

## Role of *contra proferentem* when interpreting contracts

The *contra proferentem* rule – the rule of interpretation that says the words of written documents are interpreted more forcibly against the party putting forward the document – is long-standing in contract law and insurance law. But a string of appellate decisions have re-emphasised that particular importance must be given to the language chosen by the parties to express their intentions, and the mere fact that the natural meaning of a contract has worked out badly or even disastrously for one of the parties is not a reason for departing from the natural language. So when exactly does *contra proferentem* apply? Two recent decisions of the English Court of Appeal helpfully explain the basis for and role of this rule.

### The first decision

In *Nobahar-Cookson v The Hut Group* (March 2016) the Court found that an exclusion clause should be construed *contra proferentem* if necessary to resolve an ambiguity.

The case arose out of the sale of an online sports nutrition business of a company called Cend. Following the sale, the buyer (The Hut Group Limited) purported to bring breach of warranty claims under the Share Purchase Agreement (SPA) alleging inaccuracies in the sellers' accounts. The claim was successful, however the SPA contained a clause (5.1) which imposed a time limit within which the buyer had to bring a claim as follows:

*"The Sellers will not be liable for any Claim unless the Buyer serves notice of the Claim on the Sellers (specifying in reasonable detail the nature of the Claim and, so far as practicable, the amount claimed in respect of it) as soon as reasonably practicable and in any event within 20 Business Days after becoming aware of the matter."* (emphasis added)

Under this clause, warranty breach claims had to be brought within 20 business days (as defined) of the date on which the buyer became aware of the matter. A dispute arose as to the meaning of that phrase – "*the matter*" – and in particular what level of knowledge was required for time to start running against the buyer. Was it (a) knowledge simply of facts giving rise to the Claim (even if the buyer was unaware that the facts did give rise to a claim), (b) knowledge that there might

be a claim for breach of warranty; or (c) knowledge that there was a Claim (as defined) or a "proper basis" for the Claim?

In finding in favour of the buyer, and high, level (c) knowledge, the judge at first instance held that clause 5.1 should not be interpreted *contra proferentem*; this on the basis that "*both parties were subject to time-bars in similar terms, so that each was subject to the same limitation.*" These parallel rights and limitations, in the judge's view, excluded the operation of the *contra proferentem* rule. The sellers appealed.

On appeal, Lord Justice Briggs (who wrote the leading judgment) agreed with result but not the judge's reasons therefor. Briggs LJ saw no reason to disapply the *contra proferentem* rule simply because there were time limits both ways. Briggs LJ said (at [20]), "*The same principle may be used to where necessary to resolve ambiguities (if there are any) in either of them.*" In other words, the *contra proferentem* rule could operate where necessary to resolve ambiguities in the time-limit clauses as they applied to both parties.

It is instructive to consider Briggs LJ's wider reasons, particularly his Lordship's discussion of several appellate decisions suggesting that the *contra proferentem* rule is "rarely decisive", very much a "last resort" and perhaps no longer regarded as of

significant weight in light of modern contextual interpretation.

Briggs LJ pointed out (at [14-16]) that none of those cases had to do with exclusion clauses, and other recent decisions had found that the courts "*have continued to affirm the utility of the principle that, if necessary to resolve ambiguity, [exclusion clauses] should be narrowly construed, including in relation to commercial contracts.*"

Briggs LJ founded himself and this approach to exclusion clauses on notions of common sense and freedom of contract. He said (at [19]):

*"Commercial parties are entitled to allocate between them the risks of something going wrong in their contractual relationship in any way they choose. Nor is [contra proferentem] simply to be mechanistically applied wherever an ambiguity is identified in an exclusion clause. The court must still use all its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means."*

On this basis, Briggs LJ approached clause 5.1 firstly through a lens of linguistic, contextual and purposive analysis. Then, finding some ambiguity still remained, his Lordship construed the clause (and more particularly the phrase "*the matter*") *contra proferentem* so as to require the higher level of knowledge as to the proper basis for a

claim before time could start to run against the buyer under the SPA.

#### The second decision

The second decision is *Transocean Drilling UK plc v Providence Resources plc* (April 2016) and we can take this decision relatively shortly for present purposes.

There are three points we wish to note.

The first is that the case concerned a clause which operated to exclude recoverability of “consequential loss”. This was a bilateral clause making each party subject to the same exclusions.

Second, the Court of Appeal found that that clause was not automatically subject to the *contra proferentem* rule simply because it was an exclusion clause. In reaching that finding, the Court (for which Moore-Bick LJ wrote) described *contra proferentem* as a rule or rather an ‘approach’ or ‘principle’ to which resort may properly be had:

*“...when the language chosen by the parties is one-sided and genuinely ambiguous, that is, equally capable of bearing two distinct meanings. In such cases the application of the principle may enable the court to choose the meaning that is less favourable to the party who introduced the clause or in whose favour it operates...It has no part to play, however, when the meaning of the words is clear, as I think they are in this case; nor does it have a role to play in relation to a clause which favours both parties equally, especially where they are of equal bargaining power.”*

Thirdly, like the Court in *Nobahar-Cookson*, Moore-Bick LJ emphasised freedom of contract – saying:

*“The principle of freedom of contract, which is still fundamental to our commercial law, requires the court to respect and give effect to the parties’ agreement....If, as a result of incorporating several different [exclusionary] provisions...the parties have effectively agreed to exclude any*

*liability for damages for any breaches, it is difficult to see why the court should not give effect to their agreement.”*

#### Comment

A number of conclusions may be drawn:

1. The *contra proferentem* rule (and other such particular rules of interpretation) continue to exist. Lord Neuberger recently observed of *contra proferentem* that it is “very much a last refuge, almost an admission of defeat...”.
2. Be that as it may, such rules are necessary to help resolve persistent controversies and ambiguities that for whatever reason are not resolved by more so-called ‘modern’ techniques of contextual interpretation.
3. It would seem to follow that, only if ambiguity still remains after the principles of contextual interpretation are applied can the *contra proferentem* rule be employed to resolve an ambiguity against the party putting forward the document or clause – to use a familiar example, to broaden a coverage clause and/or narrow an exclusion clause against an insurer.
4. Otherwise, if the words of written documents are clear, then *contra proferentem* has little or no role to play and the courts must, generally speaking, respect the right of parties to a contract to make such stipulations as they see fit.
5. Further, to pick up on Moore-Bick LJ’s comments, *contra proferentem* may have little or no part to play in interpreting a clause which

acts against both parties equally, especially where they are of equal bargaining power.

6. All of which is consistent with recent decisions restating the principles of ‘contextual’ interpretation with greater focus on the natural and ordinary meaning of the words used: see, for example, in the UK *Arnold v Britton* (2015, UKSC), and in NZ *Firm PI* (2014, NZSC).

#### Consistency with New Zealand law

7. It is also consistent with New Zealand authority confirming that while exclusion clauses are to be construed narrowly, that does not justify creating ambiguity. Only if the natural and ordinary meaning cannot be ascertained because of genuine ambiguity will the meaning least favourable to the party that drafted the contract be adopted (*Body Corporate No. 205963 v Leuschke Group Architects Ltd (in liq)* (2008) 15 ANZ Insurance Cases 61-804 at [15]).

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