

Overview of Three Recent Decisions on the Interpretation of Contractual Clauses

English courts will seek to determine the objective meaning of a contractual provision when a dispute as to its interpretation arises. The starting point is the ordinary meaning of the words in the agreement but as and when it is necessary, the Court will consider the factual background and commercial context in which the contract was drafted. The extent to which the Court is willing to depart from the plain meaning of the words or consider the commercial context to resolve any ambiguity will depend upon the circumstances and the particularities of the contract in question.

Discussed below are three recent decisions demonstrating the approach taken by the Court in interpreting commercial contracts.

Capita Business Services Ltd v IBM United Kingdom Ltd [2023] EWHC 2623 (Comm) (20 October 2023)

In this case the High Court considered whether assumptions can amount to a binding obligation. Capita subcontracted the provision of certain IT-related services to IBM. The agreement included the following term: *“Capita is awaiting the [client] to commission work to replace the [Relevant Service], and contract for the ongoing [Managed Services] of such, and it is assumed that this replacement [Relevant Service] will be operational on or before 30 August 2023. As such the Contractor’s obligations for the Managed Services relating to the current [Relevant Service] shall cease at that time. ...”*

The issue between the parties was whether IBM’s obligation to provide the “Managed Services” ceased on 30 August 2023 even if the replacement services were not operational by that date (IBM’s contention), or whether IBM’s obligations ceased on date when the replacement service became operational (Capita’s contention). Both parties sought to support their arguments by reference to considerations of commercial common sense.

The Court decided that if the Relevant Service had not been replaced by 31 August 2023, IBM had no contractual responsibility to continue providing the Managed Services

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from that date. The use of the word "assumed" proved significant. The Court found that *"there was no reason for setting out the parties' assumption as to the date a replacement system would become operational in the first sentence, unless that assumed date was intended to have contractual effect"*. The practical consequence of this finding is that if you include an assumption in a contract, that assumed state of affairs may have contractual force if you have not set out an agreed plan to review it, or stipulated the consequences of that assumption failing to hold true.

In respect of arguments as to commercial common sense, the Court found that in circumstances where the language of the contract was sufficiently clear, there would need to be particularly compelling arguments to suggest that IBM's construction was uncommercial. In this instance, the Court concluded that it was not necessary to consider the commerciality of the terms and that the language was sufficiently clear to indicate that IBM's obligations to provide the relevant services ceased on 31 August 2023.

Echosense Jersey Limited v Schleelein and others [2023] EWHC 2700 (Comm) (1 November 2023)

In this case, the Court was asked to decide whether a jurisdiction clause covered claims in tort, (including fraudulent misrepresentation) which arose from the conduct of a party in the period leading up to the signing of the agreements and not from the agreements themselves.

The Court held that tortious claims relating to a party's conduct prior to the contracts being entered into were not covered by the jurisdiction clause in the agreements as a matter of intention or language, even when the clause is read in a broad, purposive and commercial manner. It was held that, as a general rule, jurisdiction clauses are essentially forward-looking and this precludes, without the use of clear language to state the contrary, conduct prior to the creation of the agreement.

It is notable that the approach taken by the Court in this case departs from the general principle established in an earlier Court of Appeal decision in *Sebastian Holdings Inc v Deutsche Bank [2011] 1 Lloyd's Rep 106*. In *Sebastian Holdings*, when considering competing jurisdiction clauses, the Court held that there is a presumption that, as rational business people, contracting parties are likely to have intended that any disputes between them be resolved by the same tribunal when conferring jurisdiction in favour of arbitration or a specific forum.

Decision Inc Holdings Proprietary Ltd v Garbett and El-Mariesh [2023] EWCA Civ 1284 (3 November 2023)

The claimants made six claims for breach of warranty in relation to the purchase of a software development company from the defendants, who, in turn, counterclaimed for unpaid consideration. Following a trial in early 2023, the Court dismissed five of those claims but found that the defendants had breached a warranty that there has been no material adverse change to the company's financial prospects since the last filed annual accounts. The defendants appealed the decision, including the High Court's decision on

whether the notice served by the claimants in respect of the alleged breaches of warranty was defective under the provisions of the SPA.

The Court of Appeal decided in favour of the defendants. It held that the court at first instance had incorrectly approached the claim as it had assessed the Company's financial position as the date of the SPA. The Court of Appeal also had to interpret what the parties meant by the word "prospects". The High Court assessed this term by reference to the company's EBITDA and, in doing so, effectively equated prospects with EBITDA. The Court of the Appeal held that the term "prospects" did not refer simply to EBITDA, but rather to future "*chances or opportunities for success*".

The High Court considered two different things: the expectation that a reasonable buyer would have had on the date of the SPA, and the actual prospects at the date of the SPA. The Court of Appeal held that it should have compared the company's actual prospects on the Accounts Date and its actual prospects as of the SPA's date.

The Court of Appeal also held that the contractual notice given by the claimants in respect of the alleged breaches was defective and out of time. The Court of Appeal held that the relevant clause required the claim notice to set out a separate claim amount for each breach of warranty, which the claimants had failed to do. The Court of Appeal took the view that there was a particular commercial logic in the notice provision requiring a separate figure for each claim as the sellers might wish to settle one of the claims rather than all.