



## Context is everything

### In contracts clarity is key

Samuel Goldwyn spoke the truth when he said that “a verbal contract isn’t worth the paper it’s written on”.

But even a written contract—voluntarily signed by the parties with the intention that it comprise their entire agreement—may be worthless if the true meaning of the words used cannot easily be determined. This can easily happen when the words used are ambiguous or have multiple meanings.

#### The process

How does a court determine the meaning of the words used by parties and give legal effect to those words? By what process does a court decide:

Whether the word “package” (in a limitation of liability clause limiting the defendant’s liability to \$40 “on any one package”) meant a shrink-wrapped pallet of ice cream containers or the individual containers;

Whether the phrase “all the steel in the yard” (used by an auctioneer) meant all the steel—old and new—or was it to be interpreted to include only the old steel but not the new steel in the yard;

Whether the word “dollar” (used in a commercial agreement between a Canadian company and an American corporation) meant a Canadian or a US dollar; or

The true meaning of the words “to make feasible” (used in a contract in which a party promised to obtain permits to make feasible the gas supply).

The answer is that a court, as an integral part of the interpretation process, considers the context in which the written agreement was made when it interprets the words used and determines their “true” meaning.

Since words do not have absolute meanings they cannot be properly understood without considering their

context and surrounding circumstances. Justice Oliver Wendell Holmes, Jr. aptly stated: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and time in which it is used”.

#### The court’s task

In carrying out its difficult interpretive task, the court must consider the entire evidentiary context in which the contract was made and what meaning a business person would likely ascribe to the words used; simply using a dictionary to define the words used is insufficient.

In addition, as recently articulated by the Ontario Court of Appeal, broadly speaking, a commercial contract is to be interpreted having regard to the following principles:

“As a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;

By determining the intention of the parties in accordance with the language they have used in the written document and based upon the ‘cardinal presumption’ that they have intended what they have said;

With regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract);

In a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity;

Each word in an agreement is not to be ‘given a meaning without regard to the entire document and the nature of the relationship created by the agreement’; and Courts should not strain

to dissect a written agreement into isolated components and then interpret them in a way that does not make sense given the overall wording of the document and the relationship of the parties.

#### Your responsibilities

Given this interpretative process and the principles of contractual interpretation, it is important for parties to a contract to: Reduce their agreement to written form; voluntarily sign the agreement with the intention that it should constitute the entire agreement; use words that do not have an inherent ambiguity; define words as much as possible; use a dictionary, custom or trade usage to define words; agree that an ambiguous word should have a particular meaning; make their intentions clear; avoid inconsistent clauses in an agreement; say what they mean and mean what they say; ensure that the contractual documents are signed after they are read and understood and represent the intentions of the signers; use recitals in the contract to describe the “genesis and aim of the transaction”; ensure that the parties to the contract understand the contractual words, phrases and undertakings in the same way; and deal with as many issues that might arise in the future and that might cause future problems.

By following this advice, the parties and the court will be better able to properly interpret the meaning of the words used and give legal effect to the agreement. Justice will then be done between the parties and appropriate judicial guidance will be given to others who will know what to expect in the future.

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