

A Unified Approach to Contract Interpretation

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Foreword

This eminently readable book is directed to an important, difficult and frequently recurring question: how to interpret a written commercial contract. More particularly, it is directed to the small minority of hard cases, which tend to be precisely those cases which lead to litigation, where the interpretation is contestable because text, purpose and consequences point in different directions. That small minority of contestably interpretable contracts represents a large proportion of commercial litigation. The *majority* of contract appeals in the New South Wales Court of Appeal include questions of construction,¹ and there is no reason to doubt the position is different in other jurisdictions or at first instance. The issue is not merely one of sheer volume. The importance of the area is reflected in a steady stream of grants of special leave in contestable interpretation cases in recent years,² as well as scholarly attention from jurists of the very highest calibre.³

But the common law world is well served with books on contractual interpretation, to which this book candidly acknowledges its debt. Why another?

First and foremost, as its title suggests, this book presents and justifies a series of *principles* which inform the way in which linguistic, purposive and consequentialist arguments are resolved by courts. This is important.

1 By my count, of appeals delivered in 2019, 19 out of 34 (including cases where disputes were as to the construction of an insurance policy, lease, or guarantee).

2 See *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104; *Victoria v Tatts Group Ltd* [2016] HCA 5; (2016) 90 ALJR 392; *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47; (2016) 260 CLR 85; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544; *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; 93 ALJR 582.

3 Including chapters 8 and 9 of J D Heydon, *Heydon on Contract* (Thomson Reuters 2019), L Hoffmann, "Language and Lawyers" (2018) 134 *LQR* 553 and J Sumption, "A Question of Taste: The Supreme Court and the Interpretation of Contracts" (2017) 17 *OUCLJ* 301.

Textual, purposive and consequentialist arguments are the bread and butter of disputes about contractual interpretation. It is one thing to formulate such arguments, but how is a practitioner pronouncing an opinion or a court pronouncing judgment to resolve them when they point in different directions? Adages such as the “primacy of the text” or “context in the first instance” only go so far. One cannot cavil with an approach which is “neither uncompromisingly literal nor unswervingly purposive”;⁴ μηδὲν ἄγαν (nothing in excess) is almost always sound advice. But might there be something less Delphic to assist resolving the competing arguments?

This book supplies an approach for resolving competing arguments of interpretation, through the application of a series of principles flexible enough to accommodate the wide variety of cases, but nonetheless sufficient to give structure and transparency to the process.

The book's approach is based on *principles*, not rules. Hard and fast rules alone cannot work in this area (nor in the related area of statutory construction). “[N]o sophisticated legal system, or society, seeks intellectual refuge in the proposition that rules alone are the guardians of the security of certainty.”⁵ The principles do not of themselves yield a definitive answer. That would be to demand too much. But they do enable a more transparent evaluation, by directing attention to what ought to be the dispositive parts of the analysis, which is not so much formulating the largest number of arguments, but evaluating which are determinative. Thus, principles 5 and 6 ask whether textual meaning or purpose is a better indication of the parties' objectively imputed intention, focussing attention on the strength of the competing submissions as part of the balancing process. Principle 7 states that a purposive construction is more persuasive if the alleged contractual objective is evident from the contract text, thereby once again requiring an evaluation of the cogency of the purposive submission. And so on. Applying the principles is apt to lead to a structured analysis on the strengths and weaknesses of the competing considerations. It facilitates the articulation of what might otherwise be left unexplained. An opinion or a judgment which concludes “in my opinion, the textual submissions of party A should be preferred over the party B's purposive approach” all too commonly fails to explain why that conclusion – which is dispositive of the entire dispute – has been reached. Adopting techniques along the lines of those proposed in this book will tend to

4 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 350 (Mance J).

5 *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; (2015) 236 FCR 199, 267 [266] (Allsop CJ).

result in better justifications being given, which in turn is apt to lead to the advice or judgment being more likely to be correct.

Another strength of this book is its close engagement with more than a dozen contemporary Australian and United Kingdom decisions on contractual interpretation, commencing with the two modern foundations, *Prenn v Simmonds*⁶ and *Investors Compensation Scheme Ltd v West Bromwich Building Society*,⁷ and thereafter a series of leading Australian⁸ and United Kingdom⁹ decisions. It is almost impossible to think of a reader, neophyte or expert, who would not benefit from the analysis of those decisions in chapters 5 and 6. The analysis engages with the essence of the reasoning in each case, and then applies it by reference to the broader categories of textual, purposive and consequentialist categories, thereby elucidating and justifying the underlying principles.

Moreover, the book is the opposite of ivory-tower musings on what a unified theory of contractual interpretation might, or should, be. It is at its heart empirical. It purports to describe the way in which ultimate appellate courts in fact construe contracts.

Special mention should be made of Chapter 7. This includes a helpful conspectus of the differences between contractual interpretation and similar doctrines such as implication, equitable rectification and characterisation (such as when a contract is a lease as opposed to a licence, or when a clause is a condition as opposed to an intermediate term). There is a tendency in litigation to deploy all conceivable submissions and evidence to every problem involving contractual meaning, without heed to the different approaches governing different issues. This chapter checks that tendency. It also addresses hard questions like the way in which the identity and capacity of the contracting parties is determined. I would

6 [1971] 1 WLR 1381.

7 [1998] 1 WLR 896.

8 *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 CLR 45; *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3; (2008) 234 CLR 151; *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570; *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104; *Victoria v Tatts Group Ltd* [2016] HCA 5; (2016) 90 ALJR 392.

9 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101; *Re Sigma Finance Corp* [2009] UKSC 2; *Thompson v Goblin Hill Hotels Ltd* [2011] UKPC 8; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619; *Wood v Capital Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

have benefited from reading it before determining *BH Australia Constructions Pty Ltd v Kapeller*,¹⁰ as would most practitioners asked to advise on the use of post-contractual evidence to determine the identity of a party to a wholly written contract.

This book, in short, is a valuable contribution to an important area of law. It is of real utility to practitioners, judges and scholars of the law of contract.

Mark Leeming
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¹⁰ [2019] NSWSC 1086; (2019) 100 NSWLR 367.