Commercial Contract Clauses

Principles and Interpretation

FOURTH EDITION

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Foreword to the Fourth edition by
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Foreword to the Fourth Edition

Justice James Edelman

At its core, there is only one legitimate approach to the interpretation of contracts. Like the interpretation of constitutions, statutes, wills, trusts and court orders, the general approach to the interpretation of contracts should be based upon the general principles of ordinary language. In this 4th edition of *Commercial Contract Clauses: Principles and Interpretation*, there is much that is new, both in theory and in precedent. But the authors remain fully paid-up, card-carrying members of the school of ordinary language interpretation. Amidst a sea of principles, case law and examples, concerning every major type of clause in a commercial contract, this underlying basic approach is a beacon of light in a field that is often beset by foggy thought. There are many justifications for the need for ordinary language interpretation. The most basic is fairness. Even where a commercial contract is drafted by a lawyer, the parties to the contract need to be able to understand it. Their tool for understanding is ordinary language.

A central tenet of ordinary language communication is intention. The ordinary use of language decodes the words used, in their context, based upon what the reader or listener takes to be the intention behind the act of communication. The reader or listener is not privy to private, uncommunicated thoughts of a writer or speaker. For the reader or listener, meaning is based upon their understandings and expectations about the intention of the writer or speaker. The interpretation of contracts follows the same pattern. A contract is a formal act of communication by and between two or more parties jointly. The meaning of that joint act of communication must be understood by reference to a reasonable person in the position of all the parties. In order to understand the meaning of the contract clauses by reference to such a reasonable person, ordinary language interpretation requires the interpreter to ask what was intended by that reasonable person in the position of all the parties. On many occasions throughout *Commercial Contract Clauses: Principles and Interpretation*, the authors meticulously refer to this "objective" or "objectively assessed" intention of the parties.

Another tenet of ordinary language communication is the indispensability of implication. As early as page 4 of *Commercial Contract Clauses: Principles and Interpretation*, the authors deal with the language, which is often tortured in the courts, of implication and inference. As any linguist, philosopher of language, or aficionado of *The Simpsons* is aware, implication and inference are two sides of the same coin. A speaker implies and a listener infers. It is nonsense to speak of an "inferred term" as though it were something separate from an "implied term". In the interpretation of commercial contract clauses, it is almost always

necessary to draw inferences. Even the most tightly worded clause will usually require some inference of the blindingly obvious. But the greater the inference is that is required, and the more independent that the inference is from the clause, the more likely it will be that the implication being inferred will fall to be treated as a clause or term of its own, and subject to the more particular restrictions that courts have placed upon recognising an implied term. Once again, the treatment of implied terms throughout *Commercial Contract Clauses: Principles and Interpretation* is informed by ordinary language communication. Even in the notoriously confused area of "implications as a matter of law", the book's comprehensive treatment of implied terms of good faith rightly explains that "courts will be influenced by contemporary expectations or community standards". The implied term "by law" is little more than a highly standardised and routine expectation that a term of that nature was reasonably intended in a contract of a particular type.

Ordinary language interpretation of contracts does not, however, exhaust the field with which *Commercial Contract Clauses: Principles and Interpretation* is concerned. If this book had been written in the 19th century, an immediate objection to its title might have been that it purports to deal with "interpretation", but not "construction". At that time, some leading writers saw the distinction between interpretation and construction as akin to that which is usually now treated as a distinction between meaning and application or, for others, a distinction between essential and inessential meaning, connotation and denotation, sense and reference, or concept and conception. But without missing a beat, the first page of *Commercial Contract Clauses: Principles and Interpretation* refers to an enlightened passage from three judges in Court of Appeal of the Supreme Court of Western Australia where their Honours astutely observe that the historical distinction between the language of "interpretation" and "construction" has not been maintained. The words are now used interchangeably to embrace both concepts. But the distinction remains as a matter of principle. An understanding of the operation of clauses in a commercial contract requires not merely an understanding of the meaning of the words of those clauses but also of the application of that meaning. Throughout *Commercial Contract Clauses: Principles and Interpretation*, the authors deal comprehensively with both the meaning and application of a cornucopia of almost every major clause in a commercial contract from "take or pay" clauses to "indemnity clauses", "termination clauses" and "consequential loss" clauses. They do so with clarity, conspicuous depth of research, and remarkable coverage. Every commercial law practitioner and library in Australia should have a copy of this book.

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