



interpretation NOW!

Episode 20 – contractual interpretation



Resolution of tax disputes depends on applying the law as it is to the facts as found. If the facts are wrong, so usually will be the tax. Findings of fact often depend on contractual interpretation, so it's important to know the basics here. As the High Court restated recently¹, it's an objective approach according to what the reasonable businessperson would have understood the terms to mean². The principles involved are similar to those applied to statutes, but there are important differences. Lewison & Hughes *The Interpretation of Contracts in Australia* is a good general reference. Below are 10 key things to remember – a 2013 article provides more detail³.

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1 – objective exercise

Contractual interpretation is an objective and impersonal exercise in determining what the parties meant by the words they used. What they privately thought, believed, understood or intended regarding their rights and obligations is irrelevant to what the contract means⁴.

2 – the contract itself

Absent fraud, mistake or misrepresentation, it is only the contract itself which binds the parties and is to be interpreted⁵. Care needs to be taken, therefore, in identifying exactly what constitutes the contract. Some external materials may be available to assist interpretation, and a range of technical rules govern their use.

3 – congruent operation

Preference is to be given to an interpretation which takes into account **all** components of the contract, and which gives them a congruent and harmonious operation⁶. Perfect consistency may be difficult to achieve in practice sometimes, but courts do insist on this default setting.

4 – ordinary meaning

Ordinary meaning prevails subject to contractual context. Context may show the parties objectively intended some other meaning, and a range of rules deal with things like scientific terms, technical meaning, foreign words and customary usage. Sometimes modification may be necessary to avoid absurdity or inconsistency (but no further)⁷.

5 – unambiguous words

Unambiguous words must generally be given effect to⁸. A word is ambiguous if it has 2 or more primary meanings which may be adopted without distorting the language, or the meaning is otherwise doubtful or unclear. The ambiguity must be manifest and not theoretical, however, and we must not be over-zealous in searching for it.

6 – surrounding circumstances

Surrounding circumstances can be taken into account for interpretational purposes in Australia where the contract is ambiguous⁹. Surrounding circumstances are external things known to both parties which are relevant to what a reasonable person would understand the contract to mean.

7 – false labels

Legal relationships are determined by substance rather than any labels adopted by parties¹⁰. However, unless the label is a sham, it must be taken into account and given proper weight within the contract read as a whole¹¹. More weight may be given where the contract is unclear on the issue¹².

8 – implied terms

Terms may be implied into contracts where they are reasonable, equitable, required for business efficacy or the need is so obvious. They must always be capable of clear expression, however, and not contradict express terms¹³. Courts are slow to imply terms, as parties are presumed to embody the totality of their contract in the express terms.

9 – businesslike interpretation

Commercial contracts must be given a businesslike interpretation on the assumption the parties intended to 'produce a commercial result'. They are construed to avoid 'making commercial nonsense or working commercial inconvenience'¹⁴. Have regard here to the language used, genesis of the transaction, wider context, and the market.

10 – no external fairness

Except in special situations, contracts cannot be re-engineered to conform them to external standards of fairness¹⁵. The law does not seek to 'enforce a regime of fairness upon the multitude of economic transactions'. Courts generally should not be the 'destroyer of bargains'.

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¹ *Simic* [2016] HCA 47 (at [78]), *Woodside* [2014] HCA 7 (at [35]).
² See *Cohen* [2013] FCAFC 49 (at [35]), *Plenary* [2013] VSCA 217 (at [43]).
³ Brysland (2013) 17 *The Tax Specialist* 46.
⁴ *Byrnes v Kendle* [2011] HCA 26 (at [98]).
⁵ *Equuscorp* [2004] HCA 55 (at [33]).
⁶ *Wilkie* [2005] HCA 17 (at [16]), *ABC* (1973) 129 CLR 99 (at 106).
⁷ *Moraitis* [2008] NSWCA 327 (at [115]).

⁸ *Westpac* [2013] NSWSC 847 (at [9]).
⁹ *Codelfa* (1982) 149 CLR 337 (at 352); cf *Jireh* [2011] HCA 45 (at [4]).
¹⁰ *South Sydney* [2000] FCA 1541 (at [134]).
¹¹ *Seven Cable* [2000] FCA 350 (at [132]).
¹² *Personnel Contracting* [2004] WASCA 312 (at [38-41]).
¹³ Carter & Courtney (2015) 43 *Australian Business Law Review* 246.
¹⁴ *Woodside* [2014] HCA 7 (at [35]).
¹⁵ *Pace* (1988) 15 NSWLR 130 (at 132-133), *Alstom* [2012] SASC 49 (at [123]).