Ambiguities in Contracts – The *Contra Proferentum* Rule

Many contractual disputes within the construction industry arise as a result of differing opinions over what the parties' believe the contract terms mean, as opposed to what is actually written down. Thus the terms of a contract must be interpreted to ascertain their 'true meaning'. When such matters are put before the courts, it is for them to seek to ascertain and give effect to the intention of the parties. The leading case which has established the modern rules for interpretation of contracts is *Investors Compensation Scheme Ltd –v- West Bromwich Building Society [1998] 1WLR 896.*

However, there is a particular rule of interpretation which is commonly used and perhaps sometimes misunderstood, and this is *contra proferentum.* In essence, this rule provides that any ambiguity in a contract should be interpreted against the party seeking to rely on it i.e. against the **proferer**, or the person who drafted the document. Care must be taken when attempting to use this rule as it has effect where it applies **only to ambiguity and where all other rules of construction have failed**.

What then is an ambiguity? The Oxford dictionary confirms that an ambiguity means '*uncertainty or inexactness of meaning in language*'. Ambiguous is also stated as meaning '*open to more than one meaning; having a double meaning.*'

Those of you who are more cynical may argue that there are many ambiguities in most of the contract terms that are widely used throughout the construction industry. Does this mean that the contra proferentum rule applies to such contracts? Arguably not.

Hudson argues that the many standard forms are not drafted by the people who wish to use them and submits that '*it is both unrealistic and wrong to apply such rule* [contra proferentum] *to the interpretation of the forms..'*

Keating also states that '*In principle, the contra proferentum rule should not be applied to standard forms of contract drafted, not by the parties, but by representative bodies such as the Joint Contracts Tribunal or the Institution of Civil Engineers.'*

However, it is often not the terms of the standard forms which cause the disputes, but rather the numerous amendments to these standard forms by both Employers and Contractors which seek to give them some distinct advantage over the other party. It may be the case that such attempts to include onerous or advantageous terms may actually provide ambiguity which could be held against the party proposing such terms. Thus this rule attempts to engender a regime by which parties responsible for the drafting of contracts should incorporate terms which are concise and unambiguous.

It is also interesting to note that statute, whether intentionally or not, may provide support for this rule within Regulation 7 of the Unfair Terms in Consumer Contracts Regulations 1999 which states that: -

'(1) A seller or supplier shall ensure that any written term of a contract is expressed in plain, intelligible language.

(2) If there is doubt about the meaning of a written term, the interpretation most favourable to the consumer shall prevail..'[2]

Thus in the absence of any express terms in a contract which provide for the resolution of ambiguities, and we must remember that many standard forms deal with such matters as discrepancies or divergences, and providing that the other rules of construction have failed, this rule offers guidance to the parties to a contract as to what liabilities or entitlements they may have in respect of ambiguous terms.

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.[1] (For more information in respect of construction and interpretation of contracts, refer to the 'Jaws' article by Robert Shawyer on this website).
[2] Ewen McKendrick's Contract Law