When you go out into the deep be afraid be very afraid. Not of a shark called Jaws but rather of real danger in the murky deep waters of misplaced intentions and naivety to Contract

Many is the time that a party comes to me with a contractual problem, whereby they and the party(s) with whom they have contracted, are at odds as to what precisely they have contracted upon. Both parties are adamant that their interpretation of what rights and obligations the contract provides, is correct. Both parties feel like they are out on that fishing boat with a great white shark circling waiting to see which if not both of them ends up as the main course on the contractual a la carte menu.

How one might ask can this happen. Well with increasing frequency of lump sum package Works and usage of design and build 'all inclusive' contracts the room for problems of communication is rife. Indeed where parties contracted on Bills of Quantities, Specifications and Drawings problems of course ensued, but not such problems as are seemingly derived as a bi-product of the hectic manner by which many contracts are rushed from conception to conclusion before the ink is yet dry.

What then is the situation at law when both parties to the contract are faced with the dilemma of realising that "what you thought you were doing they did not and/or what you thought you were doing it for and how long you had to do it in, they dispute"? The answer is obvious I here some of you cry. Well is it?

At first one may refer to the Contract wherein there doubtlessly shall be a clause to clarify the problem of priority of documents, a particular problem when conflicting clauses are incorporated into contracts by reference, such as follows:

> *'In the event of any inconsistency between the Sub-Contract Order, pre-Contract Meeting Minutes and the Sub-Contract Conditions, then the Documents shall be read in such order of precedence.*
>
> *Should any conflict arise or be construed between the terms and conditions of the Main Contract and the terms and conditions of the Sub-Contract then the terms and conditions of the Sub-Contract shall prevail, except in so far that they cause the Main Contractor to be in breach of the Main Contract whereupon the terms of the Main Contract shall take precedence.'*

However the understanding of how the documentation should be read may remain of no assistance, if the dispute is in respect of whether or not either or both the party's honest intentions are relevant when construing what they have contracted for. It is hard for many people to accept that to assert that "the scope of the Contract is definable by a party's offer" is far to simplistic and fundamentally in error. To clarify the position we refer to *'Keating on Building Contracts Seventh Edition'* and in particular at paragraph 3-02 where it states, in the absence of ambiguity of terms and/or conditions, as follows:

> *'In construing a contract the court applies the rule of law that, "while it seeks to give effect to the intention of the parties, [it] must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used".'*

Ah ha I here some of you cry our intentions do count for something. However the position in respect of intent, honest or not when ascertaining what has been contracted upon remains that the contract is to be constructed from the written terms therein so as to give effect to the parties intention.

So both parties' intentions are to be objectively based on the meaning that the document would convey to a reasonable person having all the background knowledge to which they had at the time of the contract - *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912. This can be seen to provid the starting point being the contract's terms rather than any intention that the parties may have had at a point prior to the contract being entered into.

This position has been long upheld by the Courts and was expressed in the old case of *Ford v Beech* (1848) QB 114 which deals with construction of the contract in relation to a word which in itself would seem to defeat the common intention of the parties. Wilde CJ stated therein, inter alia:

> " *In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied: namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole agreement, and greater regard is to be had to the clear intention of the parties than to any particular words that may have used in the expression of their intent*"

The above is a useful statement of the construction of a contract where one word appears to alter the otherwise obvious and expressed intention of the parties.

However, where the expressed intention of the contract can be shown throughout the contract, and there is no conflict arising due to the inadvertent use of a word or words which may give rise to the expression of some different intention to that of the parties, the express wording of the contract shall prevail. Indeed Judicial construction is necessary only where the terms used are ambiguous. Where the meaning is plain and obvious the Courts will give effect to those terms.

Yet what if those plain and obvious meanings cause the occurrence of an unreasonable conclusion as to the parties' respective rights and obligations. This mater was addressed in the case of *Wickman Tools Sales Ltd v L G Schuler AG* [1974] AC 235, wherein Lord Reid stated, inter alia:

> *"The fact that a particular construction leads to a very unreasonable result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make their intention abundantly clear".*

Thus the onus remains for the parties to ensure (with emphasis if necessary) that their intentions are abundantly clear from the documentation supplied. Thereafter the fact that the other party is now unhappy with the terms of the Contract will not make the terms unreasonable.

When you enter into your next contractual agreement remember that there are at least two types of agreements – 1) being that which you may intend to agree and 2) that of the actual Contract. Which would you rely upon should you have a falling out? Most would immediately raise their hand in favour of the actual terms of the Contract. However, how many contracts are properly read and how many times do parties believe that they have contracted on the basis of what they think or indeed intended to agree instead of the contractual provisions (words) that they are actually agreeing upon?

If you are going to take anything from this Article then take this. When entering into a Contract or drafting the terms and conditions of a Contract, if you are not really paying attention as to what terms you are actually contracting upon, be afraid be very afraid, because those terms may not be what you thought you had agreed and you might find yourself on that shark's menu.

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