WHEN WORDS HAVE FAILED US

Twenty notable instances in which language has changed the meaning of contracts

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About: This paper gives some illustrative examples in which contracts (and similar instruments) were challenged or went off the tracks because of the way they were developed and drafted. As discussed in the book, there are barriers intended to prevent these sorts of missteps. But barriers aren't perfect hedges, and not all those who draft contracts have read the book.

1. Too much detail

In Breaux v. Rimmer & Garrett, Inc., a court considered the meaning of an indemnity, or "hold harmless," provision. The clause started with a general requirement to indemnify against "all actions of any character." The clause then went on to list specific activities of neglect, misconduct, use of unacceptable materials, patent infringements, and workmen's compensation claims. The court applied the tenant of *ejusdem generis*, which precludes the application of any general meaning when it's accompanied by more specific terms or descriptions. Maybe the drafter was only trying to provide some exemplary situations, but if the intent was really to hold harmless for all actions, the detail should have been left out.

This same idea was applied in an earlier case in the House of Commons, Powell v. Kempton Park Racecourse Co. [1899]. Before the court was a prohibition by the Betting Act of 1853 against the keeping of a "…house, office, room or other place…" for the purpose of betting. So the court had to determine whether betting is allowed in the outdoor racetrack. The conclusion was that it was allowed (or at least wasn't prohibited). All the places in the Act's list are indoors. By *ejusdem generis*, the specific meaning isn't changed by the general "or other place" term. A contract drafter should keep this in mind whenever compelled to throw a *catch-all* into a string.

2. Expressing one excluded another

A canon known as *expressio unius est exclusio alterius* means that the expression of one thing implies the exclusion of another. In the Nevada Supreme Court's 1969 decision in Hamm v. Carson City Nugget, Inc., the court interpreted a statute that said, *It is prohibited for saloons to provide tobacco and liquor to minors or drunkards. There will be civil liability for providing liquor to minors.*

Before the court was basically the question of whether liquor can be served to a drunk adult. Well, the second sentence that stresses the consequence of civil liability is the strongest expression of the two. And that expression therefore overrides the requirements of the first. By saying that there's only liability for giving liquor to minors, the statute implies that there's not really a prohibition on giving tobacco for minors, tobacco to drunks, or liquor to drunks.

Also, the court in Ellington v. EMI Mills Music, Inc considered a contract that said, *The Ellington estate is granted rights to royalties of all sales by EMI and its affiliates, including predecessors in interest.* The court had to consider whether the estate had rights to sales by a subsidiary of EMI that was established after the contract. No – it didn't. That's because the contract language specifically mentions predecessors and therefore excludes antecessor interests. Of course, the court did also try to read the contract as a whole. And nowhere did the contract indicate that the parties had any foresight about antecessors.

And in 1969, the Liberian ship the S.S. John Crosby collided at sea with the S.S. Haslach. A collision claim was paid to the bankrupt owner of the John Crosby, who then went on to get a refinancing loan. The lender's agreement for this refinancing loan included a general security agreement, which, under Article 9 of the Uniform Commercial Code, doesn't include tort claims. The lender took the issue to a court and suggested that the definition of "security" includes rights to tort claims. The court said that because the lender had omitted any specific mention of this in the papers (for which the lender was considered the sophisticated drafter), it was a case of *expressio unius est exclusio alterius*. That is, by failing to express this specific caveat, the drafter implied that it wasn't included.

3. The words can change after the ink is dry

Here are some examples in which the written contract language can be voided by the actions of the Principal during performance of the contract. In DeVito v. United States, the US government defaulted a fixed price supply contract after the contractor's failure to make an interim delivery. The Court noted that 40 days had passed between the delivery due date and the Contracting Officer's action to terminate. And 40 days is a long time. If the government could afford to wait 40 days before defaulting, the government probably didn't really need on-time delivery to begin with! The court said that the government, by its actions, had waived expectation for timely delivery.

A similar finding was made in favor of BCA, Patten Company, Inc.. The contractor was consistently late delivering during performance of a contract for the production and delivery of specialized rubber boats. The government repeatedly accepted late deliveries; contract modifications were executed to provide significant time extensions, and the government had permitted late delivery without exchange of consideration. Once again, the court found that the Principal, by its actions, had waived its rights to timely delivery.

4. A court corrected the grammar

A choice of forum provision in a contract is basically an agreed venue for settling disputes. This provision may specifically define not just the way that disputes are settled but even the way that law is interpreted. Applicable law and eventual enforcement of those laws can occur under different forums. The ruling of an appellate Court showed how punctuation can be ignored in order to find meaning in such a provision. The Court considered a contract requirement that described the contract's legal jurisdiction that said, generally: *This Agreement shall be interpreted, governed and enforced according to the laws of the State of California; and the Parties consent and submit to the exclusive jurisdiction and venue of the California Courts to enforce this Agreement.*

Even paraphrased, that's a long sentence. You might forgive the writer for having inserted that semicolon after California – though it's an improper use of a semicolon, maybe it was done just to give the reader a chance to breathe. On the other hand, maybe it was done to explicitly separate the independent clauses and to focus the modifying verbal phrase on just to enforce this Agreement. That is, we could be saying that the California Court's jurisdiction is limited to enforcement. All the other stuff – interpreting and governing – is intentionally excluded. But if the writer intended such an exclusion, the Court didn't give it much credence – the ruling was that the provision meaning is unchanged by the stray semicolon; there's no unique modification of independent clauses. The parties intended that forum to govern everything – interpreting, governing as well as enforcing. The interpretation was supported, of course, by the otherwise whole meaning of the contract. Other contract provisions referred to all sorts of relationships between the Agreement and California law, so it's clear that the intent was to rely exclusively on that forum for just about any event.

5. The serial comma

A union contract was disputed in a Maine court in 2014. At issue was the text of the contract that exempted the employer from paying overtime to workers involved in what the contract described as …*the canning, processing, storing, packing for shipment or distribution of foods*. Without a serial comma after "shipment," there's an ambiguity. The employer hoped to exploit that ambiguity such that drivers, who distribute (but don't pack) foods, wouldn't be eligible for overtime. The court allowed a more generous interpretation, though, because the employer was basically considered to have been the drafter of the contract[1].

Here's another look at the serial comma. The 2nd Amendment to the US Constitution says,

> *A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.*

Different courts, as well as people on either side of the question of gun ownership rights, have wrestled over what those commas mean. That is, what *shall not be infringed*: the Militia, the right to bear Arms, or both? The latest take on this, by the U.S. Supreme Court, is that writers in 1791 used commas excessively. Those commas are therefore insubstantial to the meaning of the text.

6. Many hands obscure the identity of the scrivener

The drafting of the contract at issue in Shell Offshore, Inc. v. Marr, like many contract drafts, was an iterative back and forth between the two parties. Because of that drafting process, a court found that neither one was to be considered the drafter of the whole document. And therefore no ambiguity in the whole meaning was to be resolved in favor of either of the parties.

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[1] Maybe the court didn't call it a case of *contra proferentum*, but the reasoning was similar to that or the Rule of Lenity. The employer had the position of greater power and sophistication when negotiating the contract with the worker's union. So any ambiguity was to be decided in favor of the less advantaged party.

7. Words are known by the company they keep!

Noscitur a sociis, or *known from its associates*, says that a word derives meaning from surrounding words. This canon was applied to an English statute which stated that explosives taken into a mine must be in a "case or canister" (Foster v Diphwys Casson (1887)). The court held that the cloth bag used by the defendant was non-compliant because cases and canisters, taken together, imply a certain structural integrity.

And in Pengelly v. Bell Punch Co. Ltd [1964], the court had to decide whether a floor used for storage came under the Factories Act 1961, which mandated that, *Floors, steps, stairs, passageways and gangways must be kept free from obstruction.* The question was whether the floor of a storage space had to be kept clear. The court applied the canon of interpretation in which a word is given meaning by those with which it's associated -- *noscitur a sociis*. And in this case, all the words refer to types of passageways.

In the case of Holloway Gravel Co., Inc. v. McKowen, a lease for industrial extraction from a tract of land was interpreted to be limited to just petroleum products, even though the lease said it included all "…mineral, oil and gas rights…" The court's reasoning was that mineral had been given a more specific meaning by being associated (in that sentence and in the context of the lease) with oil and gas.

8. The court does some drafting

In Sanders v. Rudd, the court considered a provision of a lease that said,

If oil production isn't started or an exploratory test is done by September 14, 1982, this lease will become null and void.

In their interpretation, the court saw that the sentence doesn't really make sense – it would be ridiculous to nullify the lease if an exploratory test has been done. So the court inserted (virtually) the word "not" before "done."

9. Poorly defined scopes can creep

Construction of the Scottish Parliament in Edinburgh, Scotland encountered some very large overruns because of "scope creep," a risk that can be mitigated by clearly defining the scope, deliverables, and payment in the contract draft.

This sounds easier than it is. There are some project management methodologies that intentionally allow for scope revision during the course of the work. Such methodologies, like the Agile method used in software development, are usually intended to be used only for work with extraordinary uncertainty and complexity. That caveat is sometimes lost on contract planners, who can make more compelling cases for their projects to be approved by using a catchy, modern phrase like Agile or LEAN. No contract requirement should simply say that the contractor has to use Agile methods – instead it should spell out exactly which of that suite of methods is to be used.

10. Text takes precedence over numeric

The Tips Family Trust involved multiple contract documents: a note, a security agreement (against a deed), and a default payment guaranty by the Trustee. In all documents, the value of the loan principal is described as

ONE MILLION SEVEN THOUSAND AND NO/100 ($1,700,000.00) DOLLARS

The appeals court that ruled on a dispute said that there's no ambiguity in this contract – the stated value is consistent throughout. And, because written words take precedence over numbers, the dollar value of the loan is interpreted to be one million and seven thousand, not $1.7 million.

…even if there's a handwritten change to the numeric expression

In Duvall, 158 S.W.2d, a contract price was expressed as

Payment shall be six percent of $15,000 ($900)

The signed contract had a handwritten change to the "$900;" it was crossed out and replaced by "$930." Well, nine hundred is indeed six percent of fifteen thousand. The rule, aligned with the priority for the Last Intent of the Parties, is that handwritten prevails over typed. However, the handwritten change was contained entirely within the numerical expression. The rule, then, that words take precedence over numbers, overrides.

11. Contract structure can leave room for fraud

A June 2017 Department of Justice indictment revealed a $53M fraud by a Department of Defense official for improperly sharing information and structuring government contracts to give contractors an unfair advantage over other potential bidders. The scheme involved manipulation of Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract mechanisms, which basically left a lot of wiggle room in which the ordering agent and the contractor could collude.

12. Frustration of purpose

There was a case in English law in 1903 (Krell v. Henry) that concerned a party who'd rented a room in order to watch the coronation procession of Edward VII. When the king had to be hospitalized, the coronation was rescheduled. The tenant refused to pay for the room, and the owner sued for breach of contract. The court ruled that the cancellation was an unforeseeable circumstance that frustrated the purpose of the contract: for the tenant, to have a good view of the procession; for the renter, to provide accommodations for audiences. The contract was therefore discharged, and a breach couldn't be claimed. (No contract means there was nothing to breach!) The Court ruling noted that the doctrine of impossibility wouldn't have applied. It would have been quite possible, after all, for the tenant to rent the room to view the route of the procession.

13. But it was only a joke!

An oft-cited case related to contract meaning is Lucy v. Zehmer (1954). In this case, the defendant signed a very simple contract written on the back of a bar tab which said he'd sell his farmland to the plaintiff for $50,000. When convincing his wife to co-sign (he and his wife owned the

restaurant together, so his wife was in the same room at the time), the defendant whispered to her that it was all a joke. The outward appearance, though, was that the defendant was signing a contract. And the appeals court that made the final ruling on this case declared that outward expression is more meaningful than unexpressed secrets. So, in this case at least, the contract was real because of its appearance. By the way, the parties had been drinking when the contract was signed. But the courts didn't see that as having impacted either party's capacity to enter into the contract.

14. But that's impossible!

A party agreed to rent the Surrey Gardens and Music hall in 1863. The facility burned down just a week before the event, and the landlord tried to collect the rent just the same. The court ruled that the contract was nullified because of impossibility. In ancient Roman law, if a thing essential to a contract has been destroyed, the parties are freed from obligation to deliver that thing. This same idea has remained in most common law systems, codified by the difficult-to-memorize Latin *verba ita sunt intelligenda ut res magis valeat quam pereat* (words are to be understood that the object may be carried out and not fail).

15. A restrictive requirement because it's not customary

In 1999, Smelkinson Sysco Food Services protested the federal government's food distribution solicitation, which had a requirement for the contractor to disclose any profit and freight costs that are in excess of actuals. According to federal law (USC Sec. 2377), a contract for acquisition of commercial items can't include a requirement that's inconsistent with customary practice. Smelkinson Sysco Food Services asserted that the charging methods, distribution networks, and accounting systems in the food systems industry preclude this requirement, which is therefore not at all customary. The Comptroller General of the United States agreed.

16. Order of Precedence is useless in the absence of an ambiguity

To support the construction of a power plant in Scotland, JN Bentley Ltd was contracted to install, test and commission a 3.5 km penstock pipeline. The installation, along with its due dates, were described in one section of the contract; the testing and commissioning, along with some due dates that conflicted with the first, were described in another section. The OOP clause gave precedence to the section that described the installation. Because of missed due dates and liquidated damages, a claim went to court, where JN Bentley Ltd argued that the installation due dates prevailed. The court, however, said that there actually was no ambiguity in the contract and therefore the OOP didn't apply. JN Bentley Ltd was ordered to pay the liquidated damages.

17. WBS and QA are important

The Central Artery/Tunnel Project, commonly known as the Big Dig, had a lot of problems, some of which you might expect from an effort to reroute Interstate 93 into a 3 ½ -mile tunnel under the city of Boston. There were two failings, at least, that might leave us with lessons in contract development. First, the Work Breakdown Structure wasn't properly described to sequence the work and keep the project on schedule. Because of this, massive delays and change orders were generated when contractors had to wait for designers to finish work. More significantly, the

contract probably didn't set stringent enough quality control procedures for concrete testing, document control, and remedies. Because of failures in the concrete ceiling, the management consultant ended up paying over $400 million in civil and criminal liabilities.

18. Text from other contracts

In their interpretation of a contract provision in Crystal Palace Gambling Hall, Inc. v. Mark Twain Indus., Inc., the court said that it was a "hornbook principle[2]" to interpret by drawing meaning from separate contracts that were held between the "… same parties, for the same purpose, and in the course of the same transaction." They found four relevant documents, and there was a common strain in three of them. That same intent was therefore applied to the contract in question, even though it didn't contain that same explicit provision.

19. Interpretation by an unscrupulous party

In 1975, an older sibling was annoying the younger one through physical contact. The younger complained to his mother, who was in the next room. The mother shouted a mandate to the older sibling, "Don't touch your brother!" The older sibling, being clever at interpreting the meaning in statutory language, held his hands centimeters from the younger sibling's body, creating a boundary that was soon violated by the movement of the younger (who had a hard time keeping still). The older triumphantly reported, "I didn't touch him; he touched me!" A court would have agreed that the older sibling had indeed complied with the express language of the mandate. But we'll never know. The case was dismissed before it could be heard. Both parties were ordered to go play outside.

20. Trade Meaning versus INCO versus intent of the parties

In 1995 the Court of Arbitration of the International Chamber of Commerce considered a claim by a Korean seller against a Czechoslovakia buyer of crude metal that was shipped overseas. The contract said that the freight was *CNF FO*. The problem, though, is that there's no such thing as a CNF INCO Term. Even in 1995, the standard INCO term was C&F. And FO commonly refers to the idea of "free off," meaning that the seller pays for unloading. But C&F, much like the current INCO term CFR, requires the buyer to pay for unloading. The ICC court realized that the contract wasn't clearly written, and the contract was interpreted by seeking extrinsic evidence as to what was the intent of the parties. Both agreed they meant to imply Cost and Freight. I don't know how to say *and* in Korean or Czech, but it seems strange to me that two non-English parties would so casually use *N* to replace the conjunction or the ampersand.

(This is the end)