AMBIGUITY IN BUILDING CONTRACTS AND INTERPRETATION DOCTRINES—WHERE ARE THE DIVIDING LINES?

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INTRODUCTION

Contract documents for building a house or constructing an industrial plant may contain discrepancies, omissions, or conflicts that create different types of ambiguities. In addition to the main contract, various plans and specifications are prepared by the employer or its architect that inevitably contain errors or inconsistencies which demonstrate the necessity of the contract interpretation. Ambiguity arises when a statement has two or more primary meanings, or where its meaning is doubtful.[1]

Depending on the type of each ambiguity, a specific interpretation doctrine is developed by common law courts to solve the contracting parties' disputes over the true meaning of the contract and the allocation of compensation. Sometimes the main subject of an agreement is too ambiguous to create a binding contract, while lack of clarity in other provisions of a contract activates either interpretation rules of '*contra proferentem*', 'patent ambiguity doctrine', or the 'duty to warn'. Throughout this article, dividing lines are drawn between these similar doctrines in order to identify the situations in which either can be used by the courts.

AMBIGUITIES THAT UNDERMINE THE PARTIES' INTENTION

When a contracting party claims that he did not intend to purchase or provide the service offered by the other party, then the question is whether there is a contract, or as it is often put, whether the contract is void.[2] Mutual understanding is crucial for the conclusion of all contracts, therefore, where terms of the offer and acceptance are so ambiguous that it is not possible to resort to any interpretation doctrines to infer the creation of a contract, the court must necessarily hold that no contract exists.[3]

Accordingly, if subject of a building contract is too ambiguous as such that the contractor accepts to build a structure different from what has been intended by the employer, the ambiguity prevents the formation of the contract.

On the other hand, ambiguities in other terms of the contract can be clarified by the interpretation tools that the courts have at their disposal to assist the parties in reaching a just outcome between them.

AMBIGUITIES AND *CONTRA PROFERENTEM*

Despite certain doubts which have been cast over the principle of *contra proferentem*, it has been used to resolve ambiguities against the party who drafted the contract. It is arguably believed that interpreting ambiguities in contract language against the drafter originated in Roman law, although the term '*contra proferentem*' is an invention of glossators of the Middle Ages.[4]

In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd*, Lord Mustill stated:

The basis of the contra proferentem principle is that a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.[5]

Although this principle is well–settled in common law jurisdictions, United States courts pointed out that the general rule of *contra proferentem* is applied when the ambiguity is latent.[6]

In *Great Western Railway v Bristol Corp*,[7] the patent and latent ambiguity classification were explained by Lord Wrenbury as follows:

If there be ambiguity in the language of a contract itself it may be a patent ambiguity—that is, one apparent on the face of the document itself; or a latent ambiguity—that is, one which arises only when you seek to apply the contract.

Where the ambiguity is latent, which means no ambiguity appeared on the face of the documents and the vagueness only arises when the term of the documents came to be applied to the facts of a project,[8] the principle of *contra proferentem* is used to clarify the documents against the drafter of those documents.

On the other hand, the United States courts have developed the 'patent ambiguity doctrine' which is an exception to the principle of *contra proferentem*.

PATENT AMBIGUITY DOCTRINE

In *EL Hamm Associates Inc v England*,[9] the court stated:

If an ambiguity exists, the next question is whether that ambiguity is patent. The doctrine of patent ambiguity is an exception to the general rule of contra proferentem, which courts use to construe ambiguities against the drafter. If, however, the ambiguity is latent, the general rule applies.

This doctrine which is also known as 'duty to inquire', is widely used in United States government contracts and requires the contractor to seek clarification on the patent ambiguities before bidding on the contracts.

For federal government contracts, a patent ambiguity is defined as a contract uncertainty so plain or glaring that it is unreasonable for a contractor not to discover and inquire about it, such as if provisions of the contract conflict facially.[10] When a patent ambiguity is found, the contractor has a duty to inquire of the government the true meaning of the ambiguity before submitting a bid, and if the government contractor does not fulfill that duty, then the ambiguity will be construed against the contractor.[11]

In *Allied Contractors Inc v United States*,[12] the plaintiff entered into a contract with the defendant for the construction of a 'Nike Launching Area'. During construction, two walls collapsed and the plaintiff claimed that the collapse was due only to the erroneous design, for which the defendant was responsible.

The court said:

It is also well settled that if a contractor knew or should have known of an obvious error in the plans or specifications, he must call it to the attention of the appropriate government representatives so that proper steps may be taken with respect to the matter.

In *Trinkle v Commonwealth*,[13] the Supreme Court of Virginia confirmed the application of the doctrine of patent ambiguity and concluded that if the contract was interpreted in favour of the contractor:

... it would place a premium on ignorance, carelessness or lack of diligence on the part of contractors, and encourage those who lose on projects to assert such claims at the one asserted here, and there would be no stability in a written contract and the Commonwealth of Virginia would be in a constant state of jeopardy. The contractor should thoroughly satisfy himself in detail as to the specifications and plans ... and if there be any doubt as to the interpretation or construction there should be a clarification before bids are submitted and contracts executed.

Several other judgments were issued in favour of this doctrine and the United States courts demonstrated that where a contractor knew or should have known an obvious ambiguity, he could not claim that the employer's misrepresentations were misleading.[14] It is also believed that the doctrine of patent ambiguity is not inconsistent with the '*Spearin* doctrine'.

The *Spearin* doctrine which originated in the old United States case of *United States v Spearin*[15] provides that:

... if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications.[16]

Nevertheless, this implied warranty of the owner regarding the adequacy of the plans and specifications does not relieve a contractor from its negligence in finding patent errors and ambiguities of plans and specifications.[17]

In other common law jurisdictions, however, the courts tend to use another interpretation principle which is known as 'duty to warn'. This duty seems to be wider than the patent ambiguity doctrine in terms of its scope and duties of the contractor.

CONTRACTOR'S DUTY TO WARN

Utilising principles in implied terms and tort law; the courts provided that there are implied contractual obligations for the experienced contractor to notify the 'obvious defects' of which they become aware or they ought to have become aware to an employer.[18]

This duty is also rooted in the contractor's obligation to exercise reasonable skill and care that may be an express term of a building contract or implied to the contract by common law courts.[19]

One of the landmark United Kingdom cases is *Equitable Debenture Assets Corp v Moss (William) Group Ltd*[20] in which the judge awarded that the contractor is liable due to failing to warn of the design's lack of buildability.

Similarly, in *Brunswick Construction Ltée v Nowlan*,[21] a majority of the Supreme Court of Canada held that a contractor of this experience should have recognised defects in the plans which were so obvious and the contractor was under a duty to warn the owner of the danger inherent in executing the works in accordance with the plans.

It is arguably believed that:

... the law does not, however, impose any blanket rule as to the circumstances in which a duty to warn will arise.[22]

Nevertheless, as to the scope of the duty, there is a consensus among the courts that when there is an obvious danger or a design is clearly defective, the implied duty to warn is imposed on the contractor.

In *Goldswain v Beltec Ltd (t/a BCS Consulting)*,[23] the court concluded that:

The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. It can arise however when a careful professional ought to have known of such danger, having regard to all the facts and circumstances.[24]

Although the intersection of the two doctrines of patent ambiguity and duty to warn is the obviousness of a defect,[25] reviewing relevant authorities and cases shows that they are not entirely aligned. In addition to the different jurisdictions that they have developed in, there are other distinctions between the two doctrines:

(1) Comparing the scopes of the two interpretation tools, the patent ambiguity doctrine is limited to the bidding process where the contractor is required to seek clarification before the conclusion of the contract. Therefore, it is described as 'a form of contractual preventive–hygiene'[26] which helps the parties to avoid post–award disputes and litigation costs. The doctrine of patent ambiguity is also limited to public construction contracts in which the parties have no opportunity to negotiate and discuss the possible ambiguities because the contractors submit their offers in sealed envelopes and the government awards the contract to the lowest bidder.[27] In such a situation, the application of the patent ambiguity doctrine is required to protect the fairness of a competitive procurement system.

In *D'Annunzio Broth v Transit Corp*,[28] the Superior Court of New Jersey stated that:

An essential element of the bidding process is a common standard of competition. To that end, the conditions and specifications must apply equally to all prospective bidders, thus permitting the contractors to prepare their bids on the same basis ... It is to assure a level playing field that contractors are urged in bid documents to examine the documents thoroughly, make site visits, attend pre–bid conferences, and raise questions about the drawings, specifications and conditions of bidding and performing the work. To every possible extent, such questions should be addressed before bid opening.[29]

On the other hand, the duty to warn is neither limited to public contracts nor limited to the bidding stage of procurements. The contractor is under a somewhat continuous duty to inform the owner of the fact that the documents or services provided by the owner, consultant or supplier (as the case may be) were defective, or otherwise fell short of the standard required by the particular contract.[30]

The duty of the contractor to work with reasonable skill and care during the implementation of the whole construction project requires that they observe the duty to warn to avoid an obvious defect or damage to the properties at any stage of construction work.

(2) The two principles also differ in terms of methods of raising an alert regarding an obvious defect in the building contract or other construction documents. The Armed Services Board of Contract Appeals (ASBCA) provided a guide on how a contractor should exercise the patent ambiguity doctrine (duty to inquire):

The duty to inquire encompasses a burden to make the government aware of the discrepancies and if the government's response does not clarify the matter further inquiry may be called for.[31]

Therefore, the nature of the contractor's duty is interrogative and the government has to clarify or correct the discrepancy, otherwise the government will be responsible for any reasonable costs incurred above the contract price by the contractor in attempting to perform.[32]

On the other hand, providing the owner with a clear and complete warning notice would be enough to discharge the contractor of his duty to warn.

In *Plant Construction Plc v Clive Adams Associates*, Judge John Hicks QC held that warning notice should be:

... progressively more formal and insistent if not met—for example by being put in writing if oral representations were ignored, by going to successively higher levels of management.[33]

It is therefore believed that:

... the warning must be clear in its content and the level of warning should commensurate with the level of danger perceived.[34]

In comparison with the patent ambiguity doctrine, however, the nature of the duty to warn seems to be cautionary, and the contractor is not legally obliged to ask a question or seek clarification from the owner to avoid liability. When the safety of the workmen is at risk, the contractor should refuse to continue to work as the last resort if the owner does not pay attention to the warning notice.[35]

CONCLUSION

Before commencing a construction project, the owner attempts to convert its intention into plans and specifications, which it does not guarantee to be flawless. Inevitably, therefore, the plans and specifications contain defects, ambiguities, errors or inconsistencies for which the courts have developed interpretation doctrines to clarify ambiguous contracts and level the playing field for the parties to perform their obligations.

When an ambiguity undermines the true intention of parties in reaching an agreement, the contract is considered void and the interpretation doctrines have no role to play. On the other hand, ambiguous provisions of a contract or details of building specifications can be interpreted by means of specific rules. When ambiguity is latent, the rule of *contra proferentem* is utilised to interpret the contract against the party that created it. However, when the ambiguous language of a contract is patent, the 'patent ambiguity doctrine' and the 'duty to warn' have been developed to make the contractor responsible for seeking clarification or informing the owner about the defect in the contract or specifications.

The dividing lines between the two doctrines of 'patent ambiguity doctrine' and the 'duty to warn' can be drawn by considering the scope and duty of the contractor.

The first doctrine was created in the United States and only used in public construction contracts where the contractor must identify obvious ambiguities and request clarification at the bidding stage and before signing the contract. On the other hand, the scope of the contractor's duty to warn is extended over the entire period of project implementation and is not limited to the tender stage. However, it seems that informing the owner of a defect or imminent danger would be enough to discharge this duty of the contractor.

Depending on the type of each ambiguity, a specific interpretation doctrine is developed by common law courts to solve the contracting parties' disputes over the true meaning of the contract and the allocation of compensation.

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5. *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Ltd* [1996] 2 BCLC 69, 77. See also: *Hargreave v Smee* (1829) 6 Bing 244, 248; *Adams v Richardson & Starling Ltd* [1969] 1 WLR 1645, 1653.

6. HPI/GSA–3C, *LLC v Perry*, 364 F.3d 1327 (Fed Cir 2004) at 1334.

7. (1918) LJ 87414 at 429.

8. Lord Justice Lewison and David Hughes, n 1, at 353. See also: *Hope v RCA Photophone of Australia Pty Ltd* (1937) 59 CLR 348.

9. 379 F.3d 1334 (Fed Cir 2004) at 1342. See also: *Metric Constructors Inc v National Aeronautics & Space Administration* 169 F.3d 747 (Fed Cir 1999); *Blue Gold Fleet v US* 492 F.3d 1308 (Fed Cir 2007).

10. Elizabeth D Lauzon, JD, 'Construction and application of patent ambiguity doctrine to federal government contracts', 13 *ALR Fed* 2d 261, 2006.

11. Elizabeth D Lauzon, JD, n 10.

12. 381 F.2d 995 (Fed Cir 1967).

13. 170 Va. 429, 196 SE 652 (Va. 1938), at 439.

14. *Leal v United States*, 276 F.2d 378, 149 Ct Cl 451 (Fed Cir 1960) at 383: 'a bare withholding is not enough to make out a case. The plaintiff must show that he was in fact misled by the withholding of information. If the plaintiff knew or should have known that he would encounter wet material, although information was withheld, then it cannot be said that he was misled'. *Ring Construction Corporation v United States* (1958) 162 F Supp 190 (Fed Cl 1958) at 192: 'A bidder should call attention to an obvious omission in a specification, and make certain that the omission was deliberate, if he intends to take advantage of it'. See also: *Anthony M Meyerstein Inc v United States* (1956) 137 F Supp 427 (Fed Cl 1956); *Dubois Const Corp v United States* (1951) 98 F Supp 590 (Fed Cl 1951); *Ragonesse v United States* (1954) 120 F Supp 768 (Fed Cl 1954).

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16. *Spearin*, 248 US at 136.

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22. Julian Bailey, *Construction Law* (2nd ed, Routledge Pub, 2016) p 1266.

23. [2015] EWHC 556 (TCC).

24. See also: *Plant Construction Plc v Clive Adams Associates* (2000) 2 TCLR 513: 'These temporary works were, to the knowledge of JMH, obviously dangerous to the extent that a risk of serious personal injury or death was apparent ... their [JMH's] obligation to perform their contract with the skill and care of ordinarily competent contractor carried with it an obligation to warn of the danger which they perceived'. See also: *Lindenberg v Canning* (1993) 9 *Const LJ* 43.

25. Vivian Ramsey and Stephen Furst, *Keating on Construction Contracts* (11th ed, Sweet & Maxwell, 2016) para 3–087. See also: *Stagecoach South Western Trains Ltd v Hind & Anor* [2014] EWHC 1891 (TCC) (11 June 2014) at 102: 'A duty to warn starts with the existence of obvious problems which are either known (or perhaps which should have been known) to the professional man or contractor. It does not impose an obligation to carry out wide–ranging inspections and investigations so as to discover whether there is an obvious defect'.

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34. Chaudhary, n 19 at 192.

35. *Plant Construction*, n 33 at 17.