TELL US WHAT YOU REALY MEAN?

EVIDENCE OF SURROUNDING CIRCUMSTANCES, AND THE INTPRETATION OF ENTERPRISE AGREEMENTS

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[THINK FOLEY'S FIRST]

THE BACKSHEET

FOLEY'S LIST WORKPLACE RELATIONS NEWSLETTER

Tells us what you really mean!

Evidence of surrounding circumstances, and the interpretation of enterprise agreements

Recent decisions of the Full Court of the Federal Court, and the Fair Work Commission **(FWC)**, reveal an emerging debate about the interpretation of both contracts and enterprise agreements made under the *Fair Work Act 2009*. The debate concerns the extent to which a Court or the Commission, in interpreting a clause which on its face is clear and unambiguous, can have regard to evidence of surrounding circumstances regarding the context of the agreement.

Under threat: the "true rule" when interpreting a contract

Anyone who has studied Contract Law 101 in the last 30 years will remember the "true rule" of contractual interpretation from *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 **(Codelfa)** at 352. The true rule, as expressed by Mason J, is that "*evidence of surrounding circumstances is admissible to interpret a contract if the language is ambiguous or susceptible to more than one meaning. But it is not admissible to contradict the language of a contract when it has a plain meaning.*"

The "true rule" from *Codelfa* has been under threat in recent years, with the New South Wales Court of Appeal (*Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184; (2014) 310 ALR 113 **(Mainteck)**) and the Full Court of the Federal Court (in *Stratton Finance Pty Ltd v Webb* [2014] FCAFC 110 **(Stratton Finance)**) holding that the High Court's decision in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 **(Woodside)** at [35] meant that when interpreting a contract regard could be had to surrounding circumstances known to the parties, as part of the contract's context, before ambiguity is demonstrated in the language of the contract[1].

Departures from the *Codelfa* "true rule", both before and after Woodside, have been subject to criticism, including by Hon Justice Kenneth Martin writing extra-judicially[2], and by Gummow, Heydon and Bell JJ in denying special leave to appeal to the High Court of Australia (*Western Export Service Inc v Jireh International Pty Ltd* [2011] HCA 45; (2011) 282 ALR 604 **(Jireh)**)[3]. However, the High Court recently made clear in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37 at [52], [111]-[113] and [118]-[119] that the reasons in *Jireh* did not create a binding authority, and that the question of whether surrounding circumstances can be taken into account in identifying ambiguity in a contract was a matter for other Courts to determine on the basis that *Codelfa* remains binding authority. Inevitably, eventually, this question will come to the High Court for determination.

Enterprise agreements: industrial context and purpose

In relation to the interpretation of industrial instruments, there has for a long time been

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1 A more detailed analysis of these decisions is contained in an article by the Hon Justice Kenneth Martin, writing extra-judicially, in a presentation to the WA Bar Association on 17 March 2015. His Honour's paper is available on the website of the Supreme Court of Western Australia.

2 See footnote 1

3 See also Prince T, "Defending orthodoxy: Codelfa and ambiguity" (2015) 89 ALJ 491.

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an understanding that the language of an award or enterprise agreement was to be understood in the light of its industrial context and purpose: K*ucks v CSR Limited* (1996) 66 IR 182 at 184, *Short v FW Hercus Pty Ltd* (1993) 40 FCR 511 and *Amcor Limited v CFMEU* (2005) 222 CLR 241 at 247 (Gleeson CJ and McHugh), 270-271 (Kirby J) and 282-283 (Callinan J). However, nevertheless, there was often a reluctance to have regard to surrounding circumstances when the language of an enterprise agreement was clear, by reference to the "true rule" in *Codelfa*.

In recent years, the FWC has started to follow the approach in *Mainteck* and *Stratton Finance*, finding that ambiguity in language need not be found before recourse may be had to the surrounding circumstances in relation to workplace determinations (*CPSU v State of Victoria (Department of Justice*) [2014] FWCFB 6153 at [11]-[12]) and enterprise agreements (*AMIEU v Golden Cockerel Pty Ltd* [2014] FWCFB 7447 at [19]-[30]).

No decisions of the Full Court of the Federal Court have yet had to consider the application of th e approach in *Mainteck* and *Stratton Finance* to enterprise agreements made under the *Fair Work Act 2009*. Recently, in *AMWU v ALS Industrial Pty Ltd* [2015] FCAFC 123, the Full Court noted that decisions after *Codelfa* suggest that context is relevant in determining meaning, but it was not necessary to determine the correctness of that approach. In *CFMEU v Hail Creek Coal Pty Ltd* [2015] FCAFC 149, the Full Court applied *Codelfa* in a more traditional way, without referring to *Mainteck* and *Stratton Finance*.

Until the High Court decides the question once and for all, debate will continue as to whether a Court can have regard to surrounding circumstances in deciding whether a contractual clause is ambiguous. However, there is a real prospect that in taking into account the "industrial context and purpose" of an enterprise agreement, the FWC or even a Court might follow *Mainteck* and *Stratton Finance* and reach an interpretation which is inconsistent with the language of a clause.

Implications in drafting enterprise agreements

In light of the propensity of the FWC and Courts to look beyond the language of a term, to industrial context and purpose, in the search for meaning and ambiguity, employers, employees and unions should do everything they can to avoid uncertainty or ambiguity in their enterprise agreements. Not every enterprise agreement clause will be drafted with the same degree of care, but particular attention should be paid to those clauses which are most important to the parties.

Taking the time (and industrial pressure) now, to insist on careful drafting of key terms, may avoid disputation (and unforeseen consequences, inconsistent with the parties' actual intentions) in the future. Even experienced industrial relations practitioners, who know well from the history of the relationship between an employer and the union what they think a clause means, would be well advised to have their drafting of important clauses reviewed by an external lawyer. By increasing clarity, industrial parties can increase the prospects that the interpretation given to an enterprise agreement, perhaps years later, reflects their actual intentions when they reached agreement.

* From 30 Oct 2015, liability limited by a scheme approved under Professional Standards Legislation.