The war of words in every lease

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"*When **I** use a word*", said Humpty Dumpty in '*Through The Looking* Glass', "*it means just what I choose it to mean, neither more nor less*." "*The question is,*" said Alice, "*whether you can make words mean so many different things*." Alice would not have asked her question if she had been more familiar with the type of modern commercial property lease currently in use. She would have known that words can be stretched, meanings can be massaged and that you can easily find yourself staring at a word or phrase in a lease that you were absolutely confident meant one thing, whilst a Judge of the High Court tells you that 'as a matter of law' it means precisely the opposite.

Why does this happen? Why can you not rely on the plain words of the lease to establish its legal effect?

The answer is that you can - but only up to a point. The purpose of this chapter is to look at when that 'point' arises and what happens beyond it.

Step 1: the starting point is the plain words of the lease

The starting point in interpreting a lease is always the words that the parties have used. The basic approach in relation to construing any contract, including a lease, is that one has to give the words used their natural and ordinary meaning in the context of the agreement as a whole. The Court will look to see what *objective* meaning would have been conveyed by the relevant words of the lease to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time that it was entered into [1].

What matters, therefore, is the intention of the parties as reflected in the words that they have used. Thus, in *Schuler (L) AG v Wickman Machine Tool Sales Ltd*[2] Lord Simon reminded us that, "*the question to be answered always is, 'What is the meaning of what the parties have said ?' not 'What did the parties mean to say ?' ...it being a presumption ...that the parties intended to say that which they have said.*"

To similar effect, in *AIB Group v Martin*[3] Lord Hutton said, "*It is a general rule in the construction of deeds that the intention of the parties is to be ascertained from the words used in the deed and that, with certain limited exceptions, extrinsic evidence cannot be given to show the real intention of the parties. On occasions this rule may lead to the actual intention of the parties being defeated but the rule is applied to ensure certainty in legal affairs*".

This means that certain matters are irrelevant. The negotiations of the parties and their subjective intentions, in particular, are always excluded from consideration except in an action for rectification (as to which, see below).

In most cases, therefore, the words that the parties have used are the starting point and finishing point of the analysis. In*Jumbo King v Faithful Properties Ltd*[4], Lord Hoffmann emphasized that, "*of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the Court will give effect to that language, even though the consequences may appear hard for one side or the other."*
It is therefore:

(i) the words used,

(ii) ‘the rest of the document'; and

(iii) ‘the factual background' that are the parameters of what can be taken into account in considering the meaning of particular clauses.

The words used
Looking at the words used means looking at them in the context of the normal rules of language and the normal meaning of the words. The meaning of a word which is included in a list of similar words, is therefore taken to be limited to the characteristics of that group.

The rest of the document
Looking at the ‘rest of the document' is straightforward: it just requires one to view the clause in question in the context of the document as a whole. A word, therefore, that must carry a particular meaning because of its place in one part of the document, will be taken to carry the same meaning when used in another part.

The factual background
The ‘factual background' can be trickier because the factual background to a lease is invariably a commercial context. This means that the process of giving the words used in the clause their natural and ordinary meaning also means looking at the true context of the agreement and of the particular clause.

This means, for instance that a lease in a non-commercial context might be construed differently from one reached in a commercial context. In *Riverside Housing Association Ltd* v *White and another* [5] the House of Lords construed a lease having close regard to the fact that it was a lease pertaining to social housing rather than commercial property.

The corollary, of course is that a commercial lease must be construed in a commercial context. In *The Antaios*[6] Lord Diplock said, "*while deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts ... I take this opportunity of restating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense*.

These simple principles are, and should, be the end of the analysis in relation to most lease terms. You ascertain the meaning of a clause by looking at the words in the context of the agreement as a whole and the factual background that would have been available to the parties at the time that the lease was entered into. Many cases never go beyond this ‘Step 1'.

Step 2: there are times when you just have to imply - import - a term that in fact is not written down in the lease at all.

A term will be implied into a contract if where it is necessary to do so to give it business efficacy (‘make it work) and where the clear expression of the necessary term is obvious. The key question in relation to the implication of a term is whether, without the implied term, the contract would work in the way that the parties might reasonably have expected it to work.[7]

The criteria for implying a term is therefore that a term will be implied if, but only if:

(i) it is reasonable and equitable to do so; and

(ii) it is necessary to give the contract business efficacy (‘make it work' - as a contract) so that no term will be implied if the contract is effective without it; and

(iii) it so obvious and easy to formulate that it goes without saying.

An example of where a term would be implied is where a lease provides that the tenant must replace an item or do particular works ‘when required by the landlord'. On a step 1 analysis alone, that might enable the landlord to ‘require' the work at any time, even when it does not need doing and even, perhaps, when the tenant has just had it done. It would therefore be necessary to imply a term into the lease that the landlord would only ‘require' when it was reasonably necessary to do so. In*Greetings Oxford Koala Pty Ltd v Oxford Square Investments Pty Limited*[8], a lease of a hotel in a high-rise building contained a landlord's covenant to provide certain services including ‘maintenance of lifts ... and replacement where required'. Young J construed ‘replacement when required' as meaning, "*... when the reasonable observer would be of the opinion that the stage had been reached that for the proper servicing of the building the lifts had reached such a stage that further patching was a waste of time, that it was appropriate for the lessor to replace the lifts*." [9]

Step 3: even if it is not necessary to make it work as a contract, you can ask a Court to change the words of a lease if you can show:

(i) that it does not reflect what we can assume must have been meant to have been agreed or
(ii) that it is based on a mistake.
If the lease does not reflect what we can assume must have been meant to have been agreed
If a lease does not reflect what it can be assumed must have been meant to be agreed, it can be rectified by the Court. In*Great Bear Investments Ltd v Solon Co-Operative Housing Services Ltd* [1997] EGCS 177 for instance, although there was machinery for rent review, the lease only required the tenant to pay, after review, "a rent equal to the rent previously payable or such rent as is reviewed". The landlord invited the court to reading the clause as including the words "whichever is the higher". The Court held that this was permissible where: (a) it was clear that a mistake had been made; and (b) a reader with sufficient experience of the sort of document in issue would inevitably say to himself, "of course X is a mistake for Y". The insertion of the words "whichever the higher" fell within that principle because the clause could not work sensibly without some machinery for deciding which of the two alternatives should apply.

If the lease is based on a mistake
If it can be shown that a lease has been entered into on a mistaken basis, the Court has power to rectify the document comprising the lease.

This arises in two circumstances. The first is where both parties proceed on the same mistaken basis - both of them erroneously think that the document that they are entering into reflects what they are agreeing. To rectify a document on this basis it is necessary to prove that each party had a continuing common intention in regard to the terms of the agreement which continued up to the time when the document which purported to record it was

executed and which was manifested in some objectively observable way and that the executed document does not represent that true common intention but that it would, if it was rectified in a specific, identifiable way.

The second is where one party stands by and allows or encourages the other to fall into error. This is relatively rare and it is unusual for a party to be able to obtain the evidence to prove it.

Conclusion

Most leases can be read simply and exclusively in accordance with the principles set out under Step 1, but that may not in all cases be the end of it. Steps 2 and 3 can also influence the impact of a lease term and no assessment of the legal effect of a lease is complete, without considering whether they might have application.

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[1] see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896
[2] [1974] AC 235
[3] [2002] 1 WLR 94
[4] (1999) HKCFAR 279
[5] [2007] UKHL 20
[6] [1985] AC 191
[7] See Lord Steyn in *Equitable Life Assurance v Hyman* [2002] 1 AC 408: "*The implication* [needs to be] *essential to give effect to the reasonable expectations of the parties*"
[8] (1989) 18 NSWLR 33
[9] "*Dilapidations: The Modern Law and Practice*" by Dowding & Reynolds, 3rd ed p.293 para 14-04.