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CONTRACTUAL INTERPRETATION: A COMPARATIVE PERSPECTIVE

Hon J J Spigelman AC

Over the last two to three decades there has been a paradigm shift in the interpretation of contracts from text to context. The purpose and surrounding circumstances of agreements are increasingly being considered for interpretation. This article charts the emergence of this approach in English jurisprudence, culminating in Lord Hoffmann’s restatement of the principles in the House of Lords. It surveys the way in which the movement from text to context has been dealt with in a number of jurisdictions, including Australia, New Zealand, England, Hong Kong, Singapore, Malaysia, India and the United States. This article argues that the theoretical distinctions between common law and civil law contractual interpretation are not as significant in practice as they appear in theory. The article undertakes a detailed comparative study on the current status of the parol evidence rule, the admissibility of evidence of surrounding circumstances, the treatment of evidence of pre-contractual negotiations and of subsequent conduct, the requirement that a written text be ambiguous before resort is had to extrinsic evidence, and the effect of entire agreement clauses on contractual interpretation. Further, it discusses the under-used Vienna Convention on Contracts for the International Sale of Goods. The article argues that the general use of extrinsic materials risks undermining commercial certainty which, in turn, will result in an increase in the cost of commercial dispute resolution and reduce the reliance that third parties can place on a written document. 412

EQUITABLE RELIEF AGAINST PENALTIES

William Newland

Equitable jurisdiction to relieve against penalties was the subject of recent litigation in New South Wales. The trial judge, who had held that such jurisdiction existed, was overturned by the Court of Appeal, which held that jurisdiction to relieve against a penalty only existed at common law, and that there was no equitable jurisdiction to be invoked. Flowing from this were differing views about the nature of the relief (of whatever jurisdiction) and the consequences of its application. Specifically, it was held by the Court of Appeal that, absent a breach of a contractual provision, no relief could be had; and that, once a clause was held to be penal, it was wholly void and unenforceable. This article shows, by recourse to an historical approach to the development of the doctrine, that the primary judge was correct in holding that the equitable jurisdiction was available for invocation. Further, such an historical analysis will reveal that no breach of contract is necessary for the application of the doctrine, and that, where applicable, equitable relief only extends so far as the penalty provision is penal; it does not make the provision wholly void. 434

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