MASON HAYES & CURRAN

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Turbulence in the Clouds

Judicial approaches to aviation insurance policy interpretation

Overview

In our first article *Turbulence in the Clouds – Ireland and the Russian Aircraft Litigation*, we summarised the main arguments made by the lessors before Mr Justice Butcher in the English aircraft litigation.

In this article, we discuss how that judgment interprets the aviation insurance policy wordings that were in dispute in both England and Ireland.

We think that Mr Justice Butcher's judgment, despite the fact that it is under appeal, taken together with recent Irish case law, gives valuable guidance to commercial parties in future disputes involving complex insurance policy wordings.

Interpretation of the policy

In *Hyper Trust Ltd t/a The Leopardstown Inn v FBD Insurance Plc*[1], the Irish Commercial Court examined the principles governing the interpretation of insurance policies. This case concerned four public houses seeking indemnity for business interruption losses arising from COVID-19 related Government closures. Mr Justice McDonald, in the Irish Commercial Court, laid out the principles of interpretation to be applied in Ireland. His analysis can be usefully compared with the roadmap recently articulated in Mr Justice Butcher's judgment.

Unitary approach / "Text in Context" approach

Both judges endorsed the modern, unitary approach to interpretation. This approach does not treat text and context as discrete steps. Instead, it considers them holistically. Mr Justice Butcher's analysis suggested that the weight given to text or context may depend on the nature of the contract. He held that professionally drafted, complex policies favour textual analysis, and shorter or informal agreements invite more contextual scrutiny.

Mr Justice McDonald, while not labelling his methodology as "unitary", did adopt a *"text in context"* approach. He stated that the court must interpret policy language considering the contract as a whole and the factual and legal background reasonably available to the parties at the time of entering into the contract. His articulation is slightly more traditional in framing. However, it is nonetheless consistent with the principle that context can inform meaning without displacing clear wording.

Reasonable person approach

Both judgments strongly reaffirmed the objective nature of contractual interpretation. Mr Justice Butcher referred to *FCA v Arch Insurance (UK) Ltd*[2], confirming that courts must consider how a reasonable person, with the background knowledge available to the parties at the time, would have understood the language used.

Mr Justice McDonald took an almost identical approach. He stated that interpretation must be grounded in what a reasonable person, with all relevant background knowledge, would have understood the words to mean at the time of entering into the contract. Both judges stressed that subjective intentions are irrelevant in this analysis.

1. [2021] IEHC 78
2. [2020] EWHC 2448 (Comm)

Market practice

The relevance, or otherwise, of evidence of London market practice was an important issue in both the English and Irish aircraft litigation. Mr Justice Butcher accepted that market practice or understanding can form part of the background knowledge reasonably available to the parties at the time of contracting. However, he was reluctant to give this too much weight. He gave the example of *Ted Baker plc v AXA Insurance UK plc*[3] where it was held that evidence of 'practice' could not displace the ordinary meaning of the words used and could not incorporate an exclusion by implication.

Mr Justice McDonald's approach was classical. He stated that evidence of objective market practices and matters of factual background that would have been reasonably known to parties entering a commercial contract are relevant for interpreting the contract terms. However, he held that subjective understandings would be inadmissible in the interpretation process.

Pick and mix approach

A distinctive feature of Mr Justice Butcher's judgment is his warning about the "pick and mix" approach to drafting in insurance contracts. He observed that insurers can often combine clauses from various sources without ensuring internal consistency.

As a result, according to Mr Justice Butcher, the use of similar phraseology in different clauses may offer little interpretive value. He warned that courts should be cautious in seeking coherence where none may exist.

This issue was not addressed in Mr Justice McDonald's judgment, and the "pick and mix" critique could therefore be a novel interpretive lens not yet applied in recent Irish case law.

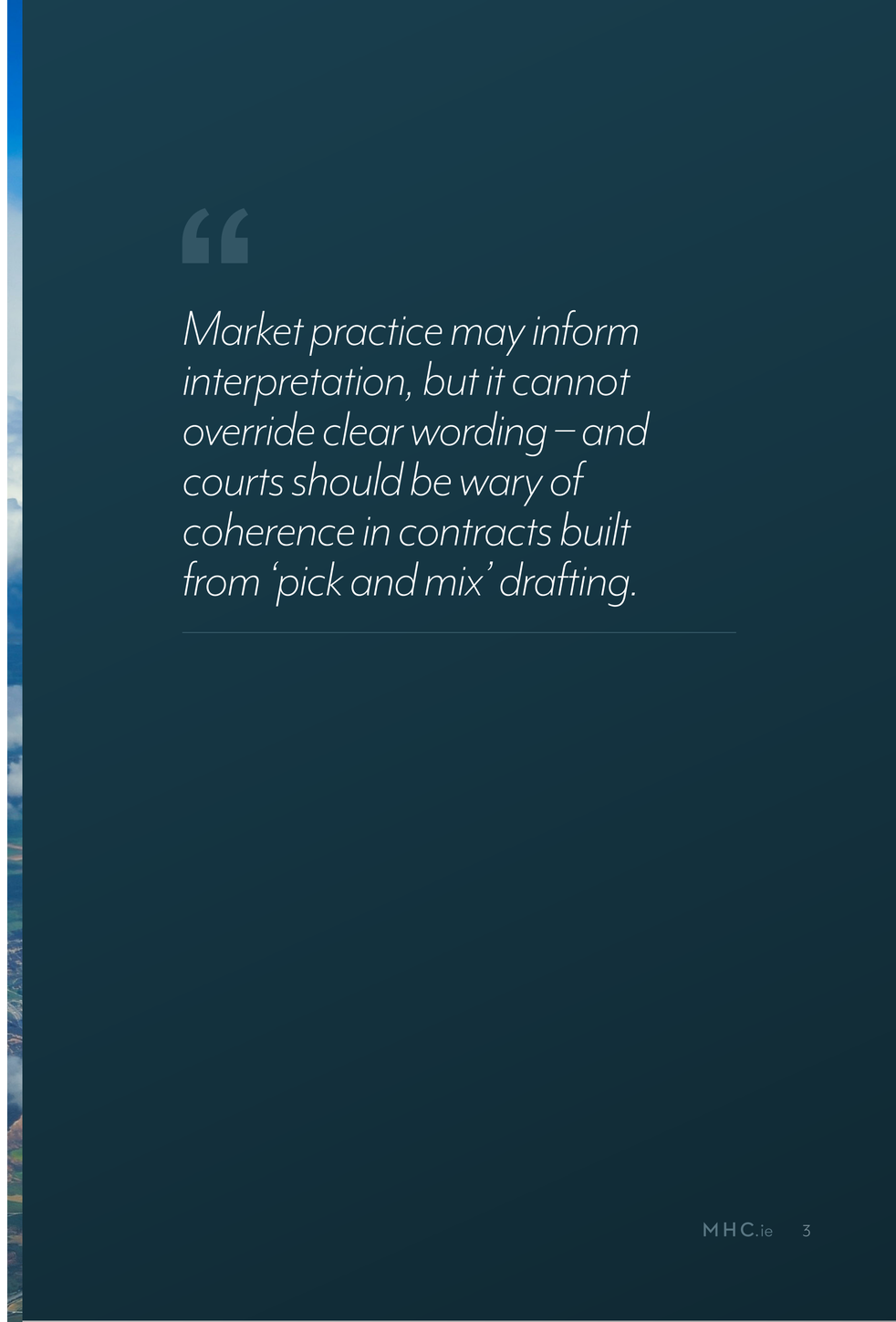
Aligned interpretation

The decisions of Mr Justice Butcher and Mr Justice McDonald reflect substantial alignment between England and Ireland in modern principles of commercial insurance policy interpretation. Both jurisdictions stress:

1. The search for objective meaning
2. A unified approach to text and context, and
3. The perspective of the reasonable commercial party

Mr Justice Butcher's judgment arguably goes further in articulating a structured framework, particularly through his commentary on inconsistent drafting practices.

3. [2014] EWHC 3548 (Comm)



> *Market practice may inform interpretation, but it cannot override clear wording – and courts should be wary of coherence in contracts built from 'pick and mix' drafting.*

"Contingent" or "Possessed" claim?

A key interpretation issue for Mr Justice Butcher was whether the lessors' recovery claims should be assessed on the "contingent" or "possessed" basis, with arguments advanced for each. Most lessors preferred the "possessed" basis, and insurers unsurprisingly argued that neither form of cover applied.

To establish a claim on the "possessed" basis, lessors had to show that they were 'in the course of repossession' within the relevant policies. The insurers argued that possessed cover only applied when the aircraft were in the *'care custody and control'* of the lessors. They said that any coverage for aircraft *'in course of repossession'* could therefore only be triggered when the repossession steps undertaken by the lessors were substantial and tangible enough to place the aircraft within the lessors' care, custody or control.

The lessors argued that by a combination of actions including serving notices on the lessees to relocate aircraft and/or terminate leasings, and by monitoring/tracking aircraft and continuously pressing airlines to return the aircraft, they were *'in course of repossession'*.

Mr Justice Butcher defined *"in the course of repossession"* as a process:

"underway towards an anticipated repossession of an aircraft" involving *"actions directed to securing the possession of a particular aircraft at a particular location and returning it to the lessor's chosen airport"*.

He then found that the aircraft were not *"in the course of repossession"* at any material time because actual repossession in Russia was not a possibility. He held that steps like serving termination notices, tracking flights, or holding meetings were merely preparatory to this process, not part of it.

Acceptance of "contingent" cover

Insurers had argued that the contingent basis of cover was similarly not triggered. They said this was the case since most policy wordings stated that cover only applied where the insured had not been indemnified or had not recovered under the relevant airline's policy. The insurers argued that this phraseology required the lessors to pursue all available recoveries, including by pursuing litigation in Russia against the relevant airline's Russian insurers, before any recovery could be made.

Mr Justice Butcher rejected the insurers' arguments. He emphasised a practical rather than strictly legalistic view of when indemnification or recovery fails. He found that the phrase *"is not indemnified"* should not be interpreted as requiring a final judicial determination of contractual entitlement to indemnity, as some insurers argued. Instead, he held that it should focus on whether the insured had in fact been paid or otherwise held harmless.

Lessor policies used a variety of terminology to define the scope of contingent cover. However, Mr Justice Butcher interpreted all these phrases to achieve similar outcomes. For example, he rejected the argument that the use of the phrase *"fails to respond"* meant that coverage only applied where the airline policy provided no coverage as a matter of legal principle. Rather, he held that it simply meant a failure to pay or accept responsibility to pay.

Concluding thoughts

Mr Justice Butcher focused on practical failure to pay when interpreting the trigger for contingent coverage. This shows the interpretative significance he attached to the reasonable commercial observer's perspective. His strict construction of the words *"in the course of repossession"*, together with his reluctance to give weight to evidence of market practice and premium rates, demonstrates his adherence to the text used and his respect for the primacy of contractual language.

His judgment is an example of an objective, unitary approach to interpretation in a complex insurance coverage dispute. The approach he adopted is substantially aligned with that of Mr Justice McDonald in the leading Irish authority, the *Hyper Trust* case. This alignment demonstrates the consistency of outcomes that commercial parties should expect when litigating complex insurance coverage claims in both jurisdictions.

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Insurance is becoming increasingly important in today's uncertain world. Our dedicated contentious insurance practice represents corporate policyholders in the largest and most complex coverage disputes.

Our service is award-winning and innovative. This approach is how we make valuable and practical contribution to each client's objectives.

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