Fraud, fairness and futility in a commercial world:
Commercial Litigation Conference

18th April 2024

Chair’s opening remarks

Steven Thompson KC

Derivative claims and unfair prejudice petitions: Tactical and practical considerations

Steven Reed, Timothy Sherwin and Harry Samuels

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Bending the rules?

- *Foss v Harbottle* (1843) 2 Hare 461: the "rule".

- s. 260 (*et seq.*) of the Companies Act 2006: the "derivative claim". (See also CPR rr. 19.14-2

- s. 994 (*et seq.*) of the Companies Act 2006: the "unfair prejudice petition".

Balancing the options

***Ntzegkoutanis v Kimionis* [2024] Bus LR 339**

- *"…it was well recognised that the court had "a very wide discretion to do what is considered fair and equitable in all the circumstances of the case" … in unfair prejudice proceedings. …. redress benefiting the company could potentially be granted on an unfair prejudice petition."* (At [32].)

- *"True it is that [the petitioner] is seeking relief which, if granted, will benefit the Company, but he is asking for it in his own right rather than on behalf of the Company."* (At [38].)

Chime! Chime! Chime!

- At [55], considering the "*Chime*" case:
  - *"The court has power to grant relief in favour of the company on an unfair prejudice petition."*
  - *"At least generally, the court should not in unfair prejudice proceedings make an order for relief in favour of the company unless the order corresponds with an order to which the company would have been entitled had the relevant allegation been successfully prosecuted in an action by the company (or in a derivative action in the name of the company)..."*
  - *"It can potentially be an abuse of process for a petitioner to claim relief in favour of the company by way of unfair prejudice petition. I cannot envisage any circumstances in which a petition claiming only such relief would be proper.... Where, on the other hand, an unfair prejudice petition seeks both relief in favour of the company and relief that would not be available in a pure derivative claim, and the petitioner appears to be genuinely interested in obtaining the latter, I do not think that it would ordinarily be appropriate to strike out either the petition or any part of the relief sought."*
  - *"Where in unfair prejudice proceedings a petitioner asks for relief in favour of the company as well as relief that could only be granted on an unfair prejudice basis, case management issues should be addressed."*

Practical considerations

- Costs indemnities: ***Wallersteiner v Moir (No. 2)*** [1975] QB 373. But beware:
  - Traditional, post-trial type: *Wallersteiner*
  - Pre-emptive, 'advance' indemnity
  - 'Pay as you go' order: *Smith v Croft* [1986] 1 WLR 580, at 597D-H per Walton J:

    "It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an order to show that it is genuinely needed, i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company."

Practical considerations

- Further authorities:
  - *Iesini v Westrip Holdings Ltd* [2010] BCC 420
  - *Tonstate Group Ltd v Wojakovski* [2019] BCC 990
  - *Re Arnbrow Ltd* [2023] EWHC 1771 (Ch)
- Importance of getting the right order: ***Humphrey v Bennett*** (ex tempore, 15 March 2024):

> *"However the application was framed, what it sought to do was to change the company's contingent liability into a present liability, and in my judgment in order to persuade the court to do that [the Claimants] had to submit evidence that they could not afford to pay the £15,000 now, or that, for some other reason, it was necessary for that payment to be made, and there is no such evidence submitted in support of the application."*

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Practical considerations

- Exclusion clauses: ***Dodson v Shield*** [2023] EWCA Civ 1391, [53]:

  "Seen in that light the no partnership clause 21 is striking. The parties have agreed that the contracts will govern their relationship, and one of the terms is that they are not in a partnership. Now of course in one sense, as the judge noted, it is a truism because a company is not a partnership of the shareholders anyway, however to read the clause in such a narrow sense is to rob it of contextual force. ***Seen with the whole agreement clause, this is a clear indication that an objective construction of the intention of the parties to these agreements was not to import concepts of a partnership as a source of obligations on top of what they have expressly agreed."***

Discussion

The Great Escape?

Contractual interpretation in unexpected circumstances

Edward Cumming KC

Ben Waistell

Niamh Davis

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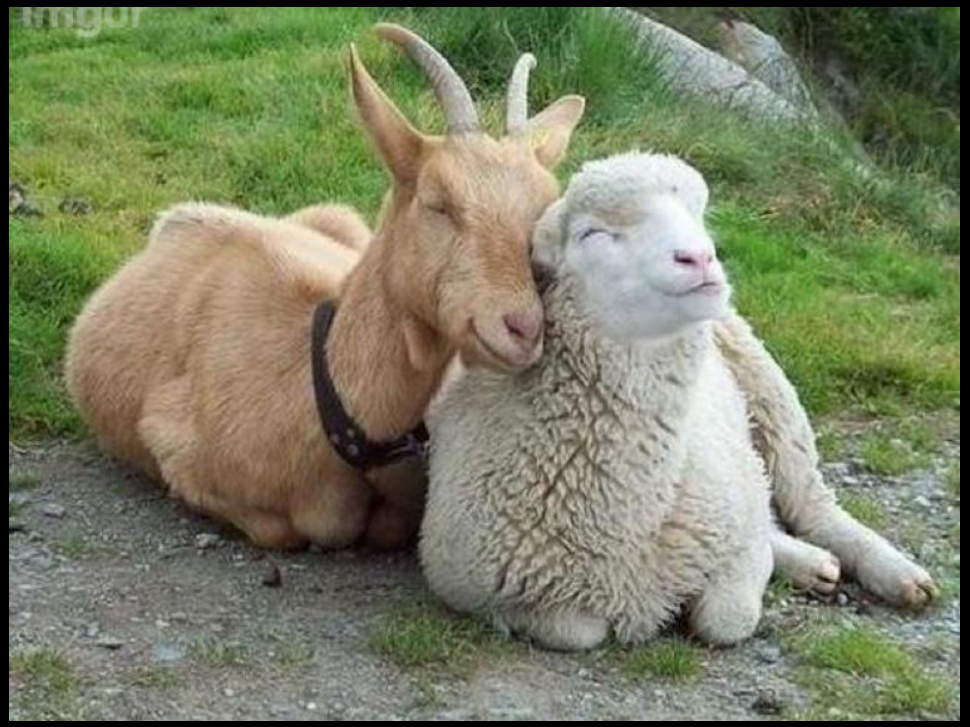

Purposive sheep

vs

Literalist goats

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"…language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement…"

"…**if a clause is capable of two meanings… it is much more appropriate to adopt the more, rather than the less, commercial construction**…"

Rainy Sky, [43]

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"...the reliance placed in some cases on commercial common sense and surrounding circumstances... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, **save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision**..."

Arnold, [17]

"...while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed..."

Arnold, [20]

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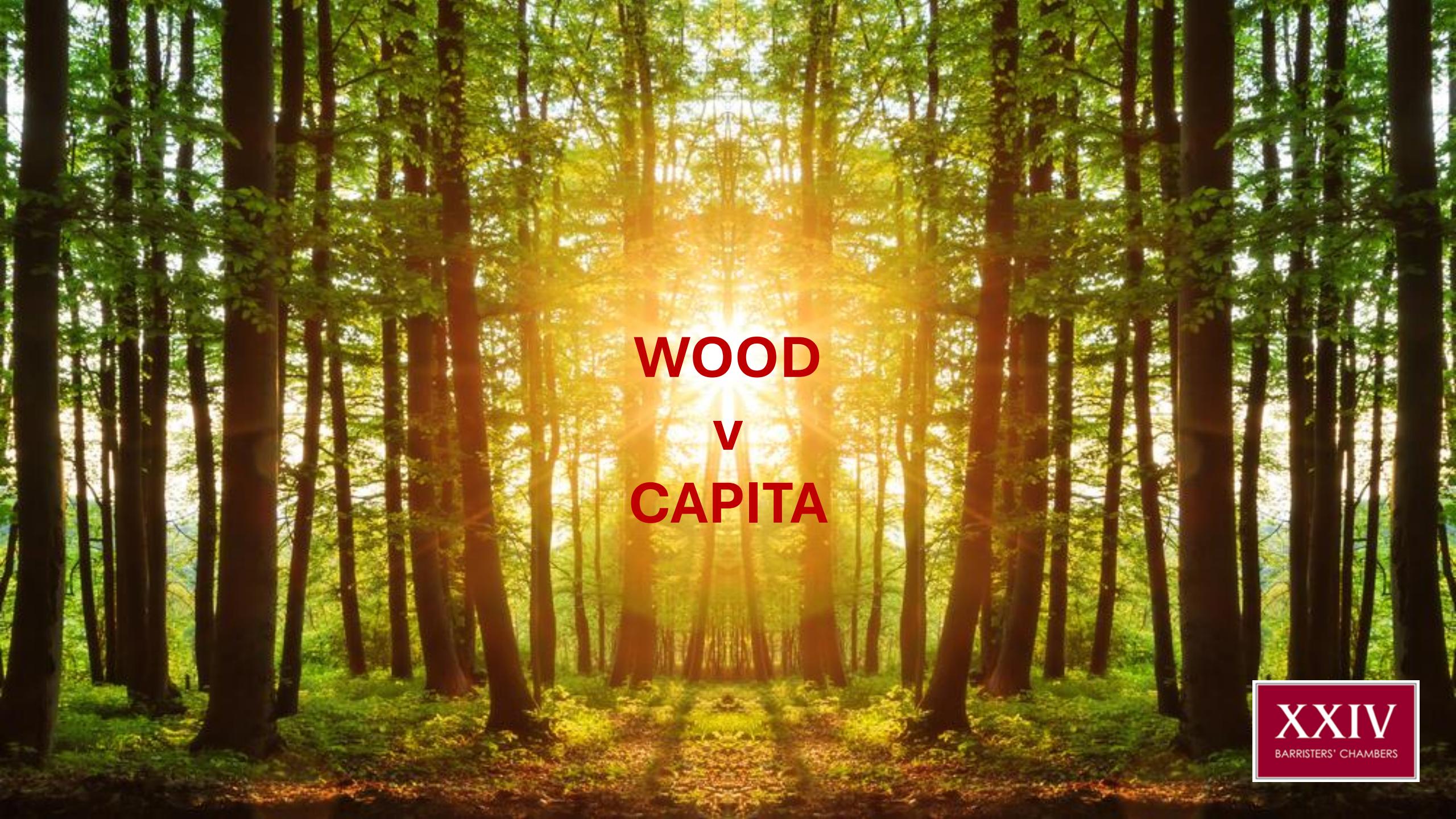

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BARRISTERS' CHAMBERS

The Supreme Court's approach

"I do not accept the proposition that the *Arnold* case involved a recalibration of the approach summarised in the *Rainy Sky* case"

Wood, [9]

"The *Rainy Sky* and *Arnold* case were saying the same thing"

Wood, [17]

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"…language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement…"

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Rainy Sky, [43]

"…the reliance placed in some cases on commercial common sense and surrounding circumstances… should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, **save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision**…"

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Arnold, [20]

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Purposive sheep should be happy?

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Application of the principles in *Wood*

"Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But **in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on which side of the line the centre line marking on the tug o' war rope lay, when the negotiations ended**."
Wood, [28]

"…the circumstances which trigger that indemnity are to be found principally in a careful examination of the language which the parties have used…"
Wood, [42]

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Purposive sheep on the run?

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May you live in interesting times.

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The Football Association Premier League Ltd v PPLive Sports International Ltd [2022] EWHC 38 (Comm)

The Claimant warranted and undertook that: *"during the Term the **format** of the Competition will not undergo any **fundamental change** which would have a **material adverse effect** on the exercise of the Rights by the Licensee and, for the purposes of this sub-clause, a **fundamental change** shall include any change which results in:*

(i) the total number of Clubs being reduced to less than eighteen (18); or

(ii) the Competition ceasing to be the premier league competition played between professional football clubs in England and Wales."

"The English law of contract does not require, or expect, contracts to be renegotiated or rewritten simply because events transpire differently to what is expected. This would lead to confusion and indeed chaos."

"any strike, lockout, labour disturbance, government action, riot, armed conflict, Act of God, period of mourning as a result of the death of a reigning monarch, accident or adverse weather conditions....."

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European Professional Club Rugby v RDA Television LLP [2022] EWHC 50 (Comm)

Clause 26.4: If a force majeure event prevented, hindered, or delayed a party's performance of its obligations for a continuous period of more than 60 days, the party not affected by the Force Majeure Event may terminate the Agreement by giving 14 days' written notice to the affected party

"any circumstances beyond the reasonable control of a party affecting the performance by that party of its obligations under this Agreement including inclement weather conditions, serious fire, storm, flood, lightning, earthquake, explosion, acts of a public enemy, terrorism, war, military operations, insurrection, sabotage, civil disorder, epidemic, embargoes and labour disputes of a person other than such party"

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UnipolSai Assicurazioni SPA v Covéa Insurance PLC [2024] EWHC 253 (Comm)

"an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. Evidence about what the parties subjectively intended or understood the contract to mean is not relevant to the court's task"

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***Stonegate Pub Company Limited v MS Amlin* [2022] EWHC 2548**

***FCA v Arch Insurance (UK) Ltd* [2021] UKSC 1**

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RTI Ltd v MUR Shipping BV

“Terms such as "state of affairs" and "overcome" are broad and non-technical terms and clause 36 should be applied in a common sense way which achieves the purpose underlying the parties' obligations – It is an ordinary and acceptable use of language to say that a problem or state of affairs is overcome if its adverse consequences are completely avoided.”

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Escaping without a parachute

- Options absent an express contractual provision:
  - Principle of construing to avoid impossibility
  - Principle of futility
  - Responding to unforeseen circumstances

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Impossibility (1)

- Canon 19 of Lewison's Canons of Interpretation:

"There is a presumption of interpretation that a contract does not require performance of the impossible, but this may be rebutted by clear words."

- *The Epaphus* [1987] 2 Lloyd's LR 215

- *The New Prosper* [1991] 2 Lloyd's Rep 93

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Impossibility (2)

- *Insurance – notice conditions and knowledge:*
  - E.g. *Euro Pools Plc (In Administration) v Royal and Sun Alliance Insurance Plc* [2019] Lloyd's Rep. I.R. 595 (CA)

- *Cuckow v Axa Insurance UK PLC* [2023] EWHC 701 (KB)

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Futility

- *Barrett Bros (Taxis) Ltd v Davies* [1966] 1 WLR 1334
- *The Sabrewing* [2008] 1 All ER (Comm) 958
- *The Ailsa Craig* [2009] EWCA Civ 425
- *Astor Management AG v Atalaya Mining Plc* [2019] 1 All ER (Comm) 885(CA)

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Unforeseen Circumstances

Arnold v Britton [2015] AC 1619

"22…in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention."

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Unforeseen Circumstances

Astor Management AG v Atalaya Mining Plc [2019] 1 All ER (Comm) 885(CA)

"40. We would accept the approach to construction set out in the last sentence, subject to the qualification in the judgment of Lord Neuberger in Arnold v Britton (at [22]). First, the court must be satisfied that ***the subsequent event*** *(here the alternative source of funding)* ***was neither intended nor contemplated****; and second, the court must also be* ***clear as to what the parties would have intended****. It is only if those points are kept in mind that the court avoids being drawn into construing a contract with a view to achieving a broadly sensible commercial bargain or in the telling words of Professor Hogg referred to in Lord Hodge's judgment in Arnold v Britton, protecting a party 'from its commercial fecklessness'."*

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The Great Escape?

What questions do you have?

Edward Cumming KC

Ben Waistell

Niamh Davis

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Check your privilege:

Sarah Bayliss and Tim Koch review recent cases on privilege including the decision on the 'iniquity exception' by the Court of Appeal in ***Al Sadeq v Dechert*** [2024] EWCA Civ 28.

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Litigation – when is it in reasonable contemplation?

- ***State of Qatar v Banque Havilland SA & Ors*** [2021] EWHC 2772 (Comm)

Waiver – how far does it go?

- ***Kyla Shipping Co Ltd v Freight Trading Ltd*** [2022] EWHC 376 (Comm)

WP material – when is it admissible?

- ***Ocean on Land Technology (UK) Ltd v Land*** [2024] EWHC 396 (IPEC)

The iniquity exception – how bad is bad enough?

- ***Al Sadeq v Dechert*** [2024] EWCA Civ 28

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Overview: Litigation Privilege

1. Litigation must be in progress or in reasonable contemplation
2. Communications must be for sole or dominant purpose of litigation
3. Litigation must be adversarial (i.e., not investigative or inquisitorial)

(See further: ***Three Rivers (No.6)*** [2005] 1 AC 610 (HL))

“more than a mere possibility but not necessarily a 50% or greater chance”

…substantial uncertainty (and scope for dispute) over the dividing line.

1) ***State of Qatar v Banque Havilland SA*** [2021] EWHC 2172 (Comm)

2) ***Kyla Shipping Co Ltd v Freight Trading Ltd*** [2022] EWHC 376 (Comm)

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Banque Havilland

"LEAKED DOCUMENTS EXPOSE STUNNING PLAN TO WAGE FINANCIAL WAR ON QATAR – AND STEAL THE WORLD CUP"

- BH knew this leak "*could have serious legal, regulatory and legal consequences.*"
- Held: PWC forensic investigation into leak was <u>not</u> subject to litigation privilege

  1) No *adversarial* regulatory proceedings (in this case)

  2) Litigation by third parties not yet anticipated at that stage

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Kyla Shipping – going on a fishing expedition

"…the instruction of an expert appears to have been for the purpose of trying to provide backing [(i.e., evidential support]) for the [contemplated] claim, but it does not seem to have reached a stage where it was possible to say that litigation in relation to [this] claim was in reasonable prospect." (at [35])

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Waiver of privilege in litigation

Whether or not there is a waiver is a fact sensitive question taking into consideration:

- whether reliance has been placed on the privileged material;
- the purpose for which it was relied upon; and
- the particular context.

PCP Capital Partners LLP v Barclays Bank Plc [2020] EWHC 1393 Comm, Waksman J

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Extent of waiver

"Voluntary disclosure of a privileged document may result in waiver of privilege of other material but not necessarily of all documents in the same category…however a broader waiver may result where the voluntary disclosure is partial or selective such that unfairness or misunderstanding may result if there is not a broader waiver."

R (Jet2.Com Ltd) v Civil Aviation Authority [2020] EWCA 35

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Kyla Shipping and Collateral Waiver

"On the one hand where one party relies on privileged material, it is only fair to the other party that the latter has an opportunity to satisfy itself that what has been disclosed is not a partial account. On the other hand, privilege is a fundamental right and it is only fair to the disclosing party that what must be disclosed is the minimum consistent with fairness to the other."

Charles Hollander QC sitting as a deputy High Court judge

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Overview: The Key Exceptions to WPP

1) Dispute re: existence / rectification / construction of a Settlement Deed

2) Unambiguous impropriety (threats, perjury, blackmail, fraud etc.)

3) Estoppel

4) Explanation of delay and/or apparent acquiescence.

5) Offers made WPSAC

(see further: ***Unilever plc v Procter & Gamble Co*** [2000] 1 WLR 2436)

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The Interpretation Exception

- First established in ***Oceanbulk Shipping & Trading SA v TMT Asia Ltd*** [2011] 1 A.C. 662. Incremental development of existing exceptions!

- Considered in two very recent decisions:

    1) ***Ocean on Land Technology (UK) Ltd v Land*** [2024] EWHC 396 (IPEC)

    2) ***Glencore Energy UK Limited v NIS J.S.C. Novi Sad*** [2023] EWHC 370 (Comm)

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Ocean on land (at [114])

1. **Admissibility as a matter of contract law:** *"The material must be evidence of facts within the common knowledge of the parties forming part of the factual matrix relevant to construction."*

2. **Admissibility as an exception to WPP:** *"Given the without prejudice context, material will fall within the exception only when it clearly satisfies the criteria for admissibility of precontractual materials"*

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The Iniquity Exception

Al Sadeq v Dechert [2024] EWCA Civ 28

- No privilege in documents or communications brought into existence "as part of" or "in furtherance of" a fraud, crime or other iniquity.
- Abuse of lawyer/client relationship
- The merits threshold for the existence of an iniquity which prevents legal professional privilege arising, whether legal advice privilege or litigation privilege is a balance of probabilities test.
- Exceptional cases – balance of harm.

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Check your privilege:

Sarah Bayliss and Tim Koch review recent cases on privilege including the decision on the 'iniquity exception' by the Court of Appeal in ***Al Sadeq v Dechert*** [2024] EWCA Civ 28.

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What's the matter?

Bajul Shah and Erin Hitchens

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Introduction

- Stays under s.9 Arbitration Act 1996
- International context
- How is “matter” identified
  - *Mozambique v Privinvest* [2023] UKSC 32
- Examples from case law

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ss.9(1) and 9(4)

s.9(1): *"A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."*

s.9(4): *On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*

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s.9 – General Points

- Validity and scope of arbitration agreement – proper law
- Whether “inoperative” – includes arbitrability issues
- All types of legal proceedings:
  - winding up and unfair prejudice petitions
  - counterclaims
- Scope of s.9 - “matter”

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International origins

- Article II(3) UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention")

"The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

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Singapore

- *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57
- s.6 International Arbitration Act:

> *"where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to stay the proceedings so far as the proceedings relate to that matter."*

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Australia

- *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164
- Section 7(2) of the International Arbitration Act 1974

> *"where:*
>
> *(a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and*
>
> *(b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;*
>
> *on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter."*

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Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP [2022] UKPC 21

"As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency…. in the interests of uniformity the words should not be given a local interpretation controlled by… 'domestic precedents of antecedent date', but rather should be construed 'on broad principles of general acceptation."

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Mozambique v Privinvest
[2023] UKSC 32

Lord Hodge:

> *"In my view there is now a general international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories of the New York Convention on the determination of "matters" which must be referred to arbitration."*

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Mozambique v Privinvest - facts

- “Tuna Bonds” case - development of an Exclusive Economic Zone in Mozambique
- Republic’s SPVs purchased equipment and services from Privinvest entities
- 3 supply contracts – arbitration clauses – Swiss law
- Financed by borrowings from Credit Suisse entities
- Borrowings guaranteed by Republic

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Mozambique v Privinvest - disputes

- Republic's allegations: victim of a conspiracy
- Bribery by Privinvest owner
- Exposed Republic to US$2bn liabilities under guarantees
- Claims in fraud in England
- Privinvest: s.9 stay application
- Stay refused - dispute not involve "matters" caught by arbitration clause

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Identifying a “matter”

- 2 stage process:
- What the are the “matters” which the parties have raised or will foreseeably arise in the Court proceedings
- In relation to each such matter, does it fall within the scope of the arbitration agreement

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First stage

- Look at substance of dispute
- Consider both claims and (potential) defences
- A substantial issue that is legally relevant to a claim or defence and susceptible to determination by the arbitrator as a separate issue
- If not an essential element of claim or defence – not a "matter"
- More than a mere issue or question
- "*practical and common-sense way*"

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Shareholder disputes

- *Tomulgen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57
- *WDR Delaware Corpn v Hydrox Holdings Pty Ltd* [2016] FCA 1164
- *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855

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FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corpn
[2023] UKPC 33

Five “matters”:

(1) Whether minority shareholder had lost trust and confidence in majority and in the conduct and management of the Company’s affairs.

(2) Whether the fundamental relationship between minority and majority had irretrievably broken down.

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FamilyMart v Ting Chuan (2)

(3) Whether it is just and equitable that the Company should be wound up.

(4) Whether minority shareholder should be granted the alternative relief, which it preferred, of an order requiring majority to sell its shares to the petitioner, and a valuation of those shares.

(5) Whether, if such alternative relief is not appropriate, a winding up order should be made.

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Mozambique v Privinvest

- Republic conceded issue of validity of supply contacts were caught by arbitration clauses
- But bribery, unlawful means conspiracy, dishonest assistance claims held not to be “matters”
- Claims not require examination of validity of supply contracts.
- Validity or commerciality of contracts not relevant or essential to defences
- Partial defence to quantum - not within scope of arbitration clause

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Sodzawiczny v Ruhan
[2018] EWHC 1908

- Fraud claims re profits from sale of data warehouses business in 2012
- Profits held in Liechtenstein structures.
- Settlement Deed in 2014: wide releases and promise not to sue on released claims
- LCIA arbitration clause in Deed

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Sodzawiczny v Ruhan [2018] EWHC 1908

- "Tier 1" claims –profits held on trust for S, D failed to account
- "Tier 2" claims – if Tier 1 claims were settled, deceit/wrongdoing induced S to enter into Deed and his loss is value of his Tier 1 claims
- Tier 1 claims: 2 matters - (i) the causes of actions for breach of trust; (ii) whether such claims settled
- Tier 2 claims: 4 matters – (iii) whether Tier 1 claims settled; (iv) whether Deed procured by wrongdoing; (v) whether Tier 2 claims settled by Deed; (vi) validity of Tier 1 claims because Tier 2 claim was for value of Tier 1 claim

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What's the matter?

Bajul Shah and Erin Hitchens

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Solutions in financial services litigation: a different perspective

Panel Discussion

Adam Cloherty KC
Oliver Assersohn KC
Bethanie Chambers
Rachel Carver

Q&A

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18th April 2024