

# **The Great Escape?**

## **Contractual interpretation in unexpected circumstances**

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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]*

“...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]*







**WOOD  
v  
CAPITA**



## 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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**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]

# Purposive sheep on the run?





*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.....”



# ***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"*



# ***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”*



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

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



## ***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.”*

# Escaping without a parachute

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





# 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



# 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)



# 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)





# 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.”*

# 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’.”*

# The Great Escape?

What questions do you have?

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