ARNOLD V BRITTON [2015]: AN ODYSSEY OF COMMERCIAL INTERPRETATION

(Case Commentary)

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INTRODUCTION

Arnold v Britton [2015][1] clarified that where the language of a contract is unambiguous the literalist interpretation of the wording will outweigh the principle of commercial common sense. The subject of the litigation was a deceptively reasonable service charge clause included in 25 lease agreements at £90 a year, which increased by 10 percent compound interest per annum. Due to the high rate of inflation at the time the contracts were entered into, the service charge increased exponentially reaching extortionate rates. Deciding in favour of the landlord, the court marks a shift to a more conservative approach to contractual interpretation, which centers on textual analysis with less regard to external context[2]. But beyond updating the rules of construction, the exercise of balancing literalism and business common sense has served as a lighthouse, illuminating the often-treacherous waves that govern commercial relations. The Lords' have deliberated whether commercial sensibilities should be allowed to interfere with the function of a competently drafted service charge and an answer has been reached. However, by favoring the commercially nonsensical interpretation of the provision in question, the Supreme Court has underestimated the value of ensuring amicability and fairness in business relations. The lingering question that remains unanswered and unchallenged is; what commercial behavior is the Supreme Court condoning by choosing to enforce this agreement?

REASONABLENESS OF THE JUDGEMENT

Historically, English principles of contractual interpretation have been perceived as strictly literalist. Contractual interpretation is considered the 'ascertainment of meaning which the document would convey to a reasonable person'[3] with access to all relevant background information. Generally, English courts are reluctant to stray away from the natural meaning of an agreement, where the language used is clear. In this case, the wording of the clause in question was identified as unambiguous, leaving little room for a different interpretation. Also, it is important to note that the question of fairness is unimportant as

[1] UKSC 36

[2] Suzanne Robertson, 'Making Sense of Commercial Common Sense' [2018] VUWLR 279

[3] Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] UKHL 28

English law 'does not often accept that people have made linguistic mistakes'[4] and courts avoid using their red pen to rectify a bad bargain. Interpretation is the exercise of identifying what the parties have agreed, not what the court thinks they should have agreed. Therefore, the Supreme Court's decision to assent to the commercially absurd interpretation was justifiable, as the danger of deciding otherwise would render legal relations in the business world volatile and risky. If plain words cannot be trusted, drafters would face an impossible task. Such was the opinion of Lord Neuberger who delivered the majority judgement, emphasizing that 'the language of the clause was simply 'too clear' as to lend itself to a different interpretation. He was reluctant to consider the agreement as commercially inconceivable given that inflation had been running over ten percent between 1974 and 1981[5], meaning that this unfair result could have occurred to the detriment of either party. The purpose of this analysis is not to condemn the decision of the Supreme Court, but to underline certain implications that may pose a danger to future commercial relations.

ROLE OF COMMERCIAL COMMON SENSE

The precedents of commercial common sense have emerged in cases were the court is required to navigate the murky waters of an ambiguous agreement. In its genesis it was held that 'detailed semantic and syntactical analysis of words'[6], which leads to a conclusion that is contrary to business common sense, must yield to the commercially probable interpretation. Opposing pedantry, it cuts through language that is commercially ambiguous and is hostile to technical interpretations and linguistic niceties[7]. In principle, business common sense clears the fog of a linguistically ambiguous contract granting flexibility in the process of construction. However, the judgement in *Britton* reflects the law's reluctance to rely on this concept in the fear of disrupting the continuity of English case law.

The service charge clause consisted of two parts, a descriptive part and a quantifying part. Lord Neuberger accepted that there was potential conflict between the two parts of the clause but rejected the lessee's argument that the first half should be interpreted as imposing a cap in order to avoid a commercially absurd result. Favouring the landlords fixed-rate interpretation, implies that commercial common sense can also be employed as a vehicle of deception. Just as technical language can conceal the consequences of an agreement, similarly CCS can also be used as a 'camouflage for partisan arguments'[8], which are really pleas for escaping a bad bargain. The majority held

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[4] ibid.

[5] Katharine Osbergy, Christopher Stothers, 'Contracts Patents and Chess - Applying *Arnold v Britton* to patent claim construction' [2017] JIPL 23

[6] Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios) [1985] A.C. 191

[7] Neil Andrews, 'Interpretation of contracts and "commercial common sense": do not overplay this useful criterion' [2017] CLR 36

[8] ibid.

that 'the natural meaning of the words used was clear': the first half of the clause stipulated for an annual charge and the second part quantified that charge. This interpretation of the second half of clause 3(2) was understandable as a variable charge would give rise to many future disputes regarding proportionality. On the contrary, Lord Carnwath's advocation for a commercially sensible result was acknowledged but ultimately rejected as this would mean 'inventing a lack of clarity'[9] to depart from the natural meaning of the clause. By doing so, the majority's insistence on protecting the continuity of English case law and the clear wording of the agreement, was viewed as a higher priority than enforcing commercial logic. It is this very continuity in contractual interpretation which protects commercial parties by enforcing the virtues of certainty and predictability in business relations[10]. Paradoxically, the pursuit for continuity may instead have the effect of muddying the waters of future construction as courts will not always have the luxury of a singular clear interpretation. The majorities conditioning of commercial common sense as a variable dependent on the degree of ambiguity may inspire a heightened need for rectification in similarly ambiguous agreements, and of course the amount of red ink available is always limited.

LACK OF FACTUAL MATRIX

From a superficial perspective, the decision to undermine the importance of this concept in business agreements may be understood as a reminder to lower courts that commercial common sense is not to be employed in unambiguous contracts. However, the question of whether an agreement is commercially sound is to be determined by inquiry to the overall purpose and provisions of a contract[11]. The contention that business common sense should not be 'invoked retrospectively' to avoid offending the natural language of the clause in question appears rather reaching. Pragmatically, not all judges possess the business acumen required to decipher what constitutes a commercially sensible agreement. This is especially true in agreements were the language used lends itself to multiple competing interpretations. Therefore, it is imperative to investigate the factual matrix behind a transaction, to avoid de-valuing the commercial implications of an absurd result.

The question of whether to draw or conceal the proverbial sword of "commercial common sense" can be better determined by inquiry to overall purpose of the agreement[12]; a resource the Supreme Court had limited access to, due to the lack of "factual matrix", which includes any information that was available to the parties at the time the contract was entered into. In other words, the decision to undermine the authority of business good sense, while necessary, appears rudderless as the majority had insufficient material to justify this approach.

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[9] *Britton* (n 1)
[10] Geoffrey Vos, 'Contractual Interpretation: Do judges sometime say one thing and mean another?' [2017] CLR
[11] Andrews (no 7)
[12] Ibid (no 7)

Apart from information about inflation, no other information was available for the majority to justify negating such a crucial agent of commercial interpretation. There was no clause in the agreement which calculated the possible exponential growth of the service charge. A measure which would have benefited both parties, if the majorities contention that the risk was mutual was indeed true (due to the high inflation of the 1970's). As established in *Rainy Sky* [2011], the process of construction requires the court to consider the language used having 'regard to all the relevant surrounding circumstances'[13]. So, the majority's reluctance to employ business common sense may be an indicator that they were ill-equipped to do so. But, evading the spotlight of abolishing a crucial tool of construction comes at the cost of thinning the line that the separates commercially unattractive agreements and undeniably absurd clauses, which clearly do not reflect the intention of the parties involved.

UNEXPLORED AMBIGUITIES IN THE AGREEMENT

To continue venturing into a credible rhetoric of skepticism without appearing redundant, one must assess the lack of factual matrix in line with the inherent ambiguities in the lease agreement. These ambiguities were highlighted in Lord Carnwath's dissenting judgement, advocating for the court to adopt the commercially logical interpretation. For example, the covenant requires the tenant to pay an annual service charge of £90 subject to exponential growth since 1974, while the alteration was made in 1980. In other words, the tenant is agreeing to pay six years of service charge before the lease was granted[14]. A result which runs contrary to the logic of a "reasonable commercial person". Also, the "triennial" covenants included in the early leases, contained the words "every subsequent Three-year period" instead of "every subsequent year". Whether these ambiguities allude that the variation of the leases were subsisting a loss incurred in the early leases is an argument Lord Carnwath was ill-equipped to employ. As asserted by Lord Neuberger, the court would not endeavor 'inventing a lack of clarity in the clause as an excuse for departing from its natural meaning'[15] as this would mean rewriting an unambiguous agreement. Additionally, there was no evidence available regarding the actual expenditure given by the landlord on meeting her obligations under the provision of the lease, whereas the escalator clause was quantified far more precisely. These minor details, when viewed together, may indeed legitimize the contention of ill-will. Naturally, no authority with the stature of the Supreme Court would dare navigate the potentially hazardous avenue of unilaterally altering the historically accepted nature of the English contract in order to emphasize the real intention of the parties. Ultimately, the clarity of the language used renders any rhetoric regarding ill-intent, futile, as the court would not undermine the clear language of a commercial agreement in order to facilitate such rhetoric. For this reason, no court though these ambiguities substantially material.

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[13] Rainy Sky SA v Kookmin Bank [2011] UKSC 50
[14] Paul Clark, 'Drafting after Arnold v Britton' [2015] 373
[15] Britton (no 1)

WHAT COMMERCIAL BEHAVIOUR IS BEING CONDONED?

Returning to the initial question regarding the commercial principles the Supreme Court is allowing to prosper, it is likely that future matters of heightened linguistic ambiguity will emerge. Given the futility of Parliamentary intervention, due to the adverse impact this would have on many mixed-use developments[16], it is evident that the common law has a monopoly on writing the frameworks of construction. In *Britton*, Lord Neuberger emphasized seven factors to be employed in contractual interpretation. The weight of these frameworks is not to be undermined, as the Supreme Court is not only clarifying the rules of interpretation but is also implying (avoiding blatantly admitting) that mistakes have been made in prior cases of construction. An example of this is the implied correction of the approach in *Aberdeen*[17] (6th factor), in which Neuberger claimed that the clear intention of the parties will be given effect over other interpretations. This seems to run contrary to the result of *Britton*, which disregards the concept of "reasonable commercial intention" to avoid offending the clarity of the agreement. Most problematically, the second factor states that where the drafting of an agreement is clear, the court must not search for 'infelicities in order to facilitate a departure from the natural meaning'[18] [18]. In less polished words, it is justified to assent to an interpretation that is clear even where this clarity stems from an ambiguous agreement, with a commercially absurd result and with limited liberty to the matrix of fact. By favoring the landlord's interpretation, the court is inadvertently limiting its flexibility in regard to future construction. The same clarity that outweighed all other considerations in the present matter, may be used as a tool to facilitate improbable agreements, in such a way as to allow pedantic parties to overthrow the courts' monopoly of construction.

CONCLUSION

Although the decision in *Arnold v Britton* did not alter the underlying principles of construction, it shed light to the hierarchy of the components to be used in the interpretation of an unambiguous agreement. It is now evident that the clear wording of an agreement will supersede commercial infelicities and linguistic ambiguities. But, by laying the foundations of such a rigid interpretive autonomy, the Supreme Court is effectively better enabling ill-willed parties to monopolize the process of construction, using the overtly elevated judicial status of "clear language" in a contract as a tool to legitimize absurd interpretations. The exercise of clarifying the contemporarily accepted rules of construction has occurred at the detriment of other crucial variables.

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[16] Ibid (no 14)
[17] [2011] UKSC 56

[18] ibid (no 1)

More recent litigious proceedings have alluded that a mistake may have been made in the judgement of *Britton.* In the case of *Monsolar IQ Ltd v Woden Park Ltd* [2021][19], the Court of Appeal rejected the absurd interpretation of an indexation clause in a lease agreement, which clearly did not reflect the intentions of the parties. Ambivalence is evident on whether the Court of Appeal has received or accepted the message left by *Britton*, as Nugee LJ rejected the contention that Arnold v Britton had modified the *Chartbook*[20] principle, which states that commercial common sense may indeed outweigh the literal interpretation of wording. Though not binding upon the Supreme Court, the case of *Monsolar* is didactic of the fact that the line which separates commercially imprudent provisions and nonsensical clauses may indeed be thinning. I believe the Supreme Court has undermined the existence of pedantry amongst commercial parties, seeking to dominate the process of construction by adhering to the hierarchical structure of interpretative components set out in *Britton* in a way as to serve their own benefit. The rainy sky may have dried up, but the benevolent seas that govern commercial behavior, have yet to be explored.

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