



SELBORNE CHAMBERS

# WHEN IS THE CONSTRUCTION OF A CONTRACT NONSENSICAL OR ABSURD?

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## INTRODUCTION

1. There are a series of well-known cases, that are largely concerned with the position where a contractual provision is open to two possible interpretations. These cases include **Rainy Sky v Kookmin Bank** (2011) 1 WLR 2900, **Arnold v Britton** (2015) AC 1619 and **Wood v Capita Insurance Services Limited** (2017) AC 1174. Those cases establish, that if the provision has more than one meaning, then the Court will adopt that meaning which most accords with commercial commonsense. But what is the position where the contractual provision is clear and unambiguous, and not open to two different interpretations. What happens then?
2. If the unambiguous meaning accords with commercial common sense there is no problem. But what if the meaning is commercially unattractive, or is unreasonable, or even is absurd? Will, the Court still apply that meaning? Such cases

can cause difficulty “because it is not unusual for apparently reasonable judicial minds to disagree on the question whether a particular contractual or other documentary provision is unattractive, unreasonable or nonsensical or absurd.” per Briggs LJ in **Sugarman v CJS Investments LLP** (2014) 3 EGLR127 at paragraph 44.

3. This article considers the questions posed above, by reference to a line of Court of Appeal cases, namely:

- (1) **City Alliance Limited v Oxford Forecasting Services Limited** (2000) EWCA Civ 510.
- (2) **Sugarman** (supra)
- (3) **Monsolar IQ Limited v Woden Park Limited** (2021) L&TR29.

## CITY ALLIANCE

4. This case concerned the construction of an agreement made between three companies. City Alliance alleged that a term of the agreement, clause 6(B), had been breached.

The Judge at first instance (Stanley Burnton QC, sitting as a Deputy High Court Judge) said that: *“The literal construction of the proviso was inconsistent with any sensible commercial objective or purpose.”* And therefore adopted his own construction, that did not accord with the literal construction.

5. The Court of Appeal disagreed. Chadwick LJ at paragraph 13 said as follows:

*“It is not for party who relies upon the words actually used to establish that those words effect a sensible commercial purpose. It should be assumed, as a starting point, that the parties understood the purpose which was effected by the words they used; and that they used those words because, to them, that was a sensible commercial purpose. Before the Court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence. If, and only if, those two conditions are satisfied, is it open to the court to introduce words which the parties have not used in order to construe the agreement. It is then permissible to do so because, if those conditions are satisfied, the additional words give to the agreement or clause the meaning which the parties must have intended.”*

## **SUGARMAN v CJS INVESTMENTS LLP**

6. The Appellants were the holders of the leases of three flats in a residential development in Manchester. The development comprised a total of 104 flats, all let out on 125 year leases, granted by a developer. The First Respondent was a company that held 66 leases. Three of the other Respondents owned another 6 leases. A dispute arose as to the voting rights of the various flat owners.

The Appellants contended that each individual, or company, had only one vote, despite the number of flats that it might own. The Respondents contended that each flat carried one vote.

7. The dispute turned on the meaning of the company’s articles. Article 13(a) provided that, on any vote at company meetings *“every Member present in person or by Proxy shall have one vote”*. At first instance the Judge held that the Appellants’ construction of the article would lead to commercial absurdity, since (at one extreme), if 102 flats were owned by one person, but the other 2 were each owned by different persons, the owners of the 2 flats could outvote the owners of all the others. On appeal the Judge’s decision was reversed. Of the three Judges in the Court of Appeal (Briggs LJ, Floyd LJ and Macur LJ) two of them delivered detailed judgments.

8. Floyd LJ delivered the first judgment. At paragraph 30, he considered the language of the voting provision in Article 13(a) to be clear and unambiguous. However, he was of the view that the voting system created by that unambiguity fell well short of commercial absurdity, and had to be applied.

9. Briggs LJ at paragraph 42 began by saying: *“I have had rather more difficulty than [the other two Judges] have had in departing from the Judge’s view that, viewed as requiring one member one vote even on a poll, Article 13(a) is a commercial absurdity ...”*. He then considered the Respondents’ arguments, and at paragraph 49 said: *“The outcome of a one member one vote structure falls short of absurdity, even if it may still appear unreasonable, un-commercial or even undemocratic, to many”*.

## MONSOLAR

10. The appeal in this case concerned a rent review formula in a lease of a solar farm, where the term was 25.5 years. The lease contained a mechanism for rent increases dependent upon RPI. The parties accepted there was no ambiguity in how the formula, read literally, operated and that, although it referred to the RPI, the rent would not increase over the term in line with RPI but (assuming RPI generally increases) at a very much higher rate.

11. The starting rent was £15,000 per annum. Adopting successive and cumulative RPI increases of 5%, the final rent would be just over £76m. Adopting “conventional” RPI, the final rent would be about £30,000.

12. The lead judgment in **Monsolar** was delivered by Nugee LJ. He addressed the pertinent law, beginning at paragraph 25. At paragraph 31, he said as follows:

*“There is therefore a distinction between a case which concerns a provision which seems merely imprudent and one which appears irrational. The position was neatly summarised by Briggs LJ in *Sugarman v CJS Investments Ltd* [2014] EWCA Civ 1239 (“**Sugarman**”) at [43]–[44] where he referred to the fine dividing line between a case where the result appears “commercially unattractive and even unreasonable” and a case which appears “nonsensical or absurd”.*”

13. The Judge then applied the law to the facts of the case, and decided that the literal construction was nonsensical or absurd.

## CONCLUSION

14. The following points are pertinent:

- (1) It is vital to ascertain whether the language of a particular contractual provision is unambiguous or not.
- (2) If the wording is ambiguous, then all of the principles discussed in **Rainy Sky** etc apply.
- (3) If the language used is unambiguous, then the literal meaning will nearly always apply, even if the consequences are uncommercial or unreasonable.
- (4) The Court will only depart from the literal meaning of unambiguous wording if the result was, in the particular Judge’s view, nonsensical or absurd.



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