Court of Appeal refuses to adjust bad bargains for a licensor and an assignee of IP rights

This article looks at two recent Court of Appeal decisions on the interpretation of IP agreements which have shared the Supreme Court's caution to apply a business common sense to contractual interpretation, instead opting for a strict literal interpretation where the meaning of a term is clear.

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Licensing counterparties and those wishing the sell or purchase technology outright should take note of the latest affirmations of the strict literal approach, given the increased risk of a "bad bargain" that may result from poor drafting.

Finding the balance: business common sense vs strict literal interpretation

Resolution of contractual ambiguity has for some time now been resolved by reference to the approach of a fictional objective business person, as opposed to a slavish following of the literal words. The "business common sense" approach (see *Rainy Sky SA & ors v Kookmin Bank* [2011] UKSC 50) codified this concept and remains good law, subject to the below constraints imposed by the Supreme Court. *Rainy Sky* found that where there are multiple plausible readings of a term in a contract, the interpretation that most closely resembles business common sense will prevail.

In *Arnold v Britton* [2015] UKSC 36 the Supreme Court advised caution in applying the business common sense approach, stating that the clearer the natural meaning of a written term, the more difficult it should be to justify a departure from it.

In *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 the Supreme Court clarified that *Arnold* did not mean that *Rainy Sky's* guidance on business common sense has no place in the interpretation of terms with rival meanings. It found that agreements could be interpreted successfully either by a:

- "textual" analysis (ie strict literal interpretation) - greater emphasis strictly upon the text where the agreement is sophisticated, complex and/or negotiated with the assistance of professionals, or
- "contextual" analysis (ie business common sense) - greater emphasis placed on the factual matrix where the

agreement is informal, brief and/or where professionals had not assisted in negotiations.

Textualism and contextualism are not conflicting concepts, rather tools with which to assess the objective meaning of the language that the parties have used to express their agreement. Wood and Capita's arguments can be summarised by reference to the below statements cited by the Supreme Court.

Statement	**Possible interpretations**	**Proponent**
"I like cats and dogs which are black and fluffy "	"I like cats and dogs which, in each case, are both black and fluffy"	• Wood • Supreme Court
	"I like cats of any kind and dogs that are black and fluffy"	
	"I like cats which are fluffy and dogs which are black and fluffy"	• Capita

A textual approach could have resulted in an interpretation in line with Capita's proposal and so the Court preferred a contextual analysis in determining the objective meaning of the clause, which was advocated by Wood.

Recent application of business common sense to IP agreements

Teva Pharma v AstraZeneca and *Kason Kek-Gardner Ltd* v PCL confirmed the above approach of the Supreme Court, opting to follow a strict literal interpretation where the meaning of a term is clear, only looking to business common sense to resolve ambiguity.

Teva Pharma v AstraZeneca [2017] EWCA Civ 2135

AstraZeneca obtained a patent for rosuvastatin as a pharmaceutical compound, the Supplementary Protection Certificate (SPC) initially expired on 03 July 2017. In 2013, AstraZeneca brought arbitration proceedings to prevent Teva from selling a generic version of rosuvastatin. A settlement agreement was signed between the two parties, whereby AstraZeneca agreed to irrevocably release Teva from (*inter alia*) all claims for distributing their generic rovustatin in Portugal (the General Release) and Teva agreed to keep its generic compound off the Portuguese market until 03 July 2017 (the Restriction).

At the time of signing the settlement agreement, AstraZeneca had drawn up a Paediatric Investigation Plan (PIP) as part of the application procedure for a Paediatric Extension. After signing the settlement agreement, AstraZeneca was granted a Paediatric Extension which extended its term of patent protection by six months to 29 December 2017. In April 2017, AstraZeneca began new arbitration proceedings to enforce its rights under the settlement agreement up until the end of the Paediatric Extension period, whereas Teva applied for a declaration that they could market their product in Portugal from 03 July 2017 onwards.

Teva claimed that the General Release applied from 03 July 2017, regardless of whether the definition of "Patent" (defined to be "EP 0521471 [rosuvastatin] and Portuguese Supplementary Protection Certificate 156") included the Paediatric Extension. AstraZeneca's arguments relied upon a business common sense reading that the Restriction was intended to last until 29 December 2017.

Court of Appeal’s ruling

In Jackson LJ’s opinion, there was no ambiguity as the meaning of the contract or that there are two reasonable interpretations of those provisions by which a business common sense view might need to be taken.

Jackson LJ considered that AstraZeneca had already obtained clear benefits in settling with Teva, as (i) Teva would no longer challenge validity of their patent which, if successful, could have removed the European level of protection enjoyed by AstraZeneca, (ii) AstraZeneca removed the risk of a finding of no infringement and not being able to prevent Teva from launching their product in Portugal, and (iii) exclusivity was preserved without challenge for over four years in Portugal. Having taken those benefits into account, the effect of the settlement agreement was clear - even though AstraZeneca’s patent did not expire until 29 December 2017, after 03 July 2017, Teva were entitled to sell their product with the benefit of the General Release from AstraZeneca.

It was found that the clear and natural meaning of the definition of “Patent” **would** include the Paediatric Extension as it was simply an extension of the SPC which was referred to in the definition and not a new right. Teva knew about the PIP, that a Paediatric Extension would likely be granted and therefore the Paediatric Extension forming part of any future claim by AstraZeneca was likely to be in the contemplation of the parties at the outset for the purposes of settling any outstanding claims in the settlement agreement. As a result, the General Release by AstraZeneca was found to cover SPC 156 **as extended by the Paediatric Extension**. Teva could also rely upon this General Release and were not in breach of the Restriction in launching their generic product after 03 July 2017.

Kason Kek-Gardner Ltd v Process Components Ltd [2017] EWCA Civ 2132

Kemutec Powder Technologies Ltd (KPTL) operated in the field of powder processing and handling, and entered administration in June 2009, as part of which two sale agreements were agreed with each of Process Components Ltd (PCL) and Kason Kek-Gardner Ltd (KGL). PCL first agreed to acquire the "Mucon" and "Spares" businesses (neither of which were defined) from KPTL, including the associated IP rights. Two weeks later, KGL agreed to acquire the "Unit Machine" and "Systems" businesses from KPTL, including the associated IP rights. An IP licence was also entered into whereby PCL licensed certain IP rights to KGL, however this was terminated for breach of confidence when PCL found out that KGL disclosed the licence agreement to a potential purchaser. PCL and KGL then disputed the IP rights that each of them had acquired under the initial sale agreements.

Court of Appeal’s ruling

The Court of Appeal cited *Arnold v Britton*, *Wood v Capita* and *Chartbrook v Persimmon* [2009] UKHL 38 in ruling on the following issues:

Interpretation of IP rights assigned

Due to the lack of clarity in the drafting of each of the definitions of the business that were transferred to each of PCL and KGL, it was equally unclear which IP rights used in those businesses were transferred to each party. The admissible background for the purposes of interpreting each agreement was limited to facts known or reasonably available to all parties at the time of entering into the PCL agreement (and not either party’s subjective intentions as to what IP rights were transferred). It was found that this could not override the actual language in the provisions of the PCL agreement, which referred broadly to IP rights used in the "Spares" business. KGL’s narrower interpretation of what was transferred to PCL relied heavily upon business common sense and background information.

The Court of Appeal clarified the judge's finding at first instance that all IP rights used by KPTL (other than some test data, user manuals and general assembly drawings) were transferred to PCL, as all such IP was used in the Spares business and evidence indicated that KGL and PCL were both aware of an intention to enter into an IP licence in favour of KGL for certain IP rights (along with a future option for KGL to buy those rights). As a result, KGL did not acquire the IP rights under the KGL agreement that their agreement purported to transfer, as those rights had already been transferred to PCL.

Trade mark

The trade mark for KEK (trade mark number 46553) was referred to as "registered" but was in fact "dead". The only "live" registered trade mark was trade mark 2506657, however this trade mark number was not listed in PCL's agreement. Following *Chartbrook v Persimmon* and applying the principle of "a plain misdescription does no harm", the judge placed more weight on the description of the mark as "registered" rather than on the trade mark number itself, meaning that the trade mark 2506657 was transferred to PCL.

Termination of the IP licence

PCL were entitled to terminate the licence to KGL, as KGL were unsuccessful in arguing that there was an implied term of "customary disclosure" in the course of business (such as on a prospective business sale) as this would have circumvented the clear contractual duties of confidence set out in the IP licence. In effect, such an implied term was held not necessary to give business efficacy to the licence nor was it so obvious that it went without saying. KGL were therefore in breach.

Lessons for drafting of IP agreements

Both *Teva v AstraZeneca* and *Kason Kek-Gardner Ltd v PCL* evidence the Court of Appeal's willingness to apply the Supreme Court's approach in *Arnold / Wood*, in particular, favouring a textual (or strict literal) interpretation where the wording of a negotiated agreement is clear. The Court refrained from applying business common sense other than to resolve ambiguity, even if to do so resulted in a poor bargain for one party. The cases are also a useful reminder of the Court's approach when considering the need to imply terms to give business efficacy to a contract.

Agreements for the assignment or licensing of IP require careful and comprehensive drafting to ensure that fundamental issues within the contemplation of the parties are properly negotiated and provided for in the agreement, such as the foreseeable term (in the case of *Teva v AstraZeneca*), or the scope of IP rights to be transferred (in the case of *Kason Kek-Gardner v PCL*).