INAUGURAL ARNOULD LECTURE

Can you judge a policy by its cover: how important is the text, and do you need to read it?

Richard Jacobs[1]

I am delighted to have been asked to give this inaugural Arnould lecture. *Arnould: Law of Marine Insurance and Average*[2] is, once again, an indispensable reference work for any practitioner not only in the field of marine insurance, but insurance more generally. I was very pleased to see that the 20th edition has already been made available to every High Court and Court of Appeal judge on the legal databases made available the judiciary. I had the pleasure of working with 5 of the 6 authors, including the great privilege when I was at the Bar of being led by Jonathan Gilman, whose knowledge of English marine insurance law is unrivalled by anyone alive today, and who has been an author of *Arnould* for 40 years. He is, usually unacknowledged, the origin of many an argument advanced in insurance litigation by other, perhaps more fashionable and certainly younger, counsel.

I would like to think that I had a very minor role myself in this new edition; since I was responsible for offering Claire Blanchard pupillage in what became Essex Court Chambers, after she had written to 40 or 50 chambers and not received a reply. The late, and much-missed, Johnny Veeder and I came to know Mark Templeman when he was our opponent in a case. The two of us then enticed him to leave his chambers and join Essex Court. But I am aware, from having read the discussion in Chapter 22 of the new edition of *Arnould*, that my minor role in the past recruitment of two of the senior authors would decidedly not enable me to say that I was the proximate cause of this new edition. All the authors are to be congratulated on producing a further edition, indeed the 4th further edition in the last 13 years.

In one of my last arbitration hearings as a barrister, I was acting for the policyholder (the expression used in the United States), or in English terminology the insured, in a Bermuda Form case. We had what I thought was a very clear argument based on the policy wording. Perhaps unusually in those cases, it was the insurer who wanted in different ways to get away from the policy wording. After I had finished the argument, my solicitors came to me and asked me what I had meant when I had submitted to the panel that this was a case where the words are clear, and were not just relying on the "vibe of the thing". I had no recollection at all of actually saying this. But the transcript was clear. In making that argument, I had been subconsciously influenced by what I think is the second best legal comedy after *My Cousin Vinny.* It is an Australian film called *The Castle*.

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[2] Jonathan Gilman QC, Mark Templeman QC, Claire Blanchard QC, Philippa Hopkins QC, Neil Hart and David Walsh (eds), *Arnould: Law of Marine Insurance and Average* 20th edition (London, Sweet & Maxwell, 2021).

There is a wonderful scene (which Youtube enables me to play to you) where a small-town lawyer, who is seeking to defend the right of his client not to have his house compulsorily purchased, pulls out a copy of the Australian constitution. The judge asks him, sceptically: which section of the constitution are you referring to? After shuffling through some pages of the book, the lawyer explains that it is the "vibe of the thing"; a point that he repeats on various occasions thereafter.

I interpose to say that it is appropriate to refer to a fine piece of acting in this inaugural *Arnould* lecture, in light of the connection between the original author of *Arnould*, (Sir Joseph Arnould) and the acting profession. The first author of the book which still bears his name was the great uncle of the most famous actor of his generation, Laurence Olivier.

When dealing with insurance and other cases, I have of course put the scene from *The Castle* and the 'vibe of the thing' out of my mind, when considering arguments which invariably arise when one party has a stronger case on the wording of a contract – thereby requiring the other party to place reliance upon what is now a very broad range of arguments available in order to persuade the court to adopt an interpretation which pays less regard to the wording of the relevant provision than to other matters.

In insurance and non-insurance cases alike, there is what one might call a "traditional" range of arguments designed to move the focus away from the contractual language and onto other matters, often with a focus on the parties' pre-contractual negotiations which are of course inadmissible as an aid to construction. This range of arguments includes placing reliance on: (i) the factual matrix, which can include factual matters conveyed by one party to the other during the pre-contractual negotiations; (ii) commercial considerations; (iii) rectification; (iv) oral agreements at the time the contract was made and which are said to amount to a collateral contract; (v) arguments based on estoppel by convention.

Commercial judges are now frequently treated to some or all of these lines of argument in many cases. The days when counsel told you that, happily, the case only raises a short point of construction seem to be long gone. Even if the critical issue is a short point of construction, the side with the more difficult construction argument may well be trying, in various ways, to make it longer and more complex.

The decision which led Mark Templeman to invite me to talk on this topic is a case called *ABN Amro v Royal Sun Alliance*.[3] It raised a very wide range of insurance related issues. In the new edition of *Arnould* it is referred to on 20 separate pages, in different contexts, although happily only once with any apparent criticism.[4]

In that case, it was the insurers who, to say the least, did not much like the contractual terms which had been agreed, in the signed documentation, on a renewal of a policy which had been in place for a number of years. The renewal terms included two terms

[3] [2021] EWHC 442 (Comm). The case is the subject of a pending appeal due to be heard in November 2021. The issues on appeal are, however, limited to the first instance decision on: (i) the interpretation of the policy, and (ii) the successful reliance on estoppel by two underwriting companies (Ark and Advent). There is therefore no appeal in relation to the first instance decision on, for example: rectification, collateral contract, non-disclosure, the applicability of the "non-avoidance clause", and the liability of the brokers.

[4] See the discussion of inducement at paragraphs 15-33 – 15.35, although the criticism is primarily of a decision of Leggatt J.

which in different ways were potentially favourable to the insured. They had been included after very careful consideration had been given by the insured, together with a top city law firm, to whether its existing policy provided sufficient cover for its perceived needs, and whether there was a gap in the cover. The claimant was a sophisticated bank which was lending money against commodities.

This talk is not going to be about the detail of the terms in question, and so I can describe the two clauses in general terms. One of those clauses was a long clause, specifically drafted by the lawyers in order to obtain an extension of the cover. That clause had never previously appeared in a marine cargo policy. It was intended by the insured, and its lawyers, to have the effect (on the insured's case) of providing cover which was in the nature of credit risk insurance. This cover was, therefore, over and above the cover (in respect of physical loss of and damage to goods) traditionally provided by the marine cargo market in which the insurance was placed. I say that the clause was a long clause. Its importance to the insured was reflected in the fact that – rather like the city according to the song New York New York[5] – the clause was so good that it actually appeared twice in the policy in question; including in its own separate section of the policy. The other clause was shorter, and was similar to clauses written in the London market, and it precluded avoidance of the policy for non-disclosure or misrepresentation unless there was fraud.

A wide range of arguments was deployed by the insurers – in addition to arguments on construction – which sought to negate, in one way or other, these two provisions which were potentially very unfavourable to them, if their arguments on contract interpretation failed. The former arguments included what I have called traditional arguments based on factual matrix, commercial considerations, collateral contract, rectification and estoppel by convention. They also included, however, a point on non-disclosure which is far from traditional, and of course would not be available to most contracting parties, other than insurers. That argument sprung from the way in which the risk had been presented. The brokers had not drawn the underwriters' attention to either of the two clauses in question. In particular, the underwriters had not been told why the insured wanted the lengthy clause included, and specifically that the lengthy clause provided a form of a proposed insurance against credit risks which normally forms no part of a marine policy covering physical loss and damage to goods. A large number of insurers gave evidence for different companies – it had been a widely subscribed policy. With only two exceptions, none of the underwriters had read the clauses in question, with one further underwriter saying that he may have skim-read the policy.

One way or another, each of these points sought to downplay the significance and effect of the written terms of the contract. Indeed, one of the features of the non-disclosure case, which lies behind the title of this talk, was the reliance placed upon the way in which business was said to be carried out in the Lloyd's and London market. This included an important oral tradition, of the broker meeting the underwriters in person and carrying out an oral broking of the risk, with a decision being made relatively quickly – particularly on a renewal – as to whether or not the underwriter would subscribe. It was said not to be practical to expect underwriters to read through lengthy policy wordings in detail.

[5] Gerard Kenny: New York New York (So Good They Named it Twice) (1979).

This has caused me to reflect on various aspects of the debate that took place in *ABN* and related issues. In particular, how important is the contract wording in the construction of insurance policies, relative to other considerations which may be relevant to construction? Does the 'factual matrix' have a significant role to play? If the contract wording is important, is all of it important? Is some less important than others, for example the 'boilerplate', such as an insurer's standard terms, that often appears as part of the insurance contract wording? In modern insurance cases, how successful are arguments based on rectification, collateral contract, estoppel by convention, all of which seek to negate the contract wording? Should brokers be required to draw the attention of underwriters to unusual clauses? In this talk, I will endeavour to answer these questions, which collectively should provide an answer to the overall question posed by the title of the talk.

The importance of the policy language

I start with the question: how important is the contract wording in insurance policies? The basic principles of construction under English law are to be found in a series of cases culminating in *Wood v Capita Insurance Services Ltd*.[6] The approach in *Wood* was recently applied in the important decision of the Supreme Court concerning business interruption insurance and the Covid-19 pandemic: *Financial Conduct Authority v Arch Insurance (UK) Ltd*. ("*FCA v Arch"* [7] The Supreme Court avoided any temptation to recast or even elaborate upon the core principles of construction set out in *Wood*, which has now therefore happily stood unrefined for over 4 years.

> "The core principle is that 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."

In *FCA v Arch*, the Supreme Court also cited some "cautionary words" of Lord Mustill in *Charter Reinsurance Co Ltd v Fagan:*[8]

> "There comes a point at which the court should remind itself that ... to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."

It is of course clear from *Wood*, and the cases which preceded it, that the approach to construction does not simply mean looking at the wording of the contract. The process of interpretation was described in *Wood* as a unitary exercise, involving an "iterative

[6] [2017] UKSC 24.
[7] [2021] UKSC 1, para [47].
[8] [1997] AC 313, 388.

process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated".[9]

I do not intend to say anything in detail about "commercial consequences". That is the subject of a very widely quoted judgment of Lord Neuberger in *Arnold v Britten*.[10] That judgment has also stood the test of time: there has been no refinement of Lord Neuberger's principles in the past 6 years. I also need to tread somewhat warily; because there is a forthcoming appeal on the construction issues raised in *ABN Amro*, and (at least judging from the arguments addressed at first instance) it is likely that arguments as to commercial consequences may loom large.

There is no doubt, however, that the "iterative" process sometimes can itself produce a mass of both evidence and argument which is said to be relevant to the issues of contract interpretation. This is, in part at least, a consequence of the wide scope of potentially admissible material which can form part of the "factual matrix" to the contract.[11] For example, there is authority, including a line of authority in the insurance context, that a court is entitled to have regard to market practice, including expert evidence of market practice, even if that practice falls short of a trade custom, at least where knowledge of that practice was known to the parties or reasonably available to them at the of the contract.[12]

This leads to longer trials and potentially extensive evidence. It also leads to longer judgments, since judges may feel the need to demonstrate in their judgments that they have not simply looked at the contract language, but have taken into account all of the matters that the iterative approach requires, even if ultimately the language of the contract is the most important factor. I am not the only Commercial Court judge who has wondered, when considering a mass of factual matrix evidence, as follows. Where does this lead? What, if anything, does this tell me about how to interpret the contractual language?

Despite the breadth of potentially admissible material, the Commercial Court does not necessarily allow everything in. In the *Arch* case at first instance, Flaux LJ and Butcher J dismissed an application by Royal & Sun Alliance Insurance Plc to introduce additional policy wordings as part of the factual matrix for construing the 21 lead policy wordings with which the court was actually concerned.[13] The Commercial Court has generally tried to place factual matrix arguments in a more rigorous setting by laying down, in the Commercial Court Guide, requirements designed to ensure that the relevant factual matrix is identified in pleadings, and any factual issues in that regard are identified in the list of issues.[14] These attempts to provide focus and rigour have, in my experience, not been particularly successful. Sometimes, they are not adhered to at all, and indeed parties have expressed surprise at the pre-trial review when referred to the above passages in the Commercial Court Guide. Furthermore, where issues are raised such as avoidance or rectification, there will inevitably be (as in *ABN Amro*) a

[9] *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, para [12].
[10] [2015] UKSC 36.
[11] See generally, *Lewison: The Interpretation of Contracts* 7th edition, para 3.143 et seq.
[12] *Crema v Cenkos Securities Plc* [2010] EWCA Civ 1444 (Aikens LJ); *Ted Baker Plc v Axa Insurance UK Plc* [2012] EWHC 1446 (Comm (Eder J).
[13] *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 para [5]
[14] Commercial Court Guide 10th edition (2018), paragraphs C1.3(h) and D6.1(b). A new edition of the Commercial Court Guide will be available in 2022, and it is likely that these provisions will be retained.

volume of evidence which will be available as a rich source of material into which the parties will (irrespective of the pleadings) be tempted to dip liberally for the purposes of factual matrix arguments. In practice, a court may be reluctant to preclude the parties from relying upon evidence actually given, irrespective of how the matter has been formally pleaded.[15]

All of that said, the more recent authorities in the context of insurance law have unquestionably and unsurprisingly laid stress on the primacy of the policy language. In *FCA v Arch*, the Supreme Court resisted any temptation to recast the principles of contract interpretation which had been developed in the series of cases culminating in *Wood.* One important aspect of the approach in *Wood* is that sophisticated and complex contracts – as opposed to contracts which are brief or drafted without professional assistance – may be "successfully interpreted principally by textual analysis".[16] Insurance contracts will almost invariably all into this category, as *Arnould* recognises:

> "Thus the text may be the clearest guide to the parties' intentions where an agreement is complex and carefully drafted, whereas the factual matrix may be of more assistance in the construction of a brief or informal contract. *Wood* appears to be the Supreme Court's last word on the proper approach to construction, at least for the time being".[17]

When preparing this lecture, I looked back on all the insurance cases in the Supreme Court over the past 10 years or so, where issues of contractual construction have been raised. Generally speaking, there is a focus in the judgments on the contractual language. The background to the policies may feature in judgments, in particular the legal background or, in the case of policies covering professional liabilities, the regulatory background. However, whilst this background will be described in the judgments, it is difficult to find a case where it is decisive or of critical importance to the Supreme Court's interpretation of the language of the policy. For example, in the lengthy and important decision in *FCA v Arch*, the factual matrix to the policies played no significant part in the decision of the court.

The most recent Supreme Court case in the insurance field concerned the application of an exclusion in a policy which provided public liability cover to a security company.[18] A security guard employed by the insured killed another man with whom there had been an altercation when the guard was seeking to eject the man from the premises. The guard was later acquitted of murder and was only convicted of assault. The insured sought to recover for liability arising from the death of the man, and the insurer relied upon an exclusion in the policy for deliberate acts. I suspect that the case has not attracted much attention from commercial practitioners. But it is interesting to consider the approach of the court in that case. There was some reference in Lord Hamblen's leading judgment to context, specifically the legal background comprising previous case law. There was also reference to the fact that the security company would naturally be faced with the risk that one of its employees would use excessive force.

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[15] *ABN Amro* [2021] EWHC (Comm) 442 paras [206] – [208].
[16] *Wood*, para [13].
[17] *Arnould* 20th edition, para 3.03.
[18] *Burnett or Grant v Insurance Company of Hanover Ltd* [2021] UKSC 12.

However, neither matter seems to have played, at least expressly, any significant part in the court's reasoning – which is based upon the contractual language.

I have indicated that it is difficult to find a case where the outcome of the case has been significantly affected by factual matrix evidence of the type that parties frequently seek to adduce. Where a mass of evidence has been adduced, the court has ignored it. Thus, in *BAI (Run-Off) Ltd v Durham,* Lord Mance said: [19]

> "Before the Supreme Court, both employers and employees continued to rely upon the evidence given at trial regarding the general purpose of employers' liability insurance as part of the background to the interpretation of the present insurances….The Supreme Court was provided with a useful summary of the considerable volume of evidence relied upon in this connection. It consisted in general of answers given by insurers, two at least of them with experience going back to the 1940s. They were asked (frequently in response to leading – though not inadmissible on that score – questions in cross- examination) about their or others' views, understandings or perceptions as to the purpose of the policies, and the way in which these would or should respond, in relation to injuries arising from exposure in the course of activities during the policy period. In my judgment, Stanley Burnton LJ was right to reject such evidence as inadmissible. The parties cannot be asked what they meant by their contract, and, failing any binding usage, it is equally inadmissible to ask other persons operating in the market to give general evidence as to what they would have understood the parties to have meant by the words used in the context in which they were used. The evidence does not seem to have amounted to more than that."

The ordinary interpretation of principles of contract interpretation may be supplemented by particular principles or, as they are sometimes known, canons of construction. These may at first sight indicate that a policy might be judged by its cover, but on analysis that is not so. For example, in the interpretation of marine cargo policies, such as that in issue in *ABN Amro,* there is an established principle that there must be clear words indicating an intention to broaden coverage beyond physical loss and damage to goods. Thus, in *Engelhart CIP (US) LLC v Lloyd's Syndicate 1221* [2018] EWHC 900 (Comm), Cranston J said[20]:

> "In my view, the authorities require that one starts from the purpose of all risks marine cargo insurance, which is to cover loss of or damage to property … Since an all risks marine cargo policy is generally construed as covering only losses flowing from physical loss and damage to goods, there must be clear words indicating a broader intention … Thus, the commercial

[19] [2012] UKSC 14 para [40]
[20] [2018] EWHC 900 (Comm), paras [39] – [41].

> context of the construction exercise is that the presumption with an all risks marine cargo policy is to insure for physical losses".

The law in many different contexts has a starting point which, if it is to be displaced, requires clear words. This approach is taken in various contexts in contract law; for example, the principle that clear words are required if a clause is to be construed as taking away ordinary rights arising from breach of contract.[21] It also applies in the context of legislation which is said to remove fundamental rights.[22] Ultimately, however the question of whether there are clear words depends of course on what the contract actually says. Accordingly, whilst presumptions or starting points may exist, the contractual language still needs to be considered carefully.

The entire contract is important

Does the entire contract need to be read? Does the 'boilerplate' have a lesser status, and so it can be skim-read? One of the arguments that featured in *ABN Amro* focused on the length of the policy document in that case. When many of us started in practice, the slip was a short document, often referring to a few standard market clauses. There was no detailed "wording", and the slip indicated that this was "to be agreed". Usually, policy wording was produced at a later stage, although sometimes a loss occurred before any wording had been issued. All of that changed in the mid-2000's, with the introduction of the "Market Reform Contract" or "MRC". The current position is described as follows in *Arnould*:

> "With effect from November 2007 the London Market adopted a new procedure. The slip was abolished, and now brokers are required to prepare policy wording in the form of the MRC. The MRC is presented to underwriters to scratch. The old two-stage process has been replaced by a single stage, which has a number of advantages: the assured and underwriters are aware from the outset of the terms which are being proposed by the broker; there is no longer a risk that the slip and the subsequent policy wording are inconsistent; and in the event of a loss before the wording has been issued there is no longer any dispute as to what that wording is, although of course there remains ample room for dispute as to what the wording actually means."[23]

The format of the MRC is that there are "Risk Details" at the front-end of the policy, followed by a number of further mandatory sections and then usually more detailed policy wording or clauses, which can be a set of standard clauses, towards the back. It is this document that, in the Lloyd's and London subscription markets, the underwriter is asked to scratch. The length of these documents led to the argument in *ABN Amro* that, in effect, business would grind to a halt if an underwriter – when asked to subscribe a line – had to read through the whole document.

I will return to that point later, but the basic principle is clear: the whole document forms part of the parties' agreement, and the detailed wording at the back-end may be

[21] *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689.
[22] *R v Secretary of State for Home Department*, ex parte Simms [2000] 2 AC 115, 131.
[23] *Arnould* para 2.05

equally or more significant contractually than the wording at the front end where the Risk Details are set out. Of course, there may on particular facts be greater significance attached to the terms at the front end, which will usually be considered to be "negotiated" terms in contrast to the standard wording set out later in the document. There is a principle of contract interpretation that where a contract contains specifically negotiated terms, and also incorporates a pre-existing set of standard or printed terms, the former will prevail over the latter to the extent of any inconsistency.[24] However, that is not always the case. For example, in *AIG Europe SA and others v John Wood Group PLC* [25], I held that a clear jurisdiction agreement contained in standard terms at the back of the signed MRC prevailed over a different jurisdiction agreement appearing at the front-end.

The whole question of boilerplate clauses, and their contractual relevance, is the subject of an outstanding chapter written by David Foxton (Mr Justice Foxton) in: *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose* Ch 15 ("The Boilerplate and the Bespoke: Should Differences in the Quality of Consent Influence the Construction and Application of Commercial Contracts?").

Rectification and other doctrines

Can the contractual wording be circumvented by other legal doctrines, such as rectification? In the insurance context, that is very difficult. Attempts are sometimes made to invoke the principles of rectification. In an insurance case in 2009, *Dunlop Haywards (DHL) Ltd v Erinacious Insurance Services Ltd*,[26] Rix LJ said:

> "The difficulties in the way of proving rectification are well-known and have been described as formidable".

Rectification has not become any easier in the intervening years. It is difficult to find a case in the past 10 or indeed 20 years where rectification of an insurance policy had been successfully claimed. None is referred to in the discussion of rectification in *Arnould* or in *MacGillivray*.[27] The classic case is where a policy is rectified so as to accord with the slip. But since the practice, as a result of the Market Reform Contract, is for the wording to appear on the slip, this route to rectification in practice no longer exists, at least in the context of the types of insurance policy which generally come before the Commercial Court.

Although other legal doctrines exist which would have the effect of qualifying the contractual words with alternative meanings, based on oral discussions, these are not likely to be more fruitful. In *ABN Amro*, arguments were advanced – alongside rectification – based on collateral contract and estoppel by convention. Those arguments did not succeed on the facts. Again it is difficult to find recent insurance cases where these principles have been successfully invoked.

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[24] *Generali Italia Spa v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm), (Foxton J) para [85].

[25] [2021] EWHC 2567 (Comm).

[26] [2009] EWCA Civ 354.

[27] See *Arnould* para 2.12; *MacGillivray on Insurance Law* 14th edition, chapter 12. A rare recent successful claim for rectification was made in *Markel Bermuda Ltd v Caesars Entertainment Inc* [2021] EWHC 1931 (Comm) where the policy documentation did not include the New York law/London arbitration clause agreed in a quotation which had been accepted.

Non-disclosure of unusual policy terms

The previous discussion leads to the conclusion that all parties – insurer, broker and insured – should indeed be reading the whole of the policy. In *ABN* Amro, however, I needed to consider whether or not insurers could rely on principles of non-disclosure when an unusual policy provision (the lengthy clause which I have previously described) had not been brought to attention, or explained, during the broking process on renewal. The particular provision had been the subject of careful consideration by the insured and his advisers, and to some extent the brokers; although there was a lively issue in the case as to whether the brokers had understood it.

The argument for the underwriters was, in substance, that they could not be expected to read or consider the whole of the policy wording. It was said that the practice in the London marine market was for there to be relatively short 'brokes', and that the market was basically doing the same things over and over again. That was why the market, which was built upon mutual trust, relied on the brokers to draw material matters to their attention. The market would slow down and grind to a halt if underwriters were expected to read lengthy documents in the detail required to understand each clause. The market did not work on the basis that people would sit and read the policies that they were writing. That might happen in an ideal world, but it was not what happened in practice.

I was not persuaded by this argument. As Arnould says:

> "The topic of whether non-disclosure or misrepresentation could arise in respect of policy terms set out in the cover presented to and written by insurers was considered at length in *ABN Amro Bank NV v Royal and Sun Alliance Insurance Plc* [2021] EWHC 442 (Comm). The short answer in that case was that they could not. Jacobs J was unimpressed with arguments that underwriters in the market concerned did not habitually read the policy documents they signed and so should have had any unusual terms pointed out to them; they should read what they sign and even if they do not, they cannot afterwards complain."[28]

The policy was placed prior to the coming into force of the Insurance Act 2015, and was therefore decided under the Marine Insurance Act 1906. However, I do not think that the analysis or result would be materially different under the 2015 Act. In summary, my reasons for reaching the conclusion described in the above passage in Arnould were as follows.

Section 18 (3) (b) of the 1906 Act provides that there is no duty to disclose circumstances which were known or presumed to be known to insurer. (There is a similar provision in section 3 (5) of the Insurance Act 2015). The terms actually in the contract were known or presumed to be known. It was for the underwriter to form his own view on what the terms meant: the insured was not required to disclose its, or its brokers', subjective views as to the meaning of the contract. If a clause was unusual, then the skill-set of underwriters should enable them to identify this, and ask any questions about it. Good practice required underwriters to read slips even if lengthy.

[28] *Arnould* para 16-53, footnote 222.

Previous case-law showed that terms actually in the slip may give the underwriter relevant knowledge for the purposes of defeating a non-disclosure argument.[29] There was a lack of authority to support the argument on non-disclosure which was advanced, and other authority which indicated that it was incorrect.[30]

Brokers' liability

Although there may be no duty of disclosure to underwriters of unusual policy terms so as to give rise to avoidance, insurance brokers may be exposed to a claim by the insured if they do not identify unusual clauses to underwriters and then there is subsequent litigation. This is a consequence of the breadth of the duty of insurance brokers as established in the line of authority beginning with *NCB Ltd v Barnet Devanney (Harrow) Ltd*.[31] Brokers have been held to owe a duty to procure cover that clearly and indisputably meets the client's requirements, and does not expose the client to an unnecessary risk of litigation. Whilst there is no duty to "nanny" underwriters, the brokers' duty to its client may require the explanation of unusual clauses to underwriters. One reason for this conclusion is that even if the drafting of the contract is clear, so that underwriters' contractual defence fails, the client may nevertheless be exposed to arguments – based, for example, on the factual matrix or commercial considerations – which seek to negate the contractual words used.

Conclusions

Whilst the policy should be read, there are limits to the amount of analysis that is required. It is common for construction arguments to be based upon minute textual analysis, with the meaning of the critical clause said to be elucidated by other clauses elsewhere in the policy. For the purposes of that line of argument, there is often an extensive search by the lawyers for any clause which might conceivably be said to have a bearing on the construction of the critical clause. In *Arch*, the Supreme Court indicated that this line of argument would not necessarily be well-received:[32]

> "[77] In the case of an insurance policy of the present kind, sold principally to SMEs, the person to whom the document should be taken to be addressed is not a pedantic lawyer who will subject the entire policy wording to a minute textual analysis … It is an ordinary policyholder who, on entering into the contract, is taken to have read through the policy conscientiously in order to understand what cover they were getting.
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> [78] The notion that such a policyholder who is presumed to have reached p 93 of the RSA 3 policy wording would understand the general exclusion of contamination or pollution and kindred risks on that page to be removing a substantial part of the cover for business interruption loss that was ostensibly conferred on p 38 is as unreasonable as it is unrealistic."

[29] *The Bedouin* [1894] P 1, discussed in *Amro* paras [613] – [615].
[30] *Iron Trades Mutual v Cia de Seguros Imperio* [1991] 1 Re LR 213 (Hobhouse J), discussed in *Amro* paras [617] – [621].
[31] [1999] Lloyd's Rep IR 459.
[32] *Arch* paras [77] – [78].

Whilst there are limits on the amount of textual analysis, I think that this passage – and indeed the general approach to construction of contracts – supports my conclusion that underwriters should read the policy. Since contract interpretation depends upon how an ordinary policyholder would read the policy – or how a reasonable person in the position of the parties would understand the contract to mean – it would in my view be somewhat strange if the person (the underwriter), whose obligations are key to the insurance the contract, did not have to read it.

My overall conclusions are as follows. The language of the policy remains critical to issues of construction. The whole policy matters, and it therefore needs to be read and understood by brokers and underwriters. Arguments based on non-disclosure are unlikely to succeed where underwriters have not read the policy terms, even if some are unusual. The broker's duty to its client may require explanation of unusual terms to underwriters.