



## The Rise of Legal Pragmatism in English Contract Law

*Alan Barron*

*Writing extra-judicially in an article published in 1996 Lord Steyn asked whether legal formalism held sway in English law.<sup>1</sup> Although he considered this question from a broad perspective, looking at a number of areas of law, he also considered the question in relation to the law of contract. Drawing on his Lordship's comments, both judicial and extra-judicial, this article seeks to demonstrate a clear change in judicial approaches to decision-making which signals a move away from formalistic interpretative techniques towards an approach very much akin to the legal pragmatism developed by Judge Richard Posner in the United States. However, the limits to the development of that approach will be demonstrated with reference to a comparison between judicial and academic conceptions of reasonable expectations in contract.*

## Entire Agreement Clauses: Contracting Out of Contextualism

*Catherine Mitchell*

*In the UK contracts literature much has been made of the perceived shift in emphasis in contractual interpretation away from literal methods to more expansive contextual approaches. However, very little attention has been paid to the question of whether, and how, contracting parties might influence the interpretation method applied to their agreement. This article considers whether use of an entire agreement (or merger) clause in the contract might be one such technique by which parties can direct a court to adopt a more formal interpretative approach to their agreement. It distinguishes different types of entire agreement clause and examines whether such clauses can affect interpretative method. It considers some of the reasons why parties might require a more formal interpretation to be applied to their agreement. It concludes that there are plausible reasons for some contracting parties to 'contract out' of contextual interpretation, and it maintains that use of an entire agreement clause might operate as a mechanism for achieving this.*

## The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine

*Chris Davies*

*A salary cap system is presently used by both the AFL and NRL with the stated objective of creating a more even competition. Although the salary cap can be viewed as creating a situation where players are being deliberately underpaid, the author argues that there is overall benefit, even to the players, in having a salary cap in operation. Such benefit includes a more even competition, which then provides for a more stable financial situation for the league and the players, and a more interesting competition for the spectators. The author therefore argues that, after applying the Nordenfelt test, salary caps in professional team sports do represent a reasonable restraint of trade. It is also suggested that the principles of contract law play an important role in protecting the rights of the players.*

## Developing the Intermediate Term Concept

*J W Carter, G J Tolhurst and Elisabeth Peden*

*Few modern decisions have captured the imaginations of contract lawyers as much as Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd. That decision gave birth to the concept and doctrine of the 'intermediate' term or 'innominate' term. It was welcomed with open arms by most scholars frustrated by the division of the world of contractual terms into merely two categories, namely, conditions and warranties. It is perhaps not surprising that the Hongkong Fir decision should have had such an impact. The dispute was considered by four of the most influential judges of the twentieth century, Salmon J, Sellers LJ, Upjohn LJ and Diplock LJ. With the exception of Lord Justice Sellers all went on to become Lords of Appeal in Ordinary. Indeed, during the 20 years following the decision, Lord Diplock, amongst other things, re-wrote the law of discharge for breach.*

## Construction Goes Off the Rails: an Analysis of Wallace-Smith v Thiess Infracore

*Wayne Courtney and Ben Curtin*

*In March last year, the Full Federal Court handed down its decision in the case of Wallace-Smith v Thiess Infracore (Swanston) Pty Ltd.<sup>1</sup> The case ultimately concerned the ability of one party to a contract to prove as a creditor for loss of bargain damages in the winding up of the other (defaulting) party to the contract. That alone is unremarkable. The interesting and controversial aspect of the case was that in order to reach its conclusion, the court had to consider the scope and operation of a severe contractual restriction on the creditor's right to terminate. The court's analysis raises some difficult theoretical issues about performance, abandonment and the right to terminate, which we will address in a later article. In this article, we examine the way the case was argued and decided and focus mostly on issues of construction. We start by briefly outlining the facts and decision in Wallace-Smith, which were quite complicated.*

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