ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2006/0429

BETWEEN

HENRICUS DRIES

Claimant

And

BARBUDA EXPRESS LIMITED

Defendant

Appearances:

Mr. Dexter Wason for the Claimant
Dr. David Dorsett for the Defendant

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2008: October 30
November 20
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JUDGMENT

[1] **Blenman J:** This is a claim by Mr. Henricus Dries against Barbuda Express Ltd. (the company) for outstanding fees. There is also a counterclaim by the company against Mr. Dries for breach of fiduciary duties, together with a request for the accounts of moneys received.

[2] **Background**

Mr. Henricus Dries was a shareholder and director of the company which owned a ferry service, the Barbuda Express, and Mr. Dries was employed as captain. On the 19th of September 2004, at a meeting of the directors of the company, Mr. Urlwin, Mr. P. van Beek and Mr. Dries, in an agreement which was reduced into writing and signed by all parties, it was agreed that, **"the daily operations rate for working directors will be *US $200.00***

per day, half to be paid in cash, and half to be retained in a Director's account". Mr. Dries during the period of October 2004 and June 2005 caused the sum of US $22,700.00 to be paid to him. He says that a similar sum was to have been placed in the Director's Account to be retained for his benefit and held in trust for him. Sometime in or about July 2005, as a result of his ill health and in view of the prospect of an extended absence from Antigua, he transferred his shares in the company and subsequently ceased to function as a director. He also ceased to be employed by the company.

[3] Mr. Dries says that based on the agreement, his salary was US $200.00 per day and therefore the company owes him US $22,700.00. He has made several requests that the salaries retained for his benefit and held in trust for him in the directors account, be paid to him, but the company has in clear breach of its contractual and fiduciary obligations failed, neglected and/or refused to pay him the outstanding amount of US $22,700.00, thereby causing him to suffer loss and damage. Accordingly, he has filed this claim for the loss and damage, which he alleges he has suffered.

[4] The company disputes that it owes Mr. Dries any money. The company maintains that Mr. Dries' salary was US $100.00 per day.

[5] Further, the company contends that in addition to the express terms of the agreement, there were certain implied terms namely:

(a) The US $100.00 to be paid in cash was remuneration for work done by the directors in operating the Barbuda Express; the US $100.00 to be allocated to the director's account was a bonus a director would be entitled to claim in the event that the company was profitable and endowed with funds so that the bonus payments could be made;

(b) The amount to be paid to the working directors was part of an incentive plan designed to encourage the directors to work assiduously and efficiently in the best interest of the company so as to maximize the possibility that the company would realise a profit;

(c) The amount that would be allocated to the director's account could only be claimed by a director if the company was profitable in the fiscal year, as would be evident upon presentation of the company's accounts;

(d) The initial cash payment of US $100.00 per day was a payment for operating the Barbuda Express and that was within the financial capacity of the company; an amount of US $200.00 per day was not within the financial capacity of the company; the amount of US $100.00 to be allocated to the director's account was not an amount representing payments that were accumulating in arrears but were amounts that could be claimed by the directors and whose payment would be contingent on the profitability of the company.

[6] By way of counterclaim, the company says that Mr. Dries owed it fiduciary duty and he was a trustee of the company's assets and property as were in his possession or control. Mr. Dries has breached this duty to the company since the period 1st October to 31st December 2004 constitutes 92 days and the Barbuda Express did not operate on all 92 days. Accordingly, it was not possible for Mr. Dries to operate the Barbuda Express for 92 days during that period. The company further alleges that during the period 1st October 2004 to 30th June 2005, Mr. Dries caused the sum of US $22,700.00 to be paid to himself purportedly pursuant to the agreement that he would be paid US $100/diem for operating the Barbuda Express. The sum of US $22,700.00 accumulating at a rate of US $100/diem represents payments for 227 days. He could not have worked 92 days from 1st October to 31st December 2004 and since he only worked during the period from 1st January to 30th June 2005 means that he could not have worked operating the Barbuda Express for 227 days during the period from 1st October 2004 to 30th June 2005.

[7] Accordingly, the company counterclaims for an account of all moneys which came into the hands of Mr. Dries as an employee/director. The company also seeks an order for the payment by Mr. Dries to the company of any sum found due from him to the company upon taking such account, together with interest thereon at the commercial rate of 10% per annum from the date the sum ordered to be paid became due until payment or judgment or

interest thereon as provided for by section 27 of the Eastern Caribbean Supreme Court Act.

[8] **Issues**

The issues that arise for the Court's determination are as follows:

(1) Whether the company is indebted to Mr. Dries;

(2) Whether Mr. Dries is liable to account to Barbuda Express for moneys collected.

[9] **Evidence**

Mr. Dries and Mr. David Milliken Smith filed witness statements on behalf of the claimant. On behalf of the company, Mr. Gregory Urlwin filed a witness statement. They were all cross examined.

[10] **Dr. David Dorsett's submissions**

Learned Counsel Dr. Dorsett stated that in light of the circumstances in which the agreement was arrived at and the language of the agreement, the contract was that the daily operators' rate was available to a director, if the director was operating the Barbuda Express for a day. Dr. Dorsett said that the agreement that half of the "daily operators rate for working directors" be retained in a directors' account was intended to work as an incentive to encourage the directors to work assiduously and efficiently in the best interests of the company so as to maximize the possibility that the company would realise a profit, and accordingly the amount to be retained in the directors' account and paid to working directors would be contingent upon the financial capacity of the company and the profitability of the company.

[11] Dr. Dorsett asked the Court to construe the agreement in the following terms:

(1) The rate for a director operating the Barbuda Express vessel is US $200 per day.

(2) The mechanism through which payment is to be paid is for half to be in cash and the other half to be retained in the directors' account.

[12] Next, Learned Counsel Dr. Dorsett said that Mr. Dries did not operate the vessel for 227 days, in that the company records indicate that in 2005 he only worked for 96 days operating the Barbuda Express (indeed he admits that he only captained the Barbuda Express for 96 days in 2005). Even though, Mr. Dries contends that he did 83 days of company related work in 2004. Dr. Dorsett said that Mr. Dries is entitled to compensation for the days he operated the Barbuda Express vessel which would be the sum of 96 days that are agreed with respect to 2005 plus the sum for the relevant days for 2004, which at its most generous would be 83 days, which sum does not add up to 227 days.

[13] Dr. Dorsett turned his attention to the interpretation of the agreement. He said the object of all construction of the terms of a written agreement is to discover the intention of the parties to the agreement. Parties cannot be held to agree to matters which they did not intend. Suffice it to say, "An aggrieved party hardly pursues litigation merely to engage the Court in a discovery of the intention of the parties". What is desired is for the Court to give effect to a certain intention and to enforce a certain outcome in favour of the aggrieved party. The intention of the parties is of course not independent of the aim, or object, or commercial purpose of the agreement. Hence, there is the need for consideration of the matrix of relevant facts in construing the terms of an agreement. He referred the Court to Lord Bingham of Cornhill in **Bank of Credit and Commerce International S.A. (in liq.) v Ali (No.1) [2001] UKHL 8; [2001 2 WLR 735**:

> "In construing any contractual provision, the object of the Court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the Court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified".

[14] In **Reardon Smith Line Ltd v Hansen-Tangen [1976] 3 All ER 570 p 574 c-h** Lord Wilberforce stated:

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties'.

[15] Following on from Lord Wilberforce's statement in **Reardon Smith Line Ltd v Hansen-Tangen** ibid, Lord Steyn in **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352 at 369 c-e** advanced three propositions:

> "Relying on the reasoning in Lord Wilberforce's speech in **Reardon Smith**, at 996D to 997D, three propositions can be formulated. First, in respect of contracts and contractual notices the contextual scene is always relevant. Secondly, what is admissible as a matter of the rules of evidence under this heading is what is arguably relevant. But admissibility is not the decisive matter. The real question is what evidence of surrounding circumstances may ultimately be allowed to influence the question of interpretation. That depends on what meanings the language read against the objective contextual scene will let in. Thirdly, the enquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind.

[16] Since all contractual activity is voluntarily undertaken, in construing what obligations are imposed on the parties by the contract, regard must be had to the nature and object of the business transaction, including the commercial context in which it was made. Dr. Dorsett referred the Court to **Transfield Shipping Inc v Mercator Shipping Inc [2008] UKHL 48; [2008] WLR 348 at p 12 and 16** per Lord Hoffman.

[17] Dr. Dorsett Learned Counsel said that contracts are often drafted inelegantly and the words used may not be accurately or efficiently convey the true intentions of the parties. Accordingly, the words must be interpreted in light of the relevant factual matrix. Even in the case of a badly drafted contract it is imperative that in construing the terms of the contract that the relevant factual situation be determined. Lord Bridge of Harwich in giving the opinion of the Privy Council in **Mitsui Construction Co Ltd v Attorney General of Hong Kong [1986] LRC (Comm) 245 at 253a stated:**

> "a badly drafted contract affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used, interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any Court should be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis".

[18] Dr. Dorsett further said that commercial agreements must be construed in a commercial sense without undue resort to a literal non-purposive interpretation of the words used. The statement of Lord Steyn in **Sirius International Insurance Co (Publ) v FAI General Insurance Ltd [2004] UKHL 54; [2004] 1 WLR 3251** captures the modern view of the Courts on this point:

> "There has been a shift from literal methods of interpretation towards a more commercial approach. In **Antaios Compania Naviera SA v Salen Rederierna AB**

[1985] AC 191, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed:

> "If detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense".

In **Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749,** I explained the rationale of this approach as follows:

> "In determining the meaning of the language of a commercial contract the law generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language".

[19] Lord Hoffman in **Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 at 114e-115d** stated the principles of construction of commercial contractual documents that is now to be adopted:

> "I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. The principles may be summarized as follows:
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes the

language of the document which would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. See (**Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd. [1997] 2 WLR 945**.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously

when he said in **The Antaios Compania Neviera S.A. v Salen Rederierna A.B. [1985] A.C. 191, 201:**

> "If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense".

[20] All questions of interpretation, including the interpretation of a contract as a whole against its commercial background, are question of law. Dr. Dorsett referred the Court to **Transfield Shipping Inc v Mercator Shipping Inc** ibid per Lord Hoffman.

[21] In the case at bar, Counsel advocated that the parties agreed for payment to working directors for operation of the Barbuda Express. But more critically is the company' contention that the payment was to be effected through a prescribed mechanism (half in cash and half to be retained in a directors' account) and the mechanism with respect to the directors' account to be available in certain circumstances (when profits have been generated by the company).

[22] Dr. Dorsett therefore submitted that the commercial background and purpose against which the agreement was drafted is fully explained by Mr. Urlwin, Managing Director of the Barbuda Express (at paragraphs [4]-[14] of his witness statement). The substance of Mr. Urlwin's account was not challenged in cross examination and it is useful that the commercial background, the aim, object, and purpose of the agreement be examined.

[23] Mr. Dries at paragraph 12 of his witness statement confirmed the shared understanding that the agreement was arrived at on the basis that the compensation arrangement was designed in the context of a new start-up company, hopeful of profitable returns in the long term, and the need for the directors to sacrifice so as to safeguard and promote the financial viability of the company. Counsel referred the Court to Mr. Dries' Witness Statement at paragraph 12:

"I want to firmly state that the initial agreement of 19th September 2004 was very important to me at that time. Why did I sign that agreement?

- "I agreed to investing US $20,000.00 because I was sure the business we were starting would give a good return.
- I agreed to work at a daily rate of only US $200.00 although my knowledge and expertise as a mariner and manager are worth more than that, because I was going to work for a company of which I was a shareholder.
- I agreed to have half of the wages to be retained in a director's account because I wanted to give the company a boost in the first months of operation".

[24] Mr. Dries admitted in cross examination that he was responsible for handling the financial accounts and matters of the company. He further admitted that during his tenure with the company, no funds were deposited into the directors' account. Dr. Dorsett submitted that no funds had been deposited into the account due to want of funds. Surely, if there was no want of funds Mr. Dries, as the person controlling the purse strings of the company would have deposited the money into his account and/or paid himself the amount he calculated was properly due him upon his exit from the company. This he did not do and this Court is asked to make the inference that the actions of Mr. Dries at the time of his exit from the company confirms his understanding of the "initial agreement" and that the current claim by Mr. Dries is to realise and give effect to a "new agreement" that Mr. Dries raised during cross examination.

[25] Dr. Dorsett reminded the Court that the mechanism for payment as provided for in the agreement was "half to be paid in cash and half to be retained in a directors' account". It is evident from Mr. Dries' own admission that no funds were retained in the directors' account. As the financial controller of the company, Mr. Dries failed to place funds into his own account. He "now seeks to draw water from an empty well" and rely on his own breach and failure of duty to effect an agreement to be construed in his favour and for his benefit. It is well settled law that as a matter of construction, unless the contract clearly

provides to the contrary, it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it.

[26] In the circumstances, Dr. Dorsett said that the financial implications of the agreement if Mr. Dries' contentions are to be accepted, defy commercial sense and as a matter of fact was not the intention of the parties to the agreement. Further, the intention of the parties in light of the commercial background as comprehensively and fully detailed by Mr. Urlwin on behalf of the company (which was neither successfully rebutted nor challenged on cross examination) is a matter of fact, that as explained by Mr. Urlwin.

[27] If it was intended that the directors were agreeing amongst themselves to an entitlement of a cash payment of US $200.00 per day at all events it would have been very easy, exceedingly simple, and most convenient for the agreement to have stated so explicitly, expressly and ambiguously. Lord Hoffman's 5th principle of construction underlines the fact that the law does not attribute to parties an intention they clearly would not have had, even if the words of the agreement suggest otherwise, because of the paramount importance of having regard to the surrounding circumstances which should inform as the intention of the parties, objectively ascertained.

[28] Next, Dr. Dorsett said that company directors occupy a fiduciary position towards the company. They must fulfill their fiduciary duties and the duties imposed on them by section 97(1) of the Companies Act 1997 of the Laws of Antigua and Barbuda, or contend with the liability that attaches to their breach of fiduciary and statutory duties. One of those duties is to give account for the company's property that comes into their possession. The company maintains that US $22,700.00 of its money came into Mr. Dries' hands and that he paid himself the entire sum. He was not entitled to the whole sum as he did not operate the vessel for 227 days but at most 179 days (96 days in 2995, as agreed by both parties and at most 83 days as contended by Mr. Dries) which would entitle him at most to US $17,900.00.

[29] Dr. Dorsett therefore argued that in light of the agreement, properly construed as advanced by the company, Mr. Dries must account for the excess of US $4,800.00 and restore that money to the company, together with interest for keeping the company out of its funds.

[30] **Mr. Dexter Wason's submissions**

Learned Counsel Mr. Dexter Wason said that Mr. Dries is entitled to receive the sums claimed. He referred the Court to the evidence in chief in which Mr. Dries stated that he not only captained the Barbuda Express on a regular basis, he performed other vital services (listed in paragraph 3 of his witness statement). Mr. Dries stated that in accordance with the agreement between himself and the company he paid himself for a total of 227 days between the 15th of November 2004 and the 8th of June 2005, at the rate of US $100.00 per day. The remaining US $100.00 per day was recorded as a liability to himself in the company's financial records kept in the "Excel Files" on the company's computer. Mr. Dries steadfastly maintained during re-examination that the financial records were available to any company director and that these records formed a part of the discussion that took place during every director's meeting.

[31] Mr. Urlwin stated that at no time during the period that he was a director of the company did he, as the major shareholder, ever object to the period of 227 days or the debt to him recorded in the company's financial records amounting to US $22,700.00.

[32] Mr. Wason adverted the Court's attention to the fact that during cross-examination, Mr. Urlwin denied that he was ever aware of the debt to Mr. Dries, or that Mr. Dries had paid himself for days when he had not personally captained the Barbuda Express to Barbuda. Counsel asked the Court not to believe Mr. Urlwin since his evidence is inconsistent with the other evidence in the case.

[33] Learned Counsel Mr. Wason said that it is settled law that extrinsic evidence is admissible to prove the nature of an agreement or the legal relationship of the parties. Thus the Court can look at the evidence of the witnesses adduced during the hearing as a guide to

correctly interpreting the agreement. In support of his contention, learned Counsel Mr. Wason referred to **McCall Brothers Limited v Hargreaves (1932) 2 KB 423** and **Yeoman Credit Ltd. v Waragowski (1961) 3 AER 145**.

[34] In **Yeoman Credit Ltd. v Waragowski** ibid, the English High Court upheld the award by a Master on an assessment of damages, in relation to a hire purchase agreement arrived at by calculating the depreciation of the motor vehicle which was the subject of the dispute, by reference to a scale extrinsic to the higher purchase agreement.

[35] Mr. Wason submitted that in the case at bar, the Court may look at the evidence adduced during the hearing as an extrinsic aid in interpreting the agreement. Mr. Wason submitted that by his actions during the period Mr. Dries was a director of the company and up until the filing of the defence, that Mr. Urlwin not only knew but consented to the period of time which Mr. Dries paid himself and that the company owed him monies. The Court should dismiss the counterclaim against Mr. Dries and award him the sum of US $22,700.00 for breach of contract with costs and interest.

[36] **Counts analysis and findings**

I have given careful consideration to the evidence adduced in the matter and I have given deliberate consideration to the learned Counsel's submissions. The following represents my findings of fact, having had the benefit of hearing both Mr. Urlwin and Mr. Dries, particularly as they testified during cross examination. Mr. Dries struck me as a very straight forward man whose evidence was credible and reliable. Mr. Urlwin is a very astute businessman who was not as candid with the Court as he could have been. Any conflict between their evidence is resolved by my acceptance of Mr. Dries' version. I have also paid regard to the agreed documents produced in the case. Mr. Smith who testified on behalf of Mr. Dries impressed me as a candid gentleman with no interest to serve. He was a very credible and reliable witness.

[37] There is no dispute that Mr. Dries, Mr. Van Beek and Mr. Urlwin came together to invest in the company. Mr. Dries contributed US $20,000.00 and bought shares in the company. He

was also appointed as a director of the company. In addition to being one of the captains of the Barbuda Express, he performed the following functions:

- Travelled to Fort Lauderdale (Florida USA) to assist with the purchase of the boat and to prepare it for the crossing to Antigua;
- Co-captained the vessel during the crossing from Florida to Antigua and supervised and assisted in the physical preparation of the vessel to operate as a ferry;
- Arranged and attended appointments for inspection of the ferry at Marine Services;
- Coordinated and supervised work done to the vessel to comply with the Marine Inspectors local and international regulations;
- Kept and obtained on a daily basis the company's daily accounts, including accumulating and numbering receipts and recording expenditure in Excel Files;
- Ensured that all wages due to crew members were paid and all outstanding bill payments made;
- Negotiated and organized special group trips as well as organized school trips to Barbuda;
- Purchased and provided the boat bar with food and drink items;
- Maintained the vessel in order to keep it in good working condition, even including physically bailing and cleaning the bilges and scraping the bottom of the boat to free it from marine growth;
- Promoted the company's ferry service to various hotel resorts;
- Did all that had to do with the rental of an office in Belmonth area, including finding vacant premises, negotiated with the owner, entered into contracts, monthly paying the rent, maintenance, furniture, office equipment etc.;
- Advertised in newspapers and magazines.

[38] From the above, it is clear that Mr. Dries performed several functions for the company's benefit in addition to captaining the Barbuda Express. It seems to me that his

uncontroverted evidence runs counter to the position which Mr. Urlwin would wish the Court to adopt in relation to the extent of the work that Mr. Dries performed. Mr. Urlwin holds the view that Mr. Dries was to be paid only for captaining the Barbuda Express and any other work that he did for the company was not to be paid work. He seems to think that Mr. Dries is overcharging by claiming fees for work which did not form part of his captaining of the boat.

[39] The Court has attached significant weight to Mr. Smith's evidence. He told the Court that Mr. Dries worked very hard and performed several important tasks, both as a director of the company and as a captain of the Barbuda Express. I was equally impressed with his evidence, which was not challenged as to long hours during which Mr. Dries worked, assisting in technical work on the boat and attending to the engine. Mr. Dries also worked as sales person and did the bookkeeping for the company. There is abundance of evidence on which the Court could properly conclude that Mr. Dries worked very hard for the company, both in an administrative capacity as well as the captain of the boat.

[40] The Court is also of the considered opinion that Mr. Dries spoke truthfully and honestly when he said that he gave the company's papers and accounts to the other two directors when he was forced to leave due to ill health. When he left the company, he was aware that there was no money in the director's account.

[41] I find as a fact that the files that relate to the payment of Mr. Dries and the other directors were available to the company on its computer and therefore it could have been accessible. There is not a scintilla of evidence before me on which I can properly conclude that the director's account was to be a bonus account. I do not believe that was ever discussed. It is noteworthy that at latest in 2005, Mr. Urlwin realised that Mr. Dries was claiming the sum of US $22,700.00 as outstanding monies, yet he never saw it fit to tell Mr. Dries that the company was not indebted to him until the filing of the defence late in 2006.

[42] There is no dispute that the company was just starting to do business and the cash flow was minimal. The company's revenue was derived from the operation of the Barbuda

Express; this is distinct from the Court's acceptance that the agreement was drafted so that the remuneration of the directors was directly tied to the operation of the Barbuda Express. The Court has no doubt that the parties were mindful of all of those facts when they entered into the agreement which term is now subject to the Court's interpretation. Those were the factual matrix against which the agreement was made.

[43] The Court now addresses the number of days for which Mr. Dries claims. On the balance of probabilities, the Court accepts Mr. Dries' evidence in preference to Mr. Urlwin in relation to the number of days on which he (Mr. Dries) worked. He worked for a period of 227 days. Mr. Dries was also responsible for overseeing the financial accounts and shared that information with his other business colleagues. I believe him when he said that he produced the financial reports to the other two directors/shareholders of the company. While there is no dispute that Mr. Dries paid himself US $100.00 per day, he says that was based on the agreement, half was to be paid up front and the other half be put into a director's account. The Court does not accept that Mr. Urlwin was not aware that Mr. Dries had placed the outstanding sum, that he claims, as a liability to the company and stored this information in the "Excel Files" report on the company's computer.

[44] The Court has no reason to disbelieve him when he said that while he was still employed as a director, Mr. Urlwin was aware that he was paying himself US $100.00 per day. On this aspect of the case, Mr. Urlwin's evidence was neither credible nor reliable. He prevaricated quite a bit. The Court does not for one moment believe Mr. Urlwin when he sought to persuade the Court that the other US $100.00 to be a bonus. The Court's query is if they had so intended, why was it not stated that in the agreement. It is passing strange that Mr. Urlwin would seek to have the Court believe that he signed the agreement but was unaware that the matter of the bonus was inadvertently omitted. The Court does not accept Mr. Urlwin's evidence when he said that in September when they signed the agreement, the directors had agreed that the US $100.00 was to be a bonus. To the contrary, the Court is of the view that Mr. Dries was claiming the second US $100.00 and Mr. Urlwin was aware of that, yet he never told Mr. Dries that it was a bonus until the time of the filing of the defence, approximately one year later.

[45] The Court is equally satisfied that all material times, Mr. Urlwin was well aware that Mr. Dries was paying himself US $100.00 per day for every day that he worked and that he (Mr. Urlwin) never objected to the payment. (This was so even though Mr. Dries was communicating regularly with the company after he had left). By way of emphasis, it is clear to the Court that Mr. Urlwin knew that Mr. Dries had paid himself US $22,700.00 and that he never objected to that payment.

[46] There is no doubt in the Court's view that Mr. Urlwin played a very important role in the company. Mr. Urlwin admitted that during the operation of the company, he had occasion to leave the country and that he left Mr. Van Beek and Mr. Dries in charge of the company. He says it is possible that at some times, Mr. Dries may have been left in charge of the company.

[47] It is evident that it was only when Mr. Dries left the company, on account of ill health, that he sought to recover the outstanding money which he alleges is owed to him. After several letters of demand made by him of the company for the money, and not having received any favourable response, he was forced to resort to legal action.

[48] In order to determine whether Mr. Dries is entitled to receive the US $22,700.00 or EC $61,671.36 which he says is owed to him, the Court has to determine the meaning of the clause in the agreement.

[49] In interpreting the contract the Court has to ascertain the intention of the parties. As a general rule the Court is limited in the search for the intention to the consideration of the document itself. In **Lovell & Christmas Ltd v Wall (1911) 104 LT 85** Cozens-Hardy MR said:

> "If there is one principle more clearly established than another in English law it is surely this: It is for the Court to construe a written document. It is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood".

The rule may be regarded as a branch of, or closely related to, the parol evidence rule. The reason for not allowing recourse to the negotiations to establish intention was explained in **Prenn v Simmonds [1971] 3All ER 237**. Lord Wilberforce said that 'such evidence is unhelpful' because only when the contract is finally made is there a consensus, and until that time the parties' respective intentions may change, or be refined. There can be no guarantee, therefore, that an intention appearing during negotiations has remained constant until the time of contracting. In those circumstances, it is thought safer to rely on the words of the document alone. However, the law has moved on.

[50] I find the principles referred to by Dr. Dorsett very helpful and applicable. Lord Bingham's statement in **Bank of Credit and Commerce International S.A v Ali** ibid is adopted. Of great significance to the case at bar are the very succinct principles enunciated by Lord Hoffman in **Investors Compensation Scheme Ltd. v West Bromwich Building Society** referred to previously and affirmed in **Bank of Credit and Commerce International S.A v Ali** ibid. The Court can do no more than apply those principles. **Investors Compensation Scheme Ltd. v West Bromwich Building Society** ibid is particularly instructive.

[51] The Court's task, as stated earlier, is to determine the parties' intention by the clause. ***"The daily operator's rate for directors will be US $200.00 per day. Half to be paid in cash and half to be retained in the directors account".*** I have read the contract as a whole and the words must be interpreted in a way that a reasonable person would. Based on the factual matrix and applying the legal principles referred to above, I have absolutely no doubt that the parties intended for the directors to be paid US $200.00 per day. This was to be for the performance of services to the company and not limited to their functions as the captain of the Barbuda Express; but included those functions.

[52] In so concluding, I was mindful of the fact that I am required to make an objective assessment of the materials identified. In passing, I state that the words used in the contract are not complex and they are to be given their natural, ordinary meanings as understood by a reasonable man. In so doing, the Court has a duty to ensure that the

interpretation does not flout business commonsense. See Lord Diplock in **Anataios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 at 201** ibid.

[53] I also find the pronouncements of Lord Hoffman in **Transfield Shipping Inc v Mercator Shipping Inc**, referred to earlier, very helpful. There is no basis on which the Court can properly read into the agreement the terms that learned Counsel Dr. Dorsett urged should be treated as implied terms. The meaning that the Court has stated is clearly that intended by the parties, having applied the principles that have been stated in **Bank of Credit and Commerce International S.A v Ali** ibid **Investors Compensation Scheme Ltd. v West Bromwich Building Society** ibid.

[54] It is important to emphasize that the question of the interpretation of a contract is a question of law. In relation to the "Half to be paid in cash and half to be retained in the directors account", it is impatient of any other interpretation that the parties intended that the directors were to be paid US $100.00 daily and that the second US $100.00 was to be placed into a director's account.

[55] I am of the respectful view that the parties agreed that the second US $100.00 was to be placed in a director's account in an effort to assist the cash flow of the company. If the company was required to pay the entire US $200.00 per day, it would no doubt have impacted negatively on the financial status of the company, since it was a new company which did not have a tremendous amount of liquid assets. The Court is not of the view that the money was to be payable only if the company was profitable. In contradistinction, this money became due when Mr. Dries worked but the payment was deferred to a later date.

[56] **Moneys outstanding**

On this aspect of the claim, I have reviewed the evidence adduced by both sides, on a balance of probability I am more persuaded by Mr. Dries' evidence when he said that he worked for the company for 83 days in 2004 and 144 days in 2005 for a total period of 227 days. This is consistent with the documentary evidence and with the Court's findings that

the parties intended by the agreement for him to be paid for the work he did for the company, as stated earlier, which is not restricted to captaining the Barbuda Express.

[57] In my respectful view, in so far as he has collected the 50% of his salary which amounts to US $22,700.00, there is no ground which the company can properly refuse to pay him the outstanding balance of US $22,700.00. Accordingly, I am of the respectful view that the company is indebted to Mr. Dries in the sum of US $22,700.00.

[58] **Counterclaim**

I now come to address the counterclaim for the account and for an order for moneys. I am not of the respectful view that Mr. Dries improperly utilised the company's funds; neither did he inappropriately utilise any funds that belonged to the company. There is no credible or reliable evidence before the Court on which it can be concluded that Mr. Dries came into possession of funds that properly belong to the company. I am fortified in my view based on the clear evidence that the defendant did not make any allegation against Mr. Dries, in relation to the salaries the latter had paid himself for the 227 days, until after Mr. Dries had filed the claim for the outstanding sum. As stated previously, at all relevant times, Mr. Urlwin was fully aware of the fact that Mr. Dries had paid himself US $22,700.00. This was in accordance with their shared intention that he be paid for the professional services that he rendered to the company as well as the days on which he captained the Barbuda Express and assisted in maintaining and servicing it.

[59] Finally, there is no credible evidence which the Court can conclude that Mr. Dries breached any of the duties that he owed to the company. I do not for one minute believe that the company had any cause for concern in relation to the efficiency with which Mr. Dries executed his functions. He acted in the company's best interest in performing several tasks for which he was entitled to be paid in accordance with the agreement. Accordingly, the company cannot properly sustain the counterclaim against Mr. Dries for the account of the sum of US $4,800.00.

[60] **Conclusion**

For the foregoing reasons, it is hereby ordered as follows:

(a) There will be judgment for Mr. Henricus Dries on his claim in the sum of US $22,700.00 against the Barbuda Express Limited. Interests are awarded at the rate of 5% from the date of the filing of the claim together with prescribed costs.

(b) Barbuda Express Limited's counterclaim against Mr. Henricus Dries is dismissed.

[61] The Court gratefully acknowledges the assistance of both learned Counsel.

Louise Esther Blenman
High Court Judge