EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2014/0008

BETWEEN:

GRENADA TECHNICAL AND ALLIED WORKERS UNION

Appellant

and

ST. GEORGE'S UNIVERSITY LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Douglas L. Mendes, SC. for the Appellant
Mr. Anthony Astaphan, SC. for the Respondent

2015: October 30;
2017: February 13.

Civil appeal – Construction of article in memorandum of agreement – Interpretation and application of Article 11 – "All shift workers shall receive a Night Differential Allowance" – Whether Night Differential Allowance should be paid to all shift workers or only to maintenance workers – Arbitration tribunal determined Article 11 applied to all workers employed by respondent who were required to work night shift – Learned judge held that Article 11 applied to maintenance personnel and not to all shift workers

This appeal stems from a dispute between the Grenada Technical and Allied Workers Union ("the Union") and St. George's University Limited ("the University") over the interpretation and application of Article 11 ("the Article") of a memorandum of agreement between the parties for the period 2004-2009.

Article 11 provides that all shift workers shall receive a Night Differential Allowance ("NDA") and outlines the amount to be received. In 1998, the University submitted to the Union a proposal for the introduction of a shift system as a consequence of the increased number

of students on the campus. The Union agreed to the shift system and to the class of workers to whom that system would apply. In 2003, workers complained to the Union that the NDA was not being properly applied, in particular that only maintenance employees were being paid. The University expressed that the allowance was specifically introduced in the memorandum of agreement in order to bring maintenance workers on the shift system.

During discussions for the final collective agreement, the University attempted to replace "All shift workers" with the words "All maintenance workers." However, the Union insisted on retaining the original wordage of "All shift workers". The University agreed to revert to the original wordage, but expressly stated that it would continue to pay the NDA as it has done under the prior union agreement to maintenance workers only. The Union took issue with the way in which the Article was being applied.

The parties submitted themselves to arbitration and the arbitration tribunal identified the main issue for determination to be 'whether a Night Differential Allowance should be paid to all shift workers or only to maintenance workers'. By a majority decision the tribunal determined that Article 11 applied to all workers employed by the respondent who were required to work a shift between 4 p.m. and 8 a.m. The University successfully appealed the decision of the arbitration tribunal to the High Court, where the learned trial judge held that Article 11 applied to maintenance personnel and not to all shift workers.

The Union has appealed the decision of the High Court and posits that the issue on this appeal is whether Article 11 applies to maintenance workers only, as the judge found, or to all shift workers as the arbitration tribunal found.

Held: dismissing the appeal and awarding costs of two thirds of the costs in the court below to the respondent, that:

1. When interpreting a commercial contract, the Court is concerned to identify the intention of the parties. In ascertaining intention, the Court has to consider "what a reasonable person having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean." The Court therefore focuses on the meaning of the relevant words in their documentary, factual and commercial context. While a commercially sensible construction of the words is generally favoured, the natural and ordinary meaning of the words used cannot be ignored and a court should be very slow to reject the natural meaning of a provision. But, where it is obvious from the "background" or context that the parties have used the wrong words or incorrect language, the law will look further so as to not attribute to the parties an intention which they plainly did not have. In the case at bar, Article 11 when read on its own appears to be ambiguous giving rise to varying interpretations. It is unclear whether the words "all shift workers" meant every shift worker employed or was limited to shift workers from the maintenance department. The Court is therefore justified in considering the circumstances and context surrounding the implementation of the Article.

Investors Compensation Scheme Ltd. v West Bromwich Building Society [1997] UKHL 28 applied; **Arnold v Britton** [2015] UKSC 36 applied; **Chartbrook Ltd v Persimmon Homes Ltd** [2009] UKHL 38 applied; **Yang Hsueh Chi Serena et al v Equity Trustee Limited et al** BVIHCMAP2013/0012 (delivered 29th September 2014, unreported) followed; **Antaios Compania Naviera S.A. v Salen Rederierna A.B** [1985] A.C. 191, 201 applied.

2. The law excludes from the admissible background, previous negotiations of the parties and their declarations of subjective intent. This exclusionary rule ought not to be infringed when identifying intention. Consequently, this Court is entitled to consider the previous negotiations between the parties before the signing of the 2001-2003 agreement and the fact that the parties knew the reason for the introduction of the shift system. The Court is also entitled to consider the fact that the category of workers to whom the NDA was to be paid was known to both parties. More fundamentally, the Court must consider the specific hours of work identified by Article 11 and the fact that only workers from the Maintenance Department were rostered for the specific night shifts identified in Article 11. The foregoing are objective facts, which were known to both parties and are therefore admissible within the parameters provided by the law. Based on the surrounding circumstances, the learned judge was correct in her findings.

Oceanbulk Shipping & Trading SA v TMT Asia Limited and others [2010] UKSC 44 applied**; Investors Compensation Scheme Ltd. v West Bromwich Building Society** [1997] UKHL 28 applied; **Arnold v Britton** [2015] UKSC 36 applied.

JUDGMENT

[1] **BAPTISTE JA**: This appeal arises from a dispute between the Grenada Technical and Allied Workers Union ("the Union") and St. George's University Limited ("the University") over the interpretation, use and application of Article 11 ("the Article") of a memorandum of agreement or collective agreement between the parties for the period 2004-2009. Article 11 provides as follows:

> "All shift workers shall receive a Night Differential Allowance as follows:-
>
> | | 2001 & 2002 | 2003 |
> |---|---|---|
> | 4.00 p.m. – 12.00 a.m. – | $3.00 | $3.25 |
> | 12.00 a.m. - 8.00 a.m. – | $3.25 | $3.50" |

[2] This Article was first incorporated in the collective agreement between the parties for the period 2001-2003. However, negotiations surrounding the Article ensued

well before the execution of that agreement. Sometime in 1998, the University submitted to the Union a proposal for the introduction of a shift system as a result of the increased number of students on the compound. The Union agreed to the shift system and to the class of workers to whom that system would apply. It is notable that although there were discussions on a shift premium, there was no agreement reached on the execution of that agreement. Negotiations continued thereafter with the result that the category of workers to whom the shift premium/Night Differential Allowance ("NDA) applied dwindled significantly. Sometime in 2003, workers complained to the Union that the NDA was not being properly applied, in that it was not being paid per hour but per shift and that only maintenance employees were being paid.[1] By letter dated 5th November 2003, the University noted that the NDA was paid per shift in error but confirmed that the NDA had not been paid to any other workers, except those of the maintenance department. The University stated that the reason for this was that the allowance "was specifically introduced in the Memorandum of Agreement for the purpose of bringing a few maintenance workers on a shift system." In that letter the University expressed that:

> "the idea and intention was to compensate workers who had an on-going and longstanding contract with the University, and the shift system was going to break that contract. The other workers in security, transport and library for example had been on a shift system from the beginning or for some considerable time before, and they were not affected."[2]

[3] It is important to note that during negotiations, different versions of Article 11 were proposed. In fact, at one point during negotiations for the final collective agreement, the University attempted to replace "All shift workers" with the words "All maintenance workers." However, by letter dated 21st November 2005, the Union insisted on retaining the original wordage of "All shift workers." By letter of the same date, the University agreed to revert to the original wordage but noted that 'the University would continue to pay the NDA as it has done under the prior union agreement to maintenance workers only and that a change in their policy

[1] Appellant's Supplemental Record of Appeal filed 10th April 2015, pp. 7-8.
[2] Respondent's Record of Appeal filed 17th February 2015, p. 143.

had never been negotiated. The University also expressed that the Union would not be acting in good faith to assume that the provision includes any worker but maintenance workers. Consequently, the University continued to pay the NDA only to workers from the maintenance department. The Union took issue with the way in which the Article was being applied.

[4] The parties submitted themselves to mediation before the Labour Commissioner, who then recommended that the matter be addressed in accordance with article 24(5) of the collective agreement for the period 2004-2009, that is to say by reference to arbitration. The dispute was then referred to arbitration. The Arbitration Tribunal, appointed in accordance with section 46(1)(c) of the **Labour Relations Act 1999**[3] identified the main issue for determination to be 'whether a Night Differential Allowance should be paid to all shift workers or only to maintenance workers'. By a majority decision the Tribunal determined that Article 11 applied to all workers employed by the respondent who were required to work a shift between 4 p.m. and 8 a.m. The tribunal found that:

> "Clear and cogent evidence have been presented to support the contention that, from 2001, the Union always intended the NDA to apply to "all shift workers" and not just maintenance workers... that all shift workers should receive Night Differential Allowance as referred to in the Memorandum of Agreement signed by the Parties on 23rd October 2002 and 23rd November 2005. That means that all workers who are rostered to work outside the hours of 8:00 am to 4:00 pm or 9:00 am to 5:00 pm without being paid overtime for the hours worked. Under Article 8 overtime work on Saturdays, Sundays and public holidays"[4]

[5] The respondent successfully appealed the decision of the Arbitration Tribunal to the High Court, where the judge held that Article 11 applied to maintenance personnel and not to all shift workers. At paragraph 56 the learned judge held that the workers to whom the NDA applies are maintenance personnel only and not to all shift workers.[5] The learned trial judge employed an all-inclusive approach and

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[3] Act No.15 of 1999.

[4] Award of the Arbitration Tribunal of 30th October 2008, appellant's supplemental record of appeal filed 10th April 2015, p. 93.

[5] Judgment of lower court, p. 17.

examined all the circumstances of the case including the history of the negotiations between the parties going back to 1997.

[6] At paragraph 28 she stated that:

> "This was not to my mind a strict case of purely interpreting the words of the Article as they appeared in the agreement, but called for an approach that took into account all the attendant factors in the operation of the agreement.

[7] She further stated:

> "The NDA was conceived to compensate maintenance workers only cannot be lightly set aside. When one looks at the history of the matter, the appellant maintained throughout the period of time not only in writing but in practice of only paying the NDA to maintenance workers, a fact that seemed to have been accepted by the Union which made no complaint about the payment to maintenance workers only until 2003, one year after the commencement of the Collective Agreement for the period 2001-2003."

[8] The learned judge noted that from "inception the NDA was intended to provide for maintenance personnel and no other class of worker." She highlighted that the NDA was conceived by the University to cover the needs of an expanding institution for almost continuous maintenance of the facilities in question. Maintenance workers had previously worked "regular hours" and with the expansion of the University and increased student population, maintenance of the facilities on a continuous 24-hour basis became necessary. Further, she had regard to the agreement which made reference to work hours which are exclusive to maintenance personnel and also to the fact that the University gave only maintenance workers that allowance.

[9] The appellant has appealed the decision of the High Court and posits that the issue on this appeal is whether Article 11 applies to maintenance workers only, as the judge found, or to all shift workers as the Arbitration Tribunal found. It is notable that in coming to her decision the learned judge made various findings of fact with which the appellant takes issue. The respondent notes however, that there is no appeal on the basis of the judge's factual findings. Be that as it may,

the respondent cites as an issue for the determination by this Court, the question of whether the judge erred in finding that there was no evidence to support or warrant the findings made by the majority of the Tribunal.

Appellant's Case and Submissions

[10] With that introduction, I move on to the appellant's case and submissions. The appellant's case is that the words used in Article 11 are unambiguous and permit of one meaning only, which is, that all shift workers are entitled to be paid the NDA. The use of the phrase "all shift workers" unambiguously excludes any limitation of the allowance to any particular category of worker. In the circumstances, the onus lies on the respondent to show that the parties made a clear mistake in their choice of words and that it is equally clear that Article 11 needs to be corrected to read "all maintenance shift workers" are entitled to the NDA. The appellant argues that to discharge the onus, the respondent will have to prove that the natural and ordinary meaning of the words "all shift workers" produces a result that is irrational or arbitrary, or is so "commercially nonsensical that the parties could not have intended it" and that it can be said with confidence that they did intend the NDA would be restricted to maintenance workers only.

[11] Mr. Mendes, SC for the appellant, contends that the learned judge erred both on the proper approach that should be taken to the construction of a document such as the one under consideration, and as to the findings and import of the facts on which she relied in coming to her conclusions. He argues that while a court is permitted to examine the factual matrix underpinning the words used by the parties to a collective agreement, the use to which such material may be put is limited and it does not appear that the learned judge fully appreciated the limitations placed on her. In particular he states that, the learned judge failed to put any importance on the actual words used in Article 11 and failed to appreciate that it was only if it was clear that the parties had used those words mistakenly, that she could read in words to give effect to what she thought their true intention might have been, and only if she was confident that indeed was their intention. He

submits that the learned judge erred in making liberal use of what passed between the parties during their negotiations, even though such negotiations are as a general rule inadmissible.

[12] Mr. Mendes, SC posits that the learned judge was wrong to suppose that the Terms of Reference charged her with the task of examining the history of the negotiations and how Article 11 was put into practice as an aid to the interpretation of the agreement. In this regard, the learned judge mistook the preamble to the Terms of Reference as the operative part of it. He points out that the Tribunal was mandated to determine whether the phrase "All Shift Workers shall receive a Night Differential Allowance" meant all workers rostered to work outside the normal working hours or only and exclusively shift workers in the maintenance department. That required an interpretation of Article 11 utilising the normal canons of construction. The preamble to the operative part of the Terms of Reference merely recorded the events which led to the reference to arbitration and in particular recorded that the parties were in dispute as to the use, meaning and application of Article 11. He asserts that the preamble statement was plainly not meant to guide the way in which the Tribunal, and later the High Court on appeal, would go about performing the task of construction.

[13] Mr. Mendes, SC complains that the learned judge misconstrued the facts constituting the surrounding circumstances which she felt entitled to examine. The learned judge inaccurately found that the NDA was conceived by the respondent and wrongly found that it was to apply only to maintenance workers. More fundamentally, the learned judge misled herself on focusing entirely on the 'surrounding circumstances' which predated the 1997-2000 agreement. In that regard, Mr. Mendes, SC contends that there was no agreement on a shift premium or NDA for that period. The NDA first appeared in the 2001-2003 agreement and accordingly it was the circumstances surrounding the settlement of Article 11 in that agreement alone which were relevant. But apart from referring to a letter which the appellant union wrote in May 2001, the learned judge made no

reference at all to anything passing between the parties in that round of negotiations. He argues that in particular the learned judge did not refer to the appellant union's letter dated 21st May 2001 in which it proposed a NDA for "all established shift workers (library staff, drivers and security) or to the amendment to that proposal contained in the appellant union's letter dated 5th July 2001, in which the appellant now proposes the NDA for "all shift workers", neither did the learned judge refer to the course of negotiations thereafter. Mr. Mendes, SC posits that from that sequence of events it is quite clear that the appellant union in this round of negotiations conceived of the NDA as applying initially to library staff, drivers and security guards, but then expanded it to all shift workers.

[14] Mr. Mendes, SC submits that the NDA was not to be restricted to maintenance workers; all shift workers were to be entitled. Further, he states that it was plainly wrong for the learned judge to find that "there must have been an understanding, given the history of the NDA, that it was to be paid to the maintenance workers only" or that "from its inception the NDA was intended to provide for maintenance personnel and no other class of workers" and that even the appellant union in its correspondence "recognised and acknowledged that this was the class of workers intended to benefit from this allowance". He submits that there was no such understanding, recognition or acknowledgement by the Union.

[15] Lastly, Mr. Mendes, SC argues that the learned judge also made too much of the fact that the union complained about the non-payment of the NDA to non-maintenance staff one year after the agreement was signed.

Respondent's Case and Submissions

[16] The respondent's primary case is grounded in the nature of the dispute referred to the Tribunal. The respondent says that the dispute went beyond the boundaries of the mere interpretation of a phrase. In that regard the respondent refers to clause 2 of the terms of reference of the Tribunal to show that the Tribunal had to consider fairly all matters concerning the dispute and present to the minister its

findings and recommendations. Mr. Astaphan, SC posits that the dispute raised issues of facts which could not properly be determined by the Tribunal or judge without consideration of all the facts and circumstances leading to the creation and use of the NDA as well as the shifts to which it applied. Included also would be the conduct of the parties and the facts communicated or which arose during their negotiations.

[17] Mr. Astaphan, SC further submits that on the assumption that the appeal turns on the construction of the phrase in Article 11, the court is not restricted to the language of the agreement or document. The court is required to consider the factual context of the phrase and agreement as a whole to determine whether the phrase is ambiguous or not. He asserts that save perhaps for evidence of subjective expressions or views, there is no conceptual limit to the context or background facts which the court ought to consider. He submits that once the context or background facts are ascertained and the phrase is construed in context, there ought to be no question that the reasonable man would have understood the phrase especially the words "all shift workers" in the phrase to mean that those maintenance workers rostered to work the specific night shifts will be paid the NDA.

[18] In summary, the respondent's case is that the appellant is bound by the findings of the judge. The issues raised were largely issues of fact. The Tribunal made findings which were appealed on the ground that they were wholly unsupported by the evidence. The learned judge was therefore correct in her judgment. Alternatively, the phrase in context means that the maintenance workers rostered to work the specific night shifts, which are part of the phrase in Article 11, will be paid the NDA. Mr. Astaphan, SC states that in seeking to determine the meaning of the phrase in context, the court is entitled to construe it within the context of the agreement as a whole and to have regard to the background facts. This will enable the court to determine the context and objective facts communicated or known to the parties and identify the workers who are the subject of the phrase.

The context also includes the pre-agreement correspondence and negotiations between the parties to determine the objective background facts which were communicated or known to the parties and to rely on these facts to determine what the reasonable man would understand the phrase to mean.

Relevant Principles of Construction of Commercial Contracts

[19] Having considered the submissions of the parties as well as the conclusion of the learned judge, it appears to me that the central thesis of this appeal concerns the interpretation and construction of Article 11. In that regard, the appropriate starting point is a consideration of the proper approach to the interpretation of this Article. Both parties have made extensive submissions on the issue, as it is an area which is not devoid of authorities. The proper approach of the courts to the question of contractual construction was enunciated by Lord Hoffmann in **Investors Compensation Scheme Ltd. v West Bromwich Building Society**[6] and has been restated and approved on a number of recent occasions. I would begin with the current authoritative pronouncement on the matter.

[20] The relevant principles relating to the construction of commercial contracts were summarised in the United Kingdom Supreme Court by Lord Neuberger in **Arnold v Britton**[7] at paragraphs 14 to 23. The general principle was set out at paragraph 15:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and

[6] [1997] UKHL 28.
[7] [2015] UKSC 36.

> (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para. 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30."

[21] In like vein, at paragraph 76 of **Arnold v Britton**, Lord Hodge accepted Lord Clarke's formulation of what is described as the 'unitary process of construction' in **Rainy Sky SA v Kookmin Bank**[8] and opined:

> "The exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has 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, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances.

[22] Having established the test to be employed when interpreting formal documents of this kind, the Court must then determine the type of evidence that ought to be taken into consideration as part of the admissible background. In **Arnold v Britton**, Lord Neuberger emphasised that:

> "When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties." [9]

[23] The case law clearly demonstrates that the admissible background includes anything known or reasonably available to the parties, which would have affected the way in which a reasonable man understood the language of the document. However, the law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. As Lord

[8] [2011] 1 WLR 2900.
[9] [2015] UKSC 36, at para 21.

Hoffmann puts it in paragraph 42 of his speech in **Chartbrook Ltd v Persimmon Homes Ltd**:[10]

> 'The [exclusionary] rule excludes evidence of what was said or done in the course of negotiating an agreement for the purpose of drawing inferences about what the contract meant."

[24] Further in **Chartbrook Ltd**, Lord Hoffman points out that the exclusionary rule does not exclude such evidence for all purposes. He states:

> "It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

[25] The distinction between relevant admissible background and other statements made in the course of negotiations was stated by Lord Hoffmann in paragraph 38 of **Chartbrook**:

> "Whereas the surrounding circumstances are, by definition, objective facts, which will usually be uncontroversial, statements in the course of pre-contractual negotiations will be drenched in subjectivity and may, if oral, be very much in dispute."

[26] Despite the attempts to make clear what constitutes the admissible background, identifying the relevant factual matrix may sometimes be a difficult task for the Court. Lord Hoffman himself recognised the difficulty which Courts may sometimes face in so doing. At paragraph 39 of **Oceanbulk Shipping & Trading SA *v* TMT Asia Limited and others**[11] Lord Clarke stated:

> "Trial judges frequently have to distinguish between material which forms part of the pre-contractual negotiations which is part of the factual matrix and therefore admissible as an aid to interpretation and material which forms part of the pre-contractual negotiations but which is not part of the factual matrix and is not therefore admissible. This is often a straightforward task but sometimes it is not."

[27] Albeit of critical importance, the factual matrix is not the sole factor that the Court considers when interpreting commercial contracts. The Court also considers the

[10] [2009] UKHL 38.
[11] [2010] UKSC 44.

commercial construction of the words used. It follows therefore that the Court generally favours a commercially sensible construction and will at all times seek to give business efficacy to the provisions of a commercial contract. Lord Diplock in a speech concurred by his fellow law Lords in **Antaios Compania Naviera S.A. v Salen Rederierna A.B**[12] expressed this view when his Lordship stated:

> "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."

[28] Further, Farara JA giving the decision of this Court in **Yang Hsueh Chi Serena et al v Equity Trustee Limited et al**[13] stated:

> "It must be emphasised that, in adopting this approach to construction, the court is not seeking simpliciter to find the dictionary or grammatical meaning of the words used in the relevant provision. The court is seeking to determine, as a matter of common sense, the intention of the parties from the meaning of the relevant words, as understood by the reasonable man having knowledge of the relevant background. This approach fundamentally involves a consideration of the words to be construed against the background of the entire document (or series of documents) relating to the particular transaction."[14]

[29] However, commercial common sense and surrounding circumstances do not represent a licence to deviate from what is expressed in the contract so as to essentially rewrite the parties' contract.[15] Effect must be given to the words used by the parties. The principles relating to the natural and ordinary meaning of words are well-known and need not be repeated. In addressing this point it is pertinent that I refer to the very useful comment of Lord Neuberger in **Arnold v Britton**. His Lordship emphasises the following important factors:

> "First the reliance placed in some cases on commercial common sense and surrounding circumstances (eg. in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that

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[12] [1985] A.C. 191, 201.
[13] BVIHCMAP2013/0012(delivered 29th September 2014, unreported).
[14] At para. 67.
[15] Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732 (22nd November 2006).

meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.

Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."[16]

[16] [2015] UKSC 36, at paras. 16-20.

[30] In light of the above pronouncements, it is clear that the natural and ordinary meaning of the words cannot be ignored when ascertaining the intention of the parties. However, where it is obvious from the "background" or context that the parties have used the wrong words or incorrect language, the law will not attribute to the parties an intention which they plainly did not have. In the present case, the appellant contends that the words used are unambiguously clear and that there is no basis for the court rewriting the parties' contract. The appellant states that effect must be given to the words as they appear and unless the context shows that the ordinary meaning cannot be given or that there is an ambiguity, the ordinary meaning of the words which have been used in the document must prevail.[17] However, I am not of the view that one can so easily dispose of the issue raised in this case by simply ascribing the natural and ordinary meaning of the words used in Article 11 to them. Article 11 when read on its own appears to be ambiguous. It is unclear whether the words "all shift workers" meant every shift worker notwithstanding the fact that not all shift workers worked the hours set out in the Article. Thus, the Court has to consider more than just the natural and ordinary meaning of the words. The Court is therefore justified in considering the circumstances and context surrounding the implementation of the Article.

[31] The appellant has also complained that the learned judge failed to appreciate the limits placed upon her by impermissibly considering by way of background facts the things she considered. The learned judge, to my mind, considered objective facts known to the parties at the time and this was perfectly within the parameters provided by law.

[32] I propose briefly to set out the relevant factual matrix without infringing on the exclusionary rule. The record shows and it is undisputed that in 1997 a shift system was introduced by the respondent for some workers because of the increase in the number of students on the compound and the resulting increase in

[17] Melanesian Mission Trust Board v Australian Mutual Provident Society (New Zealand) [1996] UKPC 53.

demand for services on a 24 hour basis. The change of working hours from day to night triggered the implementation and payment of the NDA. Initially, the new shift system was to apply to workers who could be characterised as maintenance workers, as well as those who could not be so characterised. However, over time the category of workers dwindled with the result that maintenance workers and computer technicians remained.

[33] Albeit discussions commenced in 1997, the NDA first appeared in the 2001-2003 agreement. I do not think that the background facts before the signing of the 2001-2003 agreement can be ignored since all negotiations leading up to the execution of the agreement are relevant. It is safe to say that both parties knew of the shift system to be introduced and the reason for the introduction of the shift system. It is also safe to say that despite the fact that no agreement was reached at the time of signing of the agreement in 1997, the category of workers to whom the NDA was to be paid was known to both parties. In fact, the record shows that the closing round of negotiations prior to the execution of the agreement was centred on maintenance workers.

[34] Of great significance is the specific hours of work identified by Article 11. I agree with the respondent that this delimits the meaning and application of the phrase and that the Article certainly ought not to be construed or applied without reference to these shifts. Maintenance workers had previously worked "normal hours" in the day and were rostered to work between 8:00 am to 3:30/4:00 pm and 9:00 a.m. to 5:00 p.m. I note that it was only workers from the maintenance department who worked the shifts identified in Article 11.[18] No other category of workers was rostered for those specific night shifts. From this, it seems that the University always intended for the NDA to apply only to those maintenance workers affected. Therefore, only those affected were to be compensated in light of the previous negotiations, the purpose of the shift system and the NDA.

[18] Condensed report of schedules used in departments under grievance relating to Night Differential Payment pp. 66- 67. Appellant's supplemental record of Appeal.

[35] Additionally, the appellant complains that the learned judge mistook the preamble to the Terms of Reference as the operative part of it. The learned judge at paragraph 10 simply restated what the preamble says and what the Tribunal was mandated to consider. In part the preamble states:

> "Whereas, the said dispute touches and concerns the use, meaning and application of the phrase… All Shift workers shall receive a Night Differential Allowance as follows:

The Tribunal was mandated to consider whether:

> "A All workers who are roistered to work outside the hours of 8:00 a.m. to 4:00 p.m. or 9:00 a.m. to 5:00 p.m.…" or
>
> B. Only and exclusively shift workers in the Maintenance Department of the University."[19]

[36] The fact that the learned judge made mention of the preamble in her judgment and considered the use, meaning and application of the Article, is to my mind inconsequential as the preamble and the operative clause are in essence much of the same. In my view, this submission does not assist the appellant in establishing any error on the part of the learned judge. In considering what the tribunal was mandated to do, the learned judge would have invariably considered the use, meaning and application of the Article.

[37] For completeness, I would just address one further matter. The appellant contends that there is nothing commercially nonsensical about the interpretation advanced on behalf of the union. To my mind, the interpretations given to Article 11 by both parties lead to definitions which are indeed commercially sensible. I see nothing nonsensical about the University paying all shift workers an NDA. On the other hand, it also makes commercial sense for the University to pay only one category of workers whose hours of work has now been affected. Although this is a factor

[19] That was the operative clause of the terms of reference.

to be considered, it does not affect the outcome of this appeal and I do not consider it germane in that regard.

[38] In my judgment, the appellant seeks to restrict substantially the ambit and scope of the matters which the learned judge was entitled to consider. I am of the view that the appellant, in its interpretation of Article 11 seeks to attach too much importance and significance to the natural and ordinary meaning of the words used and too little weight to the context in which those words were used. Much emphasis is placed on the literal meaning of the words "All staff". The appellant has failed to consider the relevant admissible background inclusive of the parties' respective negotiating positions. I think it is clear that a reasonable person, reading Article 11 in light of the background known to the parties and the factors laid out in **Investors Compensation Scheme** as well as **Arnold v Britton** would have taken it to have been intending that only maintenance workers would have received the NDA.

Conclusion

[39] For the reasons stated above I agree with the conclusion reached by the court below that the workers to whom the NDA applies are maintenance personnel and not all shift workers. Accordingly, I would dismiss the appeal and award costs to the respondent of two thirds of the costs in the court below.

[40] I am grateful to senior counsel on both sides for their helpful submissions.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar