EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2014/0026

BETWEEN:

DICKON MITCHELL

Appellant

and

RITA JOSEPH OLIVETTI

Respondent

Before:

The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Mario F. Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Fyard Hosein, SC with him, Mr. Alban John and Ms. Alicia Lawrence for the Appellant.
Mr. John Carrington, QC with him, Ms. Celine Edwards for the Respondent.

2018: October 16;
2019: May 24.

Civil appeal – Partnership – Dissolution of partnership by death of partner – Remaining partner carrying on business – Partnership Act 1980 UK Legislation – Agreement for sale of firm – Whether the firm was operated as sole proprietorship by the surviving partner after death of partner – Implied term – Interpretation of Agreement for sale –Whether 'Share' should be given a plain ordinary meaning or alternatively a purposive interpretation –Whether learned judge erred in holding that the there was a duty to account for the Firm's bank accounts

The respondent, Mrs. Rita Joseph-Olivetti and Mrs. Linda Grant (deceased) were original partners of the firm Grant, Joseph & Co ("the Firm"). In April 2002, the respondent took up an appointment as a judge of the High Court of the Eastern Caribbean Supreme Court. She ceased active practice in the Firm but continued to be a partner, retaining her 35% share and receiving drawings. On 27th April 2005, Mrs. Grant passed away and the

respondent became the sole surviving partner in the Firm. The Firm continued to operate until 28th February 2006 when the appellant entered into an agreement with the respondent to purchase her 35% share of the Firm ("the Agreement"). At about the same time he purchased the 65% share of the Firm owned by Mrs Grant's estate. At the time of the sale of the respondent's share to the appellant the financial statements of the Firm were being prepared but were not completed and available. Notwithstanding, the respondent and the executors of Mrs. Grant's estate went ahead and completed the agreements for the sale of their respective shares to the appellant. Thereafter, the appellant took over the running of the Firm as the sole owner and partner.

In July 2006, the respondent received the Firm's financial statements for the period starting with the passing of Mrs. Grant on 27th April 2005 to the sale to the appellant on 28th February 2006 ("the Relevant Period"). This caused the respondent to raise questions with the appellant about the financial management of the Firm and the operation of the Firm's bank accounts during the Relevant Period. The respondent contended that she sold only her net share value of the Firm as at the 27th April 2005 when Mrs. Grant died and the partnership dissolved, and the sale to the appellant did not include the undistributed profits earned by the Firm during the Relevant Period. These profits were not partnership assets and belonged to her. Therefore, they were not included in the assets that were sold to the appellant under the Agreement. In order to determine what was her remaining interest in the Firm she needed an account from the appellant of his management of the Firm and his operation of the Firm's bank accounts during the Relevant Period. The appellant contended that he had purchased the respondent's entire interest in the Firm as at the 28th February 2006 and he was not under a duty to account to her.

In March 2011, the respondent filed a claim in the High Court against the appellant claiming an account and payment of any amount found due to the respondent on taking the account, plus interest and costs. The judge allowed the claim, finding among other things that the appellant was under a duty to account to the respondent for the Firm's bank accounts during the Relevant Period and that what was transferred to the appellant was the respondent's net surplus in the Firm as at 27th April 2005. The appellant was not satisfied with the judge's decision and appealed to this Court.

Held: allowing the appeal; setting aside the judge's orders; and awarding costs of the appeal and in the court below to the appellant, such costs to be assessed as prescribed costs on a claim for $50,000.00 in the lower court and two-thirds of the amount assessed for the costs of the appeal, that:

1. A partnership does not end for all purposes following dissolution by the death of one of the partners. In appropriate circumstances a dissolved partnership can continue for a limited time after dissolution for the purpose of winding up the business of the partnership by realising its assets and distributing the net proceeds between the remaining partners and the estate of the deceased partner. There is no evidence that the respondent made any attempt to purchase Mrs. Grant's share of the partnership from the executors of her estate so as to become the sole proprietor. During the Relevant Period the respondent was the sole surviving

partner, but the Firm was not run as a sole proprietorship in the true sense because the evidence disclosed that it was owned by two persons and was being run with a view to being sold.
Jessie Duncan and another Pursuers v MVF Marigold PD145 and others [2007] SCLR 155 applied; Section 38 of the 1890 Partnership Act United Kingdom 1980 c39 43 and 54 Vict. followed.

2. As a result of continuation of the Firm as a partnership and not a sole proprietorship during the Relevant Period, the profits of the Firm (if any) did not belong exclusively to the respondent. The respondent was only entitled to a proportionate share of the profits. Therefore, the respondent did not have a lien on the surplus assets of the Firm.

3. The language of the Agreement in issue is plain and unambiguous and the Court must apply it, the Court does not have power to improve upon the instrument that it is called upon to construe. It cannot introduce terms to make it fairer or more reasonable. The Court's concern is to decipher what the instrument means. The Agreement identified what was agreed and intended by the parties, not what they should have agreed. There is no reason to depart from the plain meaning of the document. The respondent may not have intended to include the cash in the bank **Firm's bank** accounts or the undrawn profits, but that was not stated. The respondent should have made provision in the Agreement for retaining a portion of the assets, or shifting its effective date to 27th April 2005, if that was her intention.
Rainy Sky SA v Kookmin Bank [2011] UKSC 50 applied; Al Sanea v Saad Investments Co Ltd. [2012] EWCA Civ 313 applied; Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] 1 WLR 1988 applied; Arnold v Britton and others [2015] AC 1619 applied.

4. The appellant purchased the respondent's 35% share of the Firm that included all assets that the respondent owned in the Firm. The Agreement reflects this and properly construed was effective in transferring the r**espondent's** share to the appellant. As of the 1st March 2006 she no longer had an interest in the Firm. Therefore, there was nothing for which the appellant had to account. The judge should not have ventured into the background in the way that she did and place undue weight on matters that had little if any bearing on the proper interpretation of the Agreement.

JUDGMENT

[1] WEBSTER JA [AG.]: This is an appeal against the decision of the learned trial judge **("the judge")** ordering the appellant to account for his activities as an employee of the respondent including the operation of the bank accounts of the

respondent's former law practice in Grenada known as Grant, Joseph & Co ("the Firm").

Background

[2] The original partners of the Firm were the late Mrs. Linda Grant and the respondent. Mrs. Grant held 65% of the shares and the respondent 35%. In April 2002, the respondent took up an appointment as a judge of the High Court of the Eastern Caribbean Supreme Court. She ceased active practice in the Firm but continued to be a partner, retaining her 35% share and receiving drawings. Following the respondent's departure, the Firm was run by Mrs. Grant. She did not take any steps to purchase the respondent's 35% share of the Firm. She employed the appellant and Ms. Karen Samuel as associate attorneys. Ms. Valerie Parris was a long-standing and trusted employee of the Firm. She carried out the Firm's day-to-day operations.

[3] On 27th April 2005, Mrs. Grant passed away and the respondent became the sole surviving partner in the Firm. Ms. Parris and Mr. Hugh Dulland were appointed executors of Mrs. Grant's estate ("the Executors"). The two associate attorneys and Ms. Parris were by then the signatories to the Firm's bank accounts. All cheques were prepared and signed by Ms. Parris and counter-signed by one of the two attorneys. There is no evidence that the two attorneys participated in the day-to-day operations of the Firm other than signing cheques that were presented to them by Ms. Parris.

[4] The Firm continued to operate until 28th February 2006 when the appellant entered into an agreement with the respondent to purchase her 35% share of the Firm ("the Agreement"). At about the same time he purchased the 65% share of the Firm owned by Mrs Grant's estate. At the time of the sale of the respondent's share to the appellant the financial statements of the Firm were being prepared by a Ms. Helen Delves, but they were not completed and available prior to the completion of the sales to the appellant. Notwithstanding, the respondent and the

Executors went ahead and completed the agreements for the sale of their respective shares to the appellant. Thereafter, the appellant took over the running of the Firm as the sole owner and partner.

[5] All seemed to be going well until about July 2006 when the respondent received the financial statements for the Firm for the period starting with the passing of Mrs Grant on 27th April 2005 to the sale to the appellant on 28th February 2006. This period is referred to in the judge's judgment and this judgment as "the Relevant Period". This caused the respondent to raise questions with the appellant about the financial management of the Firm and the operation of the Firm's bank accounts during the Relevant Period. It transpired that the respondent's position was that she sold only her net share value of the Firm as at the 27th April 2005 when Mrs. Grant died and the partnership dissolved, and the sale to the appellant did not include the undistributed profits earned by the Firm during the Relevant Period. These profits were not partnership assets and belonged to her. Therefore, they were not included in the assets that were sold to the appellant under the Agreement. In order to determine what is her remaining interest in the Firm she needed an account from the appellant of his management of the Firm and his operation of the Firm's bank accounts.

[6] The appellant did not comply with the respondent's request for an account for the reason stated in his undated letter in response to the respondent's letter of 18th March 2007, and elsewhere. He said that he had purchased the entire assets of the Firm, including monies in the Firm's bank accounts, as of 28th February 2006 and therefore he did not have to account to the respondent for the financial affairs of the Firm during the Relevant Period. Both parties held firmly to their respective positions in subsequent negotiations.

[7] In March 2011, the respondent filed a claim in the High Court against the appellant claiming an account and payment of any amount found due to the respondent on taking the account, plus interest and costs. The claim was heard by the judge in

February and April 2014 and on 30th June 2014 she delivered a written judgment in which she allowed the claim and ordered the appellant:

(i) to provide an account of his activities as an employee of the respondent and of the operation of the **Firm's** bank accounts during the Relevant Period within 28 days from the date of the order;

(ii) to pay to the respondent any sums due to her on the taking of such account together with interest thereon in equity from 28th February 2006 until judgment at the commercial lending rate at RBTT Bank Grenada during the relevant period; and

(iii) to pay the respondent**'s prescribed costs** of the action with a value of the claim of EC$50,000.00 as was ordered by Ellis J on 11th June 2012.

[8] In coming to her decision, the judge made the following important findings of fact and law:

(i) The 1890 Partnership Act of the United Kingdom applies in the Grenada (paragraph 11 of the judgment).

(ii) The partnership comprising the Firm dissolved on 27th April 2005 on the death of Mrs. Grant and the respondent carried on the business of the Firm as a sole proprietor (paragraphs 24 and 28 of the judgment).

(iii) The appellant managed the Firm from August 2005 to 28th February 2006 (paragraph 44 of the judgment).

(iv) The Agreement should be interpreted purposively (paragraph 66) and the partnership asset that was transferred to the appellant

under the Agreement was the respondent's net surplus in the Firm as at 27th April 2005 (paragraph 72).

(v) The appellant was under a duty to account to the respondent for the Firm's bank accounts during the Relevant Period.

[9] The appellant was not satisfied with the judge's decision and appealed to this Court. The notice of appeal contains seven grounds of appeal, some of which are divided into sub-grounds. The issues that arise for consideration and determination by this Court are approximate to the main findings made by the judge that are set out in the preceding paragraph. I will treat these findings as the main issues in the appeal.

[10] The respondent's claim for an account, standing on its own, appears to be fairly uncomplicated, especially since it did not allege any wrongdoing on the part of the appellant. However, it is complicated by the way that the Firm was operated after the death of Mrs. Grant and the subsequent sale of the respondent's 35% share to the appellant. These events make it necessary to consider the principles relating to the consequences of the dissolution of a partnership by the death of one partner, and the interpretation of written contracts, before deciding whether the judge was correct to order the account.

Dissolution of the Firm and the consequences

[11] Grant, Joseph & Co was an informal partnership. There was no written partnership agreement. As often happens in the States and Territories of the Eastern Caribbean two lawyers came together and operated a law practice in the form of a partnership. The legal principles governing such partnerships have their foundation in the common law and the 1890 Partnership Act[1] of the United Kingdom ("the Act"). The judge found that the Act applies in Grenada via the reception provision in section 11 of the West Indies Associated States Supreme

[1] 1890 c39 43 and 54 Vict.

Court (Grenada) Act ("Supreme Court Act").[2] Counsel for both parties accepted that the Act applies in Grenada but relied instead on the reception provision in section 84 of the Supreme Court Act which imported into Grenada the law and practice in England relating to solicitors and the taxation and recovery of their costs. The route by which the Act was imported into Grenada is not important for the purposes of this appeal. What is important is that it is common ground that the Act applies in Grenada.

[12] The issue of the of the dissolution of the Firm arose in two contexts during the trial. The appellant contended that the Firm dissolved in 2002 when the respondent told Mrs. Grant that she was leaving the Firm to take up a position on the High Court Bench of the Eastern Caribbean Supreme Court. The judge found that this did not amount to a notice to dissolve the Firm since Mrs. Grant continued to treat with the respondent as if the partnership had not been terminated. I also note that there is no evidence that Mrs. Grant took any step to purchase the respondent's 35% share of the partnership and she continued to pay drawings to the respondent. There is no basis to interfere with the judge's finding that the partnership did not dissolve when the respondent left the Firm for a position on the High Court Bench in 2002.

[13] The more important event of dissolution occurred in April 2005 when Mrs. Grant passed away. The common law and section 33 of the Act recognise that a partnership of indefinite duration dissolves on the death of one of the partners. There is now no dispute that the partnership dissolved in April 2005 on the passing of Mrs. Grant.

[14] Learned counsel for the respondent, Mr. John Carrington, QC, submitted that on the passing of Mrs. Grant the respondent became the sole surviving partner of the Firm and that the Firm continued thereafter until sale as a sole proprietorship.

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[2] Cap. 336, Revised Laws of Grenada 2010.

[15] Learned counsel for the appellant, Mr. Fyard Hosein, SC, submitted that upon dissolution the Firm continued with a view to sale, and that this in fact is what happened nine months later on 28th February 2006 when the appellant purchased the shares owned by the respondent and Mrs. **Grant's estate.** It did not become a sole proprietorship during the Relevant Period.

[16] The judge found that upon dissolution the goodwill of the Firm survived to the respondent as the sole remaining partner and that she carried on the business of the Firm as a sole proprietorship.

[17] A sole proprietorship is by definition and in practice a business that is owned and carried on by one person for his or her own benefit. In this case, following the passing of Mrs. Grant the Firm was owned as to 65% by her estate, and 35% by the respondent. **The estate's 65%** did not survive to the respondent on Mrs. **Grant's death and** there is no evidence that the respondent took any steps to acquire the share owned by the estate. She never became the sole owner of the Firm. What appears to have happened is that she took over the ownership of the Firm and later claimed a lien on the earned (but unascertained) profits during the Relevant Period. On her case, these profits were not a part of the assets of the Firm that she sold to the appellant in February 2006.

[18] There is no dispute that the business of the Firm continued as usual after the passing of Mrs Grant. The issue that this Court has to resolve is the consequences of the dissolution in 2005. Did the Firm continue as a sole proprietorship in the true sense of that form of business ownership, or as a dissolved partnership with a view to being sold or shut down? This issue is to be determined by reference to the evidence and the relevant law.

[19] The statutory position regarding the dissolution of a partnership and its consequences are set out in sections 32 to 44 of the Act. These provisions are for most part a codification of the common law relating to the dissolution of

partnerships. Some of the sections in this part of the Act are helpful in determining the status of the respondent in relation to the Firm during the Relevant Period.

[20] Section 38 of the Act provides that a partnership does not end for all purposes following dissolution. The section reads –

> "**Continuing authority of partners for purposes of winding up.** After the dissolution of a partnership the authority of each partner to bind the firm, and the rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership … **but not otherwise.**"

The reason for including this section in the Act is obvious. A partnership is an on-going business that has obligations to its clients and employees that continue despite the dissolution, especially when the dissolution is unexpected. The section allows the surviving partner or partners to continue the business of the partnership so far as it is necessary to wind up its affairs.

[21] The cases also show that in appropriate circumstances a dissolved partnership can continue for a limited time to facilitate the orderly winding up of the **partnership's business. See for example the case of** Jessie Duncan and another Pursuers v MVF Marigold PD145 and others[3], a decision of the Outer House of Scotland. At paragraph 43 Lord Reed said-

> "**From a practical poi**nt of view, there may be advantages in enabling the business of the dissolved partnership to be carried on during the twilight period of winding up: a business may be realised to best advantage as a going concern, and the continuing trading may be necessary to maintain the value of the goodwill. On any view, however, s 38 cannot warrant the continuation of the business for more than a temporary period."

[22] In my opinion, both section 38 and the cases establish that a partnership can continue for a limited time after dissolution for the purpose of winding up the business of the partnership by realising its assets and distributing the net proceeds between the remaining partners and the estate of the deceased partner. This twilight period can be advantageous to the partners to allow them to realise the

[3] [2006] SLT 975; 2007 SCLR 155.

highest return on the assets. However, the twilight period must be temporary. It cannot continue indefinitely.

[23] Following the death of Mrs. Grant, the Executors and the respondent began discussions regarding the future of the Firm. There is no evidence that the respondent made any attempt during this period to purchase the estate's 65% share of the partnership so as to become sole proprietor in the true sense. The evidence from both sides is that the business of the Firm continued after dissolution. In the case of the respondent, the evidence is at page 63 line 22 to page 64 line 3 of the transcript –

> "Q. And with respect to the practice, Mrs Olivetti, what was your -- do you have knowledge of the nature of the practice during the period or after Mrs Grant's death?
> A. Well the only knowledge, the Practice was supposed to be continuing business until we decided what we should do with it, whether we should sell it or close it down."

The respondent's evidence was ambivalent as to whether she would sell the Firm or close it down. What is clear is that there was no suggestion that she would continue the Firm as a sole proprietorship indefinitely. And it is unlikely that there would have been such evidence since the respondent was, at the time, a sitting judge of the High Court.

[24] Mr. Hugh Dulland gave evidence for the appellant. He was very clear about his intentions for the Firm. He said at page 277 lines 10-23 of the transcript –

> "Q. As executor, what was your intention with respect to the firm?
> A. Well the immediate thinking was that the both partners, literally out of the business, the thought went through my mind that we should look at selling.
> Q. So you had no intention to operate a law firm, you and Ms. Parris?
> A. I don't think I have the competence to do that.
> Q. So, is that yes, no intention to do that?
> A. I had no intention of doing it."

On page 278 line 12-13 he said, "You cannot run a business like that, that's why I made the suggestion to sell." And on the next page at line 25 he spoke about selling the Firm before "…it began to deteriorate".

[25] The evidence of the respondent and Mr. Dulland regarding the future of the Firm is clearly in the direction of selling the Firm or shutting it down. In the case of Mr. Dulland his sole intention was to continue running the Firm until it was sold. As it turned out the sale took place ten months after the dissolution, which is not an unreasonable amount of time to complete the sale of an on-going business. The respondent's evidence is different only to the extent that she also contemplated shutting down the Firm.

[26] I disagree with the judge's finding at paragraph 71 of the judgment that the respondent carried on the business of the Firm as a sole proprietor during the Relevant Period, and that she had a lien on any surplus assets of the Firm. This is a finding of mixed law and fact and this Court is in as good a position as the judge to make its own finding.

[27] I find that the Firm dissolved upon the passing of Mrs. Grant in April 2005 but continued to operate until it was sold on 28th February 2006. During this period, the respondent was the sole surviving partner, but the Firm was not run as a sole proprietorship in the true sense because it was owned by two persons. As such the profits of the Firm (if any) during the Relevant Period did not belong exclusively to the respondent. However, she would have been entitled to a proportionate share of the profits. Any suggestion that the profits for this period cannot be shared with the Executors because they are not attorneys licensed to practise in Grenada is rejected.

[28] I note also Mr. Carrington's objection to this Court making a finding that the Firm was being operated during the Relevant Period with a view to sale because the

issue was not raised in the court below and there is no evidence to support it.[4] However, there is evidence from both sides that the Firm was being operated with a view to sale. This evidence is set out in paragraphs 23 and 24 above. Both parties addressed this issue in their oral and written submissions in this Court. In exercise of the Court's wide discretion under section 35(2) of the Supreme Court Act, this Court saw fit to deal with the issue of the parties' intention regarding the future of the Firm during the Relevant Period "… to ensure the determination of the merits of the real question in controversy between the parties".

[29] I would set aside the judge's findings at paragraph 71 of the judgment that the respondent carried on the business of the Firm as a sole proprietor during the Relevant Period, and that she had a lien on any surplus assets of the Firm. The significance of this finding will become more apparent when I deal with the interpretation of the Agreement to which I now turn.

The Agreement

[30] The central issue in this case is proper interpretation of the word "Share" as used in the Agreement. In construing the meaning of the word "Share" the Agreement must be construed as a whole. The provisions that call for particular attention are the two recitals and clauses 1 and 4.

[31] The two recitals read –

> "(1) The Vendor (Respondent) is the owner of thirty five (35) per cent (hereinafter "the Share") of the law firm trading and known as Grant, Joseph & Co. carrying on business at Lucas Street in the city of Saint George in Grenada (hereinafter "the Firm")
>
> (2) The Vendor has agreed with the Purchaser (Appellant) to sell the Share to the Purchaser and the Purchaser has agreed to buy the Share on the terms and conditions herein."

[4] Para. 24 of the respondent's written submissions filed 3rd October 2018.

By clause 1 the respondent agreed to sell the Share to the appellant free and clear of all charges, liens and incumbrances, and by clause 4 she agreed to do all things necessary to complete the sale.

[32] Counsel for the parties disagreed on the interpretation of the word "Share". In this Court and in the court below counsel for the appellant submitted that the Agreement as a whole and the word "Share" means what they say, namely, that the respondent was selling her 35% share of the Firm which included the Firm's cash in its bank accounts, as at the date of the Agreement, and its liabilities. Nothing was excluded. That was the plain and ordinary meaning of the Share that she was selling and there was no need to resort to other canons of construction to determine the assets comprised in the Share.

[33] Counsel for the respondent submitted that the Share that she was selling was the net assets of the Firm as at the date of dissolution in April 2005. The profits that accrued after that date belong to her as the sole proprietor of the Firm and therefore were not included in the assets being sold under the Agreement.

[34] The judge agreed with the respondent. She found at paragraph 64 of the judgment that the meaning of the Share was not clear and free from ambiguity and in the absence of such clarity it was necessary to have regard to the objective background and understanding to determine what the parties to the Agreement intended. She examined the background to the Agreement and concluded at paragraph 66 –

> "In my opinion, the absence of the discussion of the details of the assets, the cash in the Firm's bank accounts and the lack of financial statements for the relevant period are indicators that when the parties were entering into the Agreement the only assets, and by extension the Claimant's (Respondent's) share which were within their contemplation, was the Claimant's net shares as at 27th April 2005. In my view, the relevant objective background facts leading up to the Agreement do not support a literal interpretation but rather a purposive interpretation of the Agreement."

Applying a purposive construction, the judge found that the only assets that were included in the Agreement were the respondent's net share as at 27th April 2005.

[35] In my opinion, the language in the Agreement is clear and unambiguous and the judge should not have departed from its natural meaning. This is the guidance that was given by this Court in Kenneth Krys and others v New World Value Fund Limited and others[5] where the learned Chief Justice Dame Janice Pereira said –

> "Where the parties have used unambiguous language, the court must apply it. A court can only consider the commercial purpose where the language used is ambiguous. Further, the court is only justified in departing from the plain meaning of words if it leads to an absurdity – that is, the court is satisfied that a mistake has been made and is satisfied as to what has to be done to correct it."

The decision of the Court of Appeal was upheld by a 4 to 1 majority of the Privy Council.

[36] The Chief Justice went on to consider the guidance in Al Sanea v Saad Investments Co Ltd,[6] a decision of the English Court of Appeal where Gross LJ summarised the modern principles of construction as follows -

> "i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
>
> ii) The Court has to start somewhere and the starting point is the wording used by the parties in the contract.
>
> iii) It is not for the Court to rewrite the parties' bargain. If the language is unambiguous, the Court must apply it.
>
> iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with business common sense. A Court should always

[5] BVIHCMAP2013/0017 (delivered 26th May 2014, unreported) at para. 26.
[6] [2012] EWCA Civ 313 at para. 31.

keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

v) The contract is to be read as a whole and an "iterative process" [see para. 28 of Rainy Sky] is called for: '… involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences'."

In summarising the principles in this way Gross LJ was relying on the principles laid down by Lord Clarke in the Supreme Court in Rainy Sky SA and others v Kookmin Bank[7] at paragraphs 14 – 30.

[37] Mr. Hosein, SC also referred to the recent decision of the Supreme Court in Arnold v Britton and others[8] for the general principles of interpretation including the well-known principle that a party's subjective evidence of what the document means is irrelevant.

[38] Applied to this case I am satisfied that the language of the Agreement is, as I have said before, plain and unambiguous. The facts and circumstances were equally known to the parties and they both decided to proceed before the financial statements were prepared. The overall purpose of the transaction was the sale of the respondent's 35% share of the Firm which was achieved. The parties' subjective views of what was intended by the Agreement are irrelevant. The Agreement identified what was agreed and intended by the parties, not what they should have agreed. There is no reason to depart from the plain meaning of the document. The respondent may not have intended to include the cash in the bank accounts or the undrawn profits, but that was not stated. The Court cannot interpret the Agreement to improve on the deal that she made. As Lord Hoffmann said in Attorney General and others v Belize Telecom Ltd and another[9] -

[7] [2011] UKSC 50.
[8] [2015] AC 1619 at p.1628.
[9] [2009] 1 WLR 1988 at para. 16.

> "Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means."

[39] The Agreement represents the deal that was made between the parties. The respondent, having received the financial statements some six months later, was obviously dissatisfied with the deal she had made. However, this Court cannot be expected to improve the terms of the Agreement by straining the language to make allowance for one segment of the assets to be subject to withholding from the remainder of the assets conveyed by the Agreement. The respondent should have made provision in the Agreement for retaining a portion of the assets, or shifting its effective date to 27th April 2005, if that was her intention. For example, in clause 4 where the respondent agreed to do all such things as are necessary to transfer "any property of the Firm which immediately before March 1, 2006 is vested in the Vendor and owned by the Firm". She could easily have added "save and except the monies deposited in the Firm's bank accounts" or "save and except /the undrawn profits". This was not done.

[40] In my opinion, the judge should not have ventured into the background in the way that she did and place undue weight on matters that had little if any bearing on the proper interpretation of the Agreement. For example, in paragraph 68 she placed undue emphasis on the evidence that the Firm had approximately $750,000 in its bank accounts and the respondent's suggestion that the appellant could have paid for the Shares that he purchased out of this money. This is a very artificial way of looking at the sale of a business, unless of course appropriate language is included in the sale agreement. The appellant was acquiring the Firm as a going concern with all its assets and liabilities. The financial statements show that on the closing date the Firm had approximately $1.59 million in assets including just over $1.1 million in its bank accounts. The statements also show liabilities of approximately $1.75 million. This means that the Firm was in deficit to the tune of

approximately $160,000 when it was sold. The superficial appearance of a cash rich business is not supported by the financial statements and the appellant could not, in accordance with good business practices, have written cheques for $571,000 to pay the respondent and the Estate for their shares in the Firm.

[41] The judge's interpretation of the Agreement could also have been influenced by her erroneous finding that the respondent carried on the business of the Firm after dissolution as a sole proprietor, and that she had a lien on the profits earned during the Relevant Period. These considerations could easily have led to the conclusion that the assets conveyed by the Agreement did not include the net surplus assets for the relevant period, and that the assets acquired by the appellant were the respondent's **"net surplus assets in the firm as at 27th April 2005"**.[10] However, the business was carried on during the Relevant Period with a view to sale, not as a sole proprietorship, and the respondent did not have a lien on any of the assets.

[42] In all the circumstances, I would allow the appellant's grounds of appeal and submissions to the effect that the Agreement, properly construed, was effective in transferring the respondent's Share to the appellant and that as of the 1st March 2006 she no longer had an interest in the Firm.

The duty to account

[43] I now return to the claim itself which is for an account by the appellant of his activities as an employee of the respondent and of his operation of the Firm's bank accounts. The duty to account arose out of the judge's finding that the appellant was an employee and manager of the Firm, and a signatory to the firm's bank accounts. Having found that the appellant purchased the respondent's 35% share of the Firm that included all the assets that she owned in the Firm, and that the respondent did not have an interest in the assets of the Firm after completion of the sale in February 2006, there is nothing for which the appellant has to account.

[10] Para. 73 of the judgment.

The duty to account, if any, became redundant when the appellant acquired the respondent's share of the Firm.

[44] In all the circumstances, I would allow the appeal and set aside the order of the judge. The appellant does not have to account to the respondent.

Order

(1) The appeal is allowed, and the orders of the trial judge are set aside.

(2) Costs of the appeal and in the court below to the appellant, such costs to be assessed as prescribed costs on a claim for $50,000.00 in the lower court and two-thirds of the amount assessed for the costs of the appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar