

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA  
IN EQUITY  
SUIT NO. E 505 OF 2001

IN THE MATTER OF EQUIPMENT  
MAINTENANCE LIMITED

AND

IN THE MATTER OF SECTIONS  
196 AND/OR 203 OF THE  
COMPANIES ACT

IN COURT

Michael Hylton Q.C., Anna Gracie, Kalaycia Clarke instructed by Rattray  
Patterson Rattray for the applicants

John Vassell Q.C., Julianne Mais Cox, Cindy Lightbourne instructed by  
DunnCox for the respondents

September 25, October 3 and October 16, 2008

NOTICE OF MOTION - APPLICATION FOR INTERPRETATION OF  
CONSENT ORDER - PRINCIPLES OF CONTRACTUAL  
INTERPRETATION - COMPANY LAW - SEPARATE LEGAL  
PERSONALITY - SUBSIDIARIES DIFFERENT FROM PARENT  
COMPANIES

SYKES J.

1. This is an application by Dwight Clacken and Lynne Clacken for the following:
  1. A declaration as to the meaning of the words "in the ordinary course of business" as appear in paragraph 7 of the consent order of Anderson J. dated May 29, 2002.

2. A declaration as to whether the property located at 25 Balmoral Avenue, Kingston 10 in the parish of St. Andrew ("the said property") and/or the monies received in respect of the sale of the said property fall within the judicial interpretation of "in the ordinary course of business".
3. A declaration that the restraining order set out in paragraph 7 of the said order applies to:
  - a. the net proceeds of the sale of the said property;
  - b. the other real estate owned by Equipment Maintenance Limited and its subsidiaries as at May 29, 2002 and to the net proceeds of the sale of any of those properties;
4. An order that the net proceeds of the sale of any of the properties referred to in paragraph 3 above be paid into an interest bearing escrow account in the joint names of the attorneys for the applicants Dwight and Lyn (sic) Clacken and the respondents Michael and Richard Causwell on or before May 2, 2008.
5. Costs of this application to be agreed or taxed.

**The procedural objection**

2. Mr. Vassell Q.C. raised a highly technical objection to the court hearing this application. Mr. Vassell submitted that the entire application of the applicants was invalid on three grounds. First, the application cannot be accommodated under the liberty to apply provision in the order of Anderson J. Second, there must be a genuine ambiguity in the meaning of the order and if there is, then the proper way to frame the application is by saying that there is an ambiguity and then urge on the court an interpretation that avoids the ambiguity. According to Mr. Vassell, the applicants did not say that there was an ambiguity but took a definitive position which they are asking the court to endorse. This is a venal sin which can be purged. However, according to Queen's Counsel, the third objection amounts to a cardinal sin for which neither penance nor

purgatory is available. The third objection is this: the applicants did not seek to enforce the order of Anderson J. By this Mr. Vassell meant that they should have tried to enforce the order and if in enforcing the order it was discovered that it could not be enforced because the meaning of the order was unclear, then they could return to court and ask for an interpretation of the clause.

3. As far as the ambiguity submission and the stance of the applicants are concerned, the distinction sought to be drawn by Mr. Vassell while easy to conceptualise does not lead to any result in practice that is such that a court ought to be detained by it. The very fact that the application is opposed and a contrary interpretation put forward by the respondents is proof itself that the words used by Anderson J. in his order is capable of bearing to two interpretations. The ultimate basis for hearing the matter is that there is indeed a dispute over the interpretation of the relevant clause and I am not of the view that the verbal formulation of the application is of much moment. The form is irrelevant. It is the substance of the matter that is crucial and if on the face of it there is some ambiguity that can affect the operation of the order then the court is duty bound to hear the rival submissions and adjudicate accordingly. I have absolutely no doubt that (a) the application can be accommodated under the liberty to apply provisions; (b) there is an ambiguity in the meaning of the order; and (c) there is no precondition that there must be an attempt to enforce the order before a clarification can be sought.
4. Mr. Vassell submitted that in all the cases relied on by the applicants in support of their contention that the court can hear the application were ones in which the beneficiary of the order had sought to enforce it and in the enforcement of it an issue of interpretation arose. He stated that in none of the cases was there an application for an interpretation of the order in the absence of any attempt to enforce the order. His view was that what the applicants were really trying to do was to vary the terms of the order under the guise of seeking an interpretation of the order - a path that is not open to them.
5. I do not agree with Mr. Vassell that the cases cited by him and Mr. Hylton Q.C. are so limited. It is true that in the case of *Warring-Davis v Secretary of State for Work & Pensions* [2005] EWHC 3011 (Admin)

(November 28, 2005) the issue of the interpretation of the order arose in an attempt to enforce the order but that is not the same thing as saying that the issue of the proper construction of the order cannot arise in any other way. All that *Warring-Davis* did was illustrate, as distinct from prescribe, one of the ways in which an issue of the proper construction of a court order can arise. Similarly, in the case of *Emanuel Alexiou v James Campbell* PCA No. 63 of 2006 (delivered February 26, 2007), on appeal from the Court of Appeal of the Commonwealth of the Bahamas, the Judicial Committee of the Privy Council did not attempt to delineate all of the circumstances in which an issue of the proper meaning of an order of the court may arise. That case, like the *Warring-Davis* case, was simply an example of the manner in which a proper construction of a court order may arise. The other thing to note is that no issue arose, in either *Warring-Davis* or *Alexiou*, in relation to the manner in which the proper construction of an order had to be placed before the court. That being so, the court did not address that issue and the cases proceeded on the basis that the issue was properly before the court. It is therefore difficult for Mr. Vassell to press these cases to serve the point he is making. Finally, two cases are simply too few to generalise, by way of the inductive process, into the major premise contended for by counsel. For these reasons, I do not accept Mr. Vassell's submission on this point.

6. Where Mr. Vassell is on good ground (and I do not think Mr. Hylton dissented on this) is that a court cannot, under the guise of interpreting an order, rewrite a consent order and change the obligations of the parties, where that consent order is in truth a contract between the parties (see *Causwell v Clacken* S.C.C.A. No. 129/2002 (February 18, 2004) per Smith J.A. at pages 15 - 18). A court can always accommodate an application under the liberty to apply provision if such an application is for the purpose of working out what was agreed between the parties. The cases use the expression "working out the order". Surely, if the order is directing a party to deal with or refrain from dealing with property in a particular manner and there is some dispute as to whether (a) a particular property or (b) proceeds from the sale of a property is covered by the order, I would have thought that is a matter that can be brought before the court under the liberty to apply provision. Unless this is done, how would the parties know which property is covered by the

order when the properties to which the order referred were not identified by name, title or with any high degree of specificity?

### The disputed clause

7. In the case before me, the parties disagree over whether certain properties are covered by clause 7 of Anderson J.'s order made on May 29, 2002. Clause 7 reads:

*Pending completion of the said valuation and purchase of shares and/or winding up of the Company (sic) as the case may be the Respondents (sic), Michael and Richard Causwell are hereby restrained whether by themselves, their servants and/or agents or otherwise howsoever from removing, dissipating and/or otherwise disposing of the assets of the Company except in the ordinary course of business and from excluding the Petitioners (sic) from Directors (sic) and/or Shareholders (sic) meetings.*

8. The crucial words are "in the ordinary course of business". How should the court approach the interpretation of these words? It has already been decided that the order in which these words occur is a contract between the parties which has been embodied in a court order (see *Causwell v Clacken* per Smith J.A. at pages 17 - 18). This being so the next issue is to identify the correct principles to be used in the construction of this contract.

### The applicable principles

9. Over the last three decades, there has been more open recognition that the process of construing a contract is not quite as easy as is suggested by expressions such as "the words are clear and unambiguous", "words are to be given their plain meaning", "the words have a natural meaning." In this regard, Lord Hoffman observed in the case of *Charter Reinsurance Co. Ltd v Fagan* [1996] 2 W.L.R. 726, 762:

*I think that in some cases the notion of words having a natural meaning is not a very helpful one.*

*Because the meaning of words is so sensitive to syntax and context, the natural meaning of words in one sentence may be quite unnatural in another. Thus a statement that words have a particular natural meaning may mean no more than that in many contexts they will have that meaning. In other contexts their meaning will be different but no less natural.*

10. Steyn J. (as he then was) also contributed to this development. He observed in *Phillips and Strattan v Dorintal Insurance Ltd* [1987] 1 Lloyd's Rep. 482, 484 - 485 that:

*[W]ords and phrases in contractual documents do not usually have one immutable meaning. Often there is more than one meaning available for selection. One cannot then simply turn to a dictionary for an answer, in choosing the appropriate meaning, the contextual scene is usually of paramount importance.*

11. There has been a distinct move to bring the judicial method construction of contracts closer to the way in which the ordinary man would interpret documents. One of the judges who has been at the forefront of this development is Lord Hoffman. His Lordship stated in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912:

*The result [of the development of the law] has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life.*

12. Lord Hoffman's thoughts on the matter culminated in his most significant decision on the construction of contracts in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society*. His Lordship essayed five general principles which ought to govern the interpretation of contracts (see pp 912 - 914). From these

principles, one thing is clear: there is no room for the subjective understanding of the parties themselves. Thus when the court states that it is seeking the intention of the parties, it is a bit misleading. What the courts are seeking is the understanding that a reasonable person would have, after paying due regard to the circumstances in which the parties contracted. It is also clear that evidence of prior negotiations are excluded because such an exercise may not shed much light on what was actually agreed. It is well known that the parties' intentions shift and alter during the course of negotiations and what is finally agreed may be quite different from the initial starting positions or even positions adopted in the middle or towards the end of the discussions.

13. While I am in broad general agreement with Lord Hoffman, I have a concern. The concern is not so much with what his Lordship said as it is with how it may be used or misunderstood. His Lordship indicated that the meaning of a document is different from the meaning of the words. Lord Hoffman went on to say that the background may enable a reasonable man to choose between rival meanings and also to say either something has gone wrong with the syntax or that the wrong words were used. It is true that his Lordship appreciated that there is a difference between rectification and construction of a document. However, his Lordship's dicta have the potential to result in rectification masquerading as construction. If the interpreter (the Judge) determines that the wrong words were used, then the judge has to say what words were intended to be used and then construe the words that he has decided were intended. The dangers are obvious. It follows, therefore, that before a judge can do this he really has to be convinced that the wrong words were used. In *Investors Compensation* itself, Lord Hoffman not only decided that the words used were being used in an unusual way but that in relation to the clause being construed, some of the words in the brackets should be taken and placed outside. In other words, the syntax, the actual words used and grammar were wrong. Thus the actual decision in *Investors Compensation* should be regarded as a very unusual case.

14. The House in *Investors Compensation* was very clear that the context of the agreement was vitally important to the task of construing the agreement. When Lord Hoffman stated in *Investors Compensation* that

background "includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (page 913 of *Investor Compensation*), he meant, (as he explained in *Bank of Commerce and Credit International v Ali* [2002] 1 A.C. 251) "that there is no conceptual limit to what can be regarded as background" (at para. 39 of *Ali*). He added that he "did not think it necessary to emphasise that [he] meant anything which a reasonable man would have regarded as *relevant*" (para. 39 of *Ali* (emphasis in original)). His Lordship then went on to say that the background was not "confined to the factual background but can include the state of the law (as in cases in which one takes into account that the parties are unlikely to have intended to agree to something unlawful or legally ineffective) or proved common assumptions which were in fact quite mistaken" (para. 39 of *Ali*). Having said all this, his Lordship insisted that "the primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage: "we do not easily accept that people have made linguistic mistakes, particularly in formal documents"" (para. 39 of *Ali*) and when he had stated what he did in *Investors Compensation*, he "was certainly not encouraging a trawl through "background" which could not have made a reasonable person think that the parties must have departed from conventional usage" (para. 39 of *Ali*).

15. Conventional usage as used by Lord Hoffman means the way in which the words are usually understood. However, it is well known that even conventional usages can produce ambiguity if the words are not looked at against the background in which they were used. Thus if a primary school teacher were to speak of the "boys" while she was at school it is quite likely that she meant the school boys at that school whereas if she tells her friend that, "The boys went down the road", in response to a query about the whereabouts of the husbands who were at her home a moment ago, no one would suppose that she meant primary school age boys.

16. Steyn L.J. in *Arbuthnot v Fagan* [1995] C.L.C. 1396, 1401 - 1402 made this important contribution:

*I readily accept ... that the starting point of the process of interpretation must be the language of*



*the contract. But [counsel] went further and said that, if the meaning of the words is clear, as he submitted it is, the purpose of the contractual provisions cannot be allowed to influence the court's interpretation. That involves approaching the process of interpretation in the fashion of a black-letter man. The argument assumes that interpretation is a purely linguistic or semantic process until an ambiguity is revealed. That is wrong. Dictionaries never solve concrete problems of construction. The meaning of words cannot be ascertained divorced from their context. ... That is why in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976]. 1 WLR 989 Lord Wilberforce, speaking for the majority of their Lordships, made plain that in construing a commercial contract it is always right that the court should take into account the purpose of a contract and that presupposes an appreciation of the contextual scene of the contract. Corbin on Contracts, 1960, vol. 3, s. 545, explains the role that the ascertainment of the purpose of a contract should play in the process of interpretation:*

*'In order to determine purposes we are obliged to interpret their words in the document of agreement and their relevant words and acts extrinsic to that document. It may seem foolish, therefore, to say that the words of a contract should be interpreted in the light of the purposes that the parties meant to achieve, when we can turn on that light only by process of interpretation. Nevertheless, it is believed that such an admonition serves a useful purpose. As the*

*evidence comes in and as interpretation is in process, the court may soon form a tentative conviction as to the principal purpose or purposes of the parties. As long as that conviction holds (and the court must be ready at all times to be moved by new evidence), further interpretation of the words of contract should be such as to attain that purpose, if reasonably possible.'*

*In the same section of this seminal work the author added that if the court is convinced that it knows the purpose of the contract, however vaguely expressed and poorly analysed, it should be loath to adopt any interpretation of the language that would produce a different result. In my judgment these observations accurately state the approach to be adopted.*

17. These statements by Lord Hoffman and Steyn L.J. about the importance of context rest on the earlier exposition by Lord Wilberforce in *Prenn v Simmonds* [1971] 1 W.L.R. 1381 and *Reardon Smith* [1976] 1 W.L.R. 989 where his Lordship emphasised that no contract simply comes into being; there is always a context.
18. I am now able to say that what the principles of construction of a contract are. They are:
  1. The court begins by looking at the actual words used by the parties and those words are read in the context of the whole document.
  2. The document is examined against the background of the factual and legal environment in which it was drafted. The background does not include subsequent conduct or prior negotiations. It is restricted to what existed at or before the time of the contract.

3. The interpreter assumes that the parties give the words used their commonly understood meaning.
4. The interpreter has to bear in mind that it is possible that the parties have used the words in an unusual way in the particular document, that is to say, they may have their own dictionary. If this is so then the court is to give effect to the unusual meaning.
5. The process of construing a document is objective and the court is not concerned with the subjective intention of the parties.

**What is the background of the consent order?**

19. Dwight and Lynne Clacken are shareholders in Equipment Maintenance Limited (EML). So too are Michael and Richard Causwell. The Clackens petitioned the Supreme Court to wind up EML. The petition was filed on October 5, 2001. By May 29, 2002, the parties entered into a contract which was embodied in the court order of Anderson J. The order included clause 7 which has already been set out. The full order is set out in the Court of Appeal's judgment in *Causwell v Clacken* at pages 2 - 6 and will not be repeated. The order was varied by Anderson J. and it was that variation that generated the appeal to which I have referred. The variations are not important for this application and will not be mentioned any further.
20. The various terms of the order of May 29 can now be summarized. Clause one provides for the Causwells to purchase the shares of the Clackens at a price to be fixed by the accounting firm of Peat Marwick and Partners. Clause two states, among other things, that the shares were to be valued by reference to "the market value of all the assets owned by [EML] ... as a going concern and shares at market value in Windshield Centre Limited and Rodeo Holdings Limited, goodwill and receivables of [EML] as at 31<sup>st</sup> December 2001 without any discount for the fact that [the Clackens] [are] a minority shareholdings." Clause three deals with the amounts to be paid and the time for payment. Clause four speaks to what should happen if the payments do not take place in accordance with the time specified in the clause. The clause provides for the winding up of EML should the Causwells fail to pay the deposit or the

entire purchase price within the stipulated time. Clause 5 states that on signing of the consent order, the Clackens shall execute the instruments of transfer of their shares and send them to the attorneys for the Causwells. Clause six permits the Clackens to continue to exercise all the rights and privileges as shareholders. Clause seven is an injunction, pending the valuation and purchase of the shares or winding up, restraining the Causwells "from removing, dissipating and/or otherwise disposing of the assets of the company except in the ordinary course of business and from excluding [the Clackens] from Directors (sic) and/or Shareholders (sic) meetings." Clause eight restrains the Clackens for a period of eighteen months from using any information gleaned in their capacity as company directors. They are also enjoined from soliciting any clients of the company for the same period. Clause nine says that until the valuation and purchase of EML's shares and/or winding up the Causwells are to maintain the existing insurance as at December 31, 2001 on all the properties owned by EML and its subsidiaries, specifically Windshield Centre Limited and Rodeo Holdings Limited except computer equipment and property at 1a Montrose Road. Clauses ten, eleven and twelve are of no moment. Clause 13 is the liberty to apply clause.

21. At the time of the contract between the parties, it was known that one of the properties that has led to this application (the Balmoral property) was leased with an option to purchase given to the tenant. That tenant has now exercised that option.
22. The other property that I understand that is a matter of concern is real estate owned by Rodeo Holdings Limited which is a wholly owned subsidiary of EML.
23. Another important contextual matter is the legal framework of companies. It is well known that companies are separate from the human beings that form them. Even in the context of wholly owned subsidiaries, the orthodox position is that subsidiaries are separate legal entities from their owners and can pursue their objectives without let or hindrance provided they act within their articles and memorandum of association. This right extends to the purchase or disposition of property. Each subsidiary has its own board of directors and those

directors are always under an obligation to act in the best interests of the subsidiary. The legal position of subsidiaries is not in doubt.

24. Slade L.J. in *Adams v Cape Industries* [1990] Ch. 433, 532 puts it this way:

*There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that "each company in a group of companies (a relatively modern concept) is a separate legal entity possessed of separate legal rights and liabilities:"*  
*The Albazero* [1977] A.C. 774, 807, per Roskill L.J.

And at page 536:

*[S]ave in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22 merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.*

25. If this is the general law regarding subsidiaries, I would need to be persuaded that a clause in a contract which was designed to deal with one company also extended to other companies that were not specifically mentioned. Again, the parties could have made provision for this in the agreement but they did not do so. The court cannot remake a contract. It has power to interpret the contract. The court has no power to alter the terms of an order so that the obligations of the parties are changed (see Smith J.A. in *Causwell v Clacken* at pages 17 and 18).

26. As Mr. Vassell pointed out a significant part of the context here is that there is an obligation of the directors to manage the company effectively and to act in the company's best interests means that the directors have the responsibility of making and executing decisions from time to time that promote the interests of the company. The obligation extends to carrying out its contractual obligations when called upon to perform under any contract it has entered. It is extremely unlikely that the directors of EML would agree to tie up the assets of the company indefinitely.

#### **The memorandum of association**

27. In construing the contract between the parties, a relevant consideration must be the memorandum of association of the company. This document sets out what the company is able to do and will go a far way in determining what the prepositional phrase "in the ordinary course of business" means.
28. Clause 3 sets out the objects of the company. Clause 3 (1) states that the company is authorised to "do and perform all acts and enter into any agreement in relation to supplying to and providing for any person or firm property and services of any kind whatsoever including but not limited to premises, equipment, technical and operational services and to make all arrangements necessary for the proper discharge of the aforesaid services." EML is also authorized to "carry on the safe keeping, cleaning, repairing, refueling and the general care of motor vehicles of all kinds whatsoever form of propulsion may be used" (clause 3(1.1)). It may also "buy and sell oil and petroleum products, new and used motor vehicles, parts of such vehicles, accessories, supplies, radios, motorcycles, motor boats, and all kinds of machinery, rubber goods, electrical goods" (clause 3 (1.2)). These objects were described by the Clackens as the principal objects of the company. Mr. Hylton built his submission on this clause.
29. EML was also authorised to "take on lease, exchange, hire, or otherwise acquire, and if thought fit to sell, exchange, lease or operate, real and personal property rights of all kinds, and in particular but without prejudice to the generality of the foregoing, land, buildings, easements, mines, mining rights, metalliferous land, concessions, copyrights, inventions, agencies, processes ..., and business concerns and

undertakings" (clause 3 (5)). Clause 3 (12) permits EML to "invest, lend, or otherwise deal with unemployed moneys, in such manner, and upon such terms, as may be thought fit, and to vary investments." It also had power to "sell or dispose of the undertakings, property and assets of the Company (sic) or any part thereof in such manner and for such consideration as the Company (sic) may think fit ... " (clause 3 (26)).

30. The framers of the memorandum also decided to control how the court interprets the memorandum by adding this at the end of clause 3:

*"And it is hereby declared that in the interpretation of this clause the objects set forth in any sub-clause of this clause shall not, except when the context expressly so requires, be in any wise limited or restricted by reference to or inference from the terms of any other sub-clause, or by the name of the company. None of such sub-clauses or the objects therein specified or the powers thereby conferred shall be deemed subsidiary or auxiliary merely to the objects mentioned in the first sub-clause of this clause, but the Company (sic) shall have full power to exercise all or any of the powers conferred by any part of this clause in any part of the world and notwithstanding that the business, undertaking, property or acts proposed to be transacted, acquired, dealt with or performed do not fall within the objects of the first sub-clause of this clause."*

31. This clause was undoubtedly the product of a very cautious draftsman, who would undoubtedly have been aware of the development of the ultra vires doctrine, as laid down in *Ashbury Carriage Company v Riche* (1874 - 75) L.R. 7 H.L. 653 and the softening of the rigidity of that case by the House of Lords in *AG v Great Eastern Rly* (1879-80) L.R. 5 App. Cas. 473. The draftsman was not prepared to take the risk of a court treating the sub-clauses as expressing things that can be done provided they incidental to the objects expressed in clause 3 (1) and was therefore ultra vires. He made sure to give each sub-clause an independent footing. To this extent, the parties have indicated to the

court, should the memorandum fall for interpretation, that they have placed restrictions on the court's ability to cut down the scope of the objects clause or to declare certain acts of the company ultra vires. The draftsman chose to go this route even though there are cases from the 1960s right through to the 1980s that have accepted objects clauses of great breadth (see *Bell Houses Ltd v City Wall Properties Ltd* [1966] 2 Q.B. 656 and *Newstead v Frost* [1980] 1 W.L.R. 135).

### Analysis

32. I must say that one of the dangers of Lord Hoffman's conceptual approach to background information was threatening to overwhelm this case. The affidavits are voluminous and the information abundant. Both sides submitted what they thought was relevant background information. Mr. Vassell submitted a document which summarized what he felt was relevant background within the meaning of Lord Hoffman's formulation. This in turn provoked a response from Mr. Hylton which, mercifully, was restricted to half of one page.

33. I must say, quite respectfully, that much if not all of the references in the document submitted on behalf of the Causwells only served to validate the deep reservations that some judges in England and Wales had about Lord Hoffman's liberalisation of what can be used as background information. It was Staughton L.J. in *Scottish Power Plc v Britoil (Exploration) Ltd* (delivered November 18, 1997) who said:

*As I indicated in the cases cited earlier, it is often difficult for a judge to restrain the enthusiasm of counsel from producing a great deal of evidence under the heading of matrix, which on examination is found to contribute little or nothing to the true understanding of the parties' contract. All, or almost all, judges are now concerned about the huge cost of litigation. I have to say that such a wide definition of surrounding circumstances, background or matrix seems likely to increase the cost, to no very obvious advantage.*



34. Judge L.J., similarly, was concerned about the breadth of Lord Hoffman's proposition when he observed in *National Bank of Sharjah v Dellborg* (delivered on July 9, 1997):

*It therefore appears that if one party to the written contract wishes to dispute the obvious meaning of the words actually used in the document, as I understand it, he is entitled to do so by canvassing all the permitted matters of background - "absolutely anything" - which will serve to undermine the conclusion that the contract means what it apparently says. If this is the correct conclusion then I am bound to say expressly that I share the concerns expressed by Saville LJ in his judgment.*

35. That this concern by the two judges was not just theoretical was demonstrated by the case of *NLA Group Ltd v Bowers* [1999] 1 Lloyd's Rep 109 in which Timothy Walker J. remarked at page 111 - 112:

*Despite the nature of the preliminary issue, namely a short point of construction of a few words, Mr. Chambers on behalf of the plaintiff originally had in mind to adduce the factual evidence of no fewer than five witnesses, with subpoenas served on two further witnesses (both of whom were defendants in the action) plus the expert's report to which I have already referred. At the 11th hour he reduced this volume of evidence to three factual witnesses plus one expert, with the principally inadmissible paragraphs of the statements of the factual witnesses blacked out in the witness statements which were put before me. Even on this basis, the sheer volume of the material he sought to deploy went well beyond the borderlines of what is permissible. Mr. Calver sensibly did not cross-examine the witnesses who were called, and as a result not too much time was wasted on the oral*

evidence.

*Mr. Chambers sought to justify this course, together with his copious references to documents, on the basis of the speech of Lord Hoffmann in Investors Compensation Scheme Ltd. v. West Bromwich Building Society, [1988] 1 W.L.R. 896 at pp. 912F-913F, fastening on Lord Hoffmann's words "absolutely anything" as an invitation to include in the material before the Court just that. He also relied upon the speech of Lord Hoffmann in Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd., [1997] A.C. 749 at pp. 774C- 780B.*

36. Thus it is vital that the judge in construing a contract is not misled by a great volume of information. In the case before me, one affidavit, for example, runs to 200 pages. One bundle, excluding the 200 page affidavit, has over 300 pages. How can over 500 pages be relevant background to construing six words of a prepositional phrase occurring in one paragraph of a contract? Much of this information I have ignored.
37. The purpose of the contract entered into between the parties was to establish a framework within which the shares of EML would be valued and purchased by the Causwells within the time set. The contract also provided for what should happen in the event that the shares were not valued and transferred.
38. Mr. Hylton sought to say that EML was somehow restricted by the terms of clause seven to activities that were, in fact, its main or primary business operations despite what the memorandum may actually say. He implied that if EML did any activity that was unusual even if permitted by the memorandum of association then that activity would not be an act in ordinary course of business because it would not be the main or primary business in which EML was engaged. I cannot accept this narrow interpretation for a number of reasons. First, an examination of the memorandum of association of EML permitted the company to engage in a wide range of activities. Second, even if this were not so, a company must

be able to dispose of its property to meet a legitimate business objective such as selling property in order to use the proceeds to retire expensive debt. I can see no good reason why this could not be an activity in the ordinary course of business.

39. In support of his proposition Mr. Hylton cited the cases of *Countrywide Banking Corporation Ltd v Dean* [1998] A.C. 338 and *Ashborder v Green Gas* [2005] B.C.C. 634. The former is a decision of the Judicial Committee on appeal from New Zealand and the latter is a first instance judgment of Etherton J. Both cases were concerned with the expression "in the ordinary course of business". In the *Countrywide* case, the issue arose in the context of a liquidator attempting to set aside a transaction on the basis that it did not take place "in the ordinary course of business" as those words were to be understood in the relevant legislation under consideration in that case. In *Ashborder*, the context was the meaning of the phrase in a floating charge. As is obvious, none of these cases is close to the circumstances of this particular case and the fact that the words are in common use in the law it does not follow that they have such a uniformity of meaning that it can be said that wherever they are encountered then they have a standard meaning.
40. Etherton J. in *Ashborder* made the valuable observation that the fact that a transaction was being carried out for the first time does not take it outside of the ordinary course of business if the transaction was necessary, for example, to preserve and continue the company's business.
41. This observation along with what has been said above on the legal principles involved in construing contracts means that I cannot say that the use of the expression "in the ordinary course of business" has such a uniformity of meaning that in this case before me it means main or primary business activity. The context including the legal background and the commercial object of the contract are important considerations.
42. It seems to me that the parties, in clause 7, were providing for the preservation of the assets until the valuation, purchase and transfer of the shares were complete. EML apparently had a number of assets including real estate, and shares in two companies known as Windshield Centre Limited and Rodeo Holdings Limited. It is common ground that

these two companies are subsidiaries of EML. These two companies also had assets. Therefore to the extent that these two companies had assets which were of value then this fact would influence the value of the shares of EML. In the context of this agreement, the question is, what was the commercial object of preserving the assets until the valuation and purchase of the shares, since the date on which the value of EML's shares was to be fixed was a date before the contract and not a future date? Clause two stated that the valuation was to be determined as at December 31, 2001. This clause would have protected the Clackens against any post December 31 fall in the value of the shares. That is to say, even if EML engaged in some disastrous business venture after December 31, that fact would not influence the value of the shares for the purposes of this agreement. The converse is also true, that is, if the value of EML's shares increased beyond all expectation post December 31, the Clackens would have no claim to this enhanced value. In fact the contract makes no provision for a fall or increase in the value of EML's shares after December 31, 2001. I do not think that this was because the parties did not think about it. I think the parties concluded that providing for the alteration of the purchase price arising from fluctuating values of the assets held by EML would be too expensive. This would mean that if the assets of the company changed significantly in value so too would the value of the shares and in an economy such as that which exists in Jamaica that possibility was a very real one. The valuers would literally have to be constantly monitoring the value of the assets and then changing the value of the shares with a consequential change in the sale price of the shares. Thus choosing a fixed date would bring greater certainty to the process of valuation at least cost.

43. To answer the question posed in paragraph forty two. The sale of the shares may not go through and there is a winding up. It may well be that the shareholders and directors may lend money to the company between the time of the consent order and the winding up, should that eventuality come to pass. If that occurred then the lenders would want to know that there is some asset there out of which there was the hope of repayment. This is one possible commercial objective of preserving the assets.
44. All the persons involved in this transaction appear to be experienced business people. They would know that despite their best efforts

companies do fail. They also know that a company needs to assess its position in the market in which it operates and must be nimble enough to respond to developments in the market place and the operating environment. This was recognised in clause seven hence the asset preservation injunction excepted any disposition that was done in the ordinary course of business. The clause was designed to guard against a disposition that had no apparent commercial purpose if the disposition is examined from the stand point of the reasonable business man armed with the information known to the contracting parties at the time of the disposition while at the same time permitting sufficient flexibility should the company need to make adjustments to meet a change in its business environment. The changes in the business environment could range from an increase or decrease in demand for its goods and services to a change in interest rates or a change in the exchange rate. The contract has to be construed through the eyes of the reasonable businessman who had the information that was available or reasonably available to the parties at the time of the contract. Such a man, I suspect, would not think that the parties intended that the company could not dispose of its property in a legitimate manner that accords with commercial sense. I dare say that such a person would not think that the parties intended that should it be the case that a particular transaction turned out to be disastrous then that in and of itself meant that the disposition was not in the ordinary course of business. This must be so because businesses in a free market economy make profits and experience losses. Thus it cannot be said that a disposition is "in the ordinary course of business" if the transaction makes a profit but was not so if it makes a loss. These are additional reasons why Mr. Hylton's interpretation is not acceptable. It cannot be said that a disposition is "in the ordinary course of business" only if the disposition is in the course of what the company does mainly or primarily, that is, if it repairs equipment then the disposition has to be directly connected to repairing equipment.

45. The fact that EML may not be in the business of real estate cannot by any stretch of the imagination prevent it from disposing of any real estate it may own if such a disposition advances the best interests of the company. The memorandum of association makes this clear. I need not repeat the debt retirement example given earlier. Disposition does not mean substitution. It could not have been intended that should the

company dispose of an asset it must necessarily have the equivalent in value in some other form of property. It could very well be that EML disposes of property but has no equivalent substitute because the proceeds of sale may have repaid debt.

46. Mr. Hylton in his written submission kept referring to the protection of the minority shareholders thereby suggesting that the injunction was protecting some minority shareholders' right. However, the directors of a company have an obligation to act in the best interest of the company. The strong general rule is that directors do not owe any shareholder a fiduciary duty. For that to arise, there has to be evidence that the directors undertook some special obligation in relation to the particular shareholder or there are facts from which such an obligation arises (see *Percival v Wright* [1902] 2 Ch 421; *Coleman v Myers* [1977] 2 NZLR 225; *Platt v Platt* [1999] 2 B.C.L.C. 745 and *Peskin v Anderson* [2001] 1 B.C.L.C. 372). The directors owe their duty to the company. This is part of the general law against which the contract has to be construed. The parties in this case, at the time of the contract, were represented by very competent and experienced lawyers. The consent order undoubtedly had the input of counsel. Had the parties intended what Mr. Hylton is suggesting they could have put that in the contract although, I doubt very much whether such a clause bearing the meaning contended for by Mr. Hylton would be lawful, since it would be a remarkable thing for director of a company to agree to prevent the company from acting in its best interest by disposing of property if all the evidence suggests that this ought to be done even if by disposing of the property the company engages in a transaction that is not its primary business despite the fact that the disposition may be permitted by the memorandum of association or, on an objective view, be in the best interests of the company.

47. From what has been said, it seems to me that the expression "in the ordinary course of business" means business done in the usual flow of operations for the company; it is what businesses do to keep themselves alive. This includes selling unprofitable assets. It includes selling its own property should it be in the best interests of the company. If the company sells assets and decides to spend the money on advertising, for example, then I cannot see why this is not "in the ordinary course of business." It may be that the advertising efforts fail to bring about the

anticipated increase in revenue but that result does not make it any less an activity "in the ordinary course of business." It does not mean that if the transaction is unusual it is not in the ordinary course of business. It does not mean that if the transaction is being undertaken for the first time then it is not in the ordinary course of business.

48. The consequence is that if the company entered into a lease agreement and granted an option to purchase to the lessee then unless there is something making this unlawful for the company to do (and none has been pointed out to me) then that is an act "in the ordinary course of business." Hence the sale of 25 Balmoral Avenue is an act "in the ordinary course of business." EML was under a contractual obligation to sell the property to the lessee once the lessee exercised the option to purchase. The monies received were monies received "in the ordinary course of business" which the company was free to use as it saw fit in its ordinary course of business. It could not possibly have been the intention of clause seven to sterilise that money and prevent the company from using its own assets to conduct its business affairs on a day to day basis. This money falls within the exception stated in clause seven of the order.

49. The same reasoning applies to any property owned by EML. As long as EML is acting "in the ordinary course of business" then the company can dispose of the assets and use the proceeds if any to conduct its business.

50. In light of what has just been stated I cannot construe clause seven of the order as applying to the subsidiaries of EML. Those companies are separate legal entities which have their own rights and obligations. It necessarily follows from this that I do not have the power to order that the net proceeds of any sale of properties owned by the subsidiaries of EML be paid into any account in the joint names of the attorneys for the Clackens and the Causwells.

### Conclusion

51. I conclude that the phrase "in the ordinary course of business" has the meaning I have given above which need not be repeated. I also conclude that the property at 25 Balmoral Avenue was disposed of "in the ordinary course of business", specifically, under a lease with an option to purchase which was exercised by the lessee. This is an ordinary business

arrangement which is commonplace. The proceeds of this sale can be used in the ordinary course of the business of EML and falls within the exception of clause seven.

52. I also decline to grant the declaration and order sought in paragraphs 3 and 4, respectively. Counsel are to submit a draft order to give effect to these reasons.