JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 57/2007

BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN	GOBLIN HILL HOTELS LIMITED	APPELLANT
AND	JOHN THOMPSON	FIRST RESPONDENT
AND	JANET THOMPSON	SECOND RESPONDENT

Dr Lloyd Barnett and Miss Gillian Burgess instructed by **Watson and Watson** for the appellant

Mr Charles E. Piper for the respondents

1, 2 October and 19 December 2008

SMITH, J.A.:

I have read in draft the judgment of Morrison, J.A. I agree with his reasoning and conclusion. There is nothing further that I wish to add.

MORRISON, J.A:

Introduction

1. This is an appeal from a judgment of Sykes J dated 16 February 2007 by which he made certain declarations and consequential orders in favour of the respondents.

2. The appellant is the registered proprietor of property known as Goblin Hill ("the property") in the parish of Portland, on which there are 28

vacation villas. The respondents are shareholders in and lessees of the appellant in respect of a villa numbered 16 ("villa 16").

3. This is how Sykes J described the litigation:

> "This litigation arose because of assessments and special assessments levied by [the appellant] on its share holders/lease holders. Some of them declined to pay the assessments. One of those declining to pay the increased assessments was the [respondents]. [The appellant] responded by forfeiting the lease and shares. The [respondents] say that this is unlawful."

4. The case as originally filed also included claims against two directors and a mortgagee of the appellant, but these additional claims were decided by Sykes J against the respondents and there is no appeal from his judgment in this regard. However, the learned judge did make the declarations sought by the respondents that the assessments and special assessments made by the appellants for the years 1994 to 2001 were excessive, from which it followed that any excess amounts already paid by the respondents pursuant to those assessments should be refunded to them. As a further consequence, the appellant's counterclaim, for arrears in payment of the amounts assessed, a declaration that the shares and lease were legally forfeited and other consequential orders, was dismissed.

5. The basis of the judge's conclusion was that, on a proper construction of the relevant documents, liability to pay assessments was to be shared equally by all shareholders of the appellant, and not only by

the smaller group of shareholders who were also leaseholders, with the result that the assessments which individual share/leaseholders, including the respondents, had been called upon by the appellant to pay were excessive. The learned judge also found that the appellant had no power to levy assessments or to raise special assessments for the costs of maintenance of the company, such as filing fees at the companies' registry, legal fees and the like.

6. After judgment had been given, but before it had been perfected, the appellant applied to the judge for an order varying his judgment on the basis that, fresh calculations having been done in the light of the judgment, the respondents remained in arrears and therefore liable to forfeiture. The judge refused to grant this application, essentially on the ground that the question of forfeiture could only arise in a case in which there had been a refusal by a share/leaseholder to pay an assessment or special assessment which had been lawfully imposed and that this had not been done in the instant case.

7. The appeal is primarily concerned with the construction of the Articles of Association of the appellant company ("the articles") and the Instrument of Lease executed 2 August 1994 ("the lease") under which the respondents hold villa 16. Also relevant to this exercise is the Agreement for Sale of Options for Purchase of Shares and Grant of Leases ("the

option agreement") which governed the original scheme of development of the property. It is the proper construction of these documents which will determine the remaining questions in the litigation, that is, whether liability to pay assessments for the maintenance of the property is to be shared by all shareholders, as the judge found, and whether such assessments can include costs attributable to the maintenance of the company as distinct from the property.

The background

8. In addition to detailed reference to the documents themselves, it is necessary to give some account of the history of the various arrangements between the parties. It is a long and in some respects complicated story, which I will endeavour to compress and simplify, hopefully without losing its essence, for the purposes of this judgment. In this regard, I have relied heavily on the appellant's Statement of Facts and Issues, as well as on the witness statement of Mrs Rosalie Goodman, a shareholder and director/secretary of the appellant company. These facts are all largely uncontested.

9. The appellant is a limited liability company incorporated under the Companies Act, 1965 with a nominal share capital of $54,000.00 made up of 30,600 class A ordinary shares, 15,300 class B ordinary shares and 8,100 class C ordinary shares, all of $1.00 each. In 1969 the Goblin Hill

development was planned by the three original developers and the first directors of the appellant, Messrs Marvin Goodman, Douglas Graham and Anthony Alberga, as a number of second (vacation) homes on 11 1/2 acres of prime resort property in the San San estate, just outside of Port Antonio. 100 rooms in a combination of one and two bedroom villas were planned. It was anticipated by the developers that the development would be sold in phases. Accordingly, the shares were divided into classes A, B and C. The A shares were allocated to a certain number of villas which were to be the first set of villas constructed and sold and the B shares were allocated to the villas to be built in the second phase. The C shares, comprising 15% of the development, were designed as an incentive to the developers to remain active and interested in the project after selling off the shares. They were accordingly issued in proportion to built villas and entitled the developers to 15% of any net profit generated from the ensuing hotel operations. The developers as shareholders and directors were not to be compensated in any other way for the very active presence in the future operations of the project that it was expected they would maintain after selling off the units. Shareholders were to become entitled to participate in the earnings of the company only as from the date of completion of the villa units relating to the shares held by them.

10. For tax purposes the shares were initially held as share options in a Cayman company, San San Investments Ltd, until sold or distributed. At this time, Jamaica and Cayman had a joint taxation treaty. When share options were sold, shares were issued directly to the new purchasers by San San Investments Ltd with the signed agreement of the appellant, as the developer.

11. The A shares (options) comprising the first phase of the development of 33 villas were not all sold by 1972. Instead share options relating to the 28 villas actually built were sold and the shares issued, along with a proportionate number of C shares in the manner described in paragraph 9 above. The options for the unissued shares relating to the planned future development were due to expire in 1984 and were renewed until 1994, by which time it was assumed that the total development would have been completed. However, political and social conditions in Jamaica did not support the continued development during this period and the three developers decided to purchase the balance of share options at the price they were valued at in the appellant's audited accounts. The intention was that the developers would hold these shares jointly and severally until they were in a position to complete the development and sell the shares and the sale of the remaining options was duly reported in the company's accounts. The remaining A, B and C shares are therefore held by the three developers and any future sales will

therefore involve the sale and transfer of the shares held by them to new parties. No villas additional to the original 28 have since been built.

12. In the late 1960s, at a time when tourism was thriving and expected to grow, the Hotel Incentives Act was passed in order to provide incentives to encourage the building of more hotel rooms. The Act provided the developers with an incentive to structure the Goblin Hill development as a hotel which would be eligible for the tax relief offered under the Act if it made a profit during the first 10 years of operation. During a period accordingly designated "the incentive period" it was agreed that for the first 20 years of its operation the hotel would be operated as a "first class resort hotel", with the villas as an integral part of the property and with restrictions on use of the villas by the shareholders, so as to maximize earnings. During this period income and expenditure were to be pooled and any profit distributed among the shareholders in proportion to the A and C shares issued for built villas. Losses would also be met by shareholders of built villas.

13. After the incentive period ended (which, it is common ground, was in 1989), the property was no longer operated as a hotel, shareholders would have unlimited use of their villas and income was no longer pooled. Shareholders would now have several options available to them, including not renting their villas, using them on a year-round basis if they

chose, or renting them out and collecting the income so earned directly. The costs of maintaining the complex were now to be met by an assessment. The issue on appeal is whether the appellant was correct in apportioning liability to pay these assessments among the villa leaseholders in proportion to their shareholding in the company, or whether, as Sykes J found, the liability is to be shared between all shareholders of the company. The reason for this distinction will become clear in due course.

14. The respondents acquired the lease of villa 16 and became owners of shares in the appellant company pursuant to a Deed of Assignment dated 1 July 1994 and an Agreement for the Purchase of Shares of the same date between the respondents and Messrs Richard Jones and Robert Randall. It is not in dispute that the lease under which the respondents as assignees hold villa 16 is that dated 2 August 1994, made between the appellant as lessor and Messrs Jones and Randall as lessees. This lease is in terms virtually identical to the specimen lease attached as schedule 2 to the option agreement. Before formally assuming the rights of Messrs Jones and Randall, the first respondent sent a letter dated 6 July 1994 to the appellant in the following terms:

"Dear Mr. Goodman,

Re: Purchase of Shares in Goblin Hill Hotels Limited –
Goblin Hill Unit 16
John and Janet Thompson from Richard Jones and Robert Randall

> This serves to confirm the Purchase of Unit 16 from Messrs Richard Jones and Robert Randall by the writer and Janet Thompson.
>
> We hereby agree to pay promptly all maintenance charges/assessments and special assessments for which the owners of the relevant Class A ordinary shares are presently liable after the date on which we become the owners thereof and all future charges and assessments, special or usual, for which we may become liable under the terms of the lease which has been assigned to us.
>
> We confirm that we fully understand the terms of the lease and of the Deed of Assignment by which we consider ourselves bound, having already executed it.
>
> The expeditious approval of the Transfer of Shares in this matter would be greatly appreciated.
>
> Yours sincerely
>
> JOHN L. THOMPSON"

15. Upon assigning their lease and selling their shares to the respondents, Messrs Jones and Randall paid up all outstanding assessments and special assessments relating to villa 16 and thereafter the respondents continued to pay the then fixed amount of $13,495.00 per month. The parties subsequently fell into dispute over increased assessments, said by the appellant to be justified by inflation and increased costs over the years, but resisted by the respondents on various grounds, including that the assessments were excessive (though not on the basis on which they ultimately succeeded before Sykes J).

16. After several years, during which the respondents' payments remained fixed at $13,495.00 per month, the appellant by letter dated 17 November 2001 (through its attorneys-at-law) advised them of its intention to forfeit the lease and/or exercise its powers of sale of the shares pursuant to the articles. By letter dated 11 January 2002 the appellant (again, through its attorneys-at-law) advised the respondents that in conformity with clause 5(d) and (e) of the lease and the articles the shares and the lease had been duly forfeited. This was the trigger for the commencement of litigation, by which time the amount alleged by the appellant to be owed by the respondents for accumulated arrears to December 2001 was $3,658,375.05.

The appeal

17. The appellant filed extensive grounds of appeal, foreshadowing in considerable detail the arguments to support them, as follows:

> "(a) On a proper construction of both the Articles of Association of the Appellant and the leases:
>
> (i) The power to raise assessments and special assessments includes the overheads required to operate the hotel and maintain the villa units and therefore includes the costs of maintaining the company the sole purpose and business of which were the operation of the hotel and maintenance of the villa units;
>
> (ii) It is clear that the lease contemplates that the expenses which were to be included in the assessments, include such

overheads as management costs and by implication the costs of maintaining the company are appropriately included;

(iii) The evidence was that the only activity in which the company was engaged is the operation of the hotel and the maintenance of the villas, there was no evidence to show that any assessments were levied for costs of operations of the company unconnected to the villa units and the grounds.

(iv) It is clear that the Respondents as shareholders, in any event, were liable to pay the costs of the maintenance of the company;

(b) On a proper construction of the Lease –

(i) A shareholder who is not a lessee is not subject to any assessment under clause 5(b) of the Lease or a special assessment under clause 5(c) of the Lease, (paragraph 62 of Judgment) and conversely a shareholder whether lessee or not would be liable for company expenses not related to the company's obligations with regard to the villa units and grounds.

(ii) It does not therefore follow that in the absence of an express exemption every shareholder, including shareholders with no interest in the villas, is subject to an assessment which includes the costs of the maintenance of villas leased and enjoyed by others;

(iii) The learned trial Judge's construction of the lease and/or Articles which results in all shareholders being subject to the assessments respecting the costs of maintaining villas and therefore being

liable to pay for the maintenance of the villas produces an unfair and irrational result, which does not accord with good business sense or any possible or presumed intention of the parties;

(iv) The learned trial Judge's construction of the lease and Articles, led to an unworkable and impractical result in that it would require shareholders to contribute equally and for an indefinite period to the costs of the maintenance of villas of which other persons are the leaseholders and exclusive beneficiaries of their use and income;

(v) The learned trial Judge's construction of the lease and Articles failed to take into account that both documents are interrelated and only shareholders who were leaseholders had a right to participate in the earnings of the company, if any;

(vi) The learned trial Judge's construction of the lease and Articles leads to an impractical result, in that if the shareholders who are not leaseholders have to bear a proportionate costs of maintaining the villas, the effective remedy of forfeiture of a lease for non-payment would not be available to the company against such shareholders;

(vii) The learned trial Judge's construction of the lease and Articles lead to an impractical result in that if the shareholders who are not leaseholders fail or refuse to pay, as could well be anticipated, there would be no effective recourse and the maintenance of the villas would suffer.

(c) The learned trial Judge concluded that any excess over what was properly payable should be returned to the Respondents, without there being any factual basis for concluding that any excess had been paid and dismissed the Appellant's counterclaim although there was a clear factual basis for concluding that the Respondents were on any basis in default.

(d) The learned trial Judge failed to correct his judgment on the Appellant's application for him to do so, on the grounds that if the Notice of Assessment states the wrong amount the Respondents were not liable to pay the correct amount until a corrected assessment had been levied or rectified."

The relevant provisions of the articles and the lease

18. These grounds bring us immediately to the provisions of the articles and the lease themselves. Article 91 provides as follows:

"After the twentieth anniversary of the date specified for the commencement of Goblin Hill San San as an approved hotel enterprise under the Hotel (Incentives) Act, 1968 the Directors shall at the beginning of each financial year or as soon thereafter as possible estimate the total sum of money required for the maintenance of the company and the cost of carrying on the operation and performing the obligations of the company with regard to the villa units or apartments at Goblin Hill San San and the grounds used therewith for the coming year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and cost of repairs and replacements and the necessary expenses of upkeep

maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amount as will meet any deficit incurred in any previous year of operation and the said total sum of money shall be borne by each member in proportion to his shareholding in the Company and the proportion of annual cost estimated as aforesaid payable by each member shall be called "an Assessment". Each member shall pay the amount of the Assessment so made on him to the person and at the times and places and in the manner appointed by the Directors. An assessment shall be deemed to be made when a resolution authorizing such Assessment is passed.

(2) The Directors may from time to time make such further assessments upon the members as the Directors may deem necessary to meet any additional or unforeseen expenses of operating and/or maintaining the villa units or apartment and grounds as aforesaid and the said further sum of money shall be borne by each member in proportion to his shareholding in the company and the proportion of the annual cost made as aforesaid payable by each member shall so made on him to the person and at the times and places in the manner appointed by the Directors. A special assessment shall be deemed to be made when a resolution authorizing such Special Assessment is passed.

(3) Any member who fails to pay in full any sum due from him in respect of an Assessment or Special Assessment pursuant to subsections (1) and (2) of Article 91 hereof shall be liable to pay interest to the Company on any balance outstanding in respect of such Assessment or Special Assessment at a rate to be determined by the Board of Directors from time to time until payment of the Assessment or Special Assessment in full together with the interest payable thereon. The Board shall have the right to determine

> whether interest shall be compounded or not and if compounded the time or times of which same shall be compounded."

19. Articles 33 to 38 provide a procedure for the forfeiture of shares for non-payment of calls made by the directors and article 39 specifically applies these provisions to non-payment of "any sum which, by the terms of the issue of a share, becomes payable at a fixed time...as if the same had been payable by virtue of a call duly made and notified".

20. Clause 5 (b) and (c) of the lease provides as follows:

> "5. PROVIDED ALWAYS AND IT IS HEREBY MUTUALLY AGREED AND DECLARED as follows:
>
> (a)...
>
> (b) After the end of the Incentive Period as hereinbefore defined the Company shall at the beginning of each financial year thereafter or as soon thereof as possible estimate the total sum of money required for the maintenance of the Villa Units as a first class resort hotel for the accommodation of transient guests and the cost of carrying on the operation and performing the obligations of the Company with regard to the Villa Units and the grounds thereof for the ensuing year and in particular but without prejudice to the generality of the foregoing words the amount of all water rates taxes rates insurance premiums and other outgoings and the cost of repairs and replacement and the necessary expenses of upkeep maintenance operation and any fees payable under any management contract entered into by the Company and in addition any amount to create a reasonable reserve for the purposes aforesaid and such amounts as will meet any deficit the

> said total sum of money shall be borne by each lessee of a villa unit in proportion to his shareholding in the Company and the proportion of the annual cost estimated as aforesaid payable by each lessee shall be called 'the Assessment'.
>
> (c) Subject to the provisions of clause 4(C)(iii) of this lease if the Company shall at any time or from time to time during any year declare that funds in addition to the estimated total sum referred to in paragraph (b) of this clause are required for the continued operation and maintenance as aforesaid of the villa units and the grounds thereof, the Company shall estimate additional amounts required and this amount to be called 'the Special Assessment' shall be paid by each lessee of a villa unit in proportion to his shareholding in the Company.

21. Clause 5(d) provides for re-entry by the lessor and forfeiture of the lease in the event of arrears of rental, assessments or special assessments for more than 60 days (or if the shares held by the lessee are forfeited by the company or the lessee ceases to hold such shares) and clause 5(e) provides for at least 45 days notice to the lessee to remedy the default before re-entry. As Sykes J observed in his judgment, "there is no issue joined in respect of these clauses except to the extent that the claimants say the right of re-entry had not arisen because the assessments levied on them were unlawful."

22. Sykes J specifically found that the appellant's estimated costs of operating and maintaining the villas and grounds to the standard of a first

class resort hotel for the years 1994 to 2001 were not excessive. This is how he put it:

> "There is so much evidence about the devaluations, increase in cost of operations and inflation that no reasonable person could possibly contend that the maintenance fee should not be increased".

23. The learned judge nevertheless concluded that the assessments and special assessments in respect of the respondents were excessive in that the appellant divided those costs between the share/leaseholders, as opposed to using the entire 54,000 shares as the basis for the calculation of the contribution required of each shareholders contribution. Sykes J specifically acknowledged that shareholders who were not also lessees of villas might find this result "hard" (a word from a judgment of Lord Hoffman NPJ, sitting as a member of the Court of Final Appeal, Hong Kong Special Administrative Region in ***Jumbo King Ltd v Faithful Properties Ltd*** [1999] 2 HKCFAR 279, paragraph 48: "If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other"). However, the learned judge regarded this as an inevitable result of the construction which he placed on the documents. He was particularly

struck by the absence of any specific exemption in favour of shareholders in that category from the power to raise assessments given by article 91.

24. As regards that part of the assessment which related to maintenance of the company, as distinct from the villas and grounds, the learned judge pointed to a clear difference in wording between the provisions of clause 5(b) of the lease and article 91(1) ("a difference too stark to be attributed to careless use of language") and concluded that an assessment relating to the maintenance of the company can only be made on shareholders under article 91.

The submissions

25. Dr Barnett for the appellant submitted that the construction placed on the documents by Sykes J produced an unfair and unreasonable result, which amounted to a commercial absurdity, by imposing gratuitous hardship on those shareholders who did not enjoy the benefit of a lease. The judge's conclusion, he said, amounted to a triumph of literalism over common sense, by virtue of insufficient attention to the need to read all the relevant documents, which represented "a composite of agreements", together rather than separately. So, for instance, the construction adopted by the judge failed to recognize that only those shareholders who were also leaseholders had a right to participate in the earnings of the company. As a result, the judge's construction produced

"an impractical and unworkable result...which does not accord with good business sense or any possible or presumed intention of the parties". To demonstrate this, Dr Barnett pointed out that if, as the judge held, shareholders who are not leaseholders have to bear a proportionate cost of maintaining the villas, the effective remedy of forfeiture of a lease for non-payment would not be available to the company against such shareholders, so that if such shareholders failed or refused to pay, as could well be anticipated, there would be no effective recourse and the maintenance of the villas would suffer.

26. With regard to assessments for the purpose of maintaining the company, as distinct from the villas and grounds, Dr Barnett submitted that the learned judge had ignored the very terms of Article 91. That article, he submitted, "clearly contemplated that the expenses of maintaining the Company for the purpose of the management of the complex would form part of the assessment." He also pointed to a similar provision in clause 5(b) of the lease and submitted that in this case the unchallenged evidence was that the only operation in which the company was involved was the management of the Goblin Hill complex, thus making it impossible to separate the costs of maintaining the company from the costs of maintaining the villas and grounds.

27. Mr Piper for the respondents accepted that the central issue in the appeal was what construction should be placed on the provisions of the articles and the lease. In the light of the approach sanctioned by the authorities to the construction of contractual documents, he submitted that the learned judge had come to the correct conclusion, which should not be disturbed.

28. But Dr Barnett also relied on the law relating to implied terms, an approach which, as Mr Piper observed, without complaint, was not raised in the court below (it is certainly not referred to by the judge in his judgment). On this point, Dr Barnett submitted that even if the language of the relevant documents properly construed could not bear the meaning for which he contended, this was an appropriate case for the implication of a term to give business efficacy to the contractual arrangements, in accordance with the criteria established by the well known decision in ***The Moorcock*** (1889) 14 P.D. 64 and subsequent cases.

29. Mr Piper responded by pointing out that the authorities show that the circumstances in which terms may be implied in contracts are limited to cases of necessity and that there was nothing in the facts or circumstances of this case to call for the implication of a term.

The authorities

30. Sykes J dealt with the matter purely as a question of construction of article 91. As an aid to construction, he set out principles which he described as "nothing more than elegant judicial language of common sense propositions that ordinary persons have been doing [sic] even if they were not aware of it." I am as indebted to him for his careful analysis, as I am to both Dr Barnett and Mr Piper for their detailed and thoughtful reference to all the relevant authorities.

31. The leading modern authority on the interpretation of documents is now the decision of the House of Lords in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 All ER 98, in which Lord Hoffman summarized the relevant principles as follows (at pages 114-115):

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

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

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see ***Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*** [1997] 3 All ER 352, [1997] 2 WLR 945.

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

SA v Salen Rederierna AB, The Antaios [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

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

32. These principles, as Lord Hoffman observed (at page 114), reflect "the fundamental change which has overtaken this branch of the law", as a result of which almost all of "the old intellectual baggage of 'legal' interpretation has been discarded". In this regard, Lord Hoffman expressly acknowledged the seminal contribution of the judgments of Lord Wilberforce in ***Prenn v Simmonds*** [1971] 3 All ER 237, 240-242 and ***Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co*** [1976] 3 All ER 570. In the latter case, Lord Wilberforce had observed (at page 574), that "No contracts are made in a vacuum: there is always a setting in which they have to be placed...In a commercial contract it is certainly right that the court know the commercial purpose of the contract, and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating." And so, that learned judge had concluded (at page 575):

> "...what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. ...in the search for the

> relevant background, there may be facts, which form part of the circumstances in which the parties contract, in which one or both may take no particular interest, their minds being addressed to or concentrated on other facts, so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed".

33. ***ICS Ltd v West Bromwich Building Society*** was applied in ***Bank of Credit and Commerce International SA v Ali and others*** [2002] 1 AC 251, which provides a good example of the modern principles of interpretation in action. That was a case in which the narrow issue was whether a general release taken by an employer in consideration of the compromise of employees' claims arising out of the termination of their contract of employment was sufficiently wide in its terms to preclude a subsequent claim by the employees against the liquidator of the employer company for damages for misrepresentation and breach of their employment contracts (on grounds unrelated to the termination of their employment). The majority of the House of Lords (Lords Bingham, Browne-Wilkinson, Nicholls and Clyde) held that the parties could not have intended the releases to apply to such claims, while Lord Hoffman dissented, holding that the language of the release was sufficiently general to embrace the claims which it was now being sought to pursue.

34. Lord Bingham said (at page 258) that "To ascertain the intention of the parties [to a contract] the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as is known to the parties". To similar effect, Lord Nicholls said (at page 265) that "the meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made". Applying that approach, the majority was of the view that even this widely worded general release was limited by the context in which it was made ("the generality of the wording has no greater reach than this context indicates" - per Lord Nicholls, at page 266).

35. Lord Hoffman, though disagreeing with the actual result, also accepted that the language of the release, though wide, could not "be read completely literally" and that there might be "limitations in scope to be inferred from the background [or] limitations from context which the draftsman may have thought too obvious to mention" (page 269). Given that the leading speech in ***ICS Ltd v West Bromwich Building Society*** had been his, it would have been surprising to hear that learned judge say otherwise. But he then went on to make an observation which obviously attracted Sykes J's attention:

> "The background is however very important. I should in passing say that when, in ***Investors Compensation Scheme Ltd. v West Bromwich Building Society*** [1998] 1 WLR 896,913, I said that the admissible background included 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man', I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there is no conceptual limit to what can be regarded as background. It is not, for example, 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. But 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'. I 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."

36. Despite the fact that Lord Hoffman disagreed in the result, I do not think that this extended observation "in passing", as he put it, was intended to do more than to point out that his reference in ***ICS Ltd v West Bromwich Building Society*** to "admissible background" was to "anything which a reasonable man would have regarded as relevant". Save for this, Lord Hoffman did not qualify his earlier summary of the applicable principles in any way and indeed indicated that what he was there

saying, to the contrary, was that the admissible background might include not only the factual background, but also the state of the law or proved common assumptions, whether accurate or not.

37. On the basis of these authorities I would therefore accept that the correct approach to the construction of the articles and the lease in this case is to seek to determine what a reasonable person would have understood the parties to mean by using the language which they did in the documents, against the background which would reasonably have been available to them at the time and having due regard to the purpose of the agreements which they sought to document and the circumstances in which they were made. For this purpose, the background will include not only the factual background, though this is obviously very important, but also any assumptions held in common by the parties, whether these turn out to be correct or not. But there is no conceptual limit to what might be regarded as background, so long as it is something which a reasonable man might have regarded as relevant. (Save for the previous negotiations of the parties and their declarations of subjective intent, which as Lord Hoffman explained in ***ICS Ltd v West Bromwich Building Society*** at page 114 remain excluded "for reasons of practical policy". It is not without interest to note, though, that in ***BCCI v Ali*** at page 257, Lord Nicholls expressly reserved the question of whether those reasons of practical policy "still hold good today in all

circumstances."). While the starting point in every case will obviously be the actual words used by the parties themselves, those words can have no "greater reach" than the context indicates and, in a commercial case, a meaning that appears to fly in the face of business common sense "must be made to yield to business common sense". In the search for intention, the court will not allow the words used to lead it to a result which, from all the other relevant indicia, the parties plainly could not have intended.

38. For completeness I should perhaps add that nothing turns on the fact that this case is primarily concerned with the construction of articles of association. Section 22(1) of the Companies Act, 1965, under which the appellant was incorporated, provides that articles of association, when registered, shall bind the company and the members to the same extent as if each member had signed his name and affixed his seal thereto, and the articles contained a covenant on the part of each member to observe all of its provisions. The identical provision is now to be found in section 19(1) of the Companies Act, 2004.

39. As a matter of company law, it is well established that the articles thus become in effect a contract under seal between the company and each member (as to which, see ***Hickman v Kent or Romney Marsh Sheep-***

Breeders' Association [1915] 1 Ch 881), and in ***Holmes and Another v Keyes and Others*** [1959] 1 Ch 199, 215, Jenkins LJ (as he then was) said:

> "I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove to be unworkable".

40. With regard to implied terms generally, the traditional starting point in the modern law is of course ***The Moorcock*** and the well known extempore judgment of Bowen LJ (at page 68):

> "The question which arises here is whether when a contract is made to let the use of this jetty to a ship which can only use it, as is known by both parties, by taking the ground, there is any implied warranty on the part of the owners of the jetty, and if so, what is the extent of the warranty. Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side; and I believe if one were to take all the cases, and they are many, of implied warranties or covenants in law, it will be found that in all of them the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must

> have intended that at all events it should have. In business transactions such as this, what the law desires to effect by the implication is to give such efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose one side all perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances."

41. ***The Moorcock*** was followed a few years later by the Court of Appeal identically constituted (Lord Esher MR, Bowen and Kay LJJ) in ***Hamlyn & Company v Wood & Co.*** [1891] 2 QB 488, Lord Esher MR referring with approval to Bowen LJ's classic statement and adding (at page 491):

> "I have for a long time understood that rule to be that the Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned".

42. The rule propounded in ***The Moorcock*** is obviously a useful tool to supply, by way of implication, an unintended omission from a contract otherwise clear in meaning. That it is nevertheless to be limited in its operation, so as to avoid the rewriting of contracts by the court (which is

Mr Piper's point), is confirmed by ***Shirlaw v Southern Foundries (1926) Ltd*** [1939] 2 All ER 113, 124, where Lord Greene MR said the following:

> "I recognise that the right or duty of a court to find the existence of an implied term or implied terms in a written contract is a matter to be exercised with care, and a court is too often invited to do so upon vague and uncertain grounds. Too often, also, such an invitation is backed by the citation of a sentence or two from the judgment Bowen L.J., in ***The Moorcock***. They are sentences from an *extempore* judgment as sound and sensible as are all the utterances of that great judge, but I fancy that he would have been rather surprised if he could have foreseen that these general remarks of his would come to be a favourite citation of a supposed principle of law, and I even think that he might sympathise with the occasional impatience of his successors when ***The Moorcock*** is so often flashed before them in that guise. For my part, I think that there is a test that may be at least as usual as such generalities. If I may quote from an essay which I wrote years ago, I then said:
>
> '*Prima facie* that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying'.
>
> Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: 'Oh, of course'."

43. Thus in ***Liverpool City Council v Irwin and Another*** [1976] 3 All ER 39, Lord Wilberforce stated (at page 44) that an obligation might only be read into the tenancy agreement with which that case was concerned

"as the nature of the contract itself implicitly requires, no more, no less; a test in other words of necessity." Lord Cross of Chelsea reiterated (at page 47) that it was not enough for the court to say that the suggested term was "a reasonable one the presence of which would make the contract a better or fairer one", while Lord Salmon for his part described the term (at page 51) which it was sought to imply as "one without which the whole transaction would become futile, inefficacious and absurd".

44. And, finally in this very brief survey of the authorities to which we were referred, in ***Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others*** [1985] 2 All ER 947 (a decision of the Privy Council on appeal from Hong Kong), it was accepted that the test for implication of a term was necessity. Lord Scarman observed (at page 955) that "[i]mplication is the way in which necessary incidents come to be recognised in the absence of express agreement in a contractual relationship".

45. Apart from those cases in which a term is implied in particular classes of contract by operation of law or by custom (as to which see G.H. Treitel, The Law of Contract, 11th edn, pages 206 - 214), the court in implying a term in a contract is generally seeking to give effect to the presumed intention of the parties "as collected from the words of the agreement and the surrounding circumstances" (Chitty on Contracts, 29th edn, volume 1, paragraph 13-003). To this extent there is therefore an

obvious overlap between the principles of interpretation of, and the implication of terms in, contracts.

46. However, on the authorities, the application of the well established principles with regard to the implication of terms to articles of association is not entirely straightforward. Because the articles are part of a company's constitutional documents which are available for public inspection and may form the basis on which new investors decide to purchase shares in a company, the courts have been reluctant "to apply to the statutory contract those doctrines of contract law which might result in the memorandum and articles subsequently being held to have a content substantially different from that which someone reading the registered documents would have concluded" (Gower and Davies' Principles of Modern Company Law, 7th edition, at page 59).

47. So, for instance, it has been held that the court has no jurisdiction to rectify the memorandum and articles of association (***Scott v Frank F Scott (London) Ltd*** [1940] Ch 794) and, in ***Bratton Seymour Service Co Ltd v Oxborough*** [1992] BCLC 693, the court refused to imply terms into the articles (described at page 698 by Steyn LJ, as he then was, as "the statutory contract") from extrinsic evidence of surrounding circumstances, since that evidence would probably not be known to potential investors who would thus have no basis for anticipating that any such implication

was appropriate. However Steyn LJ did accept (at page 698) that it would be possible to imply a term in the articles "purely from the language of the document itself: a purely constructional implication is not precluded". This is because in this last situation the basis of the implication would have been "available to those who read the company's constitution" (Gower and Davies, op. cit., page 60, footnote 86).

Analysis

48. It is against this background of settled authority that I turn, at last, to the contractual provisions which it is necessary to construe and apply in this appeal.

49. It seems clear that article 91 was designed to operate in a context in which it was intended that each member of the company would also have an interest in a villa. It must be for this reason that the assessment envisaged by article 91(1) does not seek to distinguish between the cost of the maintenance of the company and "the cost of carrying on the operation and performing the obligations of the company with regard to the villa units...and the grounds used therewith...", but instead requires an estimate to be made of "the total sum of money required".

50. Sykes J was led by the absence of exemption of any category of shareholder from the power of assessment under article 91 to the

conclusion "that it was contemplated that all shareholders regardless of class would be subject to the assessments." In my view, this very fact points the opposite way, that is, that given that what was clearly intended by the parties was that a leasehold interest would only exist concomitantly with membership of the company, the parties could not have intended that the power of assessment should be capable of having an independent field of operation on shareholders without such a leasehold interest. I would therefore answer Dr Barnett's question whether the parties intended that, where no villas had been built to which the shares of some shareholders were connected, those shareholders would nevertheless have been obliged to meet the costs of maintaining villas belonging to other shareholders in which they had no interest, in the negative.

51. The result of the learned judge's conclusion, as the appellant submitted, is that shareholders who are not also leaseholders (and who have neither a right of access to the property nor a right to participate in the earnings of the company) are nevertheless liable to bear the costs of maintaining villas from which they derive no benefit. From a practical point of view, I would expect the result of such an imposition to be that the proportion of the costs expected to be borne by such shareholders to pay for the maintenance of the villas will remain chronically under-funded. Such shareholders will probably be unlikely to have any interest in

paying for a benefit not enjoyed by them, particularly in circumstances where there will be no effective remedy by way of forfeiture of a lease enjoyed by them for non-payment. Neither can this result be in the interests of those shareholders who are also leaseholders, as this under-funding will be exacerbated over time by the insufficiency of their own contributions as a group to adequately maintain the villas in which they have an interest. This must in turn result in an inadequate level of maintenance of the villas and the ultimate deterioration over time of the property itself, to the detriment not only of the company, but of the leaseholders, such as the respondents themselves.

52. This result, it seems to me, is so far removed from good business sense, in the context of what was after all designed as a business venture, that I cannot imagine that this was the intention of the parties. It certainly does result in commercial absurdity. If, as Lord Hoffman observed in ***BCCI v Ali*** (at page 271), "one of the first principles of construction is to try to give some business sense to the agreement", I would expect the court to adopt a construction where possible to avoid such an unworkable result.

53. Clause 5(b) of the lease, which is in virtually identical terms, must therefore have been intended, in my view, to complement and to reflect article 91(1), while describing the tenant's rights and obligations from the standpoint of a lessee rather than that of a shareholder. Thus the only

difference of significance in the two provisions (not counting the substitution of 'lessee' for 'member' wherever it appears) is that while article 91(1) refers to the total sum of money required "for the maintenance of the Company and the cost of carrying on the operation...", the words "for the maintenance of the Company..." are omitted from clause 5(b). The explanation for this difference in wording, which Sykes J considered "too stark to be attributed to careless use of language", must surely be, it seems to me, that furnished by the judge himself when he commented that "logically the power to levy assessments for the maintenance of the company would hardly be found anywhere else but in the articles of association." Put differently, the articles properly govern the obligations of members qua shareholders, while the lease governs their obligations qua lessees.

54. But both documents are then explicitly tied together by the virtually identical provision in each that the total sum of money required "shall be borne by each member [lessee] in proportion to his shareholding in the Company and the proportion of the annual cost estimated as aforesaid payable by each member [lessee] shall be called an [the] Assessment". So that both the factual context and the language of the documents themselves suggest, it seems to me, that they were designed and intended to operate together, to enable the company to raise by way of

assessment the total sum required to cover both the maintenance of the company and of the villas.

55. While one could not disagree with Sykes J's conclusion that "[t]he assessment powers [article 91] apply to share holders qua share holders and not share holders qua lease holders," I am of the view that, since it was plainly intended from the outset of the development that there would be an identity of interest between shareholders and leaseholders, this is a distinction without practical significance in the circumstances.

56. I would therefore hold that article 91 is to be construed as imposing liability to assessment for the maintenance of the villas on those shareholders who also have the benefit of leases of the villas, as the appellant has maintained all along to be the proper approach, and not on the wider body of shareholders, irrespective of whether they hold leases of villas, as the respondents contended and the judge held. Again as a matter of construction, I cannot see why in principle the costs of maintaining the company should not be treated as part of the overall operating costs of the property. As Dr Barnett also pointed out, correctly in my view, the unchallenged evidence was that the only operation in which the company was concerned was the management of the property. The result of this is, in my view, that such costs can be included in "any additional or unforeseen expenses of operating and/or

maintaining the villa units or grounds..." and would therefore also be recoverable by way of special assessment under article 91(2).

57. I have arrived at this conclusion by way of construction of the documents themselves. However, I am also inclined to think that, notwithstanding the traditional reluctance to imply terms in articles generally (see paragraphs 46 and 47 above), the implication of the term contended for by the appellant in this case would be permissible on the basis of its being what Steyn LJ described as a "purely constructional implication". In other words, it is the language of article 91 itself, taken together with clause 5(b) of the lease, and not reference to any extrinsic circumstances, that leads one to think that if an officious bystander had enquired at the outset of the arrangements, "what will happen if phase 2 of the development is never built, but shares are issued to shareholders who do not have the benefit of leases of villas, will all the shareholders still be liable to bear the costs of maintaining the villas?", the immediate response would have been "of course not, that would not be fair!" In these circumstances I would also have thought it necessary and permissible to imply a term in the articles to allow for this eventuality, failing which, as Lord Salmon put it in ***Liverpool City Council v Irwin*** (at page 51), "the whole transaction would become futile, inefficacious and absurd". However, in the light of the fact that this particular aspect of the

matter was not argued before us, I am content to base my conclusion on the interpretation of the documents themselves.

Conclusion

58. I have therefore come to the conclusion, with the greatest of respect to the obvious care with which Sykes J approached his task in this difficult matter, that he fell into error in concluding that the assessments and special assessments levied by the appellant were excessive because of the failure to use the entire 54,000 shares as the basis for the calculation of the individual shareholder's contribution.

59. It follows from this that the assessments made by the appellant over the years on the opposite basis, that is, by reference to shareholders who were also lessees of villas only, were in fact correct and that the order for a refund by the company of "any excess over what was properly payable", must be set aside. As I have already pointed out, the learned judge made an express finding that the respondents had "failed to show that the estimated costs of operating and maintaining the villas and grounds to the standard of a first class resort hotel for the years 1994 – 2001 were excessive". The judge also found expressly that the property had been managed by the appellant "for the benefit of the lease holders and the share holders". It follows from these findings that the appellant is therefore entitled to succeed on its counterclaim for arrears of payment

of assessments in the sum of $3,658,375.05, a declaration that the respondents' shares in the appellant company and the lease were legally forfeited, an order for delivery up of possession of villa 16 to the appellant and an order for an account of all amounts received as rental from villa 16 subsequent to the date of forfeiture.

60. Finally, a word on the question of interest. The appellant's counterclaim for $3,658,375.05, on which they are in my judgment entitled to succeed, was based on a calculation done by it and produced in evidence at trial as exhibit "RG 9" to the witness statement of Mrs Rosalie Goodman sworn to on 5 January 2004. That document shows the sum of $3,658,375.05 as the amount due from the respondents for arrears in payment of assessments and special assessments, inclusive of interest, as at 1 November 2001. Thereafter, the respondents' shares having been forfeited by the appellant for non-payment, the amount of interest, if any, on the principal amount of any sum remaining due to the appellant from the respondents must in my view fall to be assessed in accordance with general principles and not pursuant to article 91(3), by which the respondents would no longer be bound as members of the company after the date of forfeiture.

61. Sykes J did not deal with this issue at all, understandably so in the light of his dismissal of the counterclaim, and no argument was addressed

to this court on the matter. I would therefore propose that the parties be invited to make written submissions to this court no later than 19 January 2009 on whether the appellant is entitled to interest on the counterclaim and, if so, on what basis and at what rate.

62. I would therefore allow the appeal and enter judgment on the claim and counterclaim for the appellant, in the terms set out at paragraph 59 above, but subject to the question of interest to be determined after receipt of submissions from the parties, with costs to be taxed if not agreed.

DUKHARAN, J.A.:

I too agree with the reasoning and conclusions of Morrison J.A. There is nothing further that I wish to add.

SMITH, J.A:

ORDER

1. The appeal is allowed.

2. Judgment is entered on the claim and counterclaim for the appellant. The order for a refund by the company of "any excess over what was properly payable" is set aside.

3. The appellant succeeds on its counterclaim for:

(i) arrears for payment of assessments in the sum of $3,658,375.05.

(ii) a declaration that the respondents' shares in the appellant company and the lease were legally forfeited;

(iii) an order for delivery up of possession of villa 16 to the appellant and;

(iv) an order for an account of all amounts received as rental from villa 16 subsequent to the date of forfeiture;

(v) Costs to appellant to be taxed if not agreed.

4. In accordance with paragraph 61 of the judgment, the parties are to submit written submissions on or before 19 January 2009 on the question of interest on the sum of $3,658,375.05.