[2017] JMCC Comm.19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00028

BETWEEN	**NATIONAL COMMERCIAL BANK STAFF ASSOCIATION (bringing the claim in a representative capacity on behalf of all the members of the Association)**	**CLAIMANT**
AND	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**DEFENDANT**

IN OPEN COURT

Crafton Miller and Patricia Roberts Brown instructed by Crafton Miller & Co for the claimant

Walter Scott QC and Anna Gracie instructed by Rattray Patterson Rattray for the defendant

July 4, 5, 6, 7, September 12, 14, November 21, 22, 23, 2016, May 30 and July 20, 2017

CONTRACT – WHETHER CIRCULAR PART OF CONTRACT OF EMPLOYMENT – PROPER INTERPRETATION OF CLAUSE IN CIRCULAR – PRINCIPLES APPLICABLE TO INTERPRETATION OF CLAUSE – WHETHER GOOD FAITH PART OF JAMAICAN CONTRACT LAW – WHETHER TERM OF GOOD FAITH SHOULD BE IMPLIED – WHAT IS THE CONTENT OF IMPLIED TERM OF GOOD FAITH

SYKES J

The claim

[1] National Commercial Bank Staff Association ('the Association') is a registered trade union. Its members are employees of National Commercial Bank ('NCB' or 'the bank') and other companies wholly or partially owned by NCB. This case is a about profit sharing scheme ('PSS') that was agreed in principle from 1977 but was properly finalised in December 1980. It is common ground that the PSS indicated that 6% of the consolidated profits before tax would be distributed to eligible employees once the profit exceeded 25% of shareholders' funds. Apparently, the scheme proceeded without undue difficulty until 2001 and 2002 when the bank decided that it would not include a sum of JAD$63,121,000.00 in the formula for the purpose of calculating whether the PSS was activated. The reason advanced by the bank for not including this sum for the year 2002 was that there was a change in accounting standards that required the bank to take out sum attributable to minority interests. The Association says the figure should be included. The practical effect is this: if the figure is included the PSS is activated because the consolidated pre tax profit would be 25.14% and if excluded the pre-tax figure is 24.4%. The Association says that the PSS became part of the salary package of its members. The bank says not so. It was payable at the sole discretion of the bank. To resolve this question more information is needed.

[2] The Association launched this claim seeking the following remedies:

(i) a declaration that the profit sharing scheme (herein referred to as 'PSS') and the terms, conditions and rules governing the PSS as set out in Staff Circular No 33/1980/P dated December 17, 1980, with subsequent amendments thereto is the approved and governing document by both the claimant and the defendants to determine the formula and threshold figure to trigger the profit-sharing mechanism.

(ii) A declaration that the terms, conditions and rules governing the PSS and particularly item (2) of the Staff Circular No 33/1980/P dated December 17, 1980 cannot be unilaterally amended by the defendant.

(iii) A declaration that the defendant cannot unilaterally deduct minority interests' profit from profit before tax in order to establish whether a profit sharing payment has been triggered in accordance with the rules laid down in Staff Circular No 33/1980/P.

(iv) A declaration that the defendant's auditors PriceWaterhouseCoopers erred in deducting the minority interest profits from profits before tax contrary to Staff Circular No 33/1980/P.

(v) A declaration that the applicant and the defendant have a contract with regard to profit sharing which forms part of the contract of employment of members of the applicant's association.

(vi) A declaration that the bank's auditors PriceWaterhouseCoopers are to interpret the profit sharing formula as set out in Circular No 33/1980/P dated December 17, 1980 and not as it deems fit and ought to have calculated the profit sharing for the financial year ended September 30, 2002 in accordance with the stipulated formula used for the previous sixteen (16) years by them.

(vii) A declaration that the financial year ended September 30, 2002, the auditors should not have and indeed erred in making a special circulation of Group Profit before tax for the purpose of dealing with the [PSS] established and agreed upon since 1980.

(viii) A declaration that for the financial year ended September 30, 2002, the threshold for profit sharing has been triggered and the members of the claimant association are entitled to share in the profits to be calculated on the basis of Staff Circular No 33/1980/P.

(ix) An order for costs to the claimant to be agreed or taxed.

(x) Interest on the judgment sum at the commercial rate of at the date of judgment.

The circular

[3] The dispute between the bank and the Association centres on Staff Circular No 33/1980/P dated December 17, 1980 ('Circular 33') signed by the general manager. The circular represented the first fully documented formula for the calculation of amounts payable under the PSS. Before this, the PSS was agreed in principle and a payment was even made in January 1980 as a 'good faith' gesture by the bank that it was serious about implementing the PSS that was agreed in principle from as far back as 1977. The two relevant clauses in the circular are clauses 2 and 6. It reads in the relevant parts:

> *We are pleased to advise that a Profit Sharing Scheme will be brought into effect for the year ended 30th September 1980, subject to the following rules:-*
>
> *1. Beneficiaries*
>
> *All pensionable staff in full time employment in the Bank at 30th September each year who have completed a minimum of one year's continuous service.*
>
> *2. Amount*
>
> ***The maximum annual amount to be distributed shall be 6% of the consolidated profits before tax, as agreed by the Auditors (sic) before making allowance for the payments under the Scheme (sic) provided such profit is in excess of 25% of the "shareholders' funds", i.e. issued share capital, reserves (excluding capital reserves" and retained earnings, as shown in the audited accounts of the immediately preceding financial year.***

3. This amount shall be paid as soon as practicable after 30th September each year after consultation with the bank's auditors who will make allowance for such payments in the relevant year's accounts.

5. ...

6. The Scheme shall not form part of any contract of employment between the bank and any of its employees, and shall not confer on any employee any legal or equitable right whatsoever against the bank directly or indirectly nor give rise to any cause of action in law against the bank. (emphasis added)

[4] The bank says that on a proper interpretation of clause 2 minority interests are to be deducted and when that is done as was done in 2002 the threshold requirement for triggering payment under the PSS has not been met. The Association is saying that the bank is seeking to change the meaning of the document and is now seeking to give it a meaning that it never had.

[5] Regarding clause 6 the bank says that the PSS was never part of the contract of employment whereas the Association says that clause 6 was removed from 1993 or before.

The origin of the Profit Sharing Scheme – 1977 to 1980

[6] The evidence on the history of the PSS comes from various sources. Mr Paul Stewart, President of the Association, Mr Euton Cummings, Assistant General Manager for the bank and Mrs Jean Ducasse, then Secretary of the Association all swore affidavits in this matter and part of their evidence was the history of the PSS. Mrs Ducasse did not testify and her affidavit was not admitted into evidence. However, the court has to refer to it because Mr Cummings' affidavit was crafted to respond to her's as was the affidavit of Mr Saddler, another witness for the bank. Mr Cummings accepted that some parts of her affidavit were true and to that extent it is quite legitimate to refer to those parts accepted by Mr Cummings. Each of these affidavits has documents exhibited to them and the court will refer to them. Mr Stewart in particular relied on the exhibits to Mrs Ducasse's affidavits and so the court will refer to those exhibits.

[7] As the trial continued it soon became evident that Mr Euton Cummings, Assistant General Manager for the bank, did not have full and complete knowledge about the history of the matter. He joined the bank in 2004 and was relying on the bank's records for his knowledge. The bank's records are incomplete. Mr Euton Cummings stated in his affidavit that the staff was informed of the decision to implement the PSS in 1977. He also said that there were a number of board meeting, beginning in 1979, on the question of implementation of the PSS.

[8] Mr Stewart swore in his affidavit that discussions were taking place about this PSS even before 1977. Mr Stewart is in a position to know this. To say that he was a veteran at the bank would do him a disservice. One could properly say he has been a chief corner stone. He went there as a young man in 1968 and became an activist for worker's rights and compensation. He attended meetings and when the Association began took an active part in it. He eventually rose to become president of the Association. His personal knowledge of the twists and turns of this issue far exceeds any witness from the bank. By the time Mr Cummings joined the bank in 2004, Mr Stewart had completed over two decades there.

[9] Mr Cummings also stated that at a board meeting of October 16, 1979, the bank decided that it would 'immediately undertake a study of [PSSs] prior to meaningful negotiations with the Staff Association with a view to recommending such a scheme as would be considered to be in the best interest of the bank in the long term.' This statement from Mr Cummings give the misleading impression that it was the magnanimous spirit of generosity of the bank that spawned the PSS. This is not so. It was a matter of discussion and negotiation between the employees and the bank.

[10] Mr Cummings has stated that 'paragraph 6 of the Ducasse affidavit is accurate' (para 12). This means that he accepted it as a true statement which means that it is quite legitimate to take account of that part of it he said is true. Mrs Ducasse states at paragraph 6:

> *When Barclays Bank gave up ownership of the bank in 1980, to the present defendant, the latter agreed to retain the profit sharing scheme as set out in Staff Circular No 33/1980/P, dated 17th December 1980 from the defendant to the claimant's members and I exhibit hereto a copy of the said circular as "JD-1".*

[11] Exhibit JD-1 is an agreed document and is the circular referred to earlier.

[12] Mr Cummings swore in his affidavit at paragraph 12 the following:

> *That paragraph 6 of the Ducasse affidavit is true. It does not appear that any profit sharing scheme was in existence prior to 1980. By a Head of Agreement dated 1st August 1980 (effective until 30th June 1982), the bank and the National Commercial Bank Staff Association (hereafter referred to as the Staff Association) expressly agreed that "further discussions to be held" in relation to bonus and profit sharing.*

[13] At this point the court must refer to the evidence of Mr Paul Stewart. Mr Paul Stewart who testified for the Association disputes the bank's version of events on some points.

[14] Mr Stewart's position is that the matter of the PSS had been raised with the bank by the Association from as early as 1977. He stated that when the matter was raised the bank was known as Barclays Bank DCO. He says that the Association was previously known as the Barclays Bank Staff Association. He says that name of the bank changed to National Commercial Bank Jamaica Limited when the government acquired it on August 12, 1977.

[15] Mr Stewart states that there were discussions between the bank and the Association even before 1977 and it was those discussions that led to the

recommendation of the PSS at a board meeting of the bank on October 15, 1979.

[16] Mr Stewart stated that the bank and the Association had reached an agreement to introduce a PSS. This agreement came out about because the Association by letter dated April 21, 1977 had made the issue of the PSS part of its claim for improved benefits for its members. In other words, this discussion began before the government took over the bank and this explains why Mrs Ducasse said in her affidavit at paragraph 6 that the present defendant agreed to retain the PSS. Mr Stewart adds in the letter that in January 1980 a special payment of $500,000.00 was made to staff because of the good results for the year ended September 30, 1979. It was understood that formal arrangements were to be put in place for the PSS to be a tax free benefit. Mr Stewart says that the bank later on said that the advice it received from its auditors was that the scheme would be taxable. According to Mr Stewart, the PSS was approved by the board of directors at a meeting of December 16, 1980 and out of that meeting came the December 17, 1980 circular which has been set out above with the relevant clauses in bold. In light of Mr Stewart's level of personal knowledge and his activity in the Association the court accepts his evidence that discussions on the PSS began even before 1977.

[17] Mr Cummings did say in answer to questions from the court that his records did not have the meeting at the Ministry of Labour, the circular sent out by the Association above the signature of a Mrs Sheriff and even the bank's document indicating that it agreed in principle with the PSS. These documents will be detailed later on. After he was shown the document Mr Cummings accepted that the PSS was the subject of negotiation before 1979 and he was prepared to accept the reliability of the minutes from the conciliatory meeting held at the Ministry of Labour.

[18] Mr Stewart's knowledge is not a bald assertion. Confirmation of Mr Stewart's account comes from minute of a meeting between Barclays Bank of Jamaica and

the Barclays Bank of Jamaica Limited Staff Association at the Ministry of Labour held on July 12, 1977. As noted earlier, these were the previous names of the bank and Association.

[19] The minutes are headed, '*Notes of a Conference between representatives of Barclays Bank of Jamaica Limited and the Barclays Bank of Jamaica Staff Association, held at the Ministry of Labour, 110 East Street, Kingston, on Tuesday, 12th July 1977 commencing at approximately 2:30 pm.*' The very first paragraph of that minute reads:

> *The Chairman, ..., stated that the meeting had been convened at the request of the staff association of Barclays Bank Jamaica Limited for the purpose of continuing negotiations on claims that were served on the management by the Association. Continuing, he stated that the Association had advised the Ministry that several meetings were held with Management, that the offers made by Management were unacceptable.*

[20] The meeting was chaired by Mr S B Carter, Acting Director of Industrial Relations, at the Ministry. The notes of the meeting show that Mr Emil George, legal counsel for the bank, was invited by the chairman to lead off the discussions. Mr George outlined the position of both parties on various issues. Mr George spoke to 22 items. On the issue of the PSS which was item 8. The relevant part of the notes reads:

> *<u>Immediate institution of the promised Profit Sharing Scheme.</u>*
>
> *Agreed in principle. The matter was being referred to a firm of accountants and lawyers; Myers and McDonald.*

[21] The Most Honourable Mr Hugh Lawson Shearer ON, OJ, PC and former prime minister led the team from the Association and he is recorded as saying that Mr George's outline of the facts was accurate, that is to say, where there was agreement there was in fact agreement and what was agreed in principle was in fact agreed in principle.

[22] At this point this court makes the affirmative finding that Barclays Bank and the Association did agree that PSS would be instituted by the bank. The further conclusion is that the PSS would become part of the employees' contract of employment subject to the details being worked out. At this time there was no fixed formula and it appeared that each payout would have to be negotiated until the formula was put in place.

[23] Mr Cummings stated at paragraph 25:

> *There is no explanation on file for the seeming change in the position taken by the bank in 1991 to add the reference to the profit share amount in the head of agreement. ...*

[24] This is not a change in position as Mr Cummings thought. It was really the continuing evolution of the PSS issue that began even before 1977 and which in 1977 the bank and the Association agreed that a PSS would be implemented. If proof were needed that the bank's records that were available to Mr Cummings are incomplete, this is the proof.

[25] This part of the history was repeated by Mr Stewart some twenty three years later when he wrote a letter dated November 27, 2000 to the Board of Directors in which he set out the history the PSS. The crucial paragraph reads:

> *In the initial round of negotiations between the Staff Association and the Bank, agreement was reached that the bank would introduce a Profit Sharing Scheme (pursuant to Claim No 8 of the Association's letter of claim dated 1977 April 21). In 1980 January a special payment of $500,000.00 was made to the staff based on the "good results" for the year ended 1979 September 30. The bank subsequently informed the Association that based on the advice it had received from its auditors benefits under the scheme would be taxable.*

[26] The bank has not said that this history is not true and even if it did the minutes cited above would be difficult to overcome. The minutes say that it was agreed in principle that PSS would be implemented and the matter would be referred to a

firm of accountants and lawyers. It is against that background that the 1980 special payment was made. Then bank's witnesses do not provide any of this context which the documentation in the case clearly establishes.

[27] It is little wonder that by October 19, 1979, the Association's then secretary a Mrs Sheila A Sheriff wrote gleefully:

> *Profit Sharing*
>
> *We have successfully negotiated a payout of profits for year 1978/79 for all pensionable staff on record at 30th September 1979, equivalent to approximately 6% of salary. In order to ease the tax burden of each member, we have agreed to accept payment in January pay-day, which day will be conveniently brought forward.*
>
> *This agreement was reached after long and tedious deliberations with the bank during which some consideration had to be given to carry forward deficit of $4.2 million on the profit and loss account. Consequently, we agreed to treat profit sharing for 1978/79 in a special manner.*
>
> *We continue profit sharing negotiations for future years and our goal is to have the bank agree payment in a tax free manner.*

[28] No witness from the bank has said that what Mrs Sheriff wrote was in accurate. This was being written before the January 1980 payment. This was more than a year before Circular 33. This is not a letter written in some dark corner. It was sent to all branches. In other words, the Association spared no effort in broadcasting its success. Mrs Sheriff is stating the context and basis of the January 1980 payout.

[29] Not only that, but Mrs Sheriff was able to give details of the agreement. A quick look at Mrs Sheriff's later tells the tale. She said the payment was 6% of salary. It was for the year 1978/79. It was to be paid in January pay day. Hence Mr Stewart's letter of November 27 stating that special payment was made in January 1980. Mrs Sheriff added that negotiations for future years regarding PSS were to continue and the Association's goal was to have the bank agree payment in a tax free manner. There is no contemporaneous document from the bank contradicting or casting doubt on the general reliability and accuracy of the Association's stance on the PSS.

[30] This position stated by Mrs Sheriff is consistent with the an agreement for PSS which would be negotiated year by year in terms of amount but what was not the subject of negotiation was whether there was in existence a PSS agreed between the Association and the bank.

[31] The Association's documents do not stand alone. There are minutes of a board meeting of the bank dated 23rd September 1980. It reads in relevant part:

> *PROFIT SHARING SCHEME*
>
> *As you are aware, we agreed in principle in 1977, to the creation of a profit sharing scheme. Although a form of payment was made earlier this year based on our very good results for the year ending 30th September 1979 we had not put together a formal scheme as efforts were being made to find a channel to provide a tax-free benefit.*

[32] Thus the bank's board meeting confirms that an agreement was reached in principle on the PSS but the formal rules were not worked out. The payment in January 1980 was consistent with and reflected that understanding that the employees would be paid PSS. This was a negotiated position and not one arising from pure unsolicited and unprompted benevolence of the bank.

[33] In the same minutes of 23rd September 1980 rules were suggested. The most important ones for present purposes are no 2 and no 6:

> *The maximum annual amount shall be 4% of the consolidated profits before tax ~~as shown in the published accounts~~ for each year; provided such net profit is in excess of 25% of issued share capital plus reserve*
>
> *The Scheme shall not form part of any contract of employment between the bank and any of its employees, and shall not confer on*

any employee any legal or equitable right whatsoever against the bank directly or indirectly nor give rise to any cause of action in law against the bank. (Emphasis added)

[34] There is a strike through on the exhibited document in ink. Written in ink as replacing the strike though are the following words: *as agreed by the auditor before making allow (sic) for the scheme payment.*

[35] It is vital to note that this was a board minute and not an agreement with the Association. The statement in these minutes says 'we agreed in principle in 1977 to the creation of a profits sharing scheme.' This is consistent with the stated outcome of the reconciliation meeting held at the Ministry of Labour on July 12, 1977. Thus whether from the Association, the Ministry of Labour or the bank's records (not exhibited by Mr Cummings or Mr Saddler), all are agreed that the PSS was agreed in principle. The absence of a formula led to year by year negotiation of the amount but not the principle.

[36] After this board meeting there was a letter written dated October 3, 1980 to the Chairman of the Association. The copy of the letter exhibited to the Mr Cummings' affidavit is incomplete. It is not known from an examination of the document who signed it but it is the bank's document and the bank presented it as part of its case. The court will therefore conclude that the bank accepts that the document is genuine. The letter is captioned 'PROFIT SHARING SCHEME.' It opens with these words:

We are pleased to advise that after much deliberation we have been able to arrive at a suitable profit sharing scheme for the staff. The Rules of the Scheme are as follows:-

1) <u>Beneficiaries</u>

2) <u>Amount</u>

The maximum amount shall be 4% of the consolidated fund before tax, as shown in the published accounts each year; provided such amount is in excess of 25% of the issues share capital plus reserves.

This amount shall be paid as soon as practicable after 30th September each year and after consultation with the bank's auditors who will make allowance for such payments in the relevant year's accounts.

[37] Nowhere in the part of the exhibited is there any mention of clause 6. It may be that the board approved the recommendation that the PSS not form part of the contract of employment but there are no minutes from the board indicating what its decision was on 23rd September 1980. Also what was struck out in the board minutes was not struck out in this letter and neither was the addition that was made in ink included in this letter.

[38] There is a memorandum dated October 28, 1980 to the board of directors with the heading 'Staff Profit Sharing Scheme.' It reads as follows

The Board approved the scheme as set out in the paper submitted to the meeting held on 23rd September 1980. However, it is felt that the wording of rule 2 – "Amount" requires some clarification in order to avoid any misunderstanding in interpretation at a later date.

The present rule reads:-

"The maximum annual amount shall be 4% of the consolidated profits before tax as shown in the published accounts for each year; provided such profit is in excess of 25% of issued share capital plus reserve."

It is felt that this should be amended to read:

"The maximum annual amount to be distributed shall be 4% of the consolidated profits before tax, as agreed by the auditors before

making allowance for the payments under the scheme, provided such profit is in excess of 25% of shareholders' fund i.e. issued share capital, reserve (excluding capital reserves) and retained earnings as shown in the audited accounts of the immediately preceding financial year."

[39] There is letter dated 5th November 1980 addressed to the Chairman of the Association signed by Mr Rex James, General Manager. It is dealing with the PSS. It begins

> *Having further examined the mechanics of the profit sharing scheme it was considered prudent to refine certain areas of the scheme as outlined in our letter of 3rd October 1980.*

[40] Thereafter come the rules of the PSS. Clause 2 is as stated in the memorandum to the board dated October 28, 1980 with an additional paragraph which is:

> *This amount shall be paid as soon as practicable after 30th September each year after consultation with the bank's auditors who will make allowance for such payments in the relevant year's accounts.*

[41] There is the contentious clause 6 in the 5th November 1980 letter. The letter ends with this paragraph:

> *The foregoing is considered to be the official position of the bank as far as the profit sharing scheme is concerned, and all staff will be advised of the scheme by way of a general staff circular.*

[42] There follows a document dated November 7, 1980 headed 'MEMORANDUM TO THE MANAGING DIRECTOR' and the sub heading is 'PROFIT SHARING.' At the end of it there is in type 'General Manager.' The writer informed the GM that he met with Association to discuss the PSS. He said that the Association objected to most aspects of it. He noted that the Association wanted to make the scheme part of regular negotiations. However, the writer expressed the view that 'payments under such a scheme should be decided by the directors of the bank and their position should be similar with the individual shareholder of a company who is not able to dictate his dividend on his ordinary shareholding.' This is the bank's view of the matter. It appears that the bank's official position was not readily acceptable to Association.

[43] This stands in sharp contrast with the Association's position stated in a letter, dated November 12, 1980, from the Association. Mr T W Golding, then chairman of the Association wrote the bank referring to the bank's letter of November 5, 1980 and to a meeting held on November 6, 1980. The opening paragraph says that the Association was taking 'this opportunity of re-stating [its] position regarding the proposed profit sharing scheme.' The letter outlines a number of proposals. At page 2 of the letter Mr Golding stated that the Association expected that the percentage share of profits to be distributed will be no less than what was paid out for the period ending 30th September 1979. The letter ended in this way.

> *ITEM 6 – PROFIT SHARING SCHEME AS PART OF CONTRACT*
>
> *We ask that you delete this item.*
>
> *As you are no doubt aware, the [PSS} was a part of the very first labour contract between the bank and the Association, and it has never been excluded from subsequent negotiations. Moreover, we regard the [PSS} as an integral part of our package and would therefore not be favourably disposed to its exclusion from our contract.*

[44] The Association had not accepted the bank's suggestion that the PSS should not form part of the contract of employment of the employees. The Association asserted that the PSS was part of the 'the very first labour contract between the bank and the Association.' Mr Golding was standing on exceptionally strong ground when he made that assertion. The minutes for the Ministry of Labour indicated that the PSS was agreed in principle. The only thing remaining was a formula or some other method of deciding the amount of the payout. In the absence of that then clearly the amount would have to be negotiated. From this court's understanding of the history of the matter and having regard to the

documentation produced by the Association and not refuted by the bank with any credible evidence, it is difficult to see why the bank would be seeking to introduce clause 6 when the horse on this issue had already bolted. What is clear is that there was never a time, up to this point, when the Association accepted that the PSS should not form part of the contract of employment.

[45] In another memorandum to the board dated 25th November 1980 by the general manager it was noted that the Association felt 'strongly that profit sharing should be a part of their contract.' He recommended that the PSS 'should be at the sole discretion of the Board, and as such should not be an item of negotiation.'

[46] In a memorandum to the board dated 16th December 1980, the general manager, staff & administration wrote informing the board that while the PSS remained unresolved, the Association 'now accepts that the bank has the right to determine the terms of the profit sharing scheme.' There is no record, other than this statement from the bank, supporting this statement. Certainly no written record has been produced indicating that the Association had a complete turn around on its position communicated as recently as 12th November 1980 by Mr Golding. Based on all the evidence in the matter the court does not accept that the Association ever changed its position. The bank has not produced any witness or any documentation other than the general manager's self serving assertion that the Association had changed its position. This belief of the general manager seemed to have been unique to him. From this recommendation it means that either someone in the bank was intending to disregard what was agreed in principle from 1977 or the bank was completely ignorant of outcome of the meeting at the Ministry of Labour. This latter position seems most unlikely given that bank was represented by eminent Queens Counsel and two very senior officers of the bank. It is safe to say that the general manager did not accurately represent to the board the Association's position when he wrote the memorandum of 16th December 1980. It was and is inconsistent with every single document in the bundles placed before the court. Be that as it may that was the bank's position when Circular 33 was issued on 17th December 1980.

[47] To summarise the history of the matter so far:

(1) The PSS was raised by the Association in a claim submitted to the bank in 1977;

(2) The bank at the time of the claim was Barclays Bank DCO and the Association was the Barclays Bank Staff Association;

(3) The negotiations broke down at the local level and eventually the Ministry of Labour intervened;

(4) At the meeting of the parties held at the Ministry of Labour the bank and the Association indicated to the chairman of the meeting that the PSS was agreed in principle;

(5) A set formula for the payment of the PSS was not worked out in 1977;

(6) There was a payment in January 1980 consistent with the understanding that the employees were to benefit from the PSS;

(7) The Association never accepted that the PSS should not be part of the contract of employment;

(8) The view expressed by the general manager that the Association accepted that the bank had the right to determine the terms of the PSS is not supported, directly or indirectly, by any contemporaneous document. At best it seemed to have been the general manager's belief but how he came to have that view is not readily apparent;

(9) Circular 33 was issued by the bank on 17th December 1980;

(10) Clause 2 seemed to have been accepted by the Association but clause 6 was not.

[48] The next phase of the history of the matter begins in 1981.

The subsequent history 1981 to 1994

[49] It is plain that Association and the bank had locked horns over whether the PSS should be part of the contract of employment. It seems clear to the court that over time the understanding of what should happen under the PSS had changed over time. The court will now indicate the history of which it has just spoken.

[50] Mr Cummings states refers to Heads of Agreement between the bank of the Association dated August 2, 1982 where it was expressly stated that 'the bank is unable to agree to this proposal.' The evidence does not indicate what the proposal was.

[51] According to Mr Cummings, the bank decided to pay the PSS in a manner that ensured that one month's salary was the basis of the payout. This is stated in a Heads of Agreement dated June 1991 signed by the bank and the Association. Under the PSS portion of the agreement it is stated that

> *It has been agreed that profit sharing will be a minimum of one (1) month's salary.*

[52] Mr Cummings states that this Heads of Agreement dated June 1991 was effective until September 30, 1992. This strongly suggests that some claim was made and an agreement arrived at. What this means, at the very least, was that, prior to June 1991, it was not agreed that whenever PSS was activated the minimum amount payable was one month's salary.

[53] Mr Cummings noted in his affidavit that there was no explanation for what he called 'the seeming change in the position taken by the bank in 1991 to add the reference to the Profit Share amount in the Head of Agreement.' Mr Cummings observed that this inclusion 'guaranteed the staff the payment of the profit share of a minimum of one month's salary until September 1992.'

[54] From the review of the matter prior to 1981 it is not that the bank changed its position. The real truth is that the bank had agreed in principle as far back as 1977 to payout under a PSS.

[55] The reason for what Mr Cummings calls 'the seeming change in the position of the bank' is perhaps to be found in Mr Dunbar McFarlane's memorandum to the board dated 13th December 1988 which reads in relevant part:

> *...At the last round of negotiations, it was agreed that, subject to the approval of the board, the unionised staff would be guaranteed one month's pay in 1988. This offer was made in response to the Association's claim for the agreed 6% to be increased to 12%.*

[56] In light of this is it came as no surprise to the court to read in staff circular 467/1995/S, dated December 8, 1995:

> *The profit sharing for year ended 30/9/95 amounted to 2.63 weeks. However, based on the agreement with the NCB Staff Association that members of staff represented by the Association will be paid a minimum of 4 weeks as profit sharing, the payout this year will represent a maximum of 4 weeks (sic) salary.*

[57] Thus by 1995 there can be no doubt that the bank felt that one profit sharing was triggered the minimum amount payable was 4 week's salary.

[58] It is important for the court to deal with an aspect of Mr Cummings' history. He notes in paragraph 12 that the Association and the bank agreed in a Head of Agreement dated August 1, 1980 (effective until 30th June 1982) to have further discussion on the PSS. From the thrust of the Mr Cummings' oral evidence he clearly understood this to mean that it was in 1980 that there was any agreement of any kind regarding a PSS and Circular 33 represented the culmination of these efforts. However, as can be seen Mr Cummings was not knowledgeable about the history of the matter from 1977. In fact, it was the court that invited Mr Cummings to examine the documents during a break in proceedings. On his return he accepted that he had not known of the minutes of the meeting held at the Ministry of Labour in 1977. When he accepted Mrs Ducasse's paragraph 6 as accurate he thought she was referring to the bank's position in 1980 but it now very obvious that when she said the bank agreed to retain the PSS she was referring to the agreement in principle reached in 1977 that the bank would payout under a PSS. In effect, Mr Cummings agreed with Mrs Ducasse but he did not understand what he was agreeing to.

[59] There is one thing Mr Cummings is accurate on that is that clause 6 'has never found favour with the Association and it has vehemently objected to its inclusion as a term and condition of the scheme' (para 8).

[60] The next significant development in Mr Cummings' history of the PSS is found at paragraph 26 where he stated that Mr Eldon D. Forrest, Assistant General Manager, by staff circular No 41/1992/P, dated 3rd December 1992, indicated that PSS would be paid out for the year ended September 30, 1992 to all clerical and non-clerical staff. The circular indicated that the PSS was not part of the any contract of employment between the bank and any of its employees. What we see here is an extension of the class of persons who would benefit from the PSS. This circular prodded the Association and this led to a letter from that body.

[61] Mr Paul Stewart in a letter dated May 7, 1993 to Mr Eldon Forrest, Assistant General Manager (Staff), referred specifically to staff circular 41/1992/P dated December 3, 1992 which stated that the PSS was not part of the contract of employment between the bank and its employees. The letter reads:

> *We note that the following clause continues to be a part of these circulars:*
>
> > *The Scheme shall not form part of any contract of employment between the bank and any of its employees, and shall not confer on any employee any legal or equitable right whatsoever against the bank directly or indirectly nor give rise to any cause of action in law against the bank.*

From memory; this matter was discussed in December 1991 with Staff Department, when it was agreed that this clause would not form part of future circulars.

Please confirm that this was in fact an error, and would therefore not be embodied in future circulars.

[62] The letter was copied to Mr Jeff Cobham, Deputy Managing Director, Staff & Administration.

[63] Mr Forrest writes back to Mr Stewart in a letter dated June 2, 1993. He expressly refers to Mr Stewart's May 7, 1993 letter and states:

We regret that this paragraph again crept into the terms and general conditions of our Circular (sic) on the 1992 PSS.

You have our assurance that it was indeed an error.

[64] Mr Forrest must be taken as expressing the bank's considered position and not his personal views. Although Mr Stewart's the letter was copied to Mr Cobham there is no evidence that Mr Cobham disagreed with the view expressed by Mr Stewart. Mr Forrest's response uses the first person plural 'We' to begin the letter. He is not expressing a personal position but the position of the bank.

[65] After this exchange of letters between Mr Stewart and Mr Forrest, Mr Cummings tells us that the offending clause 6 was not in the bank's circular No 45/1993/P dated December 6, 1993 and circular No 54/1994/P dated November 29, 1994. Mr Cummings states that he did not have the benefit of circulars between 1995 and 2002 to say whether or not the clause continued to be omitted but he located several Heads of Agreement in which it is stated that 'all other terms and conditions remain changed.' From Mr Cummings' perusal of the bank's records the offending clause 6 disappeared from the bank's circulars from 1993 after the exchange of letters. There is no evidence that the clause appeared in any circular, as distinct from any letter, from the bank between 1993 and 2002. There is no evidence that the bank took issue with Mr Forrest's position on the clause as indicated in his letter to Mr Stewart until Mr Dunbar McFarlane's letter of

December 11, 2000. More will be said about this letter later on in these reasons for judgment.

[66] Mr Cummings said under cross examination that he has not seen clause 6 in any circular in the bank since he began working there in 2004 and he has not seen it in any circular since Mr Forrest's letter. In other words, clause 6 has not appeared in any circular for 24 years beginning in 1993.

[67] Other than Mr McFarlane's letter of December 11, the abandoned judicial review, and the present claim there is no evidence that the bank has placed reliance on clause 6 since Mr Forrest's letter of June 2, 1993.

[68] Mr Cummings says that this clause, clause 6 - all other terms and conditions remain changed – must be looked in the context of what was happening at the time. He said that before the Industrial Disputes Tribunal ('IDT'), the award No 20/98 dated August 5, 1998 was silent on the PSS. The award No 34/2000 dated August 14, 2001 made no award on the PSS. In addition he said that the Heads of Agreement dated November 21, 2002 and contained in staff circular /2002/S was silent on the PSS and 'there was no statement that the previous terms and conditions remained unchanged thereby signaling a departure from the position in the 1990s.' This position by Mr Cummings is untenable because to say that now award is made cannot mean that there was a change of position from what previously existed.

[69] It is noteworthy that Mr Cummings is not able to produce any record from the bank refuting Mr Forrest's letter of June 2, 1993 or any written documentation of any kind indicating that the bank ever changed its position from what was indicated in Mr Forrest's letter.

[70] Mr Saddler, the man who was intimately involved in the PSS from the bank's side either as part of the team which dealt with it or him personally doing the calculations and who has been in the bank for over twenty five years has not

suggested that Mr Forrest's letter was ever withdrawn or departed from by the bank.

[71] It is appropriate to mention Mr Scott's QC's cross examination of Mr Stewart on this point. Mr Scott took Mr Stewart to a Heads of Agreement dated August 1980 and specifically to the section dealing with PSS. That portion says that further discussions were to be held.

[72] Mr Stewart was next directed to the December 17, 1980 circular where it was observed that it was signed only by the bank.

[73] The next document put to Mr Stewart was a letter dated November 12, 1980 signed by Mr T W Golding, then Chairman of the Association to the bank in which it was said under a heading called 'PROFIT SHARING SCHEME AS PART OF CONTRACT' 'We ask that you delete this item.' The court has already placed Mr Golding's letter in context earlier in these reasons for judgment and what is clear is that Mr Golding was objecting to the bank's position that the PSS should not form part of the contract of employment.

[74] Mr Stewart was taken to a Heads of Agreement dated August 1982. Under PSS it is stated 'the bank is unable to agree to this proposal.'

[75] He was directed to Heads of Agreements dated December 21, 1992 and January 24, 1995. No mention is made of PSS in these documents but there is the expression in both "All other terms and Conditions remain unchanged.'

[76] Learned Queen's Counsel took Mr Stewart to the IDT Award No 34/2000 where it said, as noted above, no award made in respect of PSS. The next award referred to was IDT Award No 29/2013 in which it is recorded that no award was made under PSS.

[77] What the court will say is that the documentation from both sides is incomplete. Despite this, what is undeniable is that the Association was not happy with the initial position of the bank that clause 6 of Circular 33 was present. It is equally

undeniable that Mr Stewart wrote specifically to the bank (Mr Forrest) asserting that clause 6 was no longer part of any understanding between the bank and the Association since 1991. The bank wrote back through Mr Forrest, affirming Mr Stewart's position and went further to say that the return of clause 6 was an error. What this must mean is that despite any extant document saying that clause 6 was removed, there is no doubt that there was discussion about it and the bank and the Association did in fact agree to its removal at some point prior to Mr Stewart's May 7, 1993 letter.

[78] It is also the case that the minimum of one (1) month's salary was in fact captured in a Heads of Agreement between the bank and the Association in June 1991. What Mr Scott has pointed out is that no awards were made by the IDT but that fact cannot be taken too far since there is no evidence of what exactly was being sought. Mr Cummings has not been able to provide any documentation saying that the one month's minimum payment was changed. Mr Scott's submission on this point was that the only thing the June 1991 agreement captured was that whenever PSS was activated a minimum of one month's salary was guaranteed, nothing else.

[79] Mr Scott is asking the court to say that the no award by the IDT meant that PSS was not part of the contract of employment. Respectfully, the court cannot accede to that submission because no award simply means that it say, that in respect of the head of claim the IDT made no award which means that was there before continued. Thus if it was an entirely new head of claim and no award was made then that head of claim was not accepted. However, if it was an existing head of claim and no award was made then that means that whatever was there before continued.

From 1995 to 2000

[80] In a letter dated April 23, 1996, Mr Jeffrey Cobham, Deputy Managing Director, wrote to Mr Paul Stewart and told him that the bank had not done well. He stated

that when the guaranteed minimum payment of four week's pay was agreed no one thought the group would have been in the situation it was in and in light of that the PSS needed to be reviewed since the bank can no longer afford the minimum of four week's pay regardless of who well the group does. Mr Cobham stated that the group may well record a loss and in light of available data the group 'will come nowhere close to achieving its profit target this year' and 'indications are that it will do worse than last year.'

[81] The court makes this observation about Mr Cobham's letter. If it were the case that the PSS was not part of the contract of employment why write this letter and if it were to be written why not remind the employees that the PSS was not part of the contract of employment and it would appear that for the year in question the profit threshold that might trigger the PSS might not be met? The tone of the letter suggests that the bank was operating on the premise that it had to pay the four week's minimum once the threshold was met. In effect, this letter is not written in at tone that suggest that the payment was purely discretionary and in the bank's sole discretion. If the bank genuinely understood that the payment was completely within the bank's sole discretion why would there be any need for Mr Cobham to say that the PSS had to be reviewed since it was no longer affordable regardless of how well the group did? If it were the case that the bank genuinely thought that the PSS was not part of the contract of employment there was no need for this letter. All the bank would needed to have said was that no PSS payments would be made this year because the bank is of the view that it would not be in the best interest of the bank even if the formula was triggered. The letter would have reminded the employees that the PSS, in any event, was not part of the contract of employment. The tone of the letter is more consistent with view that the PSS was part of the contract of employment.

[82] The letter from Mr Cobham is more consistent with Mr Forrest's reply of June 2, 1993 and consistent with the understanding that clause 6 was to be removed which strongly suggests that both parties regarded PSS as part of the contract of employment. The court also observes that the tone of Mr Cobham's letter is not surprising given the fact that he was copied by Mr Stewart in his letter of May 7, 1993 challenging the inclusion of clause 6. In other words Mr Cobham was fully aware of the Association's position on clause 6, three years before Mr Cobham wrote his letter, and the bank's official response to Mr Stewart's letter of May 7 came from Mr Forrest and there is no evidence that Mr Forrest was writing out of turn.

[83] Mr Dunbar McFarlane, Managing Director, wrote to Mr Stewart in a letter dated 21st July 1998. In that letter Mr McFarlane stated that a number of items were identified for change in light of the financial difficulties of the bank. One of the items listed was the PSS. This is what the managing director had to say about that item:

> *'Under the existing arrangement profit sharing trips in once the Group's consolidated pre-tax profit exceeds 25% of the issued share capital plus reserves. Given the proposed injection of equity into the group, it may be opportune for us to re-visit this arrangement.*

[84] This letter is more consistent with the letter of Mr Forrest of June 2, 1993 and Mr Cobham's letter of 23rd April 1996. The clear tone of this letter suggests that Mr McFarlane accepted or honestly believed that once the threshold was met the PSS was activated and payouts had to be paid. There is no hint in the letter that Mr McFarlane thought or even believed that the bank, in 1998, had a discretion whether or not to pay once the threshold was met. Had he thought so, Mr McFarlane would simply have said that the bank, in the exercise of its discretion, would not payout under the PSS during the period of financial difficulty. However, by December 2000, it appears that Mr McFarlane had a change in perspective.

[85] There is a letter dated December 11, 2000 from Mr Dunbar McFarlane of the bank to Mr Paul Stewart dealing with the PSS in which Mr McFarlane repeats clause 6 and states that from its inception the PSS was always at the bank's discretion. This is the first official communication from the bank since Mr

Forrest's letter asserting that clause 6 was alive and well and would be relied on by the bank.

[86] It should be noted that Mr Dunbar's December 11, 2000 letter was written in response to Mr Stewart's letter of November 27, 2000 in which Mr Stewart refers to the 'right to profit sharing' 'if the level of profitability is sustained.' The court will refer to November 27 letter in detail at this point.

[87] There is a letter dated November 27, 2000 from Mr Stewart to the bank's board. More will be said about this letter later but the point for now is that Mr Stewart, in setting out his history of the PSS, stated that the first PSS payment under scheme was made in December 1980 in respect of profits for the financial year ended September 30, 1980. According to Mr Stewart at the time the group comprised NCB Bank, the parent company, and subsidiaries which were (a) National Commercial Mortgage & Trust Limited, West Indies Trust Company Limited, Carp Corporation Limited and Noxid Limited and its subsidiary Jamaica Honey Company Limited.

[88] Mr Stewart asserted that there were acquisitions and re-organisations and as at September 30, 2000, the NCB Group comprised a number of companies including Edward Gayle & Company Limited (50.5%), Omni Insurance Services Limited (74%) and National Commercial Bank Jamaica Limited (60%).

[89] He added that when in 1986 NCB Group replaced the bank as the parent company 'the consolidated profits for the NCB Group, before the provision for payment out of profit sharing and taxation as well as the NCB Group shareholders' funds was substituted for the National Commercial Bank Jamaica Limited consolidated profit before provision for profit sharing and taxation and shareholders' fund in the formula.' Then comes these vital paragraphs:

> *Under these arrangements profit sharing is triggered once the NCB Group's consolidated profit exceeds 25% of the shareholders' funds of the NCB Group as reflected in the audited accounts for the immediately preceding year. That is to say,* ***profit sharing is***

payable once the level of profit exceeds a 25% return on the shareholders' funds due to all shareholders of the NCB Group. (emphasis in original).

Payment of Profit Sharing

Since inception payment has been made to staff under the Profit Sharing Scheme as follows:

Year ending September 30:'

1980 – 85 National Commercial Bank Jamaica Limited (Parent Company)

1986-95 NCB Group Limited (Parent Company)

You will recall that the Association agreed to a nil increase in salaries for the contract year beginning 1998 October 1 in light of the loss made by the Group for financial year ended 1998 September 30. In 1999 although the right to Profit Sharing was triggered based on the agreed formula the Association opted to forego this payment. (emphasis in original)

...

...

It is also important for you to be aware of the organisation's practice in the application of the Profit Sharing formula over the past twenty (20) years. ***My preliminary calculations clearly show that the Profit Sharing is payable, based on the 'draft audited' financial statements presented at our last Board of Directors meeting*** *and my only disappointment at this stage is that by delaying the consideration until 2000 December 21 the board will be effectively denying itself the opportunity to generate staff goodwill.* (emphasis in original)

...

I respectfully ask for a response by Friday, 2000 December 8 (emphasis in original)

[90] No response came by December 8 and this led to a follow up letter of December 8, 2000. That letter said:

> *As you are aware we wrote to all the Directors of the Bank by letter dated 2000 November 27 outlining the reason why Profit Sharing is payable based on the Group's financial result for the year ended 2000, September 30. We had indicated to the Directors that the Association need to have a response by 2000 December 08, but we are yet to receive their response at the time of writing.*
>
> ***Our members are anxious to know the time of this payment, as this information would have already been advised as happened in the past when profit sharing is due.*** (emphasis in original).
>
> ...

[91] Mr Dunbar McFarlane responded on behalf the bank in a letter dated December 11, 2000. In that letter Mr McFarlane acknowledged receipt of both letters of November 27, 2000 and December 8, 2000. He repeated clause 6 from Circular 33.

[92] This letter from Mr Dunbar McFarlane makes no reference to the bank's earlier letter from Mr Forrest in which the offending clause 6 was said to be included in error in a December 1992 circular. The final point on this is that in reexamination Mr Cummings stated to Mr Scott QC that other than Mr McFarlane's letter he was not able to find any correspondence from the bank asserting clause 6. From what has been said earlier, Mr Dunbar McFarlane's December 11, 2000 letter – similar to General Custer's last stand – was indeed the first time since June 2, 1993 the bank has sought to rely on clause 6 upto and including the year 2001 when the bank launched judicial review proceedings to stop the IDT was assuming jurisdiction over a dispute between the bank and the Association. Finally, in answer to the court Mr Cummings confirmed that other than Mr McFarlane's letter he has not seen any documentation of any kind from any source of the

bank relying on clause 6 since Mr Forrest's letter of June 2, 1993. He said that bank is relying on clause 6 in the 2012/2014 negotiations with the Association.

[93] The December 11, 2000 letter from Mr McFarlane does not refute the history the matter as outlined in exceptional detail by Mr Stewart except to resurrect clause 6. Mr McFarlane does not say that any of the subsidiaries including Edward Gayle were not subsidiaries as stated by Mr Stewart. The import of this is that this question of minority interest was around before 2002.

[94] Mr Cummings referred to Mrs Ducasse's affidavit and says that paragraphs 15 to 18 of her affidavit are true. What did she say? She said:

> *15. For at least the past sixteen (16) years, without exception, the defendant's extended [external] auditors have been the accounting firm PricewaterhouseCoopers.*
>
> *16. In December 2002 the Board of Directors approved the September 2002 audited financial statements for the banking group.*
>
> *17. By letter dated December 23, 2002 the then managing director of the bank, Mr Aubyn Hill sent a letter to staff members informing them that the external auditors provided the board with the opinion, after using what he states is the established formula, that 'no profit share is possible' for the year ending September 30, 2002.*
>
> *18. The formula that he sets out in the letter included a line that speaks of deducting minority interests in Edward Gayle and Company Limited and I exhibit hereto as "JD -7" a copy of the said letter dated 23rd December 2002.*

[95] Mr Cummings then stated this came about because of the change in accounting standards and in light of that change in standards 'the bank was advised that [minority interests] should not be included in the consolidated profits before tax for the purpose of determining whether disbursement is due under the Profit Share Scheme' (see paragraph 31). This will be addressed shortly but the court must deal with the judicial review application by the bank.

The judicial review application

[96] In 2001 the bank sought judicial review of the decision to refer a dispute between itself and the Association. In support of this application Mr Dunbar McFarlane, then Deputy Chairman of the Board of Directors swore at paragraph 7 that the 'proposal for the creation of a profit sharing scheme was first submitted for consideration by the applicant's board by memorandum captioned "Board Meeting 23rd September 1980 – Profit Sharing Scheme.". Stunningly, Mr McFarlane's affidavit makes no mention of the meeting at the Ministry of Labour between the Association and the bank where Mr Emile George QC and the Right Honourable Hugh Lawson Shearer, agreed that the PSS was agreed in principle. It is difficult to find any reasonable and rational explanation for this omission other than an incomplete record of the whole matter on the part of the bank. Mr McFarlane failed to mention that the PSS was in fact mentioned in a wages and benefits claim in 1977. In Mr McFarlane's affidavit is to be believed then one would be left with the now established incorrect view that the PSS only arose since 1980.

[97] Mr McFarlane's affidavit was met with a robust response by Mrs Jean Ducasse. This forced a response from Mr McFarlane. He referred to paragraph 4 of Mrs Ducasse's affidavit. At paragraph 4 Mrs Ducasse referred to the meeting at the Ministry of Labour of 12th July 1997 at which It was agreed in principle that the employees would participate in a PSS. Mr McFarlane says that at that time in 1977 he was a representative of the Association and '*it is his recollection that prior to the sale, the Board of Directors of the Applicant had agreed in principle to the introduction of a Profit Sharing Scheme. However, the precise terms of the Profit Sharing Scheme were not settled on finalised until 16th December 1980.*' This way of phrasing the matter is potentially misleading. It may give the impression that it was the board that was the sole initiator of the PSS. Mr McFarlane did not deny the conciliatory meeting took place on 12th July 1977. He did not explicitly say that the bank and the Association agreed in principle to the PSS. He could not because the minutes of the meeting of July 12, 1977 at the

Ministry of Labour actually exist and were in existence at the time of the aborted judicial review proceedings.

[98] In respect of Mr Forrest's letter Mr McFarlane states that that letter could not have made any amendments to the rules and was simply an administrative arrangement that clause 6 would not appear in future circulars. The court does not accept this explanation for the absence of clause 6 in future circulars. It is a difficult explanation to swallow having regard to the fact that the Association had always been objecting to it and wished to have it removed. Why would the Association be satisfied with simply a non-recital of the clause when it had always objected to it? What would its non-recital in future communication achieve? None of the bank's witnesses in this case has sought to advance this explanation. Not even Mr Cummings has grasped at such an explanation. The most likely explanation, on a balance of probabilities, is that the bank had in fact altered its position by Mr Forrest's letter, if not before.

[99] It appears that Mr McFarlane was simply trying to explain away the true import and effect of Mr Forrest's letter. Clause 6 was definitely removed and Mr Forrest's letter confirmed that. This means that, at the very latest, June 2, 1993, the bank and the Association agreed that the terms of the PSS would be altered by removing clause 6. The effect of this is that the PSS became part of the contract of employment of the employees from at least June 2, 1993. The court also concludes that having regard to Mr Forrest's response to Mr Stewart's letter it is the case that at the clause was removed from 1992. Recall that Mr Stewart's letter was in response to the December 1992 circular. The court's final position is that clause 6 was removed in 1992 but since the court cannot say precisely when clause 6 was removed, the court will use January 1, 1993 as the effective date of removal. Mr Forrest's letter was confirmatory of a prior position taken not communicating the actual decision. The court says this because his letter did accept that clause 6 should not have been in the December 1992 circular. If that date is incorrect then the clause was removed no later than June 2, 1993 but this is not the preferred position of the court.

Was the PSS part of the contract of employment?

[100] The Association lists a number of documents which it says supports its position that the PSS was part of the contract of employment. The court will now examine them.

[101] There is a circular dated December 11, 1989, signed by the managing director, which addressed two items: profit sharing and productivity award. In respect of the profit sharing the circular noted that there was disagreement among the staff as to the size of the payment and some were contemplating industrial action. The circular added that the bank 'can only assume that those who are numbered among this group are acting in ignorance of **what has been agreed with the Staff Association and practices over the years'** (emphasis added). The managing director suggested that an urgent staff meeting be called and the matter placed in the 'proper perspective using the following, using the following as a guide.' The guide was stated to be

> *There is a profit sharing agreement in force. Under this agreement 6% the group's pre-tax profit is shared among staff on record at the end of September. The amounts paid out under this scheme over the past three years were*
>
> | | |
> |---|---|
> | *1987* | *$3,601,426* |
> | *1988* | *5,969,111* |
> | *1989* | *7,842,928* |
>
> *It should be noted that in 1988 and again this year, we very generously decided to 'top up' the figures to ensure that staff would be paid a month's gross salary (inclusive of taxable allowances). In previous years the amounts paid, when expressed in weeks, were calculated on basic salaries only. This means that all staff in the supervisory group (53% of clerical staff) benefitted (sic) from the extra cost to the bank.*

[102] It is to be noted that this circular speak to a month's salary being paid under the PSS. This was two years before the one month's salary standard was formally captures in the Head of Agreement between the bank and the Association in 1991. This means that the one month's payment of the PSS formally agreed in 1991 had not history and was not a figure plucked from thin air in 1991.

[103] The letters passing between Mr Stewart and Mr Forrest have been examined already and need not be repeated.

[104] In a December 8, 1995 circular, circular No 46/1995/S the bank indicated that PSS for the year ended September 30, 1995 amounted to 2.63 weeks but based on 'the agreement with the NCB Staff Association that members of staff represented by the Association will be paid a minimum of 4 weeks as profit sharing, the payout this year will represent a maximum of 4 weeks (sic) salary.' At the very least the bank felt bound to pay a minimum of 4 week's salary once PSS was activated. This is now post 1991 when the one month's minimum standard payout was agreed.

[105] However, by 1993 the bank had shifted ground and accepted the implicit assertion of Mr Stewart that the PSS had become part of the contract of employment and this explains why the clause 6 never appeared in any bank circular and indeed the bank never asserted it again until Mr McFarlane's letter of December 11, 2000. The disappearance of clause 6 from all circulars was not an administrative convenience. If nothing else Mr McFarlane's affidavit confirms Mr Cummings' evidence that clause 6 disappeared from all circulars and has continued to be so.

[106] In his written submissions Mr Scott is asking the court to conclude the PSS was not part of the contract because (a) the IDT made no award under the PSS and (b) the evidence proffered by the Association is weak. In respect of (a) the court has already stated its position. Regarding (b), the court is of the view that it is the cumulative effect of the little bits of evidence that has assisted the Association.

[107] Since Mr Forrest's letter was written during the financial year 192/1993, the court finds, on a balance of probability, that by the end of the financial year ending 30th September 1993 that two things were agreed between the bank and the Association: (a) the PSS had become part of the contract of employment and (b) whenever it was payable by virtue of the threshold being met, the minimum payment was 4 week's salary.

[108] The court now examines the evidence adduced by the bank where it seeks to say that it was a change in accounting standards in 2002 that led it to deduct minority interests which led to the position that no payout was possible under the PSS.

The accounting adjustment in September 2002

[109] This aspect of the case raises the important matter of whether the PSS was triggered in the year 2002. The bank has put forward an explanation for the non-payment of the PSS which simply does not stand up to even the most careless scrutiny.

[110] The court will give some background to this. What the court is about to say is common ground. Clause 2 uses the expression 'consolidated profit.' The concept of consolidated profits, it is agreed, only arises where there are two or more companies. One does not have consolidated profits in the context of a single company. It is also common ground that minority interests are accounted for by being deducted from the whole so that the profits are properly accounted for.

[111] Four witnesses spoke to this issue. Mr Cummings, Mr Alok Jain, chartered accountant and partner in PricewaterhouseCoopers ('PWC') and Mr Malcolm Saddler, Assistant General Manager of Group Finance Division of the bank testified for the bank. Mr Orville Christie, chartered accountant, testified for the Association.

[112] This is Mr Cummings' understanding of the issue. According to Mr Cummings, no distribution was made in 2002 because the bank was advised by its auditors that in accordance with International Accounting Standard 27 ('ISA') – consolidated financial statements and accounting requires that profit attributable to minority equity holdings should not be included in the financial statements dated 20th September 2002. He also said that the auditors advised that the profit attributable to minority shareholdings should not be included in consolidated profits before tax for the purpose of determining whether disbursement is due under the profit sharing scheme. Mr Cummings told us that before 2002 the auditors utilised Generally Accepted Accounting Practices ('GAAP') to prepare the bank's audited financial statements. However, in 2002 the use of the ISA became mandatory.

[113] Minority interests are not new. Let us hear from Mr Alok Jain on the point. From this extract there is no doubt that minority interests and how they are to be accounted for was not introduced for the first time in Jamaica's accounting history by the ISA standard that came into effect on July 1, 2002. This is Mr Jain's evidence.

> *Q. Isn't that Consolidated Profit before tax as in the formula for December 1980?*
>
> *A. No, that certainly would not be my interpretation. The elimination of minority interest is an integral part of what is done in the --- in a consolidation process as outlined by Jamaicans Statement of Standard Accounting Practice at the time and also subsequently under IFRS so to say that Consolidated Profit before tax is simply that number and minority interest ought to be ignored in that number, I wouldn't agree with that because minority interest, let me just elaborate, represents the interest of shareholders other than the controlling shareholders in subsidiaries -- in partners and subsidiaries. So if let's just take a theoretical case outside of this. So a company owns let's say 60% of another company, 40% is owned by other shareholders; the profits of this company would then be, 60% of them would belong to the company and 40% would belong to those other shareholders. But in preparing the consolidated account on the parent you would really be looking to*

take 60% of the profit and the way that is done in the accounting standards is to take everything in the various lines and then show as a deduction what is attributable to those other shareholders, the minority shareholders and so you are left with what really belongs to shareholders of the company right? So that concept of eliminating the minority interest is fundamental to the whole process of preparing consolidating account.

HIS LORDSHIP: And that was so before July 1, 2002?

THE WITNESS: Yes, there was a Jamaican Statement of Standard Accounting Practice. I don't recall the specific name, but there was a statement that dealt with consolidated financial statements and their preparations, how they ought to be prepared; and in that accounting standard, it would have clearly articulate that minority interest ought to be eliminated.

HIS LORDSHIP: And the purpose of that is I suspect the accurate representation of the true position of the parent company?

THE WITNESS: Absolutely. Let's -- if you don't eliminate the 40% in my theoretical example, you would be overstating the earnings attributable to the shareholders of this group. There are other shareholders, outside shareholders as it were. The whole purpose of that, the location of where that is presented in the financial statement, normally done after tax because the portion of the tax would also be attributable to the minority, so it wouldn't make sense to try and subtract in each line right? So, it's more convenience than anything else, the presentation of minority interest to be done after tax, but that doesn't make it fundamentally part of the profit determination for the group so, whether it's Consolidated Profit before tax or after tax minority interest needs to be eliminated.

HIS LORDSHIP: So, might I ask you this question then, this word "consolidated" if you see -- if you are an accountant and you see the expression "Consolidated Profit", what -- would that mean anything to you, or would anything pop into your brain when you see that expression as distinct from seeing profit, would it add anything or --

THE WITNESS: Well, consolidated really is in the context of a group, right, so you wouldn't see consolidated in the context of a single company. Consolidated arises in the context of parent and one or more subsidiaries and integral to that concept of consolidation are a number of things. One for example, is elimination of intercompany items, so if there is a transaction between the subsidiary and the parent there has been a sale or purchase, in the consolidation those bills would be eliminated because that is not a true sale as far as the group is concerned as an entity. Another similar adjustment that is integral to the concept of consolidation is the elimination of minority interest. So consolidation is a process that involves much more than simply adding across all the financial statement that the entities are part of a group.

Q. Yes, so you would agree with me that minority interest would not be relevant to this Scheme?

A. That is the exact opposite of what I have just been saying, sir. I am saying, minority interest --

Q. To the Profit Sharing?

A. The elimination of minority interest is fundamental to the concept of consolidation, so to say it would not be relevant, if I am

understanding you correctly would be saying opposite of what I am saying. Minority interest will always be relevant. That is like saying you could also decide not to eliminate the intercompany transaction and balances.

Then that's not a consolidation, that's a mere adding across of the --

HIS LORDSHIP: I see, so when you see the expression "Consolidated Account", as an accountant now, these would be your expectation so, if you are examining a set of records on a parent company and certain subsidiaries, these are the things that you would be looking to see whether the financial records adequately reflect as you say, for example, or treat intercompany transactions, minority transaction?

THE WITNESS: There are some fundamental things that are part of the process of consolidation and this is one of it.

HIS LORDSHIP: Okay, yes.

THE WITNESS: And this is actually stated in the standard, so it's not merely a matter of practice or convention. If you look at the accounting standards you would see it.

HIS LORDSHIP: You mean this is really a fundamental principle of accounting?

THE WITNESS: Yes, of preparing consolidated accounts.

[114] As this extract from Mr Jain shows, the concept was well known to accountants before 2002. The issue is not whether the bank is claiming all the profits for its own purposes thereby depriving minority interests of their share but whether for the purpose of paying employees under the PSS consolidated profits simply means all the profits made by the bank and its subsidiaries.

[115] Based on this explanation from Mr Jain, the next questions were quite logical in that they sought to find out whether there was any application of this principle before 2002 to the PSS. Mr Jain said that the papers were kept for a maximum of seven years and then destroyed. Mr Jain did not recall seeing any of those papers. This is the evidence on that point.

Q. But you have never seen minority interest brought into the Scheme before this?

A. Brought into the Scheme, what Scheme?

Q. Of the Profit Sharing.

A. Unfortunately I don't have access to any of the computation, even for 2002 all working papers we retain for 7 years, so all the working papers for 2002 and prior to that we no longer retain so I can't say definitively how the computations were done and specifically how the minority interest line was treated with, but I can say as I said earlier that elimination of minority interest is *fundamental to the concept of consolidation and that existed prior to 2002. That was not a concept that –*

Q. Years before 2002?

A. -- the standards I am referring to was in place for years before 2002, it wasn't a new standard introduced year.

Q. But it was not referred to before this year?

A. I am not saying that sir, because as I say --

Q. You just say you don't know of it?

A. -- I don't have the information.

Q. You don't have the information. I see. But wouldn't -- you said the Auditors only keep the records for seven years you say?

A. I can only speak in relation to Price Waterhouse Cooper. Other Auditors may have different practices but generally, we are required to retain working papers for a period of seven years.

Q. Of seven years?

A. Yes.

Q. And we are now talking about a period of -- we are in 2016, we are talking about 2002 and this is -- and this matter that we are talking about was from 2006, the Claim in this matter – we are looking some assistance here and to clarify. This matter was brought in 2006. Wouldn't you think in the practice of the -- because this suit says it's seven years – not in the auditing profession, the accounting isn't that so?

[116] So there it is. The way in which consolidated profits are dealt with was not being introduced for the first time in 2002.

[117] The court will now set out Mr Saddler's position on the matter. Although Mr Saddler is not a chartered accountant he is by no means a man of inferior standing. Mr Saddler is a true, dyed in the wool blue blooded accountant. He holds a first degree in accounting and is a certified public accountant since 2008 in the United States of America. He told the court that since 1977, PWC has been the auditors for the bank. He says that until September 2002, the accounts of the bank and its subsidiaries were prepared using Jamaican accounting standards. He added that subsequent accounts have been prepared '*in accordance with and comply with International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board (IASB) after the adoption of the International Accounting Standards by the Institute of Chartered Accountants of Jamaica which was effective for NCB for financial year ended September 30, 2003.*' He stated that upon adoption of IAS the 2003 accounts in order to compare with 2002 the 2002 would have to be restated to comply with the new standards.

[118] One of the reasons for this change according to Mr Saddler was financial statement fraud committed by several companies. The idea was that companies record the true value of their assets and not their historical or price of acquisition value.

[119] The court will set out part of Mr Saddler's evidence because it makes the point that the change in accounting standard did not affect the formula for calculating when the threshold was met for PSS. He testified as follows:

> *Q. So you do not use the international standards on auditing?*
>
> *A. No.*
>
> *Q. Okay. That's what auditors would use?*
>
> *A. Yes.*
>
> *Q. All right. So the division in your department, the division in your group, NCB group that would have prepared the internal profit share calculation – you have an internal audit team at the bank?*
>
> *A. We have an internal audit team, but they don't interfere with accounting matters, unless they are auditing us. They don't deal*

with operational matters or accounting matters. They are independent.

Q. So this Jamaica Accounting Standards or SSAP is the...?

A. That was existent before International Accounting Standard.

Q. That is prior to 2002?

A. Yes.

Q. No, that is 2002?

A. Up to the end of 2002, yes.

Q. Okay. So what happened in 2003, that would have affected how you work out your profit share?

A. What happened in 2003 had no impact on how we calculate profit share.

Q. What happened in 2003?

A. In 2003, Jamaica adopted new standards, internationally accepted accounting standards...

Q. Which are now...

A. ...which are now called, IFRS International Financial Reporting Standards before it was IAS, International Accounting Standards, we had change the name to International Financial Reporting Standards. So to answer your question, those standards did not impact the calculation, or how we go about doing calculation. (emphasis added)

[120] Under further cross examination, Mr Saddler accepted that had the minority interest not been deducted for the year 2002 the PSS would have been triggered.

[121] Mr Saddler went on to explain that if the calculation of the profit share were to be conducted before the deduction of the minority interest in subsidiary companies from the profit figure then the shareholders' funds/equity should also include the capital invested by minority shareholders. He went on to say, that to use the profit before deduction of minority interests in the numerator and the capital attributable only to the shareholders of the parent company does not compare like with like. He says that this was the method used by the auditors in previous years. This evidence from Mr Saddler is crucial because it is exactly what the Association has been saying. The court now sets out the evidence on this: **INSERT EVIDENCE HERE**

[122] Mr Saddler then sought to say that the PSS was not triggered even if the minority interests are not deducted and the capital invested by minority investors is included in the shareholders' funds. Finally he said that the restatement of the profits for 2002, based on the IAS standard would not trigger the PSS.

[123] Mr Saddler's explanation cannot assist the bank in this case because the issue is not what consolidated profits mean for the purpose of presentation in financial statements to regulators and the like but what does the expression mean for the purpose of the PSS.

[124] There is another intriguing bit of evidence from Mr Saddler. He said that the practice regarding the calculations for profit share was that the bank would do its own internal calculations and then send it on to the auditors who would verify it. The implication being that PWC would have been aware of how the bank understood and did the calculation for profit share. The unavoidable implication, if Mr Saddler is speaking the truth, is that the auditors would necessarily know how the bank treated minority interest and would have known this before 2002. It also means the auditors would know whether the bank was treating with minority interests in the 'approved accounting manner' and if not would certainly have made the recommendation to treat it in a particular manner. The court says that auditors would have made that recommendation because the evidence makes it plain that in 2002 it was the auditors, on their own, that made the recommendation regarding minority interests. There is no evidence that the bank solicited the advice of the auditors on this issue. If this is correct what prevented this recommendation from coming earlier when the undisputed evidence is that the auditors were the same ones for a decade and a half plus one year? This become even more significant when Mr Cummings tells us this at paragraph 7 of his affidavit:

> *The Banking Act further requires the bank publishes an audited balance sheet and profit and loss account and an auditors (sic) report and where the bank has subsidiaries, a consolidated balance sheet and consolidated profit and loss account. The Act provides that it is the duty of the auditors to advice the chief executive officer and the directors of the bank of any changes in accounting policy or any presentation of or any failure to present, facts or figures which, in the opinion of the auditors, has the effect of misrepresenting the financial position of the bank. Thus the bank is required to implement, maintain and adhere to sound accounting practices at all times.*

[125] By this Mr Cummings was endeavouring to show that the auditors were under some kind of obligation to bring to the attention of the bank the new ISA standards even if the bank did not solicit the auditor's opinion on the issue. It is vital to repeat that presentation of financial information in balance sheets to be used by investors, regulators and members of the public is a different question from determining what figures will be used to determine whether the PSS is activated. Of course the balance sheets and other documents should undoubtedly reflect the fact that payouts were made under the PSS but that is not the same thing as saying that because an accounting standard has been altered it necessarily follows inexorably that that means a change in how the threshold for PSS is calculated. There is no inevitable connection between the two. And this has been the burden of the claimant. The Association wants to show that minority interests as a matter of strict accounting and presentation of financial information has always had the principle that minority interests are deducted but that principle was not the one used for the purposes of the PSS. If,

[133] Mr Scott's relied on many cases from the law of contract since in his view those case correctly state the law applicable to clause 2. There are so many cases involving the interpretation of documents that despite the different factual contexts there has emerged a broad consensus which can safely be said to be non-controversial though the application in particular cases may give rise to reasonable disagreement among reasonable persons. The following propositions can be stated with certainty:

(1) in the interpretation of a document, the court is not seeking to find out the actual subjective interpretation or understanding of the parties but what a reasonable person in the same position of the parties would understand the document to mean at the time it came into existence (**Prenn v Simmonds** [1971] 1 WLR 1381, 1384 (Lord Wilberforce); **BCCI v Ali** [2002] 1 AC 251 [8] Lord Bingham; **Arnold v Britton** [2016] 1 All ER 1 [15] Lord Neuberger);

(2) the words are to be given their prima facie conventional meaning they had at the time of the creation of the document bearing in mind that the meaning of words are affected by syntax and context with the consequence that the meaning of the words in one context may be quite different in another context (**Charter Reinsurance v Fagan** [1997] AC 313, 391, Lord Hoffman).

(3) the meaning of a document is different from the meaning of the individual words and the meaning of a document is the meaning the document conveys to a reasonable person with knowledge of the circumstances of the parties creating the document (**Investor Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 WLR 896, 912 Lord Hoffman);

(4) the court is seeking the meaning a reasonable person would give to the document where that person has the background information available to

the person or persons creating the documents at the time the document was created (**Investor Compensation Scheme Ltd v West Bromwich Building Society p** 912 (Lord Hoffman))

(5) the background facts include almost anything but excludes pre-contractual negotiations and the subjective intention of the party or parties (**Bank of Credit and Commerce International** [2001] 1 All ER 961 [39] (Lord Hoffman); **Prenn v Simmonds** [1971] 1 WLR 1381, 1384 – 1385 (Lord Wilberforce); **Reardon Smith Line v Yngar Hansen-Tangen** [1976] 1 WLR 989, 995 – 996 Lord Wilberforce; **Investor Compensation Scheme Ltd v West Bromwich Building Society** p 912, Lord Hoffman; the court does this 'by focusing on the meaning of the relevant words ... in their documentary, factual and commercial context' (**Arnold v Britton** [15] Lord Neuberger);

(6) the starting point is the actual words used by the party or parties in the context in which they are used and even if a hard result results from the ordinarily understood meaning of the words, or favours one party more than the other or what may be considered an improbable result that is not in and of itself a good reason not to give effect words used the contracting parties (**Jumbo King Ltd v Faithful Properties** [1999] 2 HKCFAR 279 Lord Hoffman; **Co-operative Wholesale Society Ltd v National Westminster Bank plc** [1995] 1 EGLR 97 Hoffman LJ; **Rainy Sky SA v Kookmin Bank** [2012] 1 All ER 1137 [23] Lord Clarke SCJ);

(7) loyalty to the text is the paramount principle (**Society of Lloyd's v Robinson** [1999] 1 All ER (Comm) 454, 551, Lord Steyn; **Rainy Sky SA** [25], [26] Lord Clarke SCJ);

(8) 'The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of

the parties is not a reason for departing from the natural language' (**Arnold v Britton** [19] Lord Neuberger);

(9) the court cannot use the benefit of hindsight to determine whether the contract makes good commercial sense (**Thompson and other v Goblin Hill Hotels Limited** [2011] UKPC 8; [2011] 1 BCLC 587)

(10) on the question of ambiguities, 'the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve' (**Arnold v Britton** [18] Lord Neuberger).

(11) the fact that disastrous consequences have arisen is no justification for departing from the meaning a reasonable man would give the document having regard to all the background facts and circumstances known to the party or parties at the time the document was created; (**Arnold v Britton** [19] (Lord Neuberger P));

(12) if the document is a commercial document, then the concept of commercial sense cannot be used to rewrite the contract because 'it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to

assist an unwise party or to penalise an astute party.' (**Arnold v Britton** [19], [20] (Lord Neuberger P));

(13) there may be more than one interpretation reasonably available but that possibility must arise from words used and the factual background and not from the creative imagination of witness, counsel or the judge (**Arnold v Britton** [76], [77] Lord Hodge);

(14) in a commercial document displacing the conventional meaning of the document can only arise of the result is really absurd but disastrous consequences does not mean that result is absurd (**Thompson v Goblin Hill Hotels Ltd** [2011] 1 BCLC 586 [17], [18], [19] Lord Dyson);

(15) it is important that post-contract experience is irrelevant to the interpretation of the contract. 'When interpreting a contractual provision, **one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties.** Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties' (emphasis added) (**Arnold v Britton** [21] Lord Neuberger).

[134] These principles interact with each other and when applied enable interpreter to look at the documents taking all important factors into account. They were weighed and then a final decision is made. They are analytical tools that are brought to bear on the task of interpretation. Which one has the ultimate influence is decided by interpreter after careful and mature consideration. How this is done was summarised by Lord Hodge in **Wood v Capita Insurance Services Limited** [2017] UKSC 24; [2017] 2 WLR 1095 at paragraphs 10 – 15:

10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In Prenn v Simmonds [1971] 1 WLR 1381 (1383H-1385D) and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989 (997), Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896 Lord Hoffmann (pp 912-913) reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham in an extra-judicial writing, A new thing under the sun? The interpretation of contracts and the ICS decision Edin LR Vol 12, 374-390, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11. Lord Clarke elegantly summarised the approach to construction in Rainy Sky at para 21f. In Arnold all of the judgments confirmed the approach in Rainy Sky (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (Rainy Sky para 26, citing Mance LJ in Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2) [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the

possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12.This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing In re Sigma Finance Corpn [2010] 1 All ER 571, para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord

Mance spoke in Sigma Finance Corpn (above), assists the lawyer or judge to ascertain the objective meaning of disputed provisions.

14. On the approach to contractual interpretation, Rainy Sky and Arnold were saying the same thing.

15. The recent history of the common law of contractual interpretation is one of continuity rather than change. One of the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation.

[135] Thus it is not a matter of selecting one principle over all the others merely because it suits the purpose of the party advancing one interpretation over the other. Rather, the interpreter is expected to use the principles as a check and balance on any interpretation being advanced. Clearly, the interpreter on reading the clause in question must have some idea of the meaning of the words used in order to form some preliminary idea of what the clause may mean. Having come to that position, the interpreter does not stop there. He or she looks at the clause in the context of the rest of the document, the document in the context of the factual background that led to the creation of the document, bears in mind that the actual formulation of the document may have been influenced by the state of the law and other factors at the time it was created, the interpreter takes account of consequences of the interpretation but with caveat that a hard result does not necessarily mean that the parties did not agree to the clause in question.

Interpretation of clause 2

[136] The context of clause 2 is the desire of the employees of the then Barclays Bank Jamaica Limited to secure a profit sharing agreement with bank. The claim was made in 1977 by the employees. Matter deteriorated and a referral was made to the Ministry of Labour. At that meeting the bank and the employees agreed in principle that profit sharing would take place. The details were not finalised in 1977. In January 1980, the bank made a payment. That payment was not based

on a fixed formula but apparently was done pending formal arrangements for the determination of when the PSS was activated.

[137] Discussions continued. The result was Circular 33. The Circular stated the formula arrived at. It is not an accounting document. It is a document designed to confer benefit on employees of the bank. The accounting concept of minority interests existed in 1980.

[138] There is nothing in the context that shows that the parties were thinking of the strict technical analysis of consolidated profits. All that the parties thought of was adding together all the profits of the relevant companies before tax. Thus rather than say 'all' the parties chose the word 'consolidated.'

[139] Clause 2 has two aspects to it: (a) the maximum amount payable to all eligible persons and (b) the threshold requirement. Taking the latter first, the threshold requirement is very plain. The threshold is that the profit in any given year, for example 2002, must exceed 25% of the shareholders' funds as shown in the audited accounts of the immediately preceding financial years, for example 2001. Clause 2 also defines what is meant by 'shareholders' funds.' It is defined as the issued share capital, any reserves but such reserves exclude capital reserves and it also includes, retained earnings.

[140] Going now to the maximum amount payable. This maximum is the greatest amount payable overall to the employees and not what is payable to each employee. The amount payable to each employee is 4 week's salary. The maximum amount payable to each employee is not in dispute. What is in dispute is the gross amount payable to all employees who qualify under the PSS. Clause 2 tells us that the maximum amount payable is 6% of consolidated profits, as agreed by the auditors.

[141] It is this court's view that the 'as agreed by the auditors' was more for verification and not definition. It was check on the arithmetic of the bank and not that the auditors were given veto power. The Circular 33 had no such thing in mind. The bank through the affidavit of Mr Cummings has advanced the proposition that the 'Staff Association appears to have accepted that the bank is bound by the recommendation of the auditors' (para 34). There is no evidence for this. This is an attempt by the bank to rewrite history and give clause 2 a meaning it could never had and was not contemplated by the parties. The bank is seeking to escape by saying, in effect, this: *Oh employees, I really wish to pay you but regrettably the auditors have tied my hands and I cannot pay you because the auditors have told me that I cannot pay because of the new accounting standards and I am bound to follow whatever the auditors say.*

[142] Mr Cummings continues with this new found revelation by saying in paragraph 36:

> *...as the clause is dependent on the agreement of the auditors the Staff Association will not be able to include the minority interest profits as this remains in breach of IAS – 27.*

[143] The court rejects this attempt at revisionist history. It seems that the bank has forgotten that for some time before 2002 the Association has a representative on the board and thus would be privy to the way in which clause 2 was in fact applied by the bank. The Association would know how the calculations were done in order to determine whether PSS was activated.

[144] The again has to ask, how is it that for over two decades no one ever thought that the auditors had veto power of the activation of the PSS?

[145] Mr Saddler, as noted earlier, stated that the bank would do its own calculations and send them to the auditors. Mr Saddler also said he cannot recall even a single instance where the auditors disagreed with the bank's calculations in the years PSS was activated before 2002.

[146] The court is also of the view that the phrase 'as agreed by the auditors' did not give the auditors the power to define consolidated profits.

[147] As noted earlier, minority interests are not new to the world of accounting. In this court's view consolidated profits before tax simply means all the profits of the bank and its subsidiaries before tax. The complication sought to be introduced by Mr Saddler was not in the minds of the parties at the time. Had they wanted it to be more refined they could have easily said so. The fact that with the hard fact of experience the bank may now be finding the agreement unpalatable is not a reason for giving the words a new meaning. The meaning is determined, not in the light of experience, but as the parties intended at the time the document was created.

[148] The meaning arrived at by the court does not produce an absurd result or a commercially stupid arrangement. The Association and the bank were trying since 1977 to come up with a final method of having the employees participate in the profit of the bank. There is nothing in the formula that requires the bank to break any laws. The formula does not require the bank to misrepresent the profits payable to minority interests. Consolidated in this context does not have the strict accounting meaning but simply means all the profits made by the bank and its subsidiaries.

[149] This explains why, as Mr Saddler explained, the auditors never deducted the minority interests before tax for the previous sixteen years because the auditors were applying ordinary common sense to the agreement. When Mr Saddler said that that method produced a misleading result he is quite incorrect. The purpose of the agreement was determine what would be the figure used to determine whether the PSS was activated. This was not about preparing financial statements.

[150] The new IAS standard introduced in 2002 cannot alter the meaning of the document created in 1980.

Good faith

[151] After the conclusion of oral submissions the court invited the parties to make additional submissions on the question of good faith. The submissions came in the form of written submissions. This came about because the court, in doing its own research, came across the Canadian Supreme Court decision of **Bhasin v Hrynew** 379 D.L.R. (4th) 385. In the case the court introduced the concept of good faith as a general organising principle of contract law.

[152] This court, in light of that invited further submissions because the court was of the view that this principle may be more applicable to private law litigation than the public law concept of legitimate expectation that was relied on by the claimant.

[153] From the outset the Mr Miller has been pressing the argument that the employees had a legitimate expectation that the calculation that used in previous years and which apparently was settled would continue. The phrase legitimate expectation has become somewhat of a term of art in public law. Mr Miller cited cases from public law in support of his point. The public law concept does not apply to private law proceedings. The court is of the view that what Mr Miller was saying was that the bank in all good conscience cannot now come up with an interpretation and deny the employees something that they had come to expect after so many years.

[154] Mr Scott in his additional submissions suggested that the court should not consider this principle of good faith for two reasons. The first was that the case for the claimant was not pleaded as one of lack of good faith on the part of the bank. Second, the principle is not part of Jamaican. Learned Queen's Counsel added that this development should be left to the legislature.

[155] The court will address the pleading point first. It is common knowledge that a claimant does not have to use the technical language of a particular legal principle provided that the pleadings as they are permit the claimant to say, legitimately, that a particular issue is raised on the pleadings. In this case, the

Association has been saying that never before had the bank deducted minority interests in order to determine whether the PSS was activated. The Association said in its final submissions that the reason given by the bank for deducting minority interest in 2002 should not be accepted in light of the common ground between both experts that the ISA standard of 2002 did not create any new accounting principle for the treatment of minority interests. Mr Miller was perhaps too polite but the essence of what he was saying was the bank was not being entirely frank with the reason advanced. Some would use stronger language. The Association was also saying that the bank should have consulted with it before it changed its position regarding minority interests.

[156] The bank's response has been two fold. First, the PSS was not part of the contract of employment. Second, it was acting on the advice given by its auditors. If the language of good faith is to be used, the bank is saying that it acted in good faith because it was advised to do what it did in 2002 by its auditors and in that sense it was acting in good faith. It was not acting dishonestly.

[157] The court is of the view that the affidavits and material in the case permit the claimant to raise the issue of good faith and the court is satisfied that the defence of the bank enabled it to meet those allegations and so the bank is not at a disadvantage by the issue being raised now.

[158] The court's response to the second objection is that legal understandings are not static and if there have been new developments in the law then those points should be considered provided that the contest between the parties enable it point to be argued without one side being put at a disadvantage. The bank was not prejudiced by the issue being raised now. Without using the expression good faith, the Association has been saying that the bank is not acting fairly, reasonably and properly. The fact that the Association may have used the wrong legal concept should not blind our eyes to the substance of their argument.

[159] On the point that Parliament should legislate the court say that the Parliament can legislate but the responsibility of the courts is to develop the common law to meet the needs of the society in which the law is operating. The courts do this by incremental modification of, and addition to existing legal principles in light of the facts and circumstances of the case. Anyone familiar with legal history will now that when the courts come to acknowledge a new principle of general application, such a development does not come out of the blue. It is usually the culmination of previous developments. Once upon time the law was that a husband could not rape his wife. The foundation for this view was that when the woman consented to marriage she gave her irrevocable consent to sexual relations. Incidentally, this position that the law took was the minority position at the time when the debate began. That position has now been reversed by judicial decision.

[160] The Rylands v Fletcher principle arose because there had been several dam burstings with consequential devastation of property, loss of life and limb. Prior to the enunciation of that famous principle, the law had not remedy. In the face of continued devastation the common law judges responded in the nineteenth century by developing the concept of non-natural user of land.

[161] The question of good faith in contract law has been around for some time. What has happened is that it is manifested under various legal doctrines and comes to prominence in certain causes of action. Hence insurance law requires the insured to make full and frank disclosure because it is contract of utmost good faith. There is the law relating to undue influence where the law sets aside agreements on the ground that one person was not properly and fairly dealt with in the particular transaction. There is the law relating to misrepresentation (innocent, negligent and fraudulent) where agreements can be vitiated. May be the time has come for judge of Atkinian stature to review the various strands of authority and weave them into the contract law equivalent of the good Samaritan principle. There is no single comprehensive legal principle known as good faith but the idea clearly is seen in virtually every type of contract. The court does not

know of any person who enters into a contract with the full expectation that his contracting partner will not act in good faith, that is, do what is required of him even if he does it badly. Exclusion or minimisation of liability clauses are not put in because one or the other party expects that the other will not make a conscientious effort not to perform the contract. They are put in because, with the best will in the world, things go awry. In principle this court cannot see anything inherently objectionable in requiring contracting parties to act honestly, speak truthfully and not misrepresent deliberately. This case does not require the court to decide whether a generalised principle of good faith should be adopted in Jamaica but there cannot be any serious argument against such an adoption when the time comes. There are other jurisdictions that have done so and economic growth and prosperity have not been stunted. Perhaps the scholars of comparative law can shed more light on this.

[162] The bank relied on the judgment of Leggatt J in **Yam Seng Pte Ltv v International Trade Corp Ltd** [2013] 1 All ER (Comm) 1321, para 121 - 124 to say that a generalised principle of good faith has not been adopted in English law. Counsel also submitted that there was no prior existence of this principle in English law and consequently not in Jamaican law. Mr Scott also submitted that Canadian Supreme Court went too far in **Bhasin**. The court notes however that Leggatt J noted that '*refusing, however, if indeed it does refuse, to recognise any such general obligation of good faith, this jurisdiction would appear to be swimming against the tide*' (para 125). While it may well be that Jamaica is not swimming against the tide the court cannot ignore the fact that the there is a drive to create a single economic space in the Caribbean and that would include civil law jurisdictions such as Surinam. The revised Treaty of Chaguararmas lists, in article 2, Surinam as one of the member states of the Caribbean Community and Common Market. Leggatt J noted that a doctrine of good faith has existed in the United States of America, a common law jurisdiction, and in Canada which was a civil law province (Quebec) and common law provinces. His Lordship observed that Australia, another common law jurisdiction, has recognised and

applied the concept of good faith although the process of establishing the precise juridical basis for the principle remains unsettled.

[163] Leggatt J did say at paragraph 132 - 133:

> *I doubt that English law has reached the stage, however, where it is ready to recognise a requirement of good faith as a duty implied by law, even as a default rule, into all commercial contracts. Nevertheless, there seems to me to be no difficulty, following the established methodology of English law for the implication of terms in fact, in implying such a duty in any ordinary commercial contract based on the presumed intention of the parties.*
>
> *133 Traditionally, the two principal criteria used to identify terms implied in fact are that the term is so obvious that it goes without saying and that the term is necessary to give business efficacy to the contract. More recently, in Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988 at 1993–5, the process of implication has been analysed as an exercise in the construction of the contract as a whole. In giving the judgment of the Privy Council in that case, Lord Hoffmann characterised the traditional criteria, not as a series of independent tests, but rather as different ways of approaching what is ultimately always a question of construction: what would the contract, read as a whole against the relevant background, reasonably be understood to mean?*

[164] Based on this reasoning, even if there is no express term of good faith there is no impediment to finding that such a terms may to be implied in certain circumstances.

[165] This court respectfully agrees with the following observations by Leggatt J at paragraphs 147 – 155:

> *147 There are some further observations that I would make about the reasons I mentioned earlier for the reluctance of English law to recognise an implied duty on contracting parties to deal with each other in good faith.*

148 *First, because the content of the duty is heavily dependent on context and is established through a process of construction of the contract, its recognition is entirely consistent with the case by case approach favoured by the common law. There is therefore no need for common lawyers to abandon their characteristic methods and adopt those of civil law systems in order to accommodate the principle.*

149 *Second, as the basis of the duty of good faith is the presumed intention of the parties and meaning of their contract, its recognition is not an illegitimate restriction on the freedom of the parties to pursue their own interests. The essence of contracting is that the parties bind themselves in order to co-operate to their mutual benefit. The obligations which they undertake include those which are implicit in their agreement as well as those which they have made explicit.*

150 *Third, a further consequence of the fact that the duty is based on the parties' presumed intention is that it is open to the parties to modify the scope of the duty by the express terms of their contract and, in principle at least, to exclude it altogether. I say 'in principle at least' because in practice it is hardly conceivable that contracting parties would attempt expressly to exclude the core requirement to act honestly.*

151 *Fourth, I see no objection, and some advantage, in describing the duty as one of good faith 'and fair dealing'. I see no objection, as the duty does not involve the court in imposing its view of what is substantively fair on the parties. What constitutes fair dealing is defined by the contract and by those standards of conduct to which, objectively, the parties must reasonably have assumed compliance without the need to state them. The advantage of including reference to fair dealing is that it draws attention to the fact that the standard is objective and distinguishes the relevant concept of good faith from other senses in which the expression 'good faith' is used.*

152 *Fifth, in so far as English law may be less willing than some other legal systems to interpret the duty of good faith as requiring openness of the kind described by Bingham LJ in the Interfoto case as 'playing fair' 'coming clean' or 'putting one's cards face upwards*

> *on the table', this should be seen as a difference of opinion, which may reflect different cultural norms, about what constitutes good faith and fair dealing in some contractual context rather than a refusal to recognise that good faith and fair dealing are required.*
>
> *153 Sixth, the fear that recognising a duty of good faith would generate excessive uncertainty is unjustified. There is nothing unduly vague or unworkable about the concept. Its application involves no more uncertainty than is inherent in the process of contractual interpretation.*
>
> *154 In the light of these points, I respectfully suggest that the traditional English hostility towards a doctrine of good faith in the performance of contracts, to the extent that it still persists, is misplaced.*
>
> *155 I have emphasised in this discussion the extent to which the content of the duty to perform a contract in good faith is dependent on context.*

[166] The Court of Appeal of England and Wales in **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd** [2013] EWCA Civ 200 affirmed '*that there is no general doctrine of "good faith" in English contract law, although a duty of good faith is implied by law as an incident of certain categories of contract*' and '*[i]f the parties wish to impose such a duty they must do so expressly*' (para 105 Jackson LJ). Beaton LJ in the same case referred to **Yam Seng.** His Lordship did not refute the idea that implying a duty of good faith was not permissible. It is important to note that Jackson LJ in his reference ot **Yam Seng** did not disapprove of Leggatt J's reasoning.

[167] Leggatt J returned to the question of good faith in **Brogden v Investec Bank** [2014] EWHC 2785 (affirmed on appeal [2016] EWCA Civ 1031; [2016] All ER (D) 171). The claimant failed in his bid to have a term implied into his employment contract but his Lordship said at paragraph 91 – 93:

> *<u>Good faith and rationality</u>*

91. Counsel for the claimants relied on the now well established principle that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably (in the sense of irrationally): see e.g. Abu Dhabi National Tanker Co v Product Star Shipping Ltd, (The 'Product Star')(No 2) [1993] 1 Lloyd's Rep 397, 404; Paragon Finance Plc v Nash [2002] 1 WLR 685, paras 39-41; Socimer International Bank Ltd v Standard Bank London Ltd [2008] 1 Lloyd's Rep 558, 575-577; British Telecommunications Plc v Telefónica O2 UK Ltd [2014] UKSC 42, para 37. That principle applies to discretions in relation to remuneration like any other contractual discretion. The leading authorities in which the principle has been applied to payments of discretionary bonuses are Clark v Nomura International plc [2000] IRLR 766, Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287, [2005] ICR 402, and Keen v Commerzbank AG [2006] EWCA Civ 1636, [2007] ICR 623. As expressed by Burton J in Nomura at para 40:

> "My conclusion is that the right test is one of irrationality or perversity (of which caprice or capriciousness would be a good example) ie that no reasonable employer would have exercised his discretion in this way."

92. This principle is buttressed in the employment context by the overarching obligation implied by law as an incident of the employment contract that an employer will not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: see Malik v Bank of Credit and Commerce International SA [1998] AC 20. The essence of this obligation is one of fair dealing: see Johnson v Unisys Ltd [2001] UKHL 13; [2003] 1 AC 518, para 24, per Lord Steyn. As explained by Lord Nicholls (with whom Lords Hoffmann, Rodger and Brown agreed) in Eastwood v Magnox Electric plc [2004] UKHL 35; [2005] 1 AC 503, para 11, it means "in short, that an employer must treat his employees fairly in the conduct of his business" and that "in his treatment of his employees, an employer must act responsibly and in good faith". It allows "a balance to be struck between an

> *employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited": see Lord Steyn in Malik at 46D.*
>
> *93. The obligation of trust and confidence has been described as "undoubtedly the most powerful engine of movement in the modern law of employment contracts": Freedland, "The Personal Employment Contract (OUP, 2003), p.166. It will inform and regulate the contours of any contractual discretion. By way of recent example, in Attrill and Annar v Dresdner Kleinworth [2013] EWCA Civ 394, [2013] 3 All ER 607, the Court of Appeal held that on the facts of that case the obligation of trust and confidence precluded the exercise of a unilateral contractual power to vary the terms of contracts of employment to allow the employer to withhold contractual bonuses in the event of a "material adverse change".*

[168] These dicta were not criticised by the Court of Appeal. The point is that the concept of good faith has now 'escaped' its traditional confines of fiduciary relationships, insurance contracts, unconscionable bargains and has found its way into employment contracts. The case before the court is an employment circumstance albeit arrived at by collective bargaining.

[169] In this case, the Association is saying that until 2002 the bank has never deducted minority interests for the purpose of determining whether the PSS scheme was activated. Mr Scott has taken the view that Mr Stewart has not substantiated his position and has been making naked assertions that prior to 2002 minority interest have never been deducted for the purpose of the PSS.

[170] Mr Stewart, as indicated earlier, is in a unique position to speak. Mr Saddler accepted that as president of the Association Mr Stewart would be a member of the board. He has been involved with this issue from the very beginning. From all appearance it is difficult to any other person, other than perhaps, Mrs DuCasse, who has a full and complete knowledge and actual experience of the development of this point within the bank from the time when it was known as Barclays Bank DCO.

[171] Mr Stewart has made the assertion that the formula has in fact been calculated in a particular manner. It is true that he has not presented actual mathematics to prove his point. This ought to have made it easier for the bank to refute his assertion but no witness from the bank has ever said the contrary.

[172] It is also significant that Mr Scott was unable, even when he reiterated the bank's case in the additional submissions, to point to any evidence that what Mr Stewart said was untrue on this specific point. Mr Scott relied on the absence of actual calculations from the Association but the flaw in this position is that Mr Stewart is indeed in a position to know these things. Mr Saddler, the twenty six year veteran of the bank, was not able to say that what Mr Stewart said was not so. No one has suggested that Mr Stewart is deliberately lying or gravely mistaken on that specific assertion. In light of that why shouldn't the court accept his evidence on that point? The court accepts his evidence on the specific point about the lack of deduction of minority interest in the years prior to 2002 when the PSS was paid. It seems to this court that the bank itself knew this to be the truth and could not refute and chose not to so. Instead the bank reached for the ISA rule but that explanation has not held up because in strict accounting terms minority interests were to be deducted before 2002 and in that regard the ISA 2002 could not possibly be the reason for the change in position. There has to be another reason. The court cannot speculate what the reason is but what the court can say is that the one advanced by the bank has not stood up to careful examination and in that sense the bank is not acting in good faith, reasonably and properly.

[173] The court has already decided that at the very least since January 1, 1993 but certainly by June 2, 1993, if not before, the PSS became a part of the contract of employment of the employees. The court has also found that 'consolidated profits' did not have the meaning now being advanced by the bank when Circular 33 came into existence. The court is also of the view that the bank interpreted and applied clause 2 in the manner contended for by the Association and this explains the absence of any dispute over the calculation of the PSS. The dispute before 2002 was whether it would be paid in any given year but not about the

calculation. As Mr Saddler said there has never been a single disagreement between the bank's calculations and the auditors before 2002. Why was there this harmony before 2002? The answer is that the bank has never insisted on this new found revelation for the purpose of determining the PSS. How the financial statements were prepared is a different question all together.

[174] Even if the bank is correct on its technical interpretation where we are now is that the bank has never acted on this technical interpretation before 2002 and if the bank was going to change its behaviour in such a fundamental way then some dialogue would be expected because the bank by its conduct over the years would have been saying that it is not going to insist on the strict legal rights not to pay the PSS. The employees would have come to expect the bank to continue to behave in that way and acting in good faith would mean that if there was going to be a change then the bank would have sought dialogue. Some may say that this impinges freedom of contract and the freedom of the parties to arrange their affairs as they see it. This is not so freedom of contract does not mean the complete absence of boundaries. The law relating to misrepresentation, negligent misstatement, unconscionable bargains and the like operate as constraints on freedom of contract.

[175] In light of this, there are two aspects to this. First is that there is an implied term that the bank that would act in accordance with a proper interpretation of the contract and not rely on a technical meaning that no one contemplated at the time the document cane into existence. Second, even if the court's interpretation is wrong, the employees would expect the bank to determine the PSS in the manner that it has always been. The court need not find that the bank was acting dishonestly. The basis of the implication is that as a matter of construction of the document the parties must have intended that each side would act in good faith. In this case the bank would be expected to act fairly in 2002 and fairness here means act in the manner consistent with the proper interpretation of the contract or at the very least, act as it had always one in previous years when determining whether the PSS was activated and not seek to invoke an accounting rule that had not been applied in previous years when the PSS was triggered.

[176] As Leggatt observed in **Yam Seng** at paragraphs 138 - 139:

> *138 As a matter of construction, it is hard to envisage any contract which would not reasonably be understood as requiring honesty in its performance. The same conclusion is reached if the traditional tests for the implication of a term are used. In particular the requirement that parties will behave honestly is so obvious that it goes without saying. Such a requirement is also necessary to give business efficacy to commercial transactions.*
>
> *139 In addition to honesty, there are other standards of commercial dealing which are so generally accepted that the contracting parties would reasonably be understood to take them as read without explicitly stating them in their contractual document. A key aspect of good faith, as I see it, is the observance of such standards. Put the other way round, not all bad faith conduct would necessarily be described as dishonest. Other epithets which might be used to describe such conduct include 'improper', 'commercially unacceptable' or 'unconscionable'.*

[177] The court agrees with this analysis. In concluding on this point, when a term is to be implied the court must state what the terms is because the technique of implying a term is not rewriting the contract (since the court has not power) but by interpretation, make explicit what the parties had agreed. In this case the term to be implied is that the bank would act properly or acceptably when determining whether PSS was activated in any given year. This court has already decided that consolidated profit was for the purposes of the PSS did not have the technical accounting meaning. It meant simply that the profit of all the relevant companies were added together. Any change in that would have to be by negotiation and not unilateral decision by the bank. The bank cannot now seek to rely on the technical meaning which has always existed and bolster that improper conduct by seeking to rely on a rule change that in fact made no change in substance to the accounting principle that minority interests were to be taken out when determining consolidated profits.

Disposition and orders

[178] The court grants declarations 1, 2, 3, 5, 7, 8 and 9. Declaration 6 is refused. Special costs certificate for two counsel granted.