Hilary Term
[2024] UKPC 2
Privy Council Appeal No 0027 of 2022

JUDGMENT

National Commercial Bank Jamaica Ltd (Appellant) *v* NCB Staff Association (Respondent) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Hodge
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
20 February 2024

Heard on 12 December 2023

Appellant
Sandra Minott-Phillips KC
Noel Levy
(Instructed by Myers Fletcher & Gordon (London))

Respondent
M Georgia Gibson Henlin KC
Patricia Roberts-Brown
Jonathan Neita
(Instructed by Simons Muirhead & Burton LLP)

LORD HODGE:

1. This appeal is concerned with the interpretation of a contract between National Commercial Bank Jamaica Ltd ("the Bank") and the NCB Staff Association ("the Association") which created a profit-sharing scheme "("the scheme") for employees of the Bank. While there was a dispute at first instance over whether the scheme was discretionary or was contractually binding on the Bank, the finding of Sykes J at first instance that the scheme had contractual effect was not challenged before the Court of Appeal or before the Board. Sykes J found that the scheme had become part of the employees' contract of employment by 30 September 1993. Sykes J made no more precise finding as to the date on which the scheme had contractual effect but in her submissions to the Board Sandra Minott-Phillips KC accepted on behalf of the appellant that the scheme had been part of the employees' contracts of employment since 1980.

2. This appeal is concerned with the meaning of one clause of the scheme (clause 2) and whether the criterion in that clause for the sharing of the Bank's profits with its employees, had been met in the financial year to 30 September 2002.

1. The contractual provisions and the nature of the dispute

3. The contractual provision in dispute is contained in Staff Circular No 33/1980/P dated 17 December 1980 ("the circular"). It was, as Sykes J found, the first fully documented formula for the calculation of amounts payable under the scheme. The scheme had been the subject of detailed negotiation between the Association and the Bank since 1977, had been agreed in principle, and a payment had been made under the scheme in January 1980 before the scheme was promulgated in the Circular.

4. The Circular provided (so far as relevant):

> "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* before making allowance for the payments under the Scheme provided such profit is in excess of 25% of 'shareholders' funds', ie issued share capital, reserves (excluding capital reserves) and retained earnings, as shown in the audited accounts of the immediately preceding financial year. (Emphasis added)

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. The legal issue which is the subject of this appeal is the meaning of the words in clause 2 of the circular which have been emphasised: "the consolidated profits before tax, as agreed by the Auditors." This is the contested phrase.

6. In 2002 the Bank had nine subsidiaries, eight of which were wholly owned and one, Edward Gayle and Co Ltd ("EGC") in which it had a majority 50.5% stake. The Bank acquired the remaining 49.5% of the shares in EGC on 7 August 2002. The Bank's consolidated profit and loss account for the financial year ending 30 September 2002, so far as relevant, recorded the group's net interest income and other income and deducted therefrom the non-interest expenses to arrive at the profit before exceptional items and taxation, which was Jamaican $2,528,837,000. Exceptional items of Jamaican $319,551,000 were deducted from that sum. The consolidated profit and loss account then showed the following:

"	$'000
Profit before Taxation and Extraordinary Items	2,209,286
Taxation	(186,001)
	2,023,285
Minority interest in results of subsidiaries	(63,121)

Profit after Taxation and before Extraordinary Items 1,960,164"

There were no extraordinary items and therefore the sum of Jamaican $1,960,164,000 was stated as "Net profit attributable to the stockholders of [the Bank]".

7. The Bank had acquired the 50.5% stake in EGC in or shortly before 1994. As there was a minority shareholder in EGC, the consolidated profit and loss account, as shown above, deducted the sum stated as "minority interest in results of subsidiaries". This reflected the third party minority shareholder's interest in the profits of EGC in the period before the Bank acquired that minority interest in the course of the financial year to 30 September 2002, thereby making EGC a wholly owned subsidiary. There were several other subsidiaries in which the Bank held a majority interest in the year ending 30 September 2000 but it is not clear from the judge's findings of fact whether (i) they remained subsidiaries in which there was a third party minority interest in 2002, and if so, (ii) they were profitable and their results contributed to the line "minority interest in subsidiaries" in that financial year. The Bank's accounts to 30 September 2002 suggest that EGC was by then the only subsidiary in which there was a minority interest and that the Bank purchased that interest in the course of that year. Be that as it may, this uncertainty makes no difference to the resolution of the matters in dispute in this appeal.

8. The Bank and the Association cannot agree on the meaning of the contested phrase in the circular. The Association argues that the phrase is a reference to the line in the consolidated accounts, "Profit before Taxation and Extraordinary Items". If so, the staff of the Bank would be entitled to a profit share as the sum there stated exceeds 25% of the shareholder's funds as defined in the circular. The Bank on the other hand argues that the contested phrase does not refer to that line shown in the consolidated profit and loss account. The Bank argues that that line is not a "consolidated profit" because it includes the profit of the partly owned subsidiary and therefore overstates the profit properly attributable to the Bank's majority shareholding in that company. To arrive at the true "consolidated profit", the Bank argues that it is necessary to deduct from the sum shown in that line the sum which reflects the share of that profit to which the third party minority interest in the subsidiary is entitled. The Bank submits that that is how one arrives at the contractual term of art, "consolidated profits before tax". If one does so, the net figure of consolidated profits before tax falls below the contractual threshold in the circular with the result that no share of the group's profits in the financial year to 30 September 2002 is payable to the staff under the contract set out in the circular.

9. As stated in the statement of facts and issues, the Bank made payments to staff under the scheme in 1987, 1988, 1989, 1993 and 1994. The entitlement to payment was triggered in 1999 but Mr Paul Stewart, the chairman of the Association, explained in his affidavit that the Association opted to forgo the payment. It may be the case that profits were shared in other years as the Court of Appeal stated but it is not necessary to reach a concluded view on that matter. There is a dispute between the parties as to whether in

the years in which the Bank had a subsidiary or subsidiaries in which there was a minority interest, which would at least include 1994 after the acquisition of a majority interest in EGC, the Bank deducted the sums attributable to the minority interest in calculating the staff's entitlement to a profit share under the contractual scheme. The Bank's auditors, PWC, have not kept their records for those years and the parties remain in disagreement on this matter, notwithstanding Sykes J's findings of fact. This is, however, of no concern, for, as the Board explains below, the behaviour of the parties after entering into the contract is not in this case a relevant matter in the interpretation of the parties' contract.

2. The legal proceedings

10. The Association filed a fixed date claim on 14 February 2006 in which it sought several declarations which included declarations that the scheme forms part of the employment contract of the Bank's staff, that the deduction for minority interest in subsidiaries was not part of the calculation of net profits before tax in the contractual arrangement and that a profit-sharing payment was due in the year ending 30 September 2002. Several years passed during which there appears to have been negotiations to settle the claim before the Association amended its fixed date claim form in July 2014 to claim interest on the judgment sum at the commercial rate at the date of judgment.

11. Sykes J in a judgment dated 20 July 2017 ([2017] JMSC Comm 19) upheld the Association's claim and granted most of the declarations which it sought, including those summarised in para 10 above. He then heard further submissions on the award of interest and, in a judgment dated 25 October 2017 ([2017] JMSC Comm 30), awarded simple interest at the commercial rate of 20.05% on the sum of Jamaican $142,821,646.39 from 1 October 2002 to the date of payment.

12. The principal issue which Sykes J had to address in his judgment was whether the scheme formed part of the contract of employment of the Bank's employees or, as the Bank then submitted, a profit share was payable at its sole discretion. He recorded in some detail the evidence led as to genesis of the scheme from about 1977 onwards, the decisions of the Bank's board in 1980 and the stance of the Association in its negotiations with the Bank. He recorded the evidence of Euton Cummings, the assistant general manager of the Bank's Group Human Resources Division, on the operation of the scheme and his suggestion that the change in Jamaica's accounting standards in 2003 when it adopted the International Accounting Standard 27 ("IAS 27"), had caused the Bank's auditors to advise that the profits attributable to minority interests in subsidiaries were to be deducted in the calculation of the consolidated profit for the purpose of the scheme. It is not clear, from reading Mr Cummings' affidavit, that he was suggesting that the change in accounting standard necessitated the stance which the Bank took on the staff's entitlement to a profit share in 2002. The evidence of Alok Jain, a partner in PWC, the Bank's auditors, contradicted that suggestion as the 2002

accounts were prepared in accordance with the Jamaican Generally Accepted Accounting Principles ("GAAP") and the introduction of IAS 27 from 2003 did not alter the presentation of the Bank's accounts in any relevant way. Nor did the evidence of Malcolm Sadler, the assistant general manager of the Bank's Group Finance Division, support such a suggestion; he expressly stated that the change in accounting standards in 2003 had "no impact on how we calculate profit share". Evidence to the same effect was given by Orville Christie, a chartered accountant who was called as an expert witness by the Association. Notwithstanding that evidence, it appears that counsel for the Bank (then Walter Scott QC) sought to argue that a change in accounting standards in 2002 had resulted in the auditors advising the Bank that the sum attributable to the minority interest be deducted in the calculation under the scheme. Sykes J correctly rejected this submission, and counsel for the Bank departed from that submission in the Court of Appeal.

13. As Sykes J held that the scheme had contractual effect and the change in accounting standards in 2003 was irrelevant to the calculations under the scheme, the principal issue became the meaning of the contested words in clause 2 of the circular. In para 140 of his judgment Sykes J set out 15 propositions on the interpretation of contracts in common law based on the jurisprudence of the House of Lords and the United Kingdom Supreme Court ("UKSC") and quoted in para 141 from the UKSC judgment in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173, on how those principles are applied to the task of interpretation. The Bank did not dispute Sykes J's summary of the correct approach to contractual interpretation in the Court of Appeal and does not do so before the Board. Drawing on the evidence of Orville Christie, Sykes J interpreted the phrase used in the scheme "consolidated profits before tax" as referring to the line set out in the consolidated profit and loss account entitled "Profit after Taxation and before Extraordinary Items". He stated (paras 144-146) that in 1980 when the circular was issued the parties knew of the concept of "consolidated profits before tax" and that unless stated otherwise it necessarily included minority interests in subsidiaries.

14. In relation to the second part of the contested phrase, "as agreed by the auditors", Sykes J did not accept the submission that the Bank was bound by the recommendation of the auditors. The scheme gave the auditors no power of veto; their role was merely to verify the correctness of the Bank's arithmetical calculations.

15. Sykes J at the conclusion of oral submissions raised a question whether there was any principle of good faith in the law of contract of Jamaica. It was not raised by the parties. He concluded that there was such a principle and that there had been a breach by the Bank of two implied terms of the contract which were based on the concept of good faith.

16. In its appeal to the Court of Appeal the Bank accepted that the scheme had been incorporated into the contracts of employment of its staff. It appealed on three broad fronts. First, it challenged the judge's interpretation of the scheme, including the role of the auditors in determining whether the staff's entitlement to a share of the group's profits had been triggered, arguing that the judge had erred in fact and in law. Specifically, the Bank challenged the declarations that it could not deduct from the group's consolidated pre-tax profits the profits attributable to the minority interest in EGC, that the auditors should not have made such a deduction in the year ending 30 September 2002 and that the criterion for profit-sharing had been met in that year, entitling members of the Association to a contractual share of the group's profits. Secondly, it asserted, and the Court of Appeal accepted, that the question of good faith did not arise on the pleadings. Thirdly, the Bank challenged the judge's award of interest from 2002 when, it submitted, the Association had sought interest from the date of judgment in its amended fixed date claim form.

17. Counsel for the Bank presented the issue to the Court of Appeal as being "highly fact-specific". He submitted (i) that the term "consolidated profits before tax" was a term of art in the contract (not a reference to the "Profit before Taxation and Extraordinary Items" line in the consolidated accounts) and (ii) that the auditors had a veto power as it was their task to ensure that the Bank made the correct adjustments to the figures stated in the Bank's accounts to arrive at the contractual concept of "consolidated profits before tax".

18. In its judgment dated 3 July 2020 ([2020] JMCA Civ 27) the Court of Appeal (Phillips and Foster-Pusey JJA and Fraser JA (Ag)) rejected the Bank's challenge to the judge's assessment of the factual evidence, citing in support of appellate court restraint the well-known decision of the House of Lords in *Watt v Watt* [1947] AC 484, the decisions of the Board in *Industrial Chemical Co (Ja) Ltd v Ellis* (1986) 23 JLR 35 and in *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, and the Court of Appeal's own decision in *Ronald Chang and another v Frances Rockwood et al* [2013] JMCA Civ 40. In rejecting the challenge to the interpretation of the scheme the Court of Appeal accepted that the phrase "consolidated profits before tax" in the contract was an accurate description of the standard "profit before tax" line item in group financial statements, that none of the Bank's witnesses gave evidence that the sums attributable to a third party minority interest had been deducted in the past, and that the auditors had only "an arithmetical role" in the calculation of the profit share. In a review, by the agreement of the parties, of the financial statements included in the evidence the Court of Appeal observed that there had been companies in which the Bank held a majority interest but not a 100% shareholding for at least the period from 1991 until 7 August 2002 and, separately, there was no evidence of a practice of deducting the profits attributable to a third party minority interest. The Court of Appeal rejected the grounds of appeal on the interpretation of the scheme and on the calculation of the entitlement to a profit share.

19. In relation to the challenge to the judge's finding of the absence of good faith, the Court of Appeal concluded that it was neither necessary nor appropriate for the judge to raise the questions of good faith in contracting and as to whether the Bank were in breach of implied terms of the contract.

20. The third substantive challenge before the Court of Appeal concerned the judge's award of interest. The Bank argued that the judge had erred in awarding interest from 1 October 2002 because the Association has requested in its pleading "interest on the judgment sum at the commercial rate at the date of judgment". As the Board discusses more fully below, the Court of Appeal referred to rules 8.7(1) and (3) and 8.8 of the Civil Procedure Rules, section 3 of the Law Reform (Miscellaneous Provisions) Act and section 48(g) of the Judicature (Supreme Court) Act and concluded that the judge had a discretion to award interest for the period in which the Association's members had been deprived of their entitled payments under the scheme.

3. The parties' submissions

21. The Bank challenges the judgment of the Court of Appeal on the interpretation of the scheme and argues that the court erred in accepting Sykes J's findings when the evidence to support such findings was absent. On the material before the courts, the only one proper construction of the scheme was that advanced by the Bank, which had acted on the advice of its auditors in concluding that no profit share was payable. The Bank's reason for not paying the profit share in 2002 had nothing to do with any change in accounting standards, that was a misunderstanding on the part of Mr Cummings, to whom the Board referred in para 12 above. Its reason was simply that the pre-tax profits, properly calculated, had not reached the threshold set out in the scheme.

22. The Bank also argues that the courts below committed a miscarriage of justice in the inconsistent way in which they dealt with the declarations sought by the Association. It was illogical to grant the declarations which Sykes J did against the Bank and to refuse to grant declarations that PWC had erred in its calculation and that it should interpret the formula in the scheme in the way in which the Association contended. There is nothing in this submission. The obvious explanation for not making declarations involving PWC was (i) that they were unnecessary in view of the declarations given in relation to the Bank when the judge had concluded that the auditor's role was simply to check the Bank's arithmetic and (ii) that it was not appropriate to make a declaration that PWC should act in a particular way when it was not a party to the action.

23. Further, much of the Bank's written case is devoted to showing that the Association has not established that the Bank had not deducted profits attributable to a minority interest in subsidiaries in its calculations of entitlement under the scheme in the

years before 2002. But that, as the Board will discuss below, is irrelevant to the proper interpretation of the contract in the circumstances which existed when the parties entered into it.

24. As the Association's counsel did not advance the arguments in its written case in relation to good faith on its cross-appeal, it is not necessary for the Board to consider that question. The Board would in any event have been very reluctant to consider the arguments, which could have significant ramifications for the Jamaican law of contract, in a case in which the points did not properly arise.

25. The substantive issues raised by the Bank in this appeal which the Board will address are therefore (i) the proper construction of the contractual scheme and (ii) whether the Association is entitled to interest with effect from October 2002 when its pleaded claim was, it is contended, for interest from the date of judgment in 2017. In relation to the latter point, the Bank's argument, which is succinctly pleaded, is that the court's discretion in relation to the award of interest must be exercised within the boundaries of the claimant's pleaded case.

26. The case for the Association is misguided in so far as it relies, as a knock-out blow against the Bank's appeal, on the Board's well-established approach to appeals which seek to disturb concurrent findings of fact as set out in *Devi v Roy* [1946] AC 508 and later cases such as *Sancus Financial Holdings Ltd v Holm (Practice Note)* [2022] UKPC 41; [2022] 1 WLR 5181. This is so for three reasons. First, the interpretation of the contractual scheme set out in the circular is a question of law. Questions of fact on which concurrent findings might be made may arise in relation to the factual context in which a contract was entered into, not in relation to the meaning of the contract itself. Secondly, the way in which the parties operated the scheme in the years between 1980 and 2002 is, as the Board explains below, not relevant to the establishment of the correct interpretation of the contractual scheme and, in any event, there was insufficient evidence on which that practice could be established. Thirdly, the role of the auditors in determining whether the profit sharing had been triggered is a matter of contractual interpretation, which is a question of law and questions of concurrent findings of fact will arise only in relation to the factual matrix as stated in the first reason above.

27. The conclusion that the Association's reliance on the Board's general rule in relation to concurrent findings of fact is misplaced, however, does not mean that the courts below erred in their conclusion on the interpretation of the scheme. It merely deprives the Association of a knock-out blow in its answer to the appeal to the Board. The Association addresses the correct interpretation of the scheme in its response to the third ground of appeal. It asserts that the evidence established that the Bank had a consistent practice before 2002 of not deducting minority interests in its calculation of consolidated profits before tax for the purpose of the scheme and that the Bank had failed to establish the contrary position. The Board is not satisfied that that is the case.

More significantly, the Association supports the conclusion of its expert, Orville Christie that the line in the group accounts, "Profit before Taxation and Extraordinary Items" is properly referred to as "consolidated profits before tax", which is the expression used in the circular.

28. It is not necessary to discuss further the Association's response to the Bank's argument that there had been inconsistency in the grant of certain declarations as the Board has rejected the argument in para 22 above.

29. In relation to the dispute about the date from which interest is to be awarded, the Association's case is that the courts below did not misunderstand the law or the evidence and that the judge was entitled to exercise his discretion to award interest at the commercial rate from October 2002.

4. Analysis

(i) The interpretation of the contractual scheme in the circular

30. Much of the dispute before Sykes J was as to whether the scheme was discretionary or had contractual effect. Sykes J decided that the scheme was incorporated into the staff's contracts of employment. As the Board has said, he gave a summary of the principles of the interpretation of contract in paras 140 to 142 of his judgment. The Bank has not challenged that summary; the Association submits that the summary is accurate. In the Board's view the principles of the common law on the interpretation of contracts are not in any serious doubt; the question for the courts and now the Board is the application of those principles in the interpretation of a particular contract against the background of a particular factual matrix.

31. The modern approach of the common law to the interpretation of contracts has been clear at least in its outline since the judgment of Lord Wilberforce in the House of Lords in *Prenn v Simmonds* [1971] 1 WLR 1381. In three recent cases – *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, and *Wood v Capita insurance Services Ltd* (above) - the United Kingdom Supreme Court has set out those principles and stated how the various principles may be applied in the unitary but iterative task of interpreting a contract. It is necessary therefore only to draw attention to certain principles of contractual interpretation which are germane to the construction of the scheme.

32. First, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the contract as a whole. Secondly, in so doing the court has regard to the factual background known to

the parties at or before the date of the contract, but excluding evidence of prior negotiations. Thirdly, where there are rival meanings of the relevant contractual provision considered in its context, the court can give weight to the implications of the rival meanings, by considering which construction is more consistent with business common sense. But, fourthly, the court does not depart from an interpretation of the natural language of words just because the contractual arrangement has proven to be a bad bargain for one of the parties. Fifthly, the weight to be attached to the precise words used in the contract will vary depending upon the sophistication of the contractual drafting and whether skilled professionals have been involved in creating the contract. But, sixthly, even where there has been a process of sophisticated professional drafting, the court must be alive to the possibility that the text of a provision, which has been accepted to conclude a contract, is a compromise between parties with conflicting aims or the result of a failure of communication between the parties. Where that is so, the court may give more weight to the factual matrix or the purpose of similar provisions in contracts of the same type. Finally, events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation. The court has regard to the facts and circumstances which existed at the time the contract was made and which were known or reasonably available to both parties.

33. The Board addresses first, the context of the agreement of the scheme in 1980. The circular containing the scheme was the product of detailed negotiation between officials of the Bank and the Association's officers since at least 1977. There is no suggestion that the process of agreement of the text was constrained by tight commercial deadlines. The people involved in this process would have included bankers and professionals who were familiar with the presentation of the Bank's accounts and general accountancy practices. The circular was reviewed and approved by the Board of the Bank.

34. The contractual phrase, "the consolidated profits before tax", is an apt description of the line in the Bank's consolidated accounts entitled "Profit before Taxation and Extraordinary Items". That line, like all the lines in the consolidated profit and loss account which preceded it, records consolidated figures, encompassing the parent company and its subsidiaries, including subsidiaries in which the Bank owned a majority interest. There is therefore no substance in the Bank's submission that it is significant that the line of the account did not refer to "consolidated" profit before taxation. The directors of the Bank, its auditors, and its staff could readily ascertain by looking at that line in the profit and loss account in any year what was presented as the Bank's consolidated profit before taxation.

35. The Bank did not submit that the words "and extraordinary items" in the profit before tax line of the Bank's consolidated accounts were material to their arguments. The Board agrees with the Bank's judgment in this regard and sees no relevance of those words to the question of interpretation which is the subject of this dispute.

36. As the Bank's auditors explained, the layout of the Bank's consolidated profit and loss account conformed to the requirements of Jamaican GAAP and the introduction of IAS27 in 2003 did not alter the presentation of the profit and loss account in any material way. It may, as Alok Jain explained in his evidence, have been a matter of convenience that, in accordance with Jamaican GAAP, where a group included subsidiaries in which the parent company had only a majority holding, the accounts stated first the consolidated profit of the group before taxation and in the following lines deducted the taxation of the group's profits as a whole and then deducted the post-tax profits attributable to minority interests in those subsidiaries. But that does not weaken the force of the evidence of the Association's expert witness, Orville Christie, that the Bank's consolidated accounts contained a line which was properly described as the group's "consolidated profit before taxation." A similar use of the term "consolidated profit before tax" can be seen in the memorandum by the Bank's general manager, staff and administration, to the Board of Directors on 16 December 1980 which led to the release of the circular on the following day.

37. As the Board has said, the conduct of the parties in implementing a contract is not relevant to its interpretation. Much of the dispute between the parties in this case, as to whether it had been established that the Bank had or had not deducted the profits attributable to third party minority interests in its subsidiaries when calculating whether the threshold for profit-sharing had been met in earlier years, is beside the point. It is nevertheless an indication of the proper usage of language that in the memorandum to the Bank's staff of 23 December 2002 describing the Bank's position in relation to profit sharing in the year ending 30 September 2002, Aubyn Hill, the Bank's managing director, described the line in the Bank's accounts as "Consolidated Profit before Taxation September 30, 2002". He thereafter deducted the profits attributable to the minority interest to arrive at what the Bank asserted was the correct calculation for the profit-sharing scheme. The Board observes a similar use of language in the directors' report in the 1991 accounts.

38. It appears from the evidence of Paul Stewart, the chairman of the Association and a director of the Bank, whom Sykes J treated as a credible and well-informed witness, that in 1980 when the circular was promulgated to the Bank's staff the Bank had several subsidiaries which may have been 100% owned. It appears that the Bank did not at that time have any subsidiaries in which it had only a majority shareholding. There is no evidence that anyone involved in the negotiation of the scheme addressed the possibility of the Bank owning such subsidiaries and the complications which could arise in the allocation of profits between the Bank and its shareholders on the one hand and its staff on the other.

39. By 1991 the Bank had a subsidiary or subsidiaries in which it held only a majority interest, which required the Bank to include a line in its consolidated profit and loss account in which it stripped out from the group's consolidated profit the profits which were the property of the minority shareholder. The acquisition of shares in EGC,

in which it held a 50.5% interest, in about 1994 required similar treatment in the group accounts. The Board acknowledges the force of the evidence of Alok Jain and Raymond Campbell, a partner in KPMG and the Bank's expert witness, that in order to compare like with like in the fraction showing a profit-sharing calculation, it is necessary to deduct the profits belonging to a minority shareholder in a bank subsidiary. The comparison, it is argued, should be between the annual profits attributable to the shareholders of the Bank (the numerator) and the shareholders' funds as defined in the circular (the denominator). Ms Minott-Phillips was correct when she stated: "a member of a group can only share in the profits belonging to that group; he cannot share the profits belonging to someone else." Thus, it is argued, in 2002 when during most of the financial year EGC was a subsidiary in which the Bank held only a majority interest, a properly balanced profit-sharing scheme would have provided for the deduction of the profits belonging to the minority interests in that subsidiary in order to achieve a fair distribution of the group's profits between the Bank's shareholders and its staff. But that is not the whole picture. Achieving precision in the calculation of the pre-tax profits attributable to the Bank would also have involved the identification of the tax attributable to the minority interest so that it could be added back into the profit figure to arrive at the Bank's pre-tax profit, as Mr Campbell explained in his expert report.

40. The evidence given by Mr Jain and Mr Campbell was in the context of the Bank's case that the profit-sharing scheme was discretionary. Their approach makes good business sense in that context. But it is only one of the considerations which the court must address in interpreting the circular once it is established or conceded that the scheme had contractual effect from 1980. The court's task is to address the words chosen by the parties to express their agreement against the background of the facts known or reasonably available to both parties at the time of contracting.

41. The Board is satisfied that Sykes J did not err in interpreting the phrase "consolidated profits before tax" in the circular as a reference to the line in the consolidated profit and loss account in the Bank's consolidated annual accounts which stated the group's profit before taxation and extraordinary items. In the absence of subsidiaries in which the Bank had only a majority shareholding, that line was the appropriate numerator in the fraction which determined whether the threshold had been reached to trigger profit-sharing in a financial year. Even where the Bank had a subsidiary or subsidiaries in which it had only a majority interest the use of the line in the Bank's accounts had the benefits of transparency and simplicity. The Association could readily ascertain the entitlement of the staff by looking at the accounts. By contrast, the Bank's approach, if properly carried out, would involve not only the deduction of the net profits attributed to the minority interests but also the tax payable on those profits in order to arrive at the profit before tax attributed to the Bank. The tax on the profit attributed to the minority interests is not disclosed within the Bank's accounts. In contrast with the careful definition of shareholder's funds in para 2 of the circular, there is no similarly careful definition of the consolidated profits before tax as one might have expected if the Bank's interpretation of the phrase were correct.

42. Further, there was no evidence that reasonable businesspeople in the same position as the parties at the time of the contract would have foreseen that the contractual formula using the line in the consolidated profit and loss account would be significantly inaccurate if the Bank had or were to acquire a subsidiary in which it held only a majority interest. It cannot be concluded that the Bank would have taken the view that the formula was over-generous to the staff in that circumstance. Much would have depended upon the materiality of the contribution of the subsidiary to the profits of the group and the size of the minority interest in that subsidiary. Thus, notwithstanding any uncertainty as to when the scheme first had contractual effect and when the Bank first had a subsidiary in which it had only a majority interest, the Board is satisfied that Sykes J did not fall into error on this matter.

43. The Board does not think that the words "as agreed by the auditors" point towards a different meaning. Clause 3 of the circular provided for the distribution of the profit share to the staff in advance of the completion of the audit of the annual accounts. In each year, the Bank's internal accountants would have prepared a draft consolidated profit and loss account which included a statement of the consolidated profit before tax and, once the profit-sharing scheme had been agreed, would have calculated whether or not the consolidated profit before tax had crossed the threshold for profit-sharing. The distribution of money to the Bank's staff would reduce the net profit attributable to the Bank's shareholders and would have to be reflected in the audited accounts. It is therefore not surprising that, as Sykes J held, the scheme provided that the auditors should agree the arithmetical calculation by the Bank's accountants of the sums to be distributed to the staff.

44. The Board therefore rejects the Bank's arguments on the interpretation of the contractual scheme.

(ii) The claim for interest

45. In his judgment on the claim for interest dated 25 October 2017 ([2017] JMSC Comm 30) Sykes J correctly rejected the Association's application for compound interest: see *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] AC 929; *Sagicor Bank Jamaica Ltd v Seaton* [2022] UKPC 48; [2023] 1 WLR 1759. He awarded simple interest at the average rate each year from 1 October 2002 until the date of payment. Sykes J's judgment addresses the parties' submissions on the question of compound or simple interest and the appropriate interest rate. Before the Court of Appeal the Bank renewed its challenge to the period of time that interest should run based on the Association's written pleadings in its fixed date claim form. As the Board has said, the Association in its pleadings asked for "interest on the judgment sum at the commercial rate at the date of judgment", which the Bank submitted was a claim for interest only from the date of judgment. The Court of Appeal

pointed out that the Association's pleadings also sought "such further and other reliefs as this Honourable Court deems fit".

46. The Court of Appeal rejected that challenge. The Board is satisfied that it was right to do so. The challenge is in essence simply a pleading point. The Court of Appeal referred to rule 8.8 of the CPR which addresses the contents of a fixed date claim form. So far as material it states:

> "Where the claimant uses form 2, the claim form must state-
>
> (a) The question which the claimant wants the court to decide; or
>
> (b) The remedy which the claimant is seeking and the legal basis for the claim to that remedy; …"

The rule does not mention the form of pleading when a claimant seeks interest on its monetary claim. But the Court of Appeal construed rule 8.7(3) as applying to a fixed date claim form when the claimant seeks interest on its claim. Rule 8.7 provides so far as relevant:

> "(1) The claimant must in the claim form (other than a fixed date claim form) –
>
> (a) include a short description of the nature of the claim;
>
> (b) specify any remedy that the claimant seeks (though this does not limit the power of the court to grant any other remedy to which the claimant may be entitled); …
>
> "(3) A claimant who is seeking interest must –
>
> (a) say so in the claim form, and

(b) include in the claim form or particulars to claim details of –

(i) the basis of entitlement;

(ii) the rate;

(iii) the date from which it is claimed;

(iv) the date to which it is claimed; and

(v) where the claim is for a specified sum of money,

- the total amount of interest claimed to the date of the claim; and

- the daily rate at which interest will accrue after the date of the claim."

47. While the claimant did not comply with rule 8.7(3), which the Court of Appeal held was applicable to its fixed date claim form, the Court of Appeal held that the court had a discretion to award interest under section 48(g) of the Judicature (Supreme Court) Act and section 3 of the Law Reform (Miscellaneous Provisions) Act (Law 20 of 1955). It held that Sykes J had not misunderstood the law or the evidence and that he was entitled to award interest for the period in which the Association's members had been deprived of their profit share.

48. Section 48(g) of the Judicature (Supreme Court) Act empowers the Supreme Court to grant

"either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter".

Section 3 of the Law Reform (Miscellaneous Provisions) Act provides for the payment of interest on debts or damages in these terms:

> "In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: …"

49. The Bank does not dispute that Sykes J had jurisdiction to award interest from 1 October 2002 under those statutes. Its succinct complaint in its written case is that it should have exercised its discretion "within the boundaries of the claimant's pleaded case". In other words, it takes a pleading point.

50. This point has no merit. First, as the Bank recognised, the Court of Appeal has held in *British Caribbean Insurance Co Ltd v Delbert Perrier* (1996) 33 JLR 119, 125-126 per Carey JA, that as a general rule, "where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld…" The Board agrees. Secondly, there is a question of the interpretation of para 10 of the fixed date claim form in which the Association sought "Interest on the judgment sum at the commercial rate at the date of judgment". In the Board's view, this request was that the commercial rate of interest be fixed as at the date of judgment. It did not specify from when interest was sought. Thirdly, as the Court of Appeal observed, in para 11 of the fixed date claim form the Association sought "such further reliefs as this Honourable Court deems fit", a formulation which does not tie down the remedies which the court may award. Fourthly, if, as the Court of Appeal has held, rule 8.7(3) is to be applied to a fixed date claim under rule 8.8, the court had the power to allow the Association to amend the fixed date claim form to claim interest from 2002. The Court also had power to excuse a non-conformity with the civil procedure rules under CPR rule 26.9, if the point had been raised in a timely manner. In any event, although CPR rule 8.7(1) is stated as not applying to fixed date claims, rule 8.7(1)(b) suggests that the court has power to grant remedies beyond those which the claimant has sought. It would be incongruous if the court did not have a similar power in the less formal fixed date claim procedure, which is designed for cases in which there is likely to be minimal evidence and which can proceed promptly to a hearing. Any failure therefore to specify the date from which interest was sought and other matters specified in CPR rule 8.7(3), if applicable, is not a fundamental objection to the claim for interest. Fifthly, the process of pleading in a fixed date claim allows parties to set out their case in the affidavits which they lodge in court. In this case, Orville Christie, the Association's expert witness, set out a calculation of interest from September 2002 in a schedule to his second affidavit which the Association's counsel relied on in their closing submissions at the trial. The Bank was on notice. Sixthly, although the Association had not made the claim for interest until it amended its fixed date claim form in 2014, the Bank has suffered no relevant prejudice. Contrary to its statement in para 17 of its written case, the Bank through its counsel accepts that a fixed date claim form was served on it in 2006. From then on it

had notice of the Association's claim and would have been aware of the possibility that the Association would seek interest from the date when the cause of action accrued. Further, it is not suggested that the Association deliberately or unjustifiably caused the delay in pursuing the claim after 2006.

51. The appeal against the award of interest from October 2002 therefore fails.

5. The appropriate declarations

52. Sykes J granted six declarations (declarations 1, 2 ,3 5, 7 and 9). As it is now agreed that the staff's entitlement to a profit share contained in the circular has been incorporated into their contracts of employment, several of the declarations are unnecessary and may be dispensed with. The Board considers that it is possible to state in a more succinct form what the Association has sought to achieve in declarations which Sykes J granted if it were to make (i) a declaration identifying the circular with its subsequent amendments as governing the scheme and stating that it has contractual effect as part of the members' contracts of employment (ie a combination of the substance of declarations 1 and 5) and (ii) a declaration in terms of declaration 8. Declaration 9, relating to costs, should remain unchanged.

53. The Board invites the parties to submit a text of the appropriate order, including the suggested declarations, and their submissions in relation to the costs of the appeal, within four weeks of the date of this judgment.

6. Conclusion

54. The Board will humbly advise His Majesty that the appeal be dismissed and that, in the interests of simplicity, the proposed declarations referred to in para 52 above, once approved by the Board, be made in place of those made by Sykes J in his judgment dated 20 July 2017.