David John de la Haye v Jonathan David de la Haye

Jurisdiction:	Jersey
Judge:	Matthew John Thompson
Judgment Date:	19 December 2018
Neutral Citation:	[2018] JRC 233
Reported In:	[2018] JRC 233
Court:	Royal Court
Date:	19 December 2018

Text

[2018] JRC 233

Royal Court

(Samedi)

Before:

Advocate Matthew John Thompson, **Master of the Royal Court**.

Between:
David John de la Haye
Plaintiff
and
Jonathan David de la Haye
Defendant

Advocate M. P. Renouf **for the Plaintiff**.

Advocate D. S. Steenson **for the Defendant**.

Authorities

Royal Court Rules 2004, as amended

Royal Court (Amendment No.20) Rules 2017

Snell v Beadle [2001] JLR 118

MacFirbhisigh & Ching v CI Trustees & Ors [2017] JRC 130A

Corefocus Consultancy Ltd v Cronk [2013] JRC 194

Trilogy Management v YT & Ors [2012] 2 JLR Note 19

Trilogy Management v YT & Ors [2012] JCA 152

The Internine and the Intertraders Trusts [2005] JLR 236

Marett v Marett [2008] JLR 384

Farley & Son Limited v Takilla [1992] JLR 054

Dispute —application by defendant with reference to an agreement dated 17th January, 2017, and a consent dated 8th February, 2017.

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Introduction

1 This judgment contains my written reasons in respect of an application by the defendant seeking an order that the plaintiff should be precluded from amending his order of justice and seeking a declaratory ruling on the true meaning effect of an agreement dated 17 th

January, 2017, and a consent dated 8 th February, 2017.

2 The present proceedings concern a family dispute between Mr David de la Haye the plaintiff and Mr Jonathan de la Haye the defendant. The plaintiff is the defendant's father. The dispute sadly is acrimonious and there has been a complete breakdown of trust and any relationship between the parties.

3 3. In around May 2003 the plaintiff and the defendant purchased a property in the Parish of St. Mary ("the Property"). The Property was purchased jointly, with the plaintiff occupying a two bedroom flat connected to the main house which was occupied by the defendant and his wife.

4 The relationship between father and son deteriorated so that by 2015 lawyers became involved. Advocate Le Cornu of BCR Law acted for the plaintiff and Advocate Sinel acted for the defendant. In early August 2015 the plaintiff and the defendant entered into an agreement to sell the Property ("the 2015 Agreement"). The 2015 Agreement provided for the Property to be sold in its entirety for £2.3 million. If sold all borrowings were then to be repaid, with the plaintiff receiving £800,000 out of the net proceeds of sale and the balance being retained by the defendant.

5 The Property did not sell leading to the plaintiff commencing the present proceedings against the defendant by an order of justice dated 16 th June, 2016.

6 The order of justice sought to set aside the 2015 Agreement on the basis of *erreur*, implying a term that the parties would act reasonably if the sale price fell below £2.3 million, and alternatively alleging there was no formation of a contract. An answer was filed on 20 th July, 2016, with all the claims being disputed.

7 On 4 th August, 2016, the matter came before me for directions. I ordered the parties to permit each other's nominated valuer access to all parts of the Property in order to obtain a valuation. I then stayed the matter pursuant to Rule 6/28 of the *Royal Court Rules 2004, as amended* ("the Rules") to enable the parties to explore resolution of their dispute through mediation. In relation to the plaintiff's case based on *erreur*, I expressed concern as to whether Advocate Renouf could act for the plaintiff because Advocate Le Cornu would be a witness as to whether *erreur* existed and he continued to be a consultant to BCR Law.

8 Subsequent to this hearing the stay order was extended on various dates.

9 On 17 th January, 2017 ("2017 Agreement") the parties entered into a second settlement agreement to replace the 2015 Agreement. It is the 2017 Agreement that I am asked to construe.

10 The following are the material provisions of the 2017 Agreement:-

> *"2. Except as otherwise agreed in writing, the house, yard, driveway, gardens, pool and Orchard at the Property (as marked on the attached diagram with a yellow boundary, but to be marked on site with boundary stones) (the "House") will be marketed for a period of 6 months from the 17th January 2017, at £1,650,000.00 (the "Marketing Price") and the parties will accept a sale price of a minimum of £1,500,000.00 (the "Selling Price"). The exact boundaries will be marked by boundary stones, the positions of which have been marked on site today.*
>
> *3. The net proceeds of sale of the Property (or any part of it) after estate agents fees, conveyancing fees (including the costs of planting the boundary stones), associated sales costs and secured borrowings have been deducted shall be split 8/15ths to David and 7/15ths to Jonathan.*
>
> *4. The parties will use their best endeavours to sell the orchard at the Property, as marked on the attached diagram with an orange boundary (the "Orchard"), to the neighbouring property owner(s) at a premium over its market value. The parties shall use their best endeavours to obtain any consents necessary for such sale. If sold in whole or part to any neighbouring property owner, that owner is to provide his/her own right of access so that if the whole of the Orchard is sold to neighbour(s), it will no longer require the right of access from the House or the Remaining Land. The exact boundaries will be defined in a site visit. David will receive 8/15ths of the net proceeds of sale and Jonathan will receive 7/15ths of the net proceeds of sale. If the parties do not agree to sell the Orchard (or part of it) to neighbour(s), it shall be sold together with the House (subject to obtaining any necessary consents).*
>
> *5. David de la Haye will sell to Jonathan his interest in the remaining land (being the remaining land at the Property, less the House and the Orchard each as defined above) including the sheds and stables built upon it (the "Remaining Land"), subject to the Uplift defined below, based on an overall valuation of the Remaining Land of £250,000. For the avoidance of doubt, subject to the Uplift David will therefore receive 8/15ths of the net proceeds of sale for his interest in the Remaining Land, which will entitle David to £133,333 from Jonathan. In order to avoid the necessity for a remortgage, this sale will take place at the same time as the House is sold and my client will receive his £133,333 from Jonathan on the Tuesday following the conveyance of the House in the normal way.*
>
> *9. The Property shall be marketed at the revised Marketing Price set out in paragraph 2 above with the estate agents, Broadlands, Wilsons, Benest Estates and Gaudins. The parties shall give joint instructions to the agents and both be entitled to receive updates from them. If the House does not sell at or above the Selling Price of £1.5m within six months, the Marketing*

Price and the Selling Price shall be reduced to such price as the parties shall agree in writing, or in default thereof by £50,000 every three months until the House is sold, subject to a minimum selling price of £1.35m. If the House does not sell at or above the Selling Price of £1.35m, it shall be sold at such lesser selling price as the parties shall agree, or in default of agreement in accordance with such order as to price or otherwise as the Royal Court thinks just. (underlining added)

10. The parties agree not to oppose any court applications or orders to give effect to this agreement and agree to indemnify each other in respect of any costs properly incurred in any such proceedings taken to give effect to this agreement.

14. The 6.8.15 Heads of Agreement, to the extent they bind the parties, is replaced by this agreement.

15. For the avoidance of doubt, save for the purposes of enforcing the terms of this agreement, this agreement fully and finally settles all matters between them including regarding their respective entitlements to the sale proceeds of the Property, the issue of Jonathan's liability to David for the loan of £100,000 made by David to Jonathan and Andrew in the year 2000 (Balance presently estimated, after the repayment of £50,000, plus interest at approximately £66,000) (which liability is not admitted by Jonathan) and Jonathan's claim against David for utility expenses at the Glade (which liability is not admitted).”

11 The 2017 Agreement led to me issuing a consent order on 8 th February, 2017, which provided as follows:-

“1. all further proceedings in this action shall be stayed pending performance of the sale of the House and Orchard pursuant to the terms of the Settlement Agreement at paragraphs 2 to 6 and 8 and 9;

2. the parties may apply for the purposes of enforcement of the sale of the House and Orchard;

3. on the sale of the House and Orchard the present proceedings shall be irrevocably discontinued.”

12 12. The intention therefore was for the present proceedings to be discontinued on the sale of the House and the Orchard as described at clause 2 of the 2017 Agreement.

13 On 14 th June, 2018, Advocate Renouf on behalf of the plaintiff wrote to Advocate Mière at Steensons acting for the defendant as follows:-

“Re: The sale of The Glade – Subject to Contract

Broadlands have contacted us to say that an offer has been made by an unspecified client for the Glade (excluding land and sheds) of £1.2m. I gather from Broadlands that in recent days that your client has indicated a willingness to accept that offer.

Whilst my client had hoped the Property would achieve a higher offer, in view of the length of time the Property has been on the market, the number of viewings, the lack of other offers recently (£1m having been offered in recent months), and the present state of maintenance of the Property and its presentation, my client realises that they are not going to achieve the present asking price. Upon informal advice from two estate agents, however, my client would like to ask Broadlands to explore whether the offer can be raised to £1.25m. If not, he feels that there will be little alternative but to accept the £1.2m.

However, my client does so on the following basis:-

> *1. The Settlement Agreement dated 17th January 2017 does not apply. Inter alia Clause 9 of the Agreement specifies a minimum selling price of £1.35m and the present offer is £150,000 less than that minimum figure; and*
>
> *2. My client has various concerns regarding the security documentation given to NatWest which he wishes me to investigate. These concerns include the fact that he believes he never signed the 2010 loan documentation for £175,000 and signed the 2008 loan documentation for £200,000 in Jonathan's kitchen without the benefit of legal advice*.

My client has not yet decided what to do in relation to issues 1 and 2 above. He may wish to make further investigations in relation to item 2, and/or take further legal advice in relation to both issues. For present purposes he raises the issue that he has concerns which we may have to discuss further in due course and reserves his rights in relation to any matters arising.

Clearly, if the latest offer for The Glade is not accepted quickly, there is a danger that it will be lost. If the offer is the best offer likely to be available at the time, the first step must be to accept it and deal with any other issues arising later.

May I suggest that we start by asking Broadlands to propose £1.25m for a sale to secure the sale. If that is not accepted my client proposes that we then try to secure the £1.2m offer and proceed with the sale process.

We can then discuss the other matters in due course."

14 On 19 th June, 2018 Advocate Renouf emailed Broadlands to state "I confirmed by telephone call my client David de la Haye also consents to sell the Glade as defined by the boundary stones (i.e. without fields and sheds but with the small Orchard) for £1.2 million."

15 On 21 st June, 2018, Advocate Steenson emailed Advocate Renouf firstly informing Advocate Renouf that the defendant and the defendant's wife would be the purchasers of the Property. The email then went onto set out what the plaintiff would receive from the sale according to Advocate Steenson's calculations.

16 Paragraph 1 to 7 of Advocate Steenson's calculations are as follows:-

“1.	Sale Price	£1,200,000.00		
2.	Minus existing mortgage	£775,000.00	(a close approximation, as I understand it)	
3.	Minus existing mortgage	£12,000.00	(estimated Estate Agent's fee	
4.	Equals	£413,000.00	net	
5.	David's share @ 8/15ths	£220,266.66		(8/15ths of the £250,000 agreed as
6.	Plus	£133,333.00	the price of the additional land)	
7.	Equals	£353,599.66		

17 There were then some minor adjustments resulting in the plaintiff receiving a net sum of £337,922.16.

18 If the terms of the 2017 Agreement apply to a sale price of £1.2 million, the plaintiff agrees that Advocate Steenson's calculations are correct.

19 19. On 21 st June, 2018, Advocate Renouf responded to Advocate Steenson by email and stated at paragraph 4 as follows:-

> *“As the proposed selling price is £1.2m, on its face the Settlement Agreement does not apply, therefore nor does the breakdown in the agreement (8/15ths and 7/15ths), nor does any acceptance as to the validity of all the Natwest charges as against David (specifically the £200,000 and the last £175,000).”*

20 Advocate Steenson replied the following day at 12:16 by email which at paragraphs 3 and 4 stated as follows:-

"3. If you want to bring an argument before the Court that the agreement should not proceed of the fact that the purchases are Jonathan and his wife, then I shall issue licitation proceedings directly. Please confirm that this is not the case.

4. I have no idea what you are talking about in relation to the validity of the Natwest loans. Please elucidate."

21 On 3 rd July, 2018, Advocate Renouf wrote to Advocate Steenson. The contents of this letter explained his client's interpretation of Clause 9 of the Settlement Agreement as follows:-

""If the House does not sell at or above the Selling Price of £1.35m, it shall be sold at such lesser selling price as the parties shall agree, or in default of agreement in accordance with such order as to price or otherwise as the Royal Court thinks just."

It is quite clear, that the parties were not agreed about what would happen if the Glade had to be sold for less than £1.35m whether (to quote the words) (1) "as to price"; or (2) "otherwise". It is not that the Settlement Agreement is not being adhered to by my client: it is that it explicitly does not apply to a sale price of £1.2m.

The reason clause 9 was inserted was because in circumstances where my client had paid for his 50% of the Property in cash, and having made a very generous concession to his son to take 8/15ths of the net proceeds of sale, rather than 50% of the gross selling price, that my client would not be left with sufficient funds if the sale price was so low. Not only that, but the adjustment between them for the land and sheds at £133,333 was also below market value and was not tenable if the sale of the Glade itself fell below £1.35m.

So the issue now is therefore the sum my client should be paid at a £1.2m selling price. It is not that my client is refusing to agree to a sale. Nor that he objects to selling to your client, his son, notwithstanding that your client procured the estate agents not to reveal that your client was the buyer. It is that there is no agreement between them governing the apportionment of the proceeds of sale at £1.2m (and consequently I doubt your client can have financing in position when he does not know what his own equity in the Glade is). For the avoidance of doubt, my client will not accept your client's proposal to pay my client of £337,922.16 for his 50% share of the Glade, a property worth at least £1.7m and to which he would otherwise be entitled to over £800,000."

22 Following this communication, Advocate Steenson threatened to issue a summons before me requiring the plaintiff to proceed with the sale of the Property in accordance with the Act of Court of 8 th February, 2017 and the 2017 Agreement. This led to correspondence between Advocates Renouf, Steenson and myself as to whether any application should be

heard before the Royal Court or before me.

23 Ultimately, the parties agreed that I should construe the meaning of the 2017 Agreement which led to the summons presently before me. This led me to send an email dated 24th October, 2018 to the parties as follows:-

> *"Dear Advocates Steenson and Renouf*
>
> *I can rule on the meaning and effect of the settlement agreement and whether they prevent the amendments to the order of justice.* I had to consider a similar approach in *Marett v Marett* 2014 JRC 87A *and the Royal Court decision* 2014 JRC 213. *I can also issue a declaratory judgment consequent upon a summary judgment – see Vautier v Manning* [2014 (1) JLR *Note 7.* However that is as far as I can go as I have no power to issue any injunctive type relief if findings justify the same. This means I can only hear part of the defendant's current summons. If parties want a ruling as to whether the amendments should be permitted based on some form of strike out or reverse summary judgment then I can hear the same and probably more quickly than the Royal Court.
>
> *If you wish me to make some form of determination based on the above then I request Advocate Steenson to issue an appropriate summons and fix a date with Mrs Harries in the usual way."*

24 24. In the papers produced to me was a draft amended order of justice which sought to argue that the terms of the 2017 Agreement relating to the division of assets did not apply to a sale price below £1.35 million and set out claims based on:-

> (a) *déception d'outre moitié de juste prix* based on *Snell v Beadle* [2001] JLR 118; and
>
> (b) the defendant being responsible for discharging borrowings secured on the Property.

The defendant's submissions

25 Advocate Steenson for the defendant made the following submissions:-

> (i) He reserved his position as to whether BCR Law could act for the plaintiff if the plaintiff was allowed to amend its order of justice because he alleged the conflict of interest referred to in 2015 still existed.
>
> (ii) As far as the plaintiff's draft amended order of justice was concerned it was for the plaintiff to justify the amendments.
>
> (iii) It was the defendant's position however that the amendments should not be allowed because they could have been pleaded earlier.

26 In relation to the 2017 Agreement, it was clear from Clause 9 that the parties had agreed to sell the Property even if a sale price of £1.35 million was not achieved. This was clear from the final sentence of Clause 9 which provided that if the Property did not sell for the said figure above *"it shall be sold…"*. This meant that the plaintiff and the defendant could agree any price below £1.35 million on which the Property could be sold.

27 What Clause 9 also contained was a mechanism if the plaintiff and the defendant could not agree a sale price where no offers had been received for £1.35 million or more. It was then for the Court to determine at what price the Property should be sold. This was in effect reserving to the Royal Court the ability to order *licitation* and a sale of the Property. The jurisdiction of the Royal Court to determine price only arose where there was default of agreement on a price below £1.35 million.

28 28. Reserving to the Royal Court the ability to determine price did not mean that the parties were agreeing to a renegotiation of all the other terms, should the Royal Court have to determine the sale price.

29 The effect of the plaintiff arguing that the Royal Court had the complete power to apportion the proceeds of sale where the sale price was below £1.35 million, in this case was to create a dispute worth around £80,000. This was because if the sale at £1.35 million had taken place rather than £1.2 million, the parties would have received additional £150,000 of which the plaintiff would have received 8/15ths i.e. £80,000.

30 It was also clear that the defendant would have accepted £1.25 million unconditionally with the division of the proceeds of sale taking place in accordance with the 2017 Agreement. This would have meant the plaintiff would have received an additional £26,667.

31 Advocate Steenson was therefore critical of the plaintiff for continuing to pursue a dispute which had been running for some 3 years where the amount at stake was not significant and which would lead to significant costs being incurred.

32 In relation to the amendments, Advocate Steenson was also critical of the lack of any application by the plaintiff to amend. There was no summons to seeking leave to amend albeit a draft amended order of justice had been provided. In any event the complaints raised in the draft amended order of justice were not unforeseeable and therefore the plaintiff should not been allowed to go behind the agreed both 2017 Agreement and the consent order dated 8 th February, 2017.

33 If the plaintiff's position was that he wanted a specific sum of money out of the net proceeds of sale then that could have been inserted in the 2017 Agreement but there was no such provision. The plaintiff cannot now seek to reopen the 2017 Agreement because of he

failed to insert a provision that could have been negotiated earlier.

34 The plaintiff's construction of the 2017 Agreement and Clause 9 did not sit with the breadth of the full and final settlement provisions found in Clause 15. The effect of the 2017 Agreement was to settle all matters in dispute and to bring to an end a dispute that had been running then for over 2 years.

The plaintiff's submissions

35 Advocate Renouf for the plaintiff made the following submissions:-

(i) Like Advocate Steenson he reserved his position as to whether or not there was a conflict. He did not believe a conflict of interest existed at this stage.

(ii) In order to plead *deception d'outre moitié* all he had to show was that the price agreed for sale of the adjoining land and sheds of £250,000 was less than half the true value.

(iii) The consent order and the 2017 Agreement only applied to a sale over £1.35 million.

(iv) Where the price was below £1.35 million the Royal Court could make any order it saw fit and therefore could decide the apportionment of the sale proceeds.

(v) The reference to the Royal Court in the absence of agreement was akin to a default arbitration clause.

(vi) It was for the defendant to justify the construction it was arguing for. In case of doubt the Royal Court should find in favour of the plaintiff.

(vii) The background to the present dispute was of significant concern to the plaintiff. The plaintiff had paid £425,000 when purchasing the Property and was now recovering less.

36 Advocate Renouf did accept during his submissions that if his client unequivocally agreed a price below £1.35 million (the example of £1.25 million was used) then the remainder of the agreement would apply. It was the fact that the sale price had only been accepted subject to conditions which meant that the Royal Court had the right to decide how the sale proceeds should be apportioned.

37 Advocate Renouf confirmed that his client wanted the sale to proceed. His client's argument was not therefore that the Property should not be sold to the defendant and the defendant's wife but only concerned how the proceeds of sale should be divided.

38 38. Advocate Renouf also fairly accepted, if I did not accept his arguments in respect of the meaning of Clause 9, then the Property would still be sold.

39 The plaintiff was also critical of the defendant for not revealing that the defendant and his wife had made the offer, even though the plaintiff had no objection to the sale.

The defendant's reply

40 In reply Advocate Steenson emphasised the following:-

(a) The draft amended order of justice was an abuse of process;

(b) Any contra proferentem rule against his client did not apply;

(c) There was a contradiction between the plaintiff suggesting that the Royal Court only had to look at the agreement and then saying that the Royal Court had to look at the background;

(d) If the 2017 Agreement did not meet the plaintiff's expectations any redress was against his legal advisers;

(e) The plaintiff could have spelt out any minimum share he was to receive out of the proceeds of sale, but had not done so.

(f) The plaintiff could not accept matters conditionally – either he agreed to a sale price in which case the agreement applied, or the sale price was to be determined by the Royal Court.

Decision

41 There was no dispute between the parties that I was being asked to construe the 2017 Agreement on the basis of the summary judgment jurisdiction contained Rule 7 of the Rules. There was also no dispute on the general principles applicable as to when summary judgment was granted (see *MacFirbhisigh & Ching v CI Trustees & Ors* [2017] JRC 130A at paragraph 16 to 19.

42 42. Furthermore there was no dispute that the summary judgment jurisdiction extended to straightforward points of construction. This was the approach I took in *Corefocus Consultancy Ltd v Cronk* [2013] JRC 194 at paragraphs 15 to 21.

43 The Corefocus decision was based on a previous incarnation of Rule 7 by Royal Court which was replaced by a Rule 7 in 2017 (see amendment No.20 to the Rules). The 2017 amendments were based on the summary judgment procedure introduced by the Civil Procedure Rules in England and Wales in Part 24. In relation to questions of construction,

paragraph 24.2.3 of the CPR states as follows:-

> ***"Where a summary judgment application gives rise to a short point of law or construction the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an opportunity to address the point in argument."***

44 In other words the ability to construe documents on a summary judgment application still applies, notwithstanding the changes to Rule 7 in Jersey in 2017.

45 As to how I should approach questions of construction, this was established by the Court of Appeal in *Trilogy Management v YT & Ors* [2012] 2 JLR Note 19 and *Trilogy Management v YT & Ors* [2012] JCA 152. Paragraphs 37 to 40 of the unreported judgment state as follows:-

> ***"37*** *In La Petit Croatie Limited v Ledo* [2009] JCA 221 ***this Court considered the approach in this jurisdiction to the construction of documents generally.*** It endorsed the principles set out in the judgment of Commissioner Page in *In Re Internine Trust* [2005] JLR 236 ***at paragraph 62.*** At paragraph 11, Martin JA, with whom the other members of the Court agreed, summarised those principles as follows:-
>
> ***"The aim is to establish the presumed intention of the parties from the words used; but the words used must be construed against the background of the surrounding circumstances, which means the circumstances that must be taken to have been known to the [parties] at the time.*** These circumstances include anything that would have affected the way in which the language would have been understood by a reasonable man, except that evidence of subjective intention is ordinarily inadmissible. The words must also be read in the context of the document as a whole, and should so far as possible be given their ordinary meaning; but a different meaning may have to be given to them if a reading of the document as a whole and common sense so require."
>
> ***38. This summary is consistent with views recently expressed in the United Kingdom Supreme Court in Rainy Sky*** *SA v Kookmin Bank* [2011] 1 WLR 2900: ***see paragraph 14 in the judgment of Lord Clarke of Stone-cum-Ebony JSC, with whom the other members of the Court agreed***.
>
> ***39. To the summary by Martin JA the following supplementary points can be added:-***
>
> ***(i) First, where parties have used unambiguous language the Court must apply it: (per Lord Clarke in Rainy Sky SA at paragraph 23).*** The Court cannot rewrite the language which the parties have used in order to make it conform to business common sense (per Hoffmann LJ in *Co-*

operative Wholesale Society Ltd v National Westminster plc [1995] 1 EGLR 97, ***cited in Rainy Sky SA at paragraph 23).*** Loyalty to the text of a commercial contract, instrument or document read in its contextual setting is the paramount principle of interpretation (per *Lord Steyn in Society of Lloyd's v Robinson* [1999] 1 WLR 756, ***cited in Rainy Sky SA at paragraph 25)***.

(ii) Second, however, the Court should be astute to remember that, language being a flexible instrument, if the words used are capable of more than one construction that which appears most likely to give effect to the commercial purpose of the agreement should be chosen (per *Hoffmann LJ in Co-operative Wholesale Society Ltd v National Westminster* ***plc); the Court ought generally to favour a commercially sensible construction over technical interpretations and undue emphasis on niceties of language (per*** *Lord Steyn in Society of Lloyd's v Robinson*). ***If therefore there are two possible constructions, the Court is entitled to prefer the construction which is consistent with business common sense and to reject the other: see Rainy Sky SA at paragraphs 21, 23 and 25***.

(iii) The exercise of construction is therefore essentially one unitary exercise (per Lord Clarke in Rainy Sky SA at paragraph 21), "neither uncompromisingly literal nor unswervingly purposive" (per Sir Thomas Bingham MR in *Arbuthnott v Fagan* [1995] CLC 1396).

40. Advocate Journeaux also submitted that cases where the Court is asked to depart from the natural meaning of the language used by the parties fall on a spectrum. The clearer the language that the parties have used, the slower the Court should be to displace that meaning by reference to considerations of the commercial consequences. He relied on the recent statement by Briggs J in the English High Court in *LB Re Financing No 3 Ltd v Excalibur Funding No 1 Plc* [2011] EWHC 2111 ***(Ch) at paragraph 46:-***

"Commercial absurdity may require the court to depart even from the apparently unambiguous natural meaning of a provision in an instrument, because "the law does not require judges to attribute to the parties an intention they plainly could not have had": see per Lord Hoffmann in the ICS case at page 913. Questions of commercial common sense falling short of absurdity may however enable the court to choose between genuinely alternative meanings of an ambiguous provision. The greater the ambiguity, the more persuasive may be an argument based upon the apparently greater degree of common sense of one version over the other."

We accept this submission (which Advocate Baker did not dispute) and have found it a helpful statement of the appropriate approach. The corollary of the last sentence in the passage we have cited is that the

less ambiguous the provision in question is, the less persuasive is an appeal to an argument that a different interpretation appears to make more commercial sense. We agree."

46 It is also appropriate to refer to paragraph 62 of *The Internine and the Intertraders Trusts* [2005] JLR 236 and paragraphs 62 (i) to (iv) which state as follows:-

> ***"62 The correct approach to the task before the court is to a large extent the same as it is for any instrument the meaning of which is in contention:***
>
> ***(i) the aim is to establish the presumed intention of the maker(s) of the document from the words used: in the present case, there being no settlor-signatory, the maker must be taken in each case to be the trustee- or possibly the trustee and Sheikh Abdullah as the parties to the letters of instruction which conferred authority on the trustees to execute the declarations of trust (it makes little difference which in the present case);***
>
> ***words must, however, be construed against the background of the surrounding circumstances or "matrix" of facts existing at the time when the document was executed-a principle that has been a bedrock of English law since the judgment of Lord Wilberforce in*** *Prenn v. Simmonds* ***(3) and appears now to have been accepted as also properly reflecting the approach that this court should adopt in relation to such matters;***
>
> ***the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the maker at the time or, where there are more than one, known to the makers of or the parties to the document, and include (to use the language of Lord Hoffmann in*** (*Investors Compensation Scheme Ltd. v. West Bromwich Bldg.* Socy. (2) [1998] 1 W.L.R. at 913), ***from whose speech only Lord Lloyd of Berwick dissented)-"… absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man";***
>
> ***(iv) evidence of subjective intention, drafts and negotiations and other matters extrinsic to the document in question is inadmissible, as is evidence of events subsequent to the making of the instrument (evidence of this kind being relevant where an estoppel is said to arise but not in this jurisdiction, unlike some others, as an aid to construing the original meaning of the document)."***

47 The above principles are those I have applied.

48 The key question therefore is the meaning of the settlement agreement in particular Clause 9.

49 In relation to this clause, firstly, the background that I regard as relevant to its construction is that the plaintiff and the defendant had previously entered into the 2015 Agreement which agreement had not led to a sale. Litigation then started which led to the 2017 Agreement. The 2017 Agreement also came about as a result of me staying proceedings and encouraging parties to settle a long standing bitter family dispute, where the parties lived in different parts of the same Property.

50 In terms of context however that is as far as I consider it appropriate to go; in particular it was a step too far to look at all the rival contentions of the parties which led to either the 2015 Agreement, the proceedings or the 2017 Agreement. This would be giving effect to the intention and motive of parties contrary to the approach set out in the *Internine Trust* Case at paragraph 62 (iv) referred to above.

51 It is also relevant to record that the plaintiff initially agreed to a sale subject to the qualification that the plaintiff wanted the Royal Court to rule on how the proceeds of sale should be split. However, in relation to this qualification Advocate Renouf accepted on behalf of the plaintiff that, if I ruled against the construction of Clause 9 contended for by the plaintiff, then the Property would still be sold by the plaintiff to the defendant and his wife and the proceeds of sale divided up in accordance with the 2017 Agreement. In light of this concession, the question whether or not the plaintiff consented to a sale when he did not know the purchaser was the defendant and his wife falls away.

52 The effect of the argument advanced by Advocate Renouf for the plaintiff is that the Royal Court would be entitled to review the entirety of the terms agreed under the 2017 Agreement as part of determining how the proceeds of sale should be divided up. While the plaintiff only sought to challenge the split to be applied and who was responsible for indebtedness, as a matter of construction, the plaintiff's argument had to be that the Royal Court had complete discretion to decide how the proceeds of sale should be divided up and therefore had full discretion to revisit any of the terms of the 2017 Agreement in order to determine an equitable split.

53 The difficulty with this argument is that the jurisdiction of the Royal Court only applies if the parties cannot agree a sale price below £1.35 million. However, the parties have agreed that the Property would be sold even if a sale price of £1.35 million was not achieved. The mechanism of involving the Royal Court therefore applies in default of agreement on a sale price. If the parties did agree a sale price below £1.35 million an (the example was used of £1.25 million because this was asked for in Advocate Renouf's letter of 14 th June, 2018) unconditional acceptance would lead to the remaining provisions of the 2017 Agreement as to the division of proceeds applying.

54 This means that the construction advanced for by the plaintiff has the effect that if the parties agree a price then the 2017 Agreement applies, but if the parties do not agree a price then the parties are free to argue for a completely different division of the net proceeds of sale. Yet, no different wording is used to explain that if the parties agree a price below

£1.35 million the remainder of the 2017 Agreement will apply, but if they do not agree a price then the Royal Court is free to apportion the sale proceeds as it sees fit.

55 The plaintiff's construction also does not sit with the background to the 2017 Agreement namely that it was the second agreement trying to resolve the dispute between the plaintiff and the defendant following encouragement by me.

56 It also does not sit with the Clause 15 of the 2017 Agreement which records “this agreement fully and finally settles all matters between them including regarding their respective entitlements to the sale proceeds of the Property,…” [Emphasis Added]

57 57. I accept that there is ambiguity as to what was meant by the words at Clause 9 off the 2017 Agreement *“or otherwise as the Royal Court thinks just”*. However, in my judgment this wording was to make it clear that the Royal Court was intended to have full discretion as to the basis upon which it would determine how the Property was to be sold because the parties had agreed that a sale should take place. It could do so by hearing from experts in order to determine a value; it could order a sale by auction; or a sale by some other mechanism such as sealed bids. The language used does not justify a wider construction to go beyond the Royal Court determining how the Property is to be sold, the parties having agreed it should be sold. I accept that the Royal Court may well be of the view that it has this power anyway; the existence of such a power does not however make my construction pointless or meaningless; all it means is that the parties have expressly recognised that such a power applies to them.

58 By contrast, if the plaintiff wanted to obtain a minimum payment after any sale then a provision could have been inserted expressly in the 2017 Agreement. Indeed I note that such a provision was included in the 2015 Agreement where the plaintiff was to receive a fixed sum out of the net proceeds of sale once borrowings had been repaid. The lack of any such provision does not help the plaintiff's construction. Nor is it relevant to the meaning of the 2017 Agreement that the plaintiff will recover less than the monies he expended to purchase the Property.

59 Likewise Clause 9 could also have been drafted to make it clear that the jurisdiction of the Royal Court extended to rule on any division of the proceeds of sale. The lack of any such wording again does not help the plaintiff and therefore supports my view that Clause 9 relates to the power of the Royal Court to determine how best to order a sale of the Property not reserving to the Royal Court the entire dispute between the parties.

60 The construction I have suggested applies in my view is also most likely to give effect to the commercial purpose of the 2017 Agreement, namely to end the dispute between the parties and to provide for a sale of the Property with the Royal Court determining the method of sale, if the Property was sold for less than £1.35 million. By contrast the plaintiff's construction leads to the dispute continuing with nothing being resolved where there is no

sale price below £1.35 million. I regard my conclusion, adopting the words of the Court of Appeal in *Trilogy*, to be ***"a commercially sensible construction"*** whereas the plaintiff's approach placed ***"undue emphasis on niceties of language"*** by its emphasis on the word ***"otherwise"***.

61 Finally, I do not consider that there is any burden of proof on the defendant to justify the construction he argued for. The 2017 agreement was an arm's length negotiation with both parties having independent legal advice. This not a case of a party having to justify standard terms and conditions imposed on another party which purport to exclude or limit liability. If anything, it was the plaintiff who was arguing for the broader construction which argument has not persuaded me for the reasons set out above.

62 As the parties have agreed that the Property should be sold for £1.2 million, based on my construction, there is no issue to refer to the Royal Court because Clause 9 does not extend to the Royal Court having jurisdiction to apportion this sale proceeds. That issue was covered by the 2017 Agreement.

63 I should also address the proposed amendments to the plaintiff's draft amended order of justice. In addition to not allowing the amendments because they are contrary to the terms of the 2017 Agreement, in relation to the claim for *déception d'outre moitié de juste prix* this had not been properly pleaded. Paragraph 28 of the draft amended order of justice stated as follows:-

> *"28. The Plaintiff also avers that the £250,000 value for the Sheds was then and is less than half the true value for that land, and that following the doctrine of déception d'outre moitié de Juste Prix the Court is able to rectify the Second Agreement and substitute a just value to be paid for the Sheds."*

64 The draft pleading did not specify what the true *Juste Prix* was said to be and therefore failed to plead a material fact. When I asked Advocate Renouf what his case was, he replied to suggest amending his pleading to simply say that the *Juste Pri* x was at least £500,001. He contended that obtaining to obtain the evidence to support this part of his pleading was a matter for another day. However, earlier in his submissions he had also contended that various valuations had been obtained in the period leading to the 2015 Agreement and the 2017 Agreement. In the absence of any evidence as to what *Juste Prix* the plaintiff was now contending for, I was not able to assess the strength of this claim or indeed whether one could be advanced at all. I was not therefore prepared to consider this part of the application to amend in the absence of such evidence. Such evidence was also necessary for Advocate Renouf to be able to satisfy himself that a claim based on *déception* was one that could properly be pleaded.

65 In addition the issue of *déception d'outre moitié* for the sale of the Sheds could have been raised at the time the parties negotiated the 2017 Agreement. Applying *Marett v Marett* [2008] JLR 384 in particular paragraph 37, there was no pleaded allegation or other

evidence to show any *erreur* or any unforeseen change in circumstances to justify a case in *déception d'outre moitié* now being pleaded to set aside the 2017 Agreement.

66 66. In respect of the issues raised by the plaintiff concerning the defendant being responsible for the secured borrowing, these were issues raised in the order of justice prior to the parties entering into the 2017 Agreement. Again therefore, the plaintiff has not satisfied me that either of the exceptions to *Marett* applies. Rather, this appears to be an attempt by the plaintiff to re-litigate matters compromised by the 2017 Agreement. This is contrary to the approach taken by the Court of Appeal in *Farley & Son Limited v Takilla* [1992] JLR 054.

67 For the above reasons therefore I construe Clause 9 of the 2017 Agreement to be limited to a power to the Royal Court to how the Property should be sold. I further construe the 2017 Agreement as not giving the Royal Court power to decide how the proceeds of sale should be split. The plaintiff will further not be permitted to amend its order of justice in the form of the draft produced to me.