

## **Business Common Sense Should Prevail Says Supreme Court**

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Where there are two possible ways to interpret a contract, the court is entitled to prefer the interpretation which is consistent with business common sense. This was the view of the Supreme Court in its decision in *Rainy Sky SA v Kookmin Bank* issued on 2 November 2011.

### **Background**

The case concerned the interpretation of Bonds issued under shipbuilding contracts. The issue was whether Rainy Sky and five others (the buyers of the ships) were entitled to payment under the Bonds which had been issued by Kookmin Bank following the builder of the ships going into a form of insolvency in Korea.

The buyers had each paid pre-delivery instalments of over \$6million to the builder for the ships. The buyers argued that they were entitled to have their instalments repaid but the Bank argued the contrary. Everything turned on the interpretation of a clause in the Bonds.

### **Decision**

The Supreme Court agreed that there were two possible interpretations of the relevant clause. Its task was therefore to decide which to apply. It was said that the court had to consider the language used and ascertain what a reasonable person would have understood the parties to have meant. A reasonable person was said to be one who had all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The court should have regard to all the relevant surrounding circumstances. Where there were two possible interpretations, the court was entitled to prefer the one consistent with business common sense.

This does not mean an opening of the floodgates for arguments on contract interpretation where the contract is not ambiguous. The court made clear that where language is unambiguous the court will apply it. That would be the case even if it was regarded as resulting in an unlikely commercial position.

The court will not rewrite parties' contracts to make them conform to business common sense. If parties have clearly agreed to something, even if that appears contrary to common sense, the courts will give effect to it.

### **Comment**

This case underlines the need for parties to use clear and unambiguous language in contracts. The wording which caused the problem in the case was the seemingly innocuous reference to payment being made of "all such sums" due under the contract. The argument centred around what were "such sums", since two possible sums had previously been referred to in the Bond.

Whatever the parties' intention as to the meaning of these words at the time of entering into the contract, it would be safe to assume their intention was not to spend two and a half years working their way through the court of first instance, Appeal Court and Supreme Court to find this out!

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