Case No: D01BS425

IN THE BRISTOL COUNTY COURT

2 Redcliffe Street, Bristol, BS1 6GR

Date: 06/07/2018

Before:

MRS JUSTICE MAY DBE

- -

Between:

CDS (SUPERSTORES INTERNATIONAL) LIMITED	**Claimant**
- and -	
PLACE ROAD PROPERTIES LIMITED	**Defendant**

- -

- -

Stephanie Tozer (instructed by **Osborne Clarke LLP**) for the **Claimant**
Stephen Jones (instructed by **Paris Smith LLP**) for the **Defendant**

Hearing dates: 18-19 April 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE MAY:

Introduction

1. This case concerns a claim for rectification of a lease.

2. The Claimant ("CDS") operates a number of retail outlets, including a chain of stores known as "The Range". The Defendant ("PRP") is a company whose business includes acquiring, owning and leasing commercial property. On 23 June 2017 CDS and PRP, acting through solicitors, simultaneously exchanged contracts for and completed a lease ("the Lease") over commercial premises at 79 Place Road, Cowes, Isle of Wight ("the Premises"). By the Lease PRP demised the Premises to CDS for a term of 20 years commencing on 19 December 2016. In circumstances which are set out in more detail below, CDS has since issued proceedings seeking to rectify the terms of the Lease on the grounds of mutual and/or unilateral mistake.

Background

3. The parties had been in negotiation about the terms of the Lease for some years. Heads of Terms were first agreed in 2011, under which PRP was to build new premises of 30,000 square feet with 8,000 square feet external yard and 200 car parking spaces at the site. The Lease was to be for 20 years at £247,000 per annum, with a "Rent Free period" which provided for "First 3 years at half price rent".

4. There was subsequently an Agreement for Lease ("AFL"), signed by the parties, attaching a draft Lease containing the following provisions (respectively the "Initial Rent" and "Rent Review" terms):

   (1) Clause 1.14 provided that the Initial Rent was £247,000 p.a. or such lower figure as the formula set out in the AFL dictated, save that in the first 3 years of the term, the rent payable was to be 50% of that figure.

   (2) Under Schedule 2, there were to be fixed rent increases, by 2.25% per annum every 5 years.

5. CDS was told in July 2014 that planning permission had been obtained and that PRP would start construction as soon as possible. In the event, however, PRP did not build a new structure, instead it decided to refurbish an old building on the site.

6. By letter dated 16 December 2016 PRP's solicitor, Matthew Robbins ("MR") sent an amended draft lease to CDS' solicitor Paul Taylor ("PT") for approval. There were small alterations by way of updating, but no substantial amendments; in particular the Initial Rent and Rent Review terms were included unchanged. PT confirmed his approval of the updated lease by email on 19 December 2016, subject to two minor matters to do with service charge and insurance rent percentages. At this juncture, with PRP's consent, CDS entered into the Premises on 19 December 2016 and began the fitting out for opening of a new branch of The Range.

7. MR sent a further draft lease to PT on 4 January 2017 in which the Initial Rent and Rent Review terms were included as before.

8. Issues concerning planning consents for the building and access took up time over the following months and delayed completion, although in correspondence MR on behalf of PRP pressed repeatedly for completion to take place.

9. On 2 May 2017 MR wrote again to PT asking for completion, stating *"my recollection is that the Lease was effectively in an agreed form"*. In another letter dated 3 May 2017 MR wrote again asking for confirmation as to whether the Lease was agreed, stating *"I appreciate that there may be some contractual matters in connection with Planning and such like, that need to be finalised, but the core Lease itself, I believe is in an effectively agreed form"*. PT responded by letter dated 5 May 2016 agreeing that the *"form and terms of [the Lease] have been largely agreed and it is just the context in which this was always intended to take place which needs to be resolved"*. PT went on to point out, amongst other things, that there were a range of warranties covering the works that had been carried out which still needed to be finalised.

10. There was a lengthy telephone call between MR and PT on 12 May 2017 at which further amendments were discussed and agreed, as summarised in the letter from MR to PT dated 15 May 2017 in which MR undertook to send through a marked-up version of the draft lease. The Initial Rent and Rent Review clauses remained unaltered, no changes to these clauses having been discussed during the call or referred to in the letter of 15 May 2017.

11. On 22 May 2017 MR's PA sent an email attaching a letter dated 19 May 2017 and a marked-up version of the lease. The letter was short and stated as follows:

> *"Please find attached the revised draft Lease which, hopefully, takes account of the various "to-ing and fro-ing" that there has been over many months and also takes account of the recent agreement that I understand our respective clients have agreed in relation to the Highway Works."*

The marked-up version of the lease attached to this email changed the Initial Rent clause by removing the provision as to 50% rent and substituted an entirely new rent review provision.

12. Thereafter the correspondence shows PT reverting repeatedly to the subject of warranties and CDS' repairing obligations under the lease. The original AFL had been predicated on a new-build, but the final building was a refurbishment in respect of which PT sought a full specification in order to finalise the warranties and guarantees to be sought from PRP as landlord.

13. On 21 June 2017 PT sent through a new draft AFL attached to an email stating as follows:

"I now enclose a simple draft agreement which is intended to replace the original. It recognises that the work has been completed and provides for a simultaneous exchange and completion of the lease. You will see that it provides for two attachments namely the agreed specification and the approved copy lease. This is in the form it took before you annexed the warranties etc which we can now do without."

It is to be noted that the form which the lease took prior to MR annexing the warranties was the one sent by MR in January 2017 featuring the Initial Rent and Rent Review clauses in their unchanged form.

14. Clause 2 of the new AFL finally resolved the outstanding matter of the building specification and warranties, after which the parties were ready to complete.

15. On the day of completion, 23 June 2017, MR emailed PR at 13.02hrs saying that he had taken instructions from his client on two matters which Mr Harding (chairman of PRP) told him he had agreed with Mr Cotter (property manager of CDS) directly, in relation to the cost of flooring works and the deletion of a rent free period. PT's response was unequivocal:

"This is pure invention, I have just come off the phone to Mike Cotter who is livid. For the record he has not agreed or even discussed with your client either of these points."

These last-minute changes were then dropped by PRP and MR.

16. Later that day, when the parties were in contact for the purposes of completion, PT was in France, driving and speaking via the loudspeaker on his mobile phone. He did not have access to any documents, including in particular the latest draft Lease sent by MR on 22 May. Accordingly, he asked MR to take him through it. Thereafter completion was agreed. Exhibited to the third witness statement of PT and included in the trial bundle is an attendance note prepared by PT dated 23 June 2017 recording that he had asked MR:

"..to run through each of the amendments you had made to the lease so I could be sure what they were and approve them in turn. Apologised if this might be time-consuming but fortunately they were few in number".

It is accepted by PRP that MR did not in that phone call draw PT's attention to the amendments made to the Initial Rent and Rent Review clauses in the draft lease sent through on 22 May 2017.

17. Following this conversation with PT, MR emailed him at 18.08hrs on 23 June 2017 confirming simultaneous exchange and completion of an Agreement for Lease and Lease. The email purported to record the following:

"6. As to the lease, Taylor/Robbins agreed that the correct version is the one e-mailed to Taylor on 22 May 2017 (1827), which is different from previous versions, changes having been tracked. Taylor/Robbins noted some, but not all of these changes: definition of Initial Rent at 1.14, Rent Commencement Date at 1.46, structure of rent and rent review at Schedule 2 and attestation of The Range.

7. Noted that Schedule 8 is deleted and that Rent Commencement is 3/1/17. Date of lease is today. Term commencement is 19/12/16.

8. Robbins to produce clean lease.

9. Taylor to produce clean AFL."

18. By email of 17 July 2017 PT wrote as follows to MR:

On reviewing the lease in order to prepare a draft report for my clients I have come across something that concerns me greatly. In May you returned to me a draft lease which was intended to tidy up a number of anomalies which had been previously identified but I now see that it contained a substantive change which had never been mentioned or discussed. You appear to have unilaterally changed the provision for the payment of half rent over the initial period of three years into payment of the ***full*** *rent following by a third year review.*

I cannot see that there can be any logical explanation for this but will give you the opportunity to explain how it came about before we decide what steps to take to deal with it"

MR responded by letter dated 18 July 2018:

"I do not understand where you are coming from here Paul. We simultaneously exchanged and completed both the Agreement for Lease and the Lease itself on 23 June 2017 as at 17:43hrs.

The agreed form of Lease was the Lease sent through to you originally dated 19 May 2017, but also with my PA's email dated 22 May 2017 (timed at 18:25). That email specifically sent the Lease as a "tracked changes document" so that you could see the various changes.

I am not sure what I can add."

PT's reply on 18 July 2017 was pithy:

"What you 'can add' as you put it is where that amendment came from, on what basis it was introduced and whether it was on instructions from your client.

On the face of it this looks very much like sharp practice and I would strongly recommend that you consider very carefully before replying."

19. MR's response rejected any suggestion of sharp practice, pointing out once more that the draft in track change format had been sent to PT on 22 May 2017. PT's reply set out his understanding and asked, again, for an explanation:

"I have given you two opportunities to offer some explanation as to how an amendment which was never discussed, which is not consistent with the Heads of terms and runs counter to everything that had gone before could conceivably have found its way into the final draft. You have not taken either of them.

…

…as you are aware I was not in a position to review the draft immediately prior to exchange and specifically asked you to run through the changes before we completed. No mention was made of what was by far the most substantive alteration from the previously approved draft which I had sent to you in December."

20. MR returned no substantive response to PT's request for an explanation, as a result of which solicitors were instructed, letters before action sent and finally Part 8 proceedings seeking rectification were issued in October 2017. CDS' case is that PT did not know, when he agreed to the Lease over the phone on 23 June, that the terms as to rent and rent review had been so radically revised. He had asked MR to take him through the changes and MR had omitted any mention of alterations to the Initial Rent or Rent Review clauses. It is in those circumstances that CDS seeks rectification on the grounds of mutual and/or unilateral mistake.

Mutual (common) mistake

21. I turn first to consider rectification on the ground of mutual mistake.

22. The principles which I must apply are those set out by Etherton LJ (now MR) in the case of *Daventry DC v. Daventry & District Housing Ltd* [2012] 1 WLR 1333 at [80], derived from the observations of Lord Hoffman in the Supreme Court case of *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] AC 1101. Whilst there has been a degree of academic and judicial disquiet expressed concerning the *Chartbrook* approach (see for instance the observations of Leggatt J, as he then was, in *Mihail Tartsinis v. Navona Management Company* [2015] EWHC 57 (Comm) at [89] – [98]), *Daventry* remains Court of Appeal authority binding on me.

23. Applying the *Daventry* principles to the facts of this case, to succeed in its claim for rectification on the ground of mutual mistake CDS must establish:

    (1) a prior accord which, objectively construed, provided that rent would be paid at 50% for the first 3 years and that there would be 5 yearly rent reviews fixed at 2.5%.

    (2) on an objective construction of what the parties said and did, that accord continued up to the point at which the contract was concluded, and

    (3) CDS was subjectively mistaken as to the terms.

24. There was no dispute between the parties that (1) and (3) above were made out. The key issue for my determination therefore was whether the common accord, judged objectively, continued up to the point the AFL and the Lease itself were agreed on the evening of 23 June 2017.

25. Mr Jones reminded me that it was for CDS to establish the necessary elements of mistake; he submitted that I should require "convincing proof". As to this, Ms Tozer referred me to Leggatt J's analysis of the standard of proof relating to mistake, in the *Mihail Tartsinis* case at [84]- [86]. I have borne in mind that although the standard to be applied is the ordinary civil standard, "sufficiently strong proof is needed to

counteract the evidence of the parties' intention displayed by the instrument itself", see the *Thomas Bates* case (cited below) per Brightman LJ at 521.

Evidence

26. When interpreting a contractual document, evidence of negotiations is not generally relevant or admissible; the position is otherwise on a claim for rectification, where it is invariably necessary to investigate what terms the parties believed they were agreeing to. In this case CDS filed witness statements from PT and Mr Cotter. PRP filed statements from MR and Mr Harding. All four witnesses gave evidence at the hearing.

27. PT's evidence was that when he received the letter from MR dated 22 May 2017 enclosing a marked-up version of the lease he had put it to one side to consider later. The covering letter had not drawn his attention to any significant changes, the only reference in that letter to recent negotiations being to an agreement for Highway Works. The position in relation to warranties still needed to be resolved; whilst that remained outstanding there was no prospect of completing on the lease. It was only after he had sent through the new AFL on 21 June that completion could proceed.

28. In the rather exceptional circumstances prevailing on 23 June, which found him in his car on a French motorway without his papers, PT asked MR to take him through the marked-up changes to the lease. He understood that MR had identified all the changes to him over the phone in that call and it was on that basis that he agreed to completion over the phone at that time.

29. When Mr Jones, representing PRP, pressed PT on why he had not opened and looked at the attachment to the email of 22 May when he received it he said that it was because he thought he knew what was in it. He had been given no warning of any changes to a lease that had remained essentially the same for over 6 years; there was no immediate likelihood of completion and there were more pressing issues that he was dealing with at the time. There were possibly 10 similar leases for CDS in different stages of gestation, he said, this one was low priority as there were issues with planning and warranties still to be resolved. Had completion been looming in May he would have looked at it but it was not, so he did not. Mr Jones asked how he had been able to agree on 23 June that Schedule 8 would come out when he had not even familiarised himself with the contents of that schedule. PT responded that Schedule 8 had been discussed with MR when they had gone through the (then) existing draft on 12 May; MR had told him what Schedule 8 was going to contain and PT had paid it little attention as he believed that it would not meet his requirements. The pressing issue for CDS at that time was that the specification for works attached to the original AFL had not been performed, a new building had not been built as agreed; without knowing what refurbishment works had actually been done he could not construct the proper matrix of warranties.

30. Mr Jones suggested that the attachment to the email of 22 May was in the nature of a negotiating draft. PT's response was that in his experience negotiations were never done in this way. Heads of Terms propose substantive terms he pointed out, travelling drafts simply carry them forward. If a client had instructed him that they wanted to introduce a change which had not previously been discussed then he would necessarily have written to the other side to tell them what he was doing. It simply

would not be done by way of an unannounced amendment to a travelling draft lease. Moreover if such a thing ever was to be done, then the attention of the receiving solicitor would need specifically to be drawn to it in the covering letter/email. Here, PT pointed out, far from drawing his attention to any substantive changes, MR had drawn his attention away from it by referring in his email to the conversation they had had some days earlier on the basis of the (then) existing draft. He had taken MR's reference to "*to-ing and fro-ing"* as no more than an anodyne statement.

31. PT confirmed that he knew Mr Harding thought that the rent was too low. PT said that by May 2017 The Range had opened for business, he knew that Mr Harding had been to see it and, finding the car park full of cars, had expressed the view that the rent could have been higher. In his evidence PT said of Mr Harding's comment:

"But that is not negotiation, that is hot air, an expression of regret at a bargain done"

32. Mr Jones put to PT that he had not asked MR to take him through the main changes in their conversation on 23 June to which PT responded that:

"It was quite an extraordinary situation, quite unique. With the words of my client ringing in my ears to complete if at all possible I deduced that the only way I could do it was to agree the documents over the phone and I said so. [MR's] record of our conversation regarding the Agreement for Lease was spot on. Then we came to the lease and I quite clearly remember that I said I am sorry to do this but I will have to ask you to run me through the lease and identify all the track changes on it. He agreed to do so."

Mr Jones also suggested to PT that his attendance note dated 23 June, which was not attached to his first or second witness statement but only produced attached to the third statement, had been compiled long after the event and recorded what PT wished had happened, rather than what had actually happened. PT denied this, saying that he had prepared the attendance note sometime during the week he returned to the office, that it would have been kept on the file and passed to solicitors with conduct of this litigation.

33. MR's evidence was that he reasonably expected PT to have opened and read the marked-up version of the new draft lease which he sent him attached to his email of 22 May. He had not specifically identified or drawn PT's attention to the amendments to the rent or rent review clauses as he did not consider that he needed to. He accepted that when they spoke on the phone on 23 June he did not discuss the Initial Rent or Rent Review clauses with PT; he "absolutely and totally" rejected any claim that PT asked him to go through the marked-up passages in the draft. He took comfort, from PT having sent through a new AFL, that they were working to the latest draft of the lease. MR did not accept that unless or until the new AFL was agreed, the terms of the original AFL remained in force: "our view", MR said, was that the original AFL was an "irrelevant document"; he asserted that it had become redundant, although he could not say when it had become redundant.

34. Ms Tozer showed MR his letter to PT of 16 December 2016 attaching a draft lease with minor amendments each one of which was identified in the letter; she suggested to MR that this was good practice, MR responded that it was not good or bad practice, he had done so on that occasion but not in his covering letter of 22 May 2017. He had

attached a marked-up version to that letter which was sufficient, in his view, to identify the changes.

35. In answer to questions from Ms Tozer about his use of the to-ing and fro-ing phrase in his letter, MR said he had been told by Mr Harding that he had had a number of conversations with Mr Cotter and that they had agreed that all previous documents were completely irrelevant and that there was a "blank sheet of paper". There were then the following questions and answers:

Ms Tozer: "Did you think that Mr Harding and Mr Cotter had agreed to the half rent going and the review provisions changing?"

MR: "Yes, Mr Harding had told me".

...

Ms Tozer: "On matters like this you would expect discussion between principals?"

MR: "I would have expected the clients to have agreed it, Yes."

36. MR's evidence in answer to Ms Tozer was that he would not have sent out the draft on 22 May unless he had understood that the principals had discussed and agreed the changes. He accepted, however, that the clients had not in fact agreed the changes prior to completion, his evidence was that he had not known this until after completion. However, he did not say when or under what circumstances he came to understand that there had been no agreement between the clients.

37. Ms Tozer put to MR that when PT asked him over the phone on 23 June to take him through the changes he could only have meant the changes in the draft which MR had sent through on 22 May; MR's response was that that was not how he took it, he understood PT to mean the changes that had occurred since that draft. When pressed on this point he said that had he been asked to go through every one of the track changes he would have done so, or suggested that they wait.

38. Mr Cotter's evidence added little to the above, save that it was notable that Mr Jones, for PRP, never suggested to Mr Cotter that he had had discussions with Mr Harding concerning the Initial Rent or Rent Review clauses, still less that he had agreed to any changes.

39. Mr Harding's evidence was interesting. He asserted in cross-examination that he had made it quite clear to Mr Cotter and to Mr Cotter's boss Mr Dawson that there was no longer any Agreement for Lease. Mr Harding was extremely frustrated at the delay in completing, not least because without completion of the lease PRP could not get a bank loan. The half-rent had been, he said, an incentive to get on and complete. When pressed by Ms Tozer Mr Harding claimed that he had had a conversation with Mr Cotter about removing the half-rent, but said that he could not remember what Mr Cotter's response had been. He did not think it would have been a "*major surprise"* however, as it was not *"a massive number*". He believed that he would have told MR about the change at some point, he accepted that he must have made clear to MR what

his expectations were, but he could not specifically remember giving him the instructions to make the amendments to the draft lease.

Conclusions on the evidence

40. I found PT to be a reliable witness, whose evidence accorded with contemporaneous documentation and with the overall sense and purpose of the transaction he was instructed to undertake on behalf of CDS.

41. I was entirely satisfied that the principals had not discussed, let alone agreed, any alteration to the Initial Rent or Rent Review clauses. I simply did not believe Mr Harding's evidence that he had told Mr Cotter the half rent was to go. This evidence was not in Mr Harding's witness statement nor was it put to Mr Cotter when he gave his evidence. Hearing Mr Harding, I formed the view that he is accustomed to having people satisfy his demands and is accordingly inclined to interpret that which he wants to have happened as that which has happened.

42. Nor, I am afraid, did I accept MR's evidence, also given for the first time in cross-examination at trial, that he had understood from Mr Harding that the principals had specifically discussed and agreed changes to the Initial Rent and Rent Review clauses. I concluded that Mr Harding was a demanding client who told MR what he wanted to happen, namely that the half rent was to go and that the rent review clause was to be changed. MR actioned those demands, by changing the terms of the draft lease and sending a track-change document to PT. He did not draw attention to these changes in the covering letter as he did not want to invite controversy. When he did not get the negative response that he must have expected from PT/CDS, MR left well alone. He was put on the spot by PT on 23 June over the phone, when PT told him that he was driving and did not have the draft in front of him, and invited MR to take him through the changes.

43. I was unable to accept MR's account that he understood PT to be asking him to identify only such changes as had been made after the draft had been sent through on 22 May 2017 and not the changes made in that draft itself. MR's awareness of the key distinction at the time is evidenced by the email that he sent through later the same evening, referred to at paragraph 17 above. Ms Tozer suggested to MR that he had recorded the matters at item 6 of that email to give the impression that he had drawn PT's attention to them in the conversation, which MR denied. He said he had not discussed those things with PT when they spoke. Why had he recorded those items in the email then? His answer was that he supposed they were there to highlight the draft that they were working from. The email, and this exchange in evidence, satisfied me that MR was hoping to navigate a course which would allow PRP to hold CDS to the terms that his principal, Mr Harding, wanted. I will deal with MR's knowledge at this time when I consider unilateral mistake, below.

Conclusions on common mistake

44. It was common ground between the parties that the understanding between them, at least up to 22 May 2017, was that the completed lease would include the Initial Rent and Rent Review clauses unchanged. The issue is whether that understanding thereafter changed.

45. I am quite satisfied that, assessed objectively, it did not, for these reasons:

(1) The principals had not discussed, never mind agreed, any changes to the Initial Rent or Rent Review clauses. The evidence was that in the case of the lease for these premises, it was Mr Harding for PRP and Mr Cotter for CDS who negotiated the terms, not their lawyers. MR in his evidence did not seek to suggest otherwise, indeed by asserting (albeit, as I find, wrongly) that Mr Harding told him that the changes had been discussed and agreed with Mr Cotter, MR must be taken to have accepted that the changes would have needed to have been agreed by the principals. This is akin to the position noted by Toulson LJ in *Daventry* at [162]-[163].

(2) The clauses had remained in their original form, in accordance with the terms of the original AFL, for over 6 years by June 2017 when the new AFL was agreed and the Lease was completed. There was nothing in the covering email or letter of 22 May 2017 to alert CDS to significant changes to the draft lease; indeed, the tenor of the letter was to the contrary.

(3) In the context of this transaction, where very small financial details had been closely negotiated (see the outright rejection of last-minute changes having minimal financial impact referred to at paragraph 15 above), PT would have been bound to have sought instructions from Mr Cotter on any amendment; had he done so it was highly unlikely that CDS would have agreed to changes having such significant financial impact (in particular the change to the Initial Rent clause) without demur. The only sensible explanation for the absence of any objection to the alterations to the Initial Rent and Rent Review clauses was that PT had failed to appreciate that changes had been introduced into the draft, see *Daventry* at [169]. Mr Jones pointed to the time period of a month between 22 May when the track-change draft was sent and 23 June when completion occurred, but I accept PT's explanation for putting the draft to one side whilst the situation with the warranties was sorted out. In reality the time-lag, once PT sent a new draft AFL on 21 June was no more than 48hours.

(4) Even if PT could be said to have been careless in not opening and reviewing the track-change document at any point prior to his conversation from the car with MR on 23 June, that is not necessarily fatal to an objective assessment of what the parties' common understanding was – see the observations of Toulson LJ in *Daventry* at [178].

46. Mr Jones sought to persuade me that the facts of this case fell within the fourth of the scenarios identified by Etherton LJ in *Daventry* at [85]-[88], on the basis that PRP had objectively indicated that it had changed its mind when MR sent through the track-change version on 22 May 2017. On the basis of (1) to (4) above, however, I prefer Ms Tozer's identification of this case as falling within the third of Etherton LJ's scenarios. PRP, in the person of Mr Harding, had a change of mind concerning the Initial Rent and Rent Review clauses but objectively did not bring that change of mind to the attention of CDS.

Unilateral mistake

47. I turn now to unilateral mistake.

48. The elements for rectification on the ground of unilateral mistake are those set out by Buckley LJ in the case of *Thomas Bates and Son Ltd v. Wyndhams Lingerie* [1981] 1 WLR 505 at 516:

> "I think it must be shown: first, that one party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of (A); thirdly, that (B) has omitted to draw the mistake to the notice of (A). And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit (B)."

The further element is that the knowledge and intention of the defendant must be such as to involve him in a degree of sharp practice, or at least:

> "the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake."
> (*Thomas Bates,* cited above, per Buckley LJ at 515H)

Conclusion on unilateral mistake

49. As I have indicated above, the circumstances under which the parties, in the person of PT for CDS and MR for PRP, concluded agreement on the terms of the lease were very particular. PT was, as MR knew (because PT had told him) driving in his car in France without the documents in front of him. Perhaps PT should have suggested that they wait until he could get access to the documents but he did not, instead he asked MR, whom he trusted, to take him through the marked-up changes. I do not accept that MR believed PT's request to be limited to identifying changes made after the marked-up draft was sent on 22 May, or why would he have included the passages in his email of 23 June to which I refer in paragraph 17 above? Moreover, had MR really believed PT's request to him have been so limited this would have been the obvious response to PT's subsequent email accusing him of "sharp practice".

50. I find that MR must have been aware that PT believed himself to be concluding the lease on the unamended versions of those terms, ie as they appeared in all versions of the draft lease prior to 22 May, not least as there had been no objection from either PT or CDS to the proposed changes, which MR must have expected given the objections to changes having very much more minor financial impact. In his evidence MR said that he understood the amended terms to have been agreed between principals but I do not accept his evidence on this point: it is such a key assertion that I would have expected to find it made in his witness statement yet it was not there, nor was the existence of any such agreement put to Mr Cotter when he gave evidence. Moreover although MR said in evidence that he now accepted that there had been no such

discussion or agreement, he did not say how or when he had arrived at that conclusion.

51. In his evidence MR asserted that it was his *"reasonable expectation that [PT] would read the amended version and that he would see the changes"*. The key to MR's approach at the time is in my view to be found in his answers in cross-examination, for instance:

> *"I see the case very differently to you. I sent out changes in highlighted tracked changes, asked several times for him to confirm. I am sorry he did not read it"*

And

> "*I was focused on the documents, which is the beauty of them, you complete on the documents. I sent track changes, I asked him four separate times to confirm his agreement to them*"

52. It appeared to me from this and other similar answers that MR adopted a "caveat emptor" approach. He took the view that it was for PT to have read the draft lease which he sent through on the 22 May 2017. If PT was content to proceed to completion on the basis of terms which he had not troubled to read properly, then it was not for him, MR, to put him right, particularly not in circumstances where the changes were ones which his client wanted and thought he was entitled to have.

53. The difficulty with this approach in the circumstances as they were on 23 June, and why in my view the unilateral mistake doctrine is engaged, is that PT specifically told MR that he did not have the documents and that he wanted him to "be his eyes" in terms of identifying all the marked-up changes. MR must have known that the changes to the Initial Rent and Rent Review clauses would be contentious – PRP had earlier the same day strongly objected to a proposed amendment whose financial implications were minor by comparison with the removal of the half rent provision. The only explanation for the absence of any kind of outcry over the proposed changes to the Initial Rent and Rent Review clauses was that neither Mr Cotter nor PT had noticed it.

54. I conclude therefore that when he completed the lease with PT over the phone on 23 June MR was aware that PT was labouring under the mistaken view that the Initial Rent and Rent Review clauses remained unchanged, being in the same form as provided for in the original AFL and in every version of the draft lease up to 22 May 2017. When PT asked him to identify all the track-changes to the draft lease for completion, MR did not identify to PT the amendments to the Initial Rent and Rent Review clauses, evidently taking the view that PT had had over a month to notice and object and that it was not for him, MR, to do his job for him. MR must have known that, had he identified the changes to the Initial Rent and Rent Review clauses over the phone that day, PT and PRP would have objected and the lease would not have completed on the terms it did. The unattractive, but inescapable, conclusion I have reached is that MR knew of, or at least suspected, PT's mistaken belief that the Initial Rent and Rent Review clauses were unchanged and took advantage of that mistake for

the benefit of his client in circumstances where MR's conscience was engaged because he knew that PT had trusted him to identify all the changes and was agreeing to complete on the understanding that he had.

Remedy

55. Mr Jones did not seek to argue that there were any factors militating against the grant of equitable relief in the event that mistake was made out. Towards the end of his closing submissions, however, he referred me to Chitty on Contracts, 32nd Ed. at paras 3-014 and 3-019, suggesting that the correct interpretation of events, depending on my findings of fact, may be that there was no proper meeting of minds between MR and PT, each of them believing that they had reached a satisfactory conclusion on the terms of an agreement, when in fact they had not. Mr Jones submitted that, in this situation, I should find that there was no concluded agreement at all.

56. I have no hesitation in rejecting this interpretation of events. It was an entirely new line of argument which had never, as Ms Tozer pointed out, been foreshadowed in any of the exchanges or documents leading to the hearing. In any event this is simply not a realistic appraisal of what took place. There were written contracts which the parties engrossed and signed. There was plainly every intention to enter into a lease for the Premises, to that end CDS had entered into occupation in December 2016 and a new branch of The Range had been trading for some months prior to completion. This was not a case where there was no agreement. For the reasons I have set out, this is in my view an occasion where an agreement was reached under a mistake in circumstances where it is appropriate to order rectification.

57. I shall invite the parties to draw up the terms of the order.