Rectifying mistakes in property documents

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Introduction

1. Recent years have seen a substantial change in the way the courts construe property agreements, and in particular in the extent to which they may be prepared to recognise and deal with errors in drafting. This paper considers how to employ context and matrix to best advantage in revealing and remedying error. It will examine the boundaries of implication and rectification. It will end by analysing the tactics to be employed in obtaining the most advantageous result for the client.

Context and matrix: an overview

2. The purpose of the interpretation of a contract is to discover the real intention of the parties - but it is a fundamental principle of English law that this intention must be gathered from the contract itself, and not (save to a limited extent) from extrinsic evidence.

3. The principle is stated thus in a passage from Norton on Deeds cited with approval by Lord Simon of Glaisdale in L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235:

> "...The question to be answered always is 'What is the meaning of what the parties have said?' not 'what did the parties mean to say?', it being a presumption … that the parties intended to say that which they have said."

4. To this can be added the words of Lord Wilberforce in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989:

> "When one speaks of the intentions of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is

> speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

5. Where the contract does not accord with the intention of the parties, then, as Lord Simon observed in Wickman Tools:

> "It is of course always open to a party to claim rectification of an instrument which has failed to express the common intention of the parties; but so long as the instrument remains unrectified, the rule of construction is as stated by Norton. It is, indeed, the only workable rule."

6. This approach presupposes that the language used by the parties bears what the courts commonly refer to as its "natural and ordinary meaning". Where however the words used possess a number of possible meanings, or have only one meaning that appears to make no sense in its context, problems of interpretation arise that the courts have striven to deal with in the ways set out in this paper.

7. Although it is fundamental that extrinsic evidence (*ie* evidence to be found outside the words of the contract) is not admissible to prove the intention of the parties, for the reasons explained above, it has long been recognised that extrinsic evidence is admissible for the strictly limited purpose of proving the context in which the parties made their contract. In Prenn v Simmonds [1971] 1 WLR 1381, Lord Wilberforce said:

> "It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact ... And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation, if that can reasonably be found."

8. In Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, Lord Wilberforce again stressed the importance of the context in which the parties' intention is to be construed:

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

9. Lord Wilberforce went on to refer to the available body of admissible extrinsic evidence as the "matrix of fact".

10. The primacy of the words used by the parties was stressed by the Court of Appeal in Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732. In the words of Neuberger LJ:

> "[21] … The interpretation of the provision in the commercial contract is not to be assessed purely by reference to the words the parties have used within the four corners of the contract, but must be construed also by reference to the factual circumstances of commercial commonsense. However, it seems to me right to emphasise that the surrounding circumstances and commercial commonsense do not represent a licence to the Court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial commonsense which the parties cannot control, at least to the same extent.
>
> [22] Particularly in those circumstances, it seems to me that the Court must be careful before departing from the literal meaning of the provision in the contract merely because it may conflict with its notions of commercial commonsense of what the parties may must or should have thought or intended. Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves over-confidently the role of arbiter of commercial reasonableness or likelihood. Of course, in many cases, the commercial commonsense of a particular interpretation, either because of the peculiar circumstances of the case or because of more general considerations, is clear. Furthermore, sometimes it is plainly justified to depart from the primary meaning of words and give them what might, on the face of it, appear to be a strained meaning, for instance where the primary meaning of the words leads to a plainly ridiculous or unreasonable result."

11. The same point was addressed by Chadwick LJ, giving the judgment of the Court of Appeal in City Alliance Ltd v Oxford Forecasting Services Ltd [2001] 1 All ER (Comm) 233:

> "[13] It is not for party who relies upon the words actually used to establish that those words effect a sensible commercial purpose. It should be assumed, as a starting point, that the parties understood the purpose which was effected by the words they used; and that they used those words because, to them, that was a sensible commercial purpose. Before the Court can introduce words which the parties have not used, it is necessary to be satisfied (i) that the words actually used produce a result which is so commercially nonsensical that the parties could not have intended it, and (ii) that they did intend some other commercial purpose which can be identified with confidence. If, and only if, those two conditions are satisfied, is it open to the court to introduce words which the parties have not used in order to construe the agreement. It is then permissible to do so because, if those conditions are satisfied, the additional words give to the agreement or clause the meaning which the parties must have intended."

The (in)admissibility of negotiations

12. There is, however, one very important limitation to the admissibility of such extrinsic evidence. Evidence of discussions and negotiations leading up to the execution of the contract is inadmissible. In Prenn v Simmonds [1971] 1 WLR 1381, Lord Wilberforce stated:

> "In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of [one party's] intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction."

13. Lord Wilberforce gave the reasons for the rule as follows:

> "The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience, (though the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words? If the same expressions are used, nothing is gained by looking back; indeed something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to."

14. This rule survives Lord Hoffmann's reformulation of the principles of interpretation in Investors Compensation Scheme v West Bromwich Building Society [1998] 1WLR 896. It was explained by Lord Hoffmann as being due to "reasons of practical policy": what is said in the course of negotiations provides too uncertain a guide as to what is the position between contracting parties when later they commit themselves finally by their contract.

15. However, there is reason to believe that even this hallowed principle may be ripe for reconsideration. In Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, Lord Nicholls had this to say:

> "For many years the accepted wisdom has been that evidence of the actual intention of the parties is not admissible on the interpretation of a written agreement, although such evidence is admissible for other purposes, for example, on a claim for rectification. In Investors Compensation Scheme ..., my noble and learned friend Lord Hoffmann pointed out that the exclusion from evidence of the previous negotiations of the parties and their declarations of subjective intent is for reasons of practical policy. He added that the boundaries of this exception are in some respects unclear. Whether these reasons of practical policy still hold good today in all circumstances has become increasingly the subject of debate in recent years. The debate is still continuing ... This is not the moment

> to pursue this topic, important though it is, because the point does not arise on this appeal. I desire, however, to keep the point open for careful consideration on a future occasion."

16. Moreover, in Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, Lord Hoffmann added on this topic (obiter, and without express endorsement from any of the other judges):

> "[**33**.] I do however accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between the parties as part of the background which may throw light upon what they meant by the language they used. The general rule, as I said in Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, 269, is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. They may be inadmissible simply because they are irrelevant to the question which the court has to decide, namely, what the parties would reasonably be taken to have meant by the language which they finally adopted to express their agreement. For the reasons given by Lord Wilberforce, that will usually be the case. But not always. In exceptional cases, as Lord Nicholls has forcibly argued, a rule that prior negotiations are always inadmissible will prevent the court from giving effect to what a reasonable man in the position of the parties would have taken them to have meant. Of course judges may disagree over whether in a particular case such evidence is helpful or not. … As I have said, there is nothing unusual or surprising about such differences of opinion. In principle, however, I would accept that previous negotiations may be relevant."

17. The rule against the admissibility of the parties' negotiations is not, however, invariable. In Bank of New Zealand v Simpson [1900] AC 182, the Privy Council held that, although words with a fixed meaning in a written document cannot be explained by oral evidence to mean something different from what they express, where the words used are susceptible of more than one meaning, then extrinsic evidence is admissible to show what the negotiating parties had in their minds. In that way, the parties' pre-contract negotiations can be brought into account.

18. The purpose of such an investigation, however, is not to construe the contract, but rather to identify the subject matter of the contract. This slender distinction is one that is well made in the decision of the Court of Appeal of New South Wales in Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia) [1972] 2 NSWLR 806.

Ambiguity

19. Where the words used in the contract are capable of bearing more than one meaning, then the court may select that meaning which accords with commonsense and the perceived commercial purpose of the contract. Thus, in

Mitsui Construction Co Ltd v Attorney-General of Hong Kong [1986] 33 BLR 1, Lord Bridge of Harwich said:

> "It is obvious that this is a badly drafted contract. This, of course, affords no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used, interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing any court should be to be driven by semantic niceties, to attribute to the parties an improbable and unbusinesslike intention if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."

20. In order to divine this "businesslike basis" or commercial purpose of the contract, it is of course legitimate to have regard to its background and context. Moreover, it may also be legitimate to have regard to such matters in order to ascertain whether an apparently unambiguous expression used in the contract was in fact intended to bear another meaning. A recent expression of this approach in a rent review case is to be found in the speech of Lord Hope in The Melanesian Mission Trust Board v Australian Mutual Provident Society (1997) 74 P & CR 297:

> "The approach which must be taken to the construction of a clause in a formal document of this kind is well settled. The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to have been used according to the ordinary meaning of these words. If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed to by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity. But it is not the function of the court, when construing a document, to search for an ambiguity. Nor should the rules which exist to resolve ambiguities be invoked in order to create an ambiguity which, according to the ordinary meaning of the words, is not there. So the starting point is to examine the words used in order to see whether they are clear and unambiguous. It is of course legitimate to look at the document as a whole and to examine the context in which these words have been used, as the context may affect the meaning of the words. But unless the context shows that the ordinary meaning cannot be given to them or that there is an ambiguity, the ordinary meaning of the words which has been used in the document must prevail."

21. It should be noted that an ambiguity need not be established before the surrounding circumstances may be taken into account – see the Investors Compensation Scheme case.

Absurdity

22. Even where the background matrix does not assist in the interpretation of a contractual provision, it has long been recognised that too literal an approach is to

be avoided in the interpretation of contracts. The reason for this was explained thus by Lord Reid in Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235:

> "No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. ... The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

23. On the same theme, in Antaios Compania Naviera SA v Salen Rederierna AB ("The Antaios") [1985] AC 191, Lord Diplock famously stated that:

> "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

24. In Co-operative Wholesale Society Ltd v National Westminster Bank plc [1995] 1 EGLR 154, a rent review case, Hoffmann LJ added the following gloss on Lord Diplock's words:

> "This robust declaration does not, however, mean that one can rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems more likely to give effect to the commercial purpose of the agreement" (emphasis supplied).

25. Notwithstanding the clarity with which this limitation was expressed, other courts have shown themselves prepared to dispense with parts of the contract altogether: if the intention of the parties is plain, it must colour all the words they have used - so much so that a word, a phrase, or even a whole clause can be disregarded if it is irreconcilable with the plain intention of the parties gathered from other parts of the document.

26. In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, the question in the appeal was whether a tenant's notice to determine a lease which was expressed to take effect on 12 January 1995 was validly served under a provision which entitled the tenant to determine the lease by not less than six months' notice 'to expire on the third anniversary of the term commencement date' in circumstances in which the term had commenced on 13 January 1992. Lord Hoffmann pointed out that commercial contracts were to be construed in the light of all the background which could reasonably have been expected to be available to the parties; so that:

> "The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey."

27. In Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, Lord Hoffmann expanded this theme into a general reformulation of the principles of interpretation:

> "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having 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 meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (See Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 2 WLR 945).
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> The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

28. Lord Hoffmann developed this theme in Jumbo King Ltd v Faithful Properties Ltd, a judgment of the Court of Final Appeal of the Hong Kong Special Administrative Region, given on 2 December 1999. In the course of his judgment, with which the other Judges agreed, he said:

> "In my respectful opinion, the Judge's approach was far too narrow and literal. The construction of a document is not a game with words. It is an attempt to discover what a reasonable person would have understood the parties to mean. And this involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and eh practical objects which it was intended to achieve. Quite often this exercise will lead to the conclusion that although there is no reasonable doubt about what the parties meant, they have not expressed themselves very well. Their language may sometimes be careless and they may have said things which, if taken literally, means something different from what they obviously intended. In ordinary life people often express themselves infelicitously without

> leaving any doubt about what they meant. Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the Court will give effect to that language, even though the consequences may appear hard for one side or the other. The Court is not privy to the negotiation of the agreement – evidence of such negotiations is inadmissible – and has no way of knowing whether a clause which appears to have an onerous effect was a quid pro quo for some other concession. Or one of the parties may simply have made a bad bargain. The only escape from the language is an action for rectification, in which the previous negotiations can be examined. But the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. Therefore, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail."

29. Lord Hoffmann's approach in these cases appears to depart from the approach discussed in the foregoing paragraphs of this paper in these important respects:

(a) it accepts that the court can, as part of the process of interpretation, conclude that the parties may have made a "linguistic mistake" in expressing their true intention;

(b) it therefore allows the "natural and ordinary meaning" of the words used to be overridden;

(c) it does not confine the cases where the court can depart from the "natural and ordinary" meaning to cases of ambiguity (i.e. where there are available two or more possible meanings between which the court may choose: see paragraph 19 above) nor to cases where the result of adopting the "natural and ordinary" meaning would lead to nonsensical results;

(d) it recognises only limited exceptions, namely evidence of the parties' negotiations and that background knowledge which was not "reasonably available to the parties", to the extent of the extrinsic evidence which can be used as part of the matrix. Otherwise, in principle, "absolutely anything which would have affected the way in which the language of the documents would have been understood by a reasonable man" is admissible.

30. For all that Lord Hoffmann's words in the Investors Compensation Scheme case have appeared to lay down bold new principles of interpretation, in large part he was doing no more than emphasising the care with which the surrounding circumstances should be examined in order to determine what the parties meant by the words they chose to use in their contract. The same point had been made many

decades before by Lord Blackburn in River Wear Comrs v Adamson (1877) 2 App Cas 743:

> "… I shall … state, as precisely as I can, what I understand from the decided cases to be the principles on which the Courts of Law act in construing instruments in writing … . In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."

31. I suggest that the real importance of Lord Hoffmann's statement of principle is that it synthesises traditional principles, while emphasising that the modern approach does not allow the meaning, or even "the natural meaning" of words to be established without a full understanding of those circumstances, known to both parties, which would have informed them in choosing precisely which words should express their intention.

32. These authorities establish apparently clear limitations to the extent to which courts may elaborate upon the language used by the parties in order to arrive at an interpretation that appears to make for good commercial common sense. In practice, however, I suggest that different judges will draw the line between what is permissible and what is not in different positions in individual cases. The battle lines are drawn between (a) those judges who are reluctant to allow the business commonsense of the contract to cause them to depart from the natural meaning of the words used; (b) those who strain the meaning of words in order to arrive at what they consider to be a commercial outcome that best expresses the perceived intention of the parties while avoiding absurdity; and (c) those who feel able to disregard or even rewrite the parties' words to achieve the same effect. The remainder of this paper seeks to examine the tools available to the parties to forecast, and fight for, the construction that best suits them.

Correctable mistakes

33. It is now generally accepted that Brightman J was right in Re Butlin's Settlement Trusts [1976] Ch 251 in holding that rectification is available not only when the parties intended to use different words but also when they mistakenly thought their words bore a different meaning.

34. Had this flexibility been available to the Court of Appeal in Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd [1953] 2 QB 450, it might yet have been possible for them to hold that the parties had contracted for feveroles rather than the less valuable feves – whether the cause of action lay in construction or in rectification.

The approach to construction

35. In what follows, an apparent distinction is drawn between the various processes of interpretation that are considered. In practice, these should be seen not as alternative processes, but rather as part of the single process of arriving at the meaning of the contract. As Carnwath LJ said in KPMG LLP v Network Rail Infrastructure Ltd [2007] EWCA Civ 363, [2007] Bus LR 1336:

> "[50] … Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph "as it stands", as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

Correction (1): The correction of mistakes by construction

36. Where the contract has an obvious omission or other mistake, it is unnecessary to resort to rectification: the contract can be construed by reading in the words which have been omitted, or otherwise correcting the mistake. The relevant requirements for this approach were summarised thus by Brightman LJ in East v Pantiles Plant Hire Ltd [1982] 2 EGLR 111:

> "Two conditions must be satisfied: first there must be a clear mistake on the face of the instrument; secondly it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express the manner in which the parties decided to express their intention."

37. Lord Bingham added in Homburg Houtimport BV v Agrosin Private Ltd ("the Starsin") [2004] 1 AC 715:

> "I take it to be clear in principle that the court should not interpolate words into a written instrument, of whatever nature, unless it is clear both that words have been omitted and what those omitted words were …"

38. These words received the following further gloss from Carnwath LJ in KPMG:

> "[**64**.] … I think it would be wrong to apply too literally Lord Bingham's reference to the need for clarity both as to the omission of words and "what those relevant words were". As Lord Millett said, it is sufficient if the court is able to ascertain "the gist" of what has been omitted. I would go further. Once the court has identified an obvious omission, and has found in admissible background materials an obvious precedent for filling it, it should not

> be fatal that there may be more than one possible version of the replacement, or more than one explanation of the change."

39. In Chartbrook, the House of Lords agreed, adding, in the words of Lord Hoffmann:

> "[**25**.] What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant."

40. A number of authorities bear witness to the use by the courts of this interpretive tool. The following examples serve to illustrate the point.

41. In Littman v Aspen Oil (Broking) Ltd [2005] EWHC 1369 (Ch), a lease contained a break clause allowing either party to terminate the lease at the end of the third year of the term. The clause provided that in the case of a notice given by the *landlord* the tenant should have paid the rent and duly observed and performed the covenants on the part of the tenant, but provided no similar restriction upon the tenant.

42. The tenant purported to bring the lease pursuant to the clause, despite the fact that it was in breach of covenant. The landlord disputed the effectiveness of the break on the ground that the words "in the case of a notice given by the landlord" should be read as if they said "in the case of a notice given by the tenant" or "in the case of a notice given to the landlord", alternatively that the clause should be rectified so to provide, with the result that operation of the break clause by the tenant would be conditional on due performance of the covenants.

43. Hart J held that it was quite plain that something had gone wrong with the drafting of the break clause because there was no commercial purpose in making the exercise by the landlord of its right to terminate conditional on the performance by the tenant of its obligations under the lease. The inclusion of such a provision would put it in the power of the tenant, by its own breach of covenant, to defeat the right conferred on the landlord. It was obvious not only that a mistake had been made in its formulation but also obvious what that mistake was. The words "in the case of a notice given by the landlord" should be construed as if they read "in the case of a notice given by the tenant".

44. In KPMG itself, the Court of Appeal had to consider the following break clause in a renewed lease made in 1985:

> "If the Tenants shall be desirous of determining the said term hereby granted at any time after the expiration of the third thirteenth and twenty third years of the said term and of such desire shall give to the Landlords not less than six calendar months' notice in writing (such notice to expire on any quarter day and to be given within a period of six months following the determination of the reviewed rent to be payable from the expiration of the first eleventh and twenty-first years respectively of the said term [*] and thereafter during the year immediately preceding the eleventh and twenty-first years respectively of the said term) then on the expiration of such notice as aforesaid the said term shall cease and determine but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant." ([*] supplied).

45. In an earlier, 1974, lease, which the current lease had replaced, the clause contained at the point marked [*] the extra words:

> "but in the event only that such reviewed rent exceeds the yearly rent payable during the first year of the said term"

46. The Tenant contended that the clause should be read as it stood, with the result that it had five opportunities to break the lease: three related to the rent reviews, and two further during the 10th and 20th years of the term.

47. The Landlord contended that this clause gave the Tenant only three opportunities to break the lease, all dependent on a rent review, and that the lease should be rectified on the basis of mutual mistake, or alternatively as a matter of construction, to achieve that effect.

48. The Court of Appeal held that, had that been the parties' intention, it was almost inconceivable that it would have been drafted in that way. It was obvious from a reading of the later version on its own that something had gone wrong. Comparison with the earlier draft left no doubt as to the parameters of the error. The court could see that words had been omitted and what the gist of those words was and would therefore correct the error as a matter of construction rather than rectification.

49. In Chartbrook, a development agreement provided for the price payable by the developer under the agreement to include an "Additional Residential Payment" (ARP) defined as "23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives". The judge at first instance and two out of three judges in the Court of Appeal held that this provision meant what it said. Lawrence Collins LJ and the House of Lords disagreed, on the basis that the most literal meaning of the syntax was the most unlikely to achieve the commercial purpose of the agreement.

50. This approach to construction has its limitations. In particular, it can only be used in a case of very obvious mistake. In East v Pantiles (Plant Hire) Ltd

[1982] 2 EGLR 111, it failed. In that case, a lease created a term of 21 years from August 1, 1972. The rent was payable by equal quarterly payments in advance on August 14, November 1, February 1 and May 1 in each year. There was a rent review on the expiration of the seventh year, namely, August 1, 1979. The review clause provided that the review was to be initiated by a landlord's notice served "at any time before the beginning of a clear period of two quarters of a year (commencing on one of the usual quarter days hereinbefore mentioned) immediately preceding the review date …". Time was of the essence of this provision. The landlord's notice was served on January 26, 1979, which was five days before the quarter commencing February 1, 1979. The tenant contended that it was not posted before a clear period of two quarters before August 1, 1979, because the first quarter after the date of posting began on February 1, 1979 and the second ran from May 1, 1979 to August 14, 1979 so straddling the review date.

51. The court rejected the landlord's argument that it was clear that August 14 was a mistake for August 1. However, it went on to hold that, since the term started on August 1, the quarters of the year referred to in the rent review clause were those starting on August 1, November 1, February 1 and May 1 in each year. Thus, August 14 was not the date on which a quarter began but the date on which the rent for the quarter commencing on August 1 and ending on November 1 was payable. The rent review notice was therefore served in time because it was posted before the beginning of a clear period of two quarters of a year immediately preceding the review date.

Correction (2): Implication

52. Implication differs from the normal process of interpretation. As Sedley LJ said in his judgment in Legal & General Assurance Company Ltd v Expeditors International (UK) Ltd [2007] 2 P&CR 10:

> "[**47**.] I am not at all sure, despite the way it has been argued, that this case is about an implied term in the material agreement. I think it is about the meaning and effect of its express terms. The distinction between the two things is in many respects chimaeral … but not in all respects. The implication of a term sets a series of hurdles obviousness, business efficacy, reasonableness, necessity which are absent from the ordinary process of interpretation."

53. Indeed, the courts are slow to imply a term into a contract, and will only do so if certain requirements are satisfied. The requisite ingredients for implication were restated by Sir Thomas Bingham MR in Philips Electronique Grand Public SA v British Sky Broadcasting Ltd [1995] EMLR 472 thus:

(a) A term will not be implied unless it is "reasonable and equitable";

(b) A term will not be implied into a contract if the contract is effective without the term;

(c) Before a term will be implied, it must be so obvious that "it goes without saying";

(d) It is more difficult to imply a term where the parties "have entered into a lengthy and carefully-drafted contract";

(e) The argument that a term must be implied will frequently arise after a problem has arisen, and the Court must therefore be wary of using the benefit of hindsight not available to the parties when they made the contract;

(f) A term should only be implied to solve a particular problem if the Court is satisfied that there is "only one contractual solution or that one of several possible solutions would without doubt have been preferred".

54. In general, claims for implication are often made, but seldom succeed. One of the most common contexts for such claims is development contracts, where parties commonly indulge in a degree of crystal ball gazing as to the probability of certain events that may turn out, with the benefit of hindsight, to have been less than prophetic.

55. A recent illustration of such a difficulty in a development agreement context is provided by the decision of the Court of Appeal in Anglo-Continental Educational Group (GB) Ltd v Capital Homes (Southern) Ltd [2009] EWCA Civ 218. In that case, the claimant agreed to sell property to the defendant, at a price of £862,000 less the amount required to obtain a deed of release of certain restrictive covenants. By the date set for completion, no such deed had been obtained, and the claimant contended that no discount was to be allowed. The defendant argued for an implied term allowing for the estimated cost of releasing the covenants to be taken into account in some way. The Court of Appeal rejected the case based on implied term for a number of reasons, but went on to prefer an interpretation of its own devising which arose from the express terms of the agreement.

56. Given the difficulties associated with the implication of terms, if the claimant considers that its case may be supported by evidence forming part of the background matrix that is not reflected in the contract, it may be more fruitful for it to bring proceedings for rectification, rather than to seek to imply a term into the contract.

Correction (3): Rectification for mutual mistake

57. Rectification of a contract is however no soft alternative to an argument based upon implication for a term[1]. As I go on to suggest at the end of this paper, the reason for bringing a claim in rectification may more often be based upon tactics rather than a realistic evaluation of the prospects of success. I deal here with rectification for mutual mistake. Rectification for unilateral mistake is a subject that deserves a paper to itself.

58. The standard of proof in rectification cases is the usual civil standard of balance of probabilities, but there must be convincing proof[2]: Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505. Although that is not to say that the claimant's case must be proved to a level other than the balance of probabilities, the evidence adduced in support of the claim must be firm.

59. Although the party seeking rectification has to produce convincing evidence, the standard of proof is the civil standard; that is to say the balance of probabilities. However, as Chadwick LJ pointed out in Fuller v Strum [2002] 2 All ER 87, (first quoting from Lord Nicholls):

> "'Where matters in issue are facts the standard of proof required in non-criminal proceedings is the preponderance of probability, usually referred to as the balance of probability'.
>
> "But, as Lord Nicholls went on to point out there was '[b]uilt into the preponderance of probability standard … a generous degree of flexibility in respect of the seriousness of the allegation'. Lord Nicholls said:
>
> 'This approach also provides a means by which the balance of probability standard can accommodate one's instinctive feeling that even in civil proceedings a court should be more sure before finding serious allegations proved than when deciding less serious or trivial matters.'"

60. Where parties instruct lawyers to set out the terms of their agreement in writing it is inherently unlikely that the lawyers will make a mistake in recording the terms that they have agreed. It is that factor that has led the court to require convincing proof.

[1] The differences are analysed in the scholarly Jonathan Brock Memorial Lecture "If it ain't broke don't fix it: Rectification and the Boundaries of Interpretation", given by Sir Kim Lewison to the London Common Law and Commercial Bar Association on 21 May 2008.

[2] "strong irrefragable evidence", to use the description given by the Lord Chancellor in UCountess of Shelburne v Earl of InchiquinU (1784) 1 Bro CC 338.

61. Generally speaking (see Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 71), in order to obtain the remedy of rectification, the following must be demonstrated to the satisfaction of the court:

(a) that the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

(b) that there was an outward expression of this common intention;

(c) that this common intention continued up to and including the time when the contract was executed;

(d) that by mistake the contract as executed failed to give effect to that common intention;

(e) that the contract as executed can be rectified so as to give effect to the common intention;

(f) that there is no discretionary reason why rectification should be refused.

62. Some of these ingredients benefit from a little more detail. In relation to the second, Joscelyne v Nissen [1970] 2 QB 86 established that the accord need not be enforceable as a contract, provided that it is outwardly expressed. However, whether there is a need for this accord to be spoken or signified in some way, however, is currently a matter of debate. In cases where a common assumption is so obvious that it goes without saying, there is much to be said for the view that no outward expression is necessary – see JIS (1974) Ltd v MCP Investment Nominees 1 Ltd [2003] EWCA Civ 721.

63. The third ingredient may be difficult to demonstrate. It may be possible to adduce evidence of an earlier common accord (perhaps in the form of an exchange of correspondence). Proving that that accord remained in existence in that same form thereafter will often mean inviting the court to draw the inference from the lack of any further material evincing a change of mind. However, the change of mind may be said to lie in differing wording of the contract itself. Much may therefore depend upon the extent to which oral evidence of the progress of the negotiations may still be available.

64. The fifth ingredient normally requires the court to be satisfied as to exactly what was the nature of the prior agreement but in Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505, the Court of Appeal was prepared to go some way towards implying into the parties' accord certain details which they had not actually agreed.

65. The party seeking rectification must always however be in a position to show what the contract should have said. It is no use coming forward with a generalised allegation of unfairness in the contract as it stands, if it is not possible to say what was the effect of the common accord, because that inability will be likely to establish that there was no true common accord in the first place.

66. Rectification is an equitable and discretionary remedy that will not normally be used to prejudice innocent third parties. Lastly, therefore, the party seeking rectification must be able to defeat any defence arising out of the fact that rectification is an equitable remedy. As such, the remedy is liable to be refused if its grant would prejudice a bona fide purchaser for value of an interest created by the contract who did not have notice of the right to rectify.

Tactics in construction and rectifications actions

67. In Chartbrook, as with KPMG, the parties' pre-contractual negotiations were adduced in evidence, because in each case the parties were asking for rectification of the contracts in the alternative. In Chartbrook, Baroness Hale supported the opinions of the House concerning the interpretation of the development agreement with this comment:

> "[**99**.] But I have to confess that I would not have found it quite so easy to reach this conclusion had we not been made aware of the agreement which the parties had reached on this aspect of their bargain during the negotiations which led up to the formal contract. On any objective view, that made the matter crystal clear."

68. It is obvious that, no matter how astute a judge may be to exclude the effect of prejudicial material gleaned from inadmissible material (most obviously, the understanding of the parties shown by their pre-contractual correspondence), it is likely that there will be some lasting effect. So much was acknowledged by Lord Hoffmann in Chartbrook:

> "… it is said that when a dispute over construction is litigated, evidence of the pre-contractual negotiations is almost invariably tendered in support of an alternative claim for rectification (as in Prenn v Simmonds and in this case) or an argument based on estoppel by convention or some alleged exception to the exclusionary rule. Even if such an alternative claim does not succeed, the judge will have read and possibly been influenced by the evidence. The rule [excluding evidence of pre-contractual negotiations] therefore achieves little in saving costs and its abolition would restore some intellectual honesty to the judicial approach to interpretation. "

69. Accordingly, the first task of the party seeking to persuade the court to adopt something other than the literal meaning of the words as the proper interpretation of the contract will be to have admitted that which is technically inadmissible.

70. As the authorities cited above show, this is a close to impossible task when the only cause of action before the court is a claim based upon the contract. Any attempt to adduce evidence of the parties' negotiations is sure to be blocked by the other side, using the expedient endorsed by the Court of Appeal in Anglo-Continental Educational Group:

> "[**24**.] If a party is served with a witness statement which it considers may contain material which is inadmissible on a question of interpretation, it should seek to establish from the other party the basis on which the evidence is said to be admissible. If he is dissatisfied with the answer, he may in appropriate circumstances make an application to exclude the evidence before replying to it. Another course would be to issue an application to be heard at trial, but this may lead to increased costs and a diversion of the time available for trial to this subsidiary issue. Yet another course would be for the court at the case management conference to direct the parties to identify in writing the precise point which they say the evidence establishes and why they say that that evidence is admissible. This may shorten the time spent at trial on any application to exclude it."

71. The only recourse in these circumstances is to couple the construction claim with a claim for rectification in the alternative. Here, the claimant is given a helping hand by the approach of Carnwath LJ in KPMG:

> "Although the judge considered the issues of construction first, I find it more logical to reverse the order. The purpose of rectification for mutual mistake is to ensure that the terms of the written document accurately reflect the state of agreement between the parties. If rectification is ordered, it is the document as so rectified that has to be construed."

72. If accepted by the court, this will have the effect that the claimant will be able to adduce all the evidence that will support the rectification claim before dealing with the construction claim. If the court rejects the rectification claim (as did the Court of Appeal in KPMG), it will at least then approach the construction claim with its mind suitably (or, as the defendant would say, unsuitably) informed to make the correct findings.

73. Those confronted by such a tactic will want to forestall it by having the two claims heard separately, and inviting the judge to read the materials admissible to the construction claim in one trance, and to read the further materials relevant to the rectification claim only after the disposal of the construction claim. This was the expedient adopted by Blackburne J in JIS (1974) Ltd v MCP Investment Nominees 1 Ltd , which led to Hart J hearing the construction claim without any reference to the evidence concerning the rectification claim – see [2002] EWHC 1407 (Ch).

74. The only other tactic that commends itself in such cases is to ensure, so far as possible, that the forum is likely to be of the right mind. In Chartbrook, Lord

Hoffmann commented, with regard to the fact that the judge at first instance and two judges in the Court of Appeal had decided the case in a contrary way:

> "It is, I am afraid, not unusual that an interpretation which does not strike one person as sufficiently irrational to justify a conclusion that there has been a linguistic mistake will seem commercially absurd to another … . The subtleties of language are such that no judicial guidelines or statements of principle can prevent it from sometimes happening."

75. Forum shopping in litigation is frowned upon, and difficult to achieve in practice. There is much more opportunity to secure a sympathetic tribunal where the dispute is subject to an arbitration clause, and the parties have the choice of agreeing upon the identity of a legal assessor to resolve the matter.

Conclusion

76. I offer the following suggestions for those stuck with apparently unfavourable contracts. When in a hole:

(a) carry on digging: judges are clever, and like to be resourceful, and to tease out an interpretation that neither party will have thought of, and that will make any form of inventive interpretation, implication or rectification quite unnecessary. It is the lawyer's responsibility to try and get there before the judge does, and to avoid the litigation in the first place;

(b) send for help: ask for and explore all the evidence that might possibly explain the mistake;

(c) use all your tools: explore (a) correction of error by construction; (b) implication; and (c) rectification;

(d) combine your tools: even if any one of them seems weak, bear in mind the value that the use of one (evidence of negotiations in rectification) may have to another (construction or implication).

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