MACFARLANES

THE NAME GAME

LITIGATION AND DISPUTE RESOLUTION

OVERVIEW

In the recent case of *Liberty Mercian Limited v Cuddy Civil Engineering Limited* [2013] EWHC 2688, the High Court considered the doctrine of misnomer. In this case, a dormant company had been named in a construction contract as the contractor. The claimant, Liberty Mercian Limited (Liberty), failed to persuade the High Court that the reference to the dormant company was a misnomer for a different (non-dormant) company. The Court applied the test, set out in *Chartbook v Persimmon Homes* [2009] 1 AC 1101, that mistakes in contracts should be dealt with by applying the ordinary principles of construction. On the facts of this case, the Court held that the naming of a dormant company as the contractor in the construction contract was not a clear mistake.

This case also contains a useful reminder of the rules on rectification for mutual mistake and unilateral mistake.

FACTS

Liberty entered into negotiations with representatives of the "Cuddy Group" in connection with the construction of a new retail plateau for the future construction of a supermarket. Cuddy Group is the trading name of Cuddy Demolition and Dismantling Limited (CDDL). The draft documents had named Cuddy Group as the contractor. Before the construction contract was finalised, CDDL commenced work on the site and rendered invoices in its name.

Liberty's legal advisers wanted to identify the full name, as opposed to the trading name, of the contracting party in the construction contract. To this end, Liberty's legal advisers ran a Companies House search and identified, mistakenly, Cuddy Civil Engineering Limited (CCEL) as the correct company. Liberty's legal advisers then asserted that CCEL ought to be the party named in the construction contract, as opposed to Cuddy Group, and requested that the draft documentation be amended accordingly. The representatives of Cuddy Group agreed. Most of the references to Cuddy Group in the construction contract were changed to CCEL.

Unfortunately for Liberty, CCEL was in fact a dormant company: Cuddy Group was not the trading name for CCEL. It had been incorporated some 20 years earlier in order to preserve the name and with a view to eventually trading. Liberty's error only came to light when problems arose and Liberty purported to terminate the construction contract. Liberty then sought a declaration that CCEL was a misnomer for CDDL, and that CDDL was in fact the correct contracting party.

The judge accepted that Liberty had made a mistake when it requested that CCEL be named as the contracting party in the construction contract and that it had intended to enter into a contract with the company which traded as the Cuddy Group, namely CDDL. Importantly, however, the judge also found that this mistake was internal to Liberty and that there was no discussion between the parties as to the reason for Liberty's request to change the names. The representatives of Cuddy Group accepted this request because they were eager to satisfy Liberty's wishes and to finalise the contract as quickly as possible.

MISNOMER

The rules on misnomer apply where there is a wrong or inaccurate use of a name or term. It is a doctrine of construction, separate from the rules on rectification (as to which – see below).

The judge held that the correct test was set out by Lord Hoffman in the House of Lords case of *Chartbrook v Persimmon Homes*, which dealt with the principles applicable to the correction of mistakes in contracts by applying ordinary rules of construction. In *Chartbook v Persimmon Homes* Lord Hoffman said:

"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, the correction is made as a matter of construction."

If those two conditions are satisfied, then the correction can be made as a matter of proper construction of the document:

"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."

The judge reviewed the background evidence to assist him in ascertaining whether something had genuinely gone wrong with the choice or naming of the party. The judge held that this was not a case in which it could be said that there was a clear mistake from the perspective of an objective observer:

- Commercially, it was not completely nonsensical to have CCEL as the contracting party. While CCEL was dormant, it was still a real and existing company that could commence trading at any time.

- There was an unequivocal request from Liberty to name CCEL as the contacting party in the construction contract.

- The mistake was one made by Liberty only; the judge accepted the evidence from the representatives of Cuddy Group that they accepted the change requested by Liberty in order to accommodate them.

This case emphasises the high threshold a party will have to surpass in order to persuade the Court that something had gone wrong with the language.

RECTIFICATION

Liberty also tried to argue, in the alternative, that there was a mutual mistake or unilateral mistake. Unsurprisingly, given that the Court accepted the evidence of the representatives of Cuddy Group on why they agreed to the change, the Court found that Liberty did not meet the relevant tests for mutual or unilateral mistake.

Mutual Mistake

In *Swainland Builders v Freehold Property Limited* [2002] EWCA Civ 560, Peter Gibson LJ said that a party seeking rectification for mutual mistake must demonstrate that:

1. 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;

2. there was an outward expression of accord;

3. the intention continued at the time of the execution of the instrument sought to be rectified; and

4. by mistake, the instrument did not reflect that common intention.

In *Chartbrook*, Lord Hoffmann approved this test but added that the question of whether the parties had a "common continuing intention" was an objective test, which was to be determined by reference to what a hypothetical reasonable observer would have thought the intentions of the parties to be.

In this case, Liberty submitted that the parties had a common continuing intention, up until the contract was formed, that the contracting party would be the party carrying out the work, namely CDDL and that references to CCEL in the contract documentation were straightforward errors caused by its solicitors mistakenly identifying the corporate entity represented by "Cuddy Group".

The judge rejected this argument. He found that there had originally been a common intention that CDDL would be the contracting party. However, a hypothetical reasonable objective observer would have concluded that Liberty had changed its mind when it requested that the references in the contract to the Cuddy Group should be changed to CCEL. As the contract gave effect to this "objectively indicated change of mind", a claim for rectification to give effect to the earlier prior accord should be refused.

Unilateral mistake

The judge said that the test for unilateral mistake requires a claimant to show that:

1. one party (A) erroneously believed that the relevant contract contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;

2. 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;

3. B omitted to draw the mistake to the attention of A; and

4. the mistake must be one calculated to benefit B.

The second limb of this test will be satisfied if B actually knew of A's mistake or if B wilfully shut its eyes to the obvious or wilfully and recklessly failed to make such inquiries as a reasonable and honest person would make. In other words, A will normally need to demonstrate that B's conduct can be characterised as dishonest or amounting to "sharp practice".

The judge held that the evidence fell far short of establishing this. The defendants' evidence, which the judge accepted as honest, showed that they had complied with Liberty's request to change the name to CCEL in order to finalise the contract as quickly as possible and to secure further payments under the contract.

COMMENT

Previous case law suggested that the test for misnomer is more limited than the test to be applied when the Court is asked to correct other mistakes by construction. In *Dumford Trading AG v Oao Atlantrybflot* [2005] EWCA Civ 24, Rix LJ suggested that extrinsic evidence was not admissible when there were two candidates for the correct name in a contract. It followed that, in such a case, the doctrine of misnomer would not apply unless it was obvious from "the four corners of the document"

that the parties had intended to refer to a different entity from the one named in the contract. In this case, the judge preferred the broader test set out in *Chartbrook* and described above. A similar approach was taken, at first instance, by the judge in *Derek Hodd Ltd v Climate Change Capital Ltd* [2013] EWHC 1665. The point needs clarification but arguably the broader test is more consistent with the modern purposive approach to the construction of contracts.

The obvious practice point is that care must be taken to ensure that the name of the right party is inserted in a contract – especially when there are a number of group companies bearing similar names. The judge made it clear that a "strong case" is required when trying to persuade the Court that something has gone wrong in naming a particular entity as a party to a contract.

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