[2018] UKUT 0231 (TCC)

Appeal Ref UT/2017/0002

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

BETWEEN

PALO ALTO LIMITED

PETER WEISS
DAVID HEDGES

Appellants

and

ALNOR ESTATES LIMITED **Respondent**

Re: 24 Vulcan Street, Southport PR9 0TW
REF/2015/0430 and REC/2016/0019

Before: His Honour John Behrens

Sitting at: The Leeds Combined Court Centre, LS1 3BG on 10 May 2018

Peter Weiss, acted in person on behalf of the Appellants
Nicholas Jackson, instructed by Whitfields, for the Respondent

The following cases are referred to in this decision:
Daventry District Council v Daventry & District Housing Ltd [2012] 1 WLR 1333
Thomas Bates Ltd v Wyndham's (Lingerie) Ltd [1980] 1 WLR 505
Roberts v Leicestershire County Council [1961] Ch 555
Riverlate Properties v Paul [1975] Ch 133
The Nai Genova [1984] 1 LL R 353S
Wimpey v V. I. Construction [2005] EWCA Civ 77
Commission for the New Towns v Cooper (Great Britain Ltd.) [1995] Ch 259

DECISION

Introduction

1. This is a landlord and tenant dispute concerning Unit 2, 24 Vulcan Street, Southport PR9 0TW ("Unit 2"). The Appellants are the Tenant and the Respondent is the Landlord of the property. I shall refer to them as such in this decision. The Tenant holds leases of 3 other units in the same building. It was however agreed that the issues in respect of the other units were identical and Unit 2 was taken as a test case.

2. The tenancy agreement (which was not under seal) was dated 30 September 2011. It is a short two-page document not professionally prepared. The term, which is central to the issues in the case, is defined in the following terms:

> The tenancy is granted for a period of one year with an option to renew at the end of the term for a further one year on the same provisos and agreements as are herein contained including the option to renew such tenancy for a term of one year at the end thereof.

3. The rent was £3,120 p.a payable monthly in advance. The permitted use was for storage.

4. The Tenant applied to HM Land Registry for registration as proprietor of a 2,000-year lease of Unit 2 on the basis that the lease is perpetually renewable and thus converted to a 2,000 year term by s 145 and Sch 15 of the Law of Property Act 1925. The Landlord objected, and the dispute was referred to the First-Tier Tribunal ("the F-tT") pursuant to s 73 of the Land Registration Act 2002 ("the 2002 Act"). Subsequently the Landlord applied for rectification of the lease if it was perpetually renewable so as to provide for 2 renewals only.

5. The two applications came before Judge Elizabeth Cooke (the Principal Judge of the Land Registration Division of the F-tT) on 1 September 2016 in Liverpool. Judge Cooke's decision is dated 28 September 2016. She decided (paras 15 – 31) that the lease was perpetually renewable and was converted into a 2,000 year term. There is no cross-appeal by the Landlord against that part of her decision and thus it is not necessary for me to set out her reasoning or the authorities upon which she relied.

6. In paras 32 – 58 Judge Cooke went on to consider the Landlord's application for rectification. In paras 44 – 46 she rejected the Landlord's claim based on mutual mistake. Again, there is no cross appeal against this part of her decision and I say no more about it.

7. She went on to consider unilateral mistake. She referred to the decision of the Court of Appeal in *Thomas Bates Ltd v Wyndham's (Lingerie) Ltd* [1980] 1 WLR 505 and the second edition of Rectification by HH Judge Hodge QC. She held that the elements for rectification were present and that it was appropriate to rectify the lease so that it did not run for more than 3 years. In her decision she said (para 57) that she did not have to find sharp practice.

8. On 7 November 2016, in response to a request for permission to appeal dated 27 November 2016 Judge Cooke enlarged her opinion. In three of its proposed grounds of appeal the Tenant sought to argue that there was no proof of dishonesty by the Tenant and that such a finding was a necessary element of rectification for unilateral mistake. Judge Cooke disagreed. She made it clear that, in her view, there is no need for a finding of dishonesty, and thus no need for a pleading of dishonesty. Equally it was not necessary for there to be a misrepresentation by the Tenant as to the effect of the clause.

9. The Tenant's application for permission to appeal eventually came before me for an oral hearing on 3 May 2017. Mr Weiss raised a number of grounds of appeal – some of which were procedural and some of which were substantive. I rejected almost all the grounds of appeal. I

was referred to the observations of Etherton LJ in para 116 of *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333 where he said: "nothing short of dishonesty is sufficient to found a claim for rectification for unilateral mistake". In those circumstances I granted permission to appeal on the limited grounds:

> Whether a finding of dishonesty is an essential feature of the cause of action of rectification based on unilateral mistake and if so whether:
>
> a) The pleading in this case was sufficient to allege dishonesty
>
> b) Whether the findings in the judgment of Judge Cooke were sufficient to amount to a finding of dishonesty on the part of Mr Weiss.

10. Mr Weiss attempted to challenge the partial refusal of permission to appeal by means of an application for judicial review. Permission to apply was refused by Lane J on 10 November 2017 and Lewison LJ in the Court of Appeal on 29 March 2018.

11. At the hearing of the appeal on 10 July 2018 the Landlord was represented by Mr Jackson instructed by Whitfields and the Tenant by Mr Weiss. Both Mr Jackson and Mr Weiss produced helpful skeleton arguments for which I am grateful. Following the oral submissions the decision was reserved.

The authorities on unilateral mistake

12. The modern law on rectification for unilateral mistake starts with the decision of Pennycuick J in *Roberts v Leicestershire County Council* [1961] Ch 555. It is not necessary to set out the facts in detail. The case concerned the completion date for the construction of a primary school. The Company believed that completion was to take place 18 months after the instructions to proceed whereas the contract actually signed provided for a 30 month period. Its claim to rectification based on mutual mistake failed but succeeded on the basis of unilateral mistake.

13. At pp 571-572 Pennycuick J set out the law in these terms:

> The principle is stated in Snell on Equity, 25th ed. (1960), p. 569, as follows: "By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."
>
> The exact basis of the principle appears to be in some doubt. If the principle is correctly rested upon estoppel it seems to me that it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances. If, on the other hand, the principle is rested on fraud, obviously dishonesty must be established. It is well established that a party claiming rectification must prove his facts beyond reasonable doubt, and I think this high standard of proof must equally apply where the claim is based on the principle indicated above.

14. *Riverlate Properties v Paul* [1975] Ch 133 was a landlord and tenant dispute concerning liability for external repairs. The Landlord believed that the Tenant was proportionately liable for such repairs whereas the lease placed the burden wholly on the Landlord. The Landlord´s claim for rectification of the lease failed both at first instance and in the Court of Appeal. In the course of giving the judgment of the Court of Appeal Russell LJ said (at p140):

> It may be that the original conception of reformation of an instrument by rectification was based solely upon common mistake: but certainly in these days rectification may be based upon such knowledge on the part of the lessee: see, for example, *A. Roberts & Co. Ltd. v. Leicestershire*

County Council [1961] Ch. 555 . Whether there was in any particular case knowledge of the intention and mistake of the other party must be a question of fact to be decided upon the evidence. Basically it appears to us that it must be such as to involve the lessee in a degree of sharp practice.

15. *Thomas Bates and Son v Wyndham Ltd* [1981] 1 WLR 505 was also a landlord and tenant dispute which concerned a rent review clause. It provided for the rents for the review period to be such as were agreed between the Landlord and the Tenant. It failed to make any provision for what would happen in default of agreement. The Landlord's claim for rectification based on unilateral mistake succeeded. The leading judgment was given by Buckley LJ. At p 514 he made some observations about the standard of proof pointing out that it was the civil burden. (Brightman LJ said the same in his judgment but made the point that convincing evidence is required to counteract the evidence displayed by the written document itself.)

16. After citing the judgment of Pennycuick J in *Roberts*, Buckley LJ went on to consider Russell LJ's observations in *Riverlate*. At p 515 he said this:

> In that case the lessee against whom the lessor sought to rectify a lease was held to have had no such knowledge as would have brought the doctrine into play. The reference to "sharp practice" may thus be said to have been an obiter dictum. Undoubtedly I think in any such case the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document. If this necessarily implies some measure of "sharp practice", so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, 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.
>
> For this doctrine — that is to say the doctrine of *A. Roberts & Co. Ltd. v. Leicestershire County Council* — to apply 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. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.

17. At p 520 Eveleigh LJ put the matter slightly differently:

> I also think that the evidence established that Mr. Avon knew that the lease did not contain the appropriate clause and knew that Mr. Bates intended that it should. Where a party is aware that the instrument does not give effect to the common intention of the parties as communicated each to the other, there may well be an inference of sharp practice or unfair dealing. In my opinion, this will not always be so. I do not think that it is always necessary to show sharp practice. In a case like the present if one party alone knows that the instrument does not give effect to the common intention and changes his mind without telling the other party, then he will be estopped from alleging that the common intention did not continue right up to the moment of the execution of the clause. There is no need to decide whether his conduct amounted to sharp practice. I think he might at that time have had no intention of taking advantage of the mistake of the other party. I do not think that it is necessary to show that the mistake would benefit the party who is aware of it. It is enough that the inaccuracy of the instrument as drafted would be detrimental to the other party, and this may not always mean that it is beneficial to the one who knew of the mistake.

18. Brightman LJ agreed with Buckley LJ. He disagreed with the finding of the judge that Mr Avon (the Tenant's agent) was guilty of "sharp practice". However, in his view such a finding was not necessary for the Landlord's case.

19. In *The Nai Genova* [1984] 1 LL R 353 a claim to rectify two charterparties was rejected both at first instance and in the Court of Appeal. Slade LJ reviewed *Roberts, Riverlate* and *Bates* describing them as the principal authorities. He made the point that rectification for unilateral mistake could only be ordered where the Defendant had actual knowledge of the mistake at the time the contract was made.

20. This point was considered further in *Commission for the New Towns v Cooper (Great Britain Ltd.) [1995] Ch 259* where Stuart-Smith LJ's said at pp 280 - 281.

> "Did [the defendant] have actual knowledge of the mistake? The judge held not; they merely suspected it. [Counsel for the claimant] submits that the judge was in error and he should have found actual knowledge. His attention was drawn to the analysis of various forms of knowledge made by Peter Gibson J. in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA (Note) [1993] 1 WLR 509* and cited by Millett J. in *Agip (Africa) Ltd v Jackson [1990] Ch 265*, 293:
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> "Knowledge may be proved affirmatively or inferred from circumstances. The various mental states which may be involved were analysed by Peter Gibson J. in *Baden's case [1993] 1 W.L.R. 509* as comprising: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry. According to Peter Gibson J., a person in categories (ii) or (iii) will be taken to have actual knowledge, while a person in categories (iv) or (v) has constructive notice only. I gratefully adopt the classification but would warn against over refinement or a too ready assumption that categories (iv) or (v) are necessarily cases of constructive notice only. The true distinction is between honesty and dishonesty. It is essentially a jury question. If a man does not draw the obvious inferences or make the obvious inquiries, the question is: why not? If it is because, however foolishly, he did not suspect wrongdoing or, having suspected it, had his suspicions allayed, however unreasonably, that is one thing. But if he did suspect wrongdoing yet failed to make inquiries because 'he did not want to know' (category (ii)) or because he regarded it as 'none of his business' (category (iii)), that is quite another. Such conduct is dishonest, and those who are guilty of it cannot complain if, for the purpose of civil liability, they are treated as if they had actual knowledge."

21. Stuart-Smith LJ went on to hold (at 281 D-E) that knowledge within categories (ii) and (iii) was sufficient knowledge for the purpose of unilateral mistake.

22. *Wimpey v V. I. Construction* [2005] EWCA Civ 77 concerned the sale to Wimpey of a development site. The price consisted of an initial payment with a deferred payment becoming due on a contingency. The amount of the deferred payment depended on a formula. The trial judge rectified the contractual formula on the basis of unilateral mistake. The Court of Appeal allowed the appeal.

23. In his judgment Peter Gibson LJ rejected the finding of the trial judge that there had been dishonesty on the part of the vendor's witnesses. It was not a finding open to the judge on the pleadings. [See para 34]. He went on to consider "knowledge in the extended sense". In para 35 he set out Counsel for the Purchaser's argument:

> he argued that neither dishonesty nor sharp practice was a necessary ingredient for rectification on the ground of unilateral mistake and that for Mr. Daykin and Mr. Youens to behave

unconscionably by having knowledge, in the extended sense, of Wimpey's mistake and not drawing the mistake to Wimpey's attention was sufficient.

24. Peter Gibson LJ then cited passages from *Roberts, Riverlate* and the judgment of Buckley LJ in *Bates* which he accepted as an authoritative statement of the requirements for rectification for unilateral mistake. Peter Gibson LJ went on to consider the judgment of Stuart-Smith LJ in *The Commisison*.

25. In para 45 of his judgment Peter Gibson LJ draws his conclusion:

> 45. Mr. Fetherstonhaugh relies on *Commission* as holding that actual knowledge by the non-mistaken party of the mistaken party's mistake is not a requisite of the jurisdiction to rectify for unilateral mistake. He relies on the views expressed in that case that knowledge in categories (ii) and (iii) suffices. But he criticizes as illogical the reasoning of Millett J in *Agip (Africa) Ltd.* that knowledge in those categories involves dishonesty, at any rate to the extent that this court adopted that reasoning as applicable to what knowledge of the mistaken party's mistake is needed for rectification. Why, he asks, if rectification can be ordered if the non-mistaken party has actual knowledge of the mistaken party's mistake, but there is neither dishonesty nor sharp practice, should knowledge in categories (ii) and (iii), which is the equivalent in law of actual knowledge, involve dishonest behaviour for the purposes of rectification? I see force in that submission. However, Mr. Fetherstonhaugh 's difficulty, as it seems to me, lies, first, in this court's acceptance in *Commission* of the reasoning of Millett J. in the context of rectification for unilateral mistake and this court's application of that reasoning to a case of dishonest conduct, and, second, in the judge's acceptance of the same approach in para. 78 in finding dishonest conduct when concluding that VIC had knowledge (in categories (ii) and (iii)) of Wimpey's mistake. I do not accept that it is open to Wimpey to rely on the judge's finding in para. 78 that VIC had such knowledge but to say that such knowledge was without dishonesty or sharp practice where it is plain that the judge's remarks in para. 78 were permeated by his finding of dishonesty, which, because of *Commission* , he thought was required.

26. In paras 46 – 47 he went on to hold that the purchaser had failed to establish knowledge within categories (ii) and (iii).

27. Blackburne J summarised his view of the position in para 79:

> 79. How then does the matter stand? First, as a matter of strict logic, it is difficult to disagree with Mr Fetherstonhaugh 's submission; if dishonesty is not a necessary ingredient of actual knowledge, why should it have to be a component of knowledge within categories (ii) and (iii)? Second, however, it is difficult to regard as altogether honest the conduct of a person who allows another to enter into a contract with him, knowing that that other is labouring under a mistake as to the contract's terms (the mistake being one which is calculated to benefit the former) but saying nothing to alert that other to his mistake. In short, by its nature, a successful rectification claim based upon unilateral mistake will usually, if not always, call into question the probity of the defendant. Third, it is difficult to regard this court's view in *Commission for New Towns* that "actual knowledge" for the purposes of rectification includes knowledge in categories (ii) and (iii) as necessarily separate from and not dependent upon the finding in that case of dishonesty. Fourth and critically for the purposes of this ground of VIC's appeal, the judge having stated (at paragraph 73 of the judgment) that neither Mr Daykins nor Mr Youens "actually knew (in the ordinary acceptation of those words) that Mr Ketteridge was making a mistake", his finding that VIC had the requisite knowledge of Wimpey's mistake was intimately bound up with his finding that Mr Daykins and Mr Youens had behaved dishonestly. In short, it is not possible, as Mr Feathersonhaugh sought to persuade us to do, to divorce the judge's finding of knowledge from his finding that Mr Daykins and Mr Youens acted dishonestly.

28. *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333 is not a straightforward case. It concerned the sale and transfer of the Claimant's housing stock to

the Defendant. An important element related to the payment of the deficit in the local government pension scheme, administered by the county council, in respect of the staff transferred in order that they should remain members of that scheme. After extensive negotiations the contract was signed containing an express clause providing for payment of the deficit by the Claimant. The Claimant sought rectification on the grounds of mutual and unilateral mistake. At first instance the claim was dismissed. The Court of Appeal were divided. Lord Neuberger and Toulson LJ were in the majority and allowed the appeal. Etherton LJ dissented.

29. In his judgment Etherton LJ (at para 56) cited the trial judge's view of the requirements for rectification for unilateral mistake who had cited the passage from Buckley LJ's judgment in *Bates* referred to above. At paras 94 and 95 he said:

> **94** Once again, subject to one point, there is no dispute that the judge correctly set out the applicable legal principles: quoted in para 56 above. The one reservation of DDC, and the heart of Mr Croxford's attack on this part of the judge's judgment, is that the judge did not properly address the law as to the necessary state of mind of the defendant for rectification for unilateral mistake. This is a fair criticism.
>
> **95** It is now well established by authority, binding at the level of the Court of Appeal, that the defendant's knowledge of the claimant's mistake sufficient to satisfy the conditions for rectification for unilateral mistake is such knowledge as falls within any one of the first three categories described by Peter Gibson J in the *Baden* case [1993] 1 WLR 509, namely: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; and (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make: *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259, 280, 292 and *George Wimpey UK Ltd v VI Construction Ltd* [2005] BLR 135.

30. Etherton LJ thought (paras 98 – 100) that it could not be said that the trial judge was plainly wrong in finding as a fact that the Defendant did not have the requisite knowledge. Hence he would have dismissed the appeal.

31. In paras 103 – 116 he added a postscript in which he analysed and commented on the judgments of Toulson LJ and Lord Neuberger. His comments on unilateral mistake appear at para 116:

> **116** Both Lord Neuberger MR and Toulson LJ are of the view that, if rectification for mutual mistake was not available, then they might have permitted DDC's appeal on the ground of unilateral mistake. For the reasons I have given earlier, I do not agree. It is sufficient for me to add only this. The judge's conclusion of fact that Mr Roebuck's conduct was not dishonest cannot properly be challenged on this appeal as plainly wrong. As the law binding on this court presently stands, nothing short of dishonesty is sufficient to found a claim for rectification for unilateral mistake. Toulson LJ suggests that in principle that may be too rigorous a requirement. That is not a matter which was explored before us since DDC pleaded its case for rectification for unilateral mistake, and argued it before the judge, on the basis of dishonesty. Without expressing any concluded view about the point in principle, I would merely observe that our jurisprudence has tended to shy away from the notion that unconscionable conduct is of itself sufficient to give rise to equitable relief. In any event, for the reasons I have given earlier, whatever degree of culpability might be sufficient to found a claim for rectification for unilateral mistake, I consider that such a claim fails on causation since the operative or effective cause of DDC's misfortune was its own gross carelessness and not any unconscionable conduct of Mr Roebuck.

32. Toulson LJ dealt with unilateral mistake at paras 184 – 185:

> **184** I am conscious that there is authority that the test for unilateral mistake rectification is one of honesty, and that nothing less than knowledge in the sense of one of Peter Gibson J's first three categories in the *Baden* case [1993] 1 WLR 509 will be sufficient. The judge found that Mr Roebuck did not have such knowledge. But I am not sure that the legal principle is or should be so rigid. Professor Andrew Burrows in his chapter entitled "Construction and Rectification" in *Burrows & Peel eds, Contract Terms* (2007), ch 5 has tentatively suggested that the modern law of construction and rectification may be moving to what he terms "promisee objectivity",by which he means an approach which would include as part of the context not only the common intention of the parties but also the meaning of the contract which the promisor knows or ought to know that the promisee is adopting. This is close to the thinking of Professor McLauchlan. In *George Wimpy UK Ltd v VI Construction Ltd* [2005] BLR 135, paras 56-57 Sedley LJ suggested that a test of "honourable and reasonable conduct" would be preferable. In the present case the trial judge said that it would have been honourable for Mr Roebuck to check out the position with Mr Bruno, but that the court was not concerned with honour. Words like "honourable and reasonable" are imprecise, but I am inclined to agree with Sedley LJ's observation, at para 65, that "sharp practice has no defined boundary". It may be easier to judge than to define. These matters were not debated in the argument before us, and in view of the conclusion which I have reached on the prior issue it is unnecessary to explore them further.
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> **185** In summary, therefore, I would allow the appeal on the ground of common mistake, because the mistake of both parties (albeit for opposite reasons) about the conformity of their prior non-binding agreement with the written contract was a relevant mistake under the *Chartbrook* principle and subsisted at the time of execution of the contract. That analysis is independent of what I have referred to in para 178 as special features of the present case. I have expressed my anxieties about this aspect of the *Chartbrook* case [2009] AC 1101 for the reasons set out in paras 172-177 but have concluded that the court ought nevertheless to follow the principle. In so concluding I have said that I do not consider the result to be unjust in this particular case in view of the special features referred to in para 178. I would add that I am of the same opinion as Lord Neuberger MR in thinking that, but for Lord Hoffmann's analysis, it may well have been right to allow the appeal on the basis of unilateral mistake. That would to my mind be a more satisfactory basis. The outcome is that I would order rectification of the transfer contract. The appropriate form of wording would need to be the subject of further argument if the parties are unable to agree about it.

33. Lord Neuberger dealt with the case mainly under the principles by Lord Hoffmann in the *Chartbrook* case. He dealt with unilateral mistake at para 226:

> **226** It is therefore unnecessary to consider whether rectification should also be granted on the ground of unilateral mistake. But, at least as it appears to me at the moment, (i) there is much to be said for the view that many rectification claims which might previously have been regarded as based on unilateral mistake may now be better treated as being based on common mistake, and (ii) if we were deciding this appeal without the benefit of Lord Hoffmann's analysis, I might not have thought it right to allow the appeal on the ground of common mistake, although I may have done so on the ground of unilateral mistake

Findings of Judge Cooke

The granting of the lease.

34. On 9 July 2011 Mr Weiss met Ms Key and Mr Nicholson at unit 2, which had been advertised as to let in a local paper. Ms Key and Mr Nicholson were directors of the letting agency which was acting for the Landlord, as well as being directors of the Landlord. It was a short meeting.

35. Mr Weiss made it clear that he wanted the unit as an office for his advertising sales business, and he mentioned Palo Alto Ltd, and his business associate Mr Hedges. Ms Key made it clear that it was let as seen; it is common ground that it was not fit for office accommodation as it stood. The rent demanded was £35 per week. Mr Weiss paid to Ms Key a deposit of £35.

36. Ms Key told Mr Weiss that he could have a lease for one year with an option to renew. Ms Key's evidence, accepted by Judge Cooke, was that she explained that the Landlord's practice was to grant short leases on a simple form, but that if a term of more than three years was wanted the lease would have to be drafted by solicitors; Mr Weiss said he did not want to involve solicitors. Ms Key made Mr Weiss aware of the nature of the Landlord's business, letting small units "as seen" to start-up businesses, some of whom stay on for years "on periodics" as she put it, some of which fail at an early date.

37. Following the meeting Ms Key sent a two page draft lease to Mr Weiss. The draft lease contained an option to renew in simple form:

> The tenancy is granted for a period of one year with an option to renew at the end of the term

38. After discussing the matter with Mr Hedges Mr Weiss sent back the draft lease with the clause amended in bold and italics:

> The tenancy is granted for a period of one year with an option to renew at the end of the term/or *a further one year on the same provisos and agreements* ***as are herein contained including the option to renew such tenancy for a term of one year at the end thereof."***

39. Ms Key and Mr Nicholson both said that they understood the amendment to provide for 2 renewals rather than one. The parties subsequently met and the agreement for lease was signed.

40. At para 47 Judge Cooke directed herself that the relevant law was contained in the judgment of Buckley LJ in *Bates* and that there were accordingly 4 conditions that needed to be satisfied.

The parties' intentions

41. Judge Cooke accepted (para 33) that Mr Weiss and Mr Hedges both intended the lease to be perpetually renewable and (para 34 with detailed reasons at paras 35 – 41) that Ms Key and Mr Nicholson each intended the lease to be twice renewable. She held that they believed that that was the effect of the clause. As the lease was perpetually renewable they were mistaken.

Mr Weiss's knowledge of the mistake.

42. In para 51 Judge Cooke said she was sure that Mr Weiss knew of their mistake. Her reasoning is set out in paras 52 – 57. In summary:

1. Mr Weiss knew that the Landlord was not prepared to use this simple form for a long lease
2. He also knew the nature of the Landlord's business – letting small units to new businesses
3. His evidence about the drafting of the amendment was wholly unconvincing. It is not plausible that he and Mr Hedges produced a well-known conveyancing formula by accident and with no knowledge of the law.
4. This undermines their credibility. They knew of the mistake. They set out to create it and the Landlord fell into their trap.

Inequitable

43. Judge Cooke's views are set out in para 57:

> **57** Is it inequitable for the Tenant to resist rectification? I have no hesitation in finding that it is. It is inequitable both because of the conduct of the Tenant and because of the effect on the Landlord. As to the latter, it is well-known that a perpetually renewable lease is a disastrous encumbrance on a landlord's title unless – as is not the case here - it happens to make provision for a market rent throughout its life-span. The effect of a perpetually renewable lease here is that the Landlord has in effect parted with a freehold interest in the unit for a rent which reflects its value as a storage unit in 2011. As to the Tenant's conduct, I do not have to find that there was sharp practice but it is clear that Mr Weiss took advantage of the Landlord's representatives. He knew perfectly well what he was doing, and that the clause he was putting forward said something very different from what had been discussed and something to which the Landlord would certainly not deliberately agree.

44. Thus, she held that the necessary elements for rectification were made out and she ordered rectification. As already noted in refusing permission to appeal she expressed the view that dishonesty was not a necessary element of the cause of action.

Submissions

45. Mr Jackson submitted that Judge Cooke was correct for the reasons she gave. He pointed out that her decision was in accordance with *Bates.* He submitted that Buckley LJ's formulation of the cause of action had been referred to as authoritative by judges of the Court of Appeal on a number of occasions including by Etherton LJ in *Daventry*. In effect he submitted that dishonesty was not a necessary ingredient of the cause of action.

46. He referred me to para 16 of the Tenant's Statement of Case:

> In the further alternative to the extent that [Mr Weiss] knew and understood or suspected the potential effect of his proposed additional wording and/or intended thereby to effect a perpetual lease, the said leases stand to be rectified for unilateral mistake on the ground that:
>
> (1) [Mr Weiss] sought to deceive [the Landlord]
>
> (2) [Mr Weiss] knew of [the Landlord's] mistake but omitted to draw the mistake to [the Landlord's] notice and/or
>
> (3) In all the circumstances [Mr Weiss] behaved unconscionably.

47. He submitted that this pleading was sufficient to allege dishonesty and that Judge Cooke's findings amounted to a finding of dishonesty.

48. Mr Weiss argued the Tenant's case carefully and courteously. Although not a trained lawyer he had plainly carried out a great deal of research into the authorities.

49. He submitted in general terms that dishonesty was an ingredient of the cause of action and that Judge Cooke had not found him dishonest. He submitted that in order to succeed the Landlord had to show that he was either guilty of a fraudulent misrepresentation or the tort of deceit. He pointed out that he had made no representation at all. He had merely sent back the draft lease with the amended wording. He submitted that this was a case based on suspicion. As such it was within category (ii) of Baden where dishonesty is required. He submitted that the pleading was inadequate because it did not allege fraudulent misrepresentation or deceit. Accordingly it was not open to Judge Cooke to order rectification.

Discussion

50. I have reviewed the authorities in some detail because in my view they are not easy to reconcile. The starting point must be the judgment of Buckley LJ in *Bates* which has been described as "authoritative" and approved in a number of subsequent cases. It is to be noted that Buckley LJ does not include dishonesty as one of the requirements of the cause of action. Indeed it is plain that all three members of the court did not regard "sharp practice" as a requirement (though it would often be present). It is sufficient if it would be inequitable to refuse rectification on the ground that the mistake was not a mutual mistake.

51. The question of dishonesty has arisen in connection with the second of Buckley LJ's requirements – that is to say the Defendant's knowledge. It is plain from *The Commission* that knowledge includes imputed knowledge – that is to say categories (ii) and (iii) of Peter Gibson J's classification in *Baden.* A person who has imputed knowledge of this type was categorised by Millett J as "dishonest". This appears to lead to the unattractive conclusion that dishonesty is not required in a category (i) case but is in categories (ii) and (iii). In *Wimpey* Peter Gibson LJ saw the force of the argument but made the point that Millett J's reasoning had been approved in *The Commission* and that the trial judge's impermissible finding of dishonesty could not be divorced from his finding of knowledge in categories (ii) and (iii). This last point was the critical point upon which Blackburne J founded his judgment although he did comment that a successful claim based on unilateral mistake will usually if not always call into question the probity of the Defendant.

52. A number of points can be made about the *Daventry* case. First the case was decided on the basis of mutual mistake in the light of Lord Hoffmann's guidance in *Chartbrook.* Thus, the remarks on unilateral mistake are not essential to the actual decision. Second, Etherton LJ's remarks were contained in a post-script to a dissenting judgment. Third, Toulson LJ was not satisfied that the test was as rigid as that proposed by Etherton LJ. Fourth, Etherton LJ expressly approved the test set out by Buckley LJ in *Bates.* Fifth, Both Etherton LJ and Toulson LJ made it clear that the point had not been fully argued.

53. I have not found the question straightforward. In the end, however, I have concluded that dishonesty is not a requirement of the cause of action in a case where the knowledge of the Defendant is based on actual knowledge within category (i) of Peter Gibson J's classifications in *Baden.* I am conscious of the possible illogicality of this analysis but I do not read it as having been rejected in *Wimpey*. Furthermore, as already noted the judgments in *Bates* suggest that neither dishonesty nor sharp practice are necessary.

54. On my reading of the decision Judge Cooke has found that Mr Weiss and Mr Hedges knew of the mistake. They set out to create it and the Landlord fell into their trap. In my view this is actual knowledge in category(i). In his submissions Mr Weiss suggested that this was a category (ii) case and that based on suspicion. I do not accept that argument. Paras 51 – 56 of the decision make it clear that Judge Cooke was sure and found that Mr Weiss (and Mr Hedges) had actual knowledge of the mistake. That was a finding of fact open to her on the evidence.

55. In my view dishonesty and sharp practice are not an ingredient of this cause of action. Judge Cooke's judgment was in accordance with *Bates.* It follows that I would dismiss the appeal.

56. If, contrary to my view, dishonesty is a necessary ingredient I would have dismissed the appeal on the ground that dishonesty had been established on the facts as found by Judge Cooke.

57. In my view para 16 of the Landlord's Statement of Case is a sufficient pleading to make it clear that dishonesty was being alleged. In his oral submissions Mr Weiss submitted that the

Landlord could only succeed if he alleged fraudulent misrepresentation or the tort of deceit. I have no hesitation in rejecting that submission. The elements of the cause of action are set out by Buckley LJ in *Bates*. The question of dishonesty only comes into play (if at all) when considering whether the Defendant had knowledge of the mistake. The authorities do not justify an extension such as that proposed by Mr Weiss.

58. In para 57 of her decision Judge Cooke said it was inequitable for the Tenant to refuse rectification:

> it is clear that Mr Weiss took advantage of the Landlord's representatives. He knew perfectly well what he was doing, and that the clause he was putting forward said something very different from what had been discussed and something to which the Landlord would certainly not deliberately agree.

59. When this is taken with her findings in paras 51 to 56 I conclude that Mr Weiss's failure to explain the effect of his amendment to the Landlord amounted to dishonest conduct.

60. For all these reasons the appeal is dismissed.

His Honour John Behrens

Decision issued 31 July 2018