Hardwicke Building

SEPTEMBER 2009 ••• VOL 19 ••• PART 1

PROPERTY TEAM NEWSLETTER

Article: Construction of Agreements

Property practitioners should see the recent decision of the House of Lords in *Chartboook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 as both a clear warning of the consequences of careless drafting of documents and a reminder that, however poor an agreement the client may appear to have made, all may not be lost. Equally important is Lord Hoffmann's luminous explanation of the principles of construction, the limits of admissible evidence and his justification of the rule excluding evidence of prior negotiations as an aid to the construction of written contracts.

The dispute arose out of the provisions made in a mixed commercial and residential development contract for the price to be paid by the developer to the owner on the sale of each flat. Stripped to its essential detail the construction argument concerned the meaning of:

"23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value"("MGRUV"), where MGRUV was £53,438."

On the face of it this obliged the developer to pay 23.4% of the difference between each flat's sale price and £53,438. However, the developer maintained that what was payable, properly construed, was 23.4% of the price achieved less £53,438, a much lower figure. The developer also submitted that if this was not apparent as a matter of construction the law should be altered so that it was permissible to look at pre-contractual negotiations which made it clear that this interpretation represented the common intention of the parties. In the further alternative rectification was sought.

The judge at first instance and the majority in the Court of Appeal upheld the owner's interpretation in accordance with the natural meaning of the words and concluded that the developer was not entitled to be saved from a poor bargain or have the words re-written.

The developer's appeal succeeded. The contract and the figures were submitted to ruthless scrutiny and the unanimous view was that although the words in question prima facie supported the owner's contentions they made so little commercial sense that it was apparent that something had gone wrong with the wording. Paragraphs 16-19 of Lord Hoffmann's speech (paragraph 85 onwards of Lord Walker's speech for those of a mathematical inclination) explain why this was so but need not detain us.

A number of important points of principle emerge on each of the three main issues addressed. The first represents the ratio decidendi but while the latter are obiter the views expressed will surely be taken as authoritative.

On the construction issue, the principles which enables the court to look behind the syntax and primary meaning of words are clearly explained. One is looking for the objective meaning of the words, namely the meaning which they would bear to a reasonable person with all the background knowledge available to the parties. The court will not readily accept that the parties have made linguistic mistakes, particularly in formal documents. The mere fact that a contract may seem unduly favourable to one party is no reason to suppose that it does not mean what it says.

The question is whether "something must have gone wrong with the language". In such a case the court is not compelled to attribute to the parties an intention which a reasonable person would not have understood them to have had. Nevertheless it requires a strong case to persuade the court that something must have gone wrong with the language. The subtleties of language are such that there may be judicial disagreement about whether this test is satisfied, as clearly happened below. If the test is satisfied the extent of the verbal re-arrangement does not matter.

Careful consideration was given to the admissibility of material in aid of construction, in particular the extent to which the court is entitled to look outside the instrument in order to understand its objective meaning. Evidence of the background circumstances, the factual matrix against which the parties contracted, is relevant and admissible.

This leads to the heart of the matter as the developer sought the abrogation of the rule that excludes evidence of pre-contractual negotiations as an aid to construction. The House was very firmly of the view that the long established rule excluding such evidence was fully justified. There is only one exception – where there are communications that show the meaning of particular words or expressions used by the parties: their 'private language'.

Lord Hoffmann was also careful to explain the clear difference between the exercise of construing the language of the contract in order to ascertain the objective intentions of the parties and the quite different requirements that need to be met in a claim for rectification. In the latter case evidence of the parties' intentions are admissible in support of a claim that the reduction of those intentions into the language of the contract has been unsuccessful.

Indeed on this third issue, concerning rectification, the law has been clarified. The party seeking rectification does not bear the burden of showing what the actual subjective intention of the parties was, as had previously been thought and about which conflicts of evidence are not unknown. Rather, and in line with the objective approach to construction, it needs to be shown objectively what their common intention was. On this issue pre-contractual correspondence and negotiations are admissible and important. If this can be done with the requisite clarity and if the language of the contract does not reflect that intention then it may be rectified accordingly.

Practitioners should note that this does not mean that there is little practical difference between a construction argument and a plea for rectification. Where the facts justify it both arguments should be advanced and it is not unusual for this course to be followed. It does mean that the judge see material that is admissible on rectification but not on construction. That cannot be avoided. There is, however, a real difference between the two. There will be cases in which the dividing line may be as narrow as the admissibility of pre-contractual negotiations. There will also be cases in which a plea of rectification will make all the difference by enabling a court un-persuaded on the first point to discern the true intention as revealed by pre-contractual negotiations.

Robert Leonard

Did you see....? Recent cases you may have missed.

Arbitration
Limitation Act 1980, Adjudicator's Award amounts to fresh cause of action
Jim Ennis Construction Limited v Premier Asphalt Limited [2009] EWHC 1906 (TCC)

Although the original contractual claim was statute barred by virtue of the Limitation Act 1980, a party to an adjudication could bring a claim to recover monies paid pursuant to the adjudicator's award. There was an implied term that a new cause of action arose on the adjudicator's decision permitting the losing party to seek final determination of the dispute by way of legal proceedings.

Estate Agents
Commission for sale of leasehold, purchase of shares in company owning lease
Makram Estafnous v London & Leeds Business Centres Ltd [2009] EWHC 1308 (Ch)

The parties had agreed for commission to fall due upon the introduction of a purchaser of a lease. The prospective purchaser bought shares in one of the Defendant's companies that owned the leasehold and effectively took control of the building.

Held: The claim for unpaid commission failed as there had been no sale of the land.

Constructive Trust
Baynes Clarke v Corless [2009] EWHC 1636 (Ch)

C and D's houses had the benefit of a right of way over an estate road which was owned by T, a neighbouring house-owner. In February 2004 T sold its house to its sitting tenants and in December 2004 it sold the estate road and verge to D. C contended that D held the road and verge under a constructive trust for all of the

residents of the estate based on an oral agreement at a meeting in January 2003 that following the sale of T's house the respective parts of the estate road and verge would be transferred to the residents.

The claim failed: While the conduct of the parties could lead a court to infer an agreement giving rise to a constructive trust, such an agreement could not be imputed based solely on conduct. Further, there had to be reliance by C on the agreement or understanding. Finally, although unconscionable behaviour is necessary for relief by way of a constructive trust it is insufficient by itself.

Case summaries by Andy Creer, Laura Tweedy and Philip Fellows

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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Stephen Lennard	1976	Kerry Bretherton	1992	Alastair Redpath-Stevens	1998
Robert Leonard	1976	John de Waal	1992	Andrew Lane	1999
Wendy Parker	1978	Alexander Goold	1994	Sarah McCann	2001
Karl King	1985	Andrew Skelly	1994	Dean Underwood	2002
Michelle Stevens-Hoare	1986	Alexander Bastin	1995	Michael Wheater	2003
Steven Woolf	1989	Edward Rowntree	1996	Phillipa Harris	2005
Sara Benbow	1990	David Pliener	1996	Andy Creer	2005
Daniel Gatty	1990	Brendan Mullee	1996	Philip Fellows	2007
Rupert Higgins	1991	Nicola Muir	1998	Laura Tweedy	2007
Arthur Moore	1992	Alison Meacher	1998		