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Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 All ER 1077

COURT OF APPEAL, CIVIL DIVISION

BUCKLEY, EVELEIGH AND BRIGHTMAN LJJ

13, 14, 17, 18, 19, 20, 21 NOVEMBER 1980

Landlord and tenant - Lease - Rectification - Common intention of parties - Unilateral mistake - Lease not giving effect to parties' common intention due to landlord's mistake - Tenant aware of mistake at date of execution of lease - Mistake contrary to landlord's interest and beneficial to tenant's interest - Tenant not drawing landlord's attention to mistake - Failure by landlord to provide machinery in rent review clause for fixing rent in default of agreement between parties - Whether landlord entitled to rectification of clause - Whether standard of proof of common intention higher than balance of probability.

Estoppel - Deed - Rectifiable deed - Common intention of parties - Unilateral mistake - Lease - Mistake by lessor in drafting lease - Lessee aware of mistake - Conditions under which estoppel arising - Whether lessee estopped from resisting rectification of lease.

Landlord and tenant - Lease - Rent review clause - Rent payable on review to be rent agreed between parties or fixed by arbitration in default of agreement - Whether rent on review to be reasonable rent as between parties or market rent.

In December 1957 the tenants took an assignment of a lease of premises which had been executed in 1956. The lease contained an option giving the tenants the right on the expiration of the lease to take a further seven or fourteen years' lease 'at a rent to be agreed between the landlords and the tenants but in default of such agreement at a rent to be fixed by [an] arbitrator'. The tenants exercised the option and in 1963 were granted a new lease for seven years. The 1963 lease contained an option for the grant of a further seven-year term on terms similar to the option in the 1956 lease. On 4 May 1970 the tenants gave the landlords formal notice exercising the option. Negotiations followed between the parties and in September 1970 the tenants accepted the landlords' offer of a 1year lease at an exclusive rent of £ 2,350 per annum for the first five years and subject to review every five years thereafter. The 1970 lease was prepared by the landlords who by an oversight omitted to include provision for the fixing of rent by arbitration in default of agreement on a rent review and the rent revierw clause merely stated that the rent for the rent review periods was to be 'such rents as shall have been agreed between the lessor and the lessee'. It had not been agreed by the parties that the reference to arbitration should be omitted, and the tenants although aware of the omission at the time they executed the new lease did not bring it to the landlords' attention. When the rent came up for review at the end of the first five years the landlords realised their omission and suggested to the tenants that the rent for the next five-year period should be £ 5,000 per annum, that being in the landlords' opinion a market rent, and that if the parties failed to agree the rent should be fixed by an arbitrator. The tenants rejected both the proposed rent and the referral of the matter to arbitration. The landlords brought an action claiming (i) a declaration that the rent payable on the rent reviews was to be the market rent for the premises, and (ii) rectification of the rent review clause to provide for determination of the rent by arbitration in default of agreement. The tenants counterclaimed for a declaration that either the premises were to be held rent free for the remainder of the lease or the rent was to be £ 2,350 for the remainder. The judge granted the landlords' declaration that the rent on review was to be a market rent, ordered rectification of the rent review clause in the terms requested by them, and dismissed the tenants' counterclaim. The tenants appealed. At the hearing of the appeal

the tenants, while conceding that because of previous authority[a] they could not contend that the rent should continue to be £ 2,350 and that in default of agreement a reasonable rent was payable, nevertheless contended that the judge had been wrong to order rectification of the rent review clause. The landlords for their part conceded that if the order for rectification were to stand it was to be read as an agreement to arbitrate and not as an agreement to abide by a valuation, and on that footing the rent to be fixed by the arbitrator was to be such rent as would be reasonable for the particular parties to agree on having regard to all the considerations which would have affected their negotiations for a new rent, rather than a market rent as ordered by the judge.

[a] See *Beer v Bowden* p 1070, ante

Held - (1) Where two parties to an instrument had a common intention and it was shown (a) that the plaintiff erroneously believed that the instrument gave effect to that intention, (b) that the defendant knew that it did not because by reason of the plaintiff's mistake the instrument contained or omitted something, (c) that the defendant failed to bring the mistake to the plaintiff's notice, and (d) that the mistake would benefit the defendant or (per Eveleigh LJ) merely that it would be detrimental to the plaintiff, the court was entitled to conclude that the defendant's conduct was such that it would be inequitable to allow him to resist, or that he should be estopped from resisting, rectification of the instrument to give effect to the common intention, despite the fact that the mistake was not at the time of the execution of the instrument a common mistake but rather a unilateral mistake. It was not necessary for the plaintiff to show that the defendant was guilty of sharp practice (see p 1085 *f g*, p 1086 *a* to *d*, p 1090 *a* to *c f g* and p 1091 *a b*, post); *A Roberts & Co Ltd v Leicestershire County Council* [1961] 2 All ER 545 and dictum of Russell LJ in *Riverlate Properties Ltd v Paul* [1974] 2 All ER at 660 applied.

(2) The parties had a common intention to include in the rent review clause in the 1970 lease provision for arbitration in default of agreement similar to that in the 1963 lease, especially (per Buckley LJ) since under the option in the 1963 lease the tenants had a contractual right to have the rent in the sixth and seventh years of the 1970 lease determined by arbitration in default of agreement. The omission of provision for arbitration in the rent review clause occurred as the result of the landlords' mistake and was contrary to their interests. Furthermore, although the tenants had realised the landlord's mistake they had not drawn it to the landlord's attention. The landlords were accordingly entitled to rectification of the rent review clause in the 1970 lease by the insertion therein of provision for reference to arbitration in default of agreement on the rent payable on the rent reviews (see p 1084 *d* to *g*, p 1086 *f* and *j* to p 1087 *b*, p 1089 *c d* and *j* to p 1090 *a c d f g* and p 1091 *b*, post).

(3) Since the rent review clause referred to such rent 'as shall have been agreed' between the parties, and not to the rent 'agreed for the demised premises', the rent to be agreed under the clause or to be fixed by the arbitrator in default of agreement was to be the rent which it would be reasonable for the particular parties to agree having regard to all the circumstances (such as tenant's expenditure on improvements) which were relevant to their negotiations for a new rent, and was not to be a rent assessed objectively on the basis of the market rent at which the premises might reasonably be expected to be let. It followed that the judge's declaration that the rent was to be the market rent, was incorrect (see p 1087 *f* to *h*, p 1088 *e* to *j*, p 1089 *c d* and p 1090 *c d* and *f g*, post); *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837 distinguished.

Per Buckley and Brightman LJJ. The standard of proof required to establish the common intention of the parties in a rectification action is the ordinary civil standard of the balance of probability although (per Buckley LJ) a high standard of such proof might be required in the circumstances and (per Brightman LJ) as the alleged common

intention necessarily contradicts the written instrument, strong evidence will be required to counteract the evidence of the instrument (see p 1085 *b* to *d* and p 1090 *g* to *j*, post).

Notes

For the considerations affecting rectification, see 26 *Halsbury's Laws* (3rd Edn) 914-917, paras 698-1704, and for cases on unilateral mistake, see 35 *Digest* (Repl) 138, *309-316*.

For rent review clauses, see 23 *Halsbury's Laws* (3rd Edn) 539, para 1197.

Cases referred to in judgments

Beer v Bowden p 1070, ante, CA.

Hornal v Neuberger Products Ltd [1956] 3 All ER 970, [1957] 1 QB 247, [1956] 3 WLR 1034, CA, 35 *Digest* (Repl) 39, *332*.

Ponsford v HMS Aerosols Ltd [1978] 2 All ER 837, [1979] AC 63, [1978] 3 WLR 241, 38 P & CR 270, [1979] RVR 19, HL, *Digest* (Cont Vol E) 364, *3952f*.

Riverlate Properties Ltd v Paul [1974] 2 All ER 656, [1975] Ch 133, [1974] 3 WLR 564, 28 P & CR 220, CA, *Digest* (Cont Vol D) 688, *273a*.

Roberts (A) & Co Ltd v Leicestershire County Council [1961] 2 All ER 545, [1961] Ch 555, [1961] 2 WLR 1000, 59 LGR 349, 35 *Digest* (Repl) 138, *316*.

Sykes (F & G) (Wessex) Ltd v Fine Fare Ltd [1967] 1 Lloyd's Rep 53, CA.

Cases also cited

Bottomley v Ambler (1877) 38 LT 545, CA.

British Bank for Foreign Trade v Novimex [1949] 1 All ER 155, [1949] 1 KB 623, CA.

Brown v Gould [1971] 2 All ER 1505, [1972] Ch 53.

Churchward v Ford (1857) 2 H & N 446, 157 ER 184.

Clerk v Palady (1598) Cro Eliz 859, 78 ER 1085.

Collins v Collins (1858) 26 Beav 306, 53 ER 916.

Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd [1975] 1 All ER 716, [1975] 1 WLR 297, CA.

Dempster (R & J) v Motherwell Bridge & Engineering Co 1964 SLT 353.

Dungey v Angore (1794) 2 Ves 304, 30 ER 644, LC.

Foley v Classique Coaches Ltd [1934] 2 KB 1, [1934] All ER Rep 88, CA.

Hillas & Co Ltd v Arcos Ltd [1932] 147 LT 503, [1932] All ER Rep 494, HL.

Joscelyne v Nissen [1970] 1 All ER 1213, [1970] 2 QB 86, CA.

Kenilworth Industrial Sites v E C Little & Co [1975] 1 All ER 53, [1975] 1 WLR 143, CA.

King's Motors (Oxford) v Lax [1969] 3 All ER 665, [1970] 1 WLR 426.

Liverpool City Council v Irwin [1976] 2 All ER 39, [1977] AC 239, HL.

May & Butcher Ltd v R (1929) [1934] 2 KB 17n, [1929] All ER Rep 679, HL.

Moorcock, The (1889) 14 PD 64, [1886-90] All ER Rep 530, CA.

Prenn v Simmonds [1971] 3 All ER 237, [1971] 1 WLR 1381, HL.

Reade v Johnson (1591) Cro Eliz 242, 78 ER 498.

Trollope & Colls v North West Metropolitan Regional Hospital Board [1973] 2 All ER 260, [1973] 1 WLR 601, HL.

United Scientific Holdings v Burnley Borough Council [1977] 2 All ER 62, [1978] AC 904, HL.

Appeal

The plaintiffs, Thomas Bates and Son Ltd ('the landlords'), brought an action against the defendants, Wyndham's (Lingerie) Ltd ('the tenants'), seeking (1) a declaration that on the true construction of a lease dated 17 December 1970 made between the landlords and the tenants in relation to factory premises at Church Road, Harold Wood, Havering, the rents during the rent review periods provided for in the lease should be the market rents for the premises, (2) rectification of the lease to provide for determination of the

rents by a single arbitrator in default of agreement between the parties, (3) alternatively, a declaration that the lease was void and/or rescission of the lease, (4) in the further alternative, a declaration that the tenants were liable to pay a proper sum for use and occupation of the premises from 15 November 1975, and (5) an inquiry into the market rent during the first rent review period or, alternatively, an inquiry into what was the proper sum for the use and occupation of the premises from 15 November 1975. The tenants counterclaimed for a declaration that from 15 November 1975 the demised premises were held by them for the residue of the unexpired term of the lease rent free; alternatively, the rent reserved by the lease from 15 November 1970 to the expiry of the lease was £ 2,350 per annum. By a judgment given on 6 June 1979 Michael Wheeler QC sitting as a deputy judge of the High Court declared that on the true construction of the lease the rents during the rent review periods in the lease should be the market rent for the premises, and ordered rectification of the lease to provide that in default of agreement between the parties as to the rents payable they were to be determined by a single arbitrator to be appointed by the president of the Royal Institution of Chartered Surveyors. The deputy judge dismissed the counterclaim. The tenants appealed seeking an order that the rents reserved by the lease for the period 15 November 1980 to the expiry of the lease was £ 2,350 per annum; alternatively that no rent was reserved during that period. The facts are set out in the judgment of Buckley LJ.

Edward Nugee QC and Joseph Harper for the tenants.

Robert Wakefield for the landlords.

21 November 1980. The following judgments were delivered.

BUCKLEY LJ.

This is an appeal from a decision of Michael Wheeler QC, sitting as a deputy judge in the Chancery Division on 6 June 1979.

The issues in the case relate to a rent review clause contained in a lease dated 17 December 1970 and made between the plaintiffs as lessors and the defendants as lesses. The subject matter was some factory premises at Hornchurch in Essex. In order to understand the issues it is necessary to go back in history a little while.

In the year 1956, by a lease dated 20 August 1956, the plaintiffs (whom I shall call 'the landlords') let to predecessors of the defendants (and I will call the defendants 'the tenants') the factory premises in question for a term of seven years from 1 September 1956 at a yearly rent of £ 650. That lease contained, in cl 5, an option provision in the following terms:

> 'That the lessor will on the written request of the lessee made six months before the end of the term hereby created and if at the time of such request there shall not be any existing breach or non-observance of any of the covenants on the part of the lessee hereinbefore contained at the expense of the lessee grant to the lessee a lease of the demised premises for a further term of seven or fourteen years from the expiration of the said term at a rent to be agreed between the lessor and the lessee but in default of such agreement at a rent to be fixed by a single arbitrator appointed by the President for the time being of the Royal Institution of Chartered Surveyors and containing the like covenants and provisos as are herein contained.'

The term under that lease was in due course assigned to the tenants, and when the time for the exercise of the option drew near Mr Bates, the managing director of the landlords, wrote a letter to the tenants, for the attention of a Mr Avon, who was the director of the tenants who at all times has handled matters relating to this leasehold property on behalf of the tenants, a letter drawing attention to the fact that the time had come to consider a renewal of the lease, and Mr Bates said in that letter that the landlords would require an addition of £ 125 per annum, bringing the rent up to £ 775 per annum for the seven years from the expiration of the then current lease.

Stimulated by that communication, Mr Avon, on behalf of the tenants, gave a formal notice exercising the option on 19 February 1963, requesting the landlords to grant to the tenants a renewed lease of the premises for the further term of 14 years from the expiration of the current term, 'at a rent to be agreed between us [quoting from the notice] but in default of such an agreement, at a rent to be fixed by a single arbitrator appointed by the President of the Royal Institution'.

In response to that Mr Bates wrote in reply saying that in fact the landlords would require rather more rent than he had stated in his earlier letter: £ 850 a year. In consequence of which there were some oral communications, and on 11 March 1963 Mr Bates wrote to Mr Avon confirming offers which he had made orally for a further seven year term at £ 800 a year, and proposing that the landlords should construct certain additional buildings on the property, in consideration of which there would be a further rent of another £ 800 a year during the ensuing seven year period.

Those terms were accepted by the tenants, and on 29 November 1963 the parties entered into a new lease for a term of seven years from 15 November 1963 at a yearly rental of £ 1,600; and that lease contained an option clause in precisely the same terms as the option clause in the 1956 lease, save that it only granted an option for a further seven years and not for seven or 14 years as had been the case in the 1956 lease.

Time went by and the year 1970 arrived when the time was approaching for the exercise of the option in the 1963 lease, and we find that on the 14 April 1970 the landlords wrote a letter to the tenants drawing their attention to this fact, in

consequence of which Mr Avon, on 4 May, signed and sent to the landlords a formal notice exercising the option contained in the 1963 lease, and by that notice he requested the landlords to grant a renewed lease of the premises for a further term of seven years from the expiration of the then current term 'at a rent to be agreed between us, but in default of such agreement at a rent to be fixed by a single arbitrator appointed by the President for the time being of the Royal Institution', and so on. The language of that notice followed the language of the option clause contained in the 1963 lease.

As has been pointed out in argument, the effect of that notice was to change the legal relationship between the parties and to bring into existence a contract for the grant of a further term of seven years at a rent to be agreed or, in default of agreement, to be fixed by an arbitrator.

The landlords wrote back to the tenants on 7 May indicating that the rent they would require would be £ 2,600 per annum for the first three years of the new term of seven years, the rental thereafter to be reviewed and agreed for the remainder of the term. Those words are taken from the letter of 7 May 1970. So being then under a contractual obligation to grant a new lease for seven yeas at a rent to be agreed or in default of agreement to be fixed by an arbitrator, they proposed agreeing the rent for part of that term only, leaving the remainder of the term the subject of a further review and agreement at a later date.

On 3 August (that is to say, rather later than the letter I have just referred to of 7 May), there having been some oral communications in the meantime and Mr Avon having paid a visit to the landlords' offices to discuss the matter, the landlords wrote saying that they were prepared to grant a lease for a further period of 14 years from the expiration of the then current term, with a clause for rent reviews at the end of the fifth and tenth years of the term, the rental for the first period of five years to be £ 2,350 per annum exclusive of rates.

To that letter Mr Avon replied on 17 August 1970 that the tenants were reluctantly prepared to accept the figure of £ 2,350, but he said that they were not in agreement with rent reviews after five and ten years but were willing to accept a clause for a rent review at the end of the seventh year. That was, in effect, a counter-offer to the offer which had been put forward in the letter of 3 August 1970.

The landlords replied on 18 August insisting on rent reviews after five and ten year intervals, and on 20 August, following some telephonic communication, they again wrote insisting on the rent reviews, and that letter has a postscript: 'Whilst your present

lease provides for a further seven years' renewal, the question of the rent review period is something quite separate and distinct.'

It seems to me that the landlords there are saying: we recognise your right under the exercise of the option; you are entitled to a term of seven years at a rent to be agreed or in default of agreement to be fixed by an arbitrator, but we are not at the moment prepared to agree any rent beyond the first five years.

On 22 September the tenants' solicitors, Messrs Nabarro Nathanson, wrote indicating that the tenants, subject to formal exchange of the lease, accepted the offer of a new lease for a term of 14 years from 15 November 1970, at the exclusive rent of £ 2,350 per annum, subject to review at the expiration of the fifth and tenth years of the new term.

It seems to me that it is implicit in that that the rent, at any rate in respect of the two years next following the initial five years of the term under the new lease, would be fixed by agreement or, in default of agreement, by an arbitrator appointed under the provisions to that effect in the option clause.

The lease and counterpart were then executed and exchanged. The lease had not been prepared by the landlords' legal advisers; it was prepared under the instructions of Mr Bates and was typed by Mr Bates's secretary, Miss Cannon. The lease so prepared and executed demised the property to the tenants for a term of 14 years from 15 November 1970, and now I quote from the document itself:

> 'Yielding And Paying therefor during the first Five Years of the said term unto the Lessor the yearly rent of Two Thousand Three Hundred and Fifty pounds and for the next period of five years of the said term and the final period of four years of the said term such rents as shall have been agreed between the Lessor and the Lessee such rents to be paid clear of all deductions by equal monthly payments on the First day of each month in advance.'

and then there is a provision that the tenants should also pay the costs of insurance but we are not concerned with that.

The lease contains an option clause in, I think, the same terms as the option clause which was contained in the 1963 lease except that any further lease to be granted under the option in the 1970 lease was not to be required to contain an option clause. It will be observed that in the reddendum there is no reference to arbitration in default of agreement.

At a later stage when the time for fixing the rent from the end of the first five years of the term onwards became imminent, the landlords became aware of this and wrote a letter, signed by Mr Foley who was the property manager for the landlords, to the tenants as follows:

> 'As you will be aware under the terms of your lease the rent of this property is due to be reviewed, effective from 15th November, 1975, and this letter is intended to be a formal notice advising you of our intention to review the rent. The lease has no specific note how the rent may be settled should your company and ourselves fail to agree upon a figure and I suggest that the matter be settled by an independent arbitrator. I therefore enclose an agreement in duplicate and shall be obliged if you will sign the top copy and return it to me.'

As a result of that, and a hastener written on 2 May 1975, a telephone conversation took place on 6 May 1975, in the course of which Mr Avon said he was not prepared to sign any such agreement. Mr Foley then got into contact with the landlords' own solicitors, who advised him that because the rent review clause did not contain some means of definitely settling the new rent eg by arbitration following appointment by the president of the Royal Institution of Chartered Surveyors, should the parties to the lease not agree, the review clause would be unenforceable at law and the rent could remain the same until the lease expired.

Nothing further seems to have taken place immediately with regard to that, but there

was later a telephone conversation between Mr Avon and Mr Foley, to which I shall have to refer again later, in which Mr Avon said (or is said by Mr Foley to have said) that he had been aware of the implications of the clause from the day the lease was signed; that he might be prepared to pay a slightly higher rent, but not nearly so high a rent as the landlords were in fact then proposing.

It seems to me clear that the omission of any reference to arbitration in default of agreement in the reddendum of the lease of 1970 must have been due to a mistake on the part of Mr Bates, under whose instructions, as I have said, that lease was prepared. The omission was one which was clearly contrary to the landlords' interests. The only possible legal consequences which have been suggested in the course of argument are, first, that no rents having been agreed in respect of any period after the first five years of the 1year term, no rent would be payable after the end of that five year period. Counsel for the tenants, although he did not in the course of his argument altogether abandon the idea that that might be the legal consequence of the omission, frankly and very properly admitted that it could not have been in the

contemplation of the parties that there would be any period during the term of this lease when no rent would be payable at all, and it is inconceivable that that could have been the parties' real intention.

Secondly, it has been suggested that as no rent other than the rent of £ 2,350 per annum would have been agreed, that rent should continue in force until some other rent should be agreed by the parties. It seems to me that such a proposition is absolutely contrary to the clear intention of the rent review provision. The rent review provision was clearly a provision insisted on by the landlords because they wanted the matter reviewed at the end of five years and wanted a new rent to be then arrived at. If merely by withholding consent or agreement to a new rent the tenants could stultify the revision clause and ensure that the original rent of £ 2,350 should continue to be payable, the whole purpose of the rent revision clause would be destroyed or frustrated. I cannot believe that it could have been Mr Bates's intention that the lease in the form in which he framed it should have had that effect.

Thirdly, it has been suggested that in respect of the period after the first five years, and in default of agreement between the parties, the rent would have to be fixed by a process of litigation involving the implication of the parties' intentions, and it has been suggested that by implication the rent ought either to be the market rent, that is to say the rent for which this property would be let in the open market, or such rent as this particular landlord and this particular tenant would agree having regard to all the matters which would affect them in arriving mutually at a rent which the one was content to accept and the other was content to pay, which would very possibly be markedly different from a market rent, and it seems to me inconceivable that the landlords would have been content to rely on fixing a rent by a process of implication in that way without it being at all clear in what way the court would view the matter and how the rent to be so ascertained should be assessed.

The only other possible legal consequence of the omission that has been suggested at all, either in the course of argument or in the course of the evidence given before the trial judge, was that the clause was entirely inoperative because of the omission and because either it amounted to no more than an agreement to agree, or it amounted to a provision which contained such defective machinery that it could not be carried into practical effect. It will be seen that advice on those lines was what was received by Mr Foley. It seems also to have been the advice received by Mr Avon.

Mr Foley gave evidence before the deputy judge, but Mr Avon did not. The deputy judge was somewhat critical of Mr Avon for not giving evidence. That was, no doubt, a matter which rested not so much in Mr Avon's discretion as in the discretion of those who were conducting the case on the part of the tenants. The judge, in the course of his judgment, made the following finding:

> 'In evidence before me Mr Foley amplified this note [he is referring to a note written on the letter of 23rd September to which I have already referred]. I think

> it probable that in his oral evidence Mr Foley may to some extent have telescoped two telephone conversations with Mr Avon into one. His evidence, which was given with care and which I accept without hesitation, was to the following effect. He said that he quoted a new rent to Mr Avon of, he thought, about £ 5,000 per annum; that Mr Avon seemed amused and, when asked what he thought, said he might pay £ 100 or £ 200 more. Mr Foley said he realised that Mr Avon's figure bore no relation to the market value but he felt that he (Foley) was in a slightly ticklish position and said he would refer the position to Bates's solicitors; that Mr Avon then said that he (Foley) must be aware as he (Avon) was that the rent revision clause as drawn was inoperative and that he (Avon) had been aware of this at the time the lease was entered into because it had been brought to his notice by Wyndham's solicitors.'

The deputy judge, in the course of his judgment, spoke critically of Mr Avon in that respect and said that, in his judgment, Mr Avon's conduct amounted to sharp practice. As the judge had not heard any evidence from Mr Avon we cannot tell in what circumstances Mr Avon acted as he did, or under what advice he acted as he did. It is clear that he was at that time in contact with and receiving advice from the tenants' solicitors, and for my part I do not feel it necessary to

associate myself with that stricture on the part of the judge on Mr Avon's conduct. Nevertheless the fact emerges that when the tenants executed the 1970 lease they did so realising the omission of any reference to arbitration in default of agreement in the review clause and without drawing the attention of the landlords to that omission in any way.

The only reasonable conclusion, it appears to me, that can be drawn from the documents is that the lease was executed, in the form in which it was with regard to the terms of the review clause, as a consequence of a mistake on Mr Bates's part, for at the time when the lease was prepared and put forward the tenants had a contractual right to have the rent, at any rate in respect of the sixth and seventh years of the term, agreed or, in default of agreement, determined by an arbitrator appointed by the president of the Royal Institution of Chartered Surveyors. No doubt the grant of the lease displaced the contract which had arisen as a result of the exercise of the option, but the terms of that contract relating to fixing the rent in respect of the first seven years of the term which was granted by the 1970 lease remained in force up to the execution of the lease and that, in my judgment, affords a strong indication that until, at any rate, Mr Avon realised the omission of any reference to arbitration, it was the mutual intention of both parties that the rent to be paid under the lease after the first five years should be a rent which was agreed between the parties or, in default of agreement, ascertained by arbitration.

Mr Bates did not give evidence because unhappily he had died in January 1973. That was a date a considerable number of months after the issue of the writ but before the trial. No written statement of Mr Bates made during his lifetime was adduced in evidence under the Civil Evidence Act 1968. We are told by counsel, but we have got no other evidence of the fact, that Mr Bates did not make any written statement. So there was no evidence of any kind emanating from him.

But there was the evidence of Miss Cannon. Miss Cannon's evidence, in my view, in no way negatives the possibility or probability that the omission of a reference to arbitration was due to a mistake on Mr Bates's part. Her evidence, taking it quite shortly and generally, is to the effect that she typed the lease; that she did it in accordance with instructions which she received from Mr Bates; but there is nothing in her evidence which establishes one way or the other whether Mr Bates, in giving his instructions, was himself labouring under a mistake. If, as Mr Avon thought was the position, the clause in the way in which it was drawn was an inoperative clause, it seems to me to be absolutely manifest that it must have been so framed as the result of a mistake, for one cannot believe that any landlord would put into a lease a clause which he intended to be inoperative.

Counsel for the tenants has said that there is no evidence as to what Mr Bates's intention was, and he stressed that in cases of rectification a high standard of proof is required by the court. Indeed, in some cases the standard has been equated with the criminal standard of proof, 'beyond all reasonable doubt'. I think that the use of a variety of formulations used to express the degree of certainty with which a particular fact must be established in civil proceedings is not very helpful and may, indeed, be confusing. The requisite degree of cogency of proof will vary with the nature of the facts to be established and the circumstances of the case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the circumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others.

In *Hornal v Neuberger Products Ltd* [1956] 3 All ER 970 at 973, [1957] 1 QB 247 at 258 Denning LJ said:

> 'The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law.'

That, in my judgment, encapsulates the law about the standard of proof required in civil proceedings applicable to all civil proceedings, and is as applicable to cases of rectification as to any other kind of civil action.

The landlords claim rectification in the present case on the basis of a principle enunciated by Pennicuick J in *A Roberts & Co, Ltd v Leicestershire County Council* [1961] 2 All ER 545 at 551-552, [1961] Ch 555 at 570:

> 'The second ground rests on the principle that a party is entitled to rectification of a contract on proof that he believed a particular term to be included in the contract and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included ... The principle is stated in SNELL'S PRINCIPLES OF EQUITY (25th Edn, 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".'

Of course if a document is executed in circumstances in which one party realises that in some respect it does not accurately reflect what down to that moment had been the common intention of the parties, it cannot be said that the document is executed under a common mistake, because the party who has realised the mistake is no longer labouring under the mistake. There may be cases in which the principle enunciated by Pennicuick J applies although there is no prior common intention, but we are not, I think, concerned with such a case here, for it seems to me, on the facts that I have travelled through, that it is established that the parties had a common intention down to the time when Mr Avon realised the mistake in the terms of the lease, a common intention that the rent in respect of any period after the first five yars should be agreed or, in default of agreement, fixed by an arbitrator.

The principle so enunciated by Pennicuick J was referred to with approval in this court in *Riverlate Properties Ltd v Paul* [1974] 2 All ER 656 at 660, [1975] Ch 133 at 140, where Russell LJ, reading the judgment of the court, said:

> 'It may be that the original conception of reformation of an instrument by rectification was based solely on common mistake: but certainly in these days rectification may be based on such knowledge on the part of the defendant: see for example *A Roberts & Co Ltd v Leicestershire County Council*. 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 on the evidence. Basically it appears to us that it must be such as to involve the lessee in a degree of sharp practice.'

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 on 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 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; second, 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; third, 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 common mistake.

Counsel for the tenants has drawn attention to a number of other departures in the language of the 1970 lease from the language of the corresponding clauses of the 1963 lease, and he says that this lease was not, or should not be regarded as having been, granted in pursuance of the exercise of the option, but as a newly negotiated lease, the negotiations no

doubt being prompted by the exercise of the option, but the new lease not flowing from the exercise of the option. I, with respect to counsel's argument, do not find very much force in that contention. The parties were of course at liberty to modify the terms of their lease in any way they mutually agreed and none of these variations to which I am now referring has any bearing on the review clause or the language employed in it. It seems to me, as I have already said, that the omission from the review clause of any reference to arbitration was one which was clearly contrary to the landlords' interests, one which must have occurred as a result of a mistake on the part of Mr Bates.

The judge disposed of the matter on this aspect in three numbered paragraphs:

> '(i) That I cannot regard Miss Cannon's evidence as proving that Mr Bates was not making a mistake in omitting a longstop provision for arbitration of some sort; (ii) that although Miss Cannon said that she thought there had been other Bates leases which contained the same type of rent review provision as the 1970 lease, none was produced, and I cannot accept that any reasonable businessman would deliberately have adopted such a potentially defective provision; and (iii) that the provision for an option to renew the 1970 lease in cl 5 (which was in similar terms to the options in Wyndham's earlier leases) showed perfectly clearly that the parties recognised the necessity for a longstop for rent fixing purposes and that it is reasonable to suppose that it was a provision in these terms which Bates mistakenly omitted and which Wyndham's (through Mr Avon) deliberately allowed to go uncorrected.'

I have already dealt with Miss Cannon's evidence. With regard to the judge's paragraph (ii), I agree that it is highly improbable that Mr Bates would have purposely adopted a form of clause which was so disadvantageous as the review clause is with the omission of any reference to arbitration.

With regard to paragraph (iii), I would myself prefer to relate this point, not to cl 5 of the 1970 lease, but to the exercise of the option under the 1963 lease and the contract which arose from its exercise. The point is, I think, precisely the same point. It is that the parties must have had present to their minds the desirability, and indeed the

obligation of the landlords in relation at any rate to the first seven years of the new term, to arrive at a rent which was not necessarily a rent which had to be at the same rate throughout the term, but they had to arrive at a rent which was agreed between them or, in default of agreement, was one determined by arbitration.

There was no precedent for a review clause contained in the 1963 lease, for the 1963 lease did not provide for any rent review; and it is not difficult to believe that a layman like Mr Bates, in preparing the 1970 lease, failed to detect the shortcoming of the review clause as he had framed it, and failed to apply his mind to the difficulties which would arise if no provision was made for reference to arbitration.

On these findings to which I have just referred, the judge rectified the lease. The form of the order provides as follows:

> 'THIS COURT DOTH DECLARE that upon the true construction of the Lease dated 17th December 1970 and made between the Plaintiffs and the Defendants comprising factory premises at Church Road, Harold Wood in the London Borough of Havering the rents during the period of five years from the 15th November 1975 and the period of four years from the 15th November 1980 should be the market rent for the said premises. AND THIS COURT DOTH ORDER that the said Lease be rectified so that in the reddendum thereof after the words "such rents as shall have been agreed between the Lessor and the Lessee" there be inserted the words "or shall in default of such agreement be determined by a single arbitrator to be appointed by the President for the time being of the Royal Institution of Chartered Surveyors".'

So far as rectification is concerned, the language which the judge has adopted follows the language used in the option clauses in this case, except that he used the word 'determined' instead of 'fixed', and perhaps it would have been better if the word had been 'fixed'.

If the lease is so rectified the question arises: by what measure is an arbitrator to fix the rent if the parties do not agree? Counsel for the landlords initially contended that the arbitrator so-called would act not as an arbitrator but as a valuer. He based that argument on the use of the words 'shall have agreed' and the word 'fixed' in the review clause. On that basis he submitted that the rent should be the market rent for the property, on the authority of a decision of the House of Lords in *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837, [1979] AC 63. Subsequently he conceded that the clause must be read as an agreement to arbitrate and not as an agreement to abide by a valuation. On that footing he agreed that, on the true construction of the clause, the rent should be such as it would have been reasonable for this landlord and this tenant to have agreed under the lease. It would consequently be proper for the arbitrator to take into account all considerations which would affect the mind of either party in connection with the negotiation of such a rent, as, for example, past expenditure by the tenant on improvements.

In my judgment, counsel for the landlords was right to make that concession and to have accepted that the present case falls within the reasoning of the minority of the House of Lords in *Ponsford v HMS Aerosols* and not within the reasoning of the majority in that case. The review clause which was there under consideration was a review clause in a lease which provided for a yearly rent of £ 9,000--

> 'during the first seven years of the said term and during the second and third seven years of the term ... the sum of NINE THOUSAND POUNDS aforesaid or such sum, whichever be the higher, as shall be assessed as a reasonable rent for the demised premises for the appropriate period such assessment to be made in the following manner that is to say: (a) Such assessment as shall be agreed between the parties hereto in writing [and there were certain provisions as to the date by which that agreement should be reached] (b) In the event of the parties hereto failing to reach such agreement as aforesaid on or before the dates appointed ... then the reasonable rent for the second and third periods shall be fixed or assessed by an independent surveyor ... '

That form of clause, as it seems to me, focuses attention on what is there described as 'a reasonable rent for the demised premises' for the appropriate period, and that expression is first used without any reference to agreement between the parties to the lease at all. It then goes on to provide that such assessment (that is to say, the fixing of the amount of the rent so to be charged) shall be either agreed or, in default of agreement, arrived at by valuation by an independent surveyor. That form of wording, in my judgment, certainly affected the views of the majority of the House of Lords in that case. Lord Dilhorne said ([1978] 2 All ER 837 at 842, [1979] AC 63 at 77):

> 'The rent payable by the tenants will of course be rent for the demised premises, but as I see it the task of the surveyor is not to assess what would be a reasonable rent for the tenants to pay but what is a reasonable rent for the premises.'

Lord Fraser said ([1978] 2 All ER 837 at 847, [1979] AC 63 at 83):

> 'In my opinion the words point unambiguously to the result contended for by the landlords, and they mean the reasonable rent assessed on an objective basis, without reference to the particular landlord or the particular tenant or to the history of how the premises came to be built or paid for.'

Lord Keith said ([1978] 2 All ER 837 at 850, [1974] AC 63 at 86):

> 'In my opinion the words "a reasonable rent for the demised premises" simply mean "the rent at which the demised premises might reasonably be expected to let".'

Lord Wilberforce and Lord Salmon took a contrary view. They thought that what had to be ascertained was what would be reasonable between the particular parties to the transaction. However, they were in the minority on the construction of that particular rent review clause. But it appears to me that the terms of the clause there under consideration were noticeably different in important respects from the clause which we have, which refers to nothing other than such rent as the parties shall have agreed. Consequently I think that counsel for the landlord was well advised in making the concession which he made.

Counsel for the tenants, on the other hand, who had argued in the earlier stages of the appeal that in default of agreement the rent should continue after the review date at the original rate of £ 2,350 per annum, conceded that in the light of a decision of this court in *Beer v Bowden* p 1070, ante, he could no longer support that argument. That again was a concession which I think he was constrained to make. The decision in *Beer v Bowden* was only brought to the attention of counsel and, through counsel, to the attention of the court late in the course of the argument.

So the parties are now at one that, on the true construction of the clause as rectified, the rent is to be fixed by the arbitrator at such amount as it would be reasonable for the parties to agree having regard to all such considerations as I have mentioned. This is not the construction adopted by the judge, who, as appears from the terms of his order, implied a term that the rent to be agreed should be the market rent. His attention had not, of course, been drawn to the decision of this court in *Beer v Bowden*. As I understand the position, neither party now contends that the judge's view in that respect is right, and I myself am satisfied that the market rent would not provide a proper standard to adopt in the present case. In my judgment, in default of agreement between the parties, the arbitrator would have to assess what rent it would have been reasonable for these landlords and these tenants to have agreed under this lease having regard to all the circumstances relevant to any negotiations between them of a new rent from the review date.

If I were wrong on the point of rectification, then, on construction and by a process of implication, the rent to be ascertained in default of agreement must, I think, be a fair rent as between the landlords and the tenants. It would be most unjust that the landlords

should receive no rent because of failure of the parties to agree. The landlords have granted a 1year term and the court must endeavour to fill any gap in the terms of the lease by means of a fair and reasonable implication as to what the parties must have intended their bargain to be. See in this connection the decision of this court in *F & G Sykes (Wessex) Ltd v Fine Fare Ltd* [1967] 1 Lloyd's Rep 53, which was a case very different on its facts from the present, but in which the court explained the function of any court of construction where parties have embarked on any commercial relationship but under terms that are not altogether adequate to cover the eventualities. The court would ascertain by inquiry what rent the landlord and the tenant, as willing negotiators anxious to reach agreement, would arrive at for each of the two rent review periods. In short, the standard would be the same, as I see it, as would have to be adopted by an arbitrator under the clause if it is rectified in the way in which I consider that it should be rectified.

For these reasons I think that the judge, while he came to the wrong conclusion on the matter of market rent, reached the right conclusion on the matter relating to rectification. I would accordingly uphold that part of his order which directed rectification, though I would substitute the word 'fixed' for 'determined', purely as a matter of pedantry, I think. It is for consideration whether, in those circumstances, any declaration is really required to be included in the order at all. That is a matter on which, perhaps, we can hear submissions at a later stage. I would dispose of the matter in that way.

EVELEIGH LJ.

The correspondence, beginning with 4 May 1970, contained references to rent reviews. The first reference specifically was:

> 'at a rent to be agreed between us, but in default of such agreement, at a rent to be fixed by a single arbitrator appointed by the President for the time being of the Royal Institution of Chartered Surveyors ... '

The letter of 7 May from the tenants' solicitors accepting the proposed lease for 14 years said merely:

> 'at the exclusive rent of £ 2,350 per annum, subject to review at the expiration of five and ten years of the new term.'

Quite clearly that letter was written on the basis that the nature of the review was understood. It is inconceivable that a solicitor would confirm an agreement and ask for a draft lease which would, of course, reflect that agreement, as they in fact did, if such an important matter had not been resolved. The word 'review' was clearly shorthand. I take the letter of 7 May from the landlords to the tenants in the same way. The phrase there used is 'thereafter to be reviewed and agreed for the remainder of the term'. If anyone had asked the parties at that time how the review would take place, I am quite convinced that the answer would have been that the machinery contemplated had already been put forward by Mr Avon of Wyndhams in his letter of 4 May, to which the letter of the 7 May was a reply.

I see nothing in the words of the other letters written in the course of negotiations between the parties to indicate that the review machinery first referred to was being abandoned in favour of something else. I find it particularly difficult to conclude, as the tenants contend, that it was being replaced by a vague gentleman's agreement. The fact that the parties ultimately agreed on a lease of different duration from that originally agreed, and containing other terms not in the lease of 1963, in no way alters my conclusion. Certain important changes were specifically discussed. The machinery for rent review as opposed to the length of the period was treated without further discussion. The only reasonable conclusion, in my opinion, must be that the parties were negotiating on the basis that rent review in default of agreement was to be as indicated in the letter of 4 May. I therefore think that there was a common intention that the rent should be fixed by a single arbitrator in default of agreement.

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.

I agree that the lease should be rectified in the way indicated by Buckley LJ and I agree with the order which he proposes. I should just add that I, too, regard this case as different from *Ponsford v HMS Aerosols Ltd* [1978] 2 All ER 837, [1979] AC 63. There the reference was specifically to the demised premises and that is an important difference. Lord Keith said ([1978] 2 All ER 837 at 849, [1979] AC 63 at 85):

> 'At first impression the words "reasonable rent for the demised premises" suggest that what has to be ascertained is simply the rent which is reasonable for the premises as such in their actual state, the situation being viewed entirely objectively. "The demised premises" must mean the demised premises as improved, by virtue of both of the ordinary law and the passage I have quoted from the licence agreement. So on this view any contribution the improvements might have made to the rental value would have to enter into the assessment.'

And he also clearly attached importance to the words 'demised premises' in the passage which Buckley LJ has just read.

For those reasons I agree that the lease should be rectified in the terms stated, and I further agree with the interpretation of 'reasonable rent' that Buckley LJ has given.

BRIGHTMAN LJ.

I agree that the order of the deputy judge should stand, subject to minor variation, for the reasons given by Buckley LJ.

I wish to say a few words only on two points. First as regards the standard of proof. The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.

The standard of proof is no different in a case of so-called unilateral mistake such as the present. The mistake in the instant case was unilateral and not common only because the tenants became aware of the implications of the review clause on the eve of the execution of the new lease. That consideration, as it seems to me, leads to no different conclusion in relation to the standard of proof required in a rectification action.

The other point I want to touch on briefly is this. In his judgment the judge said:

> '... the parties recognised the necessity for a longstop for rent fixing purposes and ... it is reasonable to suppose that it was a provision in these terms which [the

> landlords] mistakenly omitted and which [the tenants] (through Mr Avon) deliberately allowed to go uncorrected. In my judgment this was sharp practice ... '

I would not be prepared to assume, on the evidence, that Mr Avon was consciously guilty of sharp practice. Nor is such an assumption necessary for the landlords' case. As I indicated, I take the view that there was a common intention on both sides to extend to the new lease the rent assessment arrangements contained in the covenant for renewal in the expiring lease. The discrepancy between the formula in the expiring lease and the formula in the engrossment of the new lease was not observed by Mr Avon until it was pointed out by his solicitor. I am not willing to assume that the reputable firm of solicitors acting for him would have allowed him to execute the lease in any circumstances which they saw to be dishonest. If the judgment is intended to contain a finding of sharp practice on the part of Mr Avon, I would respectfully wish to disagree with the learned judge on such a finding. I do not think this would be justified.

As I have said, I agree that the judge's order should, with the slight variation mentioned, stand.

Order of deputy judge directing rectification upheld.

Solicitors: Chethams (for the tenants); Tolhurst & Fisher, Southend-on-Sea (for the landlords).

Diana Brahams Barrister.