Mistake In English Law: Two Recent Cases

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English law recognises different types of mistake and permits various equitable remedies in case of mistake, as illustrated by the two English court decisions examined in this article.

Mistake in English law

English law recognises three types of mistake: (1) common mistake where the mistake is shared by both parties, (2) mutual mistake where the parties are at cross purposes with each other, and (3) unilateral mistake where one party is mistaken.

English courts may grant the following equitable remedies for mistake:

- Voiding the contract: if a contract is voided it is unenforceable from the outset.
- Specific performance: a court may order a contract to be performed but only if damages would not be an adequate remedy.
- Rescission: this is where the contract is set aside and the parties are returned to the position in which they were before the contract was made.
- Rectification: this is where the court corrects mistakes made in recording the parties' agreement.
- The court may order recovery of monies paid or property transferred by mistake.

The cases below examine claims and defences for (1) rectification and (2) recovery of monies paid by mistake.

Rectification

In *The Council of the Borough of Milton Keynes v. Viridor (Community Recycling MK) Limited [2017] EWHC 239 (TCC)* the English Technology and Construction Court had to determine whether payment provisions in a contract for waste recycling between *Milton Keynes* and *Viridor* should be rectified because of mistake.

The parties contracted for *Viridor* to provide waste recycling services to the Council for a 15-year period. The contract recognised that waste recycling is a profitable business and so required *Viridor* to make fixed and variable payments to the Council. The fixed payment related to an existing recycling facility owned by the Council and was sometimes referred to as rent.

The documents that *Viridor* had to provide in its tender bid included an Income Generating Payment Mechanism ("IGPM") in which *Viridor* proposed the fixed payment should be £500,000 per annum *"indexed for inflation"*. Due to a late-night error by the Council's consultants and lawyers, the final contract documents included an early version of the IGPM which had gaps and no reference to indexation, rather than the version of the IGPM completed by *Viridor* which stated that the fixed payment should be £500,000 per annum *"indexed for inflation"*.

The Court made a finding of fact that neither party spotted this error until after the contract was signed.

The Council sought rectification of the contract because of common, alternatively unilateral mistake so that the earlier, erroneous version of the IGPM would be replaced with the later, correct version, including its reference to indexation.

Viridor raised various arguments in defence including (1) arguments on the facts, (2) that the contract should not be rectified because it contained an entire agreement clause, (3) the defence of laches or delay by the Council in seeking rectification which meant that rectification would be unjust to *Viridor*, and (4) the defence of acquiescence according to which the Council

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acquiesced in the proposition that indexation would not be charged on the fixed payment.[2]

The Court rejected all *Viridor*'s arguments.

On common mistake, the Court noted that the party seeking rectification must show (as set out in *Swainland Builders Limited v. Freehold Properties Limited [2002] EWCA Civ 560)* that:

- The parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified.
- There was an outward expression of accord.
- The intention continued at the time of the execution of the instrument sought to be rectified.
- By mistake the instrument did not reflect that common intention.

Applying the law to the facts, the Court found that:

- The parties had a common intention that, at the time *Viridor*'s tender was accepted, the fixed payment was to be £500,000 "indexed for inflation".
- There was an outward expression of accord because the fixed payment indexed for inflation was part of *Viridor*'s tender which was expressly accepted by the Council.
- The common intention continued at the time of execution of the contract (*Viridor* argued that there was no continuing common intention claiming that the parties had continued to negotiate indexation after acceptance of the tender but before execution of the contract but the Court dismissed this argument).
- There was a common mistake. The court's finding of fact that neither party spotted the error until after the contract was signed meant that both parties signed off on a version of the contract which, because of the late-night error, included the wrong IGPM.
- All the ingredients were therefore in place to permit rectification.

On the alternative claim for unilateral mistaken, the Court noted that party seeking rectification must show (as set out in *Thomas Bates & Son Limited v Wyndham's (Lingerie) Limited [1981] WLR 505, 516A-516C)* that:

- Party A erroneously believed that the document sought to be rectified contained a particular term or provision or did not contain a particular term or provision which, mistakenly, it did contain.
- Party B was aware of the omission or the inclusion and that it was due to a mistake on the part of party A.
- Party B had omitted to draw the mistake to the notice of party A.
- The mistake was calculated to benefit party B.

The Court found that, if the finding of fact as to when the parties spotted the error was wrong and *Viridor* in fact spotted the error before the contract was signed, this would mean that, in order to gain financial advantage, *Viridor* failed to draw it to the attention of the Council. On this basis, the alternative claim for unilateral mistake was made out.

The Court dismissed *Viridor*'s argument that because there was an entire agreement clause (which provided that the contract *"constitutes the entire agreement and understanding between the parties … and supersedes, cancels and nullifies any previous agreement between the parties …")* the contract should not be rectified. The Court noted that an entire agreement clause *may* show that the parties intended to be bound by the document in material respects regardless of prior or other intentions.[3] However where, as in this case, there is

[2] There were other arguments, including an alleged breach of the Public Contract Regulations, which are not addressed in this article.

[3] The Court referred here to *Phillips Petroleum Co. UK Limited v Snamprogetti Limited* [2001] 79 Con LR 80.

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a strong case for rectification, the *"entire agreement"* is to be found in the contract as rectified and not in the contract in fact executed because the latter does not reflect the true intention or agreement of the parties.[4] The Court therefore found that the entire agreement clause was immaterial.

Having found mistake, the Court had to determine whether the defences of laches or acquiescence *"trumped"* the equitable remedy of rectification but easily dismissed these defences on the facts. Before doing so, however, the Court noted that the merits were firmly with the Council. *Viridor* had originally offered an indexed fixed price and it was possible to view some of the events as an attempt by *Viridor* to avoid its obligations. Also, the commercial reality of a non-indexed fixed price meant that *Viridor* would have a 15-year lease of the existing recycling facility with no break clause and no opportunity for the Council to increase the rent.

The Court ordered rectification of the contract on the basis of common mistake or, in the alternative, unilateral mistake so that the correct IGPM would replace the incorrect IGPM.

Recovery of monies paid by mistake

In *Graham Leslie v. Farrar Construction Limited [2016] EWCA Civ 1041* the English Court of Appeal had to determine whether an overpayment made allegedly because of mistake should be repaid.

Mr Leslie and Mr Farrar (the principal of Farrar Construction Limited or "FCL") reached an oral agreement to develop a number of residential property projects. Mr Leslie would acquire suitable sites, FCL would design and construct housing on the sites to an agreed scheme design and budget, Mr Leslie would pay FCL its *"build costs"* expended on the development and, on completion, the open market value of the development would be agreed, the acquisition and build costs would be deducted and the resultant profit share divided equally.

The parties proceeded amicably to complete five developments but eventually a dispute arose. Mr Leslie brought proceedings in the English Technology and Construction Court for repayment of sums he claimed he had overpaid FCL and FCL raised counterclaims for additional sums it claimed it was owed by Mr Leslie. The dispute centred on the definition of *"build costs"* and the Court's decision on this point meant that FCL had been overpaid by 22%.

The Court then had to determine Mr Leslie's claim for recovery of the overpayment. Mr Leslie argued that the overpayment had been made (1) by mutual mistake because both parties wrongly believed that the monies claimed and paid were covered by the arrangement between the parties when they were not (in other words, the parties were at cross purposes), or (2) by Mr Leslie in the mistaken belief that sums were properly payable and FCL accepted payment which should not have been made (in other words, a unilateral mistake).[5]

The Court rejected Mr Leslie's claim and he appealed to the Court of Appeal arguing that the judge ought to have allowed recovery of the overpayment as monies paid under mistake.

The Court of Appeal noted the general principle that a claimant who pays money which is not due to a defendant as a result of mistake is entitled to recover that money unless one of the recognised defences applies. It reviewed English court decisions over two centuries which refined that principle and concluded that, if party A voluntarily makes a payment to party B knowing that it may be more than he owes but chooses not to ascertain the correct amount due, party A cannot ordinarily recover that overpayment (except if there is fraud or misrepresentation which was not claimed by Mr Leslie).

Applying this to the facts, the Court of Appeal:

- Noted that the overcharges levied by FCL resulted from the parties' different

[4] The Court referred here to *LSRF III Wight Limited v Mill Valley Limited* [2016] EWHC 466 (Comm).

[5] There was a third ground (no consideration) which is not addressed in this article.

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understanding of what *"build costs"* meant in the context of their agreement.

- Dismissed Mr Leslie's claims of mistake. It found that Mr Leslie made final payments to FCL not acting on the basis of a mistake or under the influence of an erroneous assumption but because he had taken a conscious decision to pay the sums requested by FCL without investigation as that suited his purpose; he was a busy man with many business interests who was making a profit on the developments and did not wish to devote further resources to grinding through the figures with an accountant or lawyer.
- Found that Mr Leslie made the overpayment voluntarily after choosing not to ascertain the correct amount; he agreed the final payment to *"close the transaction"*.
- Found that, as a result, Mr Leslie was not entitled to recover the overpayment and rejected his appeal.

Conclusion

In the *Milton Keynes* case, the Council claimed that there had been a common or unilateral mistake which entitled it to rectification of the contract to include the correct IGPM. The Court agreed and ordered replacement of the IGPM. In the *Leslie* case, Mr Leslie claimed that there had been a mutual or unilateral mistake which entitled him to recover an overpayment. FCL successfully defended the claim on the basis that, to *"close the transaction"*, Mr Leslie had voluntarily made the overpayment choosing not to ascertain the correct amount. As a result, Mr Leslie could not recover the overpayment.

The key point from these cases is of course to ensure that the contract is correct; once a mistake has been made, it will always be difficult to correct it. The remedies available for mistake are equitable and will therefore only be permitted in certain circumstances. In particular, the party claiming an equitable remedy must do so with "clean hands". Entire agreement clauses *may* prevent rectification unless there is a strong case for rectification. If a party "sleeps on its rights" and fails to seek to have a mistake corrected within a reasonable period (laches) and/or if a party acquiesces to an infringement of its right, that party may lose the right to have the mistake corrected.

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