

Outer Temple
Chambers

‘CORRECTION’

- Where is the line beyond which you cannot use corrective interpretation ?
- Are the courts being more liberal or less in their approach to corrective interpretation ?
- Are there any short cuts to rectification ?

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CORRECTIVE INTERPRETATION

Where:

- there is a clear mistake in an instrument;
and
- the gist of the correction which ought to be made to remedy the mistake is clear,
the mistake can be corrected by the process of interpretation

ESTABLISHING THE MISTAKE

Lord Hoffman in *ICS v West Bromwich BS*
[1998] 1 WLR 896 at 913C-E

“(4)...The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. ...

ESTABLISHING THE MISTAKE

(5) ...we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. ..”

ESTABLISHING THE MISTAKE

Lord Hoffmann in *Chartbrook v Persimmon Homes* [2009] 1 AC 1101 at [24]:

“... in deciding whether there is a clear mistake, the Court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into account.”

ESTABLISHING THE MISTAKE

Mistake may be clear (from background context or other clauses) even where clause is:

- grammatically & syntactically unexceptional;
and
- semantically possible.
- *Littman v Aspen Oil (Broking) Ltd* [2005] EWHC 1369 at [11] & [13]-[16] (Hart J)
- *State Street Bank v Sompo Japan Insurance* [2010] EWHC 1461 at [20]-[26] (Sir Andrew Morritt).

ESTABLISHING THE MISTAKE

“Commercial absurdity may require the court to depart from even the apparently unambiguous meaning of a provision in an instrument, because ‘the law does not require judges to attribute to the parties an intention they plainly could not have had’”

Briggs J in *LB RE Financing No.3 Ltd v Excalibur Funding No.1 Plc* [2011] EWHC 2111 at [46].

CORRECTING THE MISTAKE

Lord Hoffmann in *Chartbrook v Persimmon Homes* [2009] 1 AC 1101 at [25]:

“... there is not ... a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant....”

CORRECTING THE MISTAKE

“Where something has gone wrong with the language, it is not ... necessarily an objection to dealing with it in a way that avoids commercial absurdity that provisions have, apparently, to be rewritten, blue pencilled or amplified so as to work rationally in particular circumstances”

Briggs J in *LB RE Financing No.3 Ltd v Excalibur Funding No.1 Plc* (above) at [59].

CORRECTING THE MISTAKE

- Not an objection that “*there might be slightly different views as to the precise wording of any potential replacement text*”
- Provided that the gist of the correction is clear, “*It is irrelevant how as a matter of drafting that result might have been achieved*”

Gloster LJ in *LBG Capital No.1 v BNY Mellon Corporate Trustee* [2015] EWCA Civ 1257 at [90]

CORRECTING THE MISTAKE

Reading words or even entire clauses **in** –

- *Homburg Houtimport v Agrosin, The Starsin* [2003] UKHL 12
- *ICM v Stribley* [2013] EWHC 2995 - NRD
- *Re BCA Pension Trustees Ltd* [2015] EWHC 3492 – indexation (s.48 AJA '85)

Reading words or even entire clauses **out** –

- *Holdings & Barnes v Hill House Hammond* [2001] EWCA Civ 1334 at [30]-[40]
- *Sterling Insurance Trustees v Sterling Insurance Group* [2015] EWHC 2665 – amendment fetter

CORRECTING THE MISTAKE

Corrective interpretation all the more appropriate and permissible where necessary to prevent an inconsistency and absurdity within the document which would invalidate part of what the document is intending to achieve.

- *Holdings & Barnes v Hill House Hammond* at [30] & [36]
- Cf. *Premier Foods Group Services Ltd v RHM Pension Trust Ltd* at [30]

CORRECTING THE MISTAKE

Illustrations:

- *Holding & Barnes v Hill House Hammond* at [30]-[40]
- *Homburg Houtimport v Agrosin, The Starsin*
- *Littman v Aspen Oil (Broking) Ltd* [2005] EWHC 1369
- *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63 at [112]-[120]
- *KPMG v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363 at [44]-[67]
- *State Street Bank v Sompo Japan Insurance* at [20]-[26]
- *LB RE Financing No.3 v Excalibur Funding* at [59]-[71]
- *LBG Capital No.1 v BNY Mellon Corporate Trustee*

SO WHERE IS THE LINE ?

Where

(a) mistake in document; or

(b) way in which it is to be corrected

- not clear; or
- can only be established by evidence inadmissible for interpretation (e.g. drafting negotiations)

ARE COURTS BEING MORE OR LESS LIBERAL ? ... NEITHER

Concern after *Arnold v Britton* [2015] UKSC 36 –

“[17] First, the reliance placed in some cases on commercial common sense and surrounding circumstances ... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. ..

ARNOLD v BRITTON (continued)

[18] Secondly, when it comes to considering the centrally relevant words to be interpreted, ... the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. ...

ARNOLD v BRITTON (continued)

[19] The third point ... is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

...

ARNOLD v BRITTON (continued)

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. ...

YET NO LESS LIBERAL IN SUBSEQUENT CASES ...

- *Sterling Insurance Trustees v Sterling Insurance Group* – reading out the word ‘due’ from the fetter to an amendment power
- *Re BCA Pension Trustees Ltd* – reading in paragraph to indicate different periods of accrual to which different rates of escalation applied
- *LBG Capital No.1 v BNY Mellon Corporate Trustee* – re-writing trigger to capital notes to allow for changes to regulatory framework which the parties had known were pending when the notes were issued.

ARE THERE ANY SHORT CUTS TO RECTIFICATION ?

- common exhibit bundle of contemporaneous documents to which witness statements can refer
- collaborate with rep ben to seek indication that will not oppose summary judgment
- before issuing proceedings, share:
 - contemporaneous documents
 - draft witness statements
 - either draft skeleton argument or draft Particulars of Claim

ARE THERE ANY SHORT CUTS TO RECTIFICATION ?

- Trustees as claimants > 2 legal teams, not 3 ?
 - *MNOPF v Watkins* [2013] EWHC 4741
 - *Modwen Properties v Herbert* [2016] EWHC 428
- Part 8 rather than Part 7, to save cost of PoC ?
 - *Hogg Robinson v Harvey* [2016] EWHC 129
- If PoC, mark up to cross-refer to exhibit bundle
- unopposed summary judgment on paper
 - *Re: University of Wales, Trinity St David*

ARE THERE ANY SHORT CUTS TO RECTIFICATION ?

Section 48 Administration of Justice Act 1985?

- No, not rectification
- Can only be on a point of interpretation
- And does not bind beneficiaries, merely insulates trustees from personal liability
- Which is rarely a risk in pension trusts, given exoneration clauses

ARE THERE ANY SHORT CUTS TO RECTIFICATION ?

Deed of Correction making retrospective change?

- Not rectification
- Unless and until rectification ordered:
 - fetter to amendment power renders invalid
 - S.67 PA95 renders voidable by TPR
 - if applicable, equal treatment renders invalid:
Harland & Wolff v Aon and *Safeway v Newton*
- If deed of correction ever challenged, would need to establish rectification to validate deed retrospectively
 - Laches (? prejudice re: evidence ?)
 - Loss / lessening of evidence

ARE THERE ANY SHORT CUTS TO RECTIFICATION ?

- Nicholas Warren QC & Paul Newman in Joint Opinion on s.67 PA95 (11.04.00) at §13.1.5(ii)
 - NB no mention of propriety ...
- ? those views to be assessed in their historical context: no successful claim for rectification of a pension scheme deed/rules
 - *Lansing Linde Ltd v Alber* on 15.10.99
- Since then, it has become commonplace for rectification to be granted on unopposed summary judgment applications