

1. SUMMARY

**Case - George Wimpey UK Ltd v VI Components Ltd, 3 February 2005,
(Court of Appeal).**

- 1.1. The Court of Appeal has overturned a decision of the High Court ordering the rectification of an overage provision in a sale contract on the grounds of unilateral mistake.
- 1.2. The Court of Appeal held that there was no evidence that the defendant had misled Wimpey, whose corporate procedures should have thoroughly checked the contract. The fact that the formula for calculating the overage payment was so complex that Wimpey did not notice that part of the formula had been omitted was not a sufficient reason to rectify the contract as they were the party with greater resources and neglected to check the formula.
- 1.3. This ruling has cost Wimpey approximately £500,000 in extra overage and over £100,000 legal costs to the defendant.

2. BACKGROUND

- 2.1. The courts may rectify written instruments that do not reflect the true bargain between the parties. There are two types of rectification:
 - 2.1.1. **COMMON MISTAKE:** where both parties mistakenly believe that the document gives effect to their common intention.
 - 2.1.2. **UNILATERAL MISTAKE:** where one party makes a mistake which is known to the other party.
- 2.2. For rectification of a unilateral mistake, each of the following must be shown:
 - 2.2.1. One party (A) erroneously believed the document did or did not contain a particular term.

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- 2.2.2. The other party (B) was aware of the omission or inclusion and that it was due to a mistake on A's part.
- 2.2.3. B omitted to draw the mistake to A's notice.
- 2.2.4. The mistake was calculated to benefit B.

(Thomas Bates & Son v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505).

3. FACTS

- 3.1. The defendant contracted to sell to the claimant a development site with outline planning permission for 231 flats in Erith, Kent. The purchase price was £2.65 million, with an additional overage payment of 50% of any surplus sum achieved by the defendant on the sale of the flats exceeding an agreed base sum.
- 3.2. The base sum represented the aggregate of the "Net Selling Price" for each flat (calculated upon the square footage of each flat), plus additional premiums for each flat with a river view, parking or a floor above ground level (the "Enhancements"). The Enhancements had a total value of over £1 million.
- 3.3. As the parties foresaw that there could be a change in the number or sizes of the flats once detailed planning permission was obtained, the contract included a formula so that the base sum would alter accordingly.
- 3.4. The formula required the Net Selling Price for each flat to be proportionately adjusted and then the price of any Enhancements added back in. The adding back of the Enhancements at the end of the formula was to be represented by "+E". As the formula making the adjustments to the Net Selling Price was extremely complex, the parties left "+E" out of the formula whilst the negotiations over the workings and refinements were discussed.
- 3.5. The final formula was put forward by the defendant to the claimant with purportedly just a minor refinement but also without "+E" having been reinserted. This revised formula was agreed directly between the parties and

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the contract correctly recited the formula as notified to the parties' solicitors, without the "+E" having been added back in by the parties.

- 3.6. The claimant sought rectification. The High Court granted an order for rectification and held that:
- 3.7. There was no mutual mistake. The defendant was aware that "+E" was omitted when the final version was put to the claimant.
- 3.8. The only issue in this case was whether the defendant was aware of the claimant's mistake.
- 3.9. There was no finding that the defendant actually knew that the claimant had made a mistake but it did at least suspect that this was so. An honest and reasonable person would have drawn attention to the absence of "+E". The defendant had crossed the line from legitimate negotiation into the realm of unfair dealing. The defendant saw the possibility of error and deliberately tested it by diverting the claimant's attention away from discovering it by saying it was just a minor refinement of the formula. This conduct was unconscionable and justified rectification.
- 3.10. The defendant appealed.

4. DECISION

- 4.1. The Court of Appeal upheld defendant's appeal and overturned the decision of the High Court, the Court of Appeal held that:
 - 4.1.1. Wimpey had failed to put forward any evidence that the defendant deliberately tried to mislead them.
 - 4.1.2. Wimpey had a reporting procedure prior to the execution of the contract. First Wimpey's solicitors made a written report, then a summary report was prepared by an employee of Wimpey. Both were placed in front of the Wimpey's board together with the contract for signature. Neither of the reports specifically highlighted the issue of

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Enhancements. As a consequence, without further evidence, it was impossible to reach any conclusion other than that the claimant intended to enter into the contract it signed.

- 4.1.3. Transactions that are at an arm's length between parties of unequal skill and resources may impose greater constraints on the stronger party. In this case, the defendant was the weaker party, as it did not have the resources or experience in the field of residential development.
- 4.1.4. The defendant was accused of having deliberately misled Wimpey (the stronger party) by failing to draw attention to the claimant's oversight. In fact, the mistake was made by Wimpey's corporate neglect.

5. CONCLUSION

- 5.1. It is increasingly common for development transactions to have complex overage provisions utilising formulae. In this case the overage formula was complex and anyone who was not directly involved in the negotiation would have difficulty understanding it. It was, therefore, relatively easy to overlook the omission especially as the solicitors were not involved in the negotiation of the formula as this was carried out directly between the parties. However, given that £1 million was potentially at stake, the developer should have checked the final contract more carefully before signature.
- 5.2. In our experience clients often negotiate such detailed terms directly between themselves without their solicitors' involvement. Where this occurs, the parties must double-check that the final version reflects what they agreed.
- 5.3. If you do inadvertently make a mistake on the final version of the formula it is essential to keep full notes of your negotiation as these can be produced as evidence to the court when you try and rectify the mistake; A costly mistake indeed!

If you require a full transcript of the Court of Appeal judgment please email

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