Correction by construction

Correction by Construction: Dealing with Drafting Errors by way of Interpretation

In *Monsolar IQ Ltd v Woden Park Ltd*[1] the Court of Appeal corrected a drafting error in a rent review provision of a lease as part of the interpretive exercise. No claim for rectification of the clause had been made. The Court of Appeal noted that the courts have long been able to disregard the literal meaning of a provision were it is clear (1) that an error has been made; and (2) what the contractual provision should have said. The Court of Appeal was of the view that recent Supreme Court decisions on interpretation had not altered that position.

A. THE FACTS

The parties had entered into a lease of a site near Cardiff. The appellant was the landlord and the respondent was the tenant. The lease was for twenty-five years and six months. The land was to be used as a solar farm.

The rent review provision was set out as a formula, the effect of which, when read literally, was to increase the previous year's rent by the total increases in RPI since the beginning of the lease, resulting in exponential rises year on year.[2] There was no dispute between the parties as to the effect of the rent review provision read literally. The dispute was whether the rent review formula should be construed so that the rent was indexed in line with the RPI, under the principle by which clear mistakes in drafting could be corrected as a matter of construction of the contract.[3]

B. DISCUSSION

Nugee LJ gave the decision of the court. He began by noting that the principles of construction of contracts had been considered by the Supreme Court in a series of well-known cases but that those authorities were largely concerned with the position where a

---

[1] [2021] EWCA Civ 961; [2022] 2 P&CR 10.

[2] A table was appended to the decision showing the increases in rent based on the rent review formula to date. This showed an increase in rent of 83.1% in seven years, when there had only been an increase in RPI of 16.9% over the same period.

[3] As argued for by the tenant, founding on *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1011, although the court noted that the principle pre-dated that case – see *Monsolar*, para 4. See for instance Lord Hoffmann's fifth rule in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896.

contractual provision had two possible interpretations. This was not such a case. Rather, this case was concerned with what he referred to as the "*Chartbrook* principle" in terms of which the literal meaning of a provision could be corrected if it was both clear that a mistake had been made, and what the provision was intended to say.[4] That was a different exercise from choosing between rival interpretations.[5]

The Court of Appeal did not read anything said by Lords Neuberger or Hodge in *Arnold v Britton*[6] as qualifying or departing from Lord Hoffmann's approach in *Chartbrook.* Lord Neuberger's point was that the parties could not control commercial common sense or the surrounding circumstances but that they could control the language used in their contract. As such, that was primarily where the reasonable reader would expect to find out what the parties had intended. In Nugee LJ's view none of that really applied where the suggestion was that the parties had made a drafting mistake.[7] He went on to note that *Arnold v Britton* undoubtedly supported the proposition that the mere fact that a bargain was not one that a reasonable and properly informed tenant would have entered into was not enough to enable the court to re-write the contract. The court could not alter an unambiguous provision simply because it provided for a party to pay what appeared to be a high a price for something. There could be any number of reasons why a party might accept such a term, for instance in return for concessions elsewhere. The reasonable objective reader, who was not privy to the parties' subjective intentions or their negotiations could not know why the party had agreed to such a clause, and, unless it was clear that there was a drafting mistake, the reasonable objective reader could not do other than read the contract as providing what it unambiguously said.[8]

Nugee LJ went on to note that what had enabled the court in *Chartbrook* to conclude that a mistake had been made was that the result was not just imprudent but arbitrary and irrational.[9] There was a distinction between a case which concerned a provision which

---

[4] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1011 in which the House of Lords held that if the context and background circumstances drove the court to conclude that something had gone wrong with the language of the contract the court did not have to attribute to the parties an intention which a reasonable person would not have understood them to have had; and that where it was clear that there was a mistake on the face of the document and what correction ought to be made to correct it the court was entitled to correct the mistake as a matter of construction.
[5] *Monsolar*, para 25.
[6] [2015] UKSC 36; [2015] AC 1619.
[7] *Monsolar*, para 27.
[8] *Ibid*, para 30.
[9] *Ibid.*

seemed merely imprudent and one which appeared irrational.[10] The position had been neatly summarised by Briggs LJ in *Sugarman v CJS Investments Ltd*[11] where he referred to the dividing line between a case where the result appeared commercially unattractive and even unreasonable, on the one hand, and, on the other, a case which appeared nonsensical or absurd. There was a consistent line of authority illustrating the sort of case that fell on the far side of the line. While the language used by judges to describe such cases varied the concept was consistent.[12] It had been referred to as "produc[ing] a result which is so commercially nonsensical that the parties could not have intended it";[13] "an interpretation… sufficiently irrational to justify a conclusion that there has been a linguistic mistake";[14] "a commercially absurd interpretation";[15] an interpretation that "makes no commercial sense";[16] an interpretation which was "arbitrary and irrational";[17] and "produc[ing] such a nonsensical result" that it could not be treated as expressing the meaning of the document.[18] For the Court of Appeal there was nothing in *Arnold v Britton* which suggested that the dividing line between, on the one hand, a provision which was unduly favourable to one side, impudent or unreasonable; and, on the other hand, one that produced irrational, arbitrary, nonsensical or absurd results had been redrawn.[19]

C. DECISION

The Court of Appeal found that the trial judge had been correct to hold that this case fell on the far side of the line and could not have been intended by the parties. There must have been a mistake.[20]

The drafting error was, said Nugee LJ, "about as plain a case of such a mistake as one could find".[21] He noted that the general purpose of a rent review clause was to reflect changes

---

[10] *Ibid,* para 31.
[11] [2014] EWCA Civ 1239; [2015] 1 BCLC 1.
[12] *Monsolar*, para 32.
[13] *City Alliance Ltd v Oxford Forecasting Services Ltd* [2000] EWCA Civ 510; [2001] 1 All ER (Comm) 233, at para 13 per Chadwick LJ.
[14] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1011, at para 15 per Lord Hoffmann.
[15] *Ibid*.
[16] *Ibid*, para 16.
[17] *Ibid*, para 20.
[18] *Sugarman v CJS Investments Ltd* [2014] EWCA Civ 1239; [2015] 1 BCLC 1, at para 43 per Briggs LJ.
[19] *Monsolar*, para 33.
[20] *Ibid.*
[21] *Ibid,* para 35.

in the value of money and real increases in the value of property over a long term.[22] Where a rent review clause was based on changes in an index such as the RPI the purpose was simply to reflect changes in the value of money usually by increasing the rent in line with the relevant index.[23] The mere fact that this was the general purpose of a rent review clause did not prevent the parties agreeing to review the rent in accordance with a different mechanism and for a different purpose. However, it was at least a reasonable working hypothesis when the rent review clause was based on the RPI that the general purpose was to increase the rent in line with that index. If that was not what the parties had intended it was odd that they should have based their rent review on the index at all.[24] The general purpose of tracking the RPI index was also echoed by another provision in the lease providing for a substitute index.[25]

Nugee LJ considered that a literal interpretation of the rent review formula could aptly be described as both arbitrary and irrational, and indeed also commercially nonsensical or absurd, such that it could not be supposed that rational parties really intended such a result.[26] It was not difficult to see how the mistake had come about. It was unnecessary before the court could correct a mistake under the *Chartbrook* principle that it should be satisfied as to how the mistake had happened and, since, unlike in an action for rectification, evidence of the drafting process would almost always be inadmissible, it would often be impossible to know. However, the fact that there was a plausible explanation of how the error had occurred could support the conclusion that there had been an error.[27]

Nugee LJ concluded that this was not just a case of a rent review clause that was unduly favourable to one party, or imprudent for the other party to have entered into. It was a "paradigm example of a clause which, literally interpreted, leads to arbitrary and irrational results".[28] He had not the slightest doubt that there had been a drafting error.[29]

---

[22] *Ibid,* para 36, with reference to *British Gas Corporation v Universities Superannuation Scheme Ltd* [1986] 1 WLR 398; and *Equity & Law Life Assurance Society plc v Bodfield Ltd* [1987] EGLR 124.
[23] *Monsolar*, para 36.
[24] *Ibid,* para 37.
[25] *Ibid*, para 38.
[26] *Ibid,* para 39.
[27] *Ibid,* para 40, with reference to *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL12; [2004] 1 AC 715.
[28] *Monsolar*, para 42.
[29] *Ibid.*

D. CONCLUSIONS

In this case the Court of Appeal differentiates between different aspects of interpretation. On the one hand, there is the type of case, which frequently comes before the courts, where the parties have rival interpretations of the clause in question. On the other hand, there is a clause, like the one in this case, where there is no dispute about what the clause means but where it is plain from the face of the document that a drafting mistake has been made. In the latter situation the court need not hold parties to an interpretation they could not have intended and will give effect to the parties' real intention. While, as the Court of Appeal pointed out, there is authority that correcting mistakes forms part of the interpretive exercise, it comes so close to rectification as to leave one wondering what purpose that doctrine has. Perhaps the only real role for rectification is where evidence of prior negotiations, which would be inadmissible in interpreting the contract,[30] needs to be led to demonstrate a prior agreement between parties that has not made its way into their contract.[31]

The Court of Appeal noted the effect of *Arnold v Britton* and the restraint put on the use of commercial common sense in contractual interpretation. But the Court was of the view that that limitation related only to the situation where there were rival interpretations, rather than the type of case before the court in *Monsolar*. The Court of Appeal distinguished *Monsolar* from *Arnold* yet the facts of the cases are remarkably similar. A literal interpretation of the rent review provision in *Monsolar* resulted in an exponential rise in the rent; in *Arnold,* giving the words of the service charge provision their natural and ordinary meaning, resulted in huge increases in the service charge sum payable.[32] In *Arnold* Lord Hodge had considered whether the court could identify and correct a mistake by construction, but came to the view that it could not. He was unable to conclude that a mistake had been made, and even if he had come to the view that there had been a mistake, it was unclear what correction needed to be made to the contract.[33]

---

[30] On the admissibility of such negotiations see *The Centre for Maritime and Industrial Safety Technology v Ineos Manufacturing Scotland Ltd* [2014] CSOH 5; 2014 GWD 5-100; and *Dragados (UK) Ltd v DC Eikefet Aggregates AS* [2021] CSOH 117; 2021 GWD 39-518. It is suggested that the court in the *Dragados* takes a stricter line than in *The Centre for Maritime* case and that the approach in the latter is to be preferred.

[31] This was the position in *Patersons of Greenoakhill Ltd v Biffa Waste Services Ltd* [2013] CSOH 18; 2013 SLT 729.

[32] A fact that the majority considered unsatisfactory but nonetheless the outcome based on the correct construction of the service charge provision: see *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619, at paras 62 and 64 per Lord Neuberger and at para 66 Lord Hodge.

[33] *Arnold,* paras 69-72 and 78.

It is suggested that it is more difficult than the Court of Appeal indicates to come to a decision on whether a case falls so far as to cross the line into a commercially absurd result, indicating a mistake in drafting; and a commercially unreasonable result, which the court should not interfere with for the reasons set out in *Arnold v Britton.* Yet this may be less of a concern in Scotland. Given that the current approach to interpretation by the Scottish courts is to focus less on the meaning of the words used, with more emphasis on commercial common sense and taking a purposive approach,[34] it seems less likely that recourse will need to be sought to the rarer situation of correcting a drafting mistake as part of the interpretive exercise, as occurred in *Monsolar*. Instead, problems with the contractual language may simply be dealt with, as part of the more common aspect of interpretation, by considering the purpose of the parties' contract and coming to what the court considers a commercially sensible outcome.

Lorna Richardson
University of Edinburgh

[34] On the basis of *Ashtead Plant Hire Co Ltd v Granton Central Developments Ltd* [2020] CSIH 2; 2020 SC 244, discussed in L Richardson, "Commercial common sense again: what role in contract interpretation?", 2021 Edin LR 25(1), 89. Recent cases demonstrating the approach to interpretation include *Mast v Chalmers* [2022] CSOH 43; 2022 GWD 18-266 and *Loudon v Stewart Milne Group Ltd* [2022] CSIH 3; 2022 GWD 7-236.