Masterton Homes P/L v Palm Assets P/L (1; Semavat Constructions P/L (2); Donovan Oates Hannaford Mortgage Corporation Limited (3)

JUDGMENT : **Einstein J;** Supreme Court, New South Wales, Equity Division, Commercial List. 1st April 2008

The proceedings

1 These proceedings concern contractual arrangements with respect to a residential strata title development carried out on property acquired by the first and second defendants [for convenience together referred to as "Palm Assets"] at 46-48 Pemberton Street Parramatta. The development was undertaken between 2004 and 2006 and comprised nine townhouses with associated car parking.

The building contract

2 The plaintiff ("Masterton Homes Pty Ltd") was engaged by Palm Assets to construct the development under the terms of a written building contract dated 13 October 2004.

3 By clause 2.5 of the Building Contract, Palm Assets agreed to pay to Masterton the Contract Price of $1,800,840 plus the cost of variations pursuant to clause 2.9 of the contract.

4 Clause 2.29 of the building contract purported to give Masterton a caveatable interest in the land the subject of the contract, for the purpose of giving effect to a charge in the Masterton's favour for payment of monies which were due and payable to it under the provisions of the contract: one issue which was foreshadowed, but ultimately not raised in the proceedings, concerns whether or not as the third defendant had contended, this contractual term was avoided by the operation of s 7D of the *Home Building Act 1989 (NSW)*.

The financier

5 The third defendant, Donovan Oates Hannaford Mortgage Corporation Ltd ("DOHM") noted as the "Financier" under the building contract, agreed to make certain advances to Palm Assets in connection with the development.

6 Palm Assets agreed to secure the DOHM advances by way of a first registered mortgage over the development.

The building tripartite agreement

7 Clause 1.9 of the building contract envisaged that the parties would enter into a Building Tripartite Agreement within 30 days from the date of the contract.

8 The parties entered into a Deed of Mortgage and Assignment of Building Contract on 18 October 2004, by which Palm Assets agreed to assign the benefit of the building contract to DOHM by way of continuing security for the advances which DOHM had agreed to make.

The essential issue

9 As will appear from what follows the central issue in the proceedings concerns an arrangement given effect to by an undertaking given to the Court at interlocutory hearing. Both parties have addressed close submissions to the proper construction of the undertaking which constitutes the ground for Masterton's contractual claim in the proceedings.

10 It is necessary to travel through some of the further facts in order to follow the events which occurred.

Palm Assets Owes Money to Masterton – the progress claim

11 The evidence establishes that:

i. Masterton made a progress claim under clause 2.5 of the building contract, which also amounted to a payment claim under section 13 of the *Building and Construction Industry Security of Payment Act* 1999 *(NSW)* on 22 March 2006 for payment of the amount of $424,262.77 for work done under the building contract (Maude, 16/11/06, Ex AM1, Tab 4);

ii. Palm Assets failed to assess the contract value of the work, as required under clause 2.5(e) of the building contract and failed to issue a payment schedule within the 5 day period referred to in clause 2.5(e) of the building contract;

iii. the progress or payment claim dated 22 March 2006 was a written demand on Palm Assets;

iv. Masterton lodged a caveat over the titles of the development on 20 April 2006;

v. on 8 May 2006, Masterton made an application for adjudication of the payment claim under section 17 of the Act (Maude, 16/11/06, para 17);

vi. the adjudicator, Mr H Laan adjudicated Masterton as entitled to payment of the amount of $418,526.54 and an adjudication certificate issued for that amount ((Maude, 16/11/06, Ex AM1, Tab 6);

vii. on 15 June 2006, DOHM noted the existence of Masterton's caveat and advised it required Masterton's consent to register a strata plan. Masterton gave that consent (Maude, 16/11/06,AM1, 15.6 and 15.17B);

viii. DOHM received title deeds following the registration of the strata plans for the development on 3 October 2006 (Maude, 16/11/06,AM1, 17.1);

ix. by November 2006, Palm Assets had purchasers offering to buy the units in the development on terms that involved a component of barter card dollars ($BBX) of more than $100,000 BBX (Maude, 4 September 2007, Tab P4);

x. Masterton obtained judgment for the adjudicated amount on 28 September 2006 (Maude, 16/11/06, para. 25); and

xi. on 7 November 2006, Judgment was entered in the Consumer, Trader & Tenancy Tribunal against Palm Assets in the sum of $424,262.77 together with interest thereon from 7 November 2006 (Maude, 16/11/06, paras 26-33).

Masterton's claimed entitlement to caveat

12 By reason of the judgments entered against Palm Assets, Masterton contends that it had a caveatable interest over the development as and from 28 September 2006, or alternatively, 7 November 2006.

13 Masterton lodged a caveat over the relevant titles of the development on 20 April 2006.

14 On 6 November 2006, DOHM served a lapsing notice in respect of that caveat. The lapsing notice was the catalyst for Masterton commencing the proceedings, seeking declarations as to its caveatable interest, and seeking consequential orders relating to the extension of the existing caveat, or for leave to lodge a further caveat to secure the charge over the money owed by Palm Assets.

15 Palm Assets have not appeared, and are in liquidation.

Orders Made on 8 December 2006

16 Masterton's application initially came before Campbell J, as a duty matter, on 22 November 2006. His Honour extended the operation of Masterton's caveat, by consent, until 8 December 2006, and stood the matter over to the Duty Judge's list on 8 December 2006.

17 As at 8 December 2006, Palm Assets had issued contracts to sell and received sales advices from their real estate agent for the proposed sale of units 1, 2, 3, 4 and 9. The advices contemplated 30% of the sale price being paid for in BBX dollar credits.

18 As foreshadowed above, the events of 8 December 2006 constitute the core issue in dispute in these proceedings. Masterton's case is that an agreement was made on that day to resolve the issues between the parties, and which enabled Palm Assets and DOHM to exchange and settle the existing sales contracts, and to sell the remaining units in the development. Its case is that following those discussions and in order to give effect to the agreement made, the Court was asked to note the following undertaking by DOHM's solicitor to the Court:

"In the event that any of the lots in the Schedules to the Summons are sold (i.e. any of the nine units in the development) and a sale is completed then the Third Defendant will either:

(a) cause the First and Second Defendants to assign and/or transfer to the Plaintiff all BBX dollar credits (net of commission) reserved at settlement of each unit sold, provided that these credits are not less than BBX $100,000; or,

(b) set aside the sum of $60,000.00 from the proceeds received on the discharge of its first mortgage or the proceeds received from any mortgagee sale of each unit sold into a fund to be held until agreement between the parties or until further order."

19 It is accepted by the parties that there is no mistake the Court's record.

20 The evidence also establishes that:

i. DOHM's solicitor went to Court on DOHM's behalf with the intention of getting an arrangement with Masterton which would result in Masterton agreeing to hand over withdrawals of the caveats at the settlement of each unit on a basis acceptable to DOHM (Miles, T118.4-9);

ii. the sale of units 1,2,3 and 4 exchanged on 22 December 2006 (Hannaford, T185.21);

iii. the settlement of the sale of units 1, 2, 3 and 4 was expected to occur on or about 15 February 2007;

iv. the matter came before the court on 15 February 2007. By that time the parties were in dispute as to the meaning and effect of the undertaking given to the Court and the nature and effect of any agreement made on 8 December 2006.

The essential divide

21 The divide which separates the parties may be expressed as follows:

i. Masterton contends that:

a) the parties common intention was that sub paragraph (a) of the undertaking was to be mandatory: that is to say that the parties agreed that in the event that any of the 9 units in the development were sold and a sale completed whereunder BBX credits in excess of BBX $100,000 constituted part of the purchase price, then DOHM was bound to take the action provided for in sub paragraph (a);

b) it was only where the credits available for assignment were in an amount less than BBX $100,000 that sub paragraph (b) would be activated.

ii. DOHM contends that it at all times had a right to elect as between:

a) on the one hand to engage sub paragraph (a) in which event that election would be binding [*meaning that once DOHM had paid BBX dollars across to Masterton it could not somehow claim them back as only having been paid on an interlocutory basis]* (cf transcript 222.28)

b) on the other hand to engage sub paragraph (b) and to do so regardless of the fact that BBX credits in excess of $100,000 were available as constituting part of the purchase price on any particular units [in which event the agreement would only constitute an interim holding measure pending agreement between the parties or further order in the proceedings].

What were BBX trade dollars?

22 BBX was a publicly listed barter company which used software, a web coordinator and electronic barter banking to enable individuals to trade goods and services throughout Australia and New Zealand. It was founded in 1993 and listed on the ASX. BBX facilitated the cashless trading of goods and services between member businesses: the trading which took place was underpinned by the principles of bartering, sometimes called "contra". In essence

BBX was a credit and debit card system (similar to other card systems) permitting member businesses to access a variety of goods and services in a less competitive marketplace. Using a currency known as BBX trade dollars, BBX allowed member businesses to conduct barter transactions.

The principles concerning the construction of written agreements

23 The principles concerning the construction of written agreements are reasonably well known.

24 In this particular case it becomes necessary to treat with the following additional integers raised by Masterton:

i. Masterton contends that on a number of occasions following 8 December 2006, DOHM made admissions consistent with the effect of the orders submitted by Masterton.

ii. Masterton has an alternate case which is that the agreement reached on 8 December 2006 was partly oral and partly in writing.

iii. Masterton has yet a further alternative case for rectification of the agreement.

25 DOHM also contends that:

i. the rectified agreement is void for uncertainty on particular grounds;

ii. Masterton is not entitled to specific performance for various reasons.

The conventional approaches to the construction of written documents

26 Dealing firstly with conventional approaches to the construction of written documents the following propositions are well established:

i. where the language of an Agreement is ambiguous or susceptible of more than one meaning the factual matrix including the context and surrounding circumstances, its aim, object or commercial purpose may be taken into account in the construction of an agreement: ***Reardon Smith Line Ltd v Hansen-Tangen*** [1976] 1 WLR 989 at 997 cited in ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** (1982) 149 CLR 337 per Mason J at 350-352.

ii. Clearly primacy must be given to the actual words used in a written contract. McColl JA in ***Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd*** [2004] NSWCA 114 at [69] enunciated the following principles:

*"[69] If the words used [in a written contract] are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. The court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate': **Australian Broadcasting Commission v Australasian Performing Right Association Ltd** (1973) 129 CLR 99 at 109–110 per Gibbs J (as he then was). However, in construing written contracts it should be presumed that the parties did not intend their terms to operate unreasonably. The more unreasonable the result a party's construction would produce, the more unlikely it is that the parties would have intended it. If the parties did intend an unreasonable result, it is essential that that intention be made "abundantly clear": **L Schuler AG v Wickman Machine Tool Sales Ltd** [1974] AC 235 at 251 per Lord Reid.*

*[70] Dealing with the circumstances where there are internal inconsistencies in a contract, Gibbs J said "it will be permissible to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument.": **Australian Broadcasting Commission v Australasian Performing Right Association Ltd** (1973) 129 CLR 99 at 109.*

*[71] Gibbs J's statement in **Australian Broadcasting Commission v Australasian Performing Right Association Ltd** (1973) 129 CLR 99 at 109 that "the court should construe commercial contracts "fairly and broadly, without being too astute or subtle in finding defects", finds reflection in the statement in **International Fina Services AG v Katrina Shipping Ltd ("The Fina Samco")** [1995] 2 Lloyd's Rep 344 at 350 per Neill LJ (with whom Roch and Auld LL.J agreed) that the primary focus is the agreement itself which "must speak for itself, but … must do so in situ and not be transported to a laboratory for microscopic analysis".*

*[72] Consistently with this approach, it has been held that if detailed semantic and syntactical analysis of a written contract lead to a conclusion that flouts business commonsense the contract must be made to yield to business commonsense: **Antaios Compania Naviera SA v Salen Rederierna AB** [1985] AC 191 at 201 per Lord Diplock; applied by Gleeson CJ, Gummow and Hayne JJ in **Maggbury Pty Ltd v Hafele Australia Pty Ltd,** above, at 198 [43]. In **Maggbury,** after referring to Lord Diplock's observations, Gleeson CJ, Gummow and Hayne JJ added: "what in respect of a particular contract comprises 'business commonsense', as an apparently objectively ascertained matter, may itself be a topic upon which minds may differ and in respect of which an imputed consensus is impossible"."*

iii. In ***Optus Vision Pty Ltd v Australian Rugby Football League Ltd*** [2004] NSWCA 61 Santow JA [with whom Meagher JA and Stein AJA agreed] at [22] referred with approval to what the trial judge had said concerning the observations of the High Court in ***Royal Botanic Gardens and Domain Trust v South Sydney City Council*** (2002) 186 ALR 289 at 292–3:

*"In **Codelfa [Construction Pty Ltd v State Rail Authority of New South Wales** (1982) 149 CLR 337], Mason J (with whose judgment Stephen J and Wilson J agreed), had referred to authorities [[i]n particular, speeches of Lord Wilberforce in **Prenn v Simmonds** [1971] 1 WLR 1381 at 1383–1385 [1971] 3 All ER 237 at 239–241; **L Schuler AG v Wickman Machine Tool Sales Ltd** [1974] AC 235 at 261; and **Reardon Smith Line Ltd v Yngvar***

> ***Hansen-Tangen*** *[1976] 1 WLR 989 at 995–997 [1976] 3 All ER 570 at 574–576] which indicated that, even in respect of agreements under seal, it is appropriate to have regard to more than internal linguistic considerations and to consider the circumstances with reference to which the words in question were used and, from those circumstances, to discern the objective which the parties had in view. In particular, an appreciation of the commercial purpose of a contract:*
>
> *"presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating" [citing* ***Reardon Smith Line Ltd v Yngvar Hansen-Tangen*** *[1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574].*
>
> *[cf* ***Toll (FGCT) Pty Limited v Alphapharm Pty Limited*** *(2004) 219 CLR 165 at 179 [40]].*

iv. Such statements exemplify the point made by Brennan J in his Judgment in Codelfa at 401:

> *"The meaning of a written contract may be illuminated by evidence of facts to which the writing refers, for the symbols of language convey meaning according to the circumstances in which they are used."*

v. Santow JA at [23] continued:

> *"To this I would add the observation of Lord Steyn, writing extra-judicially on "The Intractable Problem of the Interpretation of Legal Texts" (2003) SLR 1 at 7. After pointing to the shift from literal to purposive interpretation, he adds the caveat that it would be an oversimplification to say that there has been a homogenous shift towards a purposive interpretation of all legal texts. Nonetheless he says: "In a network of contracts governing a construction project, parties ought generally to be able to rely on the obvious meaning of the interlocking texts".*

vi. More recently these principles have been affirmed by the Court of Appeal in terms of the proposition that even if evidence of surrounding circumstances is admissible it cannot be used to construe a meaning to the document that is contrary to the express language : cf ***Ryledar Pty Ltd v Euphoric Pty Ltd*** (2007) Aust Contract R 90-254; [2007] NSWCA 65 where Tobias JA affirmed the approach of Palmer J at first instance, quoting his Honour as follows (at [108]-[109]):

> *"However, that does not mean that when the Court begins the task of construction it puts the words of the document aside and endeavours first to ascertain the commonly known factual context and purpose of the transaction, often only by resolving a strenuous contest between the parties. The Court does not, once it has found the commonly known factual context and purpose, then look at the words of the contract and, if they do not readily accommodate the context and purpose so found, force them to do so by a process of interpretation.*
>
> *When the Court is construing a commercial contract, it begins with the words of the document: there it often finds expressed the factual context known to both parties and the common purpose and object of the transaction. But the court is alive to the possibility that what seems clear by reference only to the words on the printed page may not be so clear when one takes into account as well what was known to both parties but does not appear in the document. When that is taken into account, the words in the contract may legitimately have one or more of a number of possible meanings. It is then the Court's task to identify which of the possible meanings represents the parties' contractual intention.*
>
> *However, when a party to a contract argues that the known context and common purpose of the transaction gives the words of the contract a meaning which, by no stretch of language or syntax they will bear then, in truth, one has a rectification suit, not a construction suit.*
>
> *That is the case here ...*
>
> ***[109]*** *In my opinion his Honour's approach articulated in the foregoing paragraphs of his judgment is unexceptionable."*

vii. Hence I take it as axiomatic that:

- the Court endeavours to give primacy to unambiguous words used in a written contract, this matter generally being approached in the manner outlined by McColl JA in ***Peppers Hotel Management***, supra;
- the proper approach seeks "*the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably been available to the parties in the situation in which they were at the time of the contract*" (***Maggbury Pty Ltd v Hafele Australia Pty Ltd*** (2001) 210 CLR 181 at 188 citing Lord Hoffmann; ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 at 912; [1998] 1 All ER 98 at 114; ***Peppers Hotel Management Pty Ltd,*** supra at [66] et seq;
- commercial contracts should be construed so as to be given a sensible commercial operation: ***Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd*** (1968) 118 CLR 429 at 437; ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** (1973) 129 CLR 99 at 109; *Hide* ***and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*** (1990) 20 NSWLR 310 at 313-4; ***Vodafone Pacific Ltd v Mobile Innovations Ltd*** [2004] NSWCA 15 per Giles JA at [64].

The parole evidence rule

27 In the circumstance that the words of a contract are clear and unambiguous such that the language has a plain meaning, the parol evidence rule operates to exclude from the construction of the Agreement:

a) Evidence of the parties' subjective intentions. In ***Brambles Holdings Ltd v Bathurst City Council*** (2001) 53 NSWLR 153, Heydon JA stated (at 164):

> *"…the construction of a contract is an objective question for the court, and subjective beliefs of the parties are generally irrelevant in the absence of any argument that a decree of rectification should be ordered...".*

b) In *Brambles* Heydon JA stated (at 163):

> *"…pre-contractual conduct is only admissible on questions of construction if the contract is ambiguous and if the pre-contractual conduct casts light on the genesis of the contract, its objective aim, or the meaning of any descriptive term: Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 347-352."*

c) In *Brambles* Heydon JA stated (at 164):

> *"Post-contractual conduct is not admissible on the question of what a contract means a distinct from the question of whether it was formed".*
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> [See also ***Sportsvision Australia Pty Ltd v Tallglen Pty Ltd*** (1998) 44 NSWLR 103 per Bryson J at 115-116; affirmed ***Magill v National Australia Bank Ltd*** [2001] NSWCA 221 at [51]]

The general test of objectivity and the agreed rulings to objections

28 Nothing in the above authorities suggest anything otherwise than that in dealing with the instant construction issue, the general test of objectivity remains pervasive: cf ***Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*** (1988) 18 NSWLR 540 at 549 per Gleeson CJ, citing Lord Diplock in ***Gissing v Gissing*** [1971] AC 886 and in ***Ashington Piggeries Ltd v Christopher Hill Ltd*** [1972] AC 441 at 502.

The principles concerning rectification

29 Dealing with rectification the principles have very recently been closely addressed in the decision of the Court of Appeal in ***Ryledar.*** The principles there examined are adopted for the purposes of principled approach to the issues, both evidentiary as well as substantive, raised in these present proceedings. It is reasonable to firstly note the convenient summary of their Honours observations appearing in the headnote:

i. The common intention that is required for a grant of rectification is subjective. Proof of the subjective intention of the parties to the contract is fundamental to the grant of rectification. (Campbell JA, Mason P and Tobias JA agreeing);

ii. For rectification to be granted where the parties have purposely and deliberately chosen the words of their contract, there must be clear and convincing proof that the parties held a common intention which is contrary to those words and that those words were chosen by mistake. It is less likely that the parties were mistaken as to the meaning of the words where they are clear and unambiguous, or where they had a common intention which was fundamentally inconsistent with the words they had deliberately employed. (Tobias JA, Mason P and Campbell JA agreeing);

iii. The Court cannot simply ignore the parties' true intention and rely solely upon the relevant common intention being established by correspondence and/or conduct. The whole of the objective and subjective evidence must be considered for the purpose of determining whether the party claiming rectification has established the actual and true common intention of the parties by clear and convincing proof. (Tobias JA, Mason P and Campbell JA agreeing).

The type of the intention relevant to rectification

30 In examining the type of intention relevant to rectification, Campbell JA observed as follows:

> "**[267]** By contrast, the type of intention that is relevant to rectification of a contract is the subjective intention — sometimes called the actual intention — of the parties.
>
> **[268]** In ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337 at 346 Mason J said:
>
> *The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included* ***was actually agreed upon;*** *with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it — it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention."* (Emphasis added)

Returning to parole evidence

31 In examining the admissibility of parole evidence Campbell JA further observed:

> *"**[269]** One way in which it can be seen that it is subjective intention that matters for rectification, concerns the evidence admissible in a rectification suit. Notwithstanding that the contract that it is sought to rectify is in writing, and notwithstanding the common law rule that parol evidence is not admissible to contradict a written agreement, parol evidence is receivable, in an action seeking rectification, to establish what was the intention of each of the parties to the contract:* ***Ball v Storie*** *(1823) 1 Sim & St 210 at 219 ; 57 ER 84 at 88;* ***NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd*** *(1986) 6 NSWLR 740 at 751 and 752;* ***Farrow Mortgage Services Pty Ltd (in liq) v Slade and Nelson*** *(1996) 38 NSWLR 636 at 642;* ***Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*** *(1995) 41 NSWLR 329 at 332 per Mahoney A-P;* ***Brambles***

Holdings Ltd v Bathurst City Council *(2001) 53 NSWLR 153 at 164, [27];* ***Green v AMP Life Ltd*** *[2005] NSWSC 370; (2005) 13 ANZ Ins Cas 90-124 at [172].*

[270] *It is also possible to have evidence from the draftsperson of the document stating what his or her instructions were, and that particular words were included in the document by mistake:* ***Mortimore v Shortall*** *(1842) 2 Dr & War 363 at 370 per Sir Edward Sugden.*

[271] *Lord Hardwicke explained why parol evidence was admissible in this way in* ***Baker v Paine*** *(1750)1 Ves Sen 456 at 457; 27 ER 1140 at 1141:*

How can a mistake in an agreement, be proved but by parol evidence? It is not read to contradict the face of the agreement which the court would not allow, but to prove a mistake therein, which cannot otherwise be proved …

[272] *Not only is parol evidence from the parties admissible to prove their intention, it is of considerable importance. In* ***Fowler v Fowler*** *(1859) 4 De G & J 250; 45 ER 97 Lord Chelmsford LC said, at 273 of De G & J, 106–107 of ER:*

Upon the question of rectifying a deed, the denial of one of the parties, that it is contrary to his intention, ought to have considerable weight. Lord Thurlow, in ***Irnham v Child*** *(1781) 1 Bro CC 92) says, "The difficulty of proving that there has been a mistake in a deed is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." And Lord Eldon,* ***in Marquis of Townshend v Stangroom*** *(1801) 6 Ves Jun 328), after observing that Lord Thurlow seems to say that the proof must satisfy the Court what was the concurrent intention of all the parties, adds, "And it must never be forgotten to what extent the Defendant, one of the parties, admits or denies the intention."*

[and see further as to the distinction between the evidence admissible upon construction as opposed to rectification: ***Codelfa Construction Pty Ltd v State Rail Authority of NSW*** *(1982) 149 CLR 337 per Mason J at 352;* ***Toll (FCGT) Pty Ltd v Alphapharm P/L*** *(2004) 219 CLR 165 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ at 178-179.]*

Outward expression of accord

32 Campbell JA dealt with this matter [at 273] and following. That analysis repays careful reading. Importantly His Honour observed as follows:

*"**[281]** In my view, when the fundamental requirement for granting rectification is a continuing common intention of the parties, it is of more assistance to concentrate on what is needed before an intention of the parties to a negotiation counts as a common intention. In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work — the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon, or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present purposes is that for a negotiating party to perform actions or say words from which the other party can gather his or her intention is itself a form of communication. Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since Joscelyne.*

[282] *Street J, in* ***Australasian Performing Right Association Ltd v Austarama Television Pty Ltd*** *[1972] 2 NSWLR 467 at 473 said:*

… the true principle involves finding an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other. On such facts there can be seen to exist objectively a consensual relationship between the parties.

[283] *That passage was adopted by Menzies J in the original jurisdiction of the High Court in* ***Hooker Town Developments Pty Ltd and Another v The Director of War Service Homes*** *(1973) 47 ALJR 320 at 323–4, who added, at 324:*

The consensual relationship there referred to is, I think, the common intention with which the document was executed.

[284] *The passage I have cited from Street J was also applied by Yeldham J in* ***Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*** *[1981] 1 NSWLR 429 at 430–431, who added, at 431:*

What many of the cases do make clear, however, is that the firm accord or common intention which must be established as a basis for rectification must be one that has been manifested in the words or conduct of the

parties and not merely one which remained undisclosed in the course of the negotiations. But this is a different thing from a requirement that the respective intentions must be communicated …

[285] *From the distinction that Yeldham J here draws between an intention being "disclosed" and being "communicated", it appears that he is restricting "communicated" to communicated by express statement.*

[286] *The passage from Street J was also adopted by Tipping J in* ***Westland Savings Bank v Hancock*** *[1987] 2 NZLR 21 at 30, who regarded it as supporting the conclusion that he drew, that*

… while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each party."

33 His Honour concluded as follows:

*"**[316]** For the reasons I have given, the common intention that is required to grant rectification is subjective. Even though there is a requirement for the intention to be disclosed before it can count as a common intention, that disclosure need not be by words that say in substance "this is my intention". The need for disclosure fills the role of being a limitation on the types of subjective intention that can be enforced through the remedy of rectification, or a limitation on the circumstances in which a subjective intention must exist before it can be enforced through the remedy of rectification. It still remains that proof of the subjective intention of the parties to the contract is fundamental to the grant of rectification.*

34 Hence the following propositions hold true:

i. For a party seeking to obtain a decree of rectification of the Agreement, it must adduce clear and convincing evidence that proves the document embodying the Agreement does not reflect the parties "common intention": ***Ryledar Pty Ltd v Euphoric Pty Ltd*** (2007) Aust Contract R 90-254; [2007] NSWCA 65 per Tobias JA at [151]; ***Pukallus v Cameron*** (1982) 180 CLR 447 at 452, 456; ***Maralinga Pty Ltd v Major Enterprises Pty Ltd*** (1973) 128 CLR 336 per Mason J at 349, 350.

ii. The requirement of common intention sets a very high standard. The Court of Appeal in ***Ryledar Pty Ltd v Euphoric Pty Ltd*** (2007) Aust Contract R 90-254; [2007] NSWCA 65 per Tobias JA at [122] recently approved Lord Denning's statement of the law in ***Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd*** [1953] 2 QB 450 at 461, that:

"In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by error wrote them down wrongly…".

iii. The plaintiff bears the onus of establishing that the true intention of <u>both</u> parties was something other than that recorded in the executed instrument and that the document was executed through some form of mistake: see ***Ryledar Pty Ltd v Euphoric Pty Ltd*** (2007) Aust Contract R 90-254; [2007] NSWCA 65 per Tobias JA at [122]-[130], per Campbell J at [129]; RP Meagher et al, *Meagher, Gummow & Lehane's, Equity: Doctrines & Remedies,* 4th Ed (2002) Butterworths LexisNexis [26-010]. Thus Campbell JA stated in ***Ryledar*** (at [251]):

"It is not sufficient to show that a written instrument does not represent the common intention of the parties -- as well, it must be shown what their common intention was: ***Slee v Warke*** *(1949) 86 CLR 271 at 281."*

iv. The second element of what a plaintiff must prove in a rectification suit is that the common intention was not given effect because of some mistake.

The evidence

35 The claim to rectification meant that it was necessary to permit into evidence a spectrum of material which otherwise would have been unlikely to have been admissible on any basis. In order to succeed on the rectification issue, the plaintiff was required to show that both parties intended, in their undertaking to the court of 8 December 2006, to commit to an arrangement whereby the third defendant would transfer to the plaintiff all the BBX dollars received in every case where the amount of BBX dollars received as part of the purchase price for the sale of the unit exceeded $100,000. For clarity, this alleged agreement will be referred to below as 'the non-elective agreement' in contrast to the agreement which the defendant alleges was made, in which they retained the power of election between the transfer of BBX dollars and putting money aside as an interim measure: 'the elective agreement'.

36 Extensive evidence was adduced by the parties both in relation to the events of 8 December 2006 and in relation to the subsequent events. The evidence included that adduced by the plaintiff from Ms Maude (group legal counsel for the plaintiff), Mr Glinatsis (a partner with the plaintiff's external solicitors - Kreisson) and Mr Simon Newport (the chief financial officer of the plaintiff). Mr Moore of counsel had not given evidence in these proceedings and was led by Mr Corsaro SC. However DOHM did not claim that any adverse inference should be drawn against Masterton by reason of the fact that, although Mr Moore had attended on 8 December 2006 and had played an important role in the drafting of the materials presented to the Court on that day, for obvious reasons he had not been in a position to give evidence whilst himself appearing in these proceedings.

37 In so far as evidence adduced from DOHM concerning the events of 8 December was concerned, DOHM adduced evidence from Mr Miles who had represented it during the negotiations in court on the day in question, Mr Miles being a partner with Donovan Oates Hannaford, the solicitors for DOHM. Additionally DOHM adduced evidence from Mr Hannaford who had given instructions by telephone to Mr Miles on the same day. He is the managing director of DOHM and is also a solicitor on the roll [although not currently practicing].

38 Additionally both parties adduced evidence of the communications which followed 8 December 2006, each seeking to obtain assistance from that material.

Assessment of witnesses

39 This is a case in which the assessment of witnesses provides limited assistance to the Court. Certainly where particular matters of reliability may be of significance, an attempt has been made in the reasons to treat with those matters.

40 It is not possible to hold that any of the four main witnesses did otherwise than attempt to give their best recollection of the relevant events. However this is not to suggest that such evidence required to be accepted.

41 Ms Maude did not appear to be an objective witness whose recollection was unaffected by her client's interest. That having been said, I accept that she did her level best to recall the events in respect of which she gave evidence.

42 Mr Glinatsis evidence was coloured by the fact that he had not only read Ms Maude's version of events before giving his own evidence, but had in fact *prepared* Ms Maude's affidavit. Nor was he prepared to accept what seemed to be the compelling logic of the situation, which was that a possible reason for the production of the second undertaking was the fact that his document no longer reflected the intention of the parties. That having been said, I accept that within the constraints under which his evidence came forward, he endeavoured to recall the events of the time as best he could.

43 Mr Hannaford was plainly mistaken about both DOHM's original intention to transfer $BBX to Masterton and also about the fact that DOHM had understood that such a transfer would be on a $BBX for $AUS basis. As counsel for DOHM conceded, Mr Hannaford was clearly shaken when the error of his recollection was made clear. However I accept that this fact does not alter the content of the post contractual correspondence in respect of which he was cross-examined so as to transform it into admissions from DOHM that it at all times considered itself obliged to transfer all $BBX without any option.

44 Mr Miles suffered from the difficulty that he was unable to say whether or not he had said to Ms Maude and Mr Glinatsis that Masterton could have all the BBX Dollars. He also had difficulty in providing a satisfactory explanation for having written the letter to Mr Glinatsis on 10 February 2007. Having said that, there is no doubt but that the evidence which he gave was coherent and that he presented as quietly but firmly putting forward his best recollection at the time. These matters notwithstanding, he may well, even if only subliminally, have favoured his client's interests on occasion.

Evidence of the plaintiff's intention

45 Direct evidence was adduced to indicate that Masterton, at least intended to enter into an agreement which did not permit DOHM an election, and that Masterton mistakenly believed [as of 8 December 2006] that this agreement was accurately recorded in the undertaking submitted to the court. Ms Maude and Mr Glinatsis, both of whom were representing Masterton at the December 8 negotiations, gave evidence that they understood the non-elective agreement to be the contract reached by the parties in the negotiations.

46 Mr Glinatsis gave evidence that:

"… *during our discussions I prepared a draft undertaking based on what I understood had been agreed to by Assunta Maude on behalf of the plaintiff and Mr Miles on behalf of the defendant*." [This evidence was admitted as to Mr Glinatsis' state of mind with regards to his own understanding of what the document in question represented]

47 This draft undertaking, as contained in Mr Glinatsis' handwritten notes, contained the following terms [exhibit P2]:

Note: The undertaking of the solicitor for the third defendant on behalf of the third defendant to the Court that in the event that any of the units in the schedule to the summons being [sic] sold the third defendant will:

a) cause the first and second defendant [sic] to assign and/or transfer to the plaintiff all BBX dollar credits received at the settlement of each unit sold provided that those credits are not less than BBX $100,000

b) set aside the sum of $60,000 from the proceeds received on the discharge of its first mortgage or the proceeds received from any mortgagee sale of each unit sold where the amount of BBX dollar credits received is less than BBX $100,000.

48 Mr Newport, the chief financial officer of the Masteron group, who was not present at the negotiations but was responsible on the day for instructing Ms Maude, also gave evidence that Ms Maude had informed him that the non-elective agreement proposal had been put. He left it to her to 'see what she could do'.

49 Masterton also sought to support its case by calling evidence that after the agreement, it had acted consistently with what it alleges to be the terms of the agreement, taking steps to ensure that BBX dollars received from the sale of the units could be assigned to and used by the plaintiff.

Evidence of DOHM's intention

50 Understandably, Masterton faced far greater difficultly when it came to establishing the intentions of DOHM to enter into the non-elective agreement. Generally, the evidence adduced by Masterton was indirect, in the sense that it sought to show why DOHM *might have* been inclined, on 8 December 2006, to consent to the terms of the non-elective agreement, or to suggest that an inference be drawn [from DOHM's actions subsequent to the date of agreement] that DOHM believed itself to be bound by these terms.

51 The evidence relied upon by Masterton includes:

i. Evidence that Mr Miles expressed the opinion during the negotiations that the BBX dollars were of no value to the third defendant [Ms Maude's affidavit of 8 March 2007 at paragraphs 17 and 26, Mr Glinatsis at transcript 69 at 30, 70 at 3. See also the cross-examination of Mr Miles (transcript pages 121 – 129) regarding his failure to respond to allegations that he had made such statements when they were put to him in letters sent on behalf of the plaintiff].

ii. Evidence that Mr Miles said, during the 8 December negotiations, that obtaining the consent of the first and second defendants to the proposed arrangement would not be a problem [Ms Maude in her affidavit of 8 March 2007 at 26, Mr Glinatsis: transcript 71 at 39].

52 Mr Miles denied having told Masterton's representatives that the BBX dollars were of no value to DOHM. Nor could he recall stating that the consent of the first and second defendants would not be a problem. He gave evidence that he considered it unlikely that he would have said this, as at the time of the December 8 negotiations he had not spoken to the representatives of either the first or second defendants about the proposed agreement.

53 Mr Miles also gave evidence that he was not familiar with the BBX dollar credits scheme at the time of the negotiations, and therefore would not have committed DOHM irrevocably to an agreement involving these credits. However when pressed in cross-examination, Mr Miles admitted that by December 2006 he had "*certainly probably heard about BBX dollars. I knew that they were some barter card system but I don't think I was really* (sic) *or that I had any specific knowledge or detailed knowledge about how they worked, what they were worth, how you got to use them, who got to use them, whether we could use them.*" [transcript 113 at 22]

Overview of the findings

54 It is certainly unusual to find that there are not less than four solicitors whose reliability requires to be assessed in terms of the events in question. Whilst in some circumstances the witnesses who gave evidence shared common ground, there were extensive differences in the evidence as to what had happened on 8 December and in relation to their recollections of what they had believed had been the agreement reached and what exactly had been said in the precincts of the Court.

55 As so often happens the Court receives assistance in terms of the objective indicators in the form of contemporaneous materials.

56 The value, particularly of the closest examination of the instrument to which the parties have acceded, was emphasised in ***Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd*** [1981] 1 ALL ER 1077 and like authorities: where reference is made to the "convincing proof" required "*to counteract the cogent evidence of the parties' intention displayed by the instrument itself*". As DOHM submitted, in most commercial disputes the best starting point is the documentary record of events, as the documents are not prone to the fallibilities of human memory.

57 Significantly, it is to be noted that the agreement was recorded as a note to short minutes of order, and that in addition to recording the agreement, the short minutes recorded:

a) that Masterton had provided the usual undertaking as to damages;

b) that the subject caveat be extended to 15 February 2007;

c) that the orders and undertakings were "by consent and without admissions".

58 Also of significance is the fact that whilst certainly the later correspondence between the solicitors was subjected to close examination, in the letter of 17 January 2007 from Mr Glinatsis to Mr Miles, paragraphs 2 and 3 were in the following terms:

i. As it [is] clear from the undertaking, your client was required to cause the first and second defendants to cause and/or transfer to our client [all] BBX dollar credits (net of commission) reserved at settlement of each units sold provided that those credits are not less than BBX $100,000.

On that basis, the total value of the BBX dollar credits that would be transferred to our client following settlement of all nine units would amount to BBX $900,000.

ii. Alternatively, paragraph 2 of the orders provided that BBX $60,000 [sic] be set aside from the proceeds received on the discharge of the first mortgage or the proceeds received from any mortgagee sale of each unit sold into a fund to be held until agreement between all the parties or until further orders.

On that basis following settlement of the nine units, the sum of BBX $540,000 would be set aside pending agreement or further orders.

59 It is plain from paragraph 3 that Mr Glinatsis himself in this post contractual document, recognised the *very* alternative for which DOHM contends in these proceedings. Masterton's case is that both Mr Glinatsis as well as Ms Maude [she having conceded that she would have approved the letter before it was sent] were mistaken in misstating their understanding of the agreement in this letter. I have difficulty in accepting that both of these solicitors could have been mistaken on a matter is important as this, in circumstances where the solemnity of an undertaking to the Court constituted the subject matter of this correspondence.

60 On my assessment it seems plain from the evidence given by Ms Maude that she, at least by the time she was giving evidence, was totally convinced that on 8 December 2006 the agreement for which Masterton contends had been reached: as I understood it, there being no buts, ifs or maybes about the matter. Yet her evidence suffers from the difficulty that she contended that the parties had on the day in question, *finalised* their dispute. That evidence suffered from the problem that she was unable to explain why, if the agreement had *finalised* the

dispute between the parties, there had been included in the orders the undertaking as to damages or the statement that the orders were made "without admissions". In an endeavour to treat with this matter Ms Maude did refer to practical things which had to happen, including for example matters such as particular contracts having to be exchanged and withdrawals of caveats having to be prepared and similar. However the fact remains that the express words of the undertaking given to the Court, *nowhere* recognize any arrangement whereby the proceedings were settled. This is an important issue because so much of the plaintiff's case depends upon the evidence given by Ms Maude. Missing from the undertaking is any formula capable of being utilized to 'settle' the whole of the proceedings.

The Glinatsis draft

61 A further consideration taken into account is the fact that the draft proposal prepared by Mr Glinatsis during the morning of 8 December 2006 [reproduced above] was not ultimately used by the parties to represent their final agreement.

62 The particular differences between this document, and the form of the undertaking written up by Mr Moore and handed up in court concern:

i. the use in the ultimate undertaking of the words *'will either'* which precede sub paragraph (a);

ii. the use in the ultimate undertaking of disjunctive 'or' which appears at the end of sub paragraph (a).

63 I am conscious of the fact that Mr Moore [instructed by Ms Maude and Mr Glinatsis] and Mr Miles negotiated the terms of the undertaking later filed in court and that there is no evidence that the draft prepared by Mr Glinatsis was ever shown to Mr Miles. Notwithstanding these matters there is substance in the proposition put by Mr Ashhurst that there appears at some stage during the negotiations, to have been a shift *within the Masterton camp*, from the pursuit of the format prepared by Mr Glinatsis. The matter may be of little moment as Mr Miles was never shown this draft. In other circumstances [and had the draft been communicated to Mr Miles] the matter may have achieved far more significance bearing in mind the observations by Mason J [in *Codelfa* at 352-353] to the effect that there may be a situation in which evidence of the actual intention of the parties should be arguably allowed to prevail over their presumed intention. As his Honour put it:

"If it transpires that the parties have refused to include in the contract a provision which would give effect to the presumed intention of persons in their position it may be proper to receive evidence of that refusal. After all, the court is interpreting the contract which the parties have made and in that exercise the Court takes into account what reasonable men in that situation would have intended to convey by the words chosen. But is it right to carry that exercise to the point of placing on the words of the contract a meaning which the parties have united in rejecting? It is possible that evidence of mutual intention, if amounting to concurrence, is receivable so as to negative an inference sought to be drawn from surrounding circumstances".

Evidence regarding post contractual conduct and alleged admissions

64 As already mentioned in these reasons, Masterton sought to take advantage of what were said to be post contractual admissions made by DOHM. It adduced evidence which allegedly demonstrated that DOHM, during the weeks immediately subsequent to the December agreement, engaged in various attempts to avoid or circumscribe its alleged obligation to transfer all BBX dollars received on sale of the units. These attempts to circumvent the obligation constitute, on Masterton's case, an admission that such an obligation existed, and could not simply be avoided by means of an election to set aside $60,000 into an interim fund. This post contractual conduct includes a letter sent on 10 January 2007 from Mr Miles to the plaintiff's representatives, which contained the following:

We refer to the orders made by the Court on 8 December 2006 and the undertaking given on behalf of the Third Defendant. We wish to clarify that your client is to receive BBX dollars from the sale of any units in the security development as set out in the undertaking but subject to your client not receiving any more BBX dollars than is sufficient to pay the outstanding debt due to your client.

On our calculations, it appears that your client's debt will be paid once it received approximately BBX $420,000. Would you please urgently confirm this to be the extent of your client's debt.

65 Similarly, Masterton relied upon evidence that DOHM took steps on or around 19 December 2006 to prevent the sale of units going ahead. Masterton alleged that such actions were taken because DOHM was aware that, should such sales go ahead, it would *be bound* to transfer the BBX dollars received from the sales to Masterton. This allegation was denied by Mr Hannaford on cross-examination [transcript 186 at 26].

66 Masterton also relied on a letter sent to DOHM on 21 December 2007 which set out Masterton's understanding of the 8 December agreement in terms which, Masterton maintains, did not allow for DOHM's election. On the evidence, DOHM failed to respond to refute the statements made in this letter. The letter was sent by Ms Maude in response to a telephone conversation with Mr Hannaford, and includes:

We refer to our telephone discussion with you today and confirm that in accordance with the Orders made in the Supreme Court on 8 December 2006, Masterton Homes is entitled to receive the net trade dollars on the settlement of the sale of each of the units at the above address. In this instance the balance represents the 30% portion of the purchase price less any entitlement of the agent to a portion of the trade dollars as commission.

Close distinctions to be observed when reliance is placed upon so-called 'post contractual admissions'

67 When considering these alleged post contractual admissions made by DOHM in terms of the proper construction question, an important distinction requires to be observed. While certainly in the present state of the authorities

which bind a court of first instance, post contractual conduct is not admissible on the question of what a contract means, it is otherwise where the issue concerns whether communications between parties have given rise to a binding contract at a particular point in time: cf ***Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd*** (1979) 1 BPR 9,251 at 9,7023 per McLelland J at 9255 citing ***B Seppelt & Sons Ltd v Commissioner for Main Roads*** (1975) 1 BPR 9147 [907011] Glass at 9149 and Mahoney JA at 9154 - 6.

68 McLelland J in ***Film Bars*** went on to make the following observations:

"However, consistently with what has already been said, the probative value of such subsequent communications must be found in the light they throw on the proper interpretation of the earlier communications alleged to constitute the contract. They may, for example, show that at the time of the allegedly contractual communications there were other, uncompleted negotiations between the parties concerning matters omitted from the allegedly contractual communications, in the light of which the allegedly contractual dealings could not properly be interpreted as mutual assents to be bound….

More commonly, perhaps, such subsequent communications may be legitimately used against the party as an admission by conduct of the existence or non-existence, as the case may be, of a subsisting contract….

Admissions by a party of the existence or non-existence of a contract, or of a fact relevant to that issue, are admissible against a party, but their probative force will usually vary inversely with the strength of the available direct evidence of the matters in question.

It is hardly necessary to add that if allegedly contractual communications, properly interpreted, do amount to a contract, that contract cannot be destroyed by subsequent communications not amounting to a rescission thereof…"

69 Nor must one lose sight of the fact that this is a case where both parties accept that they did reach a form of agreement and the issue is as to what precisely was that agreement: an issue to be decided either by a construction route or a rectification route. It is plain that post contract communications are admissible in the determination of *what contract* was entered into.

70 I accept that the conduct said to amount to an admission of the types of contract for which the parties respectively contended requires to be carefully weighed.

71 In the present circumstances this leads to an examination of the strength of the available direct evidence of the matters in question. On the one hand, there is direct evidence of the very words used in the undertaking and handed to the court. The natural meaning of those words assists the case made by DOHM.

72 On the other hand it is true that the correspondence before the court shows that DOHM was, at one time, considering complying with clause 1 (a) of the undertaking: however that circumstance does not amount to unequivocal conduct which would indicate that it had no option to comply with clause 1 (b) if it later chose to do so. Further DOHM is correct in its submission that the fact that DOHM did not on occasion respond to the letters from Masterton's solicitors alleging conduct that was contrary to the express terms of the agreement, whilst certainly curious, may be explained away in a number of ways.

73 At the end of the day the probative value of the so-called 'admissions' are of little real assistance in terms of a determination of what were the terms of the agreement reached on the occasion in question. And if the truth be known, the post contract communications from both parties suffered from difficulties of a similar nature-mistakes having being made in each camp.

Correction of mistakes by construction

74 During his submissions Mr Corsaro sought to suggest what he contended was a *slightly* different way of reading the very same words as had been included in the undertaking:

"It is important to understand that it is "either or" in this sense: It is either going to go along this basis or it is going to go along this basis, but the basis, the course which is going to be chosen, depends on whether the sale involves a sale of BBX dollars of more than $100,000.

Can I read it a slightly different way using exactly the same words. (a) reads as follows: "Provided that the BBX credits in the sale are more than $100,000, then the first and second defendants will cause the BBX dollars to be assigned or where the BBX dollars are not less than $100,000 then the fund is going to be set up." There's the "either or", your Honour.

So we say that really there is no ambiguity. It is an 'either or' because the 'either or' is going to be determined by the nature of the sale." [transcript 203]

75 This construction places emphasis on the proviso in (a) and construes the word "or" at the end of (a), as meaning "*or in the absence of the proviso*." It constitutes an attempt by Masterton to persuade the Court to construe the undertaking so as to remove the effect of the words "either" and "or" that had been inserted by the parties because these words were clearly mistakes.

76 It is trite that the Court has power to construe a document in the manner suggested if the word is clearly a mistake: ***Fitzgerald v Masters*** (1956) 95 CLR 420 and ***Nittan (UK) Ltd v Solent Steel Fabrication Ltd t/as Sargrove Automation*** (198)] 1 Ll L Rep 633.

77 As DOHM has contended:

i. such instances of construction to cope with mistakes arise where the offending words (or lack of them) causes "absurdity or inconsistency" [***Fitzgerald*** at 426-427] or where the clerical error is obvious [***Holding & Barnes Plc v Hill House Hammond Ltd (No.1)*** [2002] L & TR 7 (CA)].

ii. Where however the mistake is to the legal effect of a phrase or clause, rather than in the words themselves, then the remedy must be that of a rectification suit [***North Eastern Railway Company v Lord Hastings*** [1900] AC 260; ***Ryledar Pty Ltd v Euphoric Pty Ltd*** (2007) Aust Contract R 90-254 at [108] – [109] and ***AMEC Engineering Pty Ltd v Shanks*** [2001] SASC 257 at [23]].

78 The Masterton proposition clearly also suffers from the fact that Ms Maude gave evidence that she may have well said *the exact words* that appear in final form of the Undertaking.

Conclusion

79 Ultimately the proceedings require to be determined by a principled approach to the respective cases. Many of these cases present real difficulties to the court particularly where, as here, witnesses called by the plaintiff give evidence of such strong beliefs as to the spirit and intent of the negotiations and of their not having been a shadow of a doubt that the non-elective agreement was reached.

80 Masterton has simply not discharged the onus of proof which lies upon it to prove its case.

81 The undertaking does not yield to the construction for which Masterton contends. The rectification claim fails the requirement that there be clear and convincing proof that the parties held a common intention contrary to the words of the instrument. Whilst it seems clear that DOHM intended to pursue the route provided for in sub clause (a), this was not, when one reads the instrument, ultimately mandatory. And the claim that the instrument was really only part of a partially written and partially oral contract is not made out.

82 For all the morass of evidence and all the heat of the respective cross examinations, the task of the Court is to quietly and carefully stand back from the whole of the matter and to assess the strengths and weaknesses of the respective cases. Having attended to that exercise the holding is that Masterton's case has not been made out and requires to be dismissed.

Short minutes of order and costs

83 The parties are to bring in short minutes of order on which occasion costs may be argued.

Mr F Corsaro SC, Mr G Moore (Plaintiff) : instructed by Kreisson Legal
Mr M Ashhurst SC, Mr S O'Brien (Third Defendant) instructed by Donovan Oates Hannaford