

A MISTAKE CAN BE FINAL

ROWALLAN GROUP LIMITED-V- EDGEHILL PORTFOLIO

The Message: Mistakes in documentation need to be avoided as they cannot easily be corrected once the deal is done.

The Case: A property purchaser has secured a price reduction as a result of a mistake in the drafting of the contract (Rowallan Group Limited-v-Edgehill Portfolio No 1 Limited (19/1/2007)).

The Claimant was the leasehold owner of a successful retail and leisure centre known as The Kursaal in Southend-on-Sea. The landlord is Southend-on-Sea Borough Council and it granted the lease in 1998 in return for a premium of £650,000 to be paid by 10 annual instalments of £65,000 on 24 April in each following year.

The Claimant spent a considerable sum on renovating and developing the centre and, following the grant of sub-leases, it instructed CBRE in 2005 to sell the Lease. The marketing brochure sought offers in excess of £16 million and required any purchaser to pay the 4 outstanding instalments due to the landlord. The Claimant had, in fact, agreed with the landlord to pay these annual instalments by monthly payments in arrear during each year but this arrangement was not disclosed to any party.

In February 2006, the Defendant offered £16.1 million on the basis that the Claimant would pay the outstanding instalments. This offer was rejected and terms were then agreed for the Defendant to pay £16.3 million plus the instalments. These terms were clearly set out in Heads of Terms that were finalised in March 2006.

Exchange of contracts was delayed for various reasons and did not take place until 19 May 2006. The Defendant's solicitors queried on a number of occasions whether the instalment due on 24 April 2006 had been paid but received no response from the Claimant's solicitor. Despite what had been previously agreed, the Defendant's solicitor sought to amend the draft contract at the last moment to provide for the Claimant to confirm it had paid this instalment before completion of the sale and, by mistake, this amendment was agreed by the Claimant and its solicitor.

The mistake came to light before completion and the Defendant withheld £65,000 from the purchase price to cover the instalment it claimed the Claimant was liable to pay. The Claimant sought rectification of the contract so that it could recover this sum. It claimed it was obvious from the Heads of Terms that a mistake had been made and that the Defendant knew, or should have known, that the Claimant would never have agreed to accept liability for this payment.

In the absence of a mutual mistake, rectification is only possible if it can be shown that the other party intended, knew or ought to have suspected that a mistake had been made. The Defendant argued that, since it was unaware of the arrangement with the landlord to pay the

instalment monthly in arrear, it assumed the payment had been made in full on 24 April 2006 and that the Claimant had agreed to meet this cost.

The Claimant's solicitor argued that it was only intended to be agreed that the Claimant had to have made all payments up to 23 April 2006 and, since the Defendant had not sought a price reduction, it must have been apparent that a mistake had been made in agreeing the amendment to the contract. In essence, the Claimant alleged that the Defendant had deliberately obtained a benefit it knew it could never have achieved by negotiation.

The Court considered there had been no sharp practice by the Defendant. The effect of the amendment was plain and obvious and there was no need for the Defendant to make clear that it wanted a price reduction. The Defendant's solicitor had queried whether the instalment had been paid, and was unaware of the arrangement with the landlord, and there was no reason for him to know that a mistake had been made or that the Claimant's solicitor had failed to appreciate the effect of the change he had agreed to.