Neutral Citation Number: [2019] EWHC 1567 (Ch)

Case No: E30CF027

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
PROPERTY TRUSTS AND PROBATE LISTS (Ch D)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF642UA

Date: 19 June 2019

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

SEAFOOD SHACK LIMITED	**Claimant**
- and -	
ALAN DARLOW	**Defendant**

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- -

Mr Owen Prys Lewis (instructed by **Robertsons Solicitors**) for the **claimant**
Mr Samuel Shepherd (instructed by **Harding Evans Solicitors**) for the **defendant**

Hearing dates: 18 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. By a lease (the lease) dated 7 February 2017 the defendant, Mr Darlow, demised premises (the premises) at 5A High Street Cardiff to Seaford Shack UK Ltd (SSUKL) for a term of 25 years. It is common ground that no such company existed then or since. The claimant company (SSL) was incorporated in May 2016. Its wholly owned subsidiary Seaford Shack (Cardiff) Ltd (SSCL) was incorporated in November 2016. The sole director and shareholder of SSL at the time of incorporation was Darryl Kavanagh. He appointed Terry Rogers as the sole director of SSCL at the time of its incorporation. In the event, it was the latter company which traded from the premises as a seafood restaurant, but that went into liquidation and by notice of disclaimer dated 23 January 2018 the liquidators disclaimed any interest in the premises on its behalf. Mr Darlow resumed possession. SSL claims that the lease should be construed so as to refer to it as tenant, or should be rectified to do so, and claims damages from Mr Darlow for taking repossession unlawfully. Mr Darlow denies each of those claims. By order dated 9 April 2019, HH Judge Keyser QC ordered that four issues be tried as preliminary issues, and it is with those issues that this judgment is concerned.

2. The issues are:

   i) Whether, on the true construction of the lease, SSL was a party to the lease;

   ii) Whether, if rectification be required to show SSL as a party to the lease, rectification ought to be granted;

   iii) Whether the re-taking of possession of the premises by Mr Darlow on or about 29 December 2017 was lawful;

   iv) Whether SSL is entitled to possession of the premises.

3. The background is largely uncontentious. Mr Darlow instructed a firm of chartered surveyors Emmanuel Jones to market the premises and David Williams of that firm dealt with it. In the Autumn of 2016, he and Mr Kavanagh, who was then based in the Republic of Ireland, negotiated terms and eventually agreed heads of terms.

4. Mr Williams drew up a memorandum of heads of terms dated 12 October 2016. These were emailed to Mr Kavanagh by Mr Williams on 17 October. After a discussion between them on 28 October, there was an email exchange between them later that day. At about 1pm Mr Williams emailed what he referred to as "final heads of terms." which gave the tenants details as "Seafood Shack UK Limited C/O DPC Vernon Road Stoke on Trent ST4 2QY." In that document, Mr Darlow's solicitor was identified as Timothy Russen of Jacklyn Dawson and that of the tenant as Mark Walsh of Kenny Stephenson Chapman in Waterford.

5. Mr Williams in that email said that Mr Darlow needed to sign off and asked Mr Kavanagh to confirm that they could proceed. Mr Kavanagh in cross examination accepted that he realised that the purpose of this email was to see if the heads of terms were acceptable to him. He said that he sent them to his solicitor but gave no clear reason why the mistake was not picked up then.

6. About 15 minutes after receiving that email, Mr Kavanagh replied by email saying, "I can confirm that we will be proceeding as per the terms attached…" whereupon Mr Williams forwarded the final terms to Mr Darlow and to Mr Russen by email, in which the attachment was described as "Seafood Shack-5a High Street."

7. About 45 minutes after that, Mr Williams emailed Mr Kavanagh again saying this:

> "Just one thing the client has raised and he has asked can instead of 6 months rent free rent be paid half ie £25,000 over the first year. Also in regard to the company Seafood Shack Ltd is a shell company as such is there another company or personal guarantee you can offer?"

8. Mr Williams did not file or give evidence. That reference to SSL was the only such reference in the documentation surrounding the execution of the lease. Mr Kavanagh was asked in cross-examination how he responded to that email and said that he thought he telephoned Mr Williams to say that as he was spending a great deal of money on the premises, and that should be enough by way of comfort, and understood that that position was accepted. Mr Darlow in cross examination said that he recalls reference prior to execution of the lease to SSUKL but not to SSL or SSCL. He thought that guarantees were asked for but could not recall details.

9. On 24 November 2016, Mr Russen emailed Mr Walsh with the subject "5A High Street, Cardiff-Darlow to Seafood Shack UK Ltd." He said that he understood that Mr Walsh would be acting on behalf of the tenant and enclosed documentation including a draft agreement for lease and draft lease. These identified the tenant as SSUKL and gave the same address. Mr Kavanagh accepted in cross-examination that he looked at these documents and said that it must have been an oversight that the mistake was not then spotted.

10. By email dated 19 December to Mr Russen which was headed "Our Client: Seafood Shack UK Limited," Mr Walsh enclosed the execution page of the lease in duplicate, the original of which he said would follow in the post later, on the basis, amongst other things, that "the directors of the tenant authorised Darryl Kavanagh to execute the lease for and on its behalf."

11. By email dated 4 January 2017 in reply, Mr Russen acknowledged receipt of the original lease and asked for confirmation of Mr Walsh's client's address and company registration number for insertion in the lease. Mr Walsh replied by email dated 9 January confirming the name and address set out in the draft. During his oral evidence, Mr Kavanagh confirmed that at the time SSL and SSCL shared that registered address. No company registration number for SSUKL was provided by Mr Walsh, and the space for the number in the draft remained blank upon execution.

12. It was not until August 2017 that the issue of the tenant's name was taken up. By an email dated 23 of that month to Mr Walsh, Mr Russen said this:

> "You will recall that we completed the lease for the above premises on 7th February this year. Your client was Seafood Shack UK Ltd. The agent has now telephoned to say he can find no evidence of this company at Companies House. Is it a

> company registered in Ireland? If so can you please supply the registration number. If not in whose name should the lease have been taken? We will then have to put it right."

13. SSL and Mr Kavanagh then instructed a different solicitor, Julian Hamilton-Barns to deal with the matter. Mr Russen was copied into an email dated 17 October 2017, in which Mr Hamilton-Barns confirmed his instruction and said:

> "As part of my wider review of the business I note that the lease between your client Alan Darlow and [SSL] is actually in the name of Seafood Shack UK Limited, which is a company that has not been formally registered. I suspect that this was an oversight when the lease was put into place. As a consequence it will probably prove to be impossible to register the lease at HMLR, but whatever the position, the matter needs to be rectified with SSL being the Lessee."

14. Mr Russen took instructions and then sent out a draft lease naming SSL as tenant, but otherwise with the same commencement date and terms as the lease. That was returned, incorrectly executed, at the beginning of December 2017.

15. In the meantime, there had been meetings between Mr Kavanagh, Mr Hamilton-Barns and Mr Rogers. By this time Mr Kavanagh and two others had been appointed directors of SSCL alongside Mr Rogers. Mr Kavanagh says that he became uneasy during these meetings, to use his phrase, and instructed yet another solicitor, Paul Simon of Thomas Simon Ltd to deal with the lease matter.

16. On 27 December 2017, Mr Hamilton-Barns had a telephone conversation with Mr Darlow, having been unable to contact Mr Russen because of the holiday period. A few minutes later he sent an email to Mr Darlow in which he copied in Mr Russen. He said that he acted on behalf of SSCL which was insolvent to the tune of over £800,000 and the plan was to place it into administration and to sell the business and assets. The letter continued:

> "Darryl Kavanagh wants the lease to be completed in the name of…SSL, in which case he can ditch SSCL and then start a phoenix operation some time in the new year disregarding the rights of all of the SSCL creditors. My suggestion is that a new lease is granted to the buyer of the SSCL…business and assets."

17. In his witness statement, Mr Kavanagh says that on 29 December 2017, he was phoned by an investor who told him that Mr Rogers had changed the front door codes of the premises and had barred the back doors, thus preventing access to staff and deliveries.

18. On 2 January 2018, SSCL was wound up and joint liquidators appointed. In an email the same day, Mr Simon informed Mr Russen of this and continued that SSCL had "…ceased occupancy of the property and there does not need to be any further communication with either the company or their legal advisor Mr Hamitlon-Barns."

He added that the rent had been paid to date and wanted to know what the position was about securing the formal lease to SSL.

19. In reply the next day Mr Russen attached a draft of the lease which had been signed by Mr Kavanagh and sent to him by Mr Hamilton-Barns. He added that he thought the extent of the demise premises might be wrong and had asked Mr Williams to send a plan.

20. After the notice of disclaimer by the liquidators of SSCL, Mr Darlow says in his witness statement that he inspected the premises and found them abandoned. He says that he was told by the liquidators that staff had been dismissed without receiving wages, and that taken with the fact that according to him he had only received part of the rent and no insurance payments, prompted him to instrcut bailiffs to change the locks. Thereafter, Mr Russen on his behalf indicated to Mr Simon that he did not wish to proceed to grant a lease to SSL. There is now a new tenant in occupation.

21. Mr Prys Lewis on behalf of the claimant invites me to make several findings of fact. The first is that during the negotiations for a lease it was intended that the tenant would be an existing company. Mr Darlow accepted as much, and I so find.

22. The second and third findings I am invited to make are more problematic. The second is that it was not the intention of either side that the tenant would be SSCL. Mr Kavanagh's evidence was that that was always intended to be the trading company, but Mr Darlow's evidence was that he had not heard of SSCL until much later. The third is that during such negotiations, Mr Darlow knew of the existence of SSL. In this regard Mr Prys Lewis relies heavily upon the last email of his agent Mr Williams on the 28 October 2016, in which he uses the name SSL.

23. However, that email comes very quickly after Mr Kavanagh had confirmed that he would be proceeding with the name of the tenant as SSUKL. In reply, Mr Williams says his client had raised "just one thing" and that related to the rent free period. He then goes onto to say that as "Seafood Shack Ltd" was a shell company and asked whether there was another company or personal guarantee. If Mr Williams had then realised in some way that the tenant was to be SSL, it is somewhat surprising that he did not expressly point out or ask for confirmation that the name of the tenant in the head of terms should be changed to SSL.

24. Also relevant in this regard is Mr Russen's email in August 2017 when the issue was first expressly raised. The fact that Mr Williams had searched at Companies House for the company SSUKL suggests that he remained under the impression that that was the intended tenant. Moreover, the fact that he did not provide Mr Russen with the simple explanation that SSL had been the intended tenant from the outset, or indeed at any point, strongly suggests that he did not know. Rather, Mr Russen was left to ask Mr Walsh whether SSUKL was registered in Ireland and if not in whose name the lease should have been taken.

25. In my judgment the more likely explanation for the use of the name of SSL in Mr Williams' email of 28 October 2016 is the co-incidental use of shorthand or a slip in leaving out the letters "UK." His reference to a shell company does not take matters very much further given that that there is no suggestion that there was another company in the picture as a potential tenant which was other than a shell company.

26. Accordingly, on these points, I find that although Mr Kavanagh may have intended the tenant to be SSL, Mr Williams and Mr Darlow did not know prior to or upon execution of the lease of the existence of SSL or SSCL. To that extent I accept Mr Darlow's evidence that SSUKL was the only company of which he was aware at the time as a potential tenant.

27. The fourth finding I am invited to make is that it did not matter to Mr Darlow whether the name of the tenant included the initials "UK" or not. At one stage in cross-examination he appeared to accept this, although then drew back from doing so by saying that as SSUKL was the only company he knew about, that was the company which he intended as tenant. However, in my judgment the presence or absence of those initials did not at the time of negotiation and execution of the lease make any difference to Mr Darlow. He was aware that the potential tenant was a shelf company, and although a query was raised about another company or guarantees, on the evidence before me that was not pursued. In my judgment this is an appropriate finding on the evidence.

28. Having made those findings of fact, I know turn to the law. Points of law were dealt with in the skeleton argument of Mr Shepherd for the defendant, which was handed to me just as I was about to come into court. Mr Prys Lewis did not file one, but indicated orally that the principles to be applied were not in dispute.

29. The question of the extent to which mistakes in a written document can be cured by the proper construction of the document has been the subject of several authorities in the UK, including of the highest courts.

30. In *East v Pantiles* (*Plant Hire*) *Ltd* [1982] 2 EGLR 111 at 112, Brightman LJ, as he then was, stated the conditions for what he called correction of mistakes by construction:

> "It is clear on the authorities that a mistake in a written instrument can, in limited circumstances be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied, then either the Claimant must pursue an application for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention."

31. In *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336, Carnwath LJ, as he then was, added two qualifications to those conditions. The first qualification is that correction of mistakes by construction is not a separate branch of the law or a summary version of an action for rectification. Carnwarth LJ at paragraph 50 said:

> "Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph "as it stands", as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended."

32. The second qualification concerns the words 'on the face of the instrument'. Carnwath LJ at paragraph 46 observed that 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 consideration.

33. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 101 Lord Hoffman gave the lead opinion, with which the other members of the Judicial Committee agreed. At paragraph 14, he referred to the well known principles on which a contract or other instrument should be interpreted and said;

> "It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."

34. At paragraphs 22-25, Lord Hoffman accepted Brightman LJ's two conditions with the two qualifications added by Carnwarth LJ. In Lord Hoffman's opinion the statement of conditions is no more than an expression of the common-sense view that it is not readily accepted that people have made mistakes in formal documents. At paragraph 25 he continued:

> "What is clear from these cases is that there is not, so to speak, 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."

35. There have been several cases where a party has been misnamed in document. Some of these, including where the named party is non-existent, were summarised by Rix LJ in *Dumford Trading AG v OAO Atlantrybflot* [2005] EWCA Civ 24. Such cases were not cited before me, so I gave counsel the opportunity to make written submissions.

36. In *Davies v Elsby Brothers Ltd* [1960] 3 All ER 672, [1961] 1 WLR 170 a writ was issued against a defendant in a name which could apply either to a firm or a limited company. Although this was a case about a writ, not a contract, the test adopted by the Court of Appeal was a test of construction of a document. The court held that it was not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company.

37. In *Whittam v W J Daniel & Co Ltd* [1962] 1 QB 271, [1961] 3 All ER 796, on similar facts, *Davies* was distinguished because the firm which had preceded the limited company had ceased to exist, so that the writ could only have referred to the company.

38. In *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, an agreement gave the claimant's name inaccurately, and there was no such company. Stamp J concluded that looking at the surrounding circumstances, there could be only one clearly identified company as party to the agreement, and reference to it by an inaccurate name did not turn the contract into no contract.

39. The Court of Appeal in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* [1981] 1 Lloyd's Rep 633 held that the use of the name of a dormant company in an insurance policy was a mere misnomer and that there was no need for rectification.

40. After reviewing those authorities, Rix LJ in *Dumford* said at paragraph 32:

> "It seems to me that the doctrine of misnomer is of uncertain width. It is clearly a doctrine of construction, but it is not plain to what extent it permits the reference to extrinsic evidence. *Davies v Elsby Brothers Limited* would suggest that where there are two possible entities, the rule is a strict one: unless one can say from the four corners of the document that the parties must have intended to refer to one rather than the other entity, then the doctrine does not apply. If, however, there is only one possible entity, then it is possible to use extrinsic evidence to identify a misdescribed party. It is arguable that *Nittan v Solent Steel* falls into this latter category. Moreover, the cases, as does common sense, suggest that a case of mere misnomer is not easily (query if ever?) concluded to be such without the mistake being explicable."

41. That must now be read in light of *Chartbrook.* As observed above, it was emphasised by Lord Hoffman in that case, as it has been in other leading cases on construction, that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood the parties to have meant.

42. In my judgment, on the facts of this case as found, it is not possible to say that a reasonable person would take the parties to mean one of SSL or SSCL. The situation would be no different if it is taken that the background knowledge included what was available by search at Companies House, namely that SSUKL was not registered but SSL and its wholly owned subsidiary SSCL were. That knowledge would not assist a reasonable person to understand which of these was meant to be the tenant. Accordingly, it is not permissible to deal with the misnomer on the facts of this case as a matter of construction.

43. It follows also that rectification is not available. In *Chartbrook* Lord Hoffman at paragraph 48 said that the conditions for rectification on the ground of common mistake had been succinctly summarised by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 7. As applied to the facts of this case,

these include that the parties must have had a common continuing intention as to the name of the tenant and that there was an outward expression of accord. In my judgment, in light of my findings it is not the case that the parties had a common intention that SSL should be the tenant, nor was there an outward expression of accord in that regard.

44. Given that the mistake cannot be put right by construction or rectification, SSL was and is not a party to the lease. When SSCL took occupation, it is likely that a tenancy at will arose in its favour, but whatever interest it had was disclaimed by the joint liquidators by the notice of disclaimer. The taking of possession by Mr Darlow thereafter was not unlawful, and there is no basis on which SSL can claim to be entitled to possession of the premises.

45. That deals with the four issues directed to be determined as preliminary issues. Counsel indicated that they would attend the hand down of this judgment and deal orally with matters arising from it.