Neutral Citation Number: [2022] EWHC 164 (Ch)

Case No: BL-2021-000379

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

7 Rolls Buildings
Fetter lane, London
EC 4A 1NL

Date: 28 January 2022

Before :

MR SIMON GLEESON
Sitting as a Deputy High Court Judge

- -

Between :

Caledonian Maritime Assets Limited

Claimant/ Respondent

- and –

HCC International Insurance Company PLC

Defendant/ Applicant

- -
- -

Charles Hollander Q.C. and **Kyle Lawson** (instructed by **Addleshaw Goddard LLP**) for the **Claimant/Respondent**
Alexander Polley (instructed by **Gowling WLG (UK) LLP**) for the **Defendant/Applicant**

Hearing dates: 12 January 2022

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Mr. Simon Gleeson:

Introduction

1. A commercial agreement was negotiated between sophisticated commercial parties, advised by experienced solicitors, and executed as a deed, referred to in this judgment as the "Deed of Settlement". As a result of a series of subsequent developments, the terms of this deed produced an outcome which came as a surprise to all those involved in its negotiation, producing a significant windfall gain for one party at the expense of the owner of the other. It is therefore no great surprise that this has resulted in a claim being brought for the rectification of that deed. The Defendant has applied to have this claim struck out, or in the alternative to have summary judgment.

The Facts

2. It is necessary first to say a little about the facts surrounding the claim. The Claimant, CMAL, is the asset owning arm of the Caledonian MacBrayne ferry operator, and in 2015 it placed an order with Ferguson Marine Engineering Limited ("FMEL") for two vessels to be used in its operations. The terms of the contract were that CMAL paid partially in advance for the ferries, but had the right to cancel the order and have its money returned if FMEL breached the contract to supply them.

3. CMAL clearly doubted the creditworthiness of FMEL, and therefore it was arranged that the defendant HCCI would provide credit insurance to CMAL in respect of FMEL's repayment obligations. HCCI provided this by issuing indemnity bonds ("Bonds") to CMAL. The terms of these Bonds were that, in the event of HCCI becoming entitled to recover the specified sums from FMEL under the contract, it would also be entitled to claim those sums from CMAL as primary obligor.

4. As consideration for the issue of the Bonds, FMEL paid HCCI a premium, and entered into a deed of indemnity (the "Deed of Indemnity") whose effect was that FMEL (a) agreed to indemnify HCCI in respect of any payments which it was required to make under the Bonds, (b) granted a charge over its assets in respect of its liabilities under that indemnity, and (c) entered into various other covenants designed to bolster HCCI's position in the event of FMEL's default. Significantly – and critically for this litigation – the Deed of Indemnity contained not only an indemnity from FMEL, but, as a result of various amendments, came to include an indemnity from a company called MacKellar Sub-Sea Limited ("Mackellar"). Mackellar was a sister company of FMEL, both companies being ultimately owned by Ferguson Marine Engineering (Holdings) Limited.

5. It is necessary to pause here to note that Mr Hollander argues that the position in which HCCI ended up was inherently suspicious because it was "circular", in that if HCCI incurred liability to one person, it could recover it from the sole shareholder of the other. However, that is the nature of credit insurance. A credit insurer does not take the absolute risk of the insured liability. When he enters into a commitment to a creditor, he matches it with an indemnity from the debtor, such that the risk he takes is that the recovery from the debtor will be less than the payment out to the creditor. "Circularity" in this sense is inherent in the nature of the business.

6. HCCI was not of course the only creditor of FMEL. Most importantly, FMEL was in practice being kept going by a series of loans from the Scottish Government (the "Scottish Ministers"), who also required security from FMEL in respect of its repayment obligations to them. As a result, an intercreditor deed (the "Intercreditor Deed") was entered into between the various creditors of FMEL in February 2019, regulating between themselves their rights under the various security arrangements in existence. The effect of the Intercreditor Deed was that HCCI was the first ranking creditor in respect of its claims for repayment of any amounts due to it; the Scottish Ministers were the second ranking creditor, and other creditors were subordinated to both claims. The deed, as is common in such deeds, contained a "turnover clause", by which any creditor receiving monies from any obligor was obliged to pay those monies over to the secured creditors in the order specified in the deed – thus, a junior creditor receiving money from any obligor was required to turn it over to a more senior creditor until that senior creditor's claim was discharged in full. The most senior creditor was HCCI. CMAL was not a party to this deed. The Scottish Ministers, being party to the deed, were of course fully aware of its terms.

7. In May 2019 it became clear that FMEL was badly behind with the contract to deliver the two ferries to CMAL, such that CMAL was entitled to terminate the contract and demand repayment of the money paid by it. This presented CMAL with a problem. On the one hand, if it terminated the contract with FMEL it could claim repayment of the monies advanced (amounting to £24,250,000) from HCCI under the Bonds. On the other, CMAL's primary requirement was not for the repayment of the money, but the delivery of the ferries. Terminating the contract would almost certainly have resulted in the failure of FMEL and the exercise by HCCI of its rights under its security arrangements, with the likelihood that work on the partially completed ferries would cease for an indefinite period. CMAL decided that its primary objective was to procure that work on the ferries continued, and it therefore had to remove the threat of HCCI exercising its security rights. This in practice could only be done through a negotiated settlement with HCCI.

8. Negotiations for such a settlement were therefore commenced. HCCI's opening position was that it would be happy to walk away – that is, it would be released from its obligations under the Bonds, and in exchange would release the rights and securities which were given to it in consideration of its entry into those Bonds. CMAL, however, insisted that HCCI make some payment in respect of the release of its liabilities, and it was eventually agreed that HCCI would, in exchange for a payment of £4,850,000, be released from all of its remaining potential obligations under the Bonds. This agreement was documented in the Deed of Settlement, which is the document which the claimant now seeks to have rectified.

9. It is at this point that the positions of the two parties in this litigation begin to diverge. It is agreed that CMAL's primary concern was to secure the release of HCCI's claims on FMEL, in order to remove the threat to FMEL continuing in business and working on the ferries. It was the common intention of both parties that these rights should be given up, and they were, through deeds of release entered into pursuant to the Deed of Settlement. However, it will be recalled that HCCI also had an indemnity in respect of its liabilities from another group company - Mackellar. Mackellar was at this time a dormant company. The position seems to have been that it was believed that Mackellar might have a small positive asset value, but there was a common assumption that the

amount was unlikely to be significant. The question of what the parties believed the position to be as regards the continuation of the Mackellar indemnity is the crux of this case.

10. CMAL say that they thought the Mackellar indemnity was to be brought to an end by the document which they were executing, that the fact that it was not was unconscionably concealed from them, and that they were therefore misled into executing a deed which they would not otherwise have signed. CMAL therefore argue that the deed should be rectified so as to have the effect of releasing the Mackellar indemnity along with the CMAL indemnities.

11. HCCI say that they had no reason to believe that the continuing existence of the indemnity was of any significance to CMAL, and that on the facts they were entitled to believe (and did believe) that CMAL were indeed aware that this was the effect of the deed which they executed. They therefore oppose rectification.

12. It may be asked how it came about that an indemnity from a dormant company worth at best a small amount of money could have acquired such significance? The answer lies in the way in which matters developed after the date of the Deed of Settlement. The removal of the HCCI security facilitated the appointment of administrators, and it was the actions of the administrators which precipitated the windfall.

13. The administrators resolved to sell the business of FMEL as a going concern, and this sale was completed in December 2019 for the sum of £7,543,857. The sale was (effectively) to the Scottish Ministers – the purchaser was a vehicle called Macrocom (1067) Limited which was wholly owned by the Scottish Ministers, and the purchase price was paid to FMEL by reducing the amounts due from FMEL to the Scottish Ministers.

14. The question of who was entitled to this amount depended on whether the Intercreditor Deed was still in force. If it was, the Scottish ministers were obliged to pay over this amount to the senior creditor under the deed until its claim was satisfied. If it was not, the money belonged to FMEL.

15. The Intercreditor Deed provided that HCCI should be a first ranking creditor in respect of all liabilities due to it from any member of the Ferguson group pursuant to and/or as a result of the issue of any and all Bonds. However, it also provided that this would cease to be the case once the "Bond Discharge Date", as defined, had occurred. It seems to have been a working assumption of all those involved in the FMEL sale that this date had in fact occurred upon the release of HCCI from its obligations under the Bonds, such that HCCI was no longer a creditor under the Intercreditor Deed.

16. HCCI, however, took a different view. Its view was that the £4,850,000 which it had paid in settlement of the claims against it under the Bonds were payments made under the Bonds, in respect of which it was entitled to claim under the outstanding indemnity. It therefore argued that the Bond Discharge Date had not occurred, and it remained a senior creditor under the Deed.

17. This issue was litigated before the Outer House of the Court of Session. In May 2021 Lord Tyre, in HCCI v The Scottish Ministers [2021] CSOH 53, ruled that the drafting of the definition of the "Bond Discharge Date" had the effect that that date had not

occurred. Since HCCI remained a party to the deed by reason of its entitlement to its indemnity from Mackellar, it remained entitled to first priority in respect of any claims it had arising from costs or losses incurred "pursuant to and/or as a result of the issue of any and all Bonds". Lord Tyre concluded that the amount of £4,850,000, along with the legal costs of HCCI in achieving that settlement, fell within this term. HCCI was therefore a first priority creditor under the Intercreditor Deed to the tune of £5,047,775.79.

18. It is easy to see why this decision seems to have caused so much anger and irritation amongst the Scottish Ministers. In paying for the business of FMEL by reducing FMEL's liabilities to them, they believed that they were simply transferring their own money from one pocket to another, with the transaction having no impact on their overall obligations. The discovery that the choice of transaction structure had resulted in their being required to pay a little over £5m to a third party must have been highly unwelcome.

19. Having failed to persuade the Court of Session that the Intercreditor Deed said what they thought it said, the Scottish Ministers, through CMAL, now seek to persuade this court that the terms of the Deed of Settlement should be rectified in order to change the result of the application of the Intercreditor Deed to the facts. Since the Deed of Settlement is a bilateral agreement between CMAL and HCCI, CMAL is the only possible plaintiff in this action. However it is not unreasonable to note in this context that CMAL is, and has been at all material times, wholly owned by the Scottish Ministers.

The Law

20. I begin by identifying the decisions I have to make. This is an application to strike out a claim for unilateral rectification of a deed, and Mr Polley, for HCCI, correctly pointed out that this has the consequence that both sides are facing a high evidential bar – a claim for rectification on the basis of unilateral mistake must satisfy a high bar to succeed, and an application for a strike-out must also satisfy a high bar. However, as Mr Hollander, for CMAL, correctly argued, that does not mean that these two high bars "cancel out" to leave a balance of probabilities decision.

21. The task before me is therefore twofold. First, I must consider whether CMAL's case would at trial be likely to reach the high evidential bar of "convincing proof" required to satisfy the court to order rectification. If I am satisfied that that is the case, then the strike-out application must fail, and the case must proceed to trial. If I am not satisfied that that is the case, then I must separately consider what further evidence would be reasonably likely to come to light if the issue were to proceed to trial. It is only if I am satisfied that CMAL's case, bolstered by the best plausible hypothetical evidence, would not have a realistic chance of success that I should give summary judgment against it.

Rectification

22. It is customary to divide rectification cases into two categories, based respectively on common and unilateral mistake. The position is set out in Chitty:

> "Most [rectification] cases involve what has been agreed by the parties having been wrongly recorded in the document without either party being aware of the mistake. These cases involve what may be termed rectification to correct a common mistake; the document is rectified to bring it into line with the prior agreement. Rectification may also be available when, whether or not the parties had reached a prior agreement, one party signed a written document which did not record his intentions correctly, and the other party knew of the first party's intentions. In this case the court may rectify the document so that it reflects the first party's intentions. This may be termed a case of rectification to correct a unilateral mistake". Chitty on Contracts (34th ed.) at §5-057

23. CMAL's case is based on unilateral mistake. Rectification for unilateral mistake is an equitable remedy, and its basis is a species of equitable estoppel: see Snell's Equity (34th ed.) at §16-019.33. It arises where one party to a transaction (B) knows that the instrument contains a mistake in his favour, but does nothing to correct it and seeks to take advantage of the mistake by the other party (A). In those circumstances, B may be estopped from resisting rectification of the instrument so as to reflect A's understanding.

24. In *Thomas Bates & Son v Wyndhams Ltd [1981] 1 W.L.R. 505,* Buckley LJ identified four requirements for a claim for rectification for unilateral mistake (at p.515) and said that, if these are satisfied, then

> "the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake".

The requirements that he set out were:

> [1] that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain;
>
> [2] that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A;
>
> [3] that B has omitted to draw the mistake to the notice of A;
>
> [4] the mistake must be one calculated to benefit B.

25. Professor Burrows (as he then was) explains the effect of these as follows:

> "… it appears to be a serious flaw in many contract textbooks that unilateral mistake rectification is treated as if the same basic requirements apply as for common mistake rectification. In particular, while there may be a continuing common intention

> and a unilateral mistake by one party, known about by the other, in not realising that the written contract has been inaccurately drawn up so as not to reflect that common intention, this is not the usual situation. Hence a number of leading cases have not been concerned with a mistake in the recording of the agreement. Rather one party has been mistaken during the negotiations and the other party has known about that mistake and has not pointed it out. Therefore the objection is not that the written contract inaccurately reflects a previous common intention and that one party did not spot this inaccuracy while the other did. On the contrary, the written contract accurately reflects the fact that, in the previous negotiations, one party was mistaken on a serious matter and the mistake was known about by the other. It is the bad faith or, if one insists on using that most slippery of words, the 'unconscionability' of the non-mistaken party that leads to the mistaken party being able to insist on the contract being upheld on the basis of its own understanding of the contract …"
>
> "Construction and Rectification" in Burrows & Peel (ed.) Contract Terms (2007) at pp 77-99.

26. A claimant seeking rectification for unilateral mistake faces a heavy evidential burden, both because of the nature of the remedy he seeks and because of the seriousness of the allegations he must make as to the other party's knowledge. In *George Wimpey v VI Construction [2005] EWCA Civ 7*, Peter Gibson LJ (at para 39) quoted Buckley LJ's earlier statement that:

> "The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention *ex hypothesi* contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties.
>
> The standard of proof is no different in a case of so-called unilateral mistake such as the present. "

27. At para 46, he drew attention to the fact that in "*arm's length negotiations*" an "*experienced negotiator*" would need "*convincing proof*" to show that the defendant had known he (the heavyweight negotiator) had made a mistake. Similarly Sedley LJ said at paras 62, 67:

> "There are at least two kinds of mistake. One is a literal misunderstanding of some fact material to the proposed contract. The other is an error of judgment in entering into the contract. I find it difficult to think that the second kind has any relevance to

> the law of unilateral mistake. Nobody is bound, even in honour, to help his opposite number to negotiate to the best advantage … If ever a party was entitled to assume that its opponent knew what it was doing, it was VIC in its negotiations with one of the country's largest construction and development enterprises. In my judgment the mistake made by Wimpey was a result of their own corporate neglect for which VIC bore no legal or - so far as it matters - moral responsibility."

Summary judgment

28. The principles applicable to any decision to grant or refuse summary judgment were summarised by *Lewison J in Easyair v Opal [2009] EWHC 339 (Ch)*, para 15:

> "…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:
>
> (i) The court must consider whether the claimant has a 'realistic' as opposed to a 'fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91;
>
> (ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
>
> (iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman;
>
> (iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel;
>
> (v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;
>
> (vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing

> that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;
>
> (vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

29. In *Webster v Penley [2021] EWHC 3386 (Ch)*, HHJ Matthews QC quoted a later decision, *Benyatov v Credit Suisse [2020] EWHC 85 (QB)*, which added to the passage above that:

> "Complex claims, cases relying on complex inferences of fact, and cases with issues involving mixed questions of law and fact where the law is complex are likely to be inappropriate for summary judgment: see Three Rivers District Council v Bank of England (No. 3) [2003] 2 AC 1 (HL) at [95] per Lord Hope. A trial 'can often produce unexpected insights' and 'a judge will often find that his first impression of a case, when reading into it, is not the same as his final conclusion': see Playboy Club London Ltd v Banca Nazionale del Lavora SpA [2019] EWHC 303 (Comm) at [26]. "

30. Applications in respect of claims for rectification are fact-sensitive, and the Court will therefore be cautious in dealing with them summarily. In *Dunlop Haywards v Erinaceous Insurance [2009] EWCA Civ 354*, Field J had granted reverse summary judgment on a rectification claim. Rix LJ noted (para 81) that "the issue of rectification is a necessarily fact-based enquiry" and he "would have been most reluctant to deal with the rectification issue summarily". However, in that case Rix LJ identified (paras 79-80) seven factual points that might militate in favour of the remedy; and also (para

87) particular case management reasons for letting the claim proceed to trial alongside a construction claim between the primary parties in the case.

31. Conversely, in *Rowallan v Edgehill [2007] EWHC 32 (Ch)*, Lightman J granted reverse summary judgment on a claim for unilateral mistake rectification where "there is no reason why this hopeless case should proceed to trial" (para 22) because there was no sustainable basis for any allegation of sharp practice in the amendment which the defendant had made to the agreement, which had a "plain and obvious effect" (para 21):

> "The amendment on its face plainly and unequivocally imposed the obligation on the Claimant to pay the Instalment. The critical fact is that the matters which apparently induced Mr Montlake to believe that the amendment had no such effect were matters undisclosed and unknown to the Defendant. "

32. Similarly, in *NHS v Silovsky [2015] EWHC 3141 (Comm),* Leggatt J granted a defendant's application for summary judgment in respect of allegations of both common mistake and unilateral mistake rectification, where (para 36) the allegation of common mistake was "lacking in any evidential basis" and, in the context of an arms-length negotiation with a sophisticated claimant, it was untenable to suggest that the defendant "would have been aware" of any mistake by the claimant about the terms of the contract (paras 38-40).

Decision

33. The first issue for me is as to whether CMAL's case is sufficiently strong that it is likely to satisfy the high bar required to obtain unilateral rectification. If I am satisfied that it is, then the case should clearly be allowed to proceed to trial and the application for summary judgment or strike-out must fail.

34. Mr Hollander, for CMAL, advances three possible bases for rectification. Two of these relate to the state of mind of the parties at the time of the agreement as regards specific facts, and I deal with these below. The third, however, relates to future outcomes (at paragraph 39(3) of the Particulars of Claim). It is here suggested that it is a ground for rectification that a party's mistaken belief in what the future commercial outcome of the agreed drafting would be is itself a ground for unilateral rectification, even if the text of the deed was mutually agreed at the time of its execution

35. This seems to me to be simply wrong. As Lloyd LJ pointed out in *Sieff v Fox [2005] EWCA Civ 77; 2005 B.L.R. 135* at [54] in order for unilateral rectification to be available "the mistake must be as to either the words used or their legal effect". Where the mistake is as to neither the words used nor their legal effect, but as to the commercial outcome of the agreement actually made as a result of subsequent developments which were not foreordained at the time of the agreement, I do not accept that this is a ground for unilateral rectification. Another way of putting this is that there is no such thing as retrospective rectification – a party or parties are not entitled to rectification of a document which accurately reflected their intentions at the time that it was entered into, but whose terms have turned out to have unexpected consequences. If this were the case, the commercial reliability of English deeds would receive a significant body-blow which it does not need or deserve. Consequently, I think that the only issue before the court is as to the state of mind of the parties at the time of the negotiation and execution

of the deed. The fact that they wish they had not agreed what they did in fact agree would not avail them, no matter how clearly it could be proven.

36. In meeting the evidential requirements for rectification, CMAL will have to show three things. One is the unconscionable behaviour of HCCI. I accept that I can say nothing about this at this stage – this is the very thing which would fall to be investigated at trial. However, it must also show two other things – that it was itself misled, and that that fact was so significant that it would not have done what it did if it had not been misled. Translated into the facts of this case, this means that CMAL must be able to prove both its ignorance of the fact of the Mackellar indemnity, and that that fact would have been significant to it had it known of it. I am able to form a view on the likelihood of these two propositions being established on the basis of CMAL's own case.

37. As regards CMAL's knowledge of the indemnity, Mr Polley argues that there is evidence before the court sufficient to demonstrate that CMAL did know about the Mackellar indemnity. In this regard he points to the fact that

    a. over the course of the transaction, HCCI's solicitors Mills & Reeve ("M&R") referred in correspondence several times to Mackellar, and the fact that it was party to the Deed of Indemnity, both to the Scottish Ministers and directly to CMAL's solicitors, Addleshaw Goddard LLP ("AG").

    b. The same solicitors circulated draft documents – both the Deed of Settlement and the Deed of Release – which made it plain, in redline in the former case, that the obligations of any party other than FMEL would not be released.

I think it is clearly proven that CMAL had a number of pieces of information in their possession which, taken together, would have enabled them to conclude (a) that Mackellar were involved in the transaction, and (b) that there was more than one indemnitor under the Deed of Indemnity. By putting these pieces of information together, they could have worked out that Mackellar was that other indemnitor.

38. In my view, this alone is sufficient to dispense with the idea that CMAL's case for rectification is likely to succeed. As noted above, the evidential burden which a court will require to be satisfied to require rectification of a document is a high one. This fact alone creates a significant doubt as to whether that burden would be likely to be discharged on the basis of the facts before the court. I am therefore not satisfied that it is more likely than not that CMAL would succeed at trial in this application.

39. I am equally unpersuaded that CMAL would be able to show that the fact alleged to have been concealed from it would have been material to its decision to execute the deed even if it had known of it.

40. I regard it as a material fact in this context that the existence of the Mackellar indemnity was commercially irrelevant to CMAL. What CMAL wanted was an end to HCCI's ability to interfere in the future of FMEL, and this they got. The question of whether HCCI retained a right of indemnification against some other member of the Ferguson group could only have been commercially relevant to CMAL if there were some way in which that indemnity could have been used by HCCI as a negotiating lever against CMAL. It is not suggested that this was the case. Indeed the point can be put even more strongly, that even the events which actually did happen were commercially irrelevant

to CMAL, disastrous though they may have been for CMAL's sole shareholder. I am therefore unable to find that it is more likely than not that CMAL would establish this at trial.

The Position of the Scottish Ministers

41. The fact that the outcome was in fact disastrous for CMAL's sole shareholder was raised in argument as a possible reason why the Mackellar indemnity must have been significant to CMAL. It is Mr Hollander's position that "in entering into the Deed of Settlement, CMAL obviously had to consider the interests of the Scottish Ministers because the Scottish Ministers were (and are) CMAL's sole shareholder. Moreover, the Scottish Ministers had been directly involved in the pre-contractual discussions with HCCI. CMAL had also explained to HCCI that any settlement agreement would need to be approved by the Scottish Ministers" (Skeleton p.3). This is supported by the witness statement of Mr Hobbs, the Chief Executive Officer of CMAL. He says that CMAL required the approval of the Scottish Ministers in respect of the Deed of Settlement, and that if the Scottish Ministers had foreseen how things would turn out, they would have demanded changes to the draft before agreeing to CMAL executing it.

42. It is clear that the question of whether the Scottish Ministers were misled is not per se relevant to the rectification action – a document cannot be rectified at the suit of a non-party to that document, or on the basis that a non-party has been misled. However, CMAL argue that although the Mackellar indemnity was not commercially relevant to them, it was commercially relevant to the Scottish Ministers, that HCCI should have known that, and that as a result it should have been clear to HCCI that the point was significant to CMAL.

43. This argument appears to me to be self-defeating. It is the foundation of CMAL's position that it was not aware of the consequences that the Deed of Indemnity would have when combined with the terms of the Intercreditor Deed. – if that is not true, its case must necessarily fail. CMAL knew what the terms of the Deed of Indemnity were. The Scottish Ministers - the owners of CMAL – knew exactly what the terms of the Intercreditor Deed were, , because they were a party to it. CMAL aver that throughout the negotiations they worked closely with the Scottish Ministers, and that they required the consent of the Scottish Ministers before executing the final document. The Scottish Ministers knew full well of the existence of the Mackellar indemnity, and it was in that knowledge that they approved the execution of the Deed of Indemnity by CMAL in the form which it actually had. That seems to dispense completely with the idea that HCCI should have known that the existence of the indemnity was material to CMAL by reason of its ownership by the Scottish Ministers. Indeed, if the very person who would later come to suffer loss by reason of the form of the Deed approved its execution in terms, in the full knowledge of the facts alleged to have been concealed, it seems to me to be very hard to maintain that there was any element of misleading here at all.

44. I am therefore satisfied that CMAL's case is not likely to succeed at trial, since CMAL's own pleaded case does not seem to establish that the information which it claims was withheld would have been material to it even if it had not been withheld.

The Application for Summary Judgment

45. That, however, takes me to the second question – whether these problems are not merely evidential, but terminal. If a claim has no reasonable chance of success, then the defendant is entitled to summary judgment. I turn to the question of whether that is the case here.

46. Mr Hollander's basic position is that the questions for determination here are entirely questions of fact, and can therefore only be investigated at trial. It is of course quite right that the question of whether HCCI acted unconscionably could only be established at trial. However, that is not the only issue to be established. Even if we assume that the facts found at trial showed that HCCI had behaved so unconscionably as to invoke equity, that would not of itself be sufficient to succeed in its action. Even if it can be established that a person has acted unconscionably, unconscionability can only give rise to an equitable remedy if it can be shown that the result of the unconscionable conduct was different from what it would have been had the unconscionable conduct not happened. In a situation where one party wrongfully conceals information from another, but that information can be shown to have been considered as entirely irrelevant by that other party, no equitable remedy can be ordered. Equitable remedies are accurately described as such – they are remedies, not punishments. Unconscionability unaccompanied by any demonstrably adverse consequences for any other person cannot call an equitable remedy into being, and rectification is an equitable remedy.

47. What that means in this case is that in order to get to a place where the investigation of unconscionability is of any relevance, Mr Hollander must first show that he could prove that the fact of Mackellar's status as an indemnitor would have been a matter of such significance to CMAL that had they known about it they would have demanded that the terms of the draft Deed of Release be amended before they agreed to execute it. I have already held above that this is not an argument which is, on balance, likely to succeed. The question I now turn to consider is whether, on the face of the case and supporting documents before me, it has no real prospect of success.

48. Mr Hollander's case is that the negotiations between CMAL and HCCI began with an offer by HCCI to abandon all of its claims on all parties in exchange for a complete release from all of its liabilities. His argument is that because a total abandonment of all claims was the initial offering, the fact that it was never discussed further meant that CMAL was entitled to and did assume that this remained the basis of the offer throughout the negotiations.

49. This argument is wholly at variance with the commercial facts of the negotiation. The opening offer from HCCI was entirely rational – if there is no liability, there is no need for indemnities, since there is nothing to indemnify against. CMAL, however, rejected this proposal, and announced that they wanted a sum of money to be paid to them by HCCI in exchange for releasing HCCI from its liabilities. This also made perfect sense – CMAL had (or would shortly have) an unquestionable claim against HCCI for nearly £25m, and it was eminently reasonable for them to demand some meaningful compensation for releasing that claim. However, as soon as HCCI agreed to pay any money to CMAL, the logic of releasing all of its indemnities disappeared, since there was now something for it to be indemnified against. If we hypothesise a reasonable man conducting the negotiation on behalf of CMAL, it is extremely unlikely that he would have assumed that HCCI's offer to release all of its liabilities would be

unaffected by the fact that they had moved from having no liability to indemnify to having a substantial liability which they might someday hope to partially recoup. At the very least, he might be expected to have raised the issue in discussions at some point. However, it is common ground between the parties that no such discussion was ever initiated or held. Thus the background facts very strongly suggest that the existence of the Mackellar indemnity was of no particular significance to CMAL.

50. The way in which this transaction was concluded means that even at this preliminary stage there is a great deal of clarity on the relevant points. Negotiations were conducted almost entirely in writing, and records of those negotiations survive. There was only one significant face-to-face meeting between the parties, and a record of that meeting exists which is accepted by both sides as accurate. The transaction was negotiated between solicitors, and there are witness statements from the solicitors involved at AG. It is these statements in particular that Mr Hollander relies upon to demonstrate that CMAL was in fact proceeding on the basis of the mistaken belief that Mackellar would not be an indemnitor after the deed of release.

51. This comes down to the witness statements of Mr Watt and Mr McIntosh, both partners at AG representing CMAL. Mr Watt was the relationship partner for CMAL, and was clearly deeply versed in their affairs. However, at some point he passed responsibility for executing this transaction to his partner Mr McIntosh. Mr McIntosh was therefore the prime negotiator. His primary interlocutors were Mr Luto and Ms Collins, both partners at M&R, acting for HCCI.

52. Mr Hollander placed great emphasis in his submissions on the fact that CMAL had requested a copy of the Deed of Indemnity under which both FMEL's and Mackellar's obligations arose, but that the document which they received had been heavily redacted so as to remove all mention of Mackellar or its obligations. I am not sure that this fact actually helps his case. If the question being asked is whether the Mackellar indemnity was in fact significant to CMAL, the fact that, upon receiving the relevant document with the relevant provisions redacted, they did not request any further information on it is at the least neutral on the point. I also attach some significance to the fact that Mr McIntosh did ask for information about other parts of the redacted document, but concluded upon receiving responses to those requests that he could not continue to press M&R for further information because his team had "exhausted our reasonable requests for them to do so". It seems to me to be stretching credulity to argue that CMAL and its advisors believed at one and the same time that even asking for details of the Mackellar indemnity would be unreasonable, but also that its existence was so significant that the other side should have known without asking that it was material to CMAL.

53. It was a very material term of the agreement between the parties that HCCI's rights over FMEL be released, and early drafts of the deed referred to the complete release of HCCI's rights under the Deed of Indemnity. However on 13 August, towards the end of the negotiations, Mr McIntosh received from Ms Collins a revised draft which specified that this release would release only HCCI's rights over FMEL. This was described in the cover e-mail as a "minor amendment". As a matter of commercial reality this was clearly true – it is not clear on the facts that either side believed that Mackellar had any value. However, in the events that happened it was this amendment which resulted in the document having its significant and unanticipated consequences.

Mr McIntosh says that he reviewed Ms Collins' amendments at the time he received them, and did not consider them to be substantive (McIntosh at 37).

54. Mr McIntosh goes on to say – I have no doubt correctly – that if he had understood at the time the effect that Ms Collins' amendments would have in the events that followed he would never have agreed to them. He clearly regards it as a matter of significance that the point was never raised in negotiation by M&R prior to Ms Collins e-mail. This goes nowhere at all towards showing that it was of significance at the time to him, to others at AG or to CMAL – and indeed the fact that it was never raised by him or by others very strongly suggests that it was not.

55. I raised this issue with Mr Hollander towards the end of the hearing, and invited him to specify the evidence which he relied upon to show that the existence of the Mackellar indemnity was of significance to CMAL and their advisors at the relevant time. He took me to a number of paragraphs of Mr McIntosh's witness statement (17, 20, 27, 30, 33, 37, 38, 39, 40 and 45). I have carefully considered this evidence, separately and together. I am of the view that it does not come anywhere close to showing that the existence of the Mackellar indemnity was a material fact for either side at the time of the negotiation, or that the termination of the Mackellar indemnity was of any significance for CMAL during the negotiations. If this is correct, then the case for unilateral rectification is hopeless.

56. As Pennycuick J said in *A Robert & Co Ltd v Leicestershire County Council[1961] Ch. 555* at 570,

> "A party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contact with the omission or a variation of that term in the knowledge that the first party believed the term to be included."

57. CMAL cannot show that it did in fact believe that term to have been agreed, and cannot – in my judgment – show that it even addressed its mind to the issue in the course of the negotiations. If that is correct, then there is simply no issue to go to trial.

58. Mr Hollander submitted that this entire line of enquiry is illegitimate in this hearing, and that any enquiry as to what CMAL's beliefs actually were is an impermissible "mini-trial" of a matter of fact. That would clearly be the case if CMAL had provided evidence of that belief, and that evidence was disputed. However, a finding that CMAL has not provided any evidence of this belief can be reached simply by an examination of the evidence that CMAL has itself put forward. I agree that an enquiry as to HCCI's awareness of CMAL's alleged mistaken belief would constitute a mini-trial, and would be outside the scope of this hearing. However this issue is only engaged if there is scope to find that CMAL was misled. Because I do not believe that there is evidence for that point, the question of HCCI's beliefs is not engaged.

59. Even if I am wrong on this point, I would note that even if there were clear evidence that CMAL were mistaken at the time of the deed, that mistake could only have been as to what the future effect of the deed would be. In order to show that HCCI had misled CMAL in this regard, it would be necessary for CMAL to show that HCCI were in a

better position than they were to know the future, or had information which related to it, which they did not share with CMAL.

60. The chain of events which gave rise to the outcome complained of involved two independent acts taken by independent actors after the Deed of Release was entered into and without reference to it. They were (1) the acts of the administrators of FMEL once appointed, and (2) the act of the Scottish Ministers in resolving to rescue FMEL, and to discharge the payment obligation thus incurred in the way that they did. In order to make the argument that these outcomes were clearly known or anticipated by HCCI but were unknowable by and concealed from CMAL, it would be necessary to show that HCCI was so closely involved with the Scottish Ministers that it knew or could have known before the appointment of the administrators that the Scottish Ministers would agree to buy out FMEL as a going concern, for at or around the price actually paid, with the consideration discharged in the way in which it actually was, and that it knew or could have known that the administrators would elect to sell the business in this way rather than take any other action to realise the assets. This would involve arguing that the Scottish Ministers had shared detailed information about their future plans with a commercial counterparty with whom they had no direct relation, whilst withholding it from CMAL, which they owned completely. This strikes me as entirely fanciful. It also seems to be contradicted by the pleadings, which assert a close connection between CMAL and the Scottish Ministers. If anyone had privileged information about the intentions of the Scottish Ministers, it must have been CMAL, not HCCI. I do not regard the idea that the exploration of this idea at trial would be a useful exercise, or one which would have any chance of success.

61. Consequently, even disregarding the issue with regard to the knowledge of CMAL itself, I do not believe that there is any reasonable likelihood of CMAL's case succeeding at trial.

62. Finally, Mr Hollander suggested that the fact that HCCI have partially waived privilege in respect of some of the correspondence with and between lawyers is of itself an argument in favour of allowing the action to proceed, since it substantially expands the range of enquiry at trial. It is true that the partial waiver has this effect. However, I think that this fact is at best neutral for him. Experience suggests that those who waive privilege only do so when they are reasonably confident that the documents which they have thereby rendered disclosable are not harmful to their case – indeed it would be perfectly possible to make an argument that the fact of a partial waiver of privilege implies that it less likely that the documents to be revealed are of any particular sensitivity. I do not consider that this waiver affects the determination as to whether the issue should go to trial one way or the other.

63. I would therefore grant summary Judgment in favour of HCCI.