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Judgment: approved by the Court for handing down | *Delivered:* **24/10/08**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

REDEVCO UK ONE LIMITED

Plaintiff

And

W H SMITH PLC

Defendant

GILLEN J

Cause of Action

[1] In this matter the plaintiff claims a declaration that the rent payable by the defendant to the plaintiff as from 24 June 2006 is £775,000 per annum in respect of premises at Unit 1, 40/46 Donegal Place, Belfast held by the defendant from the plaintiff under a lease dated 24 September 2003. The sum of £44,264.13 is the sum claimed representing rent and late charges outstanding from 24 June 2006 to the date of the Writ of Summons.

[2] The defendant admits that on 4 January 2007 Mr Christopher Callan chartered surveyor of Whelan Property Consultants on behalf of the defendant sent a Calderbank offer in a letter to the defendant c/o Osborne King("OK"), on behalf of the plaintiff, containing terms, inter alia, that the rent payable from the relevant review date would be £775,000 pa. It is the defendant's case that the letter contained an error in that the rental figure which Mr Callan intended to insert into the letter was £745,000 per annum. It is the contention of the defendant that this error was manifest by reason of the foregoing circumstances and negotiations between Christopher Callan and Mr Alan Wilson chartered surveyor of OK and hence was known (or ought reasonably to have been known) to the plaintiff.

[3] The pleadings on behalf of the defendant included an amended counterclaim to the effect that there should be a declaration that the agreement purportedly embodied in the exchange of correspondence did not

give rise to a contract between the parties. Alternatively an order was sought that the agreement purportedly contained in the exchange of correspondence should be rectified so as to embody the intended agreement that the rental in respect of the subject premises should continue at the annual rate of £745,000. I observe at this stage that in the course of the hearing Mr Shaw QC, who appeared on behalf of the defendant with Mr Dunford abandoned the counterclaim for rectification largely I am sure because there was no basis for suggesting the plaintiff had ever agreed to the lower figure.

[4] Mr Shaw QC indicated in the course of the hearing that he was not asserting any dishonesty or lack of probity on the part of Mr Wilson. Rather it was his case that there were facts and circumstances surrounding the issue which in law amounted to knowledge of a mistake on the part of the plaintiff and which vitiated the agreement. Counsel submitted that it would be unconscionable for the court to hold the parties to the agreement contained in the impugned Calderbank offer.

Calderbank Offer

[5] A party may seek to protect himself against liability for costs by making an unconditional written offer on specified terms, expressly reserving the right to refer such an offer to the arbitrator after he has made his award as to all issues other than costs. Such an offer is known as a "Calderbank" offer (see Calderbank v Calderbank (1975) 3 All ER 333).

[6] Where the tenant has made such an offer which is equal or higher than the figure awarded, the practice is that the tenant would have its costs incurred after the date when the offer ought to have been accepted paid by the landlord and the landlord would pay the arbitrator's fees (see Sweet and Maxwell 2008, Handbook of Rent Review, issue 1/2008).

[7] I was satisfied on the evidence in this case that great care is conventionally taken over such offers by chartered surveyors. Mr McClure, another chartered surveyor who gave evidence before me, had played a role as a sounding board for Mr Wilson within OK. They had spoken together about this matter. He has spent 9 years with OK in landlord and tenant work. It was clear that he has great experience of Calderbank letters. He declared that great care is taken in the drafting of them and they are checked in his firm by a director before being allowed to leave the office. Mr Callan's experience was similar. The practice of his office is also to ensure someone other than the draftsman has looked over the offer before delivery to the opposition. In the instant case not only had a mistake been made in the figures but also in the words describing the figures? He had signed the letter personally. To compound the highly unusual event of a mistake, no one had checked the letter as would be the normal practice. Mr Callan was at a loss to explain this sequence of events.

[8] The Calderbank offer sent in this instance on the 4 January 2007 by Mr Callan was couched in the following terms:

> "Our clients WH Smith plc, hereby offer to compromise the potential outstanding rent review and arbitration on the following terms;
>
> 1) That the rent payable as from the relevant review date should be £775000 (seven hundred and seventy five thousand pounds) per annum
> 2) That each party should bear its own costs and charges incurred to date
> 3) The offer remains open for acceptance until 1pm on 19 January 2007
>
> After that date the offer in 1)above will remain open, but on terms that your client pays all our clients costs, to be determined pursuant to the Arbitration Act 1996, s.63 (if not agreed), and all fees and charges of the arbitrator, incurred after the date at 3 above.
>
> This letter is written without prejudice save as to costs with the intention that it may be drawn to the arbitrator's attention on the issue of costs, but not otherwise."

[9] I was satisfied that Mr Callan had borrowed this format, including the use of the word "compromise" from a precedent set out in a leading handbook on rent reviews authored by Reynolds and Featherstonhaugh.

[10] Equally I accept the evidence of Mr McClure that this is by no means the usual format for Calderbank letters where a nil increase is being proposed by the tenant. I accept his evidence that he had not personally come across an instance where a nil rent increase was described as a compromise. He produced instances of correspondence where assertions by a tenant that the new rent was to remain at a nil increase were baldly stated and were not couched in the terms or format of the Callan Calderbank.

[11] The response by OK dated 8 January 2007 was in the following terms:

> "We refer to your Calderbank letter dated 4 January 2007 and are instructed by our client to accept the terms detailed in that letter.

> Accordingly the rental payable from the rent review date of 24 June 206 will be £775000 (Seven Hundred and Seventy Five thousand pounds) per annum."

Background Facts

[12] Much of the evidence in this case was undisputed and hence my task in outlining the basic facts together with those in contention has been made much easier.

[13] The action concerns leasehold property at the address mentioned above. By a lease dated 24 September 2003 the plaintiff's predecessor in title demised the premises to the defendant for a period of 15 years, commencing on 24 June 2001 at a rent of £745,000 per annum.

[14] The lease provided for rent reviews to take place, inter alia, on 24 June 2006 and 24 June 2011. In relation to the 2006 review, the plaintiff appointed OK (Mr Alan Wilson) to act on its behalf and the defendant appointed Whelan Property Consultants (Mr Christopher Callan).

[15] I am satisfied that Mr Wilson is a very experienced chartered surveyor who had been employed most of his career with OK and had regularly engaged in transactions involving commercial developments and rent reviews. He usually acted for developers rather than tenants. He was au fait with the use of Calderbank offers. I observe at the outset that I found him to be a witness of truth and probity who gave his evidence with candour and sincerity. Accordingly I was not surprised that Mr Shaw at an early stage in this case made clear that he was not questioning the probity or honesty of this witness. Equally, I found Mr Callan a witness who was transparently honest. I have no doubt that he made a genuine mistake in this instance and its occurrence did nothing to diminish in my eyes his manifest knowledge and skill in the area in which he practises.

[16] As one would have expected in such instances, the two experts engaged in negotiations. The areas to be measured and valued in the premises were adjusted and eventually agreed between the parties on 16 October 2006.The property concerned had been initially incorrectly measured at the time of the 2001 review. This was corrected in the course of the negotiations between Mr Wilson and Mr Callan.

[17] Conventionally rent reviews are conducted on the basis that the first 15 feet of depth are regarded as zone A. The second 25 feet of depth are zone B, the remainder up to 100 feet in depth is zone C and the balance thereafter. A miscalculation of approximately 330 square feet had been made reducing the zone A area by 48 square feet in the 2006 calculations. Similarly there had been an error in double counting in the basement level reducing by 1,426

square feet the total used in the 2001 calculation. 13,538 square feet was now the appropriate measurement.

[18] Various calculations and analysis were put before me as to the rent of £745,000 agreed in 2001 by WH Smith through Mr Glanville an in house surveyor (they were not professionally represented) and OK represented by Mr Wilson. As a future guide, it must be to some extent seriously flawed because of the inaccuracy in the measurements. Equally so I believe there was merit in Mr McClure's point that this was an open market letting which is always a good guide as to the appropriate rent for a location. The £745,000 was never broken down although at that time the going rate in Donegall Place for zone A valuation was £235. Post agreement analysis by OK suggested a premium rent had been achieved with the zone A £235 receiving an uplift of somewhere in the range of 6.4%. Mr McClure re-analysed the original letting on the basis of the corrected floor areas illustrating that the basement could have been let at A/9.96 if £235 was the appropriate zone A level or A /11.57 if £250 per square foot was the appropriate zone A level. I found these calculations of limited value because the rent was not based on the correct floor levels and therefore to that extent any post agreement analysis is theoretical.

[19] This property had a substantial basement which is approximately twice the size of the ground floor. Conventionally first floor property was valued at A/ 15 in terms of the zone A value. The approach to the valuation of basements was a matter of much contention in this case.

[20] As early as May 2006 Mr Wilson had written to Redevco giving his broad view of the approach to the forthcoming rent review. He pointed out inter alia that the retail market was currently depressed, that there were major retail developments in the offing and that whilst there had been a clear growth in zone A rentals between 2001-2004, the reviews completed in 2005 did not follow the 2004 open market lettings of zone A at £270. Already Mr Wilson was manifesting some pessimism as to the likelihood of evidence becoming available to push the zone A above £265. He recorded that the subject property was the most modern and well planned in Donegal Place and that the rental analysis from 2001 suggested a 6.4 premium because of this.

[21] A key issue in the matter was the approach to the valuation of the basement. He noted that there were no other retail units in Donegall Place with a basement sales area where current open market rental values applied. He did mention one comparable namely Jaeger in Donegall Square West which had taken a new lease in November 2004 producing, on his analysis, a basement value representing A/8.50. The letting agent had stated, according to Mr Wilson, that the deal was done on the basis of A/10. However he indicated at that stage that the comparable could be of limited value because

the floor space was a completely different size – only 4,050 square feet and he noted that as a general rule basement retail values are often at the same rate as first floor values which of course were A/15.

[22] Mr Smith was the asset manager of the plaintiff UK portfolio of 60 properties and he gave evidence in this case. It was easy to discern through the correspondence leading up to the Calderbank offer, a tension between Mr Wilson who was advising Redevco on the one hand and Mr Smith on the other. As Mr Smith frankly told me he considered that Mr Wilson was attempting to manage his expectations and he in turn was pressing Mr Wilson as high as he could go to ensure that the best case was put forward. Mr Smith had the benefit of an estimated rental valuation (ERV) from valuers in London of this property. They had placed a figure of £790,000 on the subject property in November 2005. Consequently he manifested disappointment with Mr Wilson's May 2006 views indicating for example that he would have thought that if the access to the basement was located to the front of the unit then the rate should be A/10. Understandably a meeting took place between Mr Wilson and Mr Smith in June 2006. In the wake of that meeting Mr Wilson produced percentage increases in rentals in the immediate area. For example Zara had produced a rental increase of 34.19% between 1999 and 2004, Top Shop an increase of 33.46% between 2000 and 2005 and Easons an increase of 43.83% between 1999 to 2004. He indicated therefore that he would propose an increase of 14.9% at the current review revising the rental on the basement to A/ 12.5 giving a figure of £870,000 per annum. Mr Smith e-mailed him indicating that even more should be quoted indicating something north of £900,000.

[23] The end result was that OK wrote to W H Smith Plc on 3 July 2006 advising that the lessor proposed to increase the rental payable to the figure of £957,000 per annum with effect from their interview date. All of this of course was predicated on the erroneous measurements on which the 2001 review had proceeded.

[24] Not surprisingly Mr Callan rejected this proposal on behalf of the defendant on 14 July 2006.

[25] Thereafter the two experts met and after some lengthy assessments, it became clear that the size of the property required to be adjusted as indicated in paragraph [17]. Using the new figures, Mr Callan strongly asserted that there should be a nil increase, valuing the appropriate rent at £718,000 per annum on the basis of zone A being £265 per square foot and the basement being zone A /15. Calculations in the disclosed papers before me showed that tentative calculations by Mr Wilson on the basis of £265 for zone A and A/ 13.63 produced a figure on the new measurements of £745,000 ie the current rental.

[26] It is clear from the correspondence of 29 November 2006 from Mr Callan in which he set out the appropriate rental as £718,000 that Mr Wilson had been arguing for a premium rent. Mr Callan rejected this because there was no other evidence in the province according to him which would convince him that was correct. He argued that a premium rent could not be sustained in the absence of evidence that all reviews in lettings which immediately followed the W H Smith agreement were done at a lower level. Moreover he asserted that the advent of Victoria Square would be a significant factor in diminishing the value of zone A in Donegal Place in current conditions. Mr Callan indicated that he had taken the basement area at A /15 which he felt was in line with much of the evidence in prime High Street retail pitches. He contended that there was no difference between secondary sales space at basement or first floor level. It was Mr Callan's evidence that he approached the rent review on the basis that the weight of the evidence favoured zone A of £265 and a basement of A/15 on the basis that the closest comparator was always first floor buildings which are measured at A/15. A basement is essentially ancillary retail space. He was not impressed by the Jaeger comparison because he was not given any analysis of it amounting to A/10. He found no substance in the increase in rentals generally between 2001 and 2005 because clearly the rentals had run out of steam by 2006 and that was the relevant period.

[27] In the wake of this correspondence, Mr Wilson wrote again to Mr Smith on 7 December 2006. By this time of course he realised that the floor areas of the original letting in 2001 were inaccurate, something he had to admit to Mr Smith – and his analysis was now somewhat pessimistic. Dealing with the zone A level, he told Mr Smith that he seriously doubted that a premium rent was now payable or that such a point could be won at arbitration. According to him the zone A evidence was likely to be £265. Dealing with the basement value, he indicated that he had no local evidence to provide a basement value of A/12.5 or A/10 which he knew was necessary if any increase was to be obtained. Apart from the Jaeger unit he had no local evidence.

[28] Given the reduction in size, Mr Wilson had re-analysed the current rental of £745,000 per annum which showed, based on the adjusted areas in his calculation, a zone A of £270 with the basement at A/ 15. He stated in his letter to Mr Smith:

> "Consequently, the unit when let in 2001 appears to be over rented and the only way of securing any increase in the rental now is to prove an increase at basement level. If £265 were the maximum zone A level which could be achieved at arbitration, we would need to obtain better than A/13.63 to obtain any increase in the rental payable."

[29] Mr Smith replied on the 21 December 2006 noting with disappointment "that we are struggling with the W H Smith review" but indicating that Mr Wilson should investigate further evidence in relation to first floors.

[30] The next development to occur was that on 4 January 2007 Mr Callan wrote to Mr Wilson indicating that his clients had been pressing him for several months to have the review referred to third party but he had persuaded them to hold off in the hope of resolving the matter between themselves. He had now received clear instructions to apply for the appointment of an arbitrator and referred to a number of possibilities.

[31] Thereafter the Calderbank offer of 4 January 2007 was despatched.

[32] In his evidence Mr Wilson said his reaction to the Calderbank offer was one of surprise and he immediately showed it to Mr McClure who was in the office. Mr McClure's account was that whilst he was obviously somewhat surprised nonetheless it never occurred to him that a mistake had been made. In his view it was "go away" money representing a small increase at less than 5% on the passing rent which was a commercially plausible decision to buy off the risk of arbitration.

[33] Mr Wilson's view was similar. His account was that he considered that Mr Callan was either aware of some increase in the zone A rentals which had not yet surfaced or alternatively that he was aware of some alternation in the evidence on basement values which had served to inflate the rent.

[34] Mr Callan's account was that he had that been consistently arguing that there was no basis for a rental increase. The Calderbank offer was pure oversight on his part. The normal system in the office was to have Calderbank offer letters checked. For some reason not only had he (or perhaps his secretary) written in the wrong figure and words on this offer but that no check had been made before the letter had gone out.

[35] Mr Wilson had been unable to discuss the matter with Mr Smith due to holidays until 5 January 2007. Upon the receipt of the offer on 4 January 2007, Mr Wilson had e-mailed Mr Callan on 5 January 2007 indicating that he had just seen the offer that morning and that he would now discuss it with his client who was on holiday until the following Monday.

[36] Mr Wilson then e-mailed Mr Smith on 5 January 2007 giving his firm views on the matter. Of the offer he said in his e-mail:

> "I was very surprised by the rental offered in the Calderbank of £775,000 pa given that Chris Callan

> valued the premises at £718,725 pa in his letter of 29 November and is now offering an increase of £56,275 pa over his valuation. His offer represents an increase in the current rental payable of £30,000 pa. I have analysed the offer at £275 zone A (*this was a mistake and it should have been £270 zone A*) with £10 on the stores and £21.16 on the basement which is A over 12.75. The rental is £38.55/sq ft overall on the 20104 sq ft net area."

[37] Mr Wilson made it clear that he considered he could not find any evidence to support a higher rate than £21.16 for the basement and that even if it did exist outside Northern Ireland, it would not carry much weight in arbitration. He said "Had it not been for the latest offer, it is very likely I would have been recommending to you to accept a nil increase in this case, as there is really little or no justification for an increase. I can only assume that WHS are keen to get the review settled for some reason and wish to avoid the delay and uncertainty attached to arbitration."

[38] Mr Wilson then added in the penultimate paragraph of his letter:

> "Clearly, the WHS Calderbank offer could be withdrawn at any time and in all the circumstances, I recommend we accept it without delay and in doing so on an open basis, it becomes legally binding and removes the uncertainty of seeking WHS board approval and waiting for a memorandum to be completed. In the current market and with the weight of evidence against us, I consider a rental of £775k to be a good settlement."

[39] Mr Wilson thereafter spoke to Mr Smith in the course of a short conversation. The evidence of Mr Smith was that he did mention the possibility of going back to Mr Callan to obtain an increase but that Mr Wilson was satisfied that this was as far as Callan would go. Accordingly the decision was taken to accept the Calderbank offer. The only note of the conversation between himself and Mr Smith was a short written memorandum on the copy of the e-mail he had sent confirming that Mr Smith had agreed to him accepting the Calderbank letter.

[40] On 8 January 2007 therefore, Mr Wilson sent a letter to Mr Callan accepting the offer. The letter was delivered by a Richard McKibben in the firm of OK.

[41] Mr Callan described his consternation and upset when he received the acceptance. He realised immediately that a mistake had been made. He

refused to accept the letter from McKibben. He contacted Mr Wilson and a memorandum of that conversation made by Mr Wilson was on my papers. In the course of that conversation, according to the note, Mr Callan told Mr Wilson that he had made a mistake and had intended to state £745,000 pa. The note records that he told Mr Wilson that he would have to "dust down" his professional insurance papers. There was a dispute between the parties as to whether or not Mr Wilson had informed Mr Callan that upon receipt of the Calderbank offer letter he had thought about telephoning him. The evidence about that alleged exchange was too vague and uncertain to satisfy me that such an exchange had taken place.

[42] The evidence of Mr Smith before me was that when he was told about the offer, he was also somewhat surprise. However he accepted this as a commercial decision made by WHS in circumstances where perhaps it knew of further information which had not yet come to light or for some internal company reason it was anxious to see the matter disposed of at that moment. From his own perspective Mr Smith said that this was simply another "box ticked", and that this relatively small matter in the overall portfolio for which he was responsible was now resolved. I believed Mr Smith was telling me the truth on this issue.

[43] Subsequently Mr Callan sent a second Calderbank order letter on 8 January couched in precisely the same terms as the first letter save that the figure of £745,000 was substituted for £775,000.

[44] Mr Callan indicated that the format of the letter, including the use of the word "compromise" was the standard form when sending Calderbank letters. He regarded the compromise as indicating that costs, which would have followed the event of winning the arbitration, would not be claimed.

[45] It was Mr Callan's view that this could not have been seen as a "go away" figure because in his experience this would only come into play at the end of negotiations and not, as in this instance, at the beginning. It was not a small increase because in financial terms an increase of £30,000 per year, with over ten years remaining on the lease, would amount to £300,000. It would also increase the asset valuation substantially.

[46] It was Mr Callan's case that the paper trail prior to the Calderbank letter, the negotiations that had gone on and his reputation were such that an offer increasing the passing rent by £30,000 should have alerted Mr Wilson to the assumption that something out of the ordinary had occurred and would have alerted him and Mr Smith to inquire why the position had apparently changed.

Preliminary Matter – Expert Evidence

[47] At the commencement of this action Mr Dunford, who appeared with Mr Shaw QC on behalf of the defendant, submitted that I should hear the evidence of Mr Gordon Mawhinney, chartered surveyor, pertaining to the practice of the reasonable surveyor confronted with the facts arising in a case such as this. He relied on the authority of Archer v Hickmotts [1997] PNLR 381 where a court held that in a conveyancing matter the court is likely to be assisted by expert evidence albeit it must depend on the circumstances and the context in which the evidence is to be given.

[48] An expert's evidence is founded on his training and experience. The court will consider whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issue before the court: see King CJ in The Queen v Bougthon [1984] 385 SASR 45, 46.

[49] Basically an expert has two functions. First, to set out and explain relevant technical matters in language comprehensive to laymen. Secondly to assist in deciding whether any act or omission constitutes negligence or breach of contract eg by setting out the standards to be observed in a profession.

[50] Experts are not necessary where the courts themselves possess the necessary level of expertise to decide the question in issue. They are not necessary where the evidence to be adduced is no more than the personal opinion as to what that expert would have done in the position of the defendant: Midland Bank Trust Co v Hett Stubbs & Kemp [1979] Ch 384.

[51] Furthermore experts are not required when it is not necessary to apply any particular professional expertise in order to decide whether the defendant has failed to exercise the skill and care of an ordinary member of the profession.

[52] In this case I considered that no special skill, training or expertise is required for this court to make an informed assessment as to whether or not a mistake in the terms of this contract was known or ought to have been known to Mr Wilson acting on behalf of the plaintiff or Mr Smith. The various issues that I will have to consider (see para 58 et seq of this judgment) will not be assisted by the evidence of Mr Mawhinney in my view.

[53] In coming to this conclusion I bear in mind the Commercial Court Practice Direction on Expert's Evidence No 6.2002 which provides:

> "Those intending to instruct an expert to give or prepare evidence for the purpose of court

> proceedings should consider whether evidence from that expert is both necessary and appropriate and, in particular take into account whether the evidence is relevant to the matter which is in dispute between the parties and is reasonably required to resolve such disputes."

[54] I therefore came to the conclusion that Mr Mawhinney's evidence was not relevant to the issue in dispute and would not assist me in arriving at the decision which I have to determine.

Time Estimates for Trials

[55] I pause to mention a further matter relevant to actions in general. This case was listed as a 2 day actio. In the event it lasted 4 days. If the overriding objective of Rule 1A of the Rules of the Supreme Court is to be achieved and cases are to be dealt with fairly, expeditiously and with an appropriate and orderly allocation of the court's resources, it is important that the court is at an early stage accurately advised on the likely length of the hearing. Otherwise trials may become disrupted with judges and counsel committed to other cases which in turn become interrupted or delayed. Estimating time should be a non-adversarial process involving full and careful cooperation and discussion between the lawyers. It should be carried out in tandem with a consideration of the preparation of the documentation. It is essential to make a detailed analysis of the evidence and to stand back and reflect on the case in its broadest aspects. A particular duty in this regard falls on senior counsel who are in the best position to do so.

Legal Principles Governing Unilateral Mistake

[56] This case involved an allegation of unilateral mistake No contract can be formed if there is no correspondence between the offer and the acceptance or if the agreement is not sufficiently certain. If, therefore, one party makes to the other an offer that the other party accepts in a fundamentally different sense from that intended by the offerer, there may be no contract ie the contract may be void.

[57] The intention of the parties is, as a general rule, to be construed objectively. The language used by one party, whatever his real intention may be, is to be construed in the sense in which it would be reasonably understood by the other. The law is concerned with the objective appearance rather than with the actual fact. A person will be bound, whatever his real intention may be, if a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him.

[58] This "objective principle" means that normally a person is bound by what he said or wrote and he cannot escape by simply saying that he did not mean what the other reasonably understood, in the circumstances, by the words used.

[59] Thus the common law of mistake can be a source of hardship in light of this objective principle. A mistaken party can be held to an agreement which he did not intend to make. Indeed the non mistaken party need not show that as a result of entering into that contract he has suffered any actual detriment. See Centrovincial v Merchant Investors [1983] Com LR 158 and Africa (OT) Line Ltd v Vickers plc [1996] 1 Lloyds Rep 700.

[60] The philosophy behind the objective principle is that the common law emphasises the needs of commercial certainty. Treitel `The Law of Contract' 11th edition ("Treitel") at page 311 says of this principle: "Sometimes it is at the expense of the demands of justice in individual cases". However without this certainty, security and sanctity of contract would be seriously undermined. The need for security of transactions demands that the promisor be held to the reasonable expectations engendered in the promisee by his words or conduct (see 2008 LQR David McLaughlin `The Drastic Remedy of Rectification for Unilateral Mistake').

[61] On the other hand, the test is not purely objective. Whether the offeror is actually bound by an acceptance of his apparent offer depends on the state of mind of the alleged offeree.

[62] Thus in Hartog v Colin & Shields [1939] 3 All ER 566 the defendants offered for sale to the plaintiffs hare skins but by mistake offered them at so much per pound instead of so much per piece. The previous negotiations between the parties had proceeded on the basis that the price was to be assessed as so much per piece as was usual in the trade. The plaintiffs purported to accept the offer and sued for damages for non delivery. Singleton J determined that this was a mistake on the part of the defendants and that anyone with any knowledge of the trade must have realised that there was a mistake. Hence the plaintiffs must have known that the offer did not express the true intention of the defendants. The contract was therefore void.

[63] Chitty on Contracts 29th Edition ("Chitty") at paragraph 5-064 suggests that it is not clear whether for the mistake to be operative it must actually be known to the other party or whether it is enough that it ought to have been apparent to any reasonable man.

[64] Some cases dealing simply with mistake suggest that it suffices that the other party ought to have known of the mistake. For example in Centrovincial Estates plc v Merchant Investors Assurance Co Limited [1983]

Com LR 158 the Court of Appeal appeared to consider that the plaintiff might be able to negate any binding agreement by showing that the defendant ought to have known that the plaintiff's offer contained an error.

[65] In O.T. Africa Line Limited v Vickers plc [1996] 1 Lloyd's Rep 700 Mance J said that the objective principle would be displaced if a person knew or ought to have known of the mistake. The latter situation would include cases in which the party refrained from making inquiries or failed to make inquires when these were reasonably called for, but first there must be a real reason to suspect a mistake. Chitty suggests that such an approach would be consistent with the House of Lords in Mannai Investment Co Limited v Eagle Star Life Assurance Limited [1997] AC 749 where the House held that a contractual notice to determine the lease was effective although it did not comply exactly with the break clause in the contract provided that the notice given would convey the lessee's intention to exercise its rights under the clause unambiguously to a reasonable recipient. The majority held that the relevant test was whether the intention of the party giving the notice was, in its context, obvious to a reasonable recipient. If it was, it was immaterial that it contained a minor error.

[66] For the sake of completeness I add that a mistake has to be sufficiently important to vitiate a contract (see Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2.)

[67] Chwee's case also made clear that inferences will have to be drawn in most cases from the surrounding circumstances including the experiences of the parties and in addition what a reasonable person would have known in a similar circumstance.

[68] Equity deals to a limited extent perhaps with the hardship which the mistaken party can suffer under the objective principle. In other words, where a contract is valid at law equity may still provide a remedy for mistake. (See Treitel at page 8).

[69] Chitty at paras 5-009 and 5-010 relegates the importance of such equitable relief in light of modern developments. At paragraph 5-010 the author states:

> "The only apparent `divergence' between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either type of mistake may lead to the court refusing specific performance as a matter of discretion even though the mistake does not render the contract void or have any other effect at common law. As this

> is merely the denial of a particular remedy, and the contract remains binding in other respects (eg the claimant would still be entitled to damages if the contract were not performed) this is not a contradiction of the common law rules. In cases of contractual mistake, common law and equity are consistent and equity plays only a minor role. Thus in this edition of this Work there is no separate treatment of "mistake in equity".

[70] This may be to under estimate the role of equity. In any event it can be said that equity will in general follow the common law rule that a mistake is not operative if the mistaken party has so conducted himself as to induce the other party to reasonably believe that the mistaken offeror has agreed to the terms proposed. However even on equitable principles a person cannot have a contract set aside because of a mistake which he made simply because he failed to act with due diligence.

[71] I find a helpful analysis of the role of equity in the context of this case where rescission is sought by the defendant in Riverlate Properties Ltd v Paul [1974] 2 All ER 656. This was a case of unilateral mistake where the subject lease as executed threw the entire responsibility for repairs onto the lessor notwithstanding it was the lessor's intention that the lessee should contribute to the cost of exterior and structural repairs. However neither the lessee nor her solicitor appreciated that that was the case. At page 661 Russell LJ said:

> "Is the plaintiff entitled to rescission of the lease on the mere ground that it made a serious mistake in the drafting of the lease which it put forward and subsequently executed, when (a) the defendant did not share the mistake, (b) the defendant did not know that the document did not give effect to the plaintiff's intention, and (c) the mistake of the plaintiff was in no way attributable to anything said or done by the defendant? What is there in principle, or in authority binding in this court, which requires a person who has acquired a leasehold interest on terms on which he intended to obtain it, and who thought when he obtained it that the lessor intended him to obtain it on those terms, either to lose the leasehold interest, or, if he wished to keep it, to submit to keep it only on the terms which the lessor meant to impose but did not? In point of principle, we cannot find that this should be so. If reference be made to principles of equity it operates on conscience. If conscience is

> clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce) and would be venturing on the field of moral philosophy in which it would soon be in difficulties."

[72] In my view equitable remedies do differ from those available at common law in being more flexible and discretionary e.g. the court can refuse specific performance, grant that remedy on terms, or rectify a contractual document where a mistake has been made in the recording of same. However equity does not provide rescission for mistake where it is simply inequitable for one party to hold the other to a bargain objectively made. To the extent that OT Africa Line Ltd v Vickers Ltd [1996] 1 Lloyd's Rep 700 at page 704 suggests the contrary, I respectfully adopt the view of Treitel at page 318 footnote 97 where he asserts that such an assumption is inconsistent with the Riverlate Properties case which was not cited and "would seriously subvert the certainty which the objective principle is intended to promote." In any event the actual decision in the OT Africa Line case was that there had been no inequitable contact, so that the contract was upheld.

[73] I have therefore concluded that if the plaintiff in this case did not know of or ought not to have known of the mistake or has not contributed or shared the mistake but instead has bona fide assumed that the Calderbank letter correctly represented the intent of the offeror, there is no ground for rescission. Neither at common law nor in equity is there a power to set the contract aside in the absence of such circumstances.

[74] The concept of "unconscionability" inherent in the law of equity as a tool to provide for rescission or for that matter to rectify written agreements should not be stretched too far in granting relief whenever the court disapproves of what might appear to be a windfall in favour of a defendant who appears to have the common law on his side. An instructive case in this regard is a recent House of Lords decision in Yeoman's Row Management Ltd & Anor v Cobb [2008] UKHL 55. That case involved an oral agreement in principle between an owner of land and a developer. One party, with the

encouragement of the other, had spent time and money in obtaining planning permission in reliance on the oral agreement but without the benefit of a formal written agreement for the sale of the property. In the context of estoppel, Lord Walker of Gestingthorpe spoke of "unconscionability" in the following terms:

> "Here it is being used (as in my opinion it should always be used) as an objective value judgment on behaviour (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again. In this case Mrs Lisle-Mainwaring's conduct was unattractive. She chose to stand on her rights rather than respecting her non binding assurances, while Mr Cobbe continued to spend time and effort in obtaining planning permission. But Mr Cobbe knew that she was bound in honour only, and so in the eyes of equity her conduct, although unattractive, was not unconscionable".

[75] Thus the more general doctrine of mistake and unconscionability according to in Chitty on Contract paragraph 5-012 is restricted to cases of "special disability" such as poverty, ignorance or lack of advice". Hence there is no general inherent jurisdiction in the court to set aside a compromise which is regarded as unjust. (See Thames Trains Ltd & Anor v Adams [2006] EWHC 3291 at paragraph 45). Save for those special cases where equity might be prepared to relieve a bargain from an unconscionable bargain, it was ordinarily no part of equity's function to allow a party to escape from a bargain (see Clarion Ltd & Anors v National Provident Institution [2000] 2 All ER 265). It is only where one party has, to the knowledge of the other, made the contract under a mistake as to its subject matter or terms that relief will be granted. There is no general duty imposed upon those involved in negotiations in commercial matters to make the other side aware of all facts and manners of which it either knows or at least suspects the other side is ignorant.

[76] This illustrates both the limitations on the use of principles of equity and the general rule that the court is slow to introduce uncertainty into commercial transactions by over ready use of equitable concepts.

[77] Hence the test in this case is not merely whether the plaintiff may have obtained a windfall as a result of a mistake by Mr Callan however unattractive that result may appear to be.

[78] I shall comment on two other matters. First, a party to litigation is not obliged to be the nursemaid of his opponent. It is only in very rare cases that the law imposes a burden upon lawyers to help their opponent's case. There is thus no general duty upon one party to litigation or potential litigation to point out the mistakes of another party or his legal advisors. Each situation must be judged in the light of its particular circumstances (see Thames Trains Ltd & Anor v Adams [2006] EWHC 3291 at paragraphs 23 and 37.

[79] Secondly, whilst it is not relevant in this case since Mr Shaw no longer seeks rectification, I observe that a distinction does appear to be drawn between the remedy of rescission and rectification. The former simply undoes the bargain whilst the latter assumes a prior agreement. Cases on rectification tend to point in a rather different direction from those on rescission. It seems the relief of rectification will be granted on the basis of unconscionable conduct in circumstances where one of the parties to a contract intended the other to be mistaken as to the terms of their agreement and has diverted his attention from discovering the mistake by making false misleading statements with the result that he in fact made the very mistake intended. Thus the mistake must be actually known to the party against whom rectification is sought, although if a party wilfully shuts its eyes to the obvious or wilfully and recklessly fails to make inquiries as an honest and reasonable man would make that will count as actual knowledge (see Commission for the New Towns v Cooper (GB) [1995] 2 All ER 929.

CONCLUSIONS

[80] I have come to the conclusion that there was a corresponding offer and acceptance of £775,000 pa in this instance. Construing the intention of the parties objectively and relying on the language used, I believe a reasonable man would have believed the parties were ad idem in agreeing this figure. Any inferences to be drawn from the surrounding circumstances including the experience of the parties and what a reasonable man would have known have not deflected me from that view.

[81] It is important in the commercial world of rent reviews that there is certainty and security in such transactions. The courts should be slow to introduce uncertainty into a sphere where highly experienced professionals are assumed to have acted on instruction from their principals and with due diligence. This was not an instance where well meaning amateurs, prone to incautious mistakes, were orchestrating the process. As both the main protagonists in the case stated, it is a firmly held view in this area of

commerce that Calderbank offers are conventionally only made after careful consideration with both firms as a rule engaging in the practice of having such offers separately checked by senior persons before being despatched. That this practice was not invoked in this case cannot be allowed to undermine the climate of certainty that must attend on such offers. Accordingly I was not at all surprised to hear the witnesses for the plaintiff in this case testify they had never come across such a mistake before. I am sure that this is one of the reasons why the possibility of mistake never entered the heads Messrs Wilson, McClure or Smith in this instance. The very reputation for care and industry which Mr Callan clearly enjoys (indeed he lectures aspiring rent review experts) may have worked against him in this instance in extinguishing any prospect of the opposition considering he had made a mistake. In the event I found nothing that persuaded me that the certainty of the offer and acceptance expressly entered into in this case should be disturbed.

[82] Having carefully observed all the witnesses in this case, I was convinced that whilst Mr Callan had clearly made a mistake, that fact was not known to Mr Wilson, Mr Smith or Mr McClure. Wisely Mr Shaw did not seek to question their probity or honesty. Such an approach would have been wholly at variance with the impression that they made on me in the course of their evidence. Despite exhaustive disclosure in this case there was not the slightest hint in any of the emails passing between Mr Wilson and Mr Smith that the possibility of mistake had ever surfaced. On the contrary the email of 5 January 2007 from Mr Wilson to Mr Smith expressly referred to his assumption that the defendant wished to "get the review settled for some reason and wish to avoid the delay and uncertainty attached to arbitration."

[83] Whilst the Calderbank offer may have been couched in the format set out by a leading textbook, the use of the word "compromise" and the sum of £775,000 being in words as well as figures would have contributed to dulling the senses of the reader to any recognition of a mistake having been made.

[84] In the course of searching and skilful cross-examinations Mr Shaw concentrated on what Messrs Smith, Wilson and McClure ought to have known or on inquiries that were called for. He suggested they should have been alerted to make such inquiries in light of the background circumstances and negotiations and this would have led to the discovery of the mistake. It was his case that there was real reason to suspect a mistake.

[85] Experience over many years in such cases and the evidence of all the witnesses in this case served to persuade me that Calderbank offers are at times made in circumstances which may invoke some surprise on the part of the recipient in light of earlier negotiations. The reasoning is often because the adversarial system at the core of negotiations can instil genuine fears or concerns, albeit concealed from view, on the part of one or other of the

negotiators. There may be a number of reasons why parties choose to settle at a figure greater than that which the opposite number expects and which may be at variance with the line taken during negotiations. Reasons can include knowledge of weaknesses in the case known to or perceived by only one side. In this instance for example was there perhaps a further comparable known only to the defendant, the revelation of which in the fullness of time could have faintly flawed their case?

[86] Mr Shaw suggested that any unknown evidence of zone A rates would be a very remote possibility given the small market in this locality which was in the hands of only a few agents of which OK had a very substantial share. However I consider that the key to this rent review probably lay more in the argument over the approach to the basement. Frankly neither side had carried out much research into the issue at this stage of the negotiations. Certainly Mr Wilson had yet to carry this out in Great Britain and whilst such evidence would have had limited effect on a Belfast market it could have served to bolster the Jaeger comparable despite its frailties. The arbitration phase was yet to come and more evidence damaging to either party might have or perhaps had already emerged.

[87] Moreover there was plausible room for dispute as to the nature of this basement which might have influenced the outcome. The plaintiff argued that this was an attractively placed basement easily seen from the front of the shop and with a wide stairway. Although Mr Callan countered Mr McClure's optimistic descriptions by countering that on the contrary it was not easily seen ,was further back than he asserted and was in the middle of the shop it is noteworthy that in an earlier report to his principals he had described it in the following terms

> "An important issue for the review will be the valuation of the basement area which is almost unique in Belfast city centre retail …… Access to the basement is very good with a one-way escalator down and a wide stairwell up".

[88] This is typical of the cut and thrust of negotiation with each side putting their best foot forward but neither knowing precisely the degree to which points made are having an impact on the opponent. The fact of the matter was that Mr Wilson had put in an opening bid of £975,000 which although clearly based on an inaccurate measurement illustrated the kind of difference that a variation on the overall figure that the analysis of the basement factor could have.

[89] In the scale of things the offer of an increase amounting to something in the region of 4% over 5 years since the last review, whatever the state of the current market, might well have borne all the hallmarks of "go away money"

as Mr McClure coined it to buy off any risk inherent on arbitration. Whatever the mistake about measurements in 2001, the fact of the matter was that a large UK national firm had agreed an open market letting at £745000pa. The increase in 2006 was modest and certainly not sufficiently high to have alerted OK or Mr Smith to the realisation that this bore the stamp of a mistake.

[90] The position of the parties has to be considered in context. Mr Smith was the man responsible for a substantial portfolio of 60 properties in the UK of his employer. He is not in the position of a single landlord who is determined to squeeze the last ounce out of negotiations. As he described it, this settlement was "another box ticked" and he could move on to the next matter on his desk. Despite the pessimism of Mr Wilson, he had originally been advised by his English agents that the ERV was in excess of even that which was now offered, he had been aware of substantial increases in adjacent properties up to 2005 and had formed the view that his expectations were being managed by Mr Wilson. I was satisfied therefore that this witness held a healthy scepticism about the prospects of this matter actually coming to arbitration and that it was no real surprise when a small offer by way of increase came along. I found nothing in the evidence from his perspective that would have led him to feel this offer was a mistake or required him to make further enquiries before accepting it at face value.

[91] There are other reasons why rent reviews resolve. One party may have a genuine fear of escalating costs particularly in a case of this potential where both parties would likely have retained senior counsel over a lengthy arbitration hearing and legal costs would have soon started to escalate. Unhappy experiences in previous rent reviews where arbitrators had simply introduced the via media between two competing figures can be another rational reason for deciding to settle. The desire to bring the matter to a speedy conclusion in light of other interests such as a pending takeover, assignment of the property, other outstanding rent reviews or the desire for unconnected commercial reasons to dispose of the property with a rent review concluded can similarly generate a desire to settle. These were all reasons which were ventured by the witnesses in this case as to why cases can sometimes settle. Such experience would have deflected any consideration of mistake arising in this case. It did not surprise me therefore to hear Mr Callan concede in cross-examination that despite the negotiations he would not have thought Mr Wilson had made a mistake if he had written accepting a nil increase.

[92] The most unlikely of cases often resolve in the most surprising of circumstances. Accordingly it did not surprise me that Mr Wilson met this offer with only a measure of surprise given his experience of negotiations in the past. The strong, perhaps even seemingly intransigent, line adopted in negotiations by a party may often not be followed through in offers that are

made. The competing figures in this case prior to settlement - £975,000 against a nil increase – did not serve to distinguish this case from the type of pre-settlement posturing that often occurs before one party lances the seemingly intractable problem. I do not consider that Mr Callan's steadfast refusal to budge was any indication to the opposition that eventually movement might not occur. I found no basis for concluding that the change in his position heralded a mistake or a need to make inquiries as to why the change had come about.

[93] I found no attraction in Mr Shaw's suggestion that it was curious that Mr Wilson had not gone back to Mr Callan in the wake of the Calderbank offer to extract more if possible. As I have already indicated this is not the case of an individual private landlord anxious to squeeze the last penny. Mr Smith was content to see an increase and was soon persuaded by Mr Wilson that further efforts were fruitless. Having observed Mr Wilson in the witness box I did not form the impression that he was the textbook aggressive negotiator. I am satisfied he was content that at least some recognition of his arguments had been made and he was prepared to see the matter finalised and to move on to his next task in the absence of any pressure from Mr Smith to do so.

[94] Similarly I was not moved by the suggestion that it was curious that Mr Wilson had not asked Mr Callan why he had altered his stance or on what basis he had changed his approach. To have done so would in my view have been to betray weakness in his case and in my experience would have been a somewhat unusual approach to negotiation. It is no criticism of Mr Wilson to say that he probably was pleased that he had been able to secure an increase without having to expend the time and trouble of looking out comparables for basements in the Great Britain. I formed the impression he was a busy man in a busy practice where resolution of disputes is the optimum result rather than being committed to the work involved in lengthy arbitration proceedings.

[95] In conclusion therefore I find no reason to conclude that the plaintiff or its advisors in this case knew of, ought to have known of or had real reason to suspect a mistake had been made by Mr Callan. Any reasonable person in their position would have acted as they did. I do not believe any inquiries fell to be made or were reasonably called for once the Calderbank offer was received. I find nothing unconscionable in their behaviour. The rules of equity do not avail the defendant in this matter. I therefore grant the declaration sought by the plaintiff in the terms of this application before me with costs to follow the event and I dismiss the counterclaim.