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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CHANCERY DIVISION
(Mr Justice Neuberger)

Royal Courts of Justice
Strand
London WC2
Friday, 12th April 2002

B e f o r e :

LORD JUSTICE PETER GIBSON
LORD JUSTICE JONATHAN PARKER

SWAINLAND BUILDERS LIMITED
Claimant/Respondent
- v -
FREEHOLD PROPERTIES LIMITED
Defendant/Appellant

Friday, 12th April 2002

J U D G M E N T

1. LORD JUSTICE PETER GIBSON: The defendant, Freehold Properties Ltd, appeals with the permission of Mr Justice Neuberger from the order made by him on 10th May 2001 whereby he ordered rectification of a transfer dated 10th December 1999.

2. The relevant facts are these. The claimant, Swainland Builders Ltd, was the registered owner until 20th December 1999 of a property known as College Close, College Avenue, Grays, Essex. College Close consists of a building built by the claimant with 39 flats. By 1993 the claimant had granted long leases for 99 years of 37 flats but it had retained possession of two flats, Flats 11 and 18, subject to letting them from time to time on secure shorthold tenancies.

3. In mid 1998 the claimant decided to sell the freehold of College Close but to retain Flats 11 and 18 for the time being, as suitable selling prices for long leases of those flats could not be obtained. It was advised by Richard Irving, the manager of some ground rent brokers, that College Close should be marketed for about £60,000. That was based on the assumption that it consisted of 39 flats, each let on a long lease for 99 years at £125 per annum. The aggregate ground rents were mistakenly thought to come to £5,070. The correct aggregate figure was in fact £4,875 if, but only if, all 39 flats were so let. College Close was marketed for £60,000 and the defendant made an oral offer to buy the freehold at that price. The claimant's agents subsequently informed the defendant's agents that what was being sold was a purpose-built block of 39 flats sold on 99 year leases at a (combined) rising ground rent of £5,070 per annum, and that was later corrected so that the aggregate figure became £4,875. The defendant decided to proceed with the purchase at £60,000 as its agents confirmed on 5th October 1998. In so doing it correctly understood that the true aggregate figure for the ground rent was £4,875. That was therefore on the basis that all 39 flats were so let.

4. The disposal by the claimant of its interest in College Close was subject to the provisions of Part 1 of the Landlord and Tenant Act 1987. That gives tenants the right of first refusal when a landlord intends to sell his interest. By section 5 the landlord is required to serve a notice on the relevant tenants. That notice has to comply with the provisions, so far as relevant, of section 5D, and section 5(2) provides that in the case of a disposal to which section 5E applies, the offer notice must also comply with the requirements of that section. Section 5D applies to offer notices where the disposal is not made in pursuance of a contract binding on the landlord. By subsection (2):

> "The notice must contain particulars of the principal terms of the disposal proposed by the landlord, including in particular-
>
> (a) the property to which it relates and the estate or interest in that property proposed to be disposed of, and
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> (b)the consideration required by the landlord for making the disposal."

5. Section 5E applies

"...where, in any case to which section 5 applies, the consideration required by the landlord for making the disposal does not consist, or does not wholly consist, of money."

6. By subsection (2) the offer notice is to state certain matters in addition to complying with whichever is applicable of sections 5A to 5D.

7. Section 7 relates to a case where there has been a failure by the tenants to accept the landlord's offer. By subsection (1)

> "Where a landlord has served an offer notice on the qualifying tenants ... and
>
> (a)no acceptance notice is ... served on the landlord
>
> ...
>
> the landlord may, during the period of 12 months ... dispose of the protected interest to such person as he thinks fit, but subject to the following restrictions".

8. Subsection (3) provides that:

> "... the restrictions are-
>
> (a)that the deposit and consideration required are not less than those specified in the offer notice, and
>
> (b)that the other terms correspond to those specified in the offer notice."

9. Section 10A makes a failure to comply with the requirements of Part 1 an offence. By subsection (1):

> "A landlord commits an offence if, without reasonable excuse, he makes a relevant disposal affecting premises to which this Part applies-
>
> (a)without having first complied with the requirements of section 5 as regards the service of notices on the qualifying tenants of flats contained in the premises, or
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> (b)in contravention of any prohibition or restriction imposed by sections 6 to 10."

10. By subsection (5) it is provided that:

> "Nothing in this section affects the validity of the disposal."

11. A notice in substantially the requisite form was sent to the tenant of each flat let on a long lease. It stated that the notice constituted an offer by the landlord to dispose of an interest in 1-39 College Close for a consideration of £60,000 on the terms set out in the notice. It specified the landlord's interest of which he intended to dispose as freehold. It specified the required deposit as £6,000.

12. No, or an insufficient number of, tenants of the flats served counter notices, with the result that the claimant was entitled under section 7(1) to dispose of its interest to such persons as it thought fit, subject of course to the restrictions in section 7(3).

13. The claimant informed the defendant that its offer was accepted. Thereafter there was correspondence between the claimant's solicitors, Kosky Seal, and the defendant's solicitors, Stevensons, for whom an assistant solicitor, Rebecca McPhun, acted in the transaction. She sent the

defendant's agents a lease report and a sample lease. The report set out a summary of the essential terms of the leases of the flats. She said that all but four of the flats were let on the same terms, though she had not seen the leases for Flats 11 and 18. Those terms were that the lease was for 99 years from 1st January 1989 at a rent of £125,000 for the first 30 years and rising thereafter. The terms of the leases for the four flats, let on slightly different terms, showed a difference only as to the date of the increases in the ground rents in three cases and in the fourth case the amount of the ground rent in the final period was different.

14. On 7th April 1999 Stevensons wrote to Kosky Seal saying that there did not appear to be any leases for Flats 11 or 18 and asking if that was correct and, if so, why. On 7th June 1999 Kosky Seal replied that the claimant owned both flats. On 8th June Stevensons wrote to Kosky Seal saying:

> "With regard to flats 11 and 18 which remain in the ownership of your clients please can you advise whether or not these are being sold or whether or not it is your clients intention to retain possession of these."

15. Kosky Seal replied that they were taking further instructions about the two flats. Mr Swainland, a director of the claimant, told Kosky Seal orally and also by letter dated 31st August 1999:

> "We confirm that we do not intend to sell flats 11 and 18 in the short term. We will dispose of the properties in due course."

16. On 14th September 1999 Kosky Seal told Stevensons that the claimant

> "[does] not intend to sell in the short term but will dispose of the properties in due course. Accordingly, in the interim they are to be treated as any other tenant of the block."

17. The judge commented in his judgment:

> "It appears from the subsequent silence in the correspondence, from the parties then proceeding to the transfer, and the oral evidence, that this was accepted by the defendant."

18. The matter then proceeded to completion, which was fixed for 10th December 1999. On 7th December a schedule of arrears was sent by Kosky Seal to Stevensons. This showed Swainland & Son as the tenant of Flats 11 and 18. No ground rents were said to be due from that tenant for the half year to 24th December 1999, in contrast to all the other tenants.

19. Completion took place on 10th December when the transfer by the claimant of College Close to the defendant for £60,000 was executed. It was transferred subject to, and with the benefit of, leases referred to in the Charges Register. This did not, of course, include leases in respect of Flats 11 and 18, which had not then been let on a long lease. There was no reference to those two flats. Nor were any rights reserved or granted to the claimant in respect of the two flats. But the claimant nonetheless proceeded on the basis that it still retained a substantial interest in the two flats. Mr Swainland, shortly before completion, instructed agents to market a long lease of Flat 18 at a price of just under £50,000. That price was reduced in January 2000 to just under £45,000 and an offer was accepted in that amount on 1st February 2000. On 7th February 2000 the claimant instructed its agents to market the other flat for just under £62,000. The claimant, after the transfer, continued to manage Flats 11 and 18 as landlord and to receive rents from short lettings.

20. In February 2000 it was realised by Kosky Seal that something had gone wrong. They wrote to Stevensons on 22nd February that it had been intended that the claimant should have 99 year leases

of Flats 11 and 18. On 9th May they wrote to Stevensons and asked that the defendant should agree to rectification of the transfer so as either to exclude Flats 11 and 18 from the transfer, or to make provision for the grant of leases to the claimant for terms of 99 years from 1st January 1989 on the same terms as to ground rent as for the other leases. The defendant did not so agree.

21. On 12th May the claimant commenced proceedings against the defendant. By paragraph 8(1) of the particulars of claim, as amended at trial, it was pleaded:

> "The Claimant contends that by reason of the matters aforesaid it was the common intention of the parties that the Claimant was not disposing of the right to vacant possession of, nor the right which it had enjoyed to receive the rack rents in respect of flats 11 and 18. ... It was the common intention of the parties that Property would be acquired by the Defendant with all 39 flats therein, including flats 11 and 18, being subject to leases for terms of 99 years. This intention is ... to be given effect ... by the defendant, upon the acquisition of the Property granting long leasehold interests of flats 11 and 18 back to the Claimant for terms equivalent to those to which the flats in the Property were subject, ... either with or without the provision for the payment of a ground rent."

22. In paragraph 12 it was pleaded:

> "By mistake, common to the parties, and contrary to the parties' common intention as pleaded as aforesaid, the transfer failed to preserve the Claimant's rights to flats 11 and 18 as had been intended ... . That intention should be given effect to by providing for the grant of ... leases thereof of 99 years from 1.1.89 with or without the reservation of a ground rent. It is contended that the question of whether the leases are subject to the reservation of a ground rent is not a matter affecting the substance of the common intention of the parties, that is to say the result intended, which was for the two flats to be retained by the Claimant as if it were lessees thereof. The Claimant is prepared for the leases to be subject to ground rents of £125 per annum per flat."

23. The relief which the claimant sought originally reflected two methods for rectifying the transfer, one being by the claimant retaining the freehold interest in Flats 11 and 18, and the other being the way in which the matter is now pleaded. On amendment the relief sought by the claimant was limited to rectification of the transfer so as to provide for the grant by the defendant of separate leases of Flats 11 and 18 of terms of 99 years from 1st January 1989 on the same terms and conditions of the leases and flats within the property, save for the non-reservation of a ground rent, alternatively, subject to the reservation of a ground rent of £125 per annum per flat.

24. The action was tried by the judge, who heard oral evidence on both sides. In his judgment he referred to the evidence of the witnesses all of whom he found to be wholly honest. At page 9 he said this:

> "The intention of both parties seems quite clear from the evidence of all the witnesses, from the documents to which I have referred, from the conduct of the parties, from the price paid for the property, and the way in which that price was calculated. The parties envisaged that the claimant would retain the right to grant short term tenancies and enjoy the proceeds of Flat 11 and of Flat 18 and, when it saw fit, to grant long leases for premiums (which it would retain) of Flats 11 and 18.
>
> The intention and expectation was that what the defendant would receive would be the same rights and benefits and no more (and no less) in respect of Flat 11 and Flat 18 as

it was to receive in respect of the other 37 flats, namely a right to possession at the end of a 99 year term, subject to whatever statutory rights the tenants might then have, the right to receive the rent of £125 per anum (subject to increase), the right to recover service charges, and the right to enforce the tenant's covenants which were effectively identical in all the leases."

25. At page 11G, the judge said this:

> "The exchange of correspondence in June and September 1999 makes it clear that neither party, nor their respective solicitors, intended or believed that the payment of £60,000 was intended to purchase the right to vacant possession of the two flats. By the end of that correspondence, it was clear what the claimant wanted (albeit it was not very happily expressed). The only sensible way of reading the letter of 14 September 1999 from the claimant's solicitors to the defendant's solicitors is that in the interim (until the claimant `disposed of the properties [i.e. flats 11 and 18] in due course') the claimant was to be treated as any other tenant of the block - ie as if it had a 99 year lease at £125 per annum, subject to the terms of the other 37 leases. This accords with common sense; it accords with the actual price and the method of calculation of the price; it accords with the natural meaning of the words that the parties used in correspondence; it accords with all the oral evidence that I have heard; it accords with the subsequent actions of the parties. I am also clear that that intention continued on the part of both parties (and their respective solicitors) up to the date of the transfer - indeed thereafter."

26. The judge then reviewed the authorities on rectification. He referred to the evidence of the solicitors on both sides. He referred to the evidence of Miss McPhun for the defendant, who had admitted to an oversight in not considering the position of Flats 11 and 18, and to her expectation that on completion the freehold reversion of the entire block was to be transferred to the defendant with each flat being subject to a long lease, and that that was what the defendant expected to acquire.

27. The judge referred to the evidence of Mr Wise of Kosky Seal for the claimant. From that evidence, he said, it was clear that Mr Wise also simply forgot when completion took place to protect the claimant's interest in relation to Flats 11 and 18. The judge said at page 17E:

> "I believe it is clear that the claimant and defendant intended and envisaged that the claimant would transfer the freehold of the property to the defendant on the basis that each of the 39 flats was subject to 99 year leases at £125 per annum rent (subject to increase), the benefit of the two leases being vested in the claimant. How this was to be achieved was not discussed, and it should have been. The claimant and the defendant left the machinery to their respective solicitors, each of whom overlooked the need to deal with the matter. This may have been because they decided to go straight to transfer rather than to have the more normal procedure, of contract followed by completion of the transfer.
>
> To my mind, the clear common continuing intention was that flat 11 and flat 18 was each to be subject to a 99 year lease at £125 per anum. That was clear from the beginning: there were 39 flats each subject to a lease at a rent of £125 per year. It is plain from the correspondence in June and September 1999: the claimant is to be treated in respect of flat 11 and flat 18 in the same way as other tenants in the block -- ie as holding a 99 year lease of each flat at £125 per annum. I do not see any ground for refusing rectification simply because the mechanism for achieving this common intended result was not agreed or even discussed. So to decide would seem to fall into

the same over-technical approach rejected in the more recent cases I have cited. By granting the rectification sought (subject to the other points I have to consider) the only binding document entered into between the parties, namely the transfer, would give effect to the common intention of the parties as was agreed between them in the June/September 1990 correspondence, and as they each had in mind from the inception of the negotiations up to the completion of the transfer. I do not believe that I am extending the law of rectification in principle; I am applying established principle to unusual facts.

If I am extending the principle, then I do so without qualms. Where parties have concluded their negotiations on a clear, common, communicated and continuing assumption and/or with a clear, common, communicated and continuing intention and, through an oversight on the part of their respective solicitors the ultimate contract does not reflect that assumption and/or intention to the manifest unfair disadvantage of one party and to the manifest unfair advantage of the other, then, unless there is some good reason to the contrary, a court of equity must be able to remedy the situation at the suit of the former party. The obvious remedy, again in the absence of good reason to the contrary, is to refashion, or rectify, the contract so it reflects the assumptions and/or intention. Nothing in the more modern cases on reflection to which I have been referred suggests that there is too flabby or wide a formulation of the power of the Court to rectify."

28. The judge then dealt with a number of other points taken by the defendant, all of which he rejected. One point he noted was that, because the leases of the flats were not all in the same form, it might be said that there was a degree of uncertainty as to the terms of the leases of Flats 11 and 18, but he thought the appropriate terms were contained in the form of lease which was used for 33 of the 37 leases.

29. A further point related to the inclusion in each of the long leases of a management company, College Estate Management Company Limited. The judge noted the argument that was advanced by the defendant that it was inappropriate to grant rectification involving a third party which was not a party to the rectification proceedings. The judge decided that if he were to grant rectification, he would do so with liberty to apply in case the management company was not prepared to enter into the lease, though he did not think that that was likely to prove a problem.

30. The most substantial of the further points taken on behalf of the defendant related to the 1987 Act. It had been argued that to order rectification would result in a party being in breach of the Act, which gave rise to criminal sanctions. It was submitted that it would be against public policy to grant rectification in those circumstances. The judge did not accept that argument. He found that pursuant to section 7, the claimant was entitled to dispose of its interest, the deposit and consideration required being not less than those specified in the offer notice. If the obligation to grant back to the claimant long leases of Flats 11 and 18 could be considered as consideration, that would simply have added to the £60,000 consideration. Further, the judge held that the offer notice complied with the terms of the rectified transfer, as it was to be construed as being the disposal of the a freehold, subject to 39 leases all at ground rents.

31. Accordingly, the judge held that the 1987 Act provided no obstacle to granting rectification. He ordered that the transfer be rectified so as to provide as a term of the transfer additional provisions in the following form (and I will read them as I think they ought to be, with some corrections, "transferor" and "transferee" being transposed):

"(i) the [Transferee] do within 28 days after the completion of this Transfer grant to the

> [Transferor] leases of flats 11 and 18 within the Property each for a term of 99 years from the 1st January 1989 at a ground rent of £125 per annum (rising in accordance with the terms of provision for review on the anniversary of every period of 30 years of the term as contained within the lease annexed (`the Lease')) and otherwise on the same terms and conditions in the form of the Lease;
>
> (ii) all the costs incurred ... in the preparation and grant of the leases of the flats 11 and 18, including stamp duty and solicitor's costs and disbursements, be paid by the [Transferor] to the [Transferee] on an indemnity basis."

32. Before I turn to the rival contentions advanced before us, let me state the conditions which must be satisfied if the court is to order rectification in a case where it is alleged, as it is here, that there has been a mistake common to the parties.

33. The party seeking rectification must show that:

> (1)the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2)there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake the instrument did not reflect that common intention.

34. I would add the following points derived from the authorities:

> (1)The standard of proof required if the court is to order rectification is the ordinary standard of the balance of probabilities.
>
> "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": Thomas Bates and Sons Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505 at page 521 per Brightman LJ.
>
> (2)Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained: Cooperative Insurance Society Ltd v Centremoor Ltd [1983] 2 EGLR 52 at page 54, per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed.
>
> (3)The fact that a party intends a particular form of words in the mistaken belief that it is achieving his intention does not prevent the court giving effect to the true common intention: see Centremoor at page 55 A-B and Re Butlin's Settlement Trusts [1976] Ch 251 at page 260 per Brightman J.

35. On this appeal Mr Mark West for the defendant in a well-sustained argument takes a number of points. The first, to which he adverted in his skeleton argument, was based on the fact that the claimant before amendment had in paragraph 8.1 pleaded rectification, as he put it, in the alternative. Paragraph 8.1 had been pleaded:

> "... it was the common intention of the parties that the Claimant was not disposing of the right which it had enjoyed to receive the rack rents in respect of Flats 11 and 18 and

this intention was to be given effect either by the Claimant retaining the freehold interest in Flats 11 and 18 or, alternatively, by the Defendant, on the acquisition of the property, granting leasehold interests of Flats 11 and 18 back to the Claimant for terms equivalent to those to which the flats in the property were subject, but without the provision for the payment of ground rent."

36. Further, as we have seen from my citation of paragraph 8.1 as amended, even in the amended pleading alternatives are pleaded in that the method of giving effect to the common intention was said to be by the defendant granting the claimant long leasehold interests of Flats 11 and 18 for terms equivalent to those to which the other flats were subject "either with or without a provision for the payment of a ground rent".

37. Mr West draws attention to the decision of this court in CH Pearce & Sons Ltd v Stonechester Ltd, the Times, 17th November 1983. In that case the judge at first instance had allowed a late amendment to a statement of claim in which alternative claims for rectification were pleaded. Oliver LJ, with whom O'Connor LJ agreed, referred to the highly unsatisfactory state of the pleadings. In one paragraph a construction quite different from that which was originally pleaded was put forward; and in the next paragraph it was pleaded that that construction was the common intention of the parties, even though the plaintiff had contended for a year or more in a quite different sense. In the next paragraph it was pleaded that, alternatively, a common intention entirely different from that preceding paragraph was put forward. The court held that there was no answer to an argument that, because the plaintiff was unable to state what his own intention was, there could be no claim for rectification based upon stating with certainty a single continuing common intention of both parties. Accordingly the appeal was allowed.

38. Mr West, on the basis of that authority, submits that there is in the present case no convincing proof of the alleged common intention when by the pleadings of the claimant different matters are put forward in the alternative. I am unable to accept this submission. In the present case the claimant does not plead inconsistent common intentions. It has pleaded inconsistent ways in which the pleaded common intention can be given effect, and that, I think, was true even of the original unamended pleading. For my part that distinguishes the present case from the Pearce case. If the common intention is, as the judge found, that the transfer to the defendant by the claimant would be of the freehold of College Close subject to 39 long leases at a ground rent of £125 per annum, and if effect can be given to that common intention in more than one way, I cannot see why it should matter that the pleading should reflect that fact. To put it another way, it would seem to me to be very odd that an equitable remedy for correcting a common mistake should be defeated merely because it is pleaded that the court should give effect to the common intention by either of two methods which would achieve the common intention.

39. Mr West accepts, as he must, that a mistake has been made; indeed it is obvious that a gross mistake has been made. If the defendant is right, it would keep an adventitious windfall, in that it would have had transferred to it property worth some £160,000 for which it was paying only £60,000: neither party intended that result. But he submits that the mistake was limited to the fact that the claimant should have granted a long lease of each of Flats 11 and 18 before the transfer. He submits that it is plain that the transfer was not intended to effect the granting of a long lease back from the defendant to the claimant. But thereby, as it seems to me, he accepts that what was intended by the transfer was the transfer only of the reversion to long leases of the 39 flats, each being let at a ground rent of £125 per annum. Equity only rectifies instruments. The question is whether equity is prevented from giving effect to the common intention as to what the transfer would transfer by reason of the mistaken assumption as to the state of Flats 11 and 18.

40. Mr West takes two points. One is this. He says that there was a mistaken belief as to the quality of

what was to be transferred, in that the parties were mistaken as to whether Flats 11 and 18 were subject to long leases. He distinguishes between the parties' beliefs and understandings as to their rights and the parties' intentions, and he accuses the judge of failing to make the distinction. He submits that rectification cannot be prayed in aid to remedy an incorrect understanding about the subject matter of the contract. He suggests that the present case is indistinguishable from that considered by this court in Frederick E Rose (London) Ltd v William H Pim Junior & Company Ltd [1953] 2 QB 450. In that case the parties wrongly assumed that the subject of a contract for the supply of horsebeans was feveroles. But as both the oral and the written contracts were for horsebeans, which were the commodity which was delivered, this court refused rectification.

41. For my part, I can derive no assistance from that case, which seems to me plainly distinguishable. Both parties in the present case intended the sale and purchase of the freehold of College Close, subject to 39 long leases each at a ground rent of £125 per annum, and only of the reversion to those leases. The fact that through the oversight of the solicitors the transfer effected a transfer, amongst other things, of two flats with vacant possession subject only to shorthold tenancies does not mean that this was a case like the Rose case. In the present case there is a disparity between the common intention and what was transferred by the transfer. To my mind, it is plain that it was the common intention of the parties, continuing at the moment of transfer, that the defendant would acquire for £60,000 the freehold interest in College Close subject to 39 long leases each at a ground rent, and that is demonstrated by the fact that the property was marketed as producing an aggregate figure of £4,875 in annual ground rents. It is to my mind plain, as the judge indicated, from the evidence of the witnesses and from the documentation, that the £60,000 represented an appropriate value for that freehold interest, whereas the value of what was transferred by the transfer was £100,000 more.

42. Mr West further takes the point that there was no common intention as to the means by which the intention found by the judge to be the common intention should be given effect. He points in particular to the fact that it was never considered or agreed that the defendant should grant a lease of Flats 11 and 18 back to the defendant.

43. Mr Wayne Clark for the claimant concedes, as he must, that there was never any common intention that the transfer should contain the specific provisions ordered by the judge to be included in the transfer. But Mr Clark submits that that does not prevent rectification in a manner appropriate to give effect to the common intention. I agree. I find helpful the way Sir Raymond Evershed MR in Whiteside v Whiteside [1950] Ch 65 at pages 75 and 76 formulated the appropriate principle, that is to say, where a document has been executed which does not carry out the intention of the parties, each party has the right against the other to have the document reformed in such manner that the document will place each other in the same position vis-à-vis each other as they intended. I emphasise that formulation, as it seems to me that it correctly distinguishes between the common intention to which effect has not been given by the unrectified document and the remedy which the court can order. The court can grant relief by putting the parties in the same position vis-à-vis each other as they intended.

44. No doubt in most cases it will be possible to see from the material which the parties have considered and about which they reached a common intention the precise wording to be included in the document to be rectified. In the unusual case such as the present, there may be more than one way of achieving the common intention. Mr Perry for the defendant accepted in cross-examination that he would not have objected to the inclusion in the transfer of a requirement to grant leases back to the claimant of the two flats. I see no reason in principle why equity should be prevented from giving relief merely because the parties had not agreed on the mechanics by which effect should be given to a clear and simple common intention.

45. Mr West also argues that the transfer was in a form intended by the defendant. He submits that it was illogical for the judge to order rectification to change that form. But that is to misunderstand the function of the equitable remedy. Equity allows the correction of mistakes in the instrument which fails to give effect to the true intention of the parties. In Centremoor the parties plainly intended that the clause which the court rectified should take the form which it did. But that intention was formed as a result of a mistaken belief, and that did not prevent the court giving rectification.

46. Mr West also took the objection that the court in granting rectification in the form which it did was making a bargain for the parties by choosing the appropriate form of lease. But the court was simply rectifying the transfer in an appropriate way to give effect to the common intention, and to my mind it was plain that the form of lease, which was the same form as for 33 of the other leases, was the appropriate one to be adopted.

47. Mr West also takes a point about the inclusion of the management company in the form of lease which is to be granted by the defendant to the claimant, notwithstanding the fact that the management company was not a party to the action nor was there evidence that it had ever been given notice of it. In my judgment the same answer can be given to that point. It is that the inclusion of the management company was simply part of the mechanics by which the court, having decided that the common intention had not been given effect to by the transfer, rectifies the transfer so as to achieve the common intention. The judge recognised that the management company might not be prepared to enter into the leases, and so he granted liberty to apply. We are told that in the event the management company has agreed to enter into the leases. I do not see any real substance in this point. I would add that although Mr West submitted that the leases could not take effect without the management company being a party to the leases, I do not accept that that is a correct assessment of the position. The covenants which are to be entered into with the management company are also entered into with the landlord and can be enforced by the landlord.

48. The most substantial further point taken by Mr West is based on the 1987 Act. Mr West relies on section 10A:

> "A landlord commits an offence if, without reasonable excuse, he makes a relevant disposal ...
>
> (a)without having first complied with ... section 5".

49. He points out that rectification dates back to the date of the transfer. He submits that the transfer as rectified would be for the transfer of the freehold interest in the property to the defendant for a consideration consisting not only of £60,000, but also of the obligation on the part of the defendant to grant the claimant 99 year leases of Flats 11 and 18. He submits that the claimant had to serve an offer notice on the tenants containing the principal terms, as well as specifying the consideration under the transfer as ordered to be rectified. He argues that there is a breach of the statutory requirements. He further submits that section 5E applied, as the consideration is not only money. He says that section 5 was not complied with because there has been a failure to state in the offer notice all the principal terms, which included the obligation to grant the 99 year leases back to the claimant in respect of Flats 11 and 18. He invokes public policy as being offended by an order for rectification which, he submits, leads to the claimant being in breach of the statutory provisions.

50. Ingenious though that argument is, I am wholly unpersuaded by it. It seems to me that, in essence, the same point as has already been discussed is at the heart of this argument too. I do not accept that the consideration required by the landlord for making the disposal was increased or altered by the rectification. On the contrary, it seems to me plain that the consideration remained precisely the

same, that is to say £60,000. The inclusion in the transfer of the provision requiring the grant of leases of flats 11 and 18 was merely to give effect to that which both parties had intended right from the beginning and which was reflected in the offer notice. In other words, the changes are merely mechanics of the rectification ordered by the court and not principal terms of the disposal proposed by the landlord. There was no bargain about the terms added through rectification. I do not believe that the provisions of Part 1 of the 1987 Act were ever intended to apply to a circumstance such as we have in the present case. In my judgment there has been no offending of Part 1 of the Act, and accordingly I would reject this point also.

51. I confess I am the happier to reach the conclusion which I do so as to avoid what seems to me the plain inequity that would result if the defendant were to be allowed to hold onto a benefit for which it had never bargained, that is to say of receiving property worth some £160,000 instead of the property worth £60,000 which it thought it was acquiring.

52. For these reasons, which in substance echo the reasoning of the judge, I would dismiss this appeal.

53. LORD JUSTICE JONATHAN PARKER: I agree that this appeal should be dismissed for the reasons my Lord has given.

54. The judge concluded, as he was in my judgment bound to do on the uncontested evidence before him, that at all material times the "clear common continuing intention" of the parties in relation to Flats 11 and 18 was that each flat was to be transferred, subject to a 99 year lease, at a ground rent of £125 per annum. The transfer as executed did not give effect to that intention, in that, by mistake, it transferred Flats 11 and 18 with vacant possession subject only to secure shorthold tenancies.

55. In my judgment that mistake gave rise to a clear entitlement to rectification on the part of the respondent. I agree with the judge when he concluded (at page 18 of the transcript of his judgment at letter C) that the mere fact that the mechanism for carrying into effect the parties' common intention had not been discussed was not a ground for refusing rectification. The parties in the instant case understandably left the mechanics of the transaction to their respective solicitors in the expectation that the form of the transaction as devised by the solicitors would be effective to carry their common intention into effect.

56. Accordingly, I do not consider that in ordering rectification the judge was in any way extending the well established principle governing the equitable remedy of rectification. He was simply applying those principles to the particular facts of the instant case, and in my judgment he did so entirely correctly.

Order: Appeal dismissed with costs subject to detailed assessment.