

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 September 2013

Before :

THE HON MR JUSTICE RAMSEY

Between :

Liberty Mercian Limited	<u>Claimant</u>
- and -	
Cuddy Civil Engineering Limited	<u>1st Defendant</u>
-and-	
Cuddy Demolition and Dismantling Limited	<u>2nd Defendant</u>

Simon Lofthouse QC and Marc Lixenberg (instructed by **Morgan LaRoche**) for the
Claimant
Simon Hargreaves QC and Richard Coplin (instructed by **Hugh James**) for the **Defendants**

Judgment

Mr Justice Ramsey:

Introduction

1. In these proceedings the claimant (“Liberty Mercian”) seeks declaratory relief, specific performance, rectification and/or damages in a dispute arising from a development project at Bath House, Cardigan. The project involved the construction of a new retail plateau for future construction of a supermarket.
2. Liberty Mercian entered into an amended NEC3 Form of Contract (“the Contract”) for those works. It seeks to obtain an outstanding parent company guarantee, bond and warranties from the Contractor under the Contract. There is a dispute as to when the Contract was entered into and also whether the Contract was entered into by the second defendant (“CDDL”) a company carrying on business as a construction and civil engineering contractor or by the first defendant (“CCEL”) a company which at all material times has been dormant. I shall refer to the relevant party as the Contractor and to CCEL and CDDL jointly as the Defendants.
3. Liberty Mercian seeks a declaration that the Contract was entered into by CDDL and that CDDL remained the contracting party. It also seeks a declaration that the Contractor is contractually obliged to deliver a parent company guarantee from CDDL in the event that the Contract is found to be with CCEL and also a performance bond and warranties.

Background

4. In late 2008 there was an exchange of emails between Richard Jones, a quantity surveyor employed on behalf of Liberty Mercian and Mr Darren Evans, a director of the “Cuddy Group” concerning the work at Bath House. It is now common ground that the “Cuddy Group” is in fact a reference to the trading name of CDDL.
5. At the end of October 2009 Mr Jones provided tender documents to Mr Evans for the “Bath House section 38 and retail plateau works”. They had been prepared by Waterman Transport and Development Limited (“Waterman”) and were based upon the NEC3 Contract Option A: Priced Contract with Activity Schedule, with further options and amendments.
6. On 23 November 2009 Mr Evans sent Mr Jones and Waterman a completed form of tender for the works which named the Contractor as “Cuddy Group”. It was in the sum of £4,287,833.86 and provided as follows:

“We will, when required, enter into a formal Contract Agreement with you in the form included with the tender documentation. Until a formal Contract Agreement is entered into, this tender and your acceptance of it will constitute a binding contract between us.”
7. On 10 December 2009 Mr Jones wrote to Mr Evans and said that the tender sum was still above the budget of £4,000,000 and savings were suggested. There was then a pre-contract meeting on 18 December 2009 and on 9 January 2010 Liberty Mercian sent “Cuddy Group” a letter of intent in the following terms:

“We refer to our pre-contract meeting dated 18th December 2009 and subsequent discussions and confirm that it is our intention to enter into a contract with you to undertake the above works on the basis of Option A of the Engineering and Construction Contract 3rd Edition June 2005 along with the Modifications issued with the tender documents.

The contract will be a lump sum based on drawings and specifications issued with tender documents the value of which will be £4200000.00 as detailed in the priced Activity Schedule submitted with your tender.

The date for commencement of works will be 5th February 2010. The date for completion will be 17th November 2010.”

8. Although the letter of intent provided for it to be signed in acceptance of those terms it does not appear that in fact it was signed. CDDL subsequently commenced work on site.
9. In early February 2010 there are documents on the file of Mr Stephen Mundy of Morgan LaRoche Limited, solicitors acting on behalf of Liberty Mercian which show that he or his secretary accessed two websites. First there are two copies of a Companies House website search in relation to CCEL and, secondly, a print-out from the Cuddy Group website. In his evidence Mr Mundy says he cannot recollect the circumstances in which those documents came to be produced but assumes that with the assistance of his secretary he was looking for the company trading under the name of Cuddy Group.
10. On 9 February 2010 Mr Mundy wrote to Mr Philip Baker of Lawrence Graham LLP, solicitors acting for Sainsbury’s who were to operate the supermarket on the site, regarding the warranty to be entered into between the Contractor, Liberty Mercian and Sainsbury’s. He enclosed a copy of a draft warranty which named the Contractor as “Cuddy Group” and said *“I believe the Contractor will be [CCEL] - not Cuddy Group.”* When Mr Baker returned the warranty on 22 February 2010 he had amended the name of the contractor in manuscript to CCEL.
11. On 1 April 2010 Mr Mundy sent to Mr Lee Henning at the Cuddy Group the deed of warranty from the Contractor to Liberty Mercian and Sainsbury’s which named CCEL as the Contractor. It was subsequently executed as a deed and dated 20 December 2010. It stated that the Developer, Liberty Mercian, *“has entered into a contract (“the Contract”) dated 6 July 2010 with the Contractor to carry out and complete the Development upon the terms and conditions therein mentioned”*.
12. On 30 April 2010 an invoice in the sum of £365,990.30 plus VAT was sent by CDDL to Liberty Mercian and this was followed by a further invoice sent on 4 May 2010 in the sum of £385,894.30 plus VAT. Those invoices were sent by Mr Aled Davies of Cuddy Group to Mr Jones on 11 May 2010 saying *“please find attached Cuddy Demolition Invoice 7418 and 7419 in regard of the first two payments on Bath House works at Cardigan.”* Waterman issued certificates 1 and 2 in the name of Cuddy Group for the sums set out in those invoices.
13. Draft contract documents were prepared and on a date between 5 and 12 May 2010 those documents, based on an amended NEC3 Form of Contract, were signed by Mr Evans as Director *“on behalf of (Contractor) Cuddy Group”*.

14. On 11 May 2010 Mr Ian Crabtree of Liberty Mercian wrote to Mr Mundy enclosing *“all documentation duly signed as requested.”* He noted that the Contractor had omitted to initial certain pages. On 19 May 2010 Mr Mundy then sent to Mr Baker a *“Certified copy of the NEC3 Engineering Contract”* and asked Mr Baker to acknowledge receipt.
15. On 24 May 2010 Mr Baker responded by email to say he had been through the various documents enclosed with the letter of 19 May 2010 and had some comments. He noted that the NEC Contract had not yet been dated and stated *“The contractor is listed as Cuddy Group. It should be [CCEL].”*
16. On 26 May 2010 Mr Jones sent Mr Evans an email enclosing a copy of Mr Baker’s email. He asked Mr Evans to action this by return. In relation to the form of agreement he said that it was *“to be signed as a deed on the 2nd page by two Directors of [CCEL]. I have inserted date as 26th May 2010.”*
17. On 5 July 2010 Mr Evans sent Mr Jones copies of amended pages of the Contract which included a page signed by Mr Evans as director and Mr Mike Cuddy as director or company secretary. On the following day, 6 July 2010, Mr Jones sent the relevant pages to Mr Crabtree and Mr Chris Towers and they returned them later that day signed on behalf of the employer by Mr Towers as director and Mr Crabtree as director or company secretary. The Contract was dated 6 July 2010.
18. Subsequently, Mr Evans sent Mr Jones a copy of pages of the Contract being the form of agreement and the definition of the Contractor where the name “Cuddy Group” had been deleted and CCEL inserted with initials from both parties.
19. On 18 August 2010 Mr Aled Davies had sent Mr Jones CIS and bank account details for CDDL on Cuddy Group letterhead. It referred at the bottom to CDDL and its company registration details. All invoices in relation to the Contract up until invoice 8790 dated 1 November 2011 were in the name of CDDL and all correspondence in relation to the Contract was sent by CDDL until Mr Evans sent a letter on 29 November 2011 in the name of CCEL. All payments were made to the CDDL bank account.
20. Problems arose on the project in the form of defects in the earthworks operation for the retail plateau embankment which are not relevant to the issues in these proceedings and by letter dated 7 December 2011 addressed to Cuddy Group the Project Manager stated as follows:

“We hereby give notice pursuant to clause 91.2 of the contract that you have defaulted by substantially failing to comply with your obligations to correct the said Defects and to provide the Works regularly and diligently in that regard using your best endeavours to avoid and reduce delays.”
21. The Project Manager gave Cuddy Group 24 hours to confirm that they intended to comply with their obligations and immediately carry out all corrective works.

22. Following without prejudice discussions, on 5 January 2012 Liberty Mercian sent a letter to Cuddy Group with a copy to the Project Manager which referred to the Contract with CCEL (t/a Cuddy Group) and notified “Cuddy” and the Project Manager of its intention to terminate the Contract because “*Cuddy has not put right the default notified by Waterman (in its letter dated 7 December 2011) within five working days of being so notified.*”
23. On 7 January 2012 the Project Manager issued its Termination Certificate to Cuddy Group based on the matters set out in Liberty Mercian’s letter dated 5 January 2012. CCEL then wrote a letter saying that it did not accept that Liberty Mercian was entitled to terminate and asserted that the termination amounted to a repudiatory breach which it accepted by way of letter dated 9 January 2012.
24. Although not for resolution in these proceedings there is an issue whether Liberty Mercian terminated the Contract under the terms of the Contract or whether the Contractor or Liberty Mercian terminated it by acceptance of a repudiatory breach. So far as necessary the issues need to be considered on the basis of these alternatives.

Issues in these proceedings

25. These proceedings, under Part 8, were initially commenced by Liberty Mercian solely against CCEL seeking declaration that CCEL was obliged to deliver the parent company guarantee, performance bond and deeds of warranty.
26. Liberty Mercian subsequently contended that a mistake had been made in the identity of CCEL as the contracting party and, as a result, Liberty Mercian amended to plead that the Contractor was or should be CDDL. The issues in these proceedings were therefore expanded to include a number of alternative ways in which Liberty sought to contend that CDDL was the proper party to the Contract. There is therefore an important issue whether CCEL or CDDL is properly the Contractor under the Contract.
27. This has necessarily expanded the scope of the issues in these proceedings, which can now be summarised in the following terms:
 - (1) Was the Contract between Liberty Mercian and the Contractor formed in May or July 2010?
 - (2) Who were the parties to the Contract? If the contracting party was CCEL was that a misnomer for CDDL?
 - (3) Was there a common mistake in respect of the contracting party?
 - (4) Was there a unilateral mistake in respect of the contracting party?
 - (5) If so, should the Court rectify the Contract so that the contracting party is now CDDL and not CCEL?
 - (6) Is CDDL estopped from denying that the Contract was between Liberty Mercian and CDDL?
 - (7) Does CCEL have a parent company, and if so, is it CDDL?
 - (8) Does the Contractor (CCEL or CDDL) remain obliged to supply a parent company guarantee, a performance bond and warranties?
If so is the Contractor in breach of contract in respect of those obligations?

(9) If so, should the Court order specific performance of those obligations?

Evidence

28. I heard evidence from a number of witnesses of fact. On behalf of Liberty Mercian I heard evidence from Mr Stephen Mundy a solicitor and director of Morgan LaRoche Limited who acted for Liberty Mercian in relation to the Contract with the defendants. In his first witness statement he gave evidence in support of Liberty Mercian's Part 8 claim against CCEL based on CCEL's failure to provide a parent company guaranty, performance bond and sub-contractor warranties.
29. In his second witness statement Mr Mundy dealt with his evidence concerning the circumstances in which he said he made a mistake regarding the identity of the contracting party. He says that he knew that Liberty Mercian was intending to enter into a contract with the company that had tendered under the name "Cuddy Group". He then referred to the fact that he had on file a Companies House website search in relation to CCEL and a print out from the Cuddy Group web site, both marked as printed on 2 February 2010. He said he could not recollect the circumstances in which those documents came to be produced but he assumed he was looking for the company trading under the name of "Cuddy Group". He said that alighting upon CCEL he may have made an association with the project being a civil engineering scheme; alternatively he or his secretary may simply not have noticed that there were other companies that could be the legal entity of "Cuddy Group" trading at the relevant address. He said it was certainly his expectation and that of Liberty Mercian that the party carrying out the works would be the party identified in the Contract. He said that as a consequence of his mistakenly identifying CCEL as being the company to be carrying out the works, the name CCEL came to be inserted in the contractual documentation.
30. The second witness was Mr Philip Baker of Lawrence Graham LLP who were solicitors acting for the third party purchaser, Sainsbury's, in relation to construction issues concerning the retail site at Bath House. He said that part of his retainer was to review the proposed construction documents prepared by Liberty Mercian. He referred to an email from Stephen Mundy informing him that the Contractor would be CCEL. He said that when he reviewed the contract which was sent to him on 19 May 2010 he sent an email to Mr Mundy on 24 May 2010 stating that the Contractor was listed as Cuddy Group and he says that, according to his understanding, it should have been CCEL. He says that he relied on the information provided to him by Liberty Mercian's lawyers and his assumption was that the party named in the Contract would be the party doing the work.
31. He accepted that when in June 2010 he was provided with details of the relevant bank to pay monies to the Contractor the account details were for CDDL. He says that he did not make any connection at the time that this was different from the name of the Contractor in the Contract.
32. The next witness was Mr Richard Jones a Chartered Quantity Surveyor who was employed by Liberty Properties Limited and was involved in coordinating the tender and the subsequent works for the project at Bath House on behalf of Liberty Mercian. In relation to the email he sent on 26 May 2010 he said he did not recall questioning at the time the name of the contracting party but intended that whoever

was identified in the Contract was the party doing the works and therefore he says that referring to CCEL in the Contract was a straightforward mistake.

33. The Defendants' first witness was Mr Lee Henning who was employed by CDDL as a quantity surveyor. He was involved in the Bath House development from around December 2009 and was responsible for the commercial management of the work. He gave evidence of his role in dealing with sub-contractor collateral warranties. He also dealt with the position in relation to the bond and parent company guarantee. The Defendants then called Mr Darren Evans, a quantity surveyor and director of CDDL. He was responsible for tendering for the work at Bath House. He dealt with the dispute which ultimately led to the termination of the Contract. He also dealt with the position on warranties, the bond and the parent company guarantee.
34. In his second witness statement Mr Evans explained the circumstances in which the request was made for the Contractor to be CCEL and for the Contract to be signed as a deed by two directors of CCEL. He said that at the time of the request CCEL existed although he had no connection with it. He said the shareholders of CCEL were Mr Mike Cuddy and his brother Mr John Cuddy. At the time he said that they wanted to satisfy the requirements of Sainsbury's and Liberty Mercian, not least as it was clear that unless that happened payment would be delayed. He said he went to see Mr Mike Cuddy and told him that Sainsbury's and Liberty Mercian wanted CCEL to be the Contractor and asked him whether he was happy with this. He said he was if this was what Sainsbury's and Liberty Mercian had requested.
35. The next witness was Mr Mike Cuddy who is a director and shareholder of both CCEL and CDDL. He said that the other directors of CDDL are Mr John Cuddy, Mr Darren Evans and Mr Christian Jones. He said that he and Mr John Cuddy were shareholders. He stated that the Cuddy Group was the trading name for CDDL which was founded by him and his brother about 20 years ago. He said that CCEL was a dormant company and he and his brother are the only shareholders of that company which was incorporated by them to preserve the name and with a view to it eventually trading. He says that he remembers being informed by Mr Darren Evans that Sainsbury's and Liberty Mercian had requested that CCEL should be the Contractor under the Contract. He said Mr Evans asked him whether he was prepared to agree to this and he told him that he was happy for CCEL to be the Contractor and left him to deal with the matter. He said the conversation was brief as they both wanted to get the Contract signed as soon as possible. He said he remembered at the time thinking that they might need to consider transferring the payment applications over to CCEL or that CDDL could carry out the works on its behalf. He said that in the end, because CDDL had already been applying for payment they did not change this arrangement.
36. Mr Cuddy also gave evidence in relation to the parent company guarantee, the bond and warranties. There was a short witness statement for Mr John Cuddy confirming the matters set out by Mr Mike Cuddy, but Mr John Cuddy did not give evidence.
37. The final witness was Mr Jonathan Pearce who is a chartered accountant and who, since January 2012, has been employed by CDDL as their in-house accountant. He referred to various matters concerning CDDL's accounts and, in particular, that any

reference to “parent company” would be a reference to CDDL being the parent company of D’Arcy Holdings Limited.

38. Although a number of witnesses were hard pressed in cross-examination overall I formed the view that the witnesses were giving honest evidence which was consistent with the documentary evidence at the time. Mr Mundy was obviously concerned that, as I find, there had been a mistake made in asserting that CCEL was the same as “Cuddy Group” but as best he could he explained how the error had happened. Mr Michael Cuddy and Mr Darren Evans were equally challenged as to how they dealt with the change from Cuddy Group to CCEL and their evidence as to the circumstances in which the change was made was consistent with the position on payment at the time.
39. I shall now turn to consider each of the issues which arise.

Was the Contract between Liberty Mercian and the Contractor formed in May or July 2010?

40. Liberty Mercian contends that the Contract was formed between it and CDDL around 6 or 7 May 2010. The Defendants contend that no contract was formed in May 2010 or, if one was formed in May 2010, it was replaced by an agreement in July 2010.

Submissions

41. Liberty Mercian refers to the evidence from Mr Jones that he attended a meeting with Mr Evans at the Defendants’ offices on either the 6 or 7 May 2010 and that during that meeting Mr Evans signed and initialled the contract documents. Mr Jones says that, as far as he was concerned, an agreement had been reached on the terms of those contract documents. He says that Mr Evans understood that Liberty Mercian agreed those terms and that the contract documents would be subsequently signed by Liberty Mercian.
42. Liberty Mercian refers to what Mr Jones said in evidence. Although he repeatedly referred to the fact that there would have been an agreement if Liberty Mercian had signed and sent back the contract document, he accepted that he was not aware of any terms which had not been agreed or were outstanding or of anything which had to be done for there to be a contract. On this basis Liberty Mercian submits that the Contract was formed on 6 or 7 May 2010.
43. In so far as it is necessary, Liberty Mercian also refers to the fact that the contract documents were signed by Mr Crabtree on behalf of Liberty Mercian on 11 May 2010. On this basis Liberty Mercian contends that, in the alternative, the Contract was formed at that time. It says that the contract documents were subject to minor amendments to the terms, on or around 5 and 23 July 2010.
44. The Defendants accept that unsigned contract documents were proffered by Mr Jones and signed by Mr Evans on 6 or 7 May 2010, as explained by Mr Jones in his evidence and also that the contract documents were signed by Mr Crabtree on about 11 May 2010. However they say that CDDL was not made aware that Mr Crabtree had signed the Contract on 11 May 2010 and that, in fact, Liberty Mercian was still

in the process of checking and seeking approvals for these contract documents and so the version signed by Mr Crabtree was not dated or sent to CDDL on 11 May 2010 or at all.

45. Rather the Defendants say that on 26 May 2010 when the contract documents were eventually sent to CDDL, Mr Crabtree's and Mr Evans' signatures had been struck through and Liberty Mercian were asking, at the request of Mr Baker, on behalf of Sainsbury's, for a different agreement to that in the signed contract documents. They say that it contained different terms; it named a different contractor, CCEL not CDDL; it was to be executed as a deed not a contract under hand and it was to be dated 26 May 2010.
46. The Defendants say that the different terms requested by Mr Baker also amended the wording of clause Z22.3 (as underlined) and added a new clause Z22.6 as follows:

“22.3 The Works shall be completed as set out in the Works Information and Contract Data (to include compliance with the Purchase Agreement and Deed of Grant dated 12 May 2009 insofar as it relates to the Works). For the avoidance of doubt the Contractor agrees that the Works will start on 22 March 2010 and will be completed by 21 February 2011.”

...

“22.6 Notwithstanding the terms of the Contract and these additional Conditions of Contract the Contractor agrees and accepts that the Works which are subject to planning conditions (full particulars of which the Contractor acknowledges has been provided to it) and that Completion of the Works cannot take place until planning conditions 3, 11 and 15 have been discharged.”

47. The Defendants say that these were important new terms which led to exchanges of emails and ultimately the withdrawal of the additional wording to Clause Z22.3 and amended wording to Clause Z22.6 by adding the following phrase at the end of that clause *“but only insofar as the matters referred to in those conditions relate to works which form part of the Works to be undertaken by the Contractor under the Contract and not otherwise.”*
48. This led to Mr Jones sending Mr Evans five pages of the Contract on 5 July 2010 requesting Mr Evans to sign and return the amendments and requesting two directors of CCEL to sign the contract documents. This was done by Mr Evans and Mr Mike Cuddy on 5 July 2010 and subsequently by Mr Crabtree and Mr Towers on 6 July 2010. Mr Baker then requested a change from “Cuddy Group” to CCEL on two pages of the contract documents and for completion dates for option X5 to be included. These changes were then made and initialled by both parties on 23 July 2010.
49. The Defendants submit that the Contract, as finally entered into, had the date of 6 July 2010 in the Form of Agreement. The Form of Agreement also identified CCEL as the Contractor and was executed as a deed. They say that, whilst there is a reference to the Cuddy Group at one point, the documents make it clear that CCEL was in fact the contractor.

50. On this basis the Defendants say that no contract was formed in May 2010 because any acceptance of the terms of the contract documents by Mr Crabtree signing it on 11 May 2010 was not communicated to the Defendants but rather those documents were sent with amended pages on 26 May 2010. They also say that the disagreement about the terms of clauses Z22.3 and Z22.6 took until July 2010 to resolve. As a result they say that the Contract was formed in July 2010 not in May 2010 but if an agreement had been formed in May 2010 it was replaced in July 2010 or varied by agreement in July 2010.

Decision

51. As set out in the email from Mr Jones on 4 May 2010 the process by which Liberty Mercian and the relevant Contractor originally intended to enter into a contract involved the contract documents being signed first by the Contractor and then by Liberty Mercian shortly thereafter. At the meeting on 6 or 7 May 2010 Mr Jones provided a copy of the contract documents for Mr Evans to sign. I do not consider that the proffering of those contract documents by Mr Jones amounted to an offer which was then accepted by Mr Evans when he signed them.
52. In accordance with the procedure set out by Mr Jones in his email and in accordance with what the standard Form of Agreement envisaged, a contract was to be entered into by the signature of both parties.
53. I therefore do not consider that the Contract was entered into on the 6 or 7 May 2010 when Mr Evans signed it. Rather the Form of Agreement signed by Mr Evans amounted to an offer which was to be accepted by Liberty Mercian, in turn, signing the Form of Agreement. As stated in Chitty on Contracts (31st Edition) at para 2-045: *“The general rule is that an acceptance has no legal effect until it has been communicated to the offeror. Accordingly there is no contract where a person writes an acceptance on a piece of paper which he simply keeps;...”*
54. In this case after Mr Evans had signed the contract documents they were sent to Mr Crabtree for signature. When he had signed them he sent it back to Mr Mundy who then sent it to Mr Baker on 19 May 2010. Mr Baker then commented in his email of 24 May 2010 and this then led to Mr Jones sending Mr Evans a copy of that email and asking Mr Evans to make changes to certain pages of the contract documents which by then had been signed by Mr Crabtree. There was therefore no communication of the contract documents as signed by Mr Crabtree as an unequivocal acceptance of the terms of those contract documents in the form signed by Mr Evans. On analysis, there was a counter offer by Liberty Mercian in sending an amended version of the contract documents to Mr Evans, seeking his acceptance of those changes.
55. At that stage the date in the contract documents was to be 26 May 2010. However it is clear from the exchange of correspondence between Mr Evans and Mr Jones in the period from 3 June to 5 July 2010 that it was only on the 5 July 2010 that Mr Baker had approved the wording and Mr Jones was able to send Mr Evans amended pages dealing with clauses Z22.3 and 22.6 and including the completion date of 21 February 2011, with a request for two directors of CCEL to sign the agreement. The agreement was then signed as a deed and initialled by Mr Evans and Mr Mike

Cuddy and subsequently by Mr Crabtree and Mr Towers of Liberty Mercian and dated 6 July 2010.

56. In my judgment it was on 6 July 2010 that the Contract was formed by the parties agreeing the terms of the contract documents. Although some corrections were made after that date, they were to give effect to what had been agreed by 6 July 2010 and were, at most, agreed variations to the previously binding agreement. Accordingly I consider that the Contract between Liberty Mercian and the Contractor was formed when it was signed and dated on 6 July 2010. Even if I had come to the conclusion that the Contract was formed on 6 or 7 May 2010 then it was the form of the Contract signed and dated on 6 July 2010 which became the Contract which set out the terms finally agreed between the parties.

Who on its proper construction were the parties to the building contract?

57. On the basis set out above and as expressly requested by Liberty Mercian and set out in the form of the Contract finally entered into as a deed and signed, the parties named as the parties to the Contract were Liberty Mercian and CCEL. On that basis the next issue arises.

If the contracting party was CCEL was that a misnomer for CDDL?

58. Liberty Mercian contends that, by looking at the admissible background evidence relating to the formation of the Contract, it was plain that, as a matter of construction, the parties intended the Contractor to be CDDL and that references to CCEL in the contractual documentation amount to a “misnomer”. The Defendants say that where the Contract, in this case a deed, names a party, CCEL, which is a proper existing party, the name of the party cannot be changed by using extrinsic evidence to construe one party as another party.

Submissions

59. In support of its submissions Liberty Mercian relies on the Court of Appeal decision in Nittan (UK) Limited v Solent Steel Fabrications Limited [1981] 1 Lloyd's Law Rep 633 in which a dormant company, Sargrove Electronic Controls Limited, was named in an endorsement to a product liability insurance policy and the Court of Appeal held that what was intended was Sargrove Automation, the relevant trading name of Solent Steel Fabrications Limited (“Solent Steel”). Solent Steel had taken over the assets but not the liabilities of Sargrove Electronic Controls Limited which then became dormant. Solent Steel continued to manufacture electronic equipment under the business name of Sargrove Automation. When the insurers issued an endorsement to the product liability policy they referred to Sargrove Electronic Controls Limited when they should have said Sargrove Automation, the trading name of a division of Solent Steel.
60. The Court of Appeal unanimously held that the reference to Sargrove Electronic Controls Limited was a misnomer and that it must have been plain to the parties and to everybody that Sargrove Electronic Controls Limited was used as a name to describe Sargrove Automation, a division of Solent Steel. It is submitted by Liberty Mercian that in this case it must have been plain to the parties that the Contractor

was intended to be CDDL. It submits that it was that company, trading as Cuddy Group, which had tendered for and was carrying out the works. It says that the amendments to substitute CCEL for references to the Cuddy Group were just a misnomer and it should have said CDDL not CCEL.

61. Liberty Mercian also rely on Vodafone Limited v GNT Holdings (UK) Limited [2004] EWHC 1526; Almatrans S.A v The Steamship Mutual Underwriting Association (Bermuda) Limited [2006] EWHC 2223; Gastronome (UK) Limited v Anglo Dutch Meats (UK) Limited [2006] EWCA Civ 1233 and Lewison, The Interpretation of Contracts (5th Edition) at para 10.08. It submits that the approach in these cases is consistent with the analysis of Lord Hoffman in Chartbrook v Persimmon Homes Limited [2009] 1 AC 1101 and is unaffected by the decision of the House of Lords in Shogun Finance Limited v Hudson [2004] 1 AC 919 or the Court of Appeal decision in Dumford Trading AG v OAO Atlantrybflot [2005] 1 Lloyds Law Rep 289 which are relied on by the Defendants.
62. The Defendants submit that in cases such as this where there is a written agreement in the form of the Contract entered into as a deed which clearly and unequivocally identifies real parties, the applicable rules of construction of the Contract are those which were restated by the House of Lords in Shogun Finance Limited v Hudson. In particular they submit that where a party is specifically identified in a written agreement, oral or extrinsic evidence is not admissible to contradict the express provisions of the Contract as contained in that written document.
63. They say that on this basis where there are two separate entities, A and B and the contract unequivocally names A as a party and A is real, existing and accurately named and identified in the Contract, it cannot be asserted, as a matter of construction, that the Contract means not A but another real person named B. They rely on Beardmore Motors Ltd. v. Birch Bros. (Properties) Ltd [1959] Ch 298; Davies v Elsby Brothers [1961] 1 WLR 170; Nittan v Solent Steel; Dumford Trading and Gastronome.
64. They also say that in construing a contract it is permissible to look at deleted words and they refer to Lewison, the interpretation of contracts (5th Edition) at 3.04 and Punjab National Bank v De Boinville [1992] 1 Lloyd's Rep 1138 at 1148.

Decision

65. I shall consider, first, the Defendants' submission that to apply the principle of misnomer in the present case would be inconsistent with what was said in the House of Lords in Shogun Finance. In that case a fraudster produced a stolen driving licence and entered into a hire purchase agreement with a finance company for the purchase of a car using the name on that driving licence. The fraudster then sold the car and an issue arose whether the person who purchased it had a good title in a claim for conversion by the finance company. The written agreement on its face was between the finance company and not the fraudster but a Mr Patel, the person who had his driving licence stolen. The person who purchased the car sought to establish that the agreement was with the fraudster so that good title would have passed. To do so it had to rely on oral evidence to show that the agreement was not in fact with Mr Patel, the person named in the agreement but with the fraudster. The finance

company sought to establish that there was no agreement with the fraudster but with Mr Patel so that they retained good title.

66. On the face of the agreement it was between the finance company and Mr Patel and not the fraudster. At [49] Lord Hobhouse of Woodborough said this:

“The gist of the argument is that oral evidence may be adduced to contradict the agreement contained in a written document which is the only contract to which the finance company was a party. The agreement is a written agreement with Mr Durlabh Patel. The argument seeks to contradict this and make it an agreement with the rogue. It is argued that other evidence is always admissible to show who the parties to an agreement are. Thus, if the contents of the document are, without more, insufficient unequivocally to identify the actual individual referred to or if the identification of the party is non-specific, evidence can be given to fill any gap. Where the person signing is also acting as the agent of another, evidence can be adduced of that fact. None of this involves the contradiction of the document: Young v Schuler (1883) 11 QBD 651, which was a case of an equivocal agency signature and it was held that evidence was admissible that the signature was also a personal signature—“evidence that he intended to sign in both capacities ... does not contradict the document, and is admissible”: per Cotton LJ, at p 655. But it is different where the party is, as here, specifically identified in the document: oral or other extrinsic evidence is not admissible. Further, the rogue was no one's agent (nor did he ever purport to be). The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. The relevant principle is well summarised in Phipson on Evidence 15th ed (2000), pp 1165-1166, paras 42-11 and 42-12:

“when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory.”

(See also Bank of Australasia v Palmer [1897] AC 540, 545, per Lord Morris.) This rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty.”

67. Lord Hobhouse also said, in relation to the submissions made on behalf of the purchaser, as follows at [55]:

“They made submissions which contradicted the express written contract and were therefore contrary to principle and long established English mercantile law. They submitted that Cundy v Lindsay 3 App Cas 459 was wrongly decided and should be overruled, substituting for it a general rule which, in disregard of the document or documents which constitute the agreement (if any), makes everything depend upon a factual inquiry into extraneous facts not known to both of the parties thus depriving documentary contracts of their certainty.”

68. In that case the purchaser was trying to show that, despite the fact there was a written agreement naming Mr Patel and the finance company as the parties, in fact, the party to the contract was not Mr Patel but the fraudster. The purchaser sought to rely on an oral agreement between the fraudster and the finance company to contradict the terms of the written agreement. It was not said that, as a matter of construction in the light of background known to both parties, the agreement ought to be construed as a contract between the finance company and the fraudster because, obviously, the true identity of the fraudster was not known to the finance company. In those circumstances whilst I accept that, absent some reason to depart from the general rule, a party cannot disprove that a party named in a contract is not properly named by relying on oral evidence, I do not gain assistance from Shogun Finance in dealing with the particular issue of misnomer and whether, as a matter of construction, a party to an agreement can be construed as another party which is the issue which arises in this case.
69. Here it is said that, as a matter of construction based on the background known to the parties, there was a misnomer in identifying CCEL as the Contractor. I therefore turn first of all to the Court of Appeal decision in Nittan v Solent Steel principally relied on by Liberty Mercian. In that case Lord Denning MR at 637 identified that a mistake had been made by the insurers, a party to the contract of insurance, who put the wrong name into a clause of the policy under which Solent Steel were the insured. On the evidence the Court of Appeal held that the mistake had occurred because the insurers had taken a name, Sargrove Electronic Controls Limited, from brochures which had been sent to them but the accurate description of the party should have been Sargrove Automation which was the business being insured and the business being carried out by Solent Steel.
70. Lord Denning then said this:

“It seems to me — reading the correspondence, as I have — that it must have been plain to the parties and to everybody that the words “Sargrove Electronic Controls Limited” were used just as a name to describe the concern called Sargrove Automation, which was a division of Solent Steel Fabrications Ltd.

In this Court we are very used to dealing with misnomers. We do not allow people to take advantage of a misnomer when everyone knows what was intended. I will only refer to one authority, Whittam v. WJ Daniel & Co. Ltd., [1962] 1 QB 271 at p. 277, where Lord Justice Donovan cited the words of Lord Justice Devlin:

I think that the test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: “Of course it must mean me, but they have got my name wrong”, then there is a case of mere misnomer.

I would have thought that that would apply here. When Solent Steel Fabrications Ltd. received the policy and saw the endorsement with the words “Sargrove Electronics Limited” on it, they would have said to

themselves, "Sargrove Electronics Limited are out of business. They are dormant altogether. They cannot mean that company. They must mean Sargrove Automation". That is why they took no point on it at the time. It seems to me that the meaning of the document was clear. The words "Sargrove Electronics Limited" were just a misnomer: and the correct description was well-known to all to be "Sargrove Automation", a division of Solent Steel Fabrications, which was the insured party."

71. The references to "Sargrove Electronics Limited" in the judgment should have been, it seems, references to "Sargrove Electronic Controls Limited". The Court of Appeal therefore held that the clause in the contract excluded liability for product liability claims against Sargrove Automation, the division of Solent Steel and not against the dormant company. In construing the reference to "Sargrove Electronic Controls Limited" in the insurance policy the Court of Appeal therefore looked at extrinsic evidence in the form of correspondence between the parties through a broker to show that the insurer had made a mistake and had intended to refer to Sargrove Automation and also that Solent Steel would have known that the insurer had made a mistake. It was therefore "*well-known to all*" that the reference to "Sargrove Electronic Controls Limited" was a reference to "Sargrove Automation".
72. The next Court of Appeal decision relied on in respect of the principle of misnomer was Dumford Trading. In that case a company sought summary judgment on a guarantee in the name of ZAO Atalantribflot ("ZAO") but brought proceedings against OAO Atlantrybflot ("OAO") arguing, amongst other things, that there was a mere misnomer and that the reference to ZAO should have been to OAO. The Court of Appeal held that there were real issues which made summary judgment inappropriate. Rix LJ reviewed the law relating to misnomer. After citing a number of decisions ending with Nittan v Solent Steel he said this at [32]:

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

73. He then referred at [35] to the fact that the evidence, whether matrix or extrinsic, that the parties were content that the guarantee should be provided by OAO was very strong but was not uniform. He referred to other evidence and then stated:

"Above all, there remained the problem how, as a matter of construction, ZAO could mean OAO. If it was a matter of mere misnomer, that hurdle was leaped. But if it was not, or may not have been, then the use of evidence to turn ZAO into OAO looks, at any rate as a matter of realistic argument,

suspiciously like using evidence to alter or substitute the identity of a party, rather than to construe its meaning. And that would seem to be the role of rectification.”

74. The next case was Gastronome UK v Anglo Dutch Meats in which Anglo Dutch Meats had given a guarantee to Gastronome. Gastronome SA was a French company which had a UK subsidiary, Gastronome UK. The guarantee was in relation to sums due from IFS Limited, a company with which Gastronome UK traded. When IFS Limited defaulted Gastronome UK sought to enforce the guarantee against Anglo Dutch Meats who contended that the guarantee was not in favour of Gastronome UK but in favour of the French Gastronome company as it was addressed to “Gastronome” at an address in France (ZA La Foret, 44140 Le Bignon).
75. In giving the judgment of the Court of Appeal with which the other members agreed, Tuckey LJ referred to the Court of Appeal decision in Egan v Static Control Components Europe Limited [2004] EWCA Civ 392 in which the Court of Appeal applied ICS v West Bromwich BS [1998] 1 WLR 896 to a case about a guarantee. At [14] Tuckey LJ said this: “*The question which the court posed for itself in that case was: what meaning would the guarantee convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time it was given? I think that this was the right question to ask in our case.*”
76. He then referred to the judgment of Rix LJ in Dumford Trading at [32] and concluded that the result of the appeal would have been the same whether the question posed in Egan or the more restrictive approach suggested by Rix LJ in Dumford Trading were to be applied.
77. After analysing the correspondence which had passed between the parties prior to the guarantee, he concluded as follows at [19] and [20]:

“19. Against this background, I think it is indisputable that the commercial purpose of the guarantee was to ensure that the Claimant’s invoices would be paid for products it supplied to IFS, if IFS failed to do so. Its genesis was the Claimant’s concern that it would not be paid and ADM’s concern that IFS should continue to receive a supply of poultry products. It cannot have been the parties’ intention that the guarantee was only to apply to amounts due from some imprecisely identified Gastronome entity which was not to contract with or invoice IFS. That would have been a commercial nonsense.

20. In these circumstances, I think the guarantee must be construed as a reference to the company within the group which was actually to contract with and invoice IFS. By September 2003, this was undoubtedly the Claimant. The word “Gastronome” did not identify any particular company or legal entity. The address on the guarantee (to which it was not actually sent) was simply a mistake. Looked at in its context, there was only one entity to which the guarantee was addressed, so if it is to be considered as a case of misnomer the extrinsic evidence could be used to identify the

Claimant as the misdescribed party. None of this involves re-writing the contract; it is simply the result of the enquiry as to what the parties must have intended.”

78. I was also referred to two first instance decisions. In Vodafone Limited v GNT Holdings, Vodafone Limited (VL) sought to claim under a guarantee given by GNT Holdings. The guarantee confirmed that, in consideration of Vodafone UK Limited (VUKL) entering into an agreement with GNT UK, GNT Holdings guaranteed liabilities incurred by GNT UK in connection with its obligation to VUKL. The guarantee was addressed to “Vodafone Connect” at the address of Vodafone Connect Limited (VCL). The defendant argued that the guarantee was addressed to VCL not VL and that it offered a guarantee of liability to VCL or VUKL but not of liability to VL.
79. Christopher Moger QC, sitting as a deputy High Court judge, referred to the decisions on misnomer but said at [70] that they took the matter no further than what Lord Hoffman had said in ICS v West Bromwich BS. He set out the background knowledge available to the parties and concluded that something went wrong with the drafting of the letter and to construe it literally would be a commercial nonsense. He therefore held that it was a legally effective guarantee of GNT UK’s liability to VL.
80. In Almatrans SA v Steamship Mutual a letter of undertaking was issued addressed to Almatrans-Interferries Lines SA when no such company existed and where the relevant bills of lading named Almatrans SA as the consignees. Almatrans SA sought to enforce the letter of undertaking relying on the law of misnomer. Judge Mackie QC referred to Dumford at [32] and said this at [11] and [12] in holding that Almatrans SA could rely on the letter of undertaking:

“11. Mr Geary submits that there are two possible contenders here and that extrinsic evidence is not admissible to explain any mistake. I disagree. There is in truth only one candidate, Almatrans S.A., because Almatrans-Interferries Lines does not exist. Furthermore the text of the LOU refers to obligations “in respect of the above claims” which can only be a reference to those being secured by the arrest, which are those set out in the statement of claim document and which surrounding papers show belong to Almatrans S.A.. As soon as one looks at the substance of the “above claims” referred to the nature of the error becomes clear.”

81. I consider that those cases which deal with misnomer have to be considered in the light of the House of Lords decision in Chartbrook v Persimmon Homes in which, starting at [22], Lord Hoffmann considered the principles applicable to correction of mistakes by applying principles of construction. Those are evidently the principles applicable to cases of misnomer. He said this at [22] to [25]:

“22. In East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61 Brightman LJ stated the conditions for what he called ‘correction of mistakes by construction’:

“Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.”

23. Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that “correction of mistakes by construction” is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:

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

24. The second qualification concerns the words “on the face of the instrument”. I agree with Carnwath LJ, paras 44-50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.

25. What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”

82. In my judgment those passages summarise the principle of misnomer as it has been generally applied in the earlier decisions set out above. First there must be a clear mistake on the face of the instrument when the document is read by reference to its background or context. In Nittan there was a clear mistake by the insurers in putting Sargrove Electronic Controls Limited instead of Sargrove Automation – a dormant company instead of the company which actually carried on the business. In Gastronome the mistake was made by addressing the guarantee to Gastronome at an address in France when the French company was not the party who was to contract with or invoice the company whose liabilities were to be guaranteed.
83. The party named in the documents in those cases made commercial nonsense and was a clear mistake. Similarly in Vodafone the guarantees were provided for the liabilities of GNT UK who only ever had dealings with VL and not with VCL, a shell company or VUKL, a holding company which did not trade with customers. That led the judge to the conclusion that something had gone wrong with the

drafting. In Almatrans the guarantee was given to a company which did not exist as a result of an error by the lawyers.

84. The second requirement set out in Chartbrook is that it must be clear what correction ought to be made to cure the mistake. As Lord Hoffmann stated, it should be clear what a reasonable person would have understood the parties to have meant. In Nittan Lord Denning said at 637 that when Solent Steel saw the words Sargrove Electronic Controls Limited they would have said to themselves that that company is “*out of business. They are dormant altogether. They cannot mean that company. They must mean Sargrove Automation.*” In Gastronome the guarantee had to be construed as a reference to Gastronome UK, the company within the group which was actually to contract with and invoice IFS.
85. In Vodafone the company was VL not the dormant company VCL or the company which did not trade with customers, VUKL. In Almatrans the company was Almatrans SA, named on the bills of lading as the consignee and the one pursuing the loss claim.
86. The decision in Dumford Trading has now to be read in the light the House of Lords decision in Chartbrook. When Rix LJ came to consider the legal basis for misnomer in Dumford Trading at [32], he based the test on two cases which involved the issue of writs in the names of companies and where the parties issuing the writs sought to amend the names of the defendants. A writ is a unilateral document issued by one party. In construing that document the question is what a reasonable person would take the name to mean. In principle that may raise a different issue to the question of construction of a contract which has to be construed by reference to background or matrix known to both parties when they entered into that document.
87. The writ in Davies v Elsby Brothers Limited named a firm, Elsby Brothers, rather than a company as the defendant. Both companies had existed and there was nothing in the writ to indicate which company was intended as this depended on the date of an accident which was not stated. Pearce LJ said this at 174 to 175: “*If one of the deciding factors be whether the defendants, on looking at the writ, must have known that the writ, though the name was inaccurate, was addressed to them, then in my view it was not possible for them to say that the writ must have been intended for the company. The date of the accident is not specified in the writ. It was possible that the accident referred to in the writ was one which had occurred while the firm was still carrying on the business. Therefore, there being the two definite, separate entities, the firm and the company, it is not possible to say that the inclusion of the firm on the writ was a mere misnomer for the inclusion of the limited company.*”
88. Devlin LJ agreed and said this at 176:

“In English law as a general principle the question is not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean; and that, I think, is the test which ought to be applied as a general rule in cases of misnomer — which may embrace a number of other situations apart from misnomer on a writ, for example, mistake as to identity in the making of a contract. I think that the test must be: how would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: “Of course it must mean me, but they have got my name wrong,” then there is a case of mere misnomer. If, on the other hand, he would say: “I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries,” then it seems to me that one is getting beyond the realm of misnomer.”

89. It can be seen that Pearce LJ approached the question of interpretation of the writ from the point of view of the defendants and although Devlin LJ refers to “a reasonable man reading the document” he approaches the question by reference to whether a person receiving the document and without making enquiries would know that the document referred to that person and that the other party had got the name wrong. This would appear to be a different test to that applied to agreements, as set out in Chartbrook. Necessarily if the test is a reasonable person as a third party reading the document, that person would be unable to say what was intended.
90. In the subsequent case of Whittam v WJ Daniel and Company Limited [1962] 1 QB 271 the company which was named in the writ had ceased to exist in 1919 so that the writ could only refer to the company in existence. The court reviewed the exchanges of correspondence between the plaintiff and the relevant company and Donovan LJ said at 276 *“it is perfectly plain that the limited company knew precisely who the plaintiff was and were under no misapprehension that it was they whom she intended to sue.”* Dankwerts LJ said: *“The present case is plainly distinguishable from the decision of this court in Davies v. Elsby Brothers Ltd., because in the present case there is no other entity to which the description in the writ could be taken to refer.”* In that case, unlike in Davies v Elsby, the court did construe the writ by reference to matters known by the company on whom the writ was served.
91. On that basis I have some doubt as to whether, following Chartbrook, the more limited test of one or two parties in [32] of Dumford is still applicable to construe cases of error in the misdescription of parties in contracts.
92. As a result I will apply the test set out in Chartbrook and consider, first, whether there is a clear mistake in the contract when the document is read with regard to its background or context. Secondly I will consider whether it is clear what correction ought to be made in order to cure the mistake. I will then see whether applying the test in Dumford I would come to a different result.
93. The factual background, known to both Liberty Mercian and those acting on behalf of the Defendants, in the present case includes the following matters:

- (1) The tender submitted in November 2009 was signed by “Cuddy Group”.
 - (2) The letter of intent on 9 January 2010 was to Cuddy Group.
 - (3) Work was commenced on site and invoices were rendered in the name of CDDL.
 - (4) Bank details were provided to Liberty Mercian which showed the bank account to be in the name of CDDL. Payment was made for invoices to that account of CDDL.
 - (5) A warranty was provided in the name of CCEL to Liberty Mercian and Sainsbury’s in April 2010 although dated December 2010.
 - (6) Insurance documents were provided showing insurance in the name of CDDL.
 - (7) The correspondence relating to the works came from CDDL.
 - (8) The contract documents signed by Mr Evans on 6 or 7 May 2010 and by Mr Crabtree on 11 May 2010 showed the Contractor as Cuddy Group.
 - (9) On 26 May 2010 Liberty Mercian requested that CCEL should be the Contractor not Cuddy Group.
 - (10) The Contract dated 6 July 2010 named CCEL as the Contractor.
94. On those facts, known to both parties, the only relevant party as the potential Contractor until February 2010 was the “Cuddy Group”. When the warranty was prepared in February 2010 it was in the name of CCEL. The contract signed by Mr Evans on 6 or 7 May 2010 referred to the Contractor as being “Cuddy Group”. Until the end of May all relevant matters relating to invoices, payment, insurance or contractual documents referred to or involved CDDL. After that at the end of May 2010 there was a request from Mr Jones on behalf of Liberty Mercian to Mr Evans for the name “Cuddy Group” in the contract documents to be changed to CCEL.
95. So far as the change of the name “Cuddy Group” to CCEL is concerned, it is evident that in February 2010 Mr Mundy considered what the appropriate company would be on the basis that “Cuddy Group” was merely a trading name. From the documents on his files it is evident that he came across CCEL during a company search which led to the replacement of Cuddy Group with CCEL. That led, I find, to communications between Mr Mundy and Mr Baker which, in turn, led to the warranty provided to Liberty Mercian and Sainsbury’s being given by CCEL in place of “Cuddy Group”.
96. All of these facts were internal to Liberty Mercian, their lawyers and the lawyers acting for Sainsbury. There is no evidence that any of this, except for the fact of the requests for and changes for CCEL to be the party to the warranty and Contract, was known to the Defendants.
97. This then led to the email of 26 May 2010 in which Mr Jones made Mr Evans aware of amendments required to the contract documents which Mr Evans had signed on 6 or 7 May 2010. Mr Jones enclosed the email from Mr Baker which stated: “*The Contractor is listed as Cuddy Group. It should be Cuddy Civil Engineering Limited.*” Mr Jones stated that the contract documents should be signed by directors of CCEL. This is then what happened.

98. On the evidence I consider that the mistake, now identified, is that Liberty Mercian entered into the Contract with CCEL, a dormant company who did not carry out the work when they intended to enter into the Contract with the company which traded as the Cuddy Group, that is CDDL, a company which trades and carried out the work. There is however nothing to show that on an objective analysis of the position taking into account matters known to both parties that the request for the Contract to be in the name of CCEL was a mistake. Whilst it was evident at the time that CCEL was a dormant company, it was a real and existing party and all that was needed was for it to commence trading. At that stage the parties had, of course, signed the warranty which named CCEL.
99. As a result, in my judgment, it is difficult to see how the reference to CCEL on the face of the Contract but having regard to background or matrix, can be characterised as a clear mistake. As stated in Chartbrook at [14], [15] and [25] the starting position is that it requires a strong case to persuade the court that something has gone wrong with the language in naming CCEL and not CDDL as a party to the Contract. It must be an intention which a reasonable person would not have understood them to have had. In this case there was no discussion between the parties as to the reason for the request to change Cuddy Group to CCEL.
100. It might be said in some circumstances that the absence of any discussion would indicate that the change was a mistake. However here the background includes an unequivocal request to make that change. In addition the background would show that, despite Cuddy Group being identified as the party to the letter of intent and in the contract documents in early May 2010, when the warranty was entered into with Liberty Mercian and Sainsbury's it was with CCEL, as the Contractor, in the same way that the Contract ultimately referred to CCEL. It follows that I do not consider that this is a case where on an objective reading of the Contract having regard to the relevant background or context it can be said that there is a mistake.
101. Whilst Liberty Mercian sought to show that there remained some references to "Cuddy Group" in the Contract and the signature of Mr Evans is not correctly that of a director of CCEL, I do not consider that these are sufficient to establish a clear mistake.
102. Given that many of the reference to "Cuddy Group" were deleted and CCEL inserted instead, an objective view would be that the failure to delete other reference to "Cuddy Group" was just an error rather than that the request for CCEL to be substituted for Cuddy Group was in fact the error.
103. The Defendants also seek to gain support from the deletion of "Cuddy Group" as a matter of construction on the basis of what was said by Staughton LJ in Punjab National Bank v de Boinville [1992] 1 Lloyd's Rep 1138 at 1148. There is some

support in Lewison, the interpretation of contracts (5th Edition) at 3.04 for the principle that, in cases of ambiguity, “*The fact of deletion shows what the parties did not want in their agreement.*” I do not however derive much from this on the facts of this case.

104. Equally, I cannot see that the fact that Mr Evans was not a director of CCEL provides any evidence of mistake in the identity of the Contractor when his signature is beside a clear reference to the Contractor and the Contractor is named as CCEL.
105. As a result, on the first part of the test in Chartbrook I do not consider that Liberty Mercian has established the necessary mistake when the contract of 6 July 2010 is read against the background or context. If they had shown that there was the required mistake then in relation to the second part of the test in Chartbrook, it would, on that basis, have been clear what correction ought to be made to correct the mistake.
106. This position is to be compared with Nittan v Solent Steel where there was correspondence between the insurer and insured through the broker. This, the Court of Appeal found, showed that it was known to all that it was the trading division of Solent Steel and not the original company which was to be referred to. On an objective reading of the documents in that case it was the Sargrove division of Solent Steel that they were seeking to cover under their insurance policy and not the dormant company. That mistake was clear, reading the terms of the policy against the background or context in which the policy amendment came to be made.
107. Equally, in each of Vodafone, Gastronome and Almatrans there was admissible background or context which showed that in circumstances where there was ambiguity as to the name of the party in the guarantee in Vodafone and Gastronome or where the party named in the guarantee did not exist in Almatrans, it could plainly be seen that there was a mistake in the name in the guarantee.
108. In relation to the test in Dumford, in so far as there could, here, be said to be two possible entities, “*unless one can say from the four corners of the document that the parties must have intended to refer to one rather than the other entity, then the doctrine does not apply.*” On the terms of the Contract it is not possible to say that the parties intended to refer to CDDL rather than CCEL, the party named. On that basis this case would not come within the test of misnomer. Equally, it could not in this case be said that there was only one entity as both CCEL and CDDL existed.
109. Accordingly, for the reasons set out above, I do not consider that Liberty Mercian can, as a matter of construction, change the identity of the Contractor in the Contract from CCEL to CDDL by relying on the principle of misnomer.

Mutual Mistake: Was there a common mistake in respect of the contracting party?

110. As set out above, I have come to the conclusion that this is not a case where there was a mistake in inserting CCEL in place of “Cuddy Group” which can be remedied by applying the principle of misnomer when construing the contracts of 6 July 2010. I now turn to consider the alternative way in which Liberty Mercian seeks to achieve that result: by rectification on the basis of mutual or alternatively unilateral mistake.

Submissions

111. Liberty Mercian submits that the mistake occurred when it was recognized that there was no corporate entity known as “Cuddy Group” and so the contract documents were amended to insert CCEL in place of “Cuddy Group”. Liberty Mercian submits that the parties intended that the Contract should be entered into with the party carrying out the work, namely CDDL and that references to CCEL in the contract documentation were straightforward errors caused by Mr Mundy mistakenly identifying the corporate entity represented by “Cuddy Group”.
112. In support of their submissions that rectification is appropriate Liberty Mercian refer to the decision of the House of Lords in Chartbrook as well as the recent analysis of the law of rectification by the Court of Appeal in Daventry District Council v Daventry and District Housing Limited [2012] 1WLR 1333.
113. Liberty Mercian submits that, adopting the approach set out by Lord Neuberger in Daventry at [213], the Court should ask itself whether the hypothetical reasonable observer would have concluded that Liberty Mercian was signalling a departure from the prior agreement that the Contract would be entered into by CDDL, being the party undertaking the works. They submit that the observers would have believed that Liberty Mercian was making a mistake and the parties had a common continuing intention that the Contractor was the party undertaking the works.
114. Liberty Mercian submits that in this case the evidence shows that Mr Mundy made a mistake which, as Lord Neuberger observed in Daventry at [217] is often impossible to explain. The mistake was made because a company search was carried out identifying CCEL with the same address as that identified for “Cuddy Group” on their website and the assumption was made, without noticing that CCEL was a dormant company, that Cuddy Group was the same as CCEL.
115. Liberty Mercian says that there is no satisfactory case advanced by the Defendants to show that they could have understood Liberty Mercian to be signalling a departure from the prior agreement that the Contract would be entered into by CDDL, the party undertaking the works.
116. In relation to rectification and the summary of the requirements for mutual mistake set out by Peter Gibson, LJ in Swainland Builders v Freehold Property Limited

[2002] EWCA Civ 560 at [33] and adopted by Lord Hoffman in Chartbrook at [48], Liberty Mercian submits that in this case the contractual documents in May 2010 demonstrate that the parties had a common continuing intention that “Cuddy Group”, that is CDDL, should be the contracting party and there was a clear outward expression of accord in those contract documents. Liberty Mercian submits that there is nothing to demonstrate that the intention did not continue to the time of execution of the contract in July 2010. It submits that showing that the matter departed from the previous accord is not sufficient because in all cases of mistake the documents entered into will depart from the previous intention as that is a necessary part of the mistake. In particular there is no evidence of subsequent discussions that suggest any intention to depart from an understanding that the Contract was to be with the party carrying out the work, namely CDDL.

117. The Defendants submit that objectively there was no longer a continuing common intention when the parties entered into the contract in July 2010. They say that objectively Liberty Mercian addressed its mind to the identity of the contracting parties and made it clear that it wished to contract with CCEL and not CDDL. They submit that the common intention of the parties to be gathered by the objective observer was that Liberty Mercian now wished to enter in the Contract with CCEL.
118. The Defendants say that this case comes within the fourth scenario put forward by Etherton LJ in Daventry at [88] as there was a prior accord and Liberty Mercian objectively made it apparent that they intended to enter into a contract with CCEL and not CDDL. This is therefore, in the Defendants’ submission a case in which rectification should not be granted.
119. In addition the Defendants submit that there is no evidence to establish that a mistake was made by Liberty Mercian. Alternatively they submit that there was no mistake by Liberty Mercian. They say that neither Mr Mundy nor Mr Baker nor Mr Jones were the relevant Liberty Mercian decision takers in the sense intended by the Court of Appeal in George Wimpey UK Limited v VI Construction Limited [2005] BLR 135 and so that any conclusion as to whether Liberty Mercian actually made a mistake would be a matter of speculation, as stated by Blackburne J at [83].

Decision

120. The starting point for the principles applicable to mistake and rectification is Chartbrook at [48] citing Peter Gibson LJ in Swainland at [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.”

121. In addition in Chartbrook at [60] Lord Hoffmann said this:

“Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the “common continuing intention” were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be.”

122. While Lord Hoffmann’s analysis has been subject to academic comment, the Court of Appeal in Daventry proceeded on the basis of that analysis. At [197] to [198] Lord Neuberger said this:

“197. Lord Hoffmann’s analysis, in summary terms, proceeds as follows. When it comes to deciding whether there is a contractual relationship between two parties, and, if there is, what the terms of the contract are, such questions are normally to be assessed by what a hypothetical reasonable objective observer, aware of all the relevant facts known to both parties, and what has been communicated between the parties, would have concluded to be their intention. Exceptions to that general principle exist, such as (i) the exclusion of the antecedent negotiation when it comes to the interpretation of a written contract, and (ii) the subjective intention or understanding of the parties, which is inadmissible in relation to the interpretation of written contracts, although it is admissible when it comes to oral, or partly oral, contracts. Accordingly, where rectification of the terms of a contract is sought on the basis of alleged common mistake, while there will be some exceptions, the general rule is that the court should judge the question by reference to what a hypothetical reasonable objective observer, aware of all the relevant facts known to both parties, would conclude.

*198. However, the court will inevitably not adopt precisely the same approach to a rectification claim as it adopts to an interpretation issue. Three differences are relevant for present purposes. First, in a rectification claim the antecedent negotiations are admissible: indeed they are normally of central relevance. Secondly, even in relation to written contracts, some subjective evidence of intention or understanding is not merely admissible, but is normally required in a rectification claim: the party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract. Thirdly, as *Etherton LJ* points out in para 83 above, rectification is an equitable remedy and therefore is subject to somewhat different rules from interpretation.”*

123. In this case the central issue is whether there was a common continuing intention up until the Contract was entered into on 6 July 2010 that the Contract would be entered into by Cuddy Group, that is CDDL, the company carrying out the works. In my judgment there was a common continuing intention up until Mr Jones sent his email to Mr Evans on 26 May 2010 enclosing the email from Mr Baker to Mr Mundy. That common intention was that the party who would be the contractor was to be the “Cuddy Group”, CDDL. That is demonstrated by the letter of intent dated 9

January 2010, the tender which was dated 30 April 2010 and then the contract documents signed by Mr Evans on 6 or 7 May 2010. The question is, essentially, whether Mr Jones' email to Mr Evans and the action that was then taken in relation to the contract dated 6 July 2010 can be characterized as a new common intention or a mistake in converting the previous common intention into the contract documents which formed the Contract. That depends essentially on whether the change from "Cuddy Group" to CCEL is to be interpreted objectively as a change in intention or as a mistake.

124. In my judgment, when viewed objectively, a hypothetical reasonable objective observer, aware of the facts known to both parties, would conclude that there had been no mistake. Prior to 26 May 2010 the Contractor was stated to be "Cuddy Group", except in terms of the warranty to Liberty Mercian and Sainsbury's. When Mr Jones enclosed the email from Mr Baker with his email to Mr Evans he referred to Mr Baker's email which stated "*the contractor is listed as Cuddy Group. It should be Cuddy Civil Engineering Limited.*" To give effect to that and also a requirement that the Contract should be a deed, it was stated that the form of agreement was "*to be signed as a deed on the 2nd page by two Directors of Cuddy Civil Engineering Limited.*"
125. On this basis the hypothetical objective observer would, in my judgment, have concluded that it was the intention of the parties that the party acting as the Contractor should change from "Cuddy Group" to CCEL as requested, no matter who was then carrying out the works. This was consistent with the fact that the warranty with Liberty Mercian and Sainsbury had been entered into with CCEL on the basis that CCEL was to be the Contractor.
126. In this case there was therefore objectively no mistake as the previous common intention to enter into the Contract with Cuddy Group had changed as a result of the request on 26 May 2010.
127. As stated above, I accept that there was a mistake by Mr Mundy in identifying Cuddy Group as CCEL and then informing Mr Baker of this in early February 2010. This led to the warranty to Liberty Mercian and Sainsbury's being given by CCEL. This then caused Mr Baker to seek the change to the contract documents when they were sent to him on 19 May 2010. His email of 24 May 2010 forwarded by Mr Jones to Mr Evans then led to the Contractor being changed from Cuddy Group to CCEL. This was a mistake made unilaterally by those acting on behalf of Liberty Mercian and Sainsbury's but it led, objectively, to a change in the common intention.
128. In Daventry at [85] to [88] Etherton LJ identified four factual situations and indicated which of those situations justified "*the intervention of equity by way of rectification for mutual mistake of a contract binding on the parties at common law.*" Lord Neuberger of Abbotsbury MR agreed with this analysis at [227]. The

third and fourth scenarios applied to cases where there was a prior accord and one of the parties changed their minds. He said this as to those two scenarios:

“87. The third scenario is where there was objectively a prior accord, but one of the parties then subjectively changed their mind, but objectively did not bring that change of mind to the attention of the other party. It is right that, if the documentation gives effect to the objective prior accord, the formal documentation should not be rectified to reflect the changed but uncommunicated subjective intention; and if the documentation as executed reflects the changed but uncommunicated subjective intention, it should be rectified to give effect to the objective prior accord. To do otherwise would be to force on one of the parties a contract which they never intended to make on the basis of an uncommunicated intention and belief.

88. The fourth scenario is where there was objectively a prior accord (whether or not a subjective common intention), and one of the parties then objectively changed their mind, that is to say objectively made apparent to the other party that they intended to enter into the transaction on different terms. Leaving aside rectification for unilateral mistake (the requirements for which are quite different), it is right that, if the documentation as executed gives effect to the objectively indicated change of mind, a claim for rectification to give effect to the earlier prior accord should be refused. Once again, to do otherwise would force on the defendant a contract which they never intended to make on the basis of the claimant’s uncommunicated subjective intention to enter into a contract on the basis of the original accord notwithstanding the defendant’s objectively communicated change of mind.”

129. In the present case, as submitted by the Defendants, I accept that in this case the fourth scenario applied. There was objectively a prior accord and Liberty Mercian then objectively changed its mind. It objectively made apparent to the Defendants that it intended to enter into the transaction with a different party. As the Contract gives effect to the objectively indicated change of mind then a claim for rectification to give effect to the earlier prior accord should be refused.
130. I should add that I consider that there was sufficient evidence of the mistake when the directors of Liberty Mercian signed and initialled the changes in July 2010. Contrary to what is contended by the Defendants, I do not consider it necessary for those directors to give evidence that they made the mistake. The mistake was essentially a mistake by those drawing up the contract on behalf of Liberty Mercian which was then signed by those directors, evidently relying on those who had negotiated its terms. As stated by Patten LJ in Hawksford Trustees Jersey Limited v Stella Global UK Ltd [2012] EWCA Civ 55 at [41] and [43] the negotiator may share his intentions with the decision maker or the evidence might demonstrate objectively an intention to enter into an agreement which the negotiator had negotiated and agreed. In my judgment the evidence shows that Mr Jones and Mr Mundy were given the role of negotiators, taking account of the necessity of approval from Mr Baker on behalf of Sainsbury’s. Liberty Mercian then accepted

what had been negotiated and agreed and entered into a contract on that basis. Any mistake was therefore adopted by the decision makers.

131. For the reasons set out above, in the absence of a common continuing intention, this is not a case where there has been a mutual mistake and therefore no question of rectification arises.

Unilateral mistake: Was there a unilateral mistake in respect of the contracting party?

132. Liberty Mercian submits, in the alternative, that it is entitled to relief on the basis of unilateral mistake. The Defendants say that the test for unilateral mistake is not made out.

Submissions

133. Liberty Mercian submits that, even if an objective observer would not have identified a continuing common intention, the Defendants had knowledge of Liberty Mercian's subjective mistake as to the identity of the Contractor sufficient to give rise to rectification for unilateral mistake. They accept that the level of knowledge sufficient to give rise to rectification for unilateral mistake has traditionally been characterized as "wilfully shutting eyes to the obvious" or "wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make".
134. However they refer to what Toulson LJ said in Daventry at [184], as follows:

"I am conscious that there is authority that the test for unilateral mistake rectification is one of honesty, and that nothing less than knowledge in the sense of one of Peter Gibson J's first three categories in the Baden case [1993] 1 WLR 509 will be sufficient. The judge found that Mr Roebuck did not have such knowledge. But I am not sure that the legal principle is or should be so rigid. Professor Andrew Burrows in his chapter entitled "Construction and Rectification" in Burrows & Peel eds Contract Terms (2007), ch 5 has tentatively suggested that the modern law of construction and rectification may be moving to what he terms "promise objectivity" by which he means an approach which would include as part of the context not only the common intention of the parties but also the meaning of the contract which the promisor knows or ought to know that the promise is adopting. This is close to the thinking of Professor McLauchlan. In George Wimpey UK Ltd v VI Construction Ltd [2005] BLR 135, paras 56-57 Sedley LJ suggested that a test of "honourable and reasonable conduct" would be preferable. In the present case the trial judge said that it would have been honourable for Mr Roebuck to check out the position with Mr Bruno, but that the court was not concerned with honour. Words like "honourable and reasonable" are imprecise, but I am inclined to agree with Sedley LJ's observation, at para 65, that "sharp practice has no defined boundary". It may be easier to judge than to define. These matters were not debated in the

argument before us, and in view of the conclusion which I have reached on the prior issue it is unnecessary to explore them further.”

135. Liberty Mercian submits that in this case the opportunistic nature of the Defendants’ conduct falls squarely within the boundaries of conduct which would support relief under unilateral mistake. Liberty Mercian says that they have not been able properly to explore the internal thinking of the Defendants and rely on the absence of disclosure as being a factor for that.
136. The Defendants submit that the test for unilateral mistake is to be gathered from, in particular, the following cases: *Thomas Bates & Son v Wyndhams Ltd* [1981] 1 WLR 505 [CA]; *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 [CA]; *George Wimpey UK Ltd v VI Construction Ltd* [2005] BLR 135 [CA] and also from the passage in *Chitty on Contracts (31st Edition)* para 5-115 and following.
137. They submit that one party has to be mistaken about a provision and the other party has to be aware of the omission or the inclusion of the term and that it was due to a mistake on the part of the first party. They say that there has to be actual knowledge or wilfully shutting one’s eyes to the obvious or wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make. They submit that it is not sufficient for there to be merely constructive knowledge of circumstances which would indicate the fact to an honest and reasonable person or put an honest and reasonable person on enquiry. They submit that the critical distinction is between honesty and dishonesty. They also say that the other requirements must be met: the party must have omitted to draw the mistake to the first party and the mistake must be one calculated to benefit the other party.
138. The Defendants refer to passages in the judgment of Etherton LJ in *Daventry* at [94] to [97]. They submit that Toulson LJ was ready to consider an alternative test which did not need to be explored further but that at 207 Lord Neuberger preferred Etherton LJ’s summary. On that basis they submit that the test for unilateral mistake remains that described in *George Wimpey v VI Construction*.

Decision

139. In my judgment, the test for unilateral mistake is that set out by Etherton LJ in *Daventry* at [56] and approved by him at [94]. At [56] it was stated:

“56. Turning to the requirements for unilateral mistake, the judge said (at para 112) that these were reiterated by the Court of Appeal in George Wimpey UK Ltd v VI Construction Ltd [2005] BLR 135, para 38, approving the following statement of the principle by Buckley LJ in Thomas Bates & Son Ltd v Wyndham’s (Lingerie) Ltd [1981] 1 WLR 505, 515–516:

“For this doctrine—that is to say the doctrine of A Roberts & Co Ltd v Leicestershire County Council [1961] Ch 555 , 570—to apply I think it must be shown: first, that one party A erroneously believed that the

document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.” ”

140. In Davertry a question raised on appeal was the necessary state of mind of the defendant for rectification for unilateral mistake. Etherton LJ said this at [95]:

“95. It is now well established by authority, binding at the level of the Court of Appeal, that the defendant's knowledge of the claimant's mistake sufficient to satisfy the conditions for rectification for unilateral mistake is such knowledge as falls within any one of the first three categories described by Peter Gibson J in the Baden case [1993] 1 WLR 509, namely: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; and (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable person would make: Commission for the New Towns v Cooper (Great Britain) Ltd [1995] Ch 259, 280, 292 and George Wimpey UK Ltd v VI Construction Ltd [2005] BLR 135.”

141. He then referred to categories (2) and (3) at [97] and said:

“97. ...Those categories, like Baden category (1), reflect dishonesty, the critical broad distinction being between honesty and dishonesty: the Commission for the New Towns case, [1995] Ch 259, 280 E–281 B, the George Wimpey case [2005] BLR 135, para 45.”

142. As set out above I consider that in this case Liberty Mercian shared with the negotiators on whom they relied the erroneous belief that CCEL was the same party as Cuddy Group. As a result, Liberty Mercian requested that CCEL should be substituted for Cuddy Group in the Contract dated 6 July 2010. The Defendants were evidently aware of and complied with that request.

143. This was therefore a case where Liberty Mercian erroneously believed that the Contractor named in the Contract, CCEL, was the same legal entity as Cuddy Group when in fact Cuddy Group was CDDL.

144. However in the present case I do not consider that the evidence comes anywhere near to establishing that, in relation to the mistake, the Defendants either had actual knowledge or wilfully shut their eyes to the obvious or wilfully and recklessly failed to make the enquiries which an honest and reasonable person would make. Mr Michael Cuddy's evidence was that he did as requested and agreed that the Contract would be entered into by CCEL. He was obviously anxious to obtain further payments and he considered that the Contract needed to be finalised to do so. He therefore agreed to the request of Liberty Mercian made by Mr Jones to Mr Evans. This was supported by the evidence of Mr Evans. Mr Cuddy said, and I accept, that

he thought he would start CCEL trading or would continue with CDDL acting on behalf of CCEL.

145. Liberty Mercian criticises the disclosure given by the Defendants on this issue. However, in the absence of an application for disclosure which is pursued and which can properly be said not to have been complied with, for which there may be sanctions, I cannot possibly discount the evidence which has been given based on what would be speculation.
146. On the basis of the evidence of those involved at the time on behalf of the Defendants, which I accept as honest, I do not consider that their conduct moved into an area which could be described as “sharp practice” or characterised as dishonesty.
147. Accordingly I do not consider that this is an appropriate case for rectification for unilateral mistake.

Rectification: If so, should the Court rectify the Contract so that the contracting party is now CDDL and not CCEL?

148. For the reasons given above this is not a case where I consider that Liberty Mercian is entitled to rectification of the Contract so as to substitute CDDL for CCEL.
149. The Defendants submit that, even if this were to be a case of mutual or unilateral mistake, the Court should not grant rectification because of delay in bringing the matter forward and also the effect on other contracts and the position of third parties under those contracts. The Defendants point out that the parties to the deed of warranty are Sainsbury’s, Liberty Mercian and CCEL and that the warranty declares that CCEL is the Contractor. Further they point out that most of the sub-contractor warranties to Sainsbury’s, Liberty Mercian and Waterman refer to CCEL being the Contractor. They say that there are no proceedings to rectify any of these agreements and that the Court should not rectify one agreement in the form of the Contract where there will be a consequent impact on other contracts and third parties.
150. Liberty Mercian submits that there is no delay and that the issue of third parties and the potential need to rectify other agreements should not complicate these proceedings. It says that if it is successful and the same point is taken against other parties then those other parties, including Sainsbury’s, would be able to succeed on mistake.
151. In my judgment this is a case where the delay in seeking rectification was not such as would prevent the Court from granting rectification if it had been otherwise appropriate to do so on the basis of mutual or unilateral mistake. Rectification is an equitable remedy and the position of third parties would need to be considered. Had I decided that mutual or unilateral mistake had been established, I would have sought more detailed submissions of the impact of rectification upon other obligations affecting third parties, which I do consider would have been relevant to the grant of rectification.

Estoppel by Convention: Is CDDL estopped from denying that the Contract was between Liberty Mercian and CDDL?

152. Liberty Mercian contends that there was a common continuing understanding that the Contract was entered into and was to remain with the party undertaking the works and that CDDL is estopped from denying that it was a party to the Contract.
153. In relation to reliance on estoppel in these circumstances Liberty Mercian refer to what Rix LJ said in Dumford at [39] in relation to a submission that estoppel was being used as a sword rather than a shield. He considered that the answer might be found in what Brandon LJ had said in Amalgamated Investments & Property Co Ltd v Texas Commercial International Bank Ltd [1982] 1 QB 84 at 131-132: *“while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.”*
154. Here Liberty Mercian submits that whilst it cannot found a cause of action on estoppel it can rely on an estoppel to succeed on a cause of action against CDDL because it can rely on an estoppel against CDDL in relation to the identity of the Contractor being the party who would undertake the works.
155. The Defendants submit that there was no common assumption or agreed statement of facts that the Contract was entered into with the party who would undertake the works.
156. The Defendants rely on the Court of Appeal decision in Keen v Holland [1984] 1 WLR 251 at 261 to 262 where Oliver LJ rejected a submission that, where parties were shown to have a common view about the legal effect of a contract into which they had entered and it was established that one of them would not, to the other’s knowledge, have entered into it if that party had appreciated its true legal effect, they are estopped from asserting that the effect was otherwise than the party originally supposed. He said that that submission could not be right and that he could not see how an erroneous belief as to the effect of the contract could properly be described as a “conventional basis for dealings” so as to give rise to an estoppel.
157. The Defendants say that that the estoppel alleged in this case would have a similar effect. They say that Liberty Mercian relies upon a common understanding between Liberty Mercian and CDDL that the Contract was entered into and was to remain with the party undertaking the works. On this basis the Defendants submit that Liberty Mercian is asserting that the parties had a common understanding about the legal effect of the Contract in that CDDL would be the contracting party. The Defendants say that Liberty Mercian must then contend that it would not have entered into the Contract if it had appreciated its true legal effect, in that CCEL was the contacting party and this was known to CDDL. The Defendants then say that Liberty Mercian must contend that CDDL is estopped by convention from asserting that the effect of the Contract is other than that CDDL is the contracting party. It is therefore submitted that, as in Keen v Holland, an erroneous belief that, although CCEL was named as the party to the Contract, CDDL would be the contracting party cannot form the basis for a convention between the parties so as to give rise to an estoppel.

158. In addition the Defendants refer to a number of other authorities including Amalgamated Investments & Property Co Ltd v Texas Commercial International Bank Ltd [1982] QB 84 [CA] as well as the summary in Chitty on Contracts (31st Edition) at para 3-107 and following.
159. They say that the following principles are established by those cases:
- (1) An estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other.
 - (2) The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow that party to go back on the assumption.
 - (3) It is not enough that each of the two parties acts on an assumption not communicated to the other but a concluded agreement is not a requirement for an estoppel by convention.
160. The Defendants submit that there was no common assumption or agreed statement of facts that the Contract was entered into with the party undertaking the works. They say that CDDL knew that the Contract was entered into with CCEL which was not the party undertaking the works and Liberty Mercian asked specifically for the Contract to be with CCEL and made no mention of any assumption that it believed CCEL to be the party undertaking the works. As a result the Defendants say that nothing crossed the line between the parties and there was no convention. They refer to the fact that Liberty Mercian knew CDDL was carrying out the works and paid CDDL but yet contracted with CCEL, entered into a warranty with CCEL, procured other warranties naming the contracting party as CCEL, conducted an adjudication against CCEL and commenced these proceedings against CCEL.
161. In any event the Defendants say that estoppel cannot be used to create a contract or a cause of action where one does not exist. In relation to Liberty Mercian's submission that the continuing common understanding was that "*the Contract was entered into and was to remain with the party undertaking the works*" they submit that no party addressed itself in that form. They say that Liberty Mercian's true formulation would be "*the convention was that CDDL was a party*" but it avoids this formulation because the convention evidently changed to CCEL being a party.

Decision

162. In the present case it is difficult to see how a convention, giving rise to an estoppel, can arise. There is nothing in the evidence to indicate that there was a convention that, although the Contract was entered into by CCEL, it was entered into by the party carrying out the works, namely CDDL. It is true that although the party named in the Contract was CCEL both parties operated the contractual mechanism as if the Contractor was CDDL. However, in doing so, they did not adopt a convention that CCEL was to be treated as CDDL. In fact neither party, it seems, applied their minds seriously to the difference between the contracting party's name, CCEL and the party who was carrying out the work and performing the other contractual obligations, CDDL.

163. Both parties in this case knew that it was CCEL who was the contracting party but equally they knew that it was CDDL who was carrying out the works. On that basis I do not consider that the premise of a convention has been established.
164. In relation to the Defendants' reliance on Keen v Holland I am not persuaded that it establishes that a claimant cannot rely upon an estoppel by convention where part of the dealings between the parties is the agreement which is said to be subject to the estoppel. If for instance in this case there had been a convention that all references to CCEL were to be treated as references to "Cuddy Group", that is CDDL and subsequently one party sought to say that references to CCEL were not references to CDDL then it is difficult to see why that would not give rise to an estoppel by convention.
165. In Keen v Holland the issue was whether, where both parties had a common view about the legal effect of a contract, they were, without more, estopped from asserting that the contract means what it says. It was decided that they were not. Otherwise, the parties' common subjective intention would override what the agreement actually meant on the basis of an objective interpretation. In the case of Keen v Holland, the parties entered into a tenancy which had a particular statutory effect and the Court of Appeal held that one party could not be estopped from asserting the true effect in law of entering into that agreement. That principle does not, it seems, apply on the facts of this case as there was no common subjective intention.

Does the Contractor (CCEL or CDDL) remain obliged to supply a parent company guarantee, a performance bond and warranties after termination?

166. There are three possible ways in which the Contract was terminated. First, by Liberty Mercian terminating the Contract under the express termination provisions. Secondly, by the Defendants accepting Liberty Mercian's wrongful termination as a repudiatory breach which it accepted and thirdly by Liberty Mercian accepting the defendants' repudiatory breach. The question is whether, for each of these ways in which termination could have occurred, the Contractor remained obliged to supply the parent company guarantee, performance bond and warranties.
167. In this case Liberty Mercian is now seeking four items of outstanding documentation. There are two warranties from Quantum (GB) Limited, one in favour of Liberty Mercian and the other in favour of Waterman. These are sought under Clause Z17.1 on the basis that a request was made on the 9 June 2011 and the documentation should have been provided within 28 days of a request to do so. In addition Liberty Mercian seeks a performance bond on the basis that it was requested on 29 November and 20 December 2011 and under Clauses Z.4.1.2 the Defendants were obliged to deliver that within 7 days of a written request to do so. The fourth document sought is the parent company guarantee which was requested on 20 December 2011 and under Clause Z.4.1.1 was to be provided within 7 days of a written request to do so.

Submissions

168. Liberty Mercian contends that the obligations to provide the documents did survive termination on any of those possible ways of termination. It submits that the contractual obligations to provide a parent company guarantee, performance bond and subcontract warranties survived contractual termination alternatively repudiation on the basis of two strands of authorities.
169. First they say that the rights to those documents were rights which have been unconditionally acquired and therefore survive termination. They refer to the passage in the judgment of Dixon J in McDonald v Dennys Lascelles Limited (1933) 48 CLR 457 at 476 to 477 where he said :

“When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding on him, the contract is not rescinded as from the beginning. Both parties are discharged from further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.”

170. Liberty Mercian refers to the fact that the principle has been approved and adopted by Lord Wilberforce in Johnson v Agnew [1980] AC 367 at 395, by Lord Brandon in Bank of Boston Connecticut v European Grain and Shipping Limited [1989] AC 1056 at 1098 to 1099 and by Lord Millett in Hurst v Bryk [2002] 1 AC 185 at 193 and more recently has been adopted by the Court of Appeal in Explora Group PLC v Hesco Bastion Limited [2005] EWCA Civ 646 at [84]. Liberty Mercian says that in this case its accrued rights in relation to the parent company guarantee, the bond and the warranties had been unconditionally acquired prior to termination and continued unaffected by the termination. On that basis they submit that the obligations can be enforced as primary obligations.
171. Liberty Mercian submits that the right to the parent company guarantee, bond and warranties was acquired by partial performance as much as an obligation to inspect records or to receive an interim payment. They seek to gain assistance from the Court of Appeal decision in Rover International v Cannon Film Sales (No 3) [1989] 3 All ER 423 and, in particular, the judgment of Kerr LJ at 439 to 440 and Dillon LJ at 443.
172. Alternatively Liberty Mercian submits that its rights to a parent company guarantee, bond and warranties were “ancillary or collateral” rights which survived the termination of the other primary obligations under the Contract. Liberty Mercian refers to Heyman v Darwins Limited [1942] AC 356 and to the analysis of that case by Colman J in Yasuda Fire & Marine Insurance Company of Europe Limited v Orion Marine Insurance Underwriting Agency Limited [1995] QB 174. Liberty Mercian submits that the parent company guarantee, bond and warranty are ancillary or collateral to the subject matter of Contract in this case. It submits that those documents do not facilitate the successful conclusion of the work but are designed to provide the employer and others with financial protection against failures by the Contractor to fulfil its obligations.

173. In response to the Defendants' submission, set out below, that the obligations to provide the parent company guarantee, bond and warranties come within the obligations in clause 20.1 to "Provide the Works", which ends at termination, Liberty Mercian submits the obligations are not encompassed within this obligation and that the phrase "incidental work, services and actions" in the definition of "Provide the Works" refers to matters incidental to completing the works and it cannot be said that providing the parent company guarantee performance bond or warranties are incidental to completing the works.
174. In relation to whether there are unconditionally acquired rights, the Defendants make a number of challenges to Liberty Mercian's entitlement to the various documents which I will deal with below but they accept that in principle the provision of the parent company guarantee, performance bond and warranties would be unconditionally acquired rights. They say that the remaining unperformed obligations in relation to those documents are replaced by a secondary obligation to pay monetary compensation by way of damages for breach of those obligations. They submit that those rights give rise to "*causes of action which have accrued from its breach*" rather than rights "*which arise from the partial execution of the contract.*"
175. The Defendants say that for the right to arise from partial performance, the key aspect is performance and not that the right arises as a contractual right or from a demand. They say therefore that whether an obligation to provide a parent company guarantee, bond or warranty arises under the Contract or as a result of a demand which brings about an obligation under the Contract, the unconditionally acquired right arises from a cause of action which has accrued from the breach not from partial execution of the Contract.
176. In relation to the alternative way in which Liberty Mercian puts its case, the Defendants submit that the obligations to provide a parent company guarantee, bond or warranties are not obligations which have a contractual function which is ancillary or collateral to the subject matter of the Contract. They refer to the speech of Lord Diplock in Moschi v Lep Air Services Limited [1973] AC 331 at 350 where he said

"Although this is the general rule as to the effect of rescission of the contract upon obligations of which it was the source, there may be exceptional primary obligations which continue to exist notwithstanding that the contract has been rescinded. These are obligations that are ancillary to the main purpose of the contract - which is, of course, that the parties should perform their primary obligations voluntarily. Mutual promises to submit to arbitration disputes arising as to the performance by the parties of their other obligations arising from the contract may be expressed in terms which make it clear that it was the common intention of the parties that their primary obligation to continue to perform these promises should continue notwithstanding that their other primary obligations had come to an end: Heyman v Darwins Ltd. [1942] A.C.356. But this is the exception...."

177. The Defendants submit that the exception is narrow and the basis for the exception was correctly identified by Colman J in Yasuda in the following three propositions:
- (1) The effect of the election to accept a repudiation discharges both parties only from *the future* performance of their primary obligations;
 - (2) The arbitration clause does not involve the parties in future performance of any primary obligations, but only in the ascertainment of those rights and obligations to which *past* events have given rise;
 - (3) An arbitration clause survives termination/repudiation because it is “*collateral to the substantial stipulations of the contract.*” It is “*merely procedural and ancillary*” and “*the agreement to arbitrate depends upon there being a dispute or difference in respect of the substantive stipulation.*”
178. In this case the Defendants submit that there is nothing remotely analogous to the situation in relation to an arbitration clause or the right of inspection in Yasuda. Whilst the Defendants accept that providing a parent company guarantee, bond or warranty is different to carrying out works of civil engineering they submit that this does not mean that providing those documents is “ancillary” or “merely procedural” in the sense established by the authorities.
179. In support of this they refer to the contractual provisions in relation to the provision of the parent company guarantee, the bond and warranties. The relevant obligations are contained within NEC Option X13 and Options Z4 and Z17 of the Contract.
180. They refer to the opening words of the main obligation of the Contractor set out in Clause 20.1, as amended at p.21 and by Option Z3, which states: “The *Contractor* Provides the Works in accordance with the Works Information and in accordance with good up to date practice and in accordance with all British Standards and *relevant* Codes of Practice and shall ensure that the Works are carried out and completed in a good and workmanlike manner in accordance with the standard of good engineering practice using suitable and sound materials of good quality such that the Works (to include the internal access road) are to an adoptable standard acceptable to the local authority.”
181. They refer to the definition of “Provide the Works” in clause 11.2(13) as follows: “To Provide the Works means to do the work necessary to complete the *works* in accordance with this contract and all incidental work, services and actions which this contract requires.”
182. They submit that, on this basis, the obligations to provide the parent company guarantee, the bond and warranties fall within the definition of “Provide the Works” and, on termination under the Contract, Clause 90.5 provides as follows: “After a termination certificate has been issued, the *Contractor* does no further work necessary to Provide the Works.”
183. On this basis they say that the express terms of the Contract provide that the Contractor is not obliged to provide the parent company guarantee, bond or warranties as these are part of the “incidental work, services and actions” which come within the definition of “Provide the Works”. Alternatively they say that, by

an analysis of the “works” the obligation to provide the parent company guarantee, bond and warranties comes within the definition of the “works”. They refer to Clause 20.1 which requires for the Contractor to “Provide the Works in accordance with the Works Information” and to the Works Information which is defined in clause 11.2(19) as “information which either specifies and describes the works or states any constraints on how the Contractor Provides the Works.” They say that the Works Information imposes obligations in the quality plan which would include the parent company guarantee, bond and warranties and that the forms for those documents are attached as Appendices to the Works Information.

184. In addition they point out that under clause Z7.2 when the Employer terminates under clauses 91.2 and 91.3 of the Contract the Contractor is obliged to deliver or give the Employer certain things including copies of drawings and other documents, information and assistance. The Defendants therefore say that these arrangements show that the parties have agreed what is to happen in the event of termination and that the fact that there is no reference to the parent company guarantee, bond and warranties shows that the relevant obligations do not survive. They say it is also a strong indicator that the parties did not expect those obligations to survive repudiation either.

Decision

185. The obligation for the Contractor to provide the parent company guarantee, bond and warranties arises because a demand has been made which gives rise to the Contractor’s obligation to perform. I do not consider that this obligation arises from part performance. The demand which triggers the obligation cannot amount to partial performance any more than an obligation in a contract requiring those documents could do so. In essence the relevant partial performance here would be partial performance of the work which gives rise to unconditionally acquired rights but does not give rise to the right to the documents claimed here. Nor does payment give rise to any rights to the documents on the terms of this contract. I therefore do not think that the question of whether payment has been made for the bond provides any assistance. The exhibit LH2 would appear to show that payment was initially made but later withheld as the bond was not provided. I do not consider that payment for the bond would change the character of the unconditionally acquired right in this case.
186. I do not gain any assistance from the decision in Rover International concerning rights to payment on termination and the question of whether those rights arose from partial performance in relation to the particular obligation here.
187. I do not consider that the rights to the parent company guarantee, bond or warranties can be classed as rights which arise from the partial execution of the Contract. Rather, I consider that the rights arose from the contractual terms and that Liberty Mercian have causes of action which have accrued from the breach of contract by the Contractor in failing to provide the parent company guarantee, bond and warranties in accordance with the Contract. Subject to the question considered below as to the consequences of termination on remedies, where a party is in breach there are generally available both remedies in law in terms of payment of damages and remedies in equity such as specific performance.

188. In relation to whether the obligations survive termination, I turn first to consider the legal principles which define those obligations which do survive. They are, in my judgment to be derived from the summary of the law in the judgment of Colman J in Yasuda.
189. In Yasuda, the defendants acted as underwriting agents for the plaintiff insurers under various underwriting agency agreements. The agreements were terminated and the question arose as to whether a provision in Clause 4.2 of the agreements which entitled the plaintiff to inspect and take extracts or make copies of all necessary books, accounts, records and other documentation survived termination. Colman J held that those obligations did survive. He observed that the contractual function of Clause 4.2 was to provide the principal with information as to the manner in which the agent had already performed his obligations and without that information the principal would be in a position of ignorance. He therefore concluded that there were very strong reasons based on the contractual function of the provision in Clause 4.2 for imputing to the parties the intention that the inspection facility would not be discharged by termination for repudiatory breach.
190. He referred to Heyman v Darwins and said that the survival of the arbitration clause on termination for wrongful repudiation was based on two basic conditions. First that such termination discharged both parties only from the future performance of their primary contractual obligations as distinct from discharging the contract in all respects. Secondly that the contractual function of the dispute resolution clause did not involve the parties in future performance of any of their primary obligations which formed part of its subject matter or substance of their bargain. He referred to what Lord Wright said in Heyman v Darwins at 377 to 378 *“That illustrates clearly one aspect of an arbitration agreement, namely, that it is collateral to the substantial stipulations of the contract. It is merely procedural and ancillary, it is a mode of settling disputes, though the agreement to do so is itself subject to the discretion of the court.”*
191. Colman J referred to the well-known speech of Lord Diplock in Photo Production Limited v Securicor Transport Limited [1980] AC 827, where on termination for repudiatory breach he said that the unperformed primary obligations of that other party were discharged and referred to the bringing to an end of all primary obligations under the contract. Colman J said that these references must be read as confined to the primary obligations which are part of and not merely ancillary or collateral to the subject matter of the contract like an arbitration clause.
192. On that basis I now turn to consider whether, on termination under the provisions of the Contract, the obligations to provide the parent company guarantee, the bond and warranties survive as primary obligations. Clause 90.5 is clear that, after a termination certificate is issued, the Contractor *“does no further work necessary to Provide the Works.”* This raises two questions. First whether the obligations to provide the parent company guarantee, bond and warranties fall within the definition *“further work necessary to Provide the Works”* and if it does whether there is a distinction to be drawn between doing the work necessary to complete the *“works”* and doing all incidental work, services and actions which the Contract requires. Secondly if the obligations to provide the parent company guarantee, bond and

warranties do not fall within the phrase “Provide the Works” whether they fall under some other part of the obligations of the Contractor.

193. The primary obligations to provide the parent company guarantee, bond and warranties are contained in the Z Clauses which form amendments and additions to the NEC Third Edition June 2005 Option A and the various secondary options incorporated in the Contract. As stated in Volume 2 Contract and Tender Information, which forms part of the Contract:

“The modifications set out in the Additional Conditions of Contract or initialled by the Employer and Contractor are incorporated into this Contract and the provisions of the Contract shall have effect as so modified.”

194. In addition, Option X13 is an obligation to provide a performance bond in the form set out in the Works Information. Whilst, as the Defendants submit, there is an Appendix to the Works Information containing the forms of bond, parent company guarantee and warranty at Appendices K, L and M, in fact Clauses Z4 and Z17 contain the relevant obligation and refer to the form annexed. I therefore do not consider that the definition of “works” in the Works Information includes the obligation to provide the parent company guarantee, bond and warranties.
195. It is difficult to see how the provision of a parent company guarantee, a performance bond or warranties fits easily with the obligation for the Contractor to Provide the Works in accordance with the Works Information or the other obligations added to that clause in the amendments to the Contract. In the course of argument consideration was given to whether it was possible to distinguish between “work necessary to complete the works” and “incidental work, services and actions which this contract requires”.
196. If the obligation in Clause 20.1 is intended to cover all actions required by the Contract then in cases where the NEC conditions included, for instance, Option W2 with the tribunal being arbitration then, as the Defendants accepted, it would be difficult to say that the arbitration clause would continue on termination. In their written closing submissions they pointed out, correctly, that the matter does not arise under the Contract as it does not provide for arbitration. But they say that the answer is that the arbitration clause constitutes a self-contained contract collateral or ancillary to the agreement itself, as set out by Lord Diplock in Bremer Vulcan v South India Shipping Corporation [1981] AC 909 at 980. They therefore say that the arbitration clause would be a separate contract which would not be discharged.
197. However I do not consider that this is an answer to the question of the express terms of the Contract in this case unless it is accepted that the terms of the Contract have to be construed to give rise to separate contractual rights. Lord Diplock was there citing the effect of the decision of the House of Lords in Heyman v Darwins that collateral or ancillary provisions did not come to an end when the contract was terminated by repudiatory breach.
198. In my judgment, the termination provision in this case, Clause 90.5, was intended to apply so that the Contractor did no further work necessary to Provide the Works but this would not include the obligations which are imposed by Z.4 and Z.17 in relation

to the parent company guarantee, the bond or the warranties. Those are self-standing, independent obligations which do not arise under the Contractor's obligations under Clause 20.1 or, if they do, do not form part of the further work necessary to Provide the Works as referred to in Clause 90.5. I consider that the provision of those documents is properly described as a matter which is procedural and collateral or ancillary to the subject matter of the Contract. The subject matter of the Contract was to Provide the Works in terms of the "works" including incidental work, services or actions which the Contract required and which were necessary to complete the "works".

199. In those circumstances I consider that both as a matter of general law on termination by repudiation or under the terms of NEC3, the obligation on the Contractor to provide a parent company guarantee, the bond and warranties continues even after termination. The purpose of such documents is, in terms of the parent company guarantee and bond, to provide security to Liberty Mercian in the event that there is a default by the Contractor or when liability is determined by adjudication or the tribunal in favour of Liberty Mercian against the Contractor. Equally the warranties are provided so as to give a direct route of liability to third parties in relation to the Contractor's performance of the Contract.
200. In relation to the analysis by Colman J in Yasuda of Heyman v Darwins, as summarised by the Defendants in their propositions set out above, which I accept subject to modifications:
 - (1) The effect of the termination discharges both parties from the future performance of their primary obligations not from the future performance of *procedural, collateral or ancillary obligations*. The primary obligations in this case relate to the *works* and payment for the *works* not *procedural, collateral or ancillary obligations*.
 - (2) The provision of the parent company guarantee, bond and warranties, like an arbitration clause or inspection of documents, does not involve the parties in future performance of any primary obligations, but only performance of procedural, collateral or ancillary obligations in relation to *past* events.
 - (3) The provision of the parent company guarantee, bond and warranties, like an arbitration clause or inspection of documents, survives termination/repudiation because they are "*collateral to the substantial stipulations of the contract*" and "*merely procedural and ancillary*".
201. Accordingly to the extent that at the date of termination the Contractor was obliged to and had failed to provide a parent company guarantee, bond or warranty then I consider that they were under a continuing obligation to provide those documents.
202. I now turn to deal with the obligations to provide those documents.

Is the Contractor (CCEL or CDDL) in breach of contract in relation to any remaining obligations to supply a parent company guarantee, a performance bond and warranties?

(1) Parent company guarantee.

203. As CCEL were and remain the relevant party to the Contract, the question is whether CDDL was the parent company of CCEL.
204. The obligation to provide a parent company guarantee arises under Clause Z4.1.1 and is as follows
“The Contractor shall within 7 days of a written request by the Employer to do so deliver to the Employer: ... a Parent Company Guarantee in the form annexed executed by the Contractor’s parent company.”
205. The form of guarantee provides at recital B as follows
“The Guarantor being the ultimate parent company of the Contractor has agreed to guarantee the due performance by the Contractor of its obligations under the Contract.”

Submissions

206. Liberty Mercian relies on the provisions of section 1162(4) of the Companies Act 2006 which provides as follows:

*“(4) An undertaking is also a parent undertaking in relation to another undertaking, a subsidiary undertaking, if
(a) it has the power to exercise, or actually exercises, dominant influence or control over it, or
(b) it and the subsidiary undertaking are managed on a unified basis.”*
207. Liberty Mercian submits that CDDL exercises dominant influence or control over CCEL or that CDDL and CCEL are managed on a unified basis. Alternatively Liberty Mercian submits that even if the court were to find that CDDL does not fulfil the statutory definition of a parent company then this is a case where the presumption in favour of the term having a technical meaning in law could be displaced and it refers to *Lewison, The Interpretation of Contracts (5th Edition)* at para 5.08. They say that it is necessary to construe what was meant by “parent company” by reference to what it would mean to a reasonable person with all the background knowledge reasonably available to the parties at the time. They say the commercial purpose of the provision was to provide Liberty Mercian with financial protection. On that basis it is submitted that it could only have been intended to mean CDDL.
208. In *Lewison* a passage from the judgment of Lord Plumer MR in *Marquis Cholmondeley v Lord Clinton* (1820) 2 Jac & W. 1 at 92 is cited in the following terms:

“When technical words or phrases are made use of, the strong presumption is that the party intended to use them according to their correct technical meaning, but this is not conclusive evidence that this was his real meaning. If the technical meaning is found, in the particular case, to be an erroneous guide to the real one, leading to a meaning contrary to what the party intended to convey by it, it ceases to answer its purpose.”

209. Alternatively Liberty Mercian relies upon Lewison at para 7.19 to the effect there is a presumption of interpretation that a contract does not require performance of the impossible and the author states:

“Since the Court approaches any problem of construction on the assumption that the parties to the contract are reasonable people, and reasonable people do not require each other to do the impossible, it ought to follow that there is a presumption of construction that a contract does not require the impossible to be done.”

210. Reference is also made to the judgment of Sir John Donaldson MR in The Epaphus [1987] 2 Lloyd’s Rep 213 where he said this:

“If they do so agree [to require one party to do the impossible] and if as is inevitable, he fails to perform, he will be liable in damages. That said, any court will hesitate for a long time before holding that, as a matter of construction, the parties have contracted for the impossible, particularly in a commercial contract. Parties to such contracts can be expected to contemplate performance, not breach.”

211. Liberty Mercian refers to the evidence of Mr Henning, Mr Evans, Mr Cuddy and Mr Pearce and submits that the relationship between CDDL and CCEL satisfies the Companies Act definition of actual control or unified management. It says that alternatively as a matter of contractual interpretation, looking at the parent and child within the family business the evidence would show that there was only one candidate for “parent” that is CDDL. It submits that, given the terms of the Contract the court should find that there was a parent company and not that the provision was impossible.

212. The Defendants submit that there is no provision in the Contract that the phrase “parent company” was to be interpreted in accordance with the Companies Act 2006, as there was, for instance, in Farstad Supply A/S v Enviroco Limited [2011] UKSC 16 at [2] and [4]. They say that section 1162 of the Companies Act 2006 which applies to “parent company” by virtue of section 1173 is specifically for accounting purposes and was introduced as a result of the 7th EC Company Law Directive [83/349/EEC]. The Defendants say that the explanation of how the term “parent company” and other terms came to be incorporated in the statute is set out in paragraph [16] to [27] of Farstad.

213. In any event the Defendants say that the Companies Act does not define “dominant influence or control” or “managed on a unified basis”. By reference to Buckley on the Companies Act at para 1422 the Defendants say that in relation to the phrase “managed on a unified basis” it is simply stated that “*it is not enough that the company manages the business of another company. Rather the businesses must be integrated.*”

214. The Defendants also refer to document FRS2 accounting for subsidiary undertakings produced by the Accounting Standards Board which defines the terms as follows:

“The actual exercise of dominant influence is the exercise of an influence that achieves the result that the operating and financial policies of the undertaking influenced are set in accordance with the wishes of the holder of the influence and for the holder's benefit whether or not those wishes are explicit. The actual exercise of dominant influence is identified by its effect in practice rather than by the way in which it is exercised.”

“Managed on a unified basis: Two or more undertakings are managed on a unified basis if the whole of the operations of the undertakings are integrated and they are managed as a single unit. Unified management does not arise solely because one undertaking manages another.”

215. In so far as the provisions of the Companies Act 2006 are relevant, the Defendants refer to section 1159(1) which provides as follows:

“(1) A company is a "subsidiary" of another company, its "holding company", if that other company—
(a) holds a majority of the voting rights in it, or
(b) is a member of it and has the right to appoint or remove a majority of its board of directors, or
(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it,
or if it is a subsidiary of a company that is itself a subsidiary of that other company.”

216. In relation to the factual position of CCEL and CDDL the Defendants rely on the evidence of Mr Mike Cuddy and Mr Darren Evans to the following effect: CCEL has two directors, John Cuddy and Michael Cuddy; CCEL has two shareholders, John Cuddy and Michael Cuddy; CDDL has four directors John Cuddy, Michael Cuddy, Darren Evans and Christian Jones; CDDL has two shareholders, John Cuddy and Michael Cuddy; CDDL does not own (and has never owned) any shares in CCEL; CDDL does not have any voting rights in CCEL; CDDL does not have any right to exercise a dominant influence over CCEL.

217. The Defendants say that, on this basis, the only answer is that there is no parent company of CCEL and that both Clause Z.4.1.1 and the terms of the guarantee would need rewriting in order to impose an obligation on CCEL to provide a guarantee by CDDL.

218. The Defendants say that even if the provisions of the Companies Act 2006 are to be considered the term “parent company” requires the identification of some formal parent/subsidiary relationship. They say that CDDL cannot be described as the “parent company” of CCEL under any of the provisions of section 1162 because CDDL is not a shareholder of CCEL nor does it have any rights to exercise any influence or has the power to exercise or actually exercises any power over CCEL. The Defendants say that CCEL has been dormant and insofar as any power has ever been exercised over CCEL it was exercised by its sole directors and shareholders John and Michael Cuddy and not by CDDL. They say that the concept of companies being managed on a “unified basis” relates to accounting matters and the requirements for group accounts.

219. They say that in this case there are not consolidated accounts and the companies are not managed on a unified basis. They say that CCEL is dormant and therefore not managed in any real sense and they rely on the evidence of Mr Michael Cuddy and Mr Darren Evans to the effect that the affairs of CCEL are not discussed when dealing with CDDL. Further to the extent that the approach should be to consider section 1159 Companies Act 2006 they say that CDDL does not hold a majority of voting rights in CCEL, CDDL is not a member of CCEL and does not have the right to appoint or remove a majority of CCEL's board of Directors. CDDL is not a member of CCEL and does not control a majority of the voting rights in CCEL and CCEL is not a subsidiary of another company that is itself a subsidiary of CDDL.
220. As a result they submit that there is no obligation on CCEL to provide a parent company guarantee in the absence of their being a company properly identifiable as the "parent company".
221. The Defendants submit that Liberty Mercian seeks to rely on the interrelationship between Michael and John Cuddy and CCEL and CDDL and the informal nature of the dealings with the companies. The Defendants say that in this way Liberty Mercian are confusing the actions and wishes of John and Michael Cuddy with the actions of the separate legal entities CCEL and CDDL. They say that John and Michael Cuddy would be entitled to make a decision that affected both companies without the law finding that one of the companies had a dominant influence over the other or that they were managed on a unified basis. They say that the actual facts of the transaction in this case was that CDDL's decision to change the contracting party to CCEL as requested was one made by Mr Michael Cuddy in consultation with the two other Directors of CDDL Mr John Cuddy on the telephone and Mr Darren Evans in person. In relation to CCEL's decision to contract instead of CDDL the Defendants say this was taken by Mr Michael Cuddy who had been entrusted with such decisions by his brother Mr John Cuddy.
222. In so far as a dictionary definition assists the Defendants rely on a definition of parent company as "a company that holds the majority of shares of another company or other companies" in *Chambers Dictionary* (11th Edition) 2008 or "a company of which other companies are subsidiaries" in *The Shorter Oxford English Dictionary* (6th Edition) 2007. They say that neither of these definitions would lead to the conclusion that CDDL was the parent company of CCEL.

Decision

223. On the basis that CCEL was and remained the Contractor I consider that the obligation on CCEL in Clause Z 4.1.1 would have to be construed against the background of matters which were known to both parties. Whilst as set out above there are definitions of "parent companies" within the Companies Act 2006, in the absence of the parties expressly adopting a statutory definition, I do not consider that the parties were intending to incorporate into their contract a legal term of art by reference to the provisions of the Companies Act 2006. As the Defendants correctly state the provisions of the Companies Act 2006 uses that phrase in section 1173 by reference to section 1162 and Schedule 7 for particular accounting purposes.

224. The relationship between CCEL and CDDL is that they have directors and shareholders in common in the form of Mr Michael Cuddy and Mr John Cuddy. They are separate entities. CCEL is dormant and CDDL is trading.
225. Often contracts will identify the parent company and, for instance Option X4 which was deleted in this case refers to a parent company guarantee being provided where a parent company owns the Contractor. There is therefore no definition here.
226. If there was a parent company within the meaning of the Companies Act 2006, it would be likely that there would be a parent company for the purpose of the Contract. In the present case it is clear that the relationship between CDDL and CCEL does not come within the statutory provisions as those are generally interpreted. There is no dominant influence or control by CDDL over CCEL and the two companies are not managed on a unified basis.
227. In the absence of any “parent company” in accordance with the statutory definition, I consider that it is necessary to inquire whether on some other basis there is a parent company. To do otherwise would be to accept that a clause in the Contract is easily rendered impossible. I consider that the enquiry as to CCEL’s parent company would require, as Liberty Mercian submits, the identification of some form of parent and child relationship between CDDL and CCEL in which CDDL could be described as the parent. In the present case CDDL and CCEL are both separate companies and whilst they have directors and shareholders in common, there is nothing that otherwise connects them to one another so as to attribute a parent and child relationship.
228. In truth CCEL did not have a parent company nor did CDDL have one. In those circumstances, in the absence of an express term identifying the parent company, I do not consider that there is an obligation upon CCEL to provide a parent company guarantee from CDDL or that there is any other party that could objectively be described as the parent company of CCEL. I reserve for further submissions what effect this has under the Contract.

(2) Performance Bond

229. In relation to the bond, the Defendants in their opening submissions submitted that there was no breach because Liberty Mercian had failed to provide the defendants with a copy of the contract despite their requests. I do not consider that this is a good defence to the obligations contained within the Contract. As a matter of general principle a party who is entered into a contractual obligation to do something but for some reason does not have a copy of the contract is not thereby excused from that contractual obligation.

230. On that basis I consider that there is a continuing obligation to provide the bond.

(3) Warranties

231. In relation to warranties, Liberty Mercian only seek two warranties, both from Quantum (GB) Limited, one in favour of Liberty Mercian and the other in favour of Waterman.

232. The Defendants say that the request made on 9 June 2011 was not valid because the draft warranty attached to the Contract to which Clause Z17.1 referred provided for £2,000,000 professional indemnity cover in the aggregate. The draft warranty attached to the request dated 9 June 2011 required £5,000,000 professional indemnity cover each and every claim.
233. The Defendants also say that there is no obligation to provide a warranty to Waterman because Waterman is not a “beneficiary having a bone fide interest in the works.” Further the Defendants say that while it is accepted that no warranty has been given by Quantum (GB) Limited in favour of Liberty Mercian or, if applicable, Waterman, they rely on the fact that the obligation to obtain warranties was taken over by Liberty Mercian and that Quantum (GB) Limited is now in administration and the administrators have made it clear that they will not supply a warranty.
234. Liberty Mercian submits that there is a contractual obligation in Clause Z4.1.3 for the Contractor to provide a warranty in favour of both Liberty Mercian and Waterman. In relation to Waterman, Liberty Mercian relies on an email exchange between Mr Jones and Mr Henning in May 2010 that referred to Clause Z5 which required the Contractor to ensure that where a sub-contractor had design risk liability the sub-contractor had to maintain professional indemnity insurance with an indemnity limit of £5,000,000 in respect of each and every claim.
235. I consider that when Clause Z5 is read together with the Form of Warranty annexed to the Contract there is an inconsistency in the insurance which was required to be provided. In my judgment, construing the provisions of the Contract in relation to professional indemnity insurance with the form of warranty, I consider it is Clause Z5 and not the terms of the draft warranty which deals with that particular subject matter. In those circumstances, as a matter of construction, I consider that the warranties should properly have reflected the provisions of Clause Z5 so that the professional indemnity insurance was to be £5,000,000 each and every claim.
236. There was therefore no inconsistency between the contractual obligation to provide a warranty and the request made on behalf of Liberty Mercian for the provision of the warranties by Quantum (GB) Limited.
237. In relation to Waterman the issue is essentially whether or not Waterman come within clause Z.4.1.3 as being a “Beneficiary having a bona fide interest in the Works”. The background to Waterman having an interest was set out in Mr Jones’s email of 13 May 2010 to Mr Henning, as follows:
- “As Cuddy do not have P.I. cover Sainsbury's require Waterman to commit (by letter) that they will cover the whole of the design, including those of design subcontractors under their P.I. policy. Waterman have already committed to provide such a letter subject to the above conditions being fulfilled. The alternative is that Sainsbury's will insist on Cuddy providing appropriate P.I. insurance.”*
238. That led to the letter from Waterman to Mr Baker at Lawrence Graham LLP dated 18 May 2010 exhibited by Mr Jones in which Waterman said it was able to “accept responsibility for the entire design of this project”.

239. On that basis I consider that Waterman evidently come within the definition of “having a bona fide interest in the Works” and therefore there was a valid request made for Quantum (GB) Limited to provide a warranty in favour of Waterman. I consider that it is the bona fide interest in the Works which is the operative requirement. I do not consider that there is any particular relevance in the word “Beneficiary” other than to indicate that the person has the benefit of a warranty. In other words the person in whose favour a warranty is to be provided is a Beneficiary but to be such a person, there need only be a bona fide interest in the Works.
240. In so far as Liberty Mercian, as a matter of practicality, were indirectly involved in obtaining the warranties but did so then, without there being any alleged variation to the obligations under the Contract, I do not consider that the involvement of Liberty Mercian has any effect on the ultimate liability of the contractor to provide the warranties under clause Z.4.1.3.
241. In summary therefore, I consider that there was at the date of termination and is a continuing obligation on the Contractor to provide both the bond and also the warranties from Quantum (GB) Limited in favour of Liberty Mercian and Waterman.

Unconditionally acquired rights

242. Although, in the light of those conclusions, it is not necessary to decide the point, I now turn to consider whether, as a result of the unconditionally acquired obligations to provide the bond and the two warranties, this gives rise to an obligation on the part of the Contractor to perform those obligations rather than to pay damages. As the Defendants observe, the question is one of the available remedy.
243. They refer to what Lord Diplock said in two decisions of the House of Lords. In Moschi v Lep Air Services Ltd [1973] AC 331 at 350, where Lord Diplock said this:

“Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of the rescission. It deprives him of any right as against the other party to continue to perform them. It does not give rise to any secondary obligation in substitution for a primary obligation which has come to an end. The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations.”

244. Similarly Lord Diplock said this in Photo Production v Securicor Transport Ltd [1980] AC 827 at 849:

“Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to

the other party for the loss sustained by him in consequence of the breach; but, with two exceptions, the primary obligations of both parties so far as they have not yet been fully performed remain unchanged.”

245. He then dealt with the position where there had been an election to terminate the contract. He said this:

“Where such an elections made (a) there is substituted by implication of law for the primary obligations of the party in default which remain unperformed a secondary obligation to pay monetary compensation to the other party for the loss sustained by him in consequence of their non-performance in the future and (b) the unperformed primary obligations of that other party are discharged.”

246. On this basis the Defendants submit that the remaining unperformed primary obligations are replaced by a secondary obligation to pay monetary compensation, that is, damages.

247. In my judgment the rights which had been acquired by Liberty Mercian in relation to the bond and the warranties were, for the reasons set out above, continuing obligations on the Contractor which did not cease at termination. They therefore continue to give rights to Liberty Mercian to have specific performance of those rights and were not converted at the date of termination into only rights for damages, as they would have been had they been primary obligations in relation to the Defendants’ other obligations under the Contract to “Provide the Works”, as demonstrated by the decisions cited above.

Should the Court order specific performance of those obligations?

248. In the light of my findings set out above I consider that Liberty Mercian continues to be entitled, in principle, to all available remedies in relation to its obligations to provide the bond and the warranties from Quantum (GB) Limited in favour of Liberty Mercian and Waterman.

249. As I indicated at the hearing and as accepted by the parties, the question of whether to order specific performance of a particular obligation depends on a number of factors affecting the discretion, one of those being the question of whether it is impossible to perform the obligation. Whilst the parties sought to develop general principles in a series of written submissions, I consider that those principles need to be applied to the particular facts.

250. In the light of the findings set out above. I consider that the parties should consider what arguments, if any, they wish to put forward in support of or against an order of specific performance and, as indicated, I propose to allow, say, 56 days from the handing down of this judgment for the parties to complete this action.

Conclusions and Summary

251. For the reasons set out above I answer the issues posed in this case as follows:

- (1) Was the Contract between Liberty Mercian and the Contractor formed in May or July 2010? The Contract between Liberty Mercian and the Contractor was formed when it was signed as a deed in July 2010.
- (2) Who were the parties to the Contract? Liberty Mercian and CCEL.
- (3) If the contracting party was CCEL was that a misnomer for CDDL? No, there was no misnomer.
- (4) Was there a common mistake in respect of the contracting party? No, there was no common mistake.
- (5) Was there a unilateral mistake in respect of the contracting party? No, there was no unilateral mistake.
- (6) If so, should the Court rectify the Contract so that the contracting party is now CDDL and not CCEL? Not applicable.
- (7) Is CDDL estopped from denying that the Contract was between Liberty Mercian and CDDL? No, there is no estoppel.
- (8) Does CCEL have a parent company, and if so, is it CDDL? CDDL is not CCEL's parent company and CCEL does not have a parent company.
- (9) Does the Contractor (CCEL or CDDL) remain obliged to supply a parent company guarantee, a performance bond and warranties? CCEL remains obliged to supply the performance bond and the two remaining warranties from Quantum (GB) Limited to Liberty Mercian and Waterman. It is not obliged to provide a parent company guarantee from CDDL and there is no other parent company.
- (10) If so is the Contractor in breach of contract in respect of those obligations? Yes, CCEL is in breach of contract in failing to supply the performance bond and the two remaining warranties from Quantum (GB) Limited to Liberty Mercian and Waterman. I reserve for further submissions the effect of there being no parent company on the obligation under the Contract.
- (11) If so, should the Court order specific performance of those obligations? This issue will depend on further submissions and evidence.

252. I will deal with any matters arising from or consequential on this judgment either when judgment is handed down or at a later mutually convenient date.