



Commercial Fraud and settlement: Commercial Court considers issues of Construction, Rectification, Intimidation and Justification

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The Commercial Court handed down judgment on 29 April 2021 in *Global Display Solutions Limited & Others v NCR Financial Solutions Group Limited & Others* [2021] EWHC 1119 (Comm).

Stuart Ritchie QC (leading David Lascelles), instructed by Michael Frisby and Mike Stocks at Stevens & Bolton, acted for the successful Claimants (GDS) following a remote trial of preliminary issues before Jacobs J in February 2021.

AUTHOR



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Call Date: 1995

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The judgment contains helpful analysis and guidance on:

1. Proof of rectification and the requirements of unilateral mistake rectification.
2. Whether intimidation requires a threat, or whether coercive conduct alone suffices.
3. The availability of justification as a defence to claims in conspiracy.
4. Preparation of witness statements.

The case is also notable on the facts, including due to the calculated nature of the wrongdoing on the part of the Defendants (NCR), which led to an exemplary damages award of £125,000.

The facts

For over 25 years, GDS supplied screen displays to NCR, to build into ATMs which NCR manufacture and sell to banks and other retailers. For much of that period GDS were its sole supplier.

As part of the supply arrangement, NCR were required to provide regular 12-month forecasts to GDS setting out NCR's projected global demand for screens from GDS.

NCR's last forecast was provided on 14 January 2013. It was for over 176,000 displays over the next 12 months. This included over 11,000 displays in December 2013, just under 12 months away. The forecast demand had a value of over US\$50 million.

Two days after this forecast, and without prior warning, NCR informed GDS over the telephone that it had taken the manufacture of displays in-house. It reduced all forecasts to zero and cancelled around US\$5.1 million of existing purchase orders.

This conduct of NCR which the Judge found to have been "*brutal*" put GDS into a dire position as it had a substantial pipeline in place ready to satisfy NCR's forecast demand.

Discussions then took place between NCR and GDS which led to the parties signing a letter of "Letter of Agreement, Release and Waiver" as part of which GDS agreed to release specified claims and NCR to purchase a significant volume of stock, albeit at substantially reduced prices.

The claims and decision

GDS brought claims of: (a) breach of contract alleging that as a matter of construction or implied term the forecasts had to reflect NCR's genuine and honest belief as to its estimated future requirements; (b) deceit; (c) unlawful means conspiracy; (d) intimidation and continuing influence of deceit in relation to the entry into the Letter of Agreement.

GDS sought exemplary damages due to the manner in which NCR had carried out the fraud which, GDS alleged, was calculated to make a profit in excess of the compensation payable to GDS.

NCR initially denied that it had acted in any way wrongfully. It also contended that all GDS's forecasting claims were settled by the Letter of Agreement, on its true construction or as rectified.

The case was set down for a preliminary issue trial to determine key issues relating to liability, the scope of the settlement, rectification, intimidation and exemplary damages. Shortly before trial limited admissions were made by NCR.

The judge accepted GDS's case on each of the aspects before him save for intimidation and continuing influence of the deceit in relation to the Letter of Agreement.

The Judge accepted that the project had involved NCR deliberately deceiving GDS for a period of almost 18 months including through the provision of knowingly false forecasts.

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“ [For unilateral mistake rectification,] The Judge... concluded that dishonesty was a requirement where a state of knowledge less than actual knowledge is relied upon.

The Judge further accepted that there was a conspiracy between individuals at several NCR entities, including very senior individuals at NCR Corporation, the parent company. He found that NCR intended to injure GDS, including to destroy any economic bargaining power which GDS would have enjoyed had NCR told it the truth.

The judge further accepted GDS's case that their claims were not all settled by the Letter Agreement, as construed or as rectified.

Such was the nature of NCR's conduct that the judge awarded exemplary damages in the sum of £125,000.

Proving rectification and the requirements of unilateral mistake rectification

The Judge applied the test for rectification for mutual mistake as set out in *FSCH Holdings v GLAS Trust* [2020] Ch 365 holding that there was no sufficient evidence of an outward expression of accord or of the requisite intention on the part of GDS.

As regards proof of intention on the part of NCR, the judgment is of interest in illustrating how, even though no inference may be drawn against a party from the fact that legal professional privilege has not been waived, or that the lawyer instructed to draft the agreement in question has not been called to give evidence as to instructions received, legal advice given or the reasons why the agreement was drafted in the way that it was, the absence of such evidence may mean (as it did in this case) that gaps in the evidence submitted by the party seeking rectification

(here, NCR) have not been filled.

The absence of such evidence was fatal in the present case because of NCR's failure to call evidence from the decision-maker, the unreliability of the witness evidence which was called and the absence of support from the contemporaneous documents.

In applying the well-known test for unilateral mistake in *Thomas Bates and Sons Ltd v Wyndhams (lingerie) Ltd* [1981] 1 WLR 505 the Judge resolved the question whether, in the absence of proving actual knowledge on the part of the defendant it was necessary for there to be an allegation and finding of dishonesty where the claimant sought to establish knowledge through a wilful shutting of eyes to the obvious (this being the way in which NCR put its case) or wilfully and recklessly failing to make such enquiries as an honest and reasonable man would make.

The Judge analysed the Court of Appeal decisions in *George Wimpey v VI Construction Ltd* [2005] EWCA Civ 77 and *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 and concluded that dishonesty was a requirement where a state of knowledge less than actual knowledge is relied upon. In his view that position was supported by the recent decision of HHJ Behrens in *Paolo Alto Ltd v Alnor Estates* [2018] UKUT 231 (TCC) and by the editors of Chitty on Contract and Snell on Equity.

Neither the requisite knowledge nor dishonesty were found to have been established on the facts of the case.

Intimidation

The judgment also considers whether a claimant needs to show that there has been a threat of unlawful conduct which coerced it into acting in a particular way in order to succeed in an intimidation claim, or whether it suffices that there was actual unlawful conduct which so coerced it.

GDS argued the latter. In support, GDS relied (inter alia) upon dicta of Leggatt LJ sitting at first instance in *Al Nehayan v Kent* [2018] EWHC 333 (Comm). In considering the question of whether blackmail gave rise to a claim in intimidation, Leggatt LJ had stated that the tort covered actual as well as threatened unlawful conduct.

The Judge found that it was necessary for there to be a threat. He accepted that the authorities showed that there had to be a threat coupled with a demand, as NCR put it:

“...The defendant has got to say to the claimant: “You’ve got to do something or else I’m going to do something bad to you”, and the bad thing has to be unlawful. And if the defendant merely says that he will do something without coupling it with a demand, it’s not a threat. And when the defendant has already done something in the past, it’s not a threat either, unless he’s impliedly threatening that he might do it again, in which case it could be...”

The Judge accepted this formulation, subject only to the question (unresolved on the authorities) of whether the “bad thing” had to be unlawful, or whether it need only be illegitimate.

The Judge also found that there had not been any relevant threats. NCR had not threatened to breach the parties’ agreement: - it had actually breached it.

Accordingly, GDS’s intimidation was rejected despite the Judge having found, as GDS had submitted, the coercive effect of NCR’s conduct.

Justification

The judgment also contains an interesting discussion of the defence of justification.

NCR sought to argue that it had a justification defence to GDS’s claim in conspiracy as it made false forecasts to conceal its project out of a fear of retaliation by GDS if the latter discovered NCR’s plans.

NCR’s case was dismissed as “*a complete non-starter*”.

As to the facts, the Court rejected NCR’s case that GDS would have retaliated as claimed.

The Judge held that whether or not a defence of justification is even in theory available in relation to a claim in conspiracy, it could not arise where the unlawful means comprised fraudulent breaches of contract or deceit.

The Judge further stated, following *Edwin Hill & Partners v First National Plc* [1989] 1 WLR 225, 230, that it would in any event have been insufficient for NCR merely to show that its commercial or other best interests justified its conduct.

Nor could a real risk of retaliatory breaches of contract or tort have justified NCR’s actions. NCR would not have been justified in taking the law into its own hands. It had no higher immunity from legal obligations than other members of the community. If it had legal rights, it could only enforce them by legal means.

Witness statements

The judgment also considers the question of reference to contemporaneous documents when preparing witness statements. NCR explained to the Court that their witness statements did not attempt to reconstruct what had happened from documents. When preparing their witness statements the NCR witnesses had not (with limited exceptions) reviewed or been shown the contemporaneous evidence which was relevant to the issues in dispute. It was argued that those witnesses were properly giving evidence from their independent recollection of events.

The Judge was not persuaded that there was any virtue in the way in which NCR witnesses had given evidence. In light of the issues there was no reason at all why witnesses should not have considered, and indeed looked carefully

at the contemporaneous documents before giving evidence. He observed that even under the new rules governing preparation of witness statement (not in force at the time) it remains permissible for witnesses to refresh their memory from contemporaneous documents - paragraph 3.2 of PD 57AC and the Statement of Best Practice in the Appendix to the PD at paragraphs 3.6 and 3.4.

The fact that NCR witnesses had not done so in this case meant their evidence was far less likely to be reliable than it might otherwise have been.

If you have any enquiries, please contact our [clerking team](#).



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Stuart Ritchie QC (Call 1995, Silk 2012) is recognised as one of the leading silks in practice at the Commercial Bar.

His practice encompasses domestic and international commercial disputes in litigation and arbitration: particular areas of expertise include commercial contracts, civil fraud, disputes involving directors and senior executives and partners and LLP members.

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To read Stuart's full profile, please [click here](#).