Article Information

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Service: Commercial Contracts, Commercial Disputes, Corporate & Commercial, Dispute Resolution & Litigation

Mis-description of parties to contracts and the doctrine of misnomer

Parties may find themselves relying upon or seeking to enforce contracts where one or more parties have been mis-described, for example by the addition or omission of a word in their name, or as a result of a typographical error. Such errors may be treated by courts as 'misnomers' which are capable of correction (as a matter of contractual construction) without the need for rectification.

This article examines the decision in *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Limited* [2015] NSWSC 176 in which the mis-description of a party's name in a contract was able to be corrected in this manner.

NSW Land and Housing concerned a guarantee for indemnity issued by the Australia and New Zealand Banking Group Limited at the request of Nebax Constructions Australia Pty Ltd (In Liquidation). The New South Wales Land and Housing Corporation (ABN 24 960 729 253) claimed that it was the intended beneficiary under the guarantee despite the beneficiary being described in the guarantee as "*New South Wales Land & Housing Department trading as Housing NSW ABN 43 754 121 940*", an entity which, as described, did not exist.

In finding that such an error constituted a misnomer, Kunc J cited the following passage from *Kingstream Steel Ltd v Stemcor UK Ltd* [2001] WASCA 138 with approval (at [47]):

> *[16] In our view the misdescription of the guarantor in the first two documents is simply that, and an error of that kind is not fatal to the validity of the guarantee. Counsel for the applicant argued that because of the misdescription in the first and second guarantees, those guarantees were executed by a non-existent company. He relied primarily on Black v Smallwood [1966] HCA 2; (1966) 117 CLR 52. That case concerned a proposed company that had not been incorporated at the date of execution of a document for the sale of land. The document was executed by the signatories in the belief that the company had been incorporated and that they were directors of it. The question that arose in that case was whether the signatories were personally liable in those circumstances. The court held that, because the company on whose behalf the signatories had purported to sign did not exist, the signatories were not parties to the contract. Their signatures had been made as part of the company's signature. They were not parties to the contract as agents or otherwise and there was no basis upon which they could be held liable upon it.*
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> *[17] That case can be readily distinguished from the present where the respondent sought and obtained a guarantee from an existing company but that company was misdescribed in the guarantee. The company referred to in subcl 4 of the contract did exist. All that happened was that when the guarantee came to be prepared the word "Co." was mistakenly inserted into its name, and when the second guarantee came to be prepared, the word "Steel" was mistakenly omitted from its name. That was, in each case, simply a misnomer made in circumstances in which it must have been plain to all who were concerned with the document that it was the applicant which was the guarantor there referred to..."(original emphasis).*

Kunc J went on to express the test for a misnomer which can be corrected by construction as (at [49]) "*whether the misnomer was the product of a mistake made in circumstances in which it would have been plain to all who are concerned*

with the relevant document as to who the party was that was referred to in the document".

The Court will also look to avoiding absurdity in determining whether a misnomer can be corrected by contractual construction. Kunc J in *NSW Land and Housing* affirmed the statement of principles as expressed by Leeming JA in *National Australia Bank Ltd v Clowes* [2013] NSWCA 179 (McColl and Macfarlan JJA agreeing) as follows:

> *[34] In my view, the Bank's submission should be accepted because of the Bank's first point. In my opinion this is a clear case where the literal meaning of the contractual words is an absurdity, and it is self evident what the objective intention is to be taken to have been. Where both those elements are present, as here, ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning. As this Court observed in Westpac Banking Corporation v Tanzone Pty Ltd [2000] NSWCA 25; (2000) 9 BPR 17,521 at [21], the principle is premised upon absurdity, not ambiguity, and is available even where, as here, the language is unambiguous."*

Critically, Kunc J found (at [61]) that the process of correction of an error, including a misnomer, is still an exercise in interpretation. The application of the principle requires an assessment of what the objective intention is to be taken to have been. The subjective intention is irrelevant. As such, there is no need to call the drafter of or signatories to the contract to give evidence, and a court can resolve the issue by reference to an objective assessment founded upon principles of contractual construction. Matters that may be relevant include:

- whether there existed, at the time of execution of the contract, a party with the name in question (if not, it would be an absurdity to suggest that the parties intended a non-existent party to be a party to the contract);
- any other information by which the party in question can be identified, such as a unique ACN or ABN, or a unique address;
- the subsequent conduct of the parties in performing the contract (such as delivery of goods or services to the correct entity who has been mis-described in the contract).