

## Page 24: The Objective Theory Illustrated

The scope of the decision of the Court of Appeal in *Smith v Hughes* (1871) LR 6 QB 597 was given further consideration by Aikens J in *Statoil ASA v Louis Dreyfus Energy Services LP* [2008] All ER (D) 116 (Sep).

The parties entered into a settlement agreement relating to a claim for demurrage. The claimant's representative offered to pay to the defendant the sum of US\$103,527.84. He made this offer in the mistaken belief that the date on which the cargo was discharged was 13 October, when in fact the discharge was not completed until 24 October. Had he used the correct date of discharge the sum payable by the defendant would have been US\$539,360.96. The representative of the defendant was aware that the claimant had made a mistake but decided not to draw the mistake to the claimant's attention. When the claimant discovered its mistake, it sought to recover from the defendant the balance of the demurrage. On the facts Aiken J found that the parties had in fact reached a second agreement under which the defendant had agreed to pay to the claimant the balance of the claim. Thus the claimants were held to be entitled to recover US\$435,833.12.

Of wider interest, however, is the consideration given by Aikens J to the claimant's attempt to recover the balance of the demurrage on the ground of unilateral mistake. Before considering the law, it is necessary to establish the facts. First, the claimant's representative, Mr Rostrup, was responsible for the mistake. He admitted that he had the correct information in his possession relating to the date on which discharge had been completed but he conceded that 'he looked at the documents too quickly' and this led him to make his mistake. Second the defendant was aware, when it agreed the demurrage figure, of the mistake made by Mr Rostrop. Third, representatives of the defendant discussed whether or not to inform Mr Rostrop of his mistake but they decided that they would not do so but would wait to see whether or not he discovered the mistake himself.

In these circumstances Aikens J held that the settlement agreement was binding on the claimant. The reason for this was that the claimant's mistake did not relate to the terms of the contract but to the facts on which Mr Rostrop based his decision to enter into the contract. The date for completion of the discharge was not a term of the settlement agreement and so it could not be said that he had made a mistake as to the

terms of the contract. The mistake made was one that concerned a fact on which Mr Rostrop based his decision to enter into the settlement agreement; but such a mistake, even if it is known to the other party, does not suffice to enable a court to conclude that the parties have not entered into a contract at all or that any contract they have concluded is void (see *Smith v Hughes* (1871) LR 6QB 597).

Two other points are worth noting. The first is that the claimant sought to derive support from the decision of the Singaporean Court of Appeal in *Chwee Kin Keong v Digilandmail.com.Pte Ltd* [2005] 1 SLR 502 (see pp.36-37 of the textbook). Aikens J distinguished the case on the ground that in that case the seller's mistake was one that related to the price and the buyers knew that the sellers had made a mistake. The mistake was therefore one that related to the price, a term of the contract. The present case, by contrast, was held not to concern a mistake as to the terms of the contract.

Secondly, the claimant argued that there was a wider rule in equity. The claimant argued that:

'if there is a unilateral mistake by one party as to a fundamental assumption he has made, which mistake is known to the other party as being the basis for concluding the contract then, even if that assumption does not become a term of the contract, this unilateral mistake will give rise to a jurisdiction of the court, in equity, to grant rescission of the contract.'

Aikens J held that there was no such equitable jurisdiction. He held that there was no 'equitable jurisdiction to grant rescission of a contract where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract.'