IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2008 HCV 00980

BETWEEN	VICTOR SPENCE	CLAIMANT
AND	KES DEVELOPMENTS COMPANY LIMITED	FIRST DEFENDANT
AND	CAPITAL AND CREDIT MERCHANT BANK LIMITED	SECOND DEFENDANT

IN OPEN COURT
John Graham, Annaliesa Lindsay and Janelle East instructed by John G. Graham and Company for the claimant

Michael Hylton Q.C., M. Georgia Gibson-Henlin, Sheriann McDonald, instructed by Henlin Gibson Henlin for the second defendant

September 17, 18, October 9, 23, November 27, 2009, February 25, 2010, March 4 and 11, 2010

ALTERATION OF DOCUMENT BY MORTGAGEE EXECUTION - WHETHER ALTERATION MATERIAL - TEST FOR MATERIALITY - WHETHER BORROWER DISCHARGED FROM LIABILITY - CONSEQUENCE OF ALTERATION

SYKES J

1. Mr. Victor Spence is seeking to avoid liability on a mortgage collateral to a guarantee executed by him as guarantor of a loan made to K.E.S. Development Company Limited ("KES"). There is no doubt that the loan was made to KES. There is no doubt that KES has defaulted and there is no doubt that, unless Mr. Spence succeeds in this trial, Capital and Credit Merchant Bank Limited ("the bank"), the mortgagee, can enforce the guarantee.

2. A bit of history is necessary. KES is a real estate development company. In this particular case, the company was involved in the development of four properties. The method used to fund the project was for KES and the various property owners to enter into what is called a joint venture agreement. Under these agreements, KES provides building and construction expertise and the property owners provide the land. In furtherance of this objective, the company sought and secured financing from the bank to the tune of $146m. The loan was secured by, among other things, guarantees given by a number of persons including Mr. Spence. Mr. Spence's guarantee was supported by a mortgage over property located at 33 Jacks Hill Road which was owned by Mr. Spence. KES has defaulted on the loan and the bank is seeking to recover from Mr. Spence. Mr. Spence has filed a claim seeking to avoid liability on the basis that the guarantee and mortgagee collateral to the guarantee were altered after he executed them. Then bank has admitted some alterations of the relevant document but has said that the alterations were not material.

3. So far in his titanic struggle, Mr. Spence has not fared too well. By an amended claim form he sought four reliefs against the bank. Three of those four reliefs were disposed of by way of summary judgment in the bank's favour. The last one reads:

> *Against the second defendant for damages for breach of contract of a guarantee and a collateral mortgage no. 1433823 by way of guarantee both executed on the 8th day of August 2005 and for a discharge from a guarantee executed by the claimant on 8 August 2005 and from a collateral mortgage no. 1433823 by way of guarantee dated the 8th day of August 2005 on the grounds that the said guarantee and mortgage are not in accordance with the agreements arrived at between the claimant and the defendants pursuant to the said Joint Venture Agreement and the agreements between the claimant and the second defendants and that they have been unilaterally and materially altered by the defendants, their servants and/or agents thereby*

discharging the claimant from all obligations and liabilities thereunder.

4. In paragraph 12 of the original claim form and in paragraph 11 of the amended claim form Mr. Spence asserted that:

The claimant states that the said guarantee and the said mortgage were materially altered without his knowledge and without his consent express or implied.

The alterations

5. The bank requested further information, that is to say, the bank asked Mr. Spence to provide details of the alleged alterations.

6. Mr. Spence responded by particularising that:

   a. the mortgage and the guarantee when executed had the principal sum as $40m but were altered to read $146m;

   b. the mortgage collateral to guarantee when executed did not have these words 'and debenture of even date herewith given by the mortgagor to the mortgagee to secure the aforesaid principal sum' inserted in the recital after the word 'guarantee' in the sentence 'AND WHEREAS by way of and in order to secure its liability under the said guarantee, the mortgagor has covenanted and agreed to enter into the within named presents' so that after the insertion the sentence reads 'AND WHEREAS by way of and in order to secure its liability under the said guarantee and *debenture of even date herewith given by the mortgagor to the mortgagee to secure the aforesaid principal sum*, the mortgagor has covenanted and agreed to enter into the within named presents;

   c. on page 6 of the mortgage the words 'collateral to a principal mortgage No. 1433819' now appears.

7. For the purposes of this claim I only need to consider the alterations made on the mortgage collateral to guarantee. There are two

instruments of mortgage collateral to the guarantee that were placed before the court. One was in the possession of the Registrar of Titles and the other in the possession of the bank.

8. I only need consider the instrument that was in possession of the bank. This is so for the following reason. Mr. Spence alleges that the words 'collateral to a principal mortgage No. 1433819' were added to the instrument after execution. This allegation though true is only true in respect of the copy lodged at the Registrar of Titles and not true of the copy in the possession of the bank. The evidence did not establish that the alteration of the instrument held by the Registrar of Titles was done by the bank or anyone acting on its behalf. The significance of this conclusion will be better appreciated when the applicable law is discussed.

9. It is now settled that the bank was not part of any joint venture agreement involving Mr. Spence and KES. There is therefore no legal or factual basis to grant relief on the basis of any alleged breach of a joint venture agreement. Thus, the real issue between Mr. Spence and C.C.M.B. is whether Mr. Spence can establish that the guarantee and mortgage were materially altered after they were executed.

10. In the proceedings before the court, the evidence led has not shown that the instrument of guarantee was altered as alleged and so I need not consider that aspect of the claim.

The law on alteration of documents

11. Like all old legal principles, the law relating to the effect of a material alteration of documents has undergone change and modification in order to keep pace with developments in society and business. A good starting point is the case of ***Henry Pigot*** 77 E.R. 1177. This case established a very strict rule. The case held that if the deed was altered after execution, it was void against the parties to the deed even if the alteration was not material. The only exception to this very strict rule was if the alteration was done by a stranger, acting alone and without the privity of the obligee, **and** the alteration was not material.

12. This very strict rule was enunciated in the year 1614. The severity of the rule, at that time, is not surprising. In those days, deeds were treated as if they had a mystical quality. The idea that prevailed in those days was that if persons took the time to reduce their agreement to writing, that fact alone was a clear indication that what was written represented a very sacred agreement and any alteration was seen as an extremely serious matter. Additionally, the rule operated as a strong incentive to keep would-be fraudsters or anyone from altering documents after they were executed.

13. Although the rule developed in the context of deeds, by 1791, the rule was being discussed and applied in a case involving a bill of exchange. In ***Master v Miller*** 100 E.R. 1042, a bill of exchange was drawn on March 26, 1788 and made payable three months after date. The bill was altered by unknown persons to read as if it were drawn on March 20, 1788 which meant that the date for payment was brought forward because three months after date from March 20 (the new date after alteration) would be earlier than three months after date of March 26 (the original date). The date was altered after acceptance. The claimant sought to enforce the bill against the defendant arguing that the rule in ***Pigot's*** case applied only to deeds and does not apply to other instruments. The defendant on the other hand submitted that the rule should be extended. In effect, the defendant was arguing that the fact that it was a deed in ***Pigot*** was an accident of history rather than a determinative fact and that there was nothing in the nature of a deed which made the rule apposite only to deeds as distinct from other documents. The defendant submitted that the 'principle of law was founded in sound sense; it was calculated to prevent fraud, and deter men from tampering with written securities: and it would be directly repugnant to the policy of such a law to permit the holder of a bill to attempt a fraud of this kind with impunity; which would be the case, if, after being detected in the attempt, he were not to be in a worse situation than he was before' (see pages 1046 - 1047).

14. The defendant's submissions appealed to Ashhurst J who said at page:

> *It seems admitted that, if this had been a deed, the alteration would have vitiated it. Now I cannot see any reason why the principle on which a deed would have been avoided, should not extend to the case of a bill of exchange. All written contracts, whether by deed or not, are intended to be standing evidence against the parties entering into them. There is no magic in parchment or in wax; and a bill of exchange, though not a deed, is evidence of a contract as much as a deed; and the principle to be extracted from the cases cited is, that any alteration avoids the contract. If indeed the plaintiffs, who are innocent holders of this bill, have been defrauded of their money, they may recover it back in another form of action: but I think they cannot recover upon this instrument, which I consider to be a nullity. It is found by the verdict that the alteration was made while the bill was in possession of Wilkinson and Cooke; and it certainly was for their advantage, because it accelerated the day the day of payment.*

15. The defendant's analysis also found favour with Lord Kenyon, Chief Justice who said at page 1047:

> *The cases cited, which were all of deeds, were decisions which applied to and embraced the simplicity of all the transactions at that time; for at that time almost all written engagements were by deed only. Therefore those decisions, which were indeed confined to deeds, applied to the then state of affairs: but they establish this principle, that all written instruments which were altered or erased, should be thereby avoided. Then let us see whether the policy of the law, and some later cases do not extend this doctrine farther than to the case of deeds. It is of the greatest importance that these instruments, which are circulated*

throughout Europe, should be kept with the utmost purity, and that the sanctions to preserve them from fraud should not be lessened.

16. However, it is the formulation of Grose J that has proven to be the foundation on which the modern law was built. His Lordship developed his major premise with such skill that it is neither over broad so as to be meaningless nor too narrow so as to be inapplicable to other circumstances. Grose J said at page 1055 - 1056:

> *Now the effect of that determination is, that a material alteration in a deed causes it no longer to be the same deed. Such is the law respecting deeds: but it is said that that law does not extend to the case of a bill of exchange. Whether it does or not must depend on the principle on which this law is founded. The policy of the law has been already stated; namely, that a man shall not take the chance of committing a fraud, and, when that fraud is detected, recover on the instrument as it was originally made. In such a case the law intervenes, and says, that the deed thus altered no longer continues the same deed; and that no person can maintain an action upon it. In reading that and the other cases cited, I observe that it is no where said that the deed is void merely because it is the case of a deed, but because it is not the same deed. A deed is nothing more than an instrument or agreement under seal: and the principle of those cases is, that any alteration in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument; and this principle is founded on great good sense, because it tends to prevent the party in whose favour it is made, from attempting to make any alteration in it. This principle too, appears to me as applicable*

to one kind of instruments as to another ... . (my emphasis)

17. It is clear now that with the benefit of hindsight that Grose J's judgment can explain all subsequent cases. The rest of the case law on this area has not added very much to his Lordship's reasoning. They have only provided specific applications of the principle to different types of instruments.

18. By 1844, the issue arose in the context of a guarantee in the case of *Davidson v Cooper* 153 E.R. 142. After execution of a guarantee and while the documents were in the hands of the claimant, seals were placed near the signature of the parties, thereby giving the impression that the guarantee was under seal which would have obviated the need to prove consideration in the event that it was being enforced and the defendant sought to resist on the basis of absence of consideration. Lord Denman held at page 353:

> *Upon the doubt whether this instrument is altered, because it remains exactly as it was when signed, but only something is added near to the signatures of the defendants, we may observe, that that addition gives a different legal character to the writing, and would, if made with the consent of all interested, completely change the nature of the relation towards each other of the parties to it, and the remedies upon it.'*

19. Here, Lord Denman is rejecting the proposition that because the contract was not affected by the alteration the document remained the same as it was before the alteration. His Lordship said that the legal character had changed because not only the nature of the relationship between the parties had changed but also the remedies available to the parties. The alteration by adding the seal was therefore material. It should be noted that there was no proof of who altered the document. What the evidence showed is that it was altered while in the possession of the claimant. The rationale for the

rule was affirmed once again by Lord Denman. His Lordship said at page 352:

> *The strictness of the rule on this subject, as laid down in Pigot's Case, can only be explained on the principle that a party who has the custody of an instrument made for his benefit, is bound to preserve it in its original state. It is highly important for preserving the purity of legal instruments that this principle should be borne in mind, and the rule adhered to. The party who may suffer has no right to complain, since there cannot be any alteration except through fraud, or laches on his part.*

20. In 1884, the principle was applied to promissory notes issued by the Bank of England. This was in the case of ***Suffell v Bank of England*** (1881-82) L.R. 9. Q.B.D. 555. The case also illustrates that it can be a very close thing when deciding whether the alteration was material or not. I shall deal, first with the application of the principle to promissory notes. The Bank of England had issued notes payable to bearer. The evidence showed the claimant was a bona fide purchaser for value of the notes from a third party. It appeared that the third party or someone else had dishonestly acquired the notes and while he had them he altered the numbers and had substituted other numbers in order to prevent them being traced. It seemed that before the claimant acquired the notes, the Bank of England had issued a stop order on the notes and published the numbers. This action by the Bank necessitated the fraudulent act of erasing the original numbers. This alteration was held to be material. The bank refused to pay on the notes and the claimant sued the Bank. The Bank resisted on the ground that there was a material alteration.

21. At first instance, the eminent Lord Coleridge CJ, held that the alteration was not material because the character of the document had not changed, that is to say, the liability of the bank on the notes had not changed. His Lordship reasoned at page 271:

> *But it has always been held that the alteration which vitiates an instrument must be a material alteration; i.e. must be one which alters or attempts to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of. It is not every physical alteration which will suffice.*

And consequently for his Lordship at page 272:

> *In the sense in which the word "material" has been used in all the cases I have been able to refer to, of which Master v. Miller, Burchfield v. Moore and Gardner v. Walsh are only examples, the alteration has been held material because it varied or attempted to vary the contract. Here the alteration is nothing of the sort. It is material in a popular sense, because it interposes some difficulty in the way of the Bank of England detecting or helping to detect the original fraud, by making it harder to trace the notes or to stop them at the bank. But this is a wholly collateral matter. An alteration material in this popular and collateral sense has never yet been held to vitiate an instrument in the hands of an innocent holder; and Sir John Holker admitted this in fact, but urged that the generality of the words in Master v. Miller was wide enough to take in this case, and that it was wise so to extend them. I do not think so, and I must decline the invitation. It needed a statute to make the crossing of a cheque a material part of it.*

22. On appeal Lord Coleridge was reversed. The reasoning is interesting. Sir George Jessel MR held that the numbers on the notes were important because they can have an effect on other obligations even though the actual contract itself is not, on the face of it, affected by

the change in number. This is his Lordship's reasoning on the number alteration point. He said at page 563:

> *In an ordinary case it may be said that the number put on a bill of exchange or on a cheque will not affect the contract, and may not be a material alteration; but take the case of a debenture issued by a company, or a bond issued by a turnpike trust, or a foreign government, and that the bond is paid according to the number drawn by lot, which is a very common mode of payment; there, although the number would not affect the contract on the face of the instrument, it really would affect the contract in another way, and I should think there would be no doubt in the world that in such a case an alteration in the number would be a material alteration in the instrument.*

23. The basis for this reasoning is that one cannot say whether the alteration is material unless one knows what the instrument is. The Master of the Rolls continues at page 563:

> *It therefore appears to me, before one can consider the question as to whether the alteration is an alteration affecting the contract one must know exactly what the instrument is, what the alteration is, and what the general effect is, and it may well be that in the majority of these cases (although they may not be all rightly decided, for some of them conflict with others), they may be well decided and yet they may not enable one to decide such a case as this where other considerations arise beside the mere question of contract between the parties.*

24. So here we see the Master of the Rolls providing an analytical framework in which the determination of materiality is made. First one must know exactly what the instrument is, that is to say, what it

really is and its scope and effect. Second, one must know what the alteration is. Third, what the general effect of the alteration is.

25. The learned Master of the Rolls applied this three-step analysis to the case before him and found that the alteration was material because a Bank of England promissory note was unique in the sense that it formed part of the currency of England. In other words, the Bank of England promissory note although similar to other promissory notes had a scope and effect beyond ordinary notes. It was more than a promissory note; it was currency; it was legal tender. At the time, anyone presenting the notes to the Bank of England was entitled to receive gold bullion. This stemmed from the thinking of the pre-Bretton-Woods era which said that for any currency in circulation had to be backed by the equivalent in gold. Thus notes issued by the Bank were quite literally a promise to give gold bullion to the holder. This was how money supply was controlled in those days.

26. Sir George concluded at page 564 that the numbers were material because:

> *The number on notes has another important use. It enables the person who receives notes to trace them and so to detect crime as well as to guard against the commission of crime by reason of the knowledge that the notes may be so traced. But the utility of the number does not stop there. We have been told there is a relation between the date and the number which enables the bank more easily, no doubt, to detect forgery if the bank found that relation altered, and also to enable it to keep a register of the notes issued against the notes coming in, so as to ascertain the amount for which the bank is liable. Therefore, knowing the use made of the number, the mode in which it is regarded by the public, and in which it is utilized by the bank, no one could say that the number was not a material part of the note ...*

27. In addition to demonstrating his analytical method Sir George went on to make observations on the authorities generally. His Lordship noted that if the alteration merely stated what was implied by law, then the alteration was not material. Here, we see a restriction on the operation of *Pigot* which was that any material alteration vitiated the document.

28. The Master of the Rolls was not prepared to accept Lord Coleridge's view that before an alteration could be held to be material it had to "[alter] or [attempt] to alter the character of the instrument itself, and which affects or may affect the contract which the instrument contains or is evidence of." None of the alterations in ***Suffell*** did any of these things but the alteration was material for the reasons given by the Master of the Rolls.

29. For his part, Brett LJ (as he then was) in ***Suffell*** accepted as correct the claimant's submission that the alteration did not affect the contract evidenced by the instrument and to that extent was not material. But the Lord Justice, like the Master of the Rolls, was not prepared to accept the corollary of the submission which was that since the contract was not affected, and character of the instrument was not changed, then the alteration was not material. Brett L.J. stated that the principle relating to alterations was not confined to contractual documents or documents evidencing a contract. It was of wider application and if this is so, then the major premise of the claimant's submissions could not be accepted. For this reason Brett LJ stated the test of materiality in these terms at page 568:

> *Any alteration of any instrument seems to me to be material which would alter the business effect of the instrument if used for any ordinary business purpose for which such an instrument or any part of it is used.*

30. Brett LJ at page 569 analysed the promissory notes in these terms in coming to his conclusion that the alteration as material:

> *I am not sure whether if that were the only purpose for which it is used an alteration of it could be said to be a material alteration within the definition I have stated; but it is important in a business sense, and it is certainly used or may be used by everybody into whose hands the note comes. It seems to me that as long as all their notes are marked with a number the defendants could not issue any particular bank note without a number, and for this reason, because the person entitled to demand from them the issue of a note is entitled to have a note which will pass as currency without question or doubt, which would not be the case with respect to a bank note without a number originally upon it. The number is also most undoubtedly useful for the purpose of tracing the note in case of accident, and I will not say that there are not other business purposes for which such number may be used. It seems to me that these instances are enough to shew that the number is a part of the note used in ordinary business for a business purpose. Then it seems to me that an alteration of part of such an instrument as that is within the definition and is a material alteration. I do not rely upon the alteration of the identity of the note, if "identity" is to be used in the sense that the alteration alters the physical appearance of the document, because it seems to me that an alteration on the face of an instrument which is admitted to be an immaterial alteration does nevertheless alter the "identity," if identity is used in the sense of physical appearance.*

31. I have set out Brett LJ's analysis in these terms because despite framing the test in different words from Sir George, his Lordship's analysis followed the same three-step process identified by Sir George. Brett L.J. highlighted the business purpose aspect of the analysis. For his Lordship, if the alteration brought about any change

in the commercial effect of the document, the alteration would still be material even if it did not alter the liabilities of the contracting parties.

32. Brett LJ at page 571 concludes:

> *Both principle and authority seem to me to shew that the doctrine is to be applied to all instruments in which there is a material alteration, and that the alteration may be material although there may be no contract in the instrument, or if there be, it does not alter such contract. I am, however, inclined to admit that if the instrument contains nothing but a contract, and has no legal or business effect whatever except as a contract, that then there could be no material alteration in the document unless that alteration did alter the contract.*

33. The third member of the ***Suffell*** court, Cotton LJ also rejected the narrow formulation of the rule. His Lordship rejected the proposition that the rule was restricted to deeds or documents evidencing or containing a contract. For him, the rule applied to all instruments. Cotton LJ accepted that not every alteration would be material. At page 574 his Lordship said:

> *No doubt there is a long string of cases which do as a rule deal with the question whether the contract contained in the instrument has been altered or not, as the test by which to decide whether the alteration be a material one within the rule in Pigot's Case, and the plaintiff did, as he was entitled to do, rely on that most strongly; **but the question whether an alteration of an instrument is a material one must, in my opinion, depend upon the nature of the instrument and the uses to which it is to be put**, and, although in these cases, the proper test may have been whether the*

> *contract contained was altered or not, it by no means follows, unless it has been so laid down, that the rule is that the alteration in the contract is essential and that no other alteration will do. In my opinion that conclusion would be incorrect. The question here is whether the alteration, although not an alteration of the contract, is nevertheless an alteration of the instrument in a material way.* (My emphasis)

34. Cotton LJ also applied the three-stage analysis and concluded that the alteration was material.

35. Let me be quite clear then. In ***Suffell***, the Court of Appeal held that the concept of materiality was not confined to cases where the document altered was a contract and the contractual rights and liabilities of the parties are affected by the alteration. The Court also held that even in cases where the instrument was not a contract whether an alteration was material depended on whether the alteration altered the 'business effect of the instrument if used for any ordinary business purpose of which such an instrument or any part of it is used' (Brett LJ at 568).

36. I accept this decision as good law. I therefore do not accept learned Queen's Counsel's proposition that because the alteration in the instant case did not affect the charging clause it necessarily follows that the alteration was not material. I also do not accept learned counsel's proposition that the courts adopt varying approaches depending on the instrument or document involved. This is made plain by ***Suffell's*** case itself. The alteration of the number affected the 'ordinary business purpose' to which it could be put in the following way: (a) the number enabled the notes to be traced and in case of loss identifying which notes were lost; (b) the notes were legal currency and without the numbers on them persons would not wish to accept them as legal tender.

37. Before leaving the nineteenth century, I would be remiss not to examine the very important case of ***Aldous v Cornwell*** (1866-67) L.R.

3 Q.B. 573. In ***Aldous***, a promissory note when given to the claimant by the drawer did not contain the words "on demand". These words were added while the note was in the possession of the claimant. The drawer sought to resist enforcement on the ground that the words "on demand" were added. It was submitted that the addition was a material alteration within the rule in ***Pigot*** and therefore the note was not enforceable. This submission was rejected by Lush J on the ground that the addition of the words "on demand" was not a material alteration within the meaning of the rule because the words only expressed what would be implied.

38. What is of significance in ***Aldous*** is the explicit rejection of one of the principles that had emerged from Pigot's case, namely, '[i]f the obligee himself alters the deed by any of the said ways (viz, by interlineation, addition, erasing, or by drawing a pen through the line, &c.), although it is in words not material, yet the deed is void,...'.

39. Lush J in quite robust terms stated at page 579:

> *[W]e think we are not bound by the doctrine in Pigot's Case, or the authority cited for it; and not being bound, we are certainly not disposed to lay it down as a rule of law that the addition of words which cannot possibly prejudice any one, destroys the validity of the note. It seems to us repugnant to justice and common sense to hold that the maker of a promissory note is discharged from his obligation to pay it because the holder has put in writing on the note what the law would have supplied if the words had not been written.*

40. What ***Aldous*** did was to lay the foundation for the idea that while an alteration may appear to be material but if on examination of the matter, it turns out that the alteration had no impact on the efficacy of the document in any way whatsoever, then the alteration will not be material. It was this principle that ***Suffell*** applied.

41. From the cases, it is obvious that with the onward march of time the full rigour of *Pigot* has been negated. The wide scope of operation of the rule that would nullify documents as between the parties to the document was being restricted. The court began looking carefully, on a case by case basis, to see whether the alteration was material. The courts were plainly not enamoured with the idea that alterations to a document that (a) did not change the effect and significance of the instrument in any way; (b) did not bring about any change in the way the instrument could be used; (c) had no impact on or changed the rights and obligations of the parties or persons claiming under or through them; (d) made explicit what the law already implied, should have the devastating consequence of discharging the person against whom it was being enforced from all liability or responsibility under the instrument.

42. I now come to the case of ***Raiffeisen Zentralbank Osterreich AG v Crossseas Shipping Ltd and others*** [2001] All E.R. (Comm) 76. This case has been described by Queen's Counsel as the leading modern authority. I would add, leading modern authority in England and Wales since I do not regard myself as bound by this case or indeed any of the cases cited. They are at best persuasive because no decision was cited to me in which a court which would bind me has accepted and applied these cases.

43. Potter LJ, in ***Raiffeisen***, expressed his view of the law in this way at paragraph 27:

> *In the light of the conflict apparent in the authorities, and with a reservation in respect of banknotes and negotiable instruments (with which this case is not concerned), it seems to me that, to take advantage of the rule, the would-be avoider should be able to demonstrate that the alteration is one which, assuming the parties act in accordance with the other terms of the contract, is one which is potentially prejudicial to his legal rights or obligations under the instrument. I say 'potentially prejudicial' because I do not think it*

necessary to show that prejudice has in fact occurred. The rule remains a salutary one aimed at preventing fraud and founded upon inference of fraudulent or improper motive at the time of alteration. It seems to me that, absent any element of potential prejudice, no inference of fraud or improper motive is appropriate.

44. This reasoning of Potter LJ was clearly influenced by the Australian case of ***Armor Coatings (Marketing) Pty Ltd v General Credits (Finance) Pty Ltd*** 17 SASR 259 where Bray CJ stated at page 275 - 276:

It seems to me that the case represents a new departure. Once it is established that the court is entitled to look at the nature of the alteration it is clear that there can be no automatic sanction for the violation of the document's integrity. And speaking for myself, if it is possible to look at the effect of the alteration, I see no reason why, unless constrained otherwise by authority, the court should not look at the motive of it, too, and, if it can, adopt the American rule that the absence of fraudulent or wrongful intention may be of importance and that "if the alteration was made to express more clearly the intent of the parties or to correct a real or supposed mistake the contract is in this country generally held not avoided" s(Williston, Discharge of Contracts by Alteration, 18 Harvard Law Review (1905) p. 105 at p. 115).

Since Pigot's case the rule has been considered in many cases. It is, in my view, impossible to reconcile all of them, and I do not propose to canvass all of them. Unless I am constrained to do otherwise by authority binding on me I prefer to follow those cases which have interpreted the rule as liberally and reasonably as possible. There is, in

> *my view, little reason for preserving, in a rational system of law, a rule which instead of adjusting the equities of the case to the circumstances and nature of the alteration visits the document with total nullity.*

45. Potter LJ expressly approved this analysis. Unlike Potter LJ, I would not endorse the ***Armor Coatings*** approach. I do not see what the motivation of the "alterer" has to do with whether or not the alteration altered the effect of the instrument or altered the rights of the parties under a contract if the instrument in question happens to be a contract. The motive of the "alterer", in my view is completely irrelevant and adds an additional requirement which does not serve any legitimate purpose. It does not enhance the underlying rationale for the rule against alteration of documents and may have the unintended consequence of creating an "alterer's charter". It is my view that the strong rule against alteration of documents should be maintained as a purely objective one. An alteration motivated by the purest of motives, if material is not any less material because the person was honest.

46. The point I take from Potter LJ is the potential prejudice point. I agree that actual prejudice need not be proved because if it were otherwise the utility and policy underlying the rule would be undermined with the possible consequence that parties may be less restrained in their attempts to alter documents after execution.

47. In the instant case, the alteration in question was made by Mr. Peter DePass but no one has suggested that he was acting dishonestly. Let me make it abundantly clear that there is not the slightest suggestion that Mr. DePass was acting in a dishonourable way. The real question is whether the alteration was material.

48. There is a Canadian authority that takes the law further. The Court of Appeal of British Columbia in the case of ***Canadian Imperial Bank of Commerce v Skender*** [1986] 1 W.W.R. 284 was prepared to go to great lengths to hold the would-be avoider to the instrument. Lambert JA said: