

Rectification clarified

FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd
[2019] EWCA Civ 1361



The Court of Appeal has unanimously upheld a High Court decision allowing rectification of two deeds as not conforming with the evidence of the parties' original intentions. In so doing it clarified the test to be applied in rectification, rejecting the *obiter* comments of Lord Hoffman in *Chartbrook v Persimmon* [2009] UKHL 38.

The Court of Appeal confirmed that one does not apply an objective test; one must ascertain the subjective intentions of the parties as communicated to one another.

Leggatt LJ set out two separate tests for rectification:

- Where there was a valid contract which preceded the document to be rectified, the terms of that preceding contract must be determined **objectively**; however,
- Where the document in question stands alone, and it is argued there was a common mistake, one must establish a common intention shared by the original parties as to a different set of terms to that which were reduced into writing in the document. This is to be established by reference to the parties' **subjective** state of mind.

These principles naturally derive from rectification's equitable jurisdiction. A Court should rectify a written contract when not to do so would be unconscionable and contrary to the parties' actual, mutual intention expressed to each other at the time of contracting.

High Court first instance judgment

By two deeds executed on 18 November 2016, the appellant (FSHC) provided security to the security agent for various lenders (then Barclays Bank plc, now the respondent, GLAS Trust Corporation Limited) which FSHC had previously agreed to provide in connection with a corporate acquisition in 2012. The deeds were executed because, in 2016, FSHC's lawyers discovered that security documentation FSHC had agreed to provide in 2012 was missing.

It was submitted by the borrowers that the deeds did not accord with the bargain the parties had originally struck, and that they prescribed additional, more onerous obligations for the borrower beyond those originally intended. Rectification was granted in the High Court, where Mr Justice Carr applied an objective test to the available evidence.

The security agent argued on appeal that the evidence did was insufficient to demonstrate that the deeds were contrary to parties' original intentions.

Whilst the borrowers defended the conclusions of the first instance judge on appeal, they also argued that a subjective analysis of the evidence should apply, under which it was still clear that the deeds failed to give effect to the parties' intentions.

Court of Appeal judgment

The Court of Appeal unanimously rejected the security agent's appeal. In a lengthy judgment, Leggatt LJ examined the origins and nature of the doctrine of rectification and how it had recently come to be misunderstood following *Chartbrook Ltd v Persimmon Homes Ltd*. The Court of Appeal held that, for rectification to be ordered, it must be proved that the parties had the same subjective intention, and that they communicated it to each

other making it unconscionable for one party to take advantage of the common mistake.

"This basis for rectification is entirely concerned with the parties' subjective states of mind". ([146])

Leggatt LJ noted ([137]) that Hoffman L's comments in *Chartbrook v Persimmon* had been understood as mandating an objective test be applied. That approach had then been applied by the Court of Appeal in *Daventry District Council v Daventry and District Housing Ltd* [2011] EWCA Civ 1153 and referred to by many Courts thereafter. However, the Court of Appeal in *Daventry* had not been referred to the earlier case of *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561. If they had they would have known to reject Hoffman L's obiter comments and instead to apply the correct, subjective test.

Whilst they paid *"immense respect"* to Hoffman L's comments in the case of *Chartbrook v Persimmon*, the Court of Appeal noted that Hoffman L had sought to clarify what he had meant in later lectures ([140]), clarifications which the Court of Appeal found to be *"illuminating"*. Accordingly, the Court of Appeal was not troubled in adopting a subjective test.

Rectifying the expression of the parties' bargain

In a contract scenario, where the parties must act together with a meeting of minds and understand each other to have their shared intention, whether rectification should be awarded is to be ascertained with a subjective approach. Where an intention is not actually communicated between the parties that will not be sufficient. The key question is whether there was an outward expression of the parties' shared intention (e.g. emails, conversations, memos or communications *"crossing the line"*).

The Court of Appeal emphasised once again the high hurdle to apply for rectification and why there must be an actual, communicated mutual intention. It would be unfair *"if a document which the parties have agreed as the formal record of their contract could be altered to make it conform to the private intention of a party just because, although unknown to that party at the time, it turns out that the other party had a similar intention."* ([77])

Rectification where there are preceding contracts

Leggatt LJ noted that there was a second form of rectification where a preceding contract had been

made. Indeed, in the late 19th Century, it had been the case that rectification was only permitted where a contract had failed accurately to record a contract that already existed before the document was executed. It was only *Joscelyne v Nissen* [1970] 2 QB 86 that had expanded the regime to apply where there was simply a preceding expression of accord and not a binding contract.

This second type of rectification then, where there has been a preceding contract therefore, still involves approaching that contract objectively (as indeed one would when construing any contract). This principle is designed to ensure that parties do not seek to renege on their contractual promises, and could be regarded as an extrapolation of the doctrine of specific performance.

Subjective evidence as opposed to objective evidence

The Judge at first instance applied an objective test when considering the available evidence. The Judge then went on to consider the parties' subjective intention, in case intention was indeed required to be assessed subjectively – he concluded that in any event the parties' subjective intentions coincided with their common intention objectively assessed, so the approach adopted to that evidence was not determinative. The Court of Appeal though clarified that it was the subjective assessment which was the correct approach to adopt.

Leggatt LJ summarised Hoffman L's erroneous approach (applied by Mr Justice Carr) that *"the prior consensus or "continuing common intention" which must be shown in order to found a claim for rectification need not involve any concurrence of the parties' actual subjective intentions. Its existence must be ascertained objectively by asking what a reasonable observer would have understood the intentions of the parties to be."* ([110]). This is not the correct test.

Where there is not a preceding binding contract, and only a course of discussions (to which neither party would want to be bound), then there is nothing to objectively construe - the test must be subjective.

The subjective evidence required is described by Leggatt LJ as a *"common expression of accord"*, an intention which the parties not only each held but understood each other to share as a result of communications between them ([72]). Per *Lovell v Christmas*, one does not only try to find what one (or even both) of the parties intended. What one

must ascertain is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.

Accordingly, for the purposes of running a rectification case, the communications between the parties will be essential, and what witnesses say about their communications and discussions with the counterparty. Minutes of just one party, or witnesses' recollection of their own intentions will not necessarily be sufficient; it needs to be recollection of the mutual accord. Leggatt LJ portrays evidence of intention other than external communications as the relevant intention remaining "*locked separately in the breast of each party*". Even if each party privately and independently had the same intention, one needs evidence that this was communicated between them. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.

Leggatt LJ accepted that the bar may now be higher for a successful rectification, and had no difficulty in doing so. "*In our view, that fact that a "subjective consensus" (that is to say, a common intention in the sense we have described) is harder to prove than an "objective consensus" is not an objection to adopting a subjective test for rectification but a positive merit of such a test. As a matter of policy, rectification should be difficult to prove.*"

Rectification of pensions documents

The Court of Appeal case drew a distinction between the law as it applies to rectification of contracts in general and rectification of documents amending pension scheme's governing documents. The Court of Appeal in *FSHC* endorsed *AMP plc v Barker and Gallaher Ltd v Gallaher*, which both dealt with amendments made pursuant to an amendment power in the respective trust deeds. Where a power is wielded by one party with consent of another, there is no need to prove an accord between the employer and trustees. It will therefore be sufficient for the purposes of rectification of such an amending document that the parties' intentions coincided, in that they both independently had the same intention as to the effect of the amendment.

"*It is not necessary to show that the trustees and the employer had a common intention as a result of communication with each other because the validity of an amendment does not depend on the parties having mutually agreed it – only on one having approved what the other has done.*" ([78-79])."

Evidence of an outwardly expressed accord, which was emphasised to be essential by Leggatt LJ with respect to rectification of contracts, is not needed because the amending document does not operate by both parties having mutually agreed it. One is approving what the other wants to do - there is no bargain. There is no shared understanding to establish (although one would still need convincing evidence of the intentions of the respective parties). In that respect, therefore, this case has not changed the law for the amending pension deeds.

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