

Rectification

How clear is the 'subjective' test of common intention in rectification claims, following *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019]?

Facts

- FSHC agreed in 2012 to provide security to various parties (represented by Barclays as security agent) as part of a private equity financing transaction. In 2016 it was discovered FSHC had not in fact assigned its interest in a shareholder loan as part of the security, as required.
- FSHC and Barclays executed two deeds in order to rectify the omission. Actual intention was for the deeds to do no more than provide the missing security, but their effect as executed was to impose on FSHC additional, onerous obligations.
- FSHC claimed for rectification of the deeds to remove the additional obligations, on grounds of common mistake. Trial judge Henry Carr J allowed the claim, finding that the parties' common intention (whether assessed "*objectively*" or "*subjectively*") was that no additional obligations were to be included.
- GLAS replaced Barclays as security agent after trial and appealed to the Court of Appeal on the grounds that the intention had to be assessed objectively, and on that basis there was nothing in the deeds which did not accurately represent the parties' objective intention.

Outcome

- Court of Appeal unanimously dismissed the appeal. Leggatt LJ gave the judgment of the Court (with Rose LJ and Flaux LJ).
- Court upheld the trial judge's findings that on both a "*subjective*" and "*objective*" basis the parties' common intention was for the deeds to provide no more than the missing security.
- However, went further and took the opportunity "*to clarify the correct test to apply in deciding whether the written terms of a contract may be rectified because of a common mistake*" (at [1]).
- *Obiter dicta* of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 were not a correct statement of the law.

Outcome

- A succinct statement of the Court of Appeal's decision is at [176]:
- *“We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. **In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an “outward expression of accord”** – meaning that, as a result of communication between them, the parties understood each other to share that intention.”*

Common intention assessed subjectively

- Where rectification is to give effect to a prior contract, that contract is to be assessed objectively ([141]). Where there is no such contract but rather it is a question of “common intention”, the test is subjective.
- Decision reached on three grounds:
 - **Principle:** The basis for rectification on the grounds of continuing common intention is “*entirely concerned with the parties’ subjective states of mind*” and the underlying principle is one of “*good faith*” (at [146]). It is distinct from the principle that agreements (as objectively determined) should be kept.
 - **Precedent:** A purely objective test was “*inconsistent with precedent, including authority that is binding on this court*” (at [154]). The Court was bound by neither Lord Hoffmann’s dicta in *Chartbrook* nor *Daventry DC v Daventry & District Housing Ltd* [2011] EWCA Civ 1153. They were not followed.
 - **Policy:** There were “*good reasons of policy*” for maintaining a subjective test, one that was “*rightly a demanding test to satisfy*”. It afforded “*appropriate respect to the primacy of the final, agreed, written terms of a contract*” (at [173]).

“Outward expression of accord”

- Held to be a substantive requirement for common mistake rectification (not merely an evidential factor)
- Both required by binding Court of Appeal authority and correct in principle:
 - [76]: *Joscelyne v Nissen* [1970] 2 QB 86 “clearly held that it is essential for rectification of a written contract to show an agreement, not in the sense of a prior concluded contract but “in the more general sense of an outwardly expressed accord of minds””
 - [77]: “it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide”
- Strict requirement but with two caveats: **tacit agreement** and **pension cases**.

Commentary

- Decision has been welcomed as offering much needed clarity:
 - *Snell's Equity* at 16-015: a “*very clear judgment*” which “*restores the traditional orthodox approach*”.
 - Davies, ‘Rectification rectified’ *CLJ* 2020 79(1), 8-11: an “*excellent judgment*” providing a “*clear and authoritative test*” and a “*welcome*” departure from the “*unsatisfactory*” decision in *Chartbrook*.
- Practical implications unclear:
 - Phillips LJ in *Gwynt y Mor OFTO Plc v Gwynt y Mor Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm) at [120]: a finding of rectification may be more “*unusual*” in light of the decision in *FSHC*.
 - Opposing view given by Peel, ‘Rectification revisited’ *LQR* 2020 136 (Apr), 205-210: there may not be “*many cases where a different result will follow, depending on which test is adopted*” – would have made no difference on the facts of *FSHC* itself.

Analysis

- Decision in line with recent Supreme Court decisions and the retreat from the “*Hoffmann offensive*”. Likely to be authoritative for some time.
- Can the dual approach adopted by the Court of Appeal be justified?
- Test laid down by the Court could lead to odd results in certain situations.
- Prior agreement: a matter of degree?
- Decision has brought much-needed clarity to this area of law.