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Paved with good intentions? Rectification of contracts after the Court of Appeal's decision in 'Four Seasons'

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Introduction

In *FSHC Group Holdings Ltd* v *Glas Trust Corporation Ltd* [2019] EWCA Civ 1361, the Court of Appeal has given welcome clarification of when a written contract can be rectified because the parties were under a common mistake as to its effect. Following statements made by the House of Lords in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] UKHL 38, the apparent scope of the doctrine of rectification in English law had given rise to much debate and also some judicial criticism. Rectification for common mistake requires the parties to have shared a common intention as to the effect of their agreement, which they then failed to properly record in their written contract – if that is proven, the document is then rectified to reflect the common intention, correcting the mistake. The question that has been vexing judges and commentators alike was whether such a common intention is to be assessed using an objective or a subjective test. While objectivity is one of the hallmarks of the English law of contract, the Court of Appeal in *Four Seasons* has now confirmed that the test is subjective when it comes to rectification.

The corporate transaction giving rise to the litigation in *Four Seasons*

The claimant was the parent company of the Four Seasons Health Care group which provides care to the elderly. For convenience, the claimant company is referred to as "**Four Seasons**" in this article. Four Seasons is presently a subsidiary of Terra Firma, the private equity fund. Terra Firma acquired a controlling interest in the Four Seasons group in July 2012. The financing arrangement for that acquisition by Terra Firma was complex, and ultimately gave rise to the litigation that came before the Court of Appeal. The deal involved Four Seasons issuing a shareholder loan of £220 million. These monies were then used to purchase discounted bonds in a group of companies that owned the underlying assets of the Four Seasons group (Four Seasons itself was a holding entity). As part of the financing arrangements and capital structure for the acquisition, this asset-owning group of companies also issued notes, and assumed indebtedness under a different loan facility, in the total amount of £560 million. An Intercreditor Agreement governed the relationship between all the noteholders, lenders and other relevant parties, including Four Seasons itself. The Intercreditor Agreement required that the benefit of Four Seasons' shareholder loan be 'pledged at all times' as security for the liabilities of the asset-owning companies to their noteholders and lenders. This would have required an assignment of the shareholder loan. However, Four Seasons never executed such an assignment. Apparently, this was overlooked on completion amidst the plethora of documents that had to be executed.

One further feature of the transaction is relevant. The asset-owning companies, but not Four Seasons in its own right, entered into a contract called the Intercompany Receivables Security Assignment ("**IRSA**"). Under the IRSA, Barclays was appointed as security trustee. The effect of the IRSA was threefold: any intra-group payments due between the asset-owning companies could be assigned to the noteholders and lenders as security, the asset-owning companies agreed to repay all secured debts when they fell due, and they were also placed under certain restrictions on the kind of business that they could carry out. At the time of the acquisition, there had been no suggestion that Four Seasons would be required to take on any of these further obligations imposed by the IRSA, and Four Seasons did not enter into that contract.

Attempting to cure an oversight with a contract that nobody had read

In 2013 and 2014, Four Seasons acquired additional care homes in an unrelated deal. That subsequent transaction was largely financed by debt raised through the Santander group. The creditors in the Santander acquisition were thus different from, and unrelated to, those in the earlier acquisition involving Barclays. By 2016, the asset-owning group of companies was heavily indebted, in amounts that exceeded the value of their assets. Terra Firma instructed solicitors, Firm A, to review matters and put in place a restructuring. Firm A had not been involved in the original acquisition. Following a review of the documentation for the 2012 deal, Firm A was unable to find any document assigning the benefit of Four Seasons' shareholder loan by way of security, as required by the Intercreditor Agreement. This was of concern, not least because it was a failure to comply with the Intercreditor Agreement which could give rise to an event of default under the loan facilities if it was not remedied (within 30 days of the party in question becoming aware of the breach).

Two partners at Firm A discussed what should be done about this. They quickly ruled out creating new documentation for this assignment. Instead, they decided that the easiest solution was to ask Four Seasons to accede to the IRSA and assign the benefit of the loan in a deed of accession to that existing agreement. The partners felt this had the benefit of being Barclays' preferred approach. They instructed a junior associate to draft two such deeds of accession. Firm A's drafts were then approved by a solicitor for Terra Firma and also by a director of Four Seasons. The deeds had to be countersigned by Barclays. Barclays was represented by its own solicitors, Firm L. Prior to submitting the deeds of accession to Barclays, Firm A had asked Firm L if it might have a copy of an assignment of the shareholder loan by Four Seasons on its files. Firm L confirmed that it did not have a copy, either.

Various telephone conversations and exchanges took place between Firm A on one side and either Barclays or Firm L on the other. In those conversations, Firm A represented that the deeds of accession were required because there was no copy of any assignment of the shareholder loan. Firm A emailed the deeds across, saying they were attaching "*copies of two deeds confirming the assignment of* [Four Seasons' rights] *and interests under* [the shareholder loan]". Also attached to that email were copies of the shareholder loan agreement and the IRSA. Firm L then raised questions about the deeds on behalf of Barclays. In response, Firm A explained that the deeds were needed to comply with the Intercreditor Agreement, to ensure that the shareholder loan would be pledged by way of security. Shortly thereafter, Barclays countersigned the deeds.

The Court of Appeal noted that even though the deeds of accession had been "*… drafted in the pleonastic style often beloved by lawyers …*", they were not complicated documents. The deeds assigned the Four Seasons' rights and interests in the shareholder loan to Barclays, to be held on trust for the secured parties in the Four Seasons acquisition. However, the deeds also went considerably further. They made Four Seasons subject to the additional obligations imposed by the IRSA – it became responsible for all the debts of the asset-owning group of companies and gave security over all Four Seasons' other assets. Those other assets by then included the care homes acquired using finance raised via Santander, which had nothing to do with the amounts secured through the IRSA. In February 2017, Firm A noticed that the deeds of accession had this wider effect. It asked Firm L to amend the deeds to reflect the original intention. Firm L declined. Four Seasons then commenced proceedings against Barclays, seeking rectification.

The Commercial Court determines the intentions of the parties

Faced with this claim, Barclays argued that there had been a deliberate decision by Four Seasons to provide the missing security by becoming a party to a pre-existing contract, rather than drawing up a 'new' agreement. By going down that route, Barclays contended, Four Seasons managed to avoid the risk of the 'missing' security and

the potential event of default under the loan agreements coming to the notice of the creditors during Four Seasons' ongoing and sensitive restructuring negotiations. This explanation did not, however, find favour with the judge, who granted rectification based on a common mistake.

The relevant legal principles can be summarised as follows. Rectification for common mistake is an equitable remedy that may be granted where the parties had a common intention when signing their contract, which intention the document failed properly to record as a result of a mistake. Rectification alters the terms of a written instrument, generally presumed to be a conclusive record of the bargain struck: for that reason, there has to be convincing proof of the relevant 'common intention'. The question of proof is what became the central issue in the ensuing appeal. As discussed below, in *Chartbrook* v *Persimmon Homes*, Lord Hoffmann advocated an objective test, based on what a reasonable observer who knew the background and communications between the parties would have thought was their common intention at the time of contracting.

In the Commercial Court, the late Carr J proceeded on the basis that Lord Hoffmann's statements were binding on him. He decided, having heard the evidence, that both an objective and a subjective test led to the same result. The starting point for the learned judge's analysis was that it would have been commercially absurd for Four Seasons to give security over the new care homes acquired with the Santander financing for the benefit of the creditors in the earlier transaction. That would have fundamentally altered the commercial bargain, as the creditors from the 2012 transaction had advanced funds without Four Seasons owning the Santander properties. Offering security over these new assets would have been a crucial bargaining chip in the negotiations for a restructuring of the 2012 debt - not something that Four Seasons would have simply conceded without asking for anything in return.

The learned judge then considered the intention of the parties. As regards Four Seasons, he found that the company had adopted the intentions of its solicitors, Firm A, relying on their advice. The two partners at Firm A had each wrongly assumed that the other had read the deeds of accession and the IRSA. Neither had told the client about the effect that the deeds would actually have, or even knew of this. While that was surprising to say the least, it meant that Four Seasons executed the deeds contracts in the mistaken belief that it was just assigning the shareholder loan. The judge also found that Firm A and Four Seasons would have risked the creditors learning of the missing assignment, rather than volunteering additional security of the Santander assets. Four Seasons' subjective intention was, therefore, limited to providing the security that was missing. Turning to Barclays, the judge found that neither the bank's own representative nor its solicitor at Firm L understood Four Seasons to be doing anything more than that. An objective observer with knowledge of the exchanges between the parties would have shared that view as regards both parties.

The nature of the mistake

Pausing here, it is worth considering briefly the nature of the mistake that might warrant rectification. Barclays had sought to persuade Carr J that while the parties had indeed been under a mistake, this was of a kind that could not warrant rectification. The bank argued that Four Seasons and Firm A did intend to assume all the obligations under the IRSA, but that they had forgotten, or did not know about, the additional assets acquired in the Santander transaction. Carr J noted that if the evidence had supported that contention, then the mistake would have been one as to the financial consequences of entering into the contract, and would have been insufficient to justify rectification. He found that both Four Seasons and Firm A knew about the Santander assets, but not about the additional onerous obligations under the IRSA – because they had not read the relevant agreements. The common mistake therefore related to the legal effect of the deeds of accession, not the financial consequences of the agreement.

An unusual set of circumstances

Taking a step back, the Commercial Court therefore allowed rectification where the claimant had been legally represented, and where its own solicitors had drawn up the 'offending' contract and proposed it to the counterparty. It will be recalled that Firm A had drafted the deeds of accession and had sent them to Barclays attached to an email together with the IRSA. Yet, following cross-examination of the witnesses, Carr J was satisfied that none of the relevant individuals had read these documents, hence nobody knew what their legal effect would be. While at first glance this might seem an extraordinary result, this happened against the background of a complicated set of agreements which had already determined the parties' existing rights and obligations. It seems much less likely, and perhaps even far-fetched, that a rectification claim could succeed in circumstances where a party who is legally represented signs a new, or independent, contract prepared by its own solicitors. Not reading the contract rarely – if ever – provides a convenient escape route from a bad bargain.

The Court of Appeal in *Four Seasons* reviews the history of rectification

Following the judgment of the Commercial Court, GLAS Trust Corporation (the "**Trustee**") replaced Barclays as the security trustee under the IRSA. The Trustee appealed, arguing that applying the objective test advocated by Lord Hoffmann, the only conclusion that a reasonable observer could draw was that Four Seasons had intended to accept all of the obligations under the IRSA. Four Seasons disagreed that the objective approach mandated that result. However, Counsel for Four Seasons went one step further, arguing that Lord Hoffmann had been wrong in *Chartbrook*, and that a purely subjective test applied to the determination of the parties' 'common intention' in a claim for rectification.

The Court of Appeal conducted a careful review of the authorities before agreeing with Four Seasons. The origins of the doctrine of rectification were traced back to the Court of Chancery, which, it was said in 1749, had the power to grant relief against contracts containing a "*plain mistake*" as well as contracts tainted by fraud. This suggests that equity took the view that if the parties have misled themselves, laboring under a common mistake, the situation is really no different than if one party had been misled by the other. A leading commentary, Story's Commentaries on Equity Jurisprudence (1846), noted that:

> "*A Court of Equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs contrary to the intention of parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice …*"

By the early 20th century, however, the English Courts had moved away from this theory. Rectification became available only where there already was a prior agreement between the parties. A subsequent (written) contract could only be rectified to reflect such a prior agreement. The Court of Appeal in *Lovell & Christmas* v *Wall* (1911) stated that rectification was properly to be seen as a species of specific performance: equity would only see to it that the parties' written contract reflected the terms which they had already agreed ought to be recorded in that instrument:

> "*… it is not only clear law, but it is absolutely necessary logic, that there cannot be a rectification unless there has been a pre-existing contract which has been inaptly expressed.*"

On that approach, the existence of a common intention between the parties could only lead to rectification if it had also produced an 'antecedent' common agreement. This significantly curtailed the scope for rectification, and represented a considerable shift away from the origins of the doctrine in the Lord Chancellor's court.

The 'antecedent agreement' theory is discredited

Rectification is not an easy concept. There are tensions between holding the parties to their written agreement whenever possible, something that is necessary to give certainty to commercial dealings, and the desire to correct mistakes where this is warranted. The English Courts have continued to grapple with these tensions. Having found that an earlier, binding contract was necessary, judicial opinion then swung the other way. In *Rose* v *Pim* [1953], Denning LJ decided a dispute between the buyer and seller of beans. The claimants had been asked to supply 'feveroles' to an Egyptian counterparty. Being unsure of precisely what kind of beans were required, the claimants asked the defendants if they could fill an order for such 'feveroles'. The defendants responded that 'feveroles' meant 'horsebeans', procured beans from Algeria and supplied them to the claimants under a contract that made no mention of 'feveroles'. The claimants sold these beans on to Egypt and were then sued. They had in fact supplied beans called 'feves', which were less valuable than the desired 'feveroles'. The claimants applied to have the contract with the defendants rectified, to add the word 'feveroles' to the contractual description of the goods, which simply read 'horsebeans'. Denning LJ rejected the claim. He explained that:

> "*Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.*"

He added that by a 'complete agreement', he did not mean a fully enforceable contract that complied with all legal formalities, but there still had to be an outward expression of an agreement between the parties. In *Jocelyn* v *Nissen* [1970], the Court of Appeal subsequently confirmed, authoritatively, that a prior binding contract was not required for rectification.

The need for an outward expression of accord reaffirmed

The need for both parties to demonstrate to the outside world that they share a common intention was accepted as a part of the test for rectification until the decision of the Court of Appeal in *Munt* v *Beasley* [2006]. In that case, Mummery LJ suggested that such an outward expression was really more an evidentiary factor in proving a common intention, and that a contract could be rectified, for instance, where one party admitted that it held the same belief or intention as the other party, even though that shared understanding had never been communicated. The Court of Appeal in *Four Seasons* disagreed that privately held beliefs could alter the legal rights and obligations of the parties set out in a written contract:

> "*Whether the test applied is subjective or objective, 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. … it would be capricious 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.*"

Human communication, and the principles by which agreement in contract law is established, do not always require that any understanding is reached, or declared, in express terms. Rather, just as there can be a tacit agreement, the outward expression of a 'common intention' for the purposes of rectification can also be tacit. However, that will only arise where the subject matter of the agreement is very well understood and uncontroversial, such as, for example, established business practices and conventions. In this area, rectification and the implication of terms may seem to converge. *Chitty on Contracts* (33rd Edition) (5-117) suggests that a contract may be rectified where the parties' common intention relates to something that is so obvious as to go without saying. The Court of Appeal in *Four Seasons* noted that while this appeared similar to the test for an implied term, the two concepts rest on separate jurisprudential foundations: implied terms complete the agreement of the parties, where they have failed to turn their minds to the relevant matter, whereas rectification corrects their agreement, where they have failed to record it properly. The precise relationship between those two areas of the law was not explored in detail in *Four Seasons*. Suffice it to say that rectification based on something that was 'so obvious as to go without saying' would only apply in rare cases.

An objective or subjective test of intention?

Returning to the correct approach for determining the intention of the parties, the Court of Appeal traced the development of the law during the second half of the 20th century, stopping at *Britoil* v *Hunt Overseas Oil* [1994]. In that case, the party claiming rectification argued that the contract should be rectified to reflect the terms of non-binding heads of agreement that had preceded it. On the claimant's case, this meant that a right for the claimant to receive certain North Sea oil profits had been triggered. The heads of agreement had, it was suggested, envisaged that this entitlement should arise in circumstances not caught by the final contract wording. In advancing this point, counsel argued that the state of mind of the parties was entirely irrelevant, and that the heads of agreement should be construed objectively, just as the final contract would. On that approach, one would apply ordinary principles of contractual interpretation (which are of course objective) to both documents, and if the later contract failed to reflect the earlier heads of agreement, it would fall to be rectified. The majority in the Court of Appeal in *Britoil* dismissed this. Hobhouse LJ felt that where successive documents were more formal, comprehensive and legally binding expressions of the parties' bargain, it would be wrong to throw them back to earlier, incomplete or inchoate documents. Hoffmann LJ (as he then was) disagreed. He felt that:

> "*… the common intention was that the definitive agreement should reflect the meaning of the heads of agreement, whatever that might be. So far as it failed to do so, it was in my judgment a common mistake which should be rectified.*"

That was out of step with the law as it then stood. Lord Hoffmann would, however, return to this objective approach in *Chartbrook*, discussed below. Prior to *Chartbrook,* the law on rectification seemed settled, and could be summarised concisely as follows: (1) the parties had a common continuing intention, whether or not amounting to an agreement, (2) there was an outward expression of accord, (3) the intention continued when they signed the written agreement, (4) which, by mistake, did not properly reflect the common intention (as per the Court of Appeal in *Swainland Builders Ltd* v *Freehold Properties* Ltd [2002]).

The decision of the House of Lords in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] is perhaps best known for their Lordships' refusal to create any new exceptions to the rule that pre-contractual negotiations between the parties are not admissible as evidence to aid with the interpretation of the contract they went on to make. *Chartbrook* thus declined to alter one of the basic principles of contractual interpretation in English law. The decision did, however, introduce uncertainty into the law on rectification. That was despite the House of Lords not having to decide whether the contract needed to be rectified: Persimmon's reading of the contract wording was upheld as a matter of construction, and rectification had only been Persimmon's alternative argument.

The contested clause in *Chartbrook* set out a formula for calculating a payment due from Persimmon to Chartbrook. On a literal and strict interpretation of the contract wording, espoused by Chartbrook, Persimmon would have been liable to pay £4.4 million. Persimmon's case was that, on an alternative reading of the formula, it only had to pay Chartbrook £0.9 million. Persimmon had lost at first instance, and in the Court of Appeal – the strict interpretation prevailed. As regards rectification, the trial judge had found that two of Chartbrook's directors had understood that the clause could have this beneficial effect for their company and had intended for the contract to have the effect which the wording appeared to reflect. That finding was left undisturbed by the Court of Appeal. The House of Lords overturned the decisions below, finding that although Chartbrook's reading was consistent with the syntax of the clause, it made no commercial sense. As a matter of contractual interpretation, it was (just) possible to read the clause differently, avoiding an absurd result. As noted, their Lordships reached that result without taking any account of the pre-contractual correspondence, which was inadmissible.

Lord Hoffmann commented that if Persimmon's proposed reading of the formula had been rejected, then he would still have granted rectification. His view was that, notwithstanding the evidence of Chartbrook's directors given at trial, the pre-contract correspondence between the parties, if read objectively by a reasonable observer, showed that the parties actually intended the formula to operate in the commercially sensible manner that Persimmon advocated. He expressed the view that:

> "*Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the 'common continuing intention' were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not.*"

All other members of the House of Lords agreed with Lord Hoffmann on this point, lending considerable weight to his *obiter dicta*.

Lord Hoffmann's comments attracted judicial skepticism in the decision of the Court of Appeal in *Daventry District Council* v *Daventry & District Housing* Ltd [2011]. In that case, the council had entered into a contract by which it transferred its entire housing stock and all of the employees in its housing department to the defendant. During the negotiations, the parties signed a non-binding document which, read objectively, provided that both parties would jointly fund a pensions deficit affecting these employees. The final contract however contained a provision that made the council solely responsible for the pensions deficit. It transpired that the defendant's negotiator had told the board of directors that the council was to be responsible, while the council's agent had believed that responsibility was to be split. The council sought rectification. It is apparent from the Court of Appeal's judgments that this had not been an easy case to decide: indeed, one commentator has described the judgments as "*mind-bogglingly difficult*". Ultimately, the majority granted the council rectification. There was considerable judicial debate about Lord Hoffmann's apparent statement of principle in *Chartbrook* and exactly what it had done to the test. In short, the Court of Appeal felt it had to follow Lord Hoffmann's guidance, seeing as it was the unanimous opinion of the House of Lords.

Since *Chartbrook* and *Daventry*, leading commentators – including retired and sitting judges – have produced numerous articles and lectures grappling with the issue. In *Four Seasons*, the Court of Appeal noted the consensus among writers, that the state of the law of rectification was unsatisfactory and not conducive to certainty, and that one might not even be able to state with certainty whether English law required an objective or a subjective test: the *Restatement of the English Law of Contract* (2016), authored by Professor Burrows in conjunction with an illustrious advisory group of academics, judges and practitioners, leaves the point open and describes it as difficult.

Settling the law

Against that background, the Court of Appeal in *Four Seasons* set out to settle the law. Leggatt LJ, who gave the leading judgment, identified the key difficulty with the *Chartbrook* approach. It amounted to holding a party to an earlier 'agreement', objectively construed – including by looking at any documents such as heads of terms or other exchanges between the parties in their negotiations - when they subsequently entered into another, different, formal contract, which is again to be construed objectively. The fundamental difference between these two objective 'agreements' is that the later one is the actual binding contract, when the earlier is not – it is just an understanding that was not intended to be legally binding (recall that the 'antecedent agreement' theory is no longer part of English law). Rather than this providing grounds for rectification of the later agreement to reflect the earlier understanding, why should the reasonable observer not conclude, instead, that the parties (objectively) appear to have changed their minds during their negotiations?

Lord Hoffmann, speaking extra-judicially after *Chartbrook*, has explained that his approach to rectification was based on upholding or enforcing agreements, the existence of which (he felt) should always be determined objectively. The Court of Appeal in *Four Seasons* begged to differ, noting that:

> "*The principle that a contractual document should be reformed so as to enforce what the parties have (objectively) agreed has no validity where the prior 'agreement' is not a legally binding contract but a non-binding expression of intent. There is no principle which requires or justifies a court in holding the parties to the terms of an objective consensus reached during negotiations but never intended to be binding: it is in the very nature of such a consensus – even where … it is embodied in a document which the parties have signed – that it should not have any legal effect and represents only a stage in negotiations from which either party is free to walk away. Still less does the principle that parties should keep their promises to each other justify giving such a consensus priority over the terms of a formal written contract by which (objectively) the parties did intend to be bound. To adopt this course is to impose on the parties a contract they never made in place of one which they did make. … it is to rectify the contract made by the parties and not simply a document which fails to give effect to the terms of a contract.*"

Lord Hoffmann's approach thus involved too much objectivity, and gave insufficient weight to the fact that the parties executed a formal, legal instrument. Rectification, as an equitable remedy, operates on the conscience of the parties. The justification therefore must lie in the injustice of holding both parties to a written document that both of them in fact agreed was wrong. That requires convincing proof, but if it can be established that is what both parties actually thought, then there is no need to ask what a hypothetical reasonable observer would have thought they intended. While the common law preferred an objective approach to contractual interpretation, in order to promote certainty in commercial dealings, equitable principles could afford a remedy where there had been a 'real' intention and a 'real' mistake in expressing or recording that intention.

On the facts, Leggatt LJ saw no reason to interfere with the findings made at first instance. Four Seasons, or its representatives, had succeeded in communicating its own subjective intention to Barclays or its agents. The evidence from Barclays' side showed that nobody disagreed. In the end, the parties had made a mistake:

> "*… about the legal effect of the contractual documents and not just about their commercial consequences. This is not a case in which the parties had merely a general intention about the objective they ultimately wished to achieve without any clear or specific intention about how it was to be achieved. Rather, on the judge's factual findings their common intention was the legally specific one of binding the*

Parent to particular contract terms – but not to other specific terms which were contained in the same document. This is a classic case for rectification."

Conclusion

This "*classic*" case for rectification may rest on somewhat unusual facts, but it has provided a real benefit to English contract lawyers. Rectification has been placed on a firm and conceptually clear footing. The Court of Appeal expressly noted the policy considerations that supported the approach taken. A subjective test is harder to satisfy, and will lead to fewer contracts being rectified. Looking at the course of contractual negotiations purely objectively, one might be tempted to find a consensus where there is, in fact, none. Parties may not always expressly disagree with a suggestion the minute it is made, if only to 'keep their powder dry' and have an additional negotiating chip further down the line. If a party manages to persuade its negotiating partner to alter the final contract wording at the eleventh hour, then that successful bargaining might – if it is not separately reflected or foreshadowed in any contemporaneous documents – appear to the objective observer as an inexplicable, sudden change that is indicative of a mistake that one ought to rectify.