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

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PRACTICES Litigation, International Arbitration

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.

To read the full article, see the PDF linked below.

Paved-with-Good-Intentions?Court-of-Appeals-Decision-in-Four-Seasons.PDF

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