A party seeking rectification of a document based on a common mistake is required to show that, at the time of executing the written contract, the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed to record accurately.

In FSHC Holdings Ltd v Glas Trust Corporation Ltd [2019] EWCA Civ 1361, the Court of Appeal determined an application for rectification of two deeds, based upon an alleged common mistake. In doing so, it clarified that the test, for these purposes, of the intentions of the parties is a subjective one, as opposed to an objective one.

In reaching that conclusion, the Court of Appeal departed from the obiter comments of Lord Hoffman in Chartbrook Ltd v Persimmon Homes Ltd¹ (subsequently endorsed by the Court of Appeal in Daventry District Council v Daventry and District Housing Ltd²), which had suggested that, where the instrument of which rectification is sought is a written contract, the relevant test of intention is as to what a reasonable observer with knowledge of the background facts and prior communications between the parties would have thought their common intention at the time of contracting to be.

References in square brackets in the remainder of this note are references to paragraph numbers in the Court of Appeal judgment.

**Background and facts**

The claimant, FSHC, sought rectification of two deeds. The purpose of the deeds was to provide certain security that had been intended (but accidentally omitted) to be provided in connection with a corporate acquisition back in 2012. The missing security was a small element of a complex transaction and no one noticed that it was missing until the omission was spotted by the claimant’s lawyers during a review of the security documentation in 2016.

To correct this omission, the claimant had entered into the deeds now in issue, thereby acceding to two pre-existing security agreements.

It was subsequently realised that the effect of this was for the claimant to assume additional, onerous obligations (over and above the provision of the

1. [2009] UKHL 38
2. [2011] EWCA Civ 1153
missing security) which were not envisaged under the original 2012 transaction.

The defendant, Glas Trust, contended that the claimant had made and/or was to be taken to have made a deliberate decision to be bound by all the terms of the deeds.

**High Court decision**

Henry Carr J found as a matter of fact that, when the deeds were executed, both parties understood and intended them to do no more than provide the missing security. He found that this was their common intention both on a subjective and objective basis and therefore granted rectification.

The defendant did not challenge the first instance judge’s conclusion as to the parties’ subjective intentions, but argued that, following Lord Hoffman’s comments in *Chartbrook* (as endorsed in *Daventry*), the existence and nature of a common intention between the parties is a matter to be determined objectively and therefore as a question of law; such that it was open to the Court of Appeal to form its own view on that latter basis.

**Court of Appeal decision**

Leggatt LJ delivered the leading judgment. He concluded that Carr J had been entitled to order rectification and that there were no grounds for interfering in that decision. He noted, though, that Lord Hoffman’s comments in *Chartbrook* had proved controversial, with criticisms made in academic texts and in subsequent judgments. Leggatt LJ saw this appeal as an opportunity to confront that controversy and clarify the position.

In undertaking a review of the courts’ traditional approach to equity, he commented that historically, it was the subjective, actual intent of the parties which was relevant: “the use of the term “intention” to refer to what an “objective” observer would have understood the parties’ intention to be…” was a comparatively recent development [52].

More specifically, Leggatt LJ drew a clear distinction between (i) where parties make a binding agreement to execute a document containing particular terms but then instead execute a document containing different terms and (ii) where there was no prior contract between the parties but they had a common continuing intention in respect of a particular matter in the document sought to be rectified. In the first scenario, Leggatt LJ could see how rectification had been considered a branch of the doctrine of specific performance (as it had in *Chartbrook*). In the latter, however, there was no basis for rectification other than equitable principle [141-142].

In particular, the justification for rectification on that latter basis rested “on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract … when to do so is against conscience because it is inconsistent with what both parties had in fact intended (and mutually understood each other to intend) those terms to be when the document was executed. This basis for rectification is entirely concerned with the parties’
subjective states of minds" [146]. Referring back to his analysis of the courts’ historical approach, Leggatt LJ explains that this is far from a new principle but was, traditionally, the rationale for granting rectification in cases of common mistake.

Leggatt LJ also points out that a purely objective test of intention is inconsistent with:

- precedent, because the doctrine of rectification has always been understood and justified as an equitable remedy to correct an actual common mistake i.e. an inadvertent failure to give effect to what the parties actually intended [154];
- the law as it applies to the rectification of unilateral documents, where it remains well settled that it is a party’s actual (subjective) intention which is relevant. A difference in approach cannot be justified on the ground that an objective interpretation does not apply to unilateral documents because it has been established that it does [164-165]; and
- the law in other common law jurisdictions, most notably Australia, where it is settled law that a written contract may only be rectified on the basis of common mistake if it is shown that the instrument does not reflect the actual (subjective) common intention of the parties [167].

Comment

The Court of Appeal apparently wished to provide clarity on the conflicting authority and uncertainty surrounding the appropriate test for intention in rectification cases. It has achieved this, confirming that Lord Hoffmann’s comments in Chartbrook will no longer be relevant to assessing parties’ intentions for these purposes. The Court of Appeal acknowledges that a subjective test for rectification is likely to lead to fewer contracts being rectified but sees this as a “positive merit of such a test”, because “rectification should be difficult to prove.” [174].

The full judgment is available here.
Court of Appeal clarifies test to assess parties’ intentions in rectification claims

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This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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