

## CHANCERY BAR ASSOCIATION SEMINAR

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### 'Oops! I've done it again' – Trying to make sense of Mistake

#### Rectification after *Chartbrook v Persimmon*: where are we now ?

##### Introduction

1. You have heard two learned talks but what you are going to get from me is not going to be anything like so erudite. I am simply going to talk about one of my own cases, something we all like doing.
2. The case in question is *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101, a case which is probably best known for being Lord Hoffmann's last word on construction of contracts: it was in fact the very last appeal he heard in the House of Lords. But when I first saw the case I didn't think it was really going to be a construction case at all; I thought it was going to be a rectification case and as it turns out, it does have some quite interesting things to say about rectification.

##### What happened in *Chartbrook*

3. I used to think I understood rectification reasonably well. A client comes to you with a contract. He says it means X, the other party says it means Y. The first thing to do of course is construe it, something that I also used to think I knew how to do: the contract means what the words would mean to a reasonable objective reader armed with the background knowledge reasonably available to the parties, or if I can be allowed to paraphrase that in my own words: a contract means what a judge says it means, the assumption being that a judge is the embodiment of the reasonable objective reader. But as we all know this is not always a simple exercise, and you could write a whole book on the subject – indeed thankfully someone very learned, distinguished and diligent has done just that which makes life a great deal easier for the rest of us. So with the help of Mr Justice Lewison's invaluable book you construe

the contract and find, as often as not, that it does appear to mean Y, or at any rate that you can't be sure a judge won't say that it does.

4. The client however swears the contract was meant to say X. At that point you start thinking about rectification. Fortunately you don't need to think very hard as the requirements for rectification were succinctly stated by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at [35] as follows:

*“The party seeking rectification must show that:*

- (i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;*
- (ii) there was an outward expression of accord;*
- (iii) the intention continued at the time of the execution of the instrument sought to be rectified;*
- (iv) by mistake, the instrument did not reflect that common intention.”*

Your own client tells you there is no doubt that he intended the contract to mean X up to the time it was signed and if it doesn't mean X there is a mistake; so the difficulty usually lies in showing that the other party had the same intention. There is also the potentially tricky point about an outward expression of accord but in *Munt v Beasley* [2006] EWCA Civ 370 Mummery LJ said that an outward expression of accord was “more of an evidential factor than a strict legal requirement,” so you hope this can be finessed if the other evidence is good enough. The real question is how you prove the other party's intention.

5. When I first saw *Chartbrook*, that was exactly what the case was like. Chartbrook was a 2-man company which owned an old warehouse in Wandsworth; Persimmon is a well-known housebuilder which thought, correctly, that it could get planning permission to put up a block of flats there. Simplifying a bit (the development was actually a mixed development with commercial premises on the ground floor and there were other provisions dealing with that), the contract provided for Persimmon to pay Chartbrook a price for the flats made up of 2 parts: the first was a minimum guaranteed sum (called the Total Residential Land Value), which was calculated, at an

agreed sum per square foot, on the net internal area for which permission was obtained: this gave rise to no difficulties and came out in the event at about £4.7m.

6. The second part of the price was called the Balancing Payment (and also the Additional Residential Payment or “ARP”). It was defined as

“23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value less the Costs and Incentives.”

(Residential Unit simply meant a flat; Minimum Guaranteed Residential Unit Value (“MGRUV”) was the Total Residential Land Value divided by the number of flats, which was conveniently exactly 100; Costs & Incentives (“C&I”) were amounts spent by Persimmon to induce sales.)

7. Persimmon’s case was that the intention was that they would pay Chartbrook 23.4% of the net sale proceeds or the minimum guaranteed sum, whichever was the greater. So what this meant was that you took 23.4% of the net proceeds (deducting the C&I off the price achieved), compared this with the minimum sums (the MGRUVs) and the ARP was the excess, if any. In mathematical terms this could be expressed as

“(23.4% x (Price – C&I)) – MGRUVs”

Since the price achieved was about £24.1m and the C&I £250,000, this came out at

$(23.4\% \times (£24.1\text{m} - 0.25\text{m})) - £4.7\text{m} = c \text{ £}900,000.$

There were two fairly obvious difficulties with this. First it is not the natural meaning of the words; and second, it requires moving the C&I from where it appears at the end of the definition and sticking it in the middle.

8. Chartbrook’s case was that this was not what the contract said. What the contract said was that you took the price achieved in excess of the MGRUV, deducted the C&I, and then took 23.4% of that figure. In mathematical terms this was

“23.4% x ((Price – MGRUVs) – C&I)”

On the figures it came out as

$$23.4\% \times ((£24.1\text{m} - £4.7\text{m}) - £0.25\text{m}) = \text{c } £4\frac{1}{2} \text{ m}$$

thereby giving Chartbrook a total of some £9.2m for the flats rather than the £5.6m which Persimmon intended.

9. So the first thing to do was to construe the contract. Unfortunately I thought it pretty obvious that the contract meant what Chartbrook said. (As it turned out, so did Briggs J and a majority of the Court of Appeal (Tuckey and Rimer LJJ), although Lawrence Collins LJ and the House of Lords disagreed, and in the end we won on construction, thereby proving that I don't know how to construe a contract after all.) But at the outset I thought we would have to win the case if at all on rectification.
10. There was no difficulty in establishing Persimmon's intention: we had contemporary internal documents proving beyond doubt how Persimmon saw the contract, and letters to Chartbrook explaining it, although not perhaps as clearly as they might have. The difficulty was that Chartbrook's directors had both made witness statements to the effect that despite our letters they had read the draft contract carefully and had always understood it to have been intended to give them the higher figure. That meant (I thought) we would have to make our case through cross-examination. I also thought we had a pretty good chance of doing so in the light of the letters and various other matters.
11. So as far as I was concerned, therefore, the case was about whether we could persuade the trial judge to reject the directors' evidence and find that they had understood what Persimmon were intending to offer; and had either had the same intention (in which case it would be a case of common mistake) or, if they realised that the contract did not provide that, must have appreciated that this was a mistake but kept quiet about it (in which case it would be a classic case of unilateral mistake).
12. We thought the cross-examination to this effect went quite well, but unfortunately Briggs J didn't: he was not persuaded to reject their evidence, thus proving that as well not being able to construe a contract, I'm not much good at cross-examination either. We did manage to get permission from the Court of Appeal to appeal the rectification issue; but the Court of Appeal was unwilling to depart from the trial judge's assessment of the witnesses; this was not perhaps surprising as it would mean

rejecting the evidence of witnesses they hadn't seen when the trial judge who had seen them had refused to do so.

13. Since the House of Lords as a matter of practice would not reopen a question of fact on which there were concurrent decisions of the lower courts, that, you would have thought, was that so far as rectification was concerned.
14. But it turns out that I didn't understand the requirements for rectification either. In the House of Lords we ran a completely new argument, dubbed the "objective theory of rectification"; and, albeit obiter, Lord Hoffmann accepted this argument and at least 3 of the other 4 agreed with him.

### **The objective theory of rectification**

15. So what is the objective theory of rectification, and how does it work ? If you go back to Peter Gibson LJ's list of things that have to be proved, two of them refer to the parties' common intention. As I say, I had always thought this meant their actual intentions: what as a matter of subjective fact they intended the contract to mean. Rectification on this assumption would be a classic example of equity acting so as to prevent unconscionable behaviour, it being unconscionable for a party to rely on the fact that the contract said Y when both he and the other party subjectively intended it to mean X.
16. But it turns out that this is not what rectification is about at all. When we refer to the parties' common intention, it seems we are not referring to their subjective understanding of the contract, but to their "objective intention" that is, what an objective observer would have understood their common intention to be. This is what Lord Hoffmann says, and the argument is as follows:
  - (1) Prior to the 1930s there was a "formidable array of judicial opinion" that it was necessary to show a prior concluded contract antecedent to the written document which was sought to be rectified. The history is recounted in the

judgment of Russell LJ (giving the judgment of the Court) in *Joscelyne v Nissen* [1970] 2 QB 86, 90H-93E, starting with the uncompromising statement of James V-C in *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 that

*“it is always necessary for the Plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified”*

and continuing in similar vein through other authorities. The classic instance of such cases was where a contract was followed by a conveyance or the like, and rectification was available if the conveyance by mistake did not conform with what the parties had agreed in the contract it should. (Indeed in *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 Cozens-Hardy MR for this reason went so far as to describe rectification as a branch of the doctrine of specific performance.) The relevant point for present purposes is that the meaning of the prior contract would, like any other contract, be determined objectively not subjectively.

- (2) The idea that a prior concluded contract was required was first held to be too strict by Clauson J in *Shipley UDC v Bradford Corporation* [1936] 1 Ch 375 (where there was a prior written agreement but it was not under seal and so, being made by a corporation, could not then be a contract), followed by Simonds J in *Crane v Hegeman-Harris Co Inc* (1939) [1971] 1 WLR 1390 who held that it was sufficient to show a “common continuing intention” in regard to a particular provision or aspect of the agreement:

*“If you find that in regard to a particular point the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify although it may be there was, until the formal instrument was executed, no concluded and binding contract between the parties.”*

In *Joscelyne v Nissen* [1970] 2 QB 86 the Court of Appeal approved the statement of the law in *Crane* that an antecedent completed contract is not necessary for rectification “with the qualification that some outward expression of accord is required” (at 98D).

(3) But (Lord Hoffmann says) it would be anomalous if where there was a prior contract, the relevant agreement of the parties was to be found in the objective interpretation of the contract, but where there was merely a common continuing intention, it required looking at their subjective beliefs. He illustrated this by reference to:

(i) the well-known case of *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 where Denning LJ said, at 461:

*“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.”*

(ii) *The Olympic Pride* [1980] 2 Lloyd’s Rep 67, where Mustill J said (at 73):

*“The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the later event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.”*

(iii) *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll Rep 97 where a tenant claimed rectification of a lease on the grounds that it did not contain the same repairing covenant as the previous lease contrary to the landlord’s offer of a new lease on the same terms as the old. The Court of Appeal said it was irrelevant what the landlord actually intended by his offer: he could

not be heard to say that the offer meant anything other than it (objectively) said.

- (4) To these could be added *PT Berlian Laju Tanker TBK v Nuse Shipping Limited* [2008] 2 Ll Rep 246, where Christopher Clarke J reviewed the authorities and said (at [38]):

*“The court is not concerned with what the parties thought they had agreed or what they thought their agreement meant – a subjective inquiry. What it is concerned with is what the parties said and did, and what that would convey to a reasonable person in their position – an objective question”*

And (at [39]):

*“When the authorities speak of a continuing common intention ... the reference is not to the subjective intention of the parties but to the intention that they have manifested by what they have said and done.”*

17. What this means is that the search for a common continuing intention is not a search for what the parties understood their contract to mean but for an objective “prior consensus”. In the case of *Chartbrook*, this was found in one of Persimmon’s letters setting out its offer, which Chartbrook had agreed to. The contract as drafted did not accord with the parties’ prior consensus as shown in that letter as objectively construed. So it was irrelevant what Chartbrook’s directors actually understood the offer to be: what mattered was that the contract by mistake did not reflect what the earlier letter, which they had agreed to, objectively said.

### **What are the implications ?**

18. The judgment, like so many of Lord Hoffmann’s, exudes a cool rationality that appears to lead inexorably from its premises to their logical conclusion. But perhaps it is not as simple as might appear.
19. First, it shifts the battleground from what the parties intended their contract to mean to the “prior consensus”. But it may not be easy to identify whether any particular stage in the negotiations counts for this purpose. A good example is *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561 where the question for the Court of Appeal was

whether (non-binding) Heads of Agreement could be used to rectify the final contract. The majority held not, Hobhouse LJ saying that this would be to treat the earlier informal document as a superior statement of the parties' agreement to the carefully considered final contract, which could not be right. But Hoffmann LJ dissented, basing himself on the fact that both sides asserted that the definitive agreement was intended to implement unchanged the principles in the Heads of Agreement. There seems to be fertile ground for argument over such points as this.

20. Second, it seems rather unfair. Take the facts of *Chartbrook* itself. If the evidence of the directors was to be believed (as Briggs J found), they (i) thought Persimmon was offering the higher amount; (ii) received a letter, which they did not read carefully, in fact offering the lower amount; and (iii) received a draft contract, which they did read carefully and which confirmed them in their belief that the higher amount was offered. They admittedly agreed to the letter but they also agreed to the draft contract. Why are they stuck with the consensus objectively shown in the letter and not the consensus objectively shown in the draft contract ? Why can't they say that objectively, the parties' prior consensus is to be found in the draft contract passing between them, and that just as they didn't understand what was in the letter, Persimmon didn't understand what was in the draft contract ?
21. Third, it would appear to leave the parties in some cases without a remedy where (unlike the case of *Chartbrook*) both parties were in fact suffering from the same mistake. Suppose there is clear evidence that both A and B actually intended the contract to say X, but by mistake it said Y, yet the only prior consensus that can be pointed to also said Y. It seems odd if the contract cannot be rectified to do what both parties intended it to do, but this would appear to be the result, thereby disapproving what Mummery LJ said in *Munt v Beasley*.
22. Fourth, it now makes the case of common mistake very different from that of unilateral mistake. The House of Lords said nothing about unilateral mistake, apart from a passing comment by Lady Hale, and there does not appear to have ever been a case on unilateral mistake which has reached the Lords. I used to think unilateral mistake rectification was a minor variant of ordinary rectification. If A and B both intended the contract to say X, and it in fact said Y, B could not resist rectification by

saying that he had realised it said Y before signing it and hence the intention was no longer a common continuing intention.

23. But since this is not the way rectification for common mistake works, it seems that there is now quite a sharp divide between the two doctrines. Common mistake rectification is not about what the parties thought their contract meant but about what they objectively agreed; by contrast unilateral mistake is all about the parties' subjective states of mind: A must be mistaken about what the contract means, and B must appreciate this but keep quiet about it.
24. It also means there is a sharp divide between rectification of contracts and rectification of unilateral instruments. In the case of contracts, the parties' subjective understanding is now irrelevant. But in the case of a unilateral instrument such as a voluntary settlement, rectification can be obtained on proof that the instrument as executed does not accord with the settlor's intention – and here, since there is no question of consensus, it is his actual subjective intention which matters: see *re Butlin's Settlement Trusts* [1976] Ch 251.
25. And where does this leave an instrument such as a deed of amendment of a pension scheme where the power of amendment is vested in the employer with the agreement of the trustees ? We know that in such a case rectification is available on proof of a common intention of the employer and the trustees (there are now numerous examples of this: see eg *Lemforder Ltd v Lemforder UK Pension Trustee Ltd* [2006] PLR 85 at [41] per Warren J), but is this to be assimilated to the rules on contract, so that the common intention must be objectively demonstrated, or the rules on unilateral instruments so the common intention is a subjective one ?
26. I do not pretend to have answers to these questions: but I do predict that they, and no doubt many others, will be giving us quite a lot to argue about for some time to come. This may be a good thing for us, and keep the undoubted talents of Her Majesty's Judges fully employed, but is scarcely going to be a benefit to our clients.

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Wilberforce Chambers  
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