Rectifying Rectification: The Subjective Approach to Rectification for Common Mistake

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A. Introduction

A and B have entered into a written contract. A particular provision of that contract means X. A claims that it is clear from the parties' communications throughout their negotiations that they each intended it to mean Y and the provision has been incorrectly recorded in the parties' final written instrument. In such a scenario, it is open in principle for A to seek to have the written instrument corrected through the equitable doctrine of rectification, on the basis of a common mistake.[1] The basic requirements were set out by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd*[2] and require that A can establish:

> "(1) 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; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."[3]

The question arises, however, whether the "common continuing intention" is to be assessed by reference to the parties' *subjective* intentions or by reference to what an *objective* observer would have thought the parties' intentions to be. In 2009, *obiter dicta* of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*[4] suggested the objective approach to be the correct

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[1] The assumption here is that A's claim is that *both* parties were mistaken and so the relevant issue is rectification for common mistake. Were only A to have been mistaken, the relevant issue, if at all, would be rectification for unilateral mistake. The focus of this article is rectification for common mistake.

[2] [2002] EWCA Civ 560, [2002] 2 E.G.L.R. 71.

[3] *Swainland* [2002] EWCA Civ 560, [2002] 2 E.G.L.R. 71 at [33]. Two points should be noted in relation to (1). First, as pointed out in *Milton Keynes Borough Council v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [2017] B.L.R. 216 at [48], "the word "continuing" [is] superfluous: it is more accurate to say that there needs to be a common intention (requirement 1) which was continuing at the time that the contract was executed (requirement 3)". Secondly, as will become apparent below, the reference to the parties' "agreement" is to be taken to mean a binding *contractual* agreement.

[4] [2009] UKHL 38, [2009] 1 A.C. 1101.

one. That conclusion proved to be controversial.[5] It left the law of rectification "marred by uncertainty and complexity",[6] with much "left in the air…within [its] jurisprudence".[7]

In *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*,[8] following a comprehensive analysis of the historical development of rectification and the relevant authorities, the Court of Appeal has declined to follow Lord Hoffmann's objective approach; instead adopting a subjective approach to the question of common continuing intention to the facts of that case. The conclusion in *FSHC* is consistent with orthodoxy prior to *Chartbrook*, sound in terms of policy and principle, and must be correct.

B. The *Chartbrook* Case

Before getting to *FSHC* it is convenient to start with *Chartbrook*. Chartbrook owned land and entered into a contract with a developer, Persimmon. Under the contract, Persimmon was to obtain planning permission and then have the benefit of a licence to develop the land for commercial and residential use before selling the properties developed on long leases. The contract entitled Chartbrook to an "Additional Residential Payment" ("ARP"). This was a defined term to be calculated according to a formula set out in the contract. Chartbrook sought payment of an outstanding ARP balance. A dispute arose as to the construction of the contractual formula and hence the correct ARP. Chartbrook's case was that the correct approach to the contractual formula produced the result that Chartbrook was entitled to £4,484,862. On Persimmon's approach, the sum due was only £897,051.

On the question of construction, Chartbrook succeeded before both Briggs J[9] and a majority of the Court of Appeal.[10] Briggs J, in addition, refused to accept Persimmon's alternative argument based on rectification; a conclusion upheld unanimously by the Court of Appeal. The House of Lords took a different view of the construction of the ARP formula and Persimmon succeeded. That made it unnecessary to decide Persimmon's alternative argument based on rectification. The House of Lords concluded, nonetheless, that had Chartbrook's argument on

[5] See *Crossco No.4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch) at [253]; *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333 at [176], [195]-[196]; *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) at [89]-[99]; *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm) at [70]; Richard Calnan, *Principles of Contractual Interpretation* (Oxford: 2013) paras 9.02 and 9.43 ("the law is in a state of flux").
[6] Terence Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 C.L.P. 367, 368.
[7] Richard Buxton, '"Construction" and Rectification after Chartbrook' (2010) 69 C.L.J. 253, 261.
[8] [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429.
[9] [2007] EWHC 409 (Ch), [2007] 1 All E.R. (Comm) 1083.
[10] [2008] EWCA Civ 183, [2008] 2 All E.R. (Comm) 387 (Rimer and Tuckey LJJ; Lawrence Collins LJ dissenting).

the construction of the ARP prevailed, Persimmon would have succeeded in its claim for rectification. The analysis of the rectification issue was provided by Lord Hoffmann, with whose reasoning each of the other four members of the Appellate Committee agreed.

Persimmon's case on rectification before the House of Lords had taken a different approach to that in the lower courts. At first instance, Briggs J had found as a fact that Chartbrook had subjectively *believed* the contractual formula was such as to lead to the higher amount. The effect of this was that only Persimmon was mistaken.[11] It followed that there was no mistake common to both parties, as they each had a different subjective understanding of the correct approach to the ARP. The Court of Appeal refused to disturb the judge's findings of fact.

To get around the problem that the parties had different subjective intentions, Persimmon contended before the House of Lords that what the parties had subjectively intended did not matter. Instead, it was argued, the relevant test should be objective, that is, what a reasonable person would have taken the parties' intentions to be. It followed that it was immaterial that the parties had not, subjectively, shared an intention and made the same mistake. Lord Hoffmann accepted this argument.[12]

To understand Lord Hoffmann's reasoning, it is necessary to draw a distinction between two different situations in which rectification for common mistake might be sought.

(1) In the first situation, A and B have concluded negotiations and reached a binding contract in which they intend X. When the parties reduce that contract to writing, it actually amounts to Y. In this situation – the "antecedent contract" situation – rectification is sought in relation to the final written instrument in which the parties' contract has been incorrectly recorded so as to make that instrument reflect the antecedent contract.

(2) In the second situation, A and B have reached agreement and in their pre-contractual exchanges share an intention as to X. Their negotiations make clear that there is no binding contract until the agreement has been reduced to writing. When the parties

[11] [2007] EWHC 409 (Ch), [2007] 1 All E.R. (Comm) 1083 at [161]-[164].

[12] The way the rectification issue was dealt with in the House of Lords was criticised by Sir Richard Buxton. He observed that the difficulties that have arisen following *Chartbrook* can be explained "at least partly because the approach to rectification adopted by the House of Lords only came into the case at that level. The issue was no doubt fully and skilfully argued by counsel instructed before the House…but to permit the introduction of fundamental issues only in the final tribunal deprives both the House and the advocates appearing before it of the benefit of the wisdom of the Court of Appeal, and of the reflection, professional as well as academic, on the wider implications of any change in the law that a judgment of that court may be expected to provoke". See Buxton, '"Construction" and Rectification after Chartbrook' (2010) 69 C.L.J. 253, 261.

reduce that (non-binding) agreement to writing, it actually amounts to Y. In this situation – the "no antecedent contract" situation – rectification is sought in relation to the final written instrument in which the parties' agreement has been incorrectly recorded so as to make that instrument reflect the antecedent (non-binding) agreement.

As Lord Hoffmann correctly recognised, in the first situation – that is, where there is an antecedent contract – it is established as a matter of authority that an objective approach is the correct one.[13] The facts of *Chartbrook*, however, fell within the second – no antecedent contract – situation; the basis of the claim for rectification being to bring the parties' written contract into line with what was understood to be the intention and meaning of pre-contractual communication between the parties. Lord Hoffmann concluded that the objective approach should also be applied in the context of the second situation: "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."[14]

Lord Hoffmann considered the application of an objective approach in the second situation to be supported by authority, "[p]erhaps the clearest" of which was the famous "horsebeans" case of *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd* ("*Rose v Pim*"),[15] where Denning LJ stated that rectification was concerned with "contracts and documents" not parties' "inner minds" and "intentions" and that terms of contracts should be ascertained through parties' "outward acts" and "outward agreement".[16] In addition, Lord Hoffmann refused to accept Chartbrook's argument that *Britoil plc v Hunt Overseas Oil Inc*[17] favoured a subjective approach. This was because Hobhouse LJ had there upheld the judgment of Saville J below and had stated that "Saville J did not base himself upon any consideration of the evidence as to the actual state of mind of the parties".[18]

C. The *FSHC* Case

FSHC was a parent company ("the Parent"). In 2012, as part of a private equity financing transaction, the Parent was required to provide security over a shareholder loan to the security

[13] *Joscelyne v Nissen* [1970] 2 Q.B. 86.
[14] *Chartbrook* [2009] UKHL 38, [2009] 1 A.C. 1101 at [60].
[15] [1953] 2 Q.B. 450 at 461; *Chartbrook* [2009] UKHL 38, [2009] 1 A.C. 1101 at [60].
[16] *Rose v Pim* [1953] 2 Q.B. 450 at 461-462.
[17] [1994] C.L.C. 561.
[18] [1994] C.L.C. 561 at 571; *Chartbrook* [2009] UKHL 38, [2009] 1 A.C. 1101 at [63]. Lord Hoffmann also cited in support of an objective approach the judgment of Mustill J in *Etablissements Levy v Adderley Navigation Co Panama SA (The Olympic Pride)* [1980] 2 Lloyd's Rep. 67 at 72 and of Sir Raymond Evershed MR in *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll. L. Rep. 97 at 107.

agent (Barclays Bank plc, replaced by GLAS Trust Corp Ltd by the time of the appeal) ("the Security Agent"). In 2016, it was noticed by the Parent's lawyers that the security had not been assigned. Arrangements were made between the Parent and the Security Agent for the missing security to be provided via two accession deeds. The parties did not realise that the effect of these accession deeds was to impose additional, far more onerous, obligations on the Parent than were required. When this came to light, the Parent sought rectification of the deeds to exclude the additional obligations.

The case was, like *Chartbroo*k, one falling within the second – no antecedent contract – situation identified in Section B. The trial judge, Henry Carr J, found as a fact that when the deeds were executed both parties' representatives intended that the accession deeds would do no more than provide the missing security.[19] He, therefore, concluded that rectification should be granted. That conclusion was reached by applying an objective approach to the issue of continuing common intention following *Chartbrook*, but the judge held that he would have reached the same conclusion applying a subjective approach.

In the Court of Appeal, the Security Agent did not challenge the judge's findings of fact, but did challenge the overall conclusion. The Parent contended that the judge's overall conclusion was correct, but it was also part of the Parent's case that the correct approach to common intention was a subjective one. This put the correct approach to common intention in issue and it was "necessary to confront it".[20] The judgment of Leggatt LJ (with whom Rose and Flaux LJJ "joined") contains a comprehensive and overdue analysis of the correct test to be applied to rectification for common mistake, with the result that a subjective approach – and not the objective approach favoured in *Chartbrook* – was the correct one to apply to the facts.

In reviewing the relevant authorities, Leggatt LJ observed the longstanding jurisdiction of courts of equity to correct mistakes in documents by rectification. He pointed out that the language used by the courts in connection with that jurisdiction made clear the significance of the *actual* intentions of the parties behind the instrument of which rectification was sought. For example, the courts had spoken of identifying "the concurrent intention of all parties";[21] "reforming written agreements" that were "contrary to the intention of the parties…under a mutual mistake";[22] and the need for a party seeking rectification of an instrument to prove "that

[19] [2018] EWHC 1558 (Ch).
[20] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [10].
[21] *Shelburne v Inchiquin* (1784) 1 Bro. C.C. 338 at 341; 28 E.R. 1166 at 1168.
[22] *Fowler v Fowler* (1859) 4 De G. & J. 250 at 264; 45 E.R. 97 at 103.

the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution".[23]

Leggatt LJ also explained why certain observations of Denning LJ in *Rose v Pim*[24] – relied upon by Lord Hoffmann in *Chartbrook* – did not support the general application of an objective approach. Denning LJ's observations had to be viewed in their historical context: they were made before the Court of Appeal had, in *Joscelyne v Nissen*,[25] confirmed rectification could be granted where there was no antecedent contract, and Denning LJ had been concerned with the need to reconcile apparently conflicting authorities on the point of the correct approach in the antecedent contract situation.

As to these authorities, in *Lovell & Christmas Ltd v Wall*,[26] Lord Cozens-Hardy MR stated rectification "presupposes a prior contract".[27] Subsequently, however, in *Shipley Urban District Council v Bradford Corporation*,[28] in which *Lovell* was not cited, Clauson J would have had "difficulty" limiting rectification to the antecedent contract situation had it been necessary to decide the issue; and, in *Crane v Hegeman-Harris Co Inc*,[29] Simonds J (with whose judgment the Court of Appeal expressed its "entire agreement"[30]) stated it was "not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify".[31] In *Shipley*, Clauson J described rectification as proceeding "on proof of mutual mistake in recording the concurrent intention of the parties at the moment of execution of the instrument which it is sought to rectify"[32] and, in *Crane*, Simonds J claimed it "sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement".[33] Hence, Denning LJ's observations in *Rose v Pim* that rectification was concerned not with parties' "inner minds" and "intentions" but with their "outward acts" and "outward agreement"[34] were made in relation to the antecedent contract

[23] *Fowler* (1859) 4 De G. & J. 250 at 265; 45 E.R. 97 at 103.
[24] [1953] 2 Q.B. 450.
[25] [1970] 2 Q.B. 86.
[26] (1911) 104 L.T. 85.
[27] *Lovell* (1911) 104 L.T. 85 at 88, where it was said rectification "may be regarded as a branch of the doctrine of specific performance". Similarly, at 91, Fletcher Moulton LJ observed: "To my mind, 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."
[28] [1936] Ch. 375.
[29] [1939] 1 All E.R. 662.
[30] *Crane v Hegeman-Harris Co Inc* [1939] 4 All E.R. 68 at 72.
[31] *Crane* [1939] 1 All E.R. 662 at 664.
[32] *Shipley* [1936] Ch. 375 at 396.
[33] *Crane* [1939] 1 All E.R. 662 at 664.
[34] *Rose v Pim* [1953] 2 Q.B. 450 at 461-462.

situation. Indeed, Denning LJ had said: "It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law…but, formalities apart, there must have been a concluded contract".[35] As such, this had to be understood as no more than a statement of what the scope of rectification was thought to be at the time, with Denning LJ simply concerned to ensure that the question "whether there had been a prior contract and what its terms were" was answered with "a conventional application to the facts of the test as to whether a contract had been reached", that is, objectively, without taking into account parties' subjective intentions or understanding of what was agreed.[36] Contrary to the conclusion in *Chartbrook*, Denning LJ had not gone as far as to endorse an objective approach to rectification in the no antecedent contract situation.[37]

The court in *FSHC* also considered a subjective approach to be supported by *Britoil plc v Hunt Overseas Oil Inc*.[38] That case had been cited in *Chartbrook* in support of an objective approach. The relevant issue in *Britoil* was whether the written contractual instrument could be rectified to give it the same effect as the parties' pre-contractual "heads of agreement". It was argued that the meaning of the heads of agreement should be ascertained objectively. The dissenting judge (Hoffmann LJ) accepted that argument, but the majority held a distinction should be drawn between the antecedent contract and no antecedent contract situations. Where rectification was sought in relation to a written instrument made pursuant to an antecedent contract, the court should construe that contract objectively, with rectification of the instrument "analogous to the remedy of specific performance".[39] As Hobhouse LJ (with whom Glidewell LJ agreed "in every respect"[40]) pointed out, however, to extend that approach to the no antecedent contract situation would lead to the possibility that "less formal, less considered and

[35] *Rose v Pim* [1953] 2 Q.B. 450 at 461.
[36] These points were made extra-judicially by Patten LJ: Sir Nicholas Patten, 'Does the Law Need to be Rectified? *Chartbrook* Revisited' (Chancery Bar Association Annual Lecture, April 2013), [12] available at <www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited>; cited with approval in *FSHC* at [65].
[37] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [56]-[66]. Leggatt LJ explained, at [156], that Denning LJ's judgment "was premised on the view that rectification had to be based on a prior concluded contract and that a continuing common intention was not sufficient. Denning LJ was saying no more than that the meaning of such a concluded contract (as with any contract) must be ascertained objectively. That is unexceptionable, but does not support the view that, where rectification is based on a common intention, no actual common intention need be shown".
[38] [1994] C.L.C. 561.
[39] *Britoil* [1994] C.L.C. 561 at 572, applying the statement of Lord Cozens-Hardy MR in *Lovell* quoted above at fn. 27.
[40] *Britoil* [1994] C.L.C. 561 at 580.

less carefully drafted earlier documents" could be given greater weight than the parties' concluded written contract.[41] He explained the distinction, thus:

> "There must be a reality to the allegation of common mistake. It is a factual allegation, not a question of law. On the defendants' argument before us no actual common mistake is required. The parties are to be treated as if they were bound by the objective interpretation of the, *ex hypothesi*, non-binding heads of agreement. Where the relevant document is a legally binding document, it is appropriate and just to hold the parties to the objectively ascertained meaning of the words used. But where they are not bound and where the court is only looking at the previous document to help it answer the factual question whether or not there has been a mistake in the preparation of the legal document, the matter becomes one of fact not law."[42]

That particular passage had not been cited in *Chartbrook*. Moreover, as to the aspect of *Britoil* that was relied on by Lord Hoffmann in *Chartbrook*, a closer analysis of what Hobhouse LJ had meant when he said that the trial judge, Saville J, "did not base himself upon any consideration of the evidence as to the actual state of mind of the parties" made clear that this was not an endorsement of an objective approach. As Leggatt LJ explained, Hobhouse LJ was referring to the fact that Saville J had concluded that the heads of agreement was insufficient to establish a common intention and mistake "and in those circumstances did not find it necessary to consider the other evidence in the case that no mistake was made (including the evidence of witnesses as to what they thought at the time)".[43]

Nor was the court bound to adopt an objective approach by the problematic decision of the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*.[44] This was despite the doubt that had been expressed by some – including, extra-judicially, one of the members of the Court of Appeal in *Daventry* – whether it remained open to the Court of Appeal to not follow *Chartbrook* after the objective approach had been applied in *Daventry*.[45] That

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[41] *Britoil* [1994] C.L.C. 561 at 573; *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [94].
[42] *Britoil* [1994] C.L.C. 561 at 573.
[43] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [161]. As Lord Toulson observed, extra-judicially, Lord Hoffmann's explanation in *Chartbrook* of Hobhouse LJ's judgment in *Britoil* "minimises the real significance of Hobhouse LJ's reasoning": Lord Toulson, 'Does Rectification Require Rectifying?' (TECBAR Annual Lecture, October 2013), 13 available at <www.supremecourt.uk/docs/speech-131031.pdf>.
[44] [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333. As to the problematic nature of that decision, see: Paul S. Davies, 'Rectifying the Course of Rectification' (2012) 75 M.L.R. 412.
[45] Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 C.L.P. 367, 376. The same conclusion had been reached, extra-judicially, by Patten LJ: 'Does the Law Need to be Rectified? *Chartbrook* Revisited' (Chancery Bar Association Annual Lecture, April 2013), [10].

case had simply been argued on the basis that Lord Hoffmann's objective approach was correct and so the court had proceeded on that basis. It was also recognised that the court in *Daventry* had some difficulty with the objective approach.[46] Indeed, upon a review of the relevant authorities, it was apparent they either did not preclude or otherwise provided support for a subjective approach.[47]

Summarising the correct approach to rectification for common mistake, Leggatt LJ held:

> "[B]efore a written contract may be rectified on the basis of a 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."[48]

The distinction between scenarios (1) and (2) and the requirement of an "outward expression of accord" will be returned to below. The effect of *FSHC* is to accept that a subjective approach is required in the second – no antecedent contract – situation. This addresses the wrong turn taken in *Chartbrook* and, in general terms, should be welcomed by those that had earlier advocated for a subjective approach in response to *Chartbrook*.[49] It followed on the facts of *FSHC* that the effect of the trial judge's findings of fact was that the parties had the required common intention, so the Security Agent's appeal failed.

D. Rectification following *FSHC*

One of the main problems with the objective approach preferred in *Chartbrook* is that it allowed rectification for common mistake even where there was, in reality, no mistake common to both

[46] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [118]-[119], [133]-[134]. Moreover, as Leggatt LJ observed at [121]-[122], some of the analysis in *Daventry* was at odds with an objective approach.
[47] Support was also drawn from the position in Australia, especially *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65 and *Simic v New South Wales Land and Housing Corpn* [2016] HCA 47 (where the High Court of Australia had doubted Lord Hoffmann's approach) and from that in New Zealand, especially *Westland Savings Bank v Hancock* [1987] 2 NZLR 21. Leggatt LJ observed, at [171], that the "only common law jurisdiction, so far as we can find, in which approval has been expressed for an objective test of common intention is Hong Kong" but that was in a judgment of Lord Hoffmann, sitting as a Non-Permanent Judge in *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKSFA 35.
[48] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [176].
[49] See, eg, Paul S Davies, 'Rectification Rectified' (2020) C.L.J. (forthcoming).

parties. In the absence of such an actual mistake, there ought to be no case for equitable intervention.[50] It created the possibility that a party might escape the effects of a bad bargain via a particular understanding of what the parties had intended which that party did not itself have. This would be especially problematic were it to impose on the other party a contract to which that party had not – and would not have – agreed. In an earlier judgment, Leggatt J (as he then was) said:

> "I find it hard to see any equity in a doctrine which allows a party to obtain rectification of a document to reflect a view of what had been agreed that the party himself did not actually have, just because a reasonable observer would have taken this to be his view. Equally, I find it difficult to see the equity of imposing the view that a hypothetical reasonable observer would have formed of what had been agreed on a party who did not have that understanding of what had been agreed and whose understanding is reflected in the proper interpretation of the final document."[51]

Such an outcome as contemplated by Leggatt J is clearly unattractive as a matter of policy. It would undermine certainty and it would doubtless be of some surprise to contracting parties to learn that they could be bound in this way by different terms to those which they correctly thought the contract to contain.[52] In addition, as the court recognised in *Britoil*, it would lead to the illogical position of affording higher status to "less formal, less considered and less carefully drafted earlier documents" than "the clear language of the considered and carefully drafted definitive agreement" of the parties.[53]

Leggatt LJ observed in *FSHC* that the requirement that the wording of the contractual document must be inconsistent with the parties' actual common intention "is rightly a demanding test to satisfy" which respects the primacy of the final contract.[54] That this might result in comparatively fewer contracts being rectified than would be the case with an objective approach should be seen as a reason to support a subjective approach rather than to undermine

[50] See David McLauchlan, 'Chartbrook Ltd v Persimmon Homes Ltd: Commonsense Principles of Interpretation and Rectification?' (2010) 126 L.Q.R. 8, 13; Patten, 'Does the Law Need to be Rectified? *Chartbrook* Revisited' (Chancery Bar Association Annual Lecture, April 2013), [28].
[51] *Tartsinis* [2015] EWHC 57 (Comm) at [91].
[52] See the similar criticism by Morgan J in *Crossco No.4 Unlimited* [2011] EWHC 803 (Ch) at [253].
[53] *Britoil* [1994] C.L.C. 561 at 573; above fn. 41. See also Paul S. Davies, 'Rectification Versus Interpretation' (2016) 75 C.L.J. 62, 75.
[54] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [173].

it.[55] This must be correct. Rectification for common mistake should be reserved for situations where it can be proved that the parties actually had a contrary common intention, such that there has been a genuine mistake; a court does not have "a sort of roving commission to do whatever it regards as fair in relation to a claim for rectification",[56] nor should rectification reduce the importance of proper scrutiny during the formation process. As has, correctly, been cautioned by the Supreme Court of Canada, "a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts".[57]

Different approach according to whether an antecedent contract exists

The result of *FSHC* is that it is necessary to draw a distinction in principle between the (1) antecedent contract and (2) no antecedent contract situations as outlined in Section B. In the former situation the approach to ascertaining intention remains objective, whereas in the latter it is subjective. The need to avoid such a distinction had been influential in Lord Hoffmann's endorsing an objective approach in the no antecedent contract situation in *Chartbrook*.[58] But such a distinction and hence different approach is, upon an analysis of the authorities, capable of justification in principle.[59] In *Britoil*, Hobhouse LJ explained:

> "Where the relevant document is a legally binding document, it is appropriate and just to hold the parties to the objectively ascertained meaning of the words used. But where they are not bound and where the court is only looking at the previous document to help it answer the factual question whether or not there has been a mistake in the preparation of the legal document, the matter becomes one of fact not law. The claimant must prove the mistake and he must prove that it is a common mistake."[60]

In *FSHC*, Leggatt LJ developed this and rationalised the distinction as regards the underlying principles as follows. Where the parties have a binding agreement to execute a document containing particular terms, but in error execute a document containing different terms (the

[55] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [174]. This was made in response to an argument of Marcus Smith QC (as he then was), which had been relied upon in *Chartbrook*: Marcus Smith, 'Rectification of Contracts for Common Mistake, Joscelyne v Nissen, and Subjective States of Mind' (2007) 123 L.Q.R. 116.
[56] *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P. & C.R. 29 at [41] per Neuberger J.
[57] *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd* [2002] 1 S.C.R. 678, 2002 SCC 19 at [63].
[58] Above, text to fn. 14.
[59] It is clear that in part Leggatt LJ was concerned to reconcile the authorities on this point. It should be regarded as correct in relation to how the law currently stands. It might be, however, that the Supreme Court decides to abandon this "dual" approach. See Edwin Peel, 'Rectification Revisited' (2020) 136 L.Q.R. 205, 208-209.
[60] *Britoil* [1994] C.L.C. 561 at 573.

antecedent contract situation), the court's first task is to ascertain the terms of the prior binding agreement. That process is necessarily an objective one, in line with the usual approach to ascertaining terms of contracts at common law. If the subsequent document is not consistent with the prior binding agreement, it will be rectified to enforce the specific terms of the binding agreement.[61] This explained the observations – made before *Joscelyne v Nissen*[62] confirmed rectification was available in the no antecedent contract situation – of James V-C that "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts"[63] and of Lord Cozens-Hardy MR that rectification may be "a branch of the doctrine of specific performance".[64] The underlying principle was explained as one by which agreements (as objectively determined) must be kept, that is, "the court should give effect to what the parties have contractually agreed to record in their document".[65]

The same underlying principle could not, however, extend to the no antecedent contract situation. Rather, where rectification is sought to give effect to a common continuing intention not amounting to a legally enforceable contract, it is "based on an equitable principle of good faith".[66] As such, there was no anomaly in applying an objective approach in the antecedent contract situation and a subjective approach in the no antecedent contract situation: "Different principles are in play".[67]

The need for an outward expression of accord

Another aspect of rectification for common mistake that had remained unsettled in the non-antecedent contract situation was how the parties' intentions were to be proved in an evidential sense. Is it sufficient that the party seeking rectification could demonstrate on the evidence that both parties privately held the same intention? Or is it necessary that the intention was

[61] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [141].
[62] [1970] 2 Q.B. 86.
[63] *Mackenzie v Coulson* (1869) L.R. 8 Eq. 368 at 375.
[64] *Lovell* (1911) 104 L.T. 85 at 88.
[65] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [141].
[66] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [142]. See also at [146]: "The justification for rectifying a contractual document to conform to a "continuing common intention" is therefore not to be found in the principle that agreements (as objectively determined) must be kept. It lies elsewhere. It rests on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties 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 mind. The underlying moral principle can be characterised…as being that persons who make a contract have to observe certain standards of good faith."
[67] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [153]. For a more detailed justificatory analysis of adopting a different approach according to whether an antecedent contract exists, see James Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] L.M.C.L.Q. 48.

"shared" in the sense of expressed via an outward manifestation? If the latter, what does this look like in practice? The Court of Appeal held in *Joscelyne v Nissen*[68] that there must be an outward manifestation, that is, an "outward expression of accord". Subsequently, in *Munt v Beasley*,[69] an outward expression of accord was characterised as "an evidential factor rather than a strict legal requirement".[70] The court in *FSHC* concluded, however, that the authorities relied on in *Munt* did not support the view that an outward expression of accord was merely an evidential requirement; rather, it was a discrete element to be established.[71] This was considered necessary to ensure the court is giving effect to the parties' true (albeit non-contractual) "agreement":[72]

> "As has often been observed, the power of the court to rectify a contractual document is not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed. Moreover, the effect of rectification is not merely to prevent a party from enforcing the written terms of a contract: it is to alter those terms so as to establish legal rights and obligations which differ from those recorded in the original contractual document…establishing new contractual rights and obligations in this way is only justified if they are founded on mutual agreement…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."[73]

The need to establish an outward expression of accord equated with communicated "agreement" might be thought controversial: if the parties made the same mistake and this can be proved, should it matter that they had not expressed this via an outward expression of accord?[74] They are each mistaken and the contract amounts to something neither intended it

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[68] *Joscelyne* [1970] 2 Q.B. 86 at 98.
[69] [2006] EWCA Civ 370.
[70] *Munt* [2006] EWCA Civ 370 at [36] per Mummery LJ. The requirement of an outward expression of accord in *Joscelyne* had been criticised in Leonard Bromley QC, 'Rectification in Equity' (1971) 87 L.Q.R. 532. Mummery LJ's approach was endorsed extra-judicially by Lord Toulson: 'Does Rectification require Rectifying?' (TECBAR Annual Lecture, October 2013) at 7 available at <www.supremecourt.uk/docs/speech-131031.pdf>.
[71] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [72]-[79], [176].
[72] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [76]. Compare Smith, 'Rectification of Contracts for Common Mistake, Joscelyne v Nissen, and Subjective States of Mind' (2007) 123 L.Q.R. 116.
[73] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [77]. Leggatt LJ cited his own earlier judgment in *Tartsinis* [2015] EWHC 57 (Comm) at [88]: "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."
[74] Compare Bromley, 'Rectification in Equity' (1971) 87 L.Q.R. 532 at 532: "Intercommunication, however necessary to the common law of contract, properly plays no part either in theory or in the practice of this equitable doctrine".

to. In the Australian case of *Ryledar Pty Ltd v Euphoric Pty Ltd*,[75] in a passage cited with approval in *FSHC*, Campbell JA held:

> "That the rationale for granting rectification is to avoid unconscientious departure from the common intention assists in deciding what is required for there to be a "*common intention*". If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?"[76]

Yet, it has been said that such a position is "remarkable"[77] and the "law should not condone such two-faced behaviour".[78]

Even if "undisclosed" intentions are ruled out, the line is not always an easy one to draw in practical terms. Suppose A and B each subjectively intend X and each assumed the other to intend X. Should rectification of the contractual document be denied if it actually states or means Y?[79] It might be, for example, that each party, privately, regarded the matter to be so obvious at the time as to not require discussion and outward expression. Moreover, as the facts of *FSHC* demonstrate, what was *not* said might well be an important indication as to the parties' true agreement.[80] But it is perhaps necessary to not overstate the significance of this. The court in *FSHC* explained that "the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms. The shared understanding may be tacit"[81] or via "a well understood business practice".[82] This might mean an accord can be found

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[75] [2007] NSWCA 65.
[76] *Ryledar* [2007] NSWCA 65 at [315]; *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [77].
[77] David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 L.Q.R. 608, 617. See also David Hodge QC, *Rectification*, 2nd edn (London: Sweet & Maxwell, 2016) para 3.51.
[78] Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] L.M.C.L.Q. 48, 65.
[79] See HG Beale (ed), *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018) para 3.065 where it is suggested rectification should be available in principle in such a situation.
[80] *FSHC* [2018] EWHC 1558 (Ch) at [158] where Henry Carr J observed: "it is very significant that the entire focus of the parties was on filling the gap, and there is nothing in any of the communications between them to suggest that the parties intended, in executing the 2016 Accession Deeds, for the Parent to go further than required…The Additional Obligations resulted in a fundamental change to that structure. The absence of any discussion about such a fundamental change is, in my view, convincing proof of an intention not to incur the Additional Obligations. Had there been such an intention, it would have been the subject of substantial discussion between the parties."
[81] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [81].
[82] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [83]. Henry Carr J observed at first instance: "It would be inconsistent with the objective of rectification for common mistake if the court were precluded from

through "understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words".[83] As such, cases in which it is not possible to establish an outward expression of accord might well be rare.

Nonetheless, what equates to an outward expression of accord will likely continue to be tested, not least because the fact-sensitive nature of "common intention" means it might not be easy to establish whether the parties' communications have been sufficient to meet the requirement of an outward expression of accord in all cases.[84] For this reason, courts in other jurisdictions have doubted or refused to accept that an outward expression of accord should stand as high as a discrete or substantive element.[85] Part of the difficulty was explained by Campbell JA in *Ryledar*: "Caution is needed in evaluating the case law relating to whether or not an outward expression of accord is needed. That is because it is not clear how much (or how little) is involved in an assertion, or denial, of the need for an "outward expression of accord". It is not clear just what the phrase means."[86]

considering…understandings that the parties thought so obvious as to go without saying, or that were reached without being spelled out in so many words." See [2018] EWHC 1558 (Ch) at [35].

[83] *FSHC* [2019] EWCA Civ 1361, [2020] 2 W.L.R. 429 at [84], [87], endorsing the expression in *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018) para 3.064.

[84] Suppose during their negotiations A writes to B and says 'my understanding of this matter is X'. It is apparent from B's internal communications (not shared with A) that B also understands the matter to be X. The parties subsequently enter into a written contract and the matter bears meaning Y. At trial, A is able to establish on the evidence that B understood the matter to mean X. Would this be sufficient to amount to a tacit agreement? Should A be denied rectification?

[85] In New Zealand, see, eg, *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 30 per Tipping J. In Australia, see, eg, *Ryledar* [2007] NSWCA 65 at [273]-[316], esp [281], [316]; *RCR Tomlinson Ltd v Russell* [2015] WASCA 154 at [53] ("in order to constitute a common intention the intention of the parties must have been disclosed in some way, although not necessarily by a direct communication that gives rise to an outward expression of accord between them"). See also *Hammond v Hammond* [2010] NSWSC 331 at [52]; *Patrick Stevedores Operations (No 2) Pty Ltd v Melbourne Port Lessor Pty Ltd* [2016] VSC 528 at [38]; JW Carter, *Contract Law in Australia*, 6th edn (Australia: LexisNexis Butterworths, 2013) para 21.08, suggesting: "In view of the clear and convincing evidence which a plaintiff seeking rectification must adduce, lack of any outward manifestation of the required common intention may well signify that the party seeking rectification will not be able to discharge the onus of proof. Although in most cases it is difficult to see how a plaintiff can succeed without evidence of a manifested common intention, there are distinctions between what must be proven, how proof is adduced and how convincingly the common intention must be proved…It is suggested that the law does not require an outward manifestation of accord, and that it suffices that the plaintiff proves, even out of the mouths of the witnesses at the hearing, that both parties had the necessary common intention." At High Court level, see *Simic v New South Wales Land and Housing Corpn* [2016] HCA 47 at [41]-[46]. At [45], Kiefel J referred to the earlier High Court decision in *Pukallus v Cameron* (1982) 180 C.L.R. 447 at 452 and suggested that Wilson J (with whom Gibbs CJ agreed) there appeared to have preferred the approach of Bromley, 'Rectification in Equity' (1971) 87 L.Q.R. 532, that "that the requirement of an outward expression of accord was not justified by principle or authority". Both *Simic* and *Westland Savings Bank* were referred to in *FSHC* in support of the general subjective approach but were not discussed in connection with the issue of outward expression of accord; see above fn. 47.

[86] *Ryledar* [2007] NSWCA 65 at [280]. At [281], Campbell JA goes on to explain how the parties might come to know of each other's intentions in the way required to establish a common intention. Campbell JA's observations at [281] were cited with approval in *FSHC* at [82] in support of the need for an outward expression of accord and the fact this can be achieved via a "tacit" understanding. It is clear, however, that Campbell JA was not going so

What is clear is that the combination of a subjective approach and the need for an outward expression of accord might well have important implications in relation to the scope of rectification for common mistake. Suppose A and B each have a subjective intention as to X, which has been outwardly expressed in the parties' communication. A subsequently realises – or perhaps instructs lawyers to assist its negotiations and these lawyers point out – that X actually means Y. A thinks nothing of this and says nothing to B. The parties subsequently enter into a written contract at which point the provision means Y to A, but X to B. Were B to bring a claim for rectification, returning to the requirements set out by Peter Gibson LJ in *Swainland*,[87] as regards any common intention, B is able to establish "there was an outward expression of accord" (requirement (2)), but not that "the intention continued at the time of the execution of the instrument sought to be rectified" (requirement (3)). It seems that requirement (2) is subject to requirement (3) in that any common intention outwardly expressed must continue to the point the contract is formed. On these facts, therefore, rectification of the final written contract will not be possible.[88] The answer might be found in the doctrine of unilateral mistake rectification,[89] albeit at present that doctrine relies on a certain standard of knowledge or misleading behaviour on the part of the non-mistaken party.[90]

E. Conclusion

The function of rectification for common mistake ought to be straightforward. Parties' negotiations can be long and full of complexities and, occasionally, the written contract that is the product of these negotiations does not say or mean what the parties intended it to. (Of course, at the other extreme, it might be that for reasons of urgency the negotiations and drafting of the contract are rushed with the parties unable to check diligently what they are writing.) At common law, the courts are – quite properly – limited as regards what they can do to address this through the *construction* of the contract.[91] In these circumstances, the basis of equitable

far as to recognise an outward expression of accord as a substantive requirement in the way it was recognised in *FSHC*.

[87] *Swainland* [2002] EWCA Civ 560, [2002] 2 E.G.L.R. 71 at [33]; set out above at text to fn. 3.

[88] Compare *Daventry* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333, esp. at [211] per Lord Neuberger MR.

[89] Davies, 'Rectification Versus Interpretation' (2016) 75 C.L.J. 62, 79.

[90] See McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 L.Q.R. 608 and the discussion in *Chitty on Contracts*, 33rd edn (London: Sweet & Maxwell, 2018) para 3.088. Compare Smith, 'Rectification of Contracts for Common Mistake, Joscelyne v Nissen, and Subjective States of Mind' (2007) 123 L.Q.R. 116, 132, where the result in a scenario similar to this one is suggested to support an objective approach.

[91] Although the courts have on occasion spoken in terms that in effect give the process of construction a remedial quality of the kind which blurs the boundaries between construction and rectification. See, eg, the speeches of Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912-913 and *Chartbrook* at [14], [25] and also the dissenting judgment of Lord Carnwath in *Arnold v Britton* [2015] UKSC 36, [2015] A.C. 1619.

intervention ought to serve a distinct purpose, namely to correct the position where one of the parties can establish that something has gone wrong and the written contract does not say or mean what the parties actually intended. Strong evidence should be required for a party to persuade a court that the written contract should be corrected in this way. It is this position that the court in *FSHC* adopts.