

## MISTAKES IN CONTRACTS: CLARIFICATION ON RECTIFICATION - FSHC GROUP HOLDINGS LTD V GLAS TRUST CORPORATION LTD [2019] EWCA CIV 1361.

- **When can a mistake in a contract be rectified?**
- **What does a party need to prove in order to obtain rectification?**

### WHAT'S IT ABOUT

However unlikely it seems after weeks of negotiation, mistakes in contracts can sometimes happen. There have even been situations where both parties intended to sign up to one thing, only to discover the written terms of the contract say something completely different after completion. One might assume that this is an easy problem to rectify, as contracts may readily be amended by a Deed of Variation. While correct, this requires both parties to agree that a mistake has been made that requires rectification. What happens if the party who now finds itself at an advantage does not agree that a mistake has been made?

This is the situation that FSHC Group Holdings Limited (**FSHC**) found itself in, as reported in *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd [2019] EWCA Civ 1361*.

As part of a complex financing transaction, a shareholder loan was supposed to be assigned upon completion, but this was overlooked. When the omission was spotted, a deed of accession was drafted to join FSHC as a party to one of the finance agreements in order to resolve the issue. However, in joining the finance agreement FSHC not only assigned the benefit of the shareholder loan, it also agreed to be the primary obligor to pay debts owed under the finance agreement, and use all of its assets (which were substantial) to guarantee payments under the finance agreement.

FSHC said that it was never intended that FSHC would take on these additional onerous obligations, only that the shareholder loan would be assigned. The security trustee (previously Barclays, now Glas Trust) (**Security Trustee**) disagreed, and argued that as the parties were discussing restructuring the debt at the time, FSHC made a deliberate choice to plug the gap in the security by accession to pre-existing agreements.

FSHC contacted the Security Trustee seeking rectification, and when the Security Trustee refused, FSHC commenced proceedings.

### COULD THE MISTAKE BE RECTIFIED?

The Court of Appeal decided that the courts may rectify a contract for common mistake in two circumstances:-

- where the document fails to give effect to a prior concluded contract; and
- where there is no prior contract, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record.

It was decided that the judicial bases for each of (1) and (2) are different. For (1), if there is a previous contract then rectification would be equivalent to requesting specific performance of the terms of this prior contract. Therefore, the Court would need to apply an objective standard to determine the parties' intentions.

For (2), the Court found it was most appropriate to apply a subjective test: it was necessary to show not only that each party to the contract had the same actual intention, but also that there was "outward expression of accord" i.e. the parties understood each other to share that intention as a result of communication between them.

### WHAT NOW?

It may not be as easy as one might expect therefore, to change a concluded contract. Leggatt LJ said obiter that rectification should be difficult to prove as a matter of policy. Accordingly, it is very important to give the whole of your contract a final read before it is signed, just to make sure that everything in there is as you intend.

## WHO TO CONTACT



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