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An objective or subjective approach to rectification of documents in Scotland?

A. INTRODUCTION

In *Briggs of Burton plc v Doosan Babcock Ltd*¹ Lord Tyre had to consider a “short and important point” in relation to the law of rectification of a document under section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985. That point was whether, where there is a non-binding antecedent agreement between the parties, which is not accurately reflected in the document sought to be rectified, the court should consider the parties’ continuing common intention on a subjective or objective basis. Essentially, if between the time when the non-binding agreement was made and the time the formal document, of which rectification is sought, was entered into, one of the parties changed its mind, can that change of mind prevent there from being a continuing common intention, such that rectification is not permitted?

Section 8(1)(a) of the 1985 Act provides that where the court is satisfied that a document intended to express or give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made the court may order rectification.

In this case, the parties had entered into non-binding heads of terms for a sub-lease of commercial property. When missives, incorporating a draft sub-lease, were entered into two clauses differed from the heads of terms.² Between the heads of terms being agreed and the missives being concluded the defender had changed its mind about the issues dealt with in these clauses. The defender’s solicitor drafted the missives taking account of his client’s change of heart.³ The changes were not expressly drawn to the pursuer’s solicitor’s attention. Only after missives were concluded did the pursuer realise that the terms of the sub-lease included within the missives differed from the heads of terms.⁴ The pursuer sought rectification of the missives in order that they accorded with the heads of terms.

¹ [2020] CSOH 100

² The clauses were (1) the time at which a break in favour of the sub-tenant could be exercised; and (2) liability for repair and maintenance of cranes which were situated on the sub-leased premises.

³ When the missives were originally drafted the defender had not yet changed its position regarding maintenance and repair of the crane but subsequently did so, so that the terms of the draft missives then accorded with the defender’s instructions – see para [14].

⁴ This was so despite the fact that the pursuer’s solicitor noted the discrepancy in relation to repair and maintenance of the cranes but did not seek instructions on that issue – see para [15] – [17].

B. DECISION

Lord Tyre, first of all, considered the position where the parties' prior agreement was legally binding. Having considered the main Scottish authorities and the position in English law he noted that where there is a binding prior agreement the parties are expected to execute a document giving effect to that agreement. If there was any intention to depart from the prior agreement it had to be a common intention, and, in line with usual contractual principles, that common intention had to be determined objectively. A subjective change of intention on the part of one of the parties was of no relevance.⁵

He then went on to deal with the issue in this case: the correct approach to the existence of a continuing common intention where there is a non-binding antecedent agreement. Lord Tyre referred to Lord Cameron's *obiter* comments in *Angus v Bryden*⁶ that a subjective approach should be adopted.⁷ He then referred to the comments made in *Macdonald Estates plc v Regenis (2005) Dunfermline Ltd*⁸ where Lord Reed concluded that,

It would be productive of injustice... if the court had no jurisdiction to rectify a contract which one party had entered into on the basis of a manifest prior agreement, which to all appearances continued but had been incorrectly expressed in the final document, merely because of an uncommunicated change of mind on the part of the other party.⁹

Lord Tyre commented that there were some aspects of Lord Reed's reasoning which did not appear to him to be entirely self-evident. For instance, where a party, in the course of negotiation of the terms of the document that is intended to be legally binding, proposes a term that departs from the prior non-binding agreement, that that should be described as an undisclosed intention to depart from the prior agreement.¹⁰

Finally, Lord Tyre noted that in *Britannia Invest A/S v Scottish Ministers*¹¹ the Sheriff considered the parties' continuing common intention on an objective basis, applying Lord Hodge's statement of the law in *Patersons of Greenoakhill v Biffa Waste Services Ltd*¹² that an objective approach should be taken.¹³

⁵ *Briggs* paras [40] – [45].

⁶ 1992 SLT 884.

⁷ *Briggs*, para [46].

⁸ 2007 SLT 791.

⁹ *Ibid* at para [169].

¹⁰ *Briggs* para [48].

¹¹ 2018 SLT (Sh Ct) 133.

¹² 2013 SLT 729.

¹³ *Briggs* para [49].

Lord Tyre then went on to consider the position in English law in relation to a non-binding antecedent agreement. He noted the differing approaches of the majority and minority of the Court of Appeal in *Britoil plc v Hunt Overseas Oil Inc*¹⁴ adopting a subjective and objective approach respectively, although Lord Tyre considered it more illuminating, following the observations of Hobhouse LJ in that case, to think of the matter as being whether the existence of continuing common intention should be seen as a question of fact, or of law.¹⁵ Lord Tyre then addressed Lord Hoffmann's *obiter* comments in *Chartbrook Ltd v Persimmon Homes*,¹⁶ which had been considered persuasive by Lord Hodge in *Patersons of Greenoakhill*,¹⁷ that,

.. it would be anomalous if the “common continuing intention” were to be an objective fact if [the antecedent agreement] amounted to an enforceable contract but a subjective intention if it did not...the authorities suggest that in both cases the question is what an objective observer would have thought the intention of the parties to be.¹⁸

Lord Tyre went on to note that these remarks had been made in the context of a finding that rectification would have been ordered had the defendant's interpretation of the disputed clause not been accepted. The claimant's interpretation did not accord with a prior consensus reached in informal correspondence and rectification would have been granted despite the fact that two of the claimant's directors subjectively understood that prior correspondence to have given the claimant the same entitlement it claimed by its interpretation of the contract. For Lord Tyre it seemed that Lord Hoffmann was rejecting subjective evidence as to the meaning of the prior correspondence. As such, properly interpreted, Lord Hoffmann's reference to “common continuing intention” in the passage quoted above was to the intention embodied in the antecedent agreement and not to common intention continuing to the date of the agreement of which rectification was sought. On that basis, Lord Hoffmann's comments were not in point on the facts of the case before Lord Tyre.¹⁹

The issue of changed intention arose in *Daventry District Council v Daventry & District Housing Ltd*²⁰ in which the Court of Appeal found that the case should be determined in accordance with Lord Hoffmann's observations in *Chartbrook* but in which Toulson LJ

¹⁴ 1994 CLC 561.

¹⁵ *Briggs*, para [51].

¹⁶ [2009] 1 AC 1101.

¹⁷ 2013 SLT 729.

¹⁸ [2009] 1 AC 1101 at para [60].

¹⁹ *Briggs*, para [53].

²⁰ [2012] 1 WLR 1333.

doubted the correctness of those observations.²¹ Lord Tyre went on to note that the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*²² also considered Lord Hoffmann's remarks in *Chartbrook* to be wrong. In this case Leggatt LJ commented:

The principle that a contractual document should be reformed so as to enforce what the parties have (objectively) agreed has no validity where the prior "agreement" is not a legally binding contract but a non-binding expression of intent. There is no principle which requires or justifies a court in holding the parties to the terms of an objective consensus reached during negotiations but never intended to be binding – even where... it is embodied in a document which the parties have signed – that it should not have any legal effect and represents only a stage in negotiations from which either party is free to walk away. Still less does the principle that parties should keep their promises to each other justify giving such consensus priority over the terms of a formal written contract by which (objectively) the parties did intend to be bound. To adopt this course is to impose on the parties a contract they never made in place of one which they did make.²³

He went on to note,

The justification for rectifying a contractual document to conform to "continuing common intention" ...rests on the equitable doctrine²⁴ 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... is entirely concerned with the parties' subjective states of mind....²⁵

As such, for the Court of Appeal, there was no anomaly in applying an objective test where there was a binding antecedent agreement and a subjective test where there was a non-binding agreement.²⁶ In relation to the subjective test the party seeking rectification would have to prove that when the parties executed the agreement of which rectification was sought, the parties had a common intention regarding a particular matter which, by mistake, the

²¹ *Ibid* at paras [176] – [177], referring to an article by Prof McLauchlan, "*Chartbrook Ltd v Persimmon Homes Ltd: commonsense principles of interpretation and rectification?*" 2010 LQR 8.

²² [2020] Ch 365.

²³ *Ibid*, para [143].

²⁴ In Scotland rectification is not based on equitable doctrine but on statute. Notwithstanding this different basis Lord Tyre considered the English cases to be helpful guidance when interpreting expressions such as "intention": see *Briggs*, paras [43] and [58].

²⁵ *FSHC*, para [146].

²⁶ *Ibid*, para [153].

document did not accurately express. It would be necessary to show not only that each party had the same actual intention on the issue, but also that there was an outward expression of accord, ie as a result of communication between them the parties understood each other to share that intention.²⁷

Lord Tyre shared the concerns expressed in *FSHC* about objectively construing a common continuing intention where one of the parties had, as a matter of fact, changed its intention since entering the non-binding agreement. However, mere change of intention was not of any significance unless it was communicated to the other party.²⁸ He went on to consider what was sufficient to constitute communication, noting that, at one end of the spectrum, there was the direct statement that the contract includes a term which is different from the antecedent agreement. On the other, a change could be made covertly by one party in the knowledge that the other party was not aware of it and would not have agreed to it. Between these extremes there was scope for uncertainty. The facts of this case were an example: the defender's solicitor included terms in the draft sub-lease which differed from what had been agreed in the heads of terms and which he did nothing to draw to the pursuer's solicitor's attention. But the pursuer's solicitor did notice the change although he did not expressly draw it to his client's attention.²⁹ For Lord Tyre if the relevance of these facts made a difference to the outcome of the case the law would be in an unacceptable state of uncertainty. Yet, he opined, that would be the consequence of applying an objective test.³⁰

Like the Court of Appeal in *FSHC* Lord Tyre saw no anomaly in an objective test being used where there was a binding antecedent agreement, and a subjective test where the agreement was not binding. In the context of interpreting "intention" in section 8(1)(a) of the 1985 Act, which clearly referred to intention at the time of executing the document of which rectification was sought, where there was a binding antecedent agreement the relevant principle was that the parties should be required to adhere to their contractual obligations, and, accordingly they should be presumed to have intended that the document would reflect the common intention expressed in their earlier contract. Where the antecedent agreement was non-binding and the parties had reserved their right to depart from that antecedent agreement no such assumption should be made. The starting point was that their respective rights should be determined by the contract which they entered with the intention of being

²⁷ *Ibid*, para [176].

²⁸ *Briggs*, para [59].

²⁹ *Briggs*, para [60].

³⁰ *Briggs*, para [61]. It is difficult to understand this given the need for communication between the parties of the changed intention noted by Lord Tyre and the Court of Appeal's views in *FSHC* on what has to be proved where the subjective test is used, noted above.

legally bound, ie the document of which rectification was sought. That, said Lord Tyre, was most productive of certainty.³¹

Lord Tyre found, as a matter of fact, that there was no continuing common intention on the matters in the two clauses at issue by the time the missives were concluded.³² He went on to state that he was not persuaded that the labels “objective” and “subjective” were determinative of the matter. He did however, reject the contention that evidence of the parties’ subjective intention should be disregarded in favour of an objective assessment of continuing common intention based on communications that “crossed the line” but which disregarded the terms of, and changes made to, the draft missives themselves.³³ It was fatal to the pursuer’s case that the missives accurately reflected the subjective intention of the defender, which had been communicated to the pursuer, without any intentional or unintentional concealment, by the terms of the draft missives.³⁴ The test in s8(1)(a) of the 1985 Act was not met because, at the time the missives were concluded, it was not intended by both parties that the missives should give effect, in relation to the two clauses at issue, to their common intention, objectively ascertained, at the date heads of terms were agreed.³⁵

C. DISCUSSION

This case marks a departure on the approach to rectification from previous authority, which suggested that an objective approach should be taken, both where there was a binding antecedent agreement and where that agreement was non-binding. This case makes clear that an objective approach should not be taken in the latter case.

What is much less clear is how subjective the subjective approach should be. Lord Tyre was clearly influenced by the debate in English law on the correct approach to rectification where the prior agreement is not binding. The Court of Appeal in *FSHC*³⁶ noted the need for an “an outward expression of accord” of the parties’ subjective intentions. Lord Tyre also found it fatal to the pursuer’s claim that the defender’s intention had been communicated to the pursuer’s solicitor, albeit in the form of a change to the terms of the missives from what had been agreed in the heads of terms, without this change being otherwise drawn to the pursuer’s solicitor’s attention. All of which suggests that a change of heart on the part of one of the parties (a truly subjective approach) without more will have no

³¹ *Briggs*, para [62].

³² *Briggs*, para [64].

³³ *Briggs*, para [64].

³⁴ *Briggs*, para [64].

³⁵ *Briggs*, para [65].

³⁶ [2020] Ch 365.

effect. Thus a subjective change of heart needs to be communicated for it be effective. This comes closer to an objective approach given a third party observer of the parties' actions and communications would take this into account in determining the parties' intentions at the time of contract formation. Such an approach would, of course, fit with existing rules on various aspects of the law of contract which adopt an objective approach, including those on contract formation. Yet, Lord Tyre also notes, in his discussion of the spectrum of what may constitute communication between parties, the uncertainty there may be in distinguishing between what may and what may not constitute sufficient communication of changed intention. It seems that a further case may need to come before the courts for this issue to be clarified.

In the meantime it may be better not to talk of objective and subjective approaches to rectification but to note that where there is a non-binding antecedent agreement it will have very little, if any, effect and the parties' rights and obligations should be determined on the basis of the binding contract which they subsequently enter into.

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