Neutral Citation Number: [2019] EWCA Civ 1361

Case No: A3/2018/1832

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (CHANCERY DIVISION)
Mr Justice Henry Carr
HC/2017/001662

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2019

Before:

LORD JUSTICE FLAUX
LORD JUSTICE LEGGATT
and
LADY JUSTICE ROSE

- -

Between:

FSHC GROUP HOLDINGS LIMITED	**Claimant / Respondent**
- and –	
GLAS TRUST CORPORATION LIMITED	**Defendant / Appellant**

- -

David Wolfson QC, **Rosalind Phelps QC** and **Matthew Abraham** (instructed by **Allen & Overy LLP**) for the **Claimant / Respondent**
Roger Masefield QC and **Gregory Denton-Cox** (instructed by **Proskauer Rose (UK) LLP**) for the **Defendant / Appellant**

Hearing dates: 22 and 23 May 2019

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Approved Judgment

Lord Justice Leggatt (with whom Lady Justice Rose and Lord Justice Flaux join):

1. This is the judgment of the court on an appeal which provides the opportunity for an appellate court to clarify the correct test to apply in deciding whether the written terms of a contract may be rectified because of a common mistake.

Introduction

2. The claimant in these proceedings – referred to as "the Parent" – has claimed rectification of two deeds which it executed on 18 November 2016. The other party to the deeds, and original defendant to the claim, was Barclays Bank plc ("Barclays") acting as security agent for various lenders. Since the judgment below was given, Barclays has been replaced as security agent and as a party to these proceedings by GLAS Trust Corporation Limited, which is the present appellant.

3. The purpose of executing the deeds was to provide security which the Parent had previously agreed to provide in connection with a corporate acquisition which took place in 2012. The missing security – an assignment of the benefit of a shareholder loan – was a very small piece of a complex transaction and no one had noticed the omission until it was spotted by the Parent's lawyers, Allen & Overy LLP, during a review of the security documentation in 2016.

4. The trial judge, the late Henry Carr J, found as a fact that, when the deeds were executed, both the Parent's representatives and those acting for Barclays understood and intended the deeds to do no more than provide the missing security. However, the mechanism chosen to achieve this was for the Parent, by entering into the deeds, to accede to two pre-existing security agreements. The effect of acceding to these agreements was not only to provide the missing security over the shareholder loan but to undertake additional, onerous obligations. The judge found that no one involved in the transaction realised before or at the time of execution of the deeds that this was their effect. The judge also concluded that it was both 'objectively' and 'subjectively' the common intention of the parties to execute a document which satisfied the Parent's obligation to grant security over the shareholder loan and which did no more than this. In these circumstances, the judge granted rectification of the deeds so as to exclude from their scope the additional obligations.

5. Because the appellant does not challenge any of the judge's findings of fact, if those findings are sufficient to justify granting the remedy of rectification for common mistake, the appeal must fail. The appellant argues, however, that the test for rectification is purely 'objective'; that identifying the intention of the parties as an objective observer would have thought it to be is a question of law, on which it is open to this court to form its own opinion rather than confining ourselves to a review of the trial judge's conclusion; and that the judge was wrong to hold that, objectively assessed in this way, the parties had a common intention which was not accurately reflected in the deeds. In particular, the appellant argues that the communications between the parties would not have led an objective observer to conclude that the parties intended to do anything other or less than procure the Parent's accession to all the terms of the pre-existing security agreements – including the additional obligations.

6. Rectification is an equitable remedy by which the court may amend the terms of a legal document which, because of a mistake, fails accurately to reflect the intention of the parties to it. As we will discuss, for many years and indeed centuries it was understood that the intention which the court is concerned to identify in deciding whether to grant this remedy is the actual intention of the relevant party or parties as a matter of psychological fact. Recently, however, a different approach has been proposed where the document is a written contract.

7. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101 Lord Hoffmann (in a judgment with which all the other members of the appellate committee of the House of Lords agreed) expressed the view that, where the document of which rectification is sought is a written contract, the relevant test of intention is purely 'objective' – meaning by this what a reasonable observer with knowledge of the background facts and prior communications between the parties would have thought their common intention at the time of contracting to be.

8. The observations about rectification made in the *Chartbrook* case were recognised by the House of Lords itself to be *obiter dicta*, which therefore did not create a binding precedent. That was because, as a result of the conclusion reached about how the relevant contract term should be interpreted, the alternative claim to rectify the written contract did not arise. Great weight has nevertheless naturally been given to a unanimous statement of opinion by the UK's highest court. At the same time the view expressed in the *Chartbrook* case runs contrary to a very substantial body of learning and authority, both in England and Wales and in other common law jurisdictions, concerning the requirements for rectification based on a common mistake.

9. In the decade since Lord Hoffmann's observations were made, they have proved controversial and have been criticised by both academic commentators and judges: see e.g. D Hodge, *Rectification* (2nd Edn, 2016), paras 3-56–3-60; Spry, Equitable Remedies (9th Edn, 2014), 630; *Chitty on Contracts* (33rd Edn, 2018), vol 1, para 3-081. When the Court of Appeal first had an opportunity to consider the significance of the *Chartbrook* case in *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 WLR 1333, however, both parties argued the appeal on the footing that Lord Hoffmann's analysis was correct and the court thought it right to proceed on that basis, although two of its members expressed doubts about the correctness of that analysis and each member of the court took a different view about how it was to be applied.

10. Uncertainty and dissatisfaction about the present state of the law has grown since the *Daventry* case was decided. On this appeal the question of which test of common intention is correct has been put in issue by the Parent and we think it necessary to confront it.

11. Before considering the law in more detail, we will first summarise the factual findings made by the trial judge, which are not challenged on this appeal. They are more fully set out in his judgment at [2018] EWHC 1558 (Ch).

The acquisition of the FSHC Group

12. The Parent is the holding company of the Four Seasons Health Care Group ("the FSHC Group"), which is the largest independent provider of elderly care services in the UK.

A chart showing the corporate structure of the FSHC Group can be found at paragraph 55 of the judgment below.

13. The Parent is an indirect subsidiary of Terra Firma Capital Partners III, LP, a private equity investment fund, which acquired a controlling interest in the FSHC Group on 12 July 2012. Within the FSHC Group, a sub-group of companies known as the "High Yield Bond Group" holds the relevant assets. The acquisition was financed through a complex capital structure. This included the issue by companies in the High Yield Bond Group of senior notes in an amount of £175m and senior secured notes in an amount of £350m, along with borrowing of £40m under a term loan facility. In addition, the Parent made a shareholder loan in an amount of £220m which, via certain intermediate transactions, was used to acquire 'deeply discounted' bonds in one of the companies in the High Yield Bond Group.

14. The finance documents for the FSHC acquisition included an Intercreditor Agreement governing the relationships and priorities between the noteholders, lenders and other relevant parties (including the Parent). The intention was that the shareholder loan should be subordinate to the other finance. To that end, the Intercreditor Agreement in clause 10.6(b) imposed on the Parent an obligation to ensure that the benefit of the shareholder loan was "pledged at all times as security" for the liabilities owed by companies in the High Yield Bond Group to the holders of the senior notes and senior secured notes and the lenders under the term loan facility. This required the Parent to assign its interest in the shareholder loan as security so as to ensure that the Parent would not receive any repayment of the shareholder loan unless or until those other creditors ("the secured parties") had first been repaid.

15. By clause 18 of the Intercreditor Agreement, Barclays was appointed as the security agent to act on behalf of the secured parties (amongst other things in executing security documents on their behalf) and to hold any security on trust for them.

16. By an oversight, the Parent did not execute an assignment of the benefit of the shareholder loan as required by clause 10.6(b) of the Intercreditor Agreement at the time of the FSHC acquisition in 2012, although no one noticed this at the time.

The IRSAs

17. The finance documents also included two Intercompany Receivables Security Assignments (the "IRSAs") which were entered into by debtor companies in the High Yield Bond Group with Barclays as security agent. The function of the IRSAs was to assign the rights of companies in the group to receive any payments from other group companies under specified documents by way of security for the obligations owed to the noteholders and term lenders. Such assignments were effected by clause 3 of the IRSAs. In addition, under clauses 2 and 14.3 of the IRSAs the assignors undertook to pay these secured obligations when they fell due for payment. Further, under clause 6.2 the assignors were subject to restrictions on carrying on any business or holding any assets: these restrictions (amongst other things) prohibited them from holding shares in subsidiaries unless those shares were included in the security provided to the security agent.

18. The Parent was not a party to the IRSAs and, under the original capital structure for the FSHC acquisition, did not undertake any obligation to repay the debts owed to the

secured parties by companies in the High Yield Bond Group, nor was the Parent subject to any restrictions on the carrying on of its business and ownership of assets.

The Santander Group acquisition

19. Between 2013 and 2014 the Parent acquired two further sets of care homes, the Avery Homes and the Majesticare Homes, through a subsidiary called brighterkind (PC) Limited. These transactions were separate from the FSHC acquisition. Brighterkind (PC) Limited and its subsidiaries have been referred to as the "Santander Group" because debt financing for these acquisitions was provided by Santander UK Plc.

20. The Santander Group is a separate investment by Terra Firma, acquired at a different time, funded by separate equity drawdown and with a separate accounting treatment. It is not linked to Terra Firma's investment in the FSHC Group.

Discovery of the missing security

21. By 2016 consideration was being given to restructuring the debt of the High Yield Bond Group which was perceived substantially to exceed the value of the group's assets. The law firm Allen & Overy, which had not been involved in the FSHC acquisition, had been instructed by Terra Firma to advise on the proposed restructuring.

22. In August 2016, while reviewing the acquisition documents in this context, the lawyers at Allen & Overy were unable to locate any document pledging the Parent's rights under the shareholder loan, as required by clause 10.6(b) of the Intercreditor Agreement. They also identified that under the Term Loan Facility Agreement it was an event of default if any failure by a party to comply with the provisions of the Intercreditor Agreement was not remedied within 30 business days of that party becoming aware of the non-compliance. The Term Loan Facility Agreement required quarterly reports to be provided to the security agent containing a certificate confirming that the financial covenants had been complied with and that there was no continuing default under the agreement. Such a certificate was given on 23 August 2016. The next compliance certificate was due on 28 November 2016.

23. On 17 August 2016 Allen & Overy asked Terra Firma to search the Parent's records to see if they could find a document granting security over the Parent's rights under the shareholder loan. Two partners of Allen & Overy, Mr Baudisch and Mr Field, discussed and agreed with each other that, if no such document could be found, documentation would need to be prepared to grant such security in order to avoid an event of default under the Term Loan Facility Agreement. They also decided that, rather than creating new documentation from scratch, the simplest way of providing the required security, which Barclays was also likely to be most comfortable with, was for the Parent to accede to the IRSAs.

24. At some point in September 2016, Mr Berkeley, a lawyer employed within the Terra Firma group, informed Allen & Overy that they could not locate the missing security document. On 14 September 2016, Mr Field instructed Mr Baker, a junior associate at Allen & Overy, to prepare draft deeds of accession to the IRSAs. Mr Baker duly prepared such documents. With some minor amendments, the draft accession deeds were approved by Mr Field, Mr Baudisch and Mr Berkeley.

25. On 19 October 2016 Mr Berkeley spoke on the telephone to Mr Baker and asked him to contact Barclays to explain that Allen & Overy and Terra Firma could not locate a copy of the document granting security over the Parent's rights and interests under the shareholder loan and to ask Barclays whether they could provide Allen & Overy with a copy. Mr Berkeley asked that Barclays should be given time to locate the missing security document before Allen & Overy proposed the execution of the accession deeds.

26. On 20 October 2016 Mr Baker made initial contact by email with Mr Branwhite, who worked in Barclays' Agency Department, to say that Allen & Overy and the Parent had not managed to locate the security document assigning the Parent's rights and interests under the shareholder loan and to ask whether Barclays had a copy in their records. Mr Baker followed this up with a telephone call to Mr Branwhite on 24 October 2016 in which Mr Branwhite agreed to ask Barclays' solicitors, Latham & Watkins LLP, to check their records for the missing security document as well.

27. On 26 October and again on 7 November 2016, Mr Baker sent further emails to Mr Branwhite asking whether Lathams had managed to check whether they had a copy of the missing security assignment. On 9 November 2016 Mr Berkeley spoke on the telephone to Mr Branwhite about the matter. Later that day Mr Branwhite reported back to Mr Berkeley (and to Mr Baker) to confirm that Lathams did not have the document.

Execution of the accession deeds

28. On 11 November 2016 the draft accession deeds were executed by a director of the Parent, Mr Stokes.

29. On 14 November 2016 Mr Baker telephoned Mr Branwhite of Barclays and explained that, as Lathams had been unable to locate a copy of the document assigning the Parent's rights under the shareholder loan and as the Finance Documents required there to be such a document, Allen & Overy had drafted a simple confirmatory security document. Mr Baker said that he would send this document which had been executed by the Parent and needed to be countersigned by Barclays. Mr Baker followed up this telephone call with an email attaching "copies of two deeds confirming the assignment of [the Parent's] rights and interests under [the shareholder loan]". Mr Baker also attached to the email copies of the shareholder loan agreement and the IRSAs. Mr Baker indicated that he was happy for Lathams to contact him directly if they had any questions.

30. In a telephone conversation on 16 November 2016, Mr Branwhite of Barclays told Mr Baker that Mr Kandola, an associate lawyer at Lathams, had a couple of questions regarding the background to the documents which Barclays had been asked to execute. Mr Baker made contact directly with Mr Kandola by email and they spoke on the telephone for some eight minutes that afternoon. No contemporaneous note was made of this telephone conversation, though in an internal email sent to a partner of Allen & Overy the next day Mr Baker reported:

> "I spoke with [Mr Kandola] on the phone and took him through the [Intercreditor Agreement]/documents to show why the security was granted. He asked a couple of background

> questions (nothing substantial) and said that he would go back to Branwhite today."

31. The judge found that, in this telephone conversation on 16 November 2016, Mr Baker explained to Mr Kandola that the purpose of the accession deeds was for the Parent to comply with its obligations under the Intercreditor Agreement to ensure that its rights and interests under the shareholder loan were pledged as security for the liabilities owed to the secured parties. Mr Baker also explained that the Parent was providing the security by acceding to the IRSAs, which had already been executed by Barclays.

32. On 18 November 2016 Mr Branwhite countersigned the accession deeds on behalf of Barclays. He sent copies of the signature pages by email to Mr Baker and the original documents by courier on the same day.

The effect of the accession deeds

33. Although the accession deeds are drafted in the pleonastic style often beloved by lawyers, they are essentially simple instruments. By clause 3, they assigned to the security agent to be held on trust for the secured parties all the Parent's rights and interests under the shareholder loan. This was all that the deeds needed to do in order to comply with the Parent's contractual obligation to provide security in respect of the shareholder loan and to avoid an event of default. But the deeds also provided, by clause 2, for the shareholder loan agreement to become an "assigned agreement" covered by the IRSAs and for the Parent to become a party to each of the IRSAs as an assignor and to be bound by all the terms of the IRSAs. Those terms included not only clause 3 of the IRSAs, which assigned as security the assignor's rights under documents covered by the IRSAs, but also clauses 2, 6.2 and 14.3 mentioned earlier. Thus, the effect of executing the accession deeds was not only to assign by way of security the Parent's interest in the shareholder loan, as required by clause 10.6(b) of the Intercreditor Agreement; it was also to render the Parent liable as a primary obligor to pay the debts of companies in the High Yield Bond Group owed to the secured parties and to include in the security provided to the secured parties the Parent's other assets. Those assets included the Parent's interest in the Santander Group, which was very valuable.

34. The obligations which the Parent thereby assumed under clauses 2, 6.2 and 14.3 of the IRSAs have been referred to in these proceedings as the "Additional Obligations".

35. The judge found – and it is not disputed on this appeal – that it would have been commercially absurd for the Parent, in the absence of an agreed restructuring of the indebtedness of the High Yield Bond Group, to have intended to undertake the Additional Obligations and thereby alter the underlying commercial bargain struck at the time of the acquisition. Furthermore, offering security over the assets in the Santander Group was seen as an important bargaining chip in negotiating a restructuring. Allen & Overy, who were advising on the restructuring, were well aware of this.

These proceedings

36. In February 2017, in the context of the restructuring negotiations, Allen & Overy identified the fact that the Parent's accession to the IRSAs had resulted in the Parent

undertaking obligations, including a covenant to pay the debts owed to the secured parties, which went significantly beyond what was required to grant a pledge of its interest in the shareholder loan in accordance with clause 10.6(b) of the Intercreditor Agreement. Leading counsel was instructed to advise on seeking rectification and on 27 March 2017 Allen & Overy wrote to Lathams proposing rectification or amendment of the accession deeds.

37. That proposal was not agreed and on 7 June 2017 the Parent commenced the present proceedings. The claim was issued under CPR Part 8, which is appropriate where a claimant seeks a court's decision on a question which is unlikely to involve a substantial dispute of fact. In the event, the facts were strongly disputed by Barclays (acting on the instructions of the secured parties). In particular, Barclays argued that the Parent made a deliberate choice to plug the gap in the security by means of accession to pre-existing agreements because it was considered that Barclays' consent to such an arrangement could more readily and quickly be obtained with less risk of the issue coming to the attention of the creditors during the restructuring negotiations than if a new bespoke agreement had been prepared. Barclays contended that in these circumstances the Parent took a deliberate decision to be bound by all the terms of the IRSAs and could not say that any mistake had been made which justified rectification.

38. The action was tried over five days. All the main individuals involved in the relevant events (whose names we have mentioned) were called as witnesses and cross-examined. This is therefore a claim for rectification in which – in the words of Kekewich J in *Bonhote v Henderson* [1895] 1 Ch D 742, 749 – the court took "the proper course of having the evidence thrashed out in the witness box".

The judge's findings on intention

39. In his clear and careful judgment, the judge considered both the subjective intentions of the parties and what an objective observer would have thought their intentions to be when they executed the accession deeds.

40. It was Allen & Overy who identified the absence of a required document assigning the benefit of the shareholder loan to the secured parties and who advised the Parent that the best way of filling this gap was for the Parent to accede to the IRSAs. Mr Berkeley of Terra Firma and Mr Stokes, the director of the Parent who signed the accession deeds, relied on the advice of Allen & Overy and adopted their intentions. It is surprising, to put it at its lowest, that the solicitors involved – and, in particular, the two partners responsible for giving and implementing this advice – should have done so without actually reviewing the terms of the IRSAs and without noticing that, by acceding to the IRSAs, the Parent was undertaking the Additional Obligations. However, it was their evidence that this was indeed what happened. In summary, their evidence was that the junior associate, Mr Baker, acted on instructions and understood that the partners, Mr Field and Mr Baudisch, were responsible for reading the IRSAs in order to check that they were appropriate documents for the Parent to accede to; and Mr Field and Mr Baudisch each assumed (incorrectly) that the other had performed this essential task.

41. Although this evidence was strongly challenged by Barclays at the trial, the judge accepted it. He also accepted that, although the IRSAs were chosen because it was thought that Barclays would be more comfortable with those documents, there was no

deliberate attempt to avoid alerting the creditors to the fact that a security document was missing and the omission could anyway have been remedied before it gave rise to an event of default by unilaterally assigning the shareholder loan as security. The judge also accepted that the consequences of the Parent assuming the Additional Obligations by acceding to the IRSAs were far more serious than any disadvantage that would have been incurred if the creditors had learnt of a default. The judge was satisfied that, if the Parent or Allen & Overy had known of the Additional Obligations, the Parent would never have executed the accession deeds.

42. The judge found as a fact, in relation to each of the Parent's witnesses, that their subjective intention was to do no more than provide the third party security which had been identified by Allen & Overy as missing, and that they believed (mistakenly) that this was the effect of the accession deeds.

43. The judge also found that Mr Branwhite of Barclays understood from his communications with Mr Baker that the Parent was doing no more and no less than putting in place a document to fill the gap in the missing security and that this was the only purpose of executing the accession deeds. Mr Branwhite had accepted in evidence that this was his understanding from his telephone conversation with Mr Baker on 14 November 2016, and Mr Kandola of Lathams similarly accepted in evidence that he did not understand the Parent to be doing anything other than filling the gap in the security.

44. On this basis the judge concluded that the parties subjectively had a common intention at the time of execution of the accession deeds to execute a document which satisfied the Parent's obligation to grant security over the shareholder loan, and which did no more than this. The judge also held that an objective observer would have concluded, from the background facts and the communications between the parties, that they had such a common intention.

45. In these circumstances the judge granted the remedy of rectification.

The issues on this appeal

46. At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed.

47. On this appeal Mr Roger Masefield QC for the appellant has submitted that, following the speech of Lord Hoffmann in the *Chartbrook* case and the decision of the Court of Appeal in the *Daventry* case, the existence and nature of such a common intention is a matter to be determined objectively – that is to say, by reference to what an objective observer of the communications passing between the parties would have thought their common intention to be. The test is thus analogous, if not identical, to the objective test applicable to the interpretation of contracts. As with a question of contractual interpretation, therefore, an appellate court is in a position to take its own view as to the conclusions which should objectively be drawn from the relevant communications.

48. It is the appellant's case that, when those communications are analysed objectively, the proper conclusion to draw is that the parties intended and agreed that the Parent would provide the security which it had an obligation to provide in relation to the shareholder loan simply by acceding to the IRSAs, rather than entering into a bespoke security agreement. Mr Masefield submitted that there were no communications from which an objective observer would have concluded that there was a common intention or consensus to "do no more" than provide security over the shareholder loan. He argued that the judge wrongly relied on the absence of discussion of the terms of the IRSAs to support such an inference and that neither the absence of such discussion nor any of the communications which actually took place demonstrated an intention that the Parent should be bound by only part of the IRSAs. On the contrary, an objective observer would have thought that the common intention of the parties was that the Parent would accede to all the terms of the IRSAs – including therefore the Additional Obligations. Alternatively, Mr Masefield submitted that, if there was any mistake, it was not a mistake about the legal effect of the accession deeds but only about the commercial consequences that would flow from the Parent's accession to the IRSAs and, as such, provided no basis for rectification.

49. For the Parent, Mr David Wolfson QC submitted that, applying an objective test, the judge's conclusions were correct. An objective observer with the same background knowledge as the parties and who was privy to the communications that 'crossed the line' between them would indeed have thought that they had a common intention when they executed the accession deeds that the deeds should do no more than provide the missing security in respect of the shareholder loan. When invited to make clear, however, whether or not he accepted on behalf of the Parent that on a correct understanding of the law which this court must apply the relevant test is objective, Mr Wolfson made it clear that he did not. Whilst emphasising that it is the Parent's case that the judge's decision to order rectification should be upheld whichever test is applied, Mr Wolfson submitted that it is inherent in the very concept of a mistake and confirmed, in particular, by the decision of this court in *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561, which remains binding authority, that the parties must actually be mistaken about the content or effect of the contractual document which they executed. That requires it to be shown that the document failed to give effect to what the parties subjectively intended. In this case the judge found that each party believed and subjectively intended that the accession deeds would 'plug the gap' caused by the missing security document and nothing more. Those are findings of primary fact which are not challenged on this appeal. It follows that the appeal must fail.

50. Mr Wolfson's submissions therefore put in issue on this appeal the legal test which the court must apply to determine whether the parties in executing a contractual document had a common intention and made a common mistake of a kind that the court can rectify. To determine where the law now stands on this issue, we think it apt to begin by examining how the equitable doctrine of rectification has developed.

The traditional approach of courts of equity

51. The jurisdiction of the Court of Chancery to correct mistakes in written instruments by rectification can be traced back to its roots in canon and Roman law. Cases in which the remedy was recognised can be found in the sixteenth and seventeenth centuries. In the middle of the eighteenth century, in *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves S 317, 318, Lord Hardwicke LC sitting in the Court of Chancery was in "no

doubt, that this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts: so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified." In *Shelburne v Inchiquin* (1784) 1 Bro CC 336, 341, on a claim to rectify a written agreement made in contemplation of marriage, Lord Thurlow LC considered it "impossible to refuse, as incompetent, parol evidence, which goes to prove, that the words taken down in writing were contrary to the current intention of all parties." These statements of principle were approved by Lord Eldon LC in *Townshend v Stangroom* (1801) 6 Ves 328, 333. Half a century later in *Fowler v Fowler* (1859) 4 De G & J 250, 264, Lord Chelmsford LC said:

> "The power which the court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake is one which has been frequently and most usefully exercised."

52. There can be no doubt that where, in these and other cases in which rectification was claimed, judges referred to the "intention" of the parties, they were referring to what the parties actually intended. Indeed, the use of the term "intention" to refer to what an 'objective' observer would reasonably have understood the parties' intention to be from their communications (irrespective of their actual states of mind) is, we believe, a comparatively recent legal artefact. That the court was concerned on a claim for rectification of a written contract (or other instrument) to identify what the parties actually intended its terms to be is confirmed by the fact that they were allowed, and indeed expected, to give evidence of what was in their minds when they executed the document. In *Fowler v Fowler* (1859) 4 De G & J 250, 265, Lord Chelmsford LC said:

> "It is clear that the person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which it desires it to be made conformable continued concurrently in the minds of all parties down the time of its execution…"

In that regard, the Lord Chancellor further observed (at 273) that:

> "Upon the question of rectifying a deed, the denial of one of the parties, that it is contrary to his intention, ought to have considerable weight. Lord Thurlow, in *Irnham v Child* (1 Bro C C 93) says, 'The difficulty of proving that there has been a mistake in a deed is so great, that there is no instance of its prevailing against a party insisting that there was no mistake.' And Lord Eldon, in *Marquis of Townshend v Stangroom* (6 Ves 334), after observing that Lord Thurlow seems to say that the proof must satisfy the Court what was the concurrent intention of all the parties, adds, 'And it must never be forgotten to what extent the defendant, one of the parties, admits or denies the intention.'"

53. The relevance of the actual subjective intentions of the parties also follows from the rationale of the equitable remedy of rectification, as historically understood. In Story's

Commentaries on Equity Jurisprudence (4th Edn, 1846 – the last edition for which that distinguished jurist was personally responsible) vol 1, ch 5, para 155, having discussed the rectification of documents fraudulently drawn up, the author explained:

> "It is upon the same ground that Equity interferes in cases of written agreements, where there has been an innocent omission or insertion of a material stipulation, contrary to the intention of both parties, and under a mutual mistake. To allow it to prevail in such a case would be to work a surprise, or fraud, upon both parties; and certainly upon the one who is the sufferer. As much injustice would to the full be done under such circumstances, as would be done by a positive fraud, or an inevitable accident. A Court of Equity would be of little value, if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs contrary to the intention of parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it. In a practical view, there would be as much mischief done by refusing relief in such cases, as there would be introduced by allowing parol evidence in all cases to vary written contracts."

54. An illustration of this reasoning can be seen in *Calverley v Williams* (1790) 1 Ves Jr 210, 211, in which the question was whether a particular piece of land was correctly included in the description of the land to be conveyed under a contract of sale. Lord Thurlow LC said that:

> "… if both [parties] understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying, any more than the seller imagined he was selling, this part, then this pretence to have the whole conveyed is as contrary to good faith upon his side, as the refusal to sell would be in the other case. The question is, does it appear to have been the common purpose of both to have conveyed this part."

55. In other words, it is contrary to good faith for a party to take advantage of a mistake made in drawing up a written contract by seeking to apply the contract inconsistently with what that party knew to be the common intention of the parties when the document was executed.

The antecedent contract theory

56. Notwithstanding this long line of authority, there developed in the second part of the nineteenth century and early twentieth century what eventually became a "formidable array of judicial opinion" (per Buckley LJ in *Joscelyne v Nissen* [1970] 2 QB 86, 93) in support of the view that a contractual document could only be rectified in order to bring it into conformity with a contract that already existed before the document was executed and which the document failed accurately to record as a result of a mutual

mistake. This view seems to have originated in the following statement of James V-C in *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375:

> "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. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument."

57. The high-water mark of this theory was *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85. The written contract in that case contained a restrictive covenant limiting the defendant's freedom to carry on the business of a "provision merchant" other than on behalf of the plaintiff company. On the facts found, the parties in their discussions before the contract was signed never reached any consensus on the intended scope of the restrictive covenant. On any view the claim for rectification therefore could not succeed. But in giving his reasons for dismissing the plaintiff's appeal to the Court of Appeal, Lord Cozens-Hardy MR made these general observations (at 88):

> "The essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement. Indeed, it may be regarded as a branch of the doctrine of specific performance. It presupposes a prior contract, and it requires proof that, by common mistake, the final completed instrument as executed fails to give proper effect to the prior contract."

To similar effect, Fletcher Moulton LJ said (at 91):

> "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."

Buckley LJ stated the principle differently (at 93):

> "For rectification it is not enough to set about to find what one or even both of the parties to the contract intended. What you have to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain."

58. As later noted by the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86, 90, *Lovell & Christmas Ltd v Wall* was not mentioned in textbooks and seems to have disappeared from professional sight for many years. It was not cited in *Shipley Urban District Council v Bradford Corporation* [1936] Ch 375, despite the fact that the court in that case heard "very elaborate and careful argument" (per Clauson J at 391) on the question whether the power to rectify a contractual document is limited to the case where there is a pre-existing binding contract. On the facts of the *Shipley* case the parties had reached a clear common understanding in their negotiations as to how they intended the price of water supplied to the plaintiff council by the defendant corporation to be

calculated; but, as each party only had power to contract under seal, no legally enforceable agreement could be made until a contract under seal was executed. In the event the judge held that the language of the contract bore the meaning for which the plaintiff council contended, so that its alternative claim to rectify the wording did not arise. Clauson J nevertheless summarised the "long and ancient line of authorities" showing that "rectification proceeds 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": [1936] Ch 375, 396. He said that, had it been necessary for him to decide the point, he should have felt "some difficulty" in following *dicta* suggesting that proof of a prior contract was necessary and "should have felt bound to hold" that, on the facts found, it was necessary to rectify the instrument so as to accord with the concurrent intention of the parties at the moment of execution.

59. In *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662, 664; [1971] 1 WLR 1390n, 1391, Simonds J endorsed in emphatic terms the view of Clauson J in the *Shipley* case that "it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify". Rather:

> "… it is sufficient if you find 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 that there was, until the formal instrument was executed, no concluded and binding contract between the parties."

Simonds J said that he wholly concurred with the reasoning of Clauson J in the matter and could add nothing to his authority, except to say that:

> "if it were not so, it would be a strange thing, for the result would be that two parties binding themselves by a mistake to which each had equally contributed, by an instrument which did not express their real intention, would yet be bound by it. That is a state of affairs which I hold is not the law …"

60. It can be seen that, in the first passage quoted above, Simonds J referred interchangeably to the "common intention" and "common agreement" of the parties. Elsewhere in the judgment he also used on several occasions the expressions "true consensus of the parties" and "the true consensus of their minds", and he concluded that the defendants were entitled to have the written agreement rectified so as to "bring it into conformity with the consensus of their minds". Two important points are clear from these formulations and from the way in which Simonds J analysed the evidence given at the trial. First, he plainly regarded the power to rectify the written agreement as dependent upon proof that it did not accurately represent the actual (subjective) intentions of the parties and was thus concerned to identify what was "in their minds". To that end the judge did not regard the relevant evidence as limited to matters which would have been apparent to an 'objective observer'. He considered and evaluated the testimony given by the individuals who represented the defendants in the negotiations and by the plaintiff, Mr Crane, about what they each (subjectively) believed and

intended at the relevant time. Simonds J also attached considerable weight to a memorandum written by Mr Crane to his own solicitor, in respect of which privilege had been waived. This was not a communication which had 'crossed the line' between the parties, but the judge observed (at 1397) that:

> "privilege was waived in respect of many documents in this case in order that I might be able to examine fully into the minds and intentions of the parties at the time when this agreement was being negotiated and executed."

61. The second significant point to note is that, while he regarded it as necessary, equally clearly Simonds J did not regard it as sufficient to prove that the written agreement did not reflect what each party subjectively intended. He treated it as necessary for the purposes of rectification to show that the formal agreement did not represent the "real agreement" between the parties with regard to the matter in issue – using the term "agreement" not in the sense of a legally binding contract but in the sense of a consensus or shared intention of the parties achieved through communication between them. It is apparent from the whole of the judgment that this is what Simonds J meant and understood by the requirement to show a "common intention".

62. On appeal in *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68, the Court of Appeal expressed its agreement with the judgment of Simonds J on the question of rectification, although there does not appear to have been any argument about the correct legal test.

***Rose v Pim*: the 'horsebeans' case**

63. The "lost cause" (per Buckley LJ in *Joscelyne v Nissen* [1970] 2 QB 86, 91) of *Lovell & Christmas Ltd v Wall* was re-discovered in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450. This was the 'horsebeans' case, which "has amused generations of law students" (per Tadgell JA in *Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd* (2001) 3 VR 526, para 5). The plaintiffs, who were London merchants, had been asked by Egyptian buyers to supply "feveroles". Not knowing what this term meant, they asked the defendants' representative, who responded that "feveroles" meant horsebeans. Relying on this information, the plaintiffs contracted to buy a quantity of horsebeans from the defendants, which they then sold on as "feveroles" to the Egyptian buyers. To fulfil the contract, the defendants purchased "horsebeans" from an Algerian supplier. There are in fact different varieties of horsebeans and those supplied were "feves", which were less valuable than "feveroles". The Egyptian buyers claimed the difference in value as damages from the plaintiffs, who then sought to rectify their contract with the defendants by adding the word "feveroles" after the references to "horsebeans". The judge granted rectification, but that decision was reversed by the Court of Appeal on the ground that the written contract correctly recorded what the parties had agreed.

64. A passage in the judgment of Denning LJ (at 461) has since been relied on, most importantly in the *Chartbrook* case, as expounding an objective approach to rectification:

> "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."

65. As Sir Nicholas Patten explained in the Chancery Bar Association 2013 Annual Lecture, "Does the law need to be rectified? *Chartbrook* revisited", at para 12, this passage needs to be read in its historical context:

> "It was delivered some 17 years before the Court of Appeal stated unequivocally in *Joscelyne v Nissen* that the parties' pre-existing accord need not be contractual and it is little more than a statement of what many judges at that time considered the scope of rectification to be. If, as [Denning LJ] said, you can predicate with certainty what their contract was and by common mistake it was wrongly expressed in the written document, then the court can intervene to create consistency between the two. All that one is doing, indeed all that one could do in such circumstances, was to ensure that the terms of the prior contract were accurately recorded. What the parties believed those terms to mean was irrelevant. All that the court was concerned with was whether there had been a prior contract and what its terms were. That required a conventional application to the facts of the test as to whether a contract had been reached which depends upon an objective assessment of the parties' dealings and takes no account of their subjective intention or understanding of what was agreed."

66. As Sir Nicholas Patten pointed out, this thinking comes out even more clearly in the immediately following passage of Denning LJ's judgment in *Rose v Pim* [1953] 2 QB 450 at 461-2, where he said:

> "It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council v Bradford Corporation*); but, formalities apart, there must have been a concluded contract. There is a passage in *Crane v Hegeman-Harris Co Inc* which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different: see *Lovell*

> *& Christmas v Wall*, per Lord Cozens-Hardy MR, and per Buckley LJ, but not that they intended something different."

Joscelyne v Nissen

67. The question whether rectification may only be granted to bring a document into conformity with a prior concluded contract was finally resolved in the leading case of *Joscelyne v Nissen* [1970] 2 QB 86. A father entered into a written contract with his daughter by which he transferred to her his car hire business in return for her agreement to pay him a pension and discharge certain expenses. In their discussions it had been agreed between them that these expenses should include the father's gas, electricity and coal bills and the cost of home help. However, the daughter argued, and the trial judge held, that the signed contract did not on its proper interpretation provide for payment of these expenses. The judge nevertheless rectified the written contract to provide for these expenses to be paid by the daughter, although he found that no binding contract had been concluded until the document was signed. The daughter appealed, contending that as a matter of law the remedy of rectification was not available to the father in the absence of an antecedent concluded contract.

68. The Court of Appeal, after a full review of the authorities, rejected this contention. Russell LJ, who gave the judgment of the court, concluded that "the law is as expounded by Simonds J in *Crane's* case with the qualification that some outward expression of accord is required": see [1970] 2 QB 86 at 98.

69. The Court of Appeal also approved, as apt to cover the case before them, the following statement of Megaw J in *London Weekend Television Ltd v Paris and Griffith* (1969) 113 Sol J 222:

> "Where two persons agreed expressly with one another what was the meaning of a particular phrase but did not record their definition in the contract itself, if one of the parties sought to enforce the agreement on the basis of some other meaning, he could be prevented by an action for rectification."

Rose v Pim was explained (at 97) on the basis that:

> "It turned out that locked separately in the breast of each party was the misapprehension that the word 'horsebeans' meant another commodity, but as we understand the case there was no communication between them to the effect that when they should speak of horsebeans that was to be their private label for the other commodity. The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties."

In so far as Denning LJ had suggested that an "antecedent complete concluded contract" is necessary, the Court of Appeal rejected his view as inconsistent with the views of both courts in *Crane v Hegeman-Harris* and as not supported by the other judgments

in *Rose v Pim*. In so far as he was speaking of "agreement in the more general sense of an outwardly expressed accord of minds," the Court of Appeal said that Denning LJ had done no more than accept the argument advanced by counsel for the appellant in *Rose v Pim* as to "the true width of the views of Simonds J". That argument was that, when Simonds J said in *Crane's* case that it was sufficient to find a "common continuing intention", he meant intention "as expressed": see [1953] 2 QB 450, 457.

70. The suggestion that in *Rose v Pim* the understanding that "horsebeans" meant "feveroles" turned out to be "locked separately in the breast of each party" is difficult to follow as, on the facts found in *Rose v Pim*, the plaintiffs' understanding was derived from communication with the defendants' representative. It appears that the case was indeed one in which the parties were using the word "horsebeans" as their own private label for "feveroles". But as Sir Kim Lewison pointed out in the Jonathan Brock Memorial Lecture, 21 May 2008, "If it ain't broke, don't fix it", para 50, at the time when *Rose v Pim* was decided the law had not yet clearly recognised that rectification was an available remedy where parties had deliberately chosen words but were mistaken about their meaning. That possibility, as Sir Nicholas Patten observed in the passage from his Chancery Bar Association lecture quoted earlier, was not consistent with the view that the sole function of rectification was to ensure that the terms of the prior contract were accurately recorded. It has since, however, become well established. In *Re Butlin's Settlement Trusts* [1976] Ch 251, 260, Brightman J said that rectification is available:

> "not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction."

That statement of the law has been approved and applied on many occasions since, including by the House of Lords in the *Chartbrook* case, where Lord Hoffmann referred (at para 46) to the availability of rectification in such a situation as a reason why it was unnecessary to relax the rule excluding evidence of prior communications as an aid to interpreting a contract.

71. We agree with Sir Kim Lewison that the best justification for the refusal to grant the remedy of rectification in *Rose v Pim* is that the contract of which rectification was sought was part of a chain of contracts involving third parties so that, as Denning LJ observed (at 462):

> "It would not be fair to rectify one of the contracts without rectifying all three, which is obviously impossible."

The need for an "outward expression of accord"

72. *Joscelyne v Nissen* clearly and authoritatively established that a prior concluded contract is not necessary for rectification and that a common intention continuing at the time when a contract is made is sufficient, subject only to the qualification that some "outward expression of accord" is required. That qualification did no more than spell out the sense in which, as discussed earlier, Simonds J in *Crane's* case used the phrase

"common intention" to refer to what he also called the "common agreement" of the parties or the "true consensus of their minds" – in other words, an intention which the parties not only each held but understood each other to share as a result of communication between them. The same principle was stated by Buckley LJ in *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 93, in the passage we have quoted earlier (and which was also quoted in *Joscelyne v Nissen* [1970] 2 QB 86, 92) when he said:

> "For rectification it is not enough to set about to find what one or even both of the parties to the contract intended. What you have to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain."

73. By insisting on the requirement of an outward expression of accord, the Court of Appeal was thus making clear that it is not sufficient for rectification to prove that each party privately and independently had the same intention as the other with regard to a particular provision of their contract. There can be no common intention of a kind with which the written contract can justifiably be made to conform if the relevant intentions remained "locked separately in the breast of each party" without being communicated by each party to the other. At the same time, the judgment in *Joscelyne v Nissen* makes it equally clear that the insistence on an outward expression of accord does not supplant or detract from the need to establish what the parties actually intended the relevant term of the contract (or its effect) to be. The Court of Appeal was not suggesting that only outward appearances are relevant for rectification and that, provided they appear outwardly to be in agreement, the actual intentions of the parties do not matter. On the contrary, the unequivocal holding in *Joscelyne v Nissen* that the law was correctly stated by Simonds J in *Crane's* case leaves no room for doubt that, in order to find a common intention, it is necessary to establish what was in the minds of the parties. As we have outlined and as was considered in detail in the *Shipley* case, which was then approved in *Crane's* case, that has always been the basis of the equitable remedy of rectification. The essence of the remedy is that, in a proper case where there is shown to have been a real mistake, the terms of a written contract (or other document) should be reformed in order to give effect to the parties' real intention.

74. An illustration of how a claim for rectification may fail at the first hurdle for want of proof that the written contract was contrary to the actual intentions of the parties can be found in *Lloyd v Stanbury* [1971] 1 WLR 535, a case decided very shortly after *Joscelyne v Nissen* in which the judge (Brightman J) observed that his approach was laid down for him by the Court of Appeal. The issue was whether a particular plot of land had been included through a common mistake in a written contract for the sale of land. On the facts the court found that, when negotiating the contract, the buyer had not given any thought to the matter and had no positive intention that the relevant plot either should or should not be included. Brightman J saw reason to suspect that the seller intended the plot not to be included but considered the evidence insufficient to make a finding to that effect. Accordingly, no common intention to exclude the plot from the land sold had been established and the claim to rectify the written contract therefore failed.

Uncommunicated intentions

75. The decision in *Joscelyne v Nissen* was not received with universal approval. Shortly after it was decided, Mr Leonard Bromley QC in an article published in the Law Quarterly Review argued that the Court of Appeal was wrong to require an "outward expression of accord" and that all that is required for rectification is:

> "the establishment of the subjective intention of the party or of the parties to the instrument (in the latter case an identical intention). Intercommunication, however necessary in the common law of contract, properly plays no part either in the theory or in the practice of this equitable doctrine …"

See L Bromley, "Rectification in Equity" (1971) 87 LQR 532. Mr Bromley submitted that the presence or absence of an outward expression of accord "may well go to whether the burden of proof can be discharged" but is not "*per se* a requirement of rectification".

76. The suggestion that an outward expression of accord is not an absolute requirement for rectification but only of evidential value in proving the parties' intentions has also from time to time been made by others. It is endorsed in *Chitty on Contracts* (33rd Edn, 2018), vol 1, para 3-064, and was advanced by counsel for the Parent in their skeleton argument for this appeal. Apart from pension cases which we will consider shortly, the authority relied on in *Chitty* is *Munt v Beasley* [2006] EWCA Civ 370, para 36, where Mummery LJ expressed the view that an outward expression of accord, although established on the facts of that case, was not a strict legal requirement for rectification where the party resisting rectification had in fact admitted that his true state of belief when he entered into the transaction was the same as that of the other party. Mummery LJ saw the trend in recent cases as being "to treat the expression 'outward expression of accord' more as an evidential factor rather than a strict legal requirement in all cases of rectification." The cases cited by Mummery LJ for this proposition, however, do not in our view support it. The only English authority cited which might at first blush appear to do so is *Gallaher v Gallaher Pensions Ltd* [2005] Pens LR 103, para 117. But that was a case involving a pension scheme where, as we are about to discuss, proof of a consensus established through communication between the parties is not required because the relevant transaction is not a contract. In any case, *Joscelyne v Nissen* clearly held that it is essential for rectification of a written contract to show an agreement, not in the sense of a prior concluded contract but "in the more general sense of an outwardly expressed accord of minds", and this requirement has been affirmed by the Court of Appeal on many subsequent occasions, as we will see.

77. We also consider that the requirement is sound in principle. 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. Leaving aside for the time being cases of rectification for unilateral mistake, establishing new contractual rights and obligations in this way is only justified if they are founded on mutual agreement. Whether the test applied is subjective or objective, 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. Thus, as noted in *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm), para 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. We agree with the answer implied to the following question posed by Campbell JA in the Australian case of *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; [2007] NSWLR 603 at para 315:

> "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 [into] 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?"

The pension cases

78. The nature of the requirement to show an outward expression of accord can be further brought out by contrasting a line of cases involving the rectification of amendments made to the rules of employee pension schemes where the trustees of the scheme have the power to alter the rules provided they obtain the consent of the employer. As analysed by Lawrence Collins J in *AMP (UK) plc v Barker* [2001] Pens LR 77, in this situation no agreement between the trustees and the employer is needed in order to effect a change in the rules: it is sufficient that the employer gives its consent to the proposed change. In such a case it is sufficient to justify rectification that the intentions of the trustees and the employer coincide in that they both independently have the same intention regarding the effect of the amendment. It is not necessary to show that the trustees and the employer had a common intention as a result of communication with each other because the validity of an amendment does not depend on the parties having mutually agreed it – only on one having approved what the other has done.

79. This analysis has been followed in later cases: see e.g. *Gallaher v Gallaher Pensions Ltd* [2005] Pens LR 103, para 117; *Re IBM Pension Plan* [2012] Pens LR 469. In the latter case Warren J said (at para 19):

> "There needs to be cogent evidence of the intentions of both the trustee and the employer where the power of amendment requires the consent of both. … In a case such as *Chartbrook* or *Daventry*, what is sought to be rectified is a contract; it makes sense that, in order to displace the contract actually made by rectifying it, there should be found a consensus, albeit not one giving rise to a legally binding agreement. In contrast, in a case such as the present, no sort of agreement is required for there to be a valid deed of amendments. What is needed is an exercise of the power of amendment by the trustee and the consent of the employer to the exercise of the power. If that is to be called a consensus, so be it, but it is a different animal from the agreement or consensus which is relevant in a contractual case."

Tacit agreement

80. Another authority cited in *Munt v Beasley* as support for the suggestion that an outward expression of accord is not a strict legal requirement for rectification was *JIS (1974) Ltd v MCP Investment Nominees I Ltd* [2003] EWCA Civ 721, paras 33-34 – where Carnwath LJ quoted with what might be described as cautious or tentative approval the following passage from the judgment of Hart J at first instance:

> "A particular intention may, as it seems to me, as a matter of the general nature of human discourse, be communicated by one party to another without express words necessarily being used. It may therefore sometimes be possible for the court to conclude that there has been sufficient outward evidence of the accord of the parties' intentions in relation to a particular term of their bargain without either party having actually spelled out to the other that term in so many words. It may be, like an implied term in a contract, something which, in the context of the particular discourse, is so obvious that it need not be stated."

After referring to a submission that there was no room for the implication of terms so as to show accord for the purposes of applying the doctrine of rectification, Hart J continued:

> "But, for myself, I do not think that that can be right. There are many occasions in ordinary human exchange in which something can be implied and, without being expressly stated, perfectly understood by the other party …"

See *JIS (1974) Ltd v MCP Investment Nominees I Ltd* [2002] EWHC 1407 (Ch).

81. The important point made in these passages, however, is not that an outward expression of an accord is unnecessary for rectification. It is 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.

82. The same point was well made by Campbell JA in the *Ryledar* case at para 281, when he said that, in order to form a common intention, parties might come to know of each other's intentions without those intentions being directly stated, through various other means. As he elaborated:

> "Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work – the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon, or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present purposes is that for a negotiating party to

> perform actions or say words from which the other party can gather his or her intention is itself a form of communication. Negotiation of any contract takes place in a context in which various facts are known or assumed by the negotiating parties. Sometimes, for example, if a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions. This view of what is needed before an intention is a common intention, accords, it seems to me, with the Australian case law since *Joscelyne*."

This view of what is needed before an intention is a common intention also accords, as it seems to us, with English law since *Joscelyne v Nissen*.

83. An old case which illustrates how a common intention may be formed without needing to be expressly articulated when a contract is negotiated in a context where there is a well understood business practice is *Caraman, Rowley & May v Aperghis* (1923) 17 Ll L Rep 183. Two contracts for the sale of sultanas on cif terms were drawn up by a broker acting for the sellers. By mistake, the broker used a form intended for spot contracts instead of the form for cif contracts with the result that the written contracts did not include, as was customary in the trade, a clause exempting the seller from liability in the event of war preventing the delivery of the goods. No reference had been made to this clause in negotiating the contracts because it was a usual clause which did not need to be spelt out, and no one noticed until later that the clause was not included in the forms used to document the transactions. Greer J nevertheless held that the sellers were entitled to have the contractual documents rectified to insert the war clause. His reasoning was that the parties had taken it for granted that, when the written contracts were drawn up, if anyone read through them they would find the clause there.

84. This point is summarised in *Chitty on Contracts* (33rd Edn, 2018) vol 1, para 5-117, in the statement that an accord "may include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words".

85. Although leading counsel for the appellant in the present case, Mr Masefield QC, criticised this formulation, he accepted the general proposition that intentions or understandings may be communicated without being expressly stated. He also accepted that there can be cases where, depending on the circumstances and the context, the fact that an intention or understanding is shared may be apparent from the fact that nothing is said – a form of inference, as Rose LJ observed during oral argument, analogous to the case of the dog that didn't bark in the night.

86. Mr Masefield confined his criticism of the statement in *Chitty* to any suggestion that the test for implying a term into a contract is applicable to a claim for rectification. We agree with him that the juridical basis is different. The difference was clearly explained by Mason J in the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346:

> "The implication of a term is to be compared, and at the same time contrasted, with rectification of the contract. In each case the problem is caused by a deficiency in the expression of the consensual agreement. A term which should have been included has been omitted. The difference is that with rectification the term which has been omitted and should have been included was actually agreed upon; with implication the term is one which it is presumed that the parties would have agreed upon had they turned their minds to it – it is not a term that they have actually agreed upon. Thus, in the case of the implied term the deficiency in the expression of the consensual agreement is caused by the failure of the parties to direct their minds to a particular eventuality and to make explicit provision for it. Rectification ensures that the contract gives effect to the parties' actual intention; the implication of a term is designed to give effect to the parties' presumed intention." (emphasis added)

87. The notion that something is so obvious as to go without saying is both a familiar feature of actual human communication (which underlies a whole branch of linguistics, known as 'pragmatics') and a basis for the implication of a term. Provided that it is understood that on a claim for rectification the court is concerned with what the parties actually communicated to each other, and not with identifying their presumed intention by means of an officious bystander test, we consider that the formulation in *Chitty* is sound.

Britoil v Hunt

88. We have rejected the suggestion, which cannot stand with *Joscelyne v Nissen*, that a correspondence of subjective intentions is all that is required for rectification of a contractual document and that intercommunication is unnecessary. In an important case decided during the period between *Joscelyne v Nissen* and the *Chartbrook* case, an argument was advanced for the opposite position that the parties' subjective states of mind are irrelevant for the purpose of determining whether a written contract should be rectified and that a wholly objective test should be applied. That argument was rejected by the Court of Appeal (with Hoffmann LJ dissenting) in *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561.

89. After the failure of the attempt by the Texan oil tycoon, Nelson Bunker Hunt, in the 1970s to corner the world silver market, his fortune collapsed and his companies were forced to sell off assets. In 1979 two of those companies (the defendants in the subsequent litigation) entered into a contract by which they assigned to the plaintiffs (then the British National Oil Corporation, which subsequently became Britoil plc) their interests in a licence to produce petroleum from a North Sea oil field. Under the terms of the contract the Hunt companies had a right to receive a share of the profits if the exploitation of the oil field was sufficiently successful. A dispute later arose as to whether this right had been triggered. This depended in the first place on what the relevant terms of the contract meant. That question of interpretation was decided in the plaintiffs' favour. The defendants made an alternative claim for rectification. The contract had been preceded by non-binding "heads of agreement". The defendants contended that it was the common intention of the parties that the definitive written contract should in the relevant respects give effect to the heads of agreement and that, under the terms of the heads of agreement, their right to a share of profits had been

triggered. In so far as the contract on its proper interpretation had a different effect, the contract should be rectified so as to have the same effect as the heads of agreement.

90. The defendants further submitted that for this purpose the parties' states of mind were wholly irrelevant. They argued that the heads of agreement should be construed objectively, in exactly the same way as a contract is construed.

91. In support of this argument, the defendants relied on three authorities. One was the passage in Denning LJ's judgment in *Rose v Pim* which we have quoted at paragraph 64 above. Another was *George Cohen v Docks & Inland Waterways* (1950) 84 Ll Rep 97, to which we will return. The third authority was *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The "Olympic Pride")* [1980] 2 Lloyds Rep 67, 72, in which Mustill J sought to summarise the law in a few propositions:

> "1. The remedy of rectification is available only for the putting right of a mistake in the terms of a document which purports to record the terms of a previous transaction. …
>
> 2. Rectification may be granted in two situations: (a) where there is a mistake common to both parties, the mistake being the belief that the document accurately records the terms of the transaction. …
>
> 3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. <u>It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter.</u>
>
> 4. The court must be satisfied not only that the document fails to reflect the prior agreement or intention but also that there was a prior agreement or common intention in terms that the court can ascertain.
>
> 5. The court requires the mistake to be proved with a high degree of conviction before granting relief."

The defendants relied on the sentence we have underlined.

92. Hoffmann LJ accepted the defendants' argument. In his view, which he thought was supported by the authorities relied on:

> "The purpose of rectification of a contract (as opposed to rectification of a unilateral instrument like a will or voluntary settlement) is not to make the instrument accord with what the parties subjectively intended but with what they actually agreed. Agreement in English law does not require a meeting of minds, a *consensus ad idem*. It is an objective fact, requiring only the appearance of such a consensus. If therefore the parties both intended a written instrument to embody their agreement and it does not do so, the necessary common mistake exists. It does

> not require that the written instrument should actually mean something different from what each of the parties thought it meant."

See [1994] CLC 561, 578. Hoffmann LJ accepted that there could be cases in which the proper inference is that the final document represents the true agreement of the parties even though it means something different from prior heads of agreement. However, in the *Britoil* case Hoffmann LJ thought it clear that:

> "the common intention was that the definitive agreement should reflect the meaning of the heads of agreement, whatever that might be. So far as it failed to do so, it was in my judgment a common mistake which should be rectified."

93. Hoffmann LJ's view was not shared, however, by the majority of the Court of Appeal. Hobhouse LJ, with whose judgment Glidewell LJ agreed "in every respect", pointed out that there is a material difference between a case where the parties have made a legally binding contract which their formal document is intended to record and a situation where there was no prior contract. In the former case the court will have to construe the earlier contract as a matter of law and give effect to it in a manner analogous to the remedy of specific performance. Where there is no prior contract, by contrast, a different approach is required: see [1994] CLC 561, 572.

94. Hobhouse LJ observed (at 573) that, as a matter of logic, the defendants' argument had the result that:

> "where there is a succession of documents of increasing formality but without legal effect leading up to a final considered legal document, the ascertainment of the actual agreement between the parties can be thrown back to the successively less formal, less considered and less carefully drafted earlier documents. This cannot be right."

95. Hobhouse LJ rejected in clear and emphatic terms the defendants' contention that the heads of agreement should be construed wholly objectively, in the same way as a contract, and that what the parties subjectively intended was irrelevant. The critical reasoning is contained in this passage (at 573):

> "Further, 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, e*x 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. The claimant must prove the mistake and he must prove that it is a

> common mistake. The answering of that factual question is assisted by considering what is the natural meaning of the words used in an earlier document – people normally mean what they say – but strictly it cannot be concluded by it. It cannot be right to treat as conclusive evidence of the existence of a mistake in the execution of a carefully prepared and clearly expressed later contract the fact that language has been used in an earlier document which is *bona fide* capable of being understood in more than one way."

96. Applying this legal analysis, Hobhouse J concluded (at 573-4) that the judge (Saville J) had been right to find that the defendants had failed to prove that there was any common mistake in the preparation of the written contract. The only evidence relied on was the earlier heads of agreement, which was open to more than one interpretation and was on any view incomplete, and which did not justify the conclusion that the plaintiffs were mistaken when they executed the written contract. As he further emphasised (at 574):

> "How a court would construe the heads of agreement if they were intended to be a legally binding contract and the court was forced to choose between treating it as void for uncertainty or giving it an effect, is beside the point. What the court is doing is looking to see if the document provides clear evidence to justify the conclusion that the plaintiffs were mistaken when they executed the definitive agreement. In my judgment it does not support that conclusion."

97. The claim for rectification therefore failed as the court was not satisfied that there was, as a matter of fact, a common mistake.

From *Joscelyne* to *Chartbrook*

98. In the 40 years after *Joscelyne v Nissen* was decided the requirements for rectification for common mistake laid down in that case were applied and re-affirmed by the Court of Appeal on several occasions in addition to the *Britoil* case. For example, in *Co-operative Insurance Society Ltd v Centremoor Ltd* [1983] 2 EGLR 52 at 53, Dillon LJ said:

> "In view of the decision in *Joscelyne v Nissen* [1970] 2 QB 86, we can take it in this court … that a claimant for rectification has to show a common continuing intention of the parties, outwardly expressed or communicated between them, which is not reflected in the concluded instrument which they have executed, but does not have to show that that common continuing intention amounted to a complete concluded contract antecedent to the instrument which it is sought to have rectified. Such a common continuing intention is conveniently referred to as an 'agreement' in inverted commas."

99. In *Agip SpA v Navigazione Alta Italia SpA (The "Nai Genova")* [1984] 1 Lloyd's Rep 353 at 359, Slade LJ (with whom Oliver and Robert Goff LJJ agreed) summarised the requirements in this way:

> "First, there must be a common intention in regard to the particular provisions of the agreement in question, together with some outward expression of accord. Secondly, this common intention must continue up to the time of execution of the instrument. Thirdly, there must be clear evidence that the instrument as executed does not accurately represent the true agreement of the parties at the time of its execution. Fourthly, it must be shown that the instrument, if rectified as claimed, would accurately represent the true agreement of the parties at that time …"

100. To similar effect, in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560; [2002] 2 EGLR 71, para 33, Peter Gibson LJ said that the party seeking rectification must show that:

> "(1) the parties had a common continuing intention,[1] 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."

101. This last summary of the requirements for rectification has often been cited. It was quoted with approval by Lord Hoffmann in the *Chartbrook* case (at para 48), though as we will shortly discuss the approach taken by Lord Hoffmann differs from that established by *Joscelyne v Nissen* and summarised in the *Swainland* case, which requires an actual common intention to be proved together with an outward expression of accord.

102. A yet further decision of the Court of Appeal which treated it as necessary to establish that both parties actually intended their written contract to contain a particular term as well as giving outward expression to that common intent is *The Demetra K* [2002] EWCA Civ 1070; [2002] 2 Lloyd's Rep 581, para 22. Lord Phillips MR (who gave the judgment of the court) cited in support of these requirements, in addition to *Joscelyne v Nissen*, the following statement of Lord Diplock in *American Airlines Inc v Hope* [1974] 2 Lloyds Rep 301, 307:

> "Rectification is a remedy which is available where parties to a contract, intending to reproduce in a more formal document the terms of an agreement upon which they are already *ad idem*, use in that document words which are inapt to record the true agreement reached between them. The formal document may

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[1] As Coulson J pointed out in *Milton Keynes BC v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC); [2017] BLR 216, para 48, the word "continuing" here seems superfluous, as it is the subject of the third, separate requirement.

> then be rectified so as to conform with the true agreement which it was intended to reproduce and enforced in its rectified form."

We think it clear that in this passage the expression "true agreement" is being used to refer, not to a mere appearance of agreement, but to an actual '*consensus ad idem*' or what in *Joscelyne v Nissen* [1970] 2 QB 86, 97, the Court of Appeal described as an "outwardly expressed accord of minds".

Unilateral mistake

103. It has come to be accepted that the jurisdiction to rectify a written contract is not limited to cases where there was a common mistake and that in certain circumstances rectification may be granted even though at the time of execution of the contract only one of the parties was mistaken about its terms or effect. The development of the modern doctrine stems from the approval in *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555 of the following statement of principle in *Snell's Equity* (25th Edn, 1960) at 570:

> "… a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included."

104. The precise scope of this principle remains controversial. But there is no doubt that it covers at least a case, such as the facts found in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, where the parties had a common intention that each had communicated to the other but one party before executing the contract realised that the document did not give effect to that intention and changed their mind without telling the other party.

105. The recognition of this principle is consistent with the traditional rationale of rectification for common mistake and gives effect to the same underlying equity. In the case of common mistake it is inequitable for a party to the contract to seek to apply the contract inconsistently with what that party knew to be the common intention of the parties when the written contract was executed. The doctrine of unilateral mistake extends this principle to the situation where a party seeks to apply the contract inconsistently with what that party knew the other party believed to be the common intention of the parties when the written contract was executed.

106. In *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P&CR 29, para 41, Neuberger J summarised the law in what were then uncontroversial terms as follows:

> "Rectification of a bilateral document can be obtained in two types of case. The first is where the party seeking rectification can establish that both parties to the document had an intention that it should contain something different from that which it actually contains, that that intention had been communicated between the parties before execution of the document, and that the intention was shared by both parties up to the time that they executed the document. The second type of case is where the

> party opposing the claim for rectification appreciated that the document departed from what had previously been negotiated between the parties, and that the other party was under a misapprehension, and the first party, though aware of this, forbore from drawing his attention to the error."

The *Chartbrook* case

107. This apparently settled state of the law was thrown into doubt by the observations of Lord Hoffmann on the question of rectification in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101.

108. In summary, the facts were that owners of land (Chartbrook) made a contract with a developer (Persimmon) granting Persimmon a licence to develop the land for commercial and residential use. Planning permission was granted and the development was built. The sums payable to Chartbrook under the contract included an "additional residential payment" (or "ARP") which was to be calculated according to a defined formula. On what Chartbrook contended – and the trial judge (Briggs J) and the Court of Appeal held – was the correct interpretation of the contractual formula, the amount payable to Chartbrook was some £4.4m, whereas on Persimmon's case it was only some £900,000. On Persimmon's alternative claim to rectify the contract, Briggs J found that there had been no common mistake, as the two directors of Chartbrook had understood both the relevant clause in the contract and a pre-contractual exchange of letters describing the ARP as having the effect for which Chartbrook contended. The Court of Appeal declined to interfere with that finding.

109. The House of Lords allowed Persimmon's appeal on the issue of interpretation holding that, objectively construed, it was clear that something had gone wrong with the language used to define the ARP in the contract and that a reasonable person would have understood the contractual definition to bear the meaning for which Persimmon contended – essentially because Chartbrook's interpretation, although consistent with ordinary rules of syntax, made no commercial sense. The House of Lords reached that conclusion without taking account of what was said in the pre-contractual correspondence, having declined to depart from the established rule that what is said in the course of negotiating a contract is not admissible for the purpose of drawing inferences about what the contract means.

110. In these circumstances the question whether Persimmon was entitled to have the wording of the contract rectified did not arise. Nevertheless, while acknowledging that the question was "academic", Lord Hoffmann expressed the opinion that, had it not succeeded on the issue of interpretation, Persimmon would have been entitled to an order for rectification. The basis for this opinion was an argument advanced for the first time on behalf of Persimmon in the House of Lords, encouraged in particular by an article in the Law Quarterly Review by Marcus Smith (now Mr Justice Marcus Smith): "Rectification of Contracts for Common Mistake, *Joscelyne v Nissen* and Subjective States of Mind" (2007) 123 LQR 116. The argument was that the prior consensus or "continuing common intention" which must be shown in order to found a claim for rectification need not involve any concurrence of the parties' actual subjective intentions. Its existence must be ascertained objectively by asking what a reasonable observer would have understood the intentions of the parties to be. This was the same

argument as had previously been advanced by the defendants in the *Britoil* case, and Lord Hoffmann once again agreed with it.

111. The starting point for his legal analysis was the observation of Lord Cozens-Hardy MR in *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 (quoted at paragraph 57 above) that rectification "may be regarded as a branch of the doctrine of specific performance". As Lord Hoffmann explained (at para 59), what Lord Cozens-Hardy clearly meant by this was that, if parties contractually agree to execute a document containing particular terms but instead execute a document containing different terms, the court can specifically perform the contract by rectifying the document. For this purpose, Lord Hoffmann reasoned, the terms of the contract to which the subsequent document must conform must be objectively determined in the same way as any other contract.

112. Lord Hoffmann then extended this reasoning to cases where there is no prior contract in the following key sentence (at para 60):

> "Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, 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."

Lord Hoffmann also relied on the same three authorities on which he had relied in expressing a similar opinion in the *Britoil* case. He distinguished the *Britoil* case (at para 63) on the ground that the difference between himself and the majority of the Court of Appeal in that case had merely been about whether the language of the heads of agreement was sufficiently certain to establish a prior common agreement or intention, ascertained objectively, and that the judgment of Hobhouse LJ lent no support to the view that, in order for rectification to be granted, a party must be mistaken as to whether the document reflects what that party subjectively understood to have been agreed.

113. Applying this approach to the facts of the *Chartbrook* case, Lord Hoffmann considered that a reasonable observer would have understood from the pre-contractual exchange of letters between the parties that they intended the ARP formula to operate in the way for which Persimmon contended. There was no suggestion that the contract was intended to depart from what had previously been discussed. In these circumstances, if the wording of the contract had, on its proper interpretation, borne the meaning for which Chartbrook contended, Persimmon would have been entitled to have the contract rectified to make it accord with the prior consensus expressed in correspondence. That would have been so, even though (on the undisturbed factual findings of the trial judge) Chartbrook's directors had understood the formula agreed in correspondence as well as the wording of the contract to mean something different.

114. Each of the other members of the appellate committee either agreed or saw no reason to differ from Lord Hoffmann's observations on what Lord Walker and Baroness Hale respectively referred to as "the important questions that we do not have to decide" (para 97) and "the issues which we do not have to decide" (para 101).

The *Daventry* case

115. The first case following the *Chartbrook* case in which the Court of Appeal had to analyse a claim for rectification was *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 WLR 1333. In somewhat simplified summary, the claimant council sought rectification of a contract by which it transferred its housing stock and the staff employed in its housing department to the defendant company. There was a deficit of £2.4m in the staff pension scheme referable to the transferred employees and the contract provided for the council to fund this deficit. An earlier non-binding document which was agreed in principle and signed during the negotiations, objectively interpreted, provided that the cost of funding the deficit would be shared equally between the parties. This was how the council's agent understood it (as the company's negotiator knew) but the company's negotiator thought that a different interpretation of the document was tenable and told the company's board of directors that the deal was for the council to fund the deficit.

116. When the formal contract was prepared, the company's funders proposed the inclusion of a clause which had the clear effect that the council was to fund the pension scheme deficit. The council's agent approved the inclusion of this clause, and the council executed the contract, without realising its effect. When the error was discovered, the council brought a claim to rectify the contract. Although the claim failed before the judge (Vos J), the Court of Appeal by a majority (Lord Neuberger MR and Toulson LJ, with Etherton LJ dissenting) held that the council was entitled to rectification.

117. The judgments of the Court of Appeal are long and have been described by Professor Burrows in his *Casebook on Contract* (6th Edn, 2018) at 739 as "mind-bogglingly difficult". Their preparation evidently involved what in current jargon was an 'iterative process' by which, as Lord Neuberger explained at para 187, "we have effectively been conducting a dialogue through the exchange and consequent refining of successive drafts of our respective judgments." The following general points may, however, be extracted.

118. First, the case was argued, both before the judge and on the appeal, on the basis that Lord Hoffmann's observations about the law of rectification in the *Chartbrook* case were correct, and the Court of Appeal – while recognising that those observations were *obiter dicta* – thought it right to proceed on that basis.

119. Second, although Etherton LJ thought that Lord Hoffmann's observations in the *Chartbrook* case had "set out established principles rather than seeking to change them" and that both parties had "rightly" proceeded on the basis that those observations correctly stated the existing law (see para 78), the other two members of the court expressed considerable reservations about the correctness of Lord Hoffmann's analysis. Toulson LJ pointed out at some length objections to it, stating at para 176:

> "Notwithstanding the immense respect due to Lord Hoffmann and the other members of the House of Lords, I have difficulty in accepting it as a general principle that a mistake by both the parties as to whether a written contract conformed with a prior non-binding agreement, objectively construed, gives rise to a claim for rectification."

Lord Neuberger agreed (at para 195) that "the analysis is not without its difficulties and has not met with universal approval in learned articles, and may have to be reconsidered or at least refined."

120. Third, all the members of the court were in agreement that, proceeding on the basis of the approach outlined in the *Chartbrook* case, the question whether there was a common mistake was to be judged 'objectively' by reference to what a hypothetical reasonable observer would have concluded; but they had different opinions about exactly what this test required. Etherton LJ regarded Lord Hoffmann's "clarification" as being that the required "common continuing intention" was what an objective observer would have thought the intention to be. He suggested that the requirements for rectification for common mistake could be rephrased so that, instead of treating a "common continuing intention" and "an outward expression of accord" as separate conditions, what is required is a common continuing intention which is "to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be" (para 80).

121. Lord Neuberger also proceeded on the basis that the issue as to whether there was a common mistake must be judged objectively and said that he agreed with Etherton LJ's analysis of the law (paras 225 and 227). However, in identifying differences between rectification and contractual interpretation, Lord Neuberger said (para 198):

> "Even in relation to written contracts, some subjective evidence of intention or understanding is not merely admissible, but is normally required in a rectification claim: the party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract."

Etherton LJ may have been saying the same thing when he stated at para 82:

> "… a party can always give evidence that the wording of the document was the result of a mistake. That is an essential part of the cause of action."

122. This is at odds with the assumption that the question whether there was a mistake should be judged wholly objectively by reference to what a hypothetical reasonable observer would have concluded and suggests that, to succeed in a claim to rectify a contract, the claimant must show that he or she was actually (i.e. subjectively) mistaken about what the contract provided. Such a requirement is consistent with the law as it was understood before the *Chartbrook* case. But once it is accepted that an actual mistake by the claimant is an essential part of the cause of action, it seems to us logically to follow that it is also necessary to show such a mistake on the part of the defendant. The principle under consideration is not that of rectification based on a unilateral mistake by the claimant: it is rectification for <u>common</u> mistake. Whatever the appropriate test of a mistake, the very idea of a "common mistake" requires that the same test must apply to both parties.

123. Applying his understanding of the *Chartbrook* test to the facts of the *Daventry* case, Etherton LJ thought that the critical question was whether objectively, prior to the execution of the contract, the company communicated to the council that it intended to contract in relation to the pension deficit on a different basis from the accord reflected

in the earlier non-binding document (para 91). In Etherton LJ's view, the objective observer would have thought that, when the company put forward the clause which made different provision for the pension deficit from that contained in the earlier non-binding agreement, the company no longer adhered to that earlier agreement.

124. As well as questioning whether the principle adopted in the *Chartbrook* case on the rectification issue was right, Toulson LJ differed from Etherton LJ about how the principle operated. Toulson LJ considered that where on an objective analysis the form of the written contract differs from the effect of a previous non-binding agreement, the relevant question to ask is "whether on a fair view there was a renegotiation or a mistake in the drafting of the contract". To answer that question, it is necessary to ask whether the parties "behaved in such a way that they would reasonably understand one another to be involved in a process of seeking to negotiate a different deal from the one originally agreed or as involved in a process of drafting an agreement intended to accord with the deal originally agreed" (para 160). Applying that test, Toulson LJ concluded that the new clause put forward would not reasonably have been understood as an attempt by the company to renegotiate or vary the earlier non-binding agreement (paras 167-170).

125. Lord Neuberger agreed with Etherton LJ's approach of looking solely at whether the company had indicated an intention to resile from the prior accord, rather than also looking at the council's reaction and asking whether the reasonable observer would have thought that the council was agreeing to what the company proposed, as Toulson LJ's approach required (paras 205-207). However, on the facts of the case, Lord Neuberger reached the same result as Toulson LJ. In Lord Neuberger's view (para 213):

> "Despite the clear terms of the proffered clause … the hypothetical observer would not have concluded that [the company] was signalling a departure from the prior accord: the observer would have believed that [the company] was making a mistake."

In these circumstances Lord Neuberger agreed with Toulson LJ that the council was entitled to have the contract rectified on the ground of common mistake.

Cases since the *Daventry* case

126. We were referred to two cases involving claims for rectification in which, since the *Daventry* case, appeals have been heard by the Court of Appeal. In *Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005, the recorder had found that both parties had been mistaken in their belief about the effect of a lease and had granted rectification. The appeal was dismissed. Arden LJ (with whom Lloyd Jones and Fulford LJJ agreed) approached the issue of rectification by considering whether the requirements set out by Peter Gibson LJ in the *Swainland* case had been satisfied: see paras 25-26 and 34. Reference was made to the *Chartbrook* case as indicating that the existence of the parties' common intention is to be ascertained on an objective basis. But the question whether there had been an "outward expression of accord" seems to have been approached simply by reference to whether the evidence was sufficient to show that in the course of their negotiations the parties had in fact agreed what the terms of the lease were to be. The Court of Appeal concluded that the recorder had been

entitled to find that they had reached such an agreement on which the party seeking rectification had relied in signing the lease, and that the other party had afterwards changed his mind about what the legal effect of the lease was (paras 46-47).

127. *Day v Day* [2013] EWCA Civ 280; [2014] Ch 114 concerned a claim to rectify a conveyance of property by the claimant's mother. The Court of Appeal (Sir Terence Etherton C, Elias and Lewison LJJ) held that the conveyance was in the nature of a voluntary settlement and that in such a case what is relevant is the subjective intention of the settlor (see paras 22 and 50). The *Chartbrook* and *Daventry* cases were distinguished on the basis that they involved bilateral transactions.

128. The general approach adopted by judges at first instance since the *Chartbrook* and *Daventry* cases were decided has been the prudent course followed by the trial judge in this case of making findings about the subjective intentions and the 'objective' intention of the parties which, in all the cases cited to us, happily produced the same result. In several cases, however, significant misgivings have been expressed about the notion that a written contract should be rectified to conform to what a reasonable observer would have understood the parties' common intention as manifested in pre-contractual communications to have been, irrespective of whether it actually was the parties' common intention: see *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), para 253; *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm), paras 89-99; *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), para 70.

Commentary

129. In his judgment in the *Daventry* case at paras 173-176, Toulson LJ quoted from a case comment by Professor David McLauchlan which criticised the approach taken to rectification in the *Chartbrook* case: "*Chartbrook Ltd v Persimmon Homes Ltd*: Common-sense Principles of Interpretation and Rectification?" (2010) 126 LQR 8. This comment made the point that, on the undisturbed findings of fact:

> "… it is difficult to accept that Chartbrook was mistaken, at least in any usual sense of that word. The company intended the contract to provide the benefits that (we assume) it did provide for."

Toulson LJ saw "much force" in the criticism made (para 174). Since the *Daventry* case, the criticism has become something of a chorus. At our request, we were provided with a full bundle of relevant academic and extra-judicial commentary. Journal articles which we have found particularly helpful are one by James Ruddell, "Common Intention and Rectification for Common Mistake" [2014] LMCLQ 48, and two articles by Professor Paul Davies, "Rectifying the Course of Rectification" (2012) 75 MLR 412 and "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75 CLJ 62.

130. The controversial nature of the issues raised by the *Chartbrook* and *Daventry* cases is also reflected in the number of lectures – unprecedented in our experience – in which judges or retired judges have commented on those issues. In addition to the two lectures mentioned earlier given by Sir Kim Lewison and Sir Nicholas Patten, we have had the benefit of reading nine other such lectures, comprising two given by each of Lord Hoffmann and Sir Terence Etherton and one by each of Sir Christopher Nugee, Sir Paul

Morgan, Lord Toulson, Lord Neuberger and Lord Briggs, as well as an article in the Cambridge Law Journal by Sir Richard Buxton: "'Construction' and rectification after *Chartbrook*" (2010) 69 CLJ 253.

131. Much of this academic and extra-judicial commentary has been reviewed in detail by David Hodge QC in his comprehensive treatise on *Rectification* (2nd Edn, 2016). He concludes (at para 3-81) that:

> "… there is general acceptance that the present state of the law of rectification is unsatisfactory. It is over-complicated, unpredictable in its outcome, capable of producing unacceptable consequences, and creates confusion between cases of common and unilateral mistake."

132. In *A Restatement of the English Law of Contract* (2016), prepared by Professor Andrew Burrows assisted by an advisory group of academics, judges and practitioners, there were two "issues of topical dispute" which it was decided, "after considerable debate", that the *Restatement* would have to leave open. One (the approach to illegality) has since been resolved. The other is "whether Lord Hoffmann was correct in *obiter dicta* in *Chartbrook Ltd v Persimmon Homes Ltd* to regard the common continuing intention needed for rectification as objective rather than subjective" (see xi-xii).

The need for reconsideration

133. Like the Court of Appeal in the *Daventry* case, we recognise the immense respect due to an opinion expressed by Lord Hoffmann on a point of law which commanded the unanimous agreement of the House of Lords. Nevertheless, Lord Hoffmann's observations in the *Chartbrook* case were expressly acknowledged to be *obiter dicta* and are therefore not binding authority. In circumstances where Lord Hoffmann's opinion that a purely objective approach should be adopted in determining whether the parties had a 'common continuing intention' has been disputed by the Parent on this appeal, we think it necessary to decide whether it is correct in law.

134. We are satisfied that we are not prevented from doing so by this court's decision in the *Daventry* case because in that case the Court of Appeal proceeded on the basis that Lord Hoffmann's analysis was correct in circumstances where the parties argued the case on that assumption. Moreover, two members of the court expressed concerns about the reasoning in the *Chartbrook* case, suggesting that it may have to be reconsidered in a future case.

135. A similar question potentially arose in *Joscelyne v Nissen* [1970] 2 QB 86, 98-99, as to whether the Court of Appeal was bound by its previous decision in *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68 which approved the analysis of Simonds J, but did so in circumstances where the correctness of that analysis had not been disputed. On the question whether a binding precedent had nevertheless been created, the members of the Court of Appeal in *Joscelyne* expressed themselves "attracted by a suggestion that the conceded point of law should be open to argument in another case," provided it was made plain that this would not apply where "an argument, though put forward, had been only weakly or inexpertly put forward".

136. Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in *Joscelyne v Nissen* is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the *ratio decidendi* of the case). In *Re Hetherington, deceased* [1990] Ch 1 at 10, Sir Nicolas Browne-Wilkinson V-C held that, as a first instance judge, he was entitled to decline to follow even a decision of the House of Lords in which a proposition of law necessary for the decision was not disputed. After a review of the authorities, he concluded that:

> "… the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."

See also *R (Kadhim) v Brent London Borough Council* [2001] QB 955, para 33; *Rawlinson & Hunter Trustees SA v SFO (No2)* [2014] EWCA Civ 1129; [2015] 1 WLR 797, para 43.

137. Furthermore, because of the assumption on which the case was conducted, the Court of Appeal in the *Daventry* case was not referred to and did not consider the substantial body of case law which we have reviewed establishing the need to show an actual (and not merely objectively inferred) common intention and mistake in order to obtain rectification of a contract. In particular, the important decisions of this court in *Joscelyne v Nissen* [1970] 2 QB 86 and *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561 were not cited in the *Daventry* case. In a lecture given to TECBAR on 31 October 2013, "Does Rectification Require Rectifying?", Lord Toulson (as he by then was) drew attention to the *Britoil* case and observed:

> "When a similar problem arises, as no doubt it will, it will be a matter for argument whether a court should follow the reasoning in *Britoil* or in *Chartbrook*. In principle, a court should follow a binding decision of the Court of Appeal rather than a later opinion expressed *obiter* by the House of Lords."

138. In addition, the differences of view which emerged between the members of the Court of Appeal in the *Daventry* case, and the difficulties encountered in that case in attempting to analyse and apply a purely 'objective' test, together with the controversy and uncertainty that currently afflicts the test of rectification for common mistake, make it all the more imperative, in our view, to identify the true principle of law that underpins the doctrine.

139. In considering whether the approach approved in the *Chartbrook* case is correct, we will examine it from the point of view of (i) principle, (ii) precedent and (iii) policy considerations.

Principle

140. In later lectures in which he has sought to explain and further justify his opinion in the *Chartbrook* case, Lord Hoffmann has drawn a distinction between two forms of

rectification, based on different principles. As described in his recent TECBAR Lecture, 21 November 2018, "Rectifying Rectification":

> "… we have two forms of rectification, based on altogether different principles. The first is rectification of a document because it does not reflect what the parties agreed. … Whether there was an agreement is an objective fact. The underlying moral principle is that parties should keep their promises to each other; they should be bound by what they agreed to record in the document and not by a document which does not give effect to that agreement. The second, more recent form of rectification is entirely concerned with the parties' intentions, their subjective states of mind. A party who subjectively knows that the other party is mistaken about the terms of the contract … cannot enforce those terms and the mistaken party may be entitled to rectification. … The underlying moral principle is that persons negotiating a contract have to observe certain standards of good faith."

See also Lord Hoffmann, Lecture to the Commercial Bar Association, 3 November 2015, "Rectification and other Mistakes", paras 27-29.

141. We find this analysis illuminating. Applying the distinction between the two forms of rectification, it can be seen that the judges who at one time espoused the view that it was necessary to find a prior concluded contract before an order for rectification could be made were treating the only permissible form of rectification for common mistake as the first form of rectification described by Lord Hoffmann, based on the principle that the court should give effect to what the parties have contractually agreed to record in their document. This explains the *dictum* of James V-C in *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375, 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."

It also explains, as Lord Hoffmann pointed out in the *Chartbrook* case at para 59, the observation of Lord Cozens-Hardy MR in *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88, that rectification "may be regarded as a branch of the doctrine of specific performance". We agree with the reasoning (as did the majority of the Court of Appeal in the *Britoil* case) that, if parties make a binding agreement to execute a document containing particular terms but instead execute a document containing different terms, the court may specifically enforce the agreement by rectifying the document; and that, in such a case, the terms of the contract to which the subsequent document is made to conform must be objectively determined in the same way as any other contract.

142. We do not, however, accept that the same reasoning can be applied to a situation in which parties have not made any prior contract but had a common continuing intention in respect of a particular matter in the document sought to be rectified. Where, as we see it, the analysis in the *Chartbrook* case went awry was in regarding rectification to reflect a common intention where there was no prior contract as also based on the principle that agreements must be kept. As we have seen, that was not historically the

principle on which equity interfered with written contracts which mistakenly failed to reflect the common intention of the parties; nor in our view does it provide a proper basis for such interference. Rather, rectification to give effect to a 'common continuing intention' not amounting to a legally enforceable contract is justified, and is only capable of being justified, as an instance of the second form of rectification, based on an equitable principle of good faith.

143. 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: it is in the very nature of such a consensus – even where, as in the *Britoil* and *Daventry* cases, 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 a 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. It is to do exactly what on the reasoning of cases like *Lovell & Christmas Ltd v Wall* and Denning LJ's judgment in *Rose v Pim* courts should not do: it is to rectify the contract made by the parties and not simply a document which fails to give effect to the terms of a contract.

144. It is in the very nature of a formal written contract that it is objectively intended to have priority over any earlier informal non-binding record of the parties' intention, as objectively assessed. In so far as there is a difference between them, it is therefore the contractual document which must prevail. As Professor Paul Davies has aptly put it:

> "The objective approach to rectification involves too much objectivity: objectively, a binding written contract with a particular meaning, ascertained through the process of interpretation, has been concluded."

See "Construing commercial contracts: no need for violence" in M Freeman and F Smith (eds), *Law and Language: Current Legal Issues Volume 15* (2013), 444.

145. Nor is it an answer to argue that rectifying a written contract to accord with a prior objective consensus is legitimate as, on a rectification claim, more facts can be taken into account by the hypothetical observer than can be taken into account in interpreting the final contract because evidence of the parties' negotiations is admissible. Rectification does not simply involve deciding whether the parties have made a contract and, if so, what effect it has, applying the same objective test as where the question is one of interpretation but having recourse to a wider range of material. It involves altering the terms of the written contract and doing so in some cases even where those terms cannot reasonably be read, however much material (including evidence of antecedent negotiations) is admitted as background, as having the effect which rectification seeks to achieve. The present case is a good example.

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, to adopt Lord Hoffmann's analysis, as being that persons who make a contract have to observe certain standards of good faith.

147. It is not, however, a new principle, as suggested by Lord Hoffmann in the passage we have quoted from his recent lecture. Nor is it limited, as also there suggested, to cases of unilateral mistake. We have seen that the principle is of ancient origin and was, historically, the rationale for granting rectification in cases of common mistake. Moreover, it is just as contrary to good faith – if not more obviously so – for a party to take advantage of a mistake about the content or effect of a written contract in a case where both parties were mistaken in believing when the contract was executed that it faithfully recorded their common intention than it is to do so in a case where only one party made such a mistake (to the other's knowledge). Rectification for unilateral mistake can, as we noted earlier (at paragraph 105 above), be understood as an extension of the same basic equitable principle. It is fundamental to the doctrine, in either aspect, that an actual mistake was made by one or more real people in believing that the written contract gave effect to what either was or was understood by one party to be the parties' actual common intention. As it was put in the passage from Story's *Commentaries*, quoted earlier, to allow the terms of the written contract to prevail where such a mistake was made:

> "would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party, who receives the benefit of the mistake, to resist the claims of justice, under the shelter of a rule framed to promote it."

The objective test and its limits

148. To elucidate this further, it is useful to consider why English law applies an objective test in interpreting contracts at all and asks, as stated earlier in Lord Hoffmann's judgment in the *Chartbrook* case at para 14, "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." The reasons lie in the greater predictability and consistency of decision-making that such an approach is considered to bring.

149. In many, if not most, cases in which parties to a contract disagree about how it should be interpreted, it is likely, if not certain, that they had no relevant intention when they entered into the contract that the particular clause should have the particular effect for which they later contend – let alone a common intention in that regard which they had communicated to each other. One reason for this is that contracts often contain standard terms, the meaning of which will often (for good practical reasons) have been given little thought by the parties or their agents when entering into the contract, if indeed they read them at all. Another reason is that it is impossible to foresee when a contract is made all the future eventualities to which its terms will fall to be applied. Nevertheless, English law proceeds on the assumption that the words used have a single

specific meaning (the "proper interpretation" or "true construction" of the contract) which is established objectively by asking what the language should reasonably be understood to mean rather than by enquiring into what, if anything, the parties subjectively meant.

150. This approach has many practical advantages. It enables a party to predict with a reasonable degree of certainty when entering into a contract how its provisions will be interpreted, without having to probe or be concerned about whether the other party shares this understanding. It also allows third parties to ascertain the meaning of contractual provisions without requiring them to have been privy to the actual intentions of the parties to the contract. In addition, this approach facilitates contractual ventures by giving content to contractual obligations even in circumstances which the parties did not specifically envisage. In all these ways the objective approach enhances the ability of parties to plan and act in reliance on contracts.

151. The reasons for enforcing a contract in accordance with its objective meaning lose their force, however, in a situation where the parties did have an agreed understanding or common intention about what a particular provision in their contract required but the contract as objectively interpreted does not reflect that common intention. In such a situation, provided the common intention is clearly demonstrated, there is no sound justification for giving effect to the meaning that a hypothetical reasonable observer would have attributed to the words used in preference to what the parties actually intended the effect of their contract to be. Indeed, to do so will result in injustice.

152. Lord Wright explained the position very clearly in *Inland Revenue Commissioners v Raphael* [1935] AC 96, 143, when he said that:

> "... the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention: these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or re-write the clauses in order to give effect to the real intention. But that is not construction, but rectification."

153. For these reasons, there is in our view no anomaly in applying an objective test where rectification is based on a prior concluded contract and a subjective test where it is based on a common continuing intention. Different principles are in play.

Precedent

154. To apply a purely objective test of intention is also, as we have seen, inconsistent with precedent, including authority that is binding on this court. We have reviewed the history of the doctrine of rectification and seen that, in cases where the court is not

simply enforcing a contractual obligation to execute a document in particular terms, the doctrine has always been understood and justified as an equitable remedy to correct an actual common mistake – that is to say, an inadvertent failure to give effect to what the parties actually intended. This explains why, in considering whether the necessary common intention has been established, it has always been regarded as relevant to take account of evidence bearing on what each party intended which was not contained in communications that 'crossed the line', including evidence of subsequent conduct – which may show what a party believed the effect of the contract to be but *ex hypothesi* could not be known by a notional objective observer of such communications – and evidence of a party's later admission or credible denial that he or she had the relevant intention.

155. As noted earlier, Lord Hoffmann relied in the *Chartbrook* case on three authorities to support the suggestion that, in establishing the existence of a common intention, the question is what an objective observer would have thought the intentions of the parties to be. These were the same three authorities on which he had previously relied in his dissenting judgment in the *Britoil* case, but which had failed on that occasion to persuade the majority of the Court of Appeal. In our view, none of the three authorities justifies the reliance placed on it.

156. Lord Hoffmann described as "perhaps the clearest statement" the passage in Denning LJ's judgment in *Rose v Pim* which we have quoted at paragraph 64 above. As already discussed, that passage, read in context, 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.

157. *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll L Rep 97 was a claim for rectification of a lease. The parties had entered into a previous lease of a wharf for a term of 21 years. Under the terms of that original lease the defendant landlord was responsible for repairing the quay walls. Two years before that lease expired, the parties executed a new lease which contained a clause putting the repairing obligation on the plaintiff tenant. In the course of the negotiations for the new lease it had been agreed in correspondence that the terms and conditions contained in the then current lease were to be embodied in the new lease "where applicable". The trial judge found that, notwithstanding the denials of the defendant's witnesses, both parties had subjectively intended that all the relevant terms and conditions of the old lease, including the repairing covenant, were to be transferred to the new lease and that the document should be rectified to give effect to that intention. The Court of Appeal upheld the judge's decision. The case therefore involved an application of traditional equitable doctrine and is inconsistent with the view that, where a common intention is alleged, it is what an objective observer would have thought and not what the parties actually intended that matters.

158. There was a further ground given for dismissing the appeal. Although the judge had not made such a finding, the members of the Court of Appeal also considered that the agreement reached in correspondence that the new lease should embody the terms and conditions of the old lease "where applicable" amounted to a binding contract. It followed that (unless it could be shown that this contract was later varied or superseded)

the plaintiff was entitled to enforce this contract, objectively interpreted in accordance with the principle that the words used should be given their ordinary meaning, and to have the lease rectified to give effect to it. Applying that principle, the repairing covenant was clearly an "applicable" term which the parties had therefore agreed was to be transposed into the new lease. Again, however, this reasoning is no more than an application of orthodox principle – here the principle that contracts should be enforced – and provides no support for the view that the objective test applicable to the interpretation of a contract should also be applied to ascertain the parties' intentions when there is no concluded contract.

159. The third authority referred to by Lord Hoffmann, and the only one which post-dates the seminal decision of the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86, is the statement of Mustill J in *The Olympic Pride* [1980] 2 Lloyd's Rep 67, 72, that it is "the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter". However, that statement was simply one of a number of propositions "which were not seriously in dispute at the trial" seeking to summarise the effect of earlier authorities. It is clear from the earlier propositions quoted at paragraph 91 above that Mustill J was not seeking to suggest that it is unnecessary to demonstrate an actual common mistake. His third proposition should, we think, be understood as a statement of the requirement to show an "outward expression of accord" and as signifying only that the inward thoughts of the parties, unless manifested to each other, will not support a claim for rectification.

160. There was no discussion in Lord Hoffmann's judgment in the *Chartbrook* case of the history of the equitable remedy of rectification for common mistake which shows that courts of equity have always been concerned with the actual intention of the parties. Nor, with one exception, was any reference made to the authorities which, where a claim is based on a common continuing intention, establish the need to prove the reality of that intention. The one exception was the *Britoil* case which, as noted earlier, Lord Hoffmann sought to distinguish on the ground that the only disagreement between himself and Hobhouse LJ, who gave the majority judgment, was that Hobhouse LJ thought that the language of the heads of agreement was too uncertain to establish a prior common agreement or intention which the final document failed to reflect: see the *Chartbrook* case, para 63.

161. We do not accept that on a fair reading of the judgments the differences between the majority and dissenting opinions in the *Britoil* case were so narrowly confined. When Hobhouse LJ noted (at 571) that Saville J (the trial judge) "did not base himself upon any consideration of the evidence as to the actual state of mind of the parties", he was referring to the fact that the defendants in the *Britoil* case had sought to rely, to establish a common intention, solely on the heads of agreement; Saville J had found that the evidence of the heads of agreement was insufficient to prove 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). But, as Hobhouse LJ repeatedly emphasised, that was all a matter of evidence. His judgment cannot fairly be read as suggesting that the actual intentions of the parties were irrelevant or that what matters is what an objective observer would have thought their intentions to be. Quite the reverse.

162. In particular, we think it clear that, in the passage we have quoted at paragraph 95 above, Hobhouse LJ was insisting that rectification for common mistake is an exercise

of a different nature from the interpretation of a contractual document and requires proof that the parties were actually mistaken as a matter of fact. Therefore, where a non-binding document which precedes the final written contract is relied on in support of a claim to rectify the final contract, its relevance is only as evidence of what the parties intended the effect of the contract to be. Hence in the *Britoil* case the heads of agreement were only relevant if and in so far as they justified a factual finding that the parties had a common intention, which continued at the time of execution of the contract, that the contract should have the effect for which the defendants contended such that, when they executed the contract, they were both mistaken about its effect. Applying that test, the heads of agreement did not justify the conclusion that as a matter of fact such a mistake was made.

163. There was no suggestion in the *Chartbrook* case that the *Britoil* case was wrongly decided or should be overruled. It was not brought to the attention of the Court of Appeal in the *Daventry* case, but it remains good authority which is binding on us.

Comparison with unilateral documents

164. To apply an objective test of intention where the claim is to rectify a written contract is also inconsistent with the law that applies to the rectification of unilateral documents – where it remains well settled that it is a party's actual intention that matters. For example, as mentioned earlier, in *Day v Day* [2013] EWCA Civ 280; [2014] Ch 114 the Court of Appeal confirmed that, on a claim to rectify a voluntary settlement, what is relevant is the subjective intention of the settlor.

165. Such a difference of approach cannot be justified on the ground that the objective principle of interpretation does not apply to unilateral documents, since it is clearly established that it does. English law takes the same approach to the interpretation of unilateral documents such as wills, contractual notices and patents as it does to the interpretation of contracts: see e.g. *Mannai Ltd Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; and *Marley v Rawlings* [2014] UKSC 2; [2015] AC 129, paras 20-23. The test in each case is what a reasonable person would have understood the words used, in their context, to mean. However, where in the case of a unilateral document it is demonstrated that the words used, as objectively interpreted, do not correctly express the maker's subjective intention, a court may order rectification. The fact that a contract is agreed between two or more parties provides a reason for requiring proof of a common intention communicated between them before rectification may be granted. But it does not provide a reason for dispensing with the need to show any actual mistake and for ignoring the parties' actual intentions in favour of what a hypothetical objective observer would have thought. We cannot see any difference of principle between a one party and a two party case which is capable of justifying such a radical difference of approach.

166. The illogicality of such a distinction is highlighted in the present case by the fact that the Parent could, as Mr Masefield accepted, have satisfied its contractual obligation to assign its interest in the shareholder loan as security by executing a unilateral document and giving notice of the assignment. As Flaux LJ pointed out in the course of argument, if the Parent had done that, it is clear that the court would be interested only in the Parent's subjective intention. As it happens, the Parent chose instead to invite Barclays to countersign deeds which, although the difference was of little, if any, practical importance, were bilateral documents because Barclays as security agent undertook

obligations pursuant to the IRSAs to apply any proceeds of the shareholder loan in specified ways. Because the transaction was structured in this way, with consideration given by Barclays, the alternative case advanced by the Parent in a respondent's notice on this appeal that the deeds were unilateral documents cannot be accepted. But it is hard to see why the difference should be material to the test of intention such that, just because a bilateral structure was chosen, a purely objective test should be adopted and the court ignore the Parent's actual intention (unless for some reason it sheds light on what an objective observer would have thought).

The law in other common law jurisdictions

167. The purely objective approach endorsed in the *Chartbrook* case is also inconsistent with how the doctrine of rectification is understood and applied in other common law jurisdictions – most notably Australia, where it is settled law that a written contract may only be rectified on the basis of a common mistake if it is shown that the instrument does not reflect the actual common intention of the parties.

168. An argument that the common intention of the parties should be determined objectively and that their subjective intentions are not relevant was comprehensively rejected by the New South Wales Court of Appeal in *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65; [2007] NSWLR 603. The history and rationale of the remedy of rectification for common mistake were thoroughly reviewed by Campbell JA in a judgment which repays careful study. He concluded (at para 316) that "proof of subjective intention of the parties to the contract is fundamental to the grant of rectification". Campbell JA further concluded that there is a requirement for each party's intention to be disclosed to the other before it can count as a "common intention", while explaining (as mentioned earlier) that such communication can occur through means other than express statement. Mason P and Tobias JA agreed with Campbell JA's analysis. This decision has been followed and applied by the New South Wales Court of Appeal in later cases: see e.g. *Newey v Westpac Banking Corpn* [2014] NSWCA 319, paras 173-192; *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132, paras 113-115.

169. In *Simic v New South Wales Land and Housing Corp* [2016] HCA 47 the High Court of Australia, in holding that certain performance bonds should be rectified in order to correct a common mistake, applied the traditional test of asking what was the actual or true common intention of the parties: see the joint judgment of Gageler, Nettle and Gordon JJ at para 104. In his concurring judgment, French CJ referred to Lord Hoffmann's *obiter* remarks in the *Chartbrook* case supporting a requirement for an objectively attributed common intention, but observed that such an objective test had not been argued for and "does not represent the common law of Australia as it presently stands" (para 19). Kiefel J (with whose reasons for granting rectification French CJ also agreed) commented (at para 48):

> "Lord Hoffmann's view involves a departure from the traditional approach of the courts to rectification. Its utility has been questioned. It has been observed that it is difficult to see why a prior agreement, objectively determined, should override the later instrument, unless it reflects the parties' actual intentions. The need for consistency which his Lordship thought desirable may also be questioned. Rectification is an equitable remedy

> which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement and it does so pragmatically, by reference to considerations such as business efficacy."

While noting that it was unnecessary to express a concluded opinion on the matter, Kiefel J considered that the appeal "should be approached by reference to settled principle" (para 49).

170. In New Zealand the requirements for rectification for common mistake were authoritatively stated by Tipping J in *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 30, as follows:

> "(1) That, whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
>
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
>
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.
>
> (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested."

This statement has been approved by the New Zealand Court of Appeal in *Pimlico Properties Ltd v Driftwood Developments Ltd* [2009] NZCA 523, paras 26-27, and *Robb v James* [2014] NZCA 42, paras 21-22. In the latter case the Court of Appeal contrasted "the state of some uncertainty as to the requisites for rectification in English law" (referring to the *Daventry* case) with the "relatively settled" position in New Zealand where "Tipping J's 1987 formulation still applies".

171. 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. The Hong Kong Court of Final Appeal approved the *Chartbrook* approach in *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKSFA 35 in a judgment given by Lord Hoffmann MPJ (with whom the other members of the court agreed).

172. We find the Australian authorities, in particular, strongly persuasive. They are consistent with and provide compelling reasons for adhering to what we consider to be the true principles on which contractual documents may be rectified for common mistake in English law.

Policy

173. In addition to these reasons of principle and precedent, there are in our view good reasons of policy for maintaining the requirement (in any case where there is no prior contract) to show that the wording of a contractual document is inconsistent with the parties' actual common intention before the document may be rectified. That is rightly a demanding test to satisfy and one which affords appropriate respect to the primacy of the final, agreed, written terms of a contract. Allowing those terms to be altered to reflect an objectively ascertained common intention, even though one party to the contract (or even both parties) actually intended to be bound by the terms of the document as executed, does not adequately protect the certainty and security of commercial transactions. An additional layer of uncertainty, as the *Daventry* case shows, attends the way in which an objective test of intention should operate.

174. In the article mentioned earlier in which he argued for a purely objective approach to the rectification of contracts for common mistake, Marcus Smith criticised a test which requires proof of the parties' actual intentions partly on the ground that:

> "a subjective test for rectification is likely to lead to fewer contracts being rectified. This is because an objective consensus is not only easier to demonstrate in any given case, but is also much more likely to arise in a contractual negotiation. By contrast, subjective consensus is likely to be far more elusive. It is precisely for this reason that contractual analysis adopts an objective test for agreement."

See (2007) 123 LQR 116, 130. In our view, that fact that a "subjective consensus" (that is to say, a common intention in the sense we have described) is harder to prove than an "objective consensus" is not an objection to adopting a subjective test for rectification but a positive merit of such a test. As a matter of policy, rectification should be difficult to prove. The reasons for adopting an objective test of agreement which makes it easier to establish a legally enforceable contract than would a subjective test are not reasons for making it easier to alter such a contract. We agree with the response of Professor Paul Davies that:

> "Formal, written contracts should be presumptively upheld and instances of rectification should be rare. Any other approach would undermine the importance commercial parties put on the final written agreement."

See Paul Davies, "Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016) 75 CLJ 62, 78.

Injustice

175. Finally, what we see as the potential unfairness of the objective approach approved in the *Chartbrook* case can be illustrated by reference to the facts of that case itself. As noted earlier, on the facts found, the directors of Chartbrook honestly believed that there was no mistake in the final contractual document and that the ARP formula as expressed both in that document and in the pre-contractual correspondence meant what Chartbrook contended in the proceedings that it meant. The House of Lords was

considering Persimmon's claim for rectification on the assumption that the Chartbrook directors were wrong about the objective meaning of the pre-contractual correspondence but right about the objective meaning of the final contract. We cannot in these circumstances see any equity in treating Chartbrook as bound by the objective meaning of communications which were not intended by either party to be binding rather than the objective meaning of the final document by which the parties intended to be bound. As Christopher Nugee QC (now Mr Justice Nugee), who argued the case successfully for Persimmon, subsequently observed:

> "[Chartbrook] 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?"

A conclusion that Chartbrook was bound to the earlier, informal objective consensus in priority to the objective meaning of the contract would, in his view, have been "rather unfair": see C Nugee, "Rectification after *Chartbrook v Persimmon*: where are we now?" (2012) 26 Trust Law International 76. We agree.

Conclusion on the law

176. For all these reasons, we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann's *obiter* remarks in the *Chartbrook* case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before 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.

Conclusion on the facts

177. As mentioned earlier, the judge in this case made findings of fact that, when they executed the accession deeds, the Parent and Barclays each intended to execute a document which satisfied the Parent's obligation to grant security over the shareholder loan and did no more than this. The judge also found that the relevant individuals acting for and advising Barclays (Mr Branwhite and Mr Kandola) derived their understanding of the purpose of executing the accession deeds from communications, including telephone conversations, with Mr Baker who was acting for the Parent. Although the judge did not say so in terms, it is implicit in his findings about the effect of these telephone conversations that Mr Baker must have understood that he had successfully communicated to Mr Branwhite and Mr Kandola his own (and the Parent's) understanding of the purpose of executing the accession deeds, such that they shared a common intention.

178. Given these findings, to which no challenge is made on this appeal, it follows from our analysis of the law that the appeal must fail – subject only to the issue raised by the appellant about the nature of the mistake made by the parties.

The nature of the mistake

179. For the appellant, Mr Masefield QC relied on the distinction between a mistake as to the legal effect of a document and a mistake as to the wisdom or consequences of or motive for agreeing to the wording of the document. He cited the following passage from the judgment of Lord Diplock (with whom the other members of the House of Lords agreed) in *American Airlines Inc v Hope* [1974] 2 Lloyds Rep 301, 307:

> "That either or both [parties] were mistaken in their reasons for agreeing to this wording is no ground for rectification. Rectification is concerned with *what* the parties to a contract did agree and not with *why* they did so." (emphasis in original)

Mr Masefield also cited a passing observation of Lord Walker in *Pitt v Holt* [2013] UKSC 26; [2013] 2 AC 108, para 131, that:

> "Rectification is a closely guarded remedy, strictly limited to some clearly established disparity between the words of a legal document, and the intentions of the parties to it. It is not concerned with consequences."

180. Lord Walker's observation was made with reference to the decision of the Court of Appeal in *Racal Group Services Ltd v Ashmore* [1995] STC 1151. In that case the Court of Appeal applied the principle that a document cannot be rectified merely on the ground that it failed to achieve the grantor's fiscal objective: the specific intention of the grantor as to how the objective was to be achieved must be shown. Peter Gibson LJ quoted with approval words of Evershed J in *Van der Linde v Van der Linde* [1947] Ch 306, 312, that the remedy of rectification is not appropriate if the grantor's real intention:

> "be no more precise than this, namely, that he intended, by whatever formulation of words was appropriate or possible, to achieve the result that he could deduct in his surtax return the amount of bounty that he paid to his sister…"

181. In *AMP (UK) Plc v Barker* [2001] Pens LR 77, para 70, Lawrence Collins J described the rule that rectification is not available if the mistake relates only to the consequences of the transaction or the advantages to be gained by entering into it as:

> "simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them. The cases certainly establish that relief may be available if there is a mistake as to law or the legal consequences of an agreement or settlement …"

The mistake in the *AMP* case was to make an amendment to the rules of a pension scheme which had the effect of introducing substantial new benefits for early leavers when the intention had been only to benefit those who left because of incapacity. That was held to be a mistake as to the legal effect of the amendment and not merely as to its commercial consequences.

182. In the present case the judge found that, although the relevant individuals understood the effect of the accession deeds to be that the Parent would become bound by the terms of the IRSAs, they did not review all the terms of those agreements and did not know or intend that those terms would include the Additional Obligations, as well as terms which assigned the Parent's interest in the shareholder loan as security for the obligations secured by the IRSAs. Despite the valiant efforts of Mr Masefield to argue otherwise, the judge was undoubtedly correct to characterise this mistake as a mistake about the legal effect of the contractual documents and not just about their commercial consequences. This is not a case in which the parties had merely a general intention about the objective they ultimately wished to achieve without any clear or specific intention about how it was to be achieved. Rather, on the judge's factual findings their common intention was the legally specific one of binding the Parent to particular contract terms – but not to other specific terms which were contained in the same document. This is a classic case for rectification.

Common intention objectively assessed

183. On the conclusions we have reached, having found as the judge did that, as matter of fact, the parties had a relevant common intention (in the sense we have discussed) and made a common mistake about the legal effect of the accession deeds, there was no further requirement which the Parent had to satisfy as a matter of law of establishing the existence of an 'objective' common intention, based on what a hypothetical observer would have thought the intentions of the parties to be when they executed the accession deeds. The factors that we mention at paragraphs 186 – 192 below were, we think it clear, relevant and taken into account by the judge in making the factual findings that he did about what the parties actually understood and intended. They are all matters which strongly supported his conclusion, based on the evidence at the trial, that as a matter of fact the parties intended (and understood each other to intend) the accession deeds to do no more (or less) than assign the shareholder loan as security. It was not necessary for the judge to decide separately or additionally whether the parties had a presumed common intention, established by reference to what an objective observer would have thought. We are nevertheless satisfied that the judge was also right to conclude that the perception of such an objective observer would have matched what the parties actually intended.

184. On behalf of the appellant, Mr Masefield emphasised that, on the judge's factual findings, while it was indeed made clear in the communications between the parties that the accession deeds were intended to satisfy the Parent's obligation to assign the benefit of the shareholder loan as security, it was never expressly said that the documents were intended to do no more than this. Furthermore, the relevant communications did not just explain that the intention was to grant security over the shareholder loan: they also explained the way in which this was intended to be done – which was by the Parent acceding to the terms of the IRSAs. Thus, the recitals to the draft accession deeds attached to the email of 14 November 2016 referred to the IRSAs and stated that the Parent "has agreed to enter into this Deed in order for the Shareholder Loan to become

an Assigned Agreement and to become an Assignor under the [relevant IRSA]". In addition, copies of the IRSAs were attached to the email; and in their telephone conversation on 16 November 2016 Mr Baker of Allen & Overy told Mr Kandola of Lathams that the security was to be given by way of accession to the IRSAs which had already been executed by Barclays.

185. Mr Masefield pointed out that the objective observer, aware only of matters communicated between the parties, would not have known that – as the judge found in fact to be the case – none of the individuals involved had actually reviewed the IRSAs and realised that they contained the Additional Obligations. To the contrary, the objective observer would naturally have expected that both the Parent's representatives and those representing Barclays, before executing deeds which provided for the Parent to become a party to the IRSAs, would have examined the terms of the IRSAs and seen that they contained the Additional Obligations. Mr Masefield submitted that, in the circumstances, the notional observer would reasonably have thought that the accession deeds were intended to have the legal effect which it was obvious from reading them in conjunction with the IRSAs that they did indeed have of binding the Parent to comply with the Additional Obligations. At any rate the objective observer could not be confident that this was not what either party intended.

186. Undoubtedly the plain terms of the documents create a strong presumption that, in executing them, the parties meant what they said. But in considering whether that presumption was rebutted, the judge was in our opinion right to attach decisive weight to three factors. The first was the contractual background to the accession deeds and the communications which preceded their execution.

187. A significant feature of this case, which Mr Wolfson for the Parent stressed, is that the parties were not negotiating a new contract from scratch. The relevant commercial negotiations had taken place some four years earlier, in 2012, when the terms of the FSHC acquisition had been agreed. Those terms were contained in a complex contractual structure comprising a series of interlocking agreements. What was discovered in 2016 was, to use Mr Wolfson's metaphor, that there was one missing brick in the edifice. The shape of the missing piece was defined by the existing contractual documentation in that – as the hypothetical observer must be taken to have known – clause 10.6(b) of the Intercreditor Agreement imposed an obligation on the Parent to assign to the secured creditors the benefit of the shareholder loan.

188. The initial communications between Allen & Overy on behalf of the Parent and Barclays about the missing security are also important background to the execution of the accession deeds. In the email in which Mr Baker of Allen & Overy first made contact with Mr Branwhite of Barclays on 20 October 2016, Mr Baker explained that, despite a thorough search, Allen & Overy had not managed to locate the security document assigning the Parent's rights and interests under the shareholder loan, and asked if Barclays could provide a copy. The request that Barclays and Lathams should search for such a document was subsequently repeated on four separate occasions before 9 November 2016, when Barclays and Lathams each confirmed that they had checked their records and did not have the missing security document.

189. When, against that background, Mr Baker of Allen & Overy sent to Mr Branwhite of Barclays on 14 November 2016 the accession deeds, signed by the Parent, with a request for Barclays' counter-signature, the obvious inference and understanding was

that the deeds were intended to replace the missing security document which Barclays and Lathams had been asked to look for, and not to fulfil any other or additional purpose. This was confirmed by the description of the deeds in the email and by the fact that, as the judge found, on the same day Mr Baker explained in telephone conversations with Mr Branwhite and Mr Kandola of Lathams that the purpose of the accession deeds was for the Parent to comply with its obligation under the Intercreditor Agreement to have in place a document which pledged to the security agent the Parent's rights and interests under the shareholder loan. It was clearly implicit in that explanation that – as Mr Branwhite and Mr Kandola both understood from what was said – the stated purpose was the only purpose of executing the deeds and that there was no intention that the deeds should, in addition, commit the Parent to new and onerous obligations which it was not contractually required to undertake.

190. A second cogent consideration is the commercial absurdity of the Parent agreeing, in the absence of any pre-existing obligation to do so or anything of any commercial value being given in return, to undertake through the accession deeds additional onerous contractual obligations which did not form part of the bargain struck in 2012.

191. The third compelling factor is the absence of any discussion of such a fundamental change to the structure of the transaction. At the time when the accession deeds were executed, the liabilities of the High Yield Bond Group were far greater than the value of its assets, with the result that (as noted in paragraph 91 of the judgment below) the shareholder loan was perceived to be worthless. Furthermore, a restructuring of the debt and security was in contemplation. It is hard enough to conceive that, if the Parent had intended to offer to undertake itself to meet the liabilities of companies in the High Yield Bond Group and to provide further very valuable security for those liabilities in the form of the Santander Group assets – as was the effect of undertaking the Additional Obligations – it would have done so without attempting to negotiate anything in return. It is, if anything, still more inconceivable that the Parent would have done this without even mentioning to Barclays that this was its intention.

192. It is true that Allen & Overy did not say in so many words that the Parent did not intend to do any more than satisfy its obligation to provide the missing security in respect of the shareholder loan. But, as Mr Wolfson pointed out, the very nature of the mistake made in overlooking the fact that the deeds did more than this explains why no such express statement was made. Parties entering into a contract do not spell out the fact that they lack intentions which no reasonable counterparty or observer would imagine them to have. Rather, it was the complete absence of any reference to the Additional Obligations in any of the relevant communications which, in this particular context, spoke louder than words.

193. In the circumstances, the judge was in our view plainly right to conclude that an objective observer would have understood – just as Barclays in fact understood – that the accession deeds were not intended to do more than fill the gap in the security.

Result

194. It follows that there is no ground for interfering with the judge's decision to order rectification and that this appeal must be dismissed.

Postscript

195. We wish to record here our sadness at the untimely death of Mr Justice Henry Carr which occurred shortly before the draft of this judgment was circulated to the parties. His judgment in this case illustrates his valuable contribution to the law and the administration of justice.