OUTER HOUSE, COURT OF SESSION

[2020] CSOH 100

CA178/19

OPINION OF LORD TYRE

In the cause

BRIGGS OF BURTON PLC

Pursuer

against

DOOSAN BABCOCK LIMITED

Defender

Pursuer: McKinlay; Eversheds LLP
Defender: McClelland; Dentons LLP

15 December 2020

Introduction

[1] This is an action for rectification of a sub-lease of commercial premises that raises a short and important point. In somewhat simplified form, the point is as follows. A (a tenant) and B (a prospective sub-tenant) enter into heads of terms for the subletting of premises. The heads of terms are expressly stated to be non-binding and subject to conclusion of formal missives incorporating a sub-lease. During the period between agreement of the heads of terms and conclusion of the missives, A changes his mind about certain matters of detail in the parties' agreement. A's solicitors draft a sub-lease incorporating those changes. The changes are not expressly drawn to the attention of B's

solicitors. The missives incorporating the sub-lease, as so drafted, are concluded. B subsequently becomes aware that the terms of the sub-lease depart from the agreed heads of terms. Is B entitled to rectification of the sub-lease to bring it into accord with the heads of terms?

The statutory provision

[2] In contrast to England where rectification is founded upon equitable principles, the law of rectification of documents in Scotland is statutory. Section 8(1)(a) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 provides as follows:

> "Subject to section 9 of this Act, where the court is satisfied, on an application made to it, that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties to the agreement at the date when it was made;
> …
>
> it may order the document to be rectified in any manner that it may specify in order to give effect to that intention."

[3] The point of statutory interpretation that arises in the present case is whether, in the circumstances outlined above, it can be said that the sub-lease was "intended to express or to give effect" to the prior non-binding heads of terms. The answer to that question depends upon the approach to be adopted, as a matter of law, to the ascertainment of the parties' intentions at the date of conclusion of the missives, as opposed to their common intention at the date when they agreed the heads of terms.

The facts in more detail

[4] The present action came before the court for a proof before answer. The evidence took the form of a joint minute of agreement, witness statements and relevant documents. There were no material facts in dispute and no oral evidence required to be led. The following narrative is based upon the joint minute of agreement, supplemented by details derived from the documents and witness statements.

Agreement of non-binding heads of terms

[5] At the material time, the defender was the head tenant of premises at Porterfield Road, Renfrew. The pursuer was in need of additional premises for a limited period of time, and ascertained that the defender had space available within its Renfrew premises. Negotiations began between the parties. Initially these were conducted by Mr George Crombie, the pursuer's engineering director, and Mr Mark Wylie, the defender's commercial director. At the point when heads of terms were being agreed, Ms Julie Fletcher, the pursuer's legal and commercial manager, also participated. The parties exchanged several drafts of heads of terms. Both parties consulted their solicitors on the heads of terms before they were finalised. On 15 November 2017, the pursuer and defender agreed heads of terms for a proposed sublease by the defender to the pursuer of part of the head lease subjects, known as Block E, Bay 3, and related accommodation ("the sub-let premises").

[6] One matter in relation to the negotiation of heads of terms may be noted. As regards the duration of the lease, the pursuer was unsure for how long it would require the premises. The estimated period was 9 months but Ms Fletcher wished to incorporate some flexibility in case of overruns. She was content with a term of 24 months but wished to be able to serve notice after 9 months to terminate the lease after 12 months and thereby avoid

further service charges, if the premises were no longer needed. Mr Wylie, on the other hand, was content for there to be a break clause but intended it to operate by allowing the pursuer to give notice after 12 months to terminate the lease after 15 months. He considered that he had achieved that in the course of negotiation of the heads of terms by substituting the word "twelve" (as it appears in the final version set out below) for the word "nine" which had previously appeared there. These conflicting intentions were not communicated by either party to the other prior to finalisation of the heads of terms.

[7] The final heads of terms, which are now agreed to have accurately represented the parties' common intention as at 15 November 2017, provided *inter alia* as follows:

> "These Heads of Terms are not intended to form part of any legally binding contract and are expressly subject to completion of formal legal missives in accordance with Scots law.
> …
>
> 22. Break Option. Sub-Tenant only option to break any time after the first twelve months' of the sub-lease upon three months' prior notice.
> …
>
> 49. Crane Access. Sub-tenant to have full access to cranes. The cranes will be verified as compliant and fit for purpose at the date of entry. Thereafter the Tenant will be responsible for the maintenance and repair."

[8] Following agreement of the heads of terms, the parties instructed their respective solicitors to prepare missives, a sub-lease and related documents. The pursuer instructed Ms Dixcee Fast and Mr Graham Ronald of Eversheds Sutherland (International) LLP ("Eversheds"). The defender instructed Mr Gordon Aitken of Dentons UK and Middle East LLP ("Dentons"). The pursuer's instructions to Eversheds came from Ms Fletcher; the defender's instructions to Dentons came from Mr Wylie.

Negotiation of terms of missives and sub-lease

[9] On 17 November 2017, having been instructed to draft the missives and sub-lease, Mr Aitken raised four queries with Mr Wylie including the following:

- "The Heads of Terms make no mention of cranes. What's the position with them?"
- "As regards the break notice, can it be served after month 9 to make the break effective w.e.f. month 12 or do they have to wait until the end of month 12 before serving the three month break notice so that there's a minimum of 15 months rent?"

On the same day, Mr Wylie responded:

- "The Heads of Terms does refer to cranes. I think it's the last point. We will be responsible for maintenance of the cranes at our own cost."
- "I would draft the lease on the basis that they can only break the lease after the 12 months have elapsed, meaning they would be tied in for a minimum of 15 months."

[10] On 27 November 2017, Mr Aitken emailed Ms Fast drafts of an offer missive and sub-lease. These were the first drafts of such documents to be exchanged between the parties. Mr Aitken's email stated "Please see attached draft offer, partial sublease and licence for works which I've prepared following agreement of heads of terms between our respective clients relative to the above."

[11] Between 27 November 2017 and 29 March 2018, the latter being the date when missives were concluded, Dentons and Eversheds exchanged revised drafts of the offer missive and sub-lease and negotiated their terms. Aside from the various drafts of the offer missive and sub-lease exchanged between the parties, there was no other written or verbal correspondence between the pursuer and the defender, or between their respective solicitors, proposing or discussing any departure from the position agreed in clauses 22 and

49 respectively of the heads of terms. At no time did Dentons expressly draw Eversheds' attention to any such departure.

[12] Clause 2.2 of the draft sub-lease circulated on 27 November 2017 provided:

> "The Sub-Tenant will be entitled at any time after the first anniversary of the Date of Entry to serve written notice (a "Break Notice") on the Head Tenant advising the Head Tenant that the Sub-Tenant is terminating this Sub-Lease early and with effect from a date specified in the Break Notice (said date to be no earlier than 3 months after the date of service of the Break Notice)."

The practical effect of clause 2.2 as so drafted was that a break notice could not be served until at least 12 months of the sublease term had elapsed, and could not take effect until at least 15 months of the sublease term had elapsed. That drafting of clause 2.2 accurately implemented the Mr Wylie's instructions on behalf of the defender to Dentons. It did not reflect the pursuer's understanding of what had been agreed in the heads of terms.

[13] Clause 5.1 of the draft sub-lease circulated by Mr Aitken on 27 November 2017 provided for the sub-tenant to maintain and repair "the sub-let premises". The sub-let premises were defined by clause 1.14, and in particular by clause 1.14.3, as including "all fittings, apparatus, plant and machinery (including cranes)". The practical effect of clauses 5.1 and 1.14 as so drafted was to include the cranes within the scope of the sub-tenant's (ie the pursuer's) maintenance and repair obligation. That differed from clause 49 of the heads of terms, under which responsibility for the maintenance and repair of the cranes was to rest with the tenant (ie the defender). Clause 5.3 of the draft sub-lease provided:

> "Notwithstanding the provisions of Clause 5.1 and Clause 5.2 above, the Sub-Tenant shall in respect of the four cranes in the Sub-let Premises provide evidence at the Date of Expiry to the Head Tenant in the form of up to date official certification that the said cranes are in good and satisfactory condition and compliant with all relevant health and safety requirements in connection with their use."

The heads of terms had made no such provision.

[14] Mr Aitken's drafting of clauses 1.14, 5.1 and 5.3 was contrary to the intentions hitherto expressed to him by Mr Wylie. It reflected Mr Aitken's own view that by making the defender liable to repair cranes which the pursuer had the exclusive right to use, clause 49 of the heads of terms did not make commercial sense and created a risk for the defender that it would not have intended to assume. In the meantime, however, the defender's head of facilities management, Mr Graeme Dowson, had expressed concerns to Mr Wylie about the defender being liable for the repair and maintenance of the cranes when he was shown the heads of terms in December 2017. Acting on Mr Dowson's concerns, Mr Wylie instructed Mr Aitken on 13 December as follows:

- that the pursuer should be responsible for maintaining the cranes for the duration of the sub-lease; and
- that the pursuer should provide a certificate to the defender on expiry of the sub-lease that the cranes had been maintained to the correct standard and were fit for use.

In fact, Mr Aitken had already drafted the relevant provisions in a manner consistent with those instructions by including the cranes within the sub-tenant's maintenance and repair obligation. It follows that from 13 December 2017 onwards, the drafts of the sub-lease and offer missive accurately reflected the defender's instructions to Dentons for the maintenance and repair of the cranes.

[15] On reviewing the draft sub-lease on 11 January 2018, Mr Ronald of Eversheds correctly identified that the definition of the sub-let premises included the cranes. He also correctly identified its consequence: ie that the pursuer would be responsible for maintaining and repairing the cranes during the subsistence of the sub-lease. He appreciated that the draft sub-lease contradicted the heads of terms in that respect. He

queried with Ms Fast whether the pursuer had agreed to that. He further correctly identified that the draft sub-lease provided for the pursuer to provide to the defender official certification on expiry of the sub-lease that the cranes were in good condition and compliant with all relevant health and safety requirements in connection with their use. Having done so, he put clause 5.3 in square brackets and added text to oblige the defender to provide equivalent certification at the date of entry. The wording added by Mr Ronald to clause 5.3 was later removed to be replaced by equivalent language in a clause of the missives.

[16] In the course of negotiation of the terms of the sub-lease, Eversheds identified various inconsistencies between the heads of terms and the draft sub-lease, brought those inconsistencies to the attention of the pursuer and sought the pursuer's instructions on how to address them. These included matters such as separate metering of utilities and liability for miscellaneous expenses including security services and grounds maintenance. They did not include the terms of the break clause or liability for maintenance of the cranes.

[17] Prior to obtaining the pursuer's instructions to conclude missives, Eversheds reported to the pursuer on the terms of the draft sub-lease. Their report noted, *inter alia*:

- Under the heading "Premises", that "the premises … include all landlord's fixtures and fittings and additions to the premises";
- Under the heading "Term", that the sublease term was 24 months "subject to right for the sub-tenant to terminate the sub-lease at any time after the first anniversary of the date of entry upon not less than 3 months' written notice to the mid-landlord";
- Under the heading "Repair", (i) that the sub-tenant was "to keep the property in good and tenantable repair and condition to the reasonable satisfaction of the mid-landlord", subject to a schedule of condition; and (ii) that "At expiry of the sub-lease, official certification is to be provided to the mid-landlord confirming that the cranes are in good condition and compliant with all relevant health and safety requirements";

- Under the heading "Rights Granted", that the pursuer was granted "exclusive use of four cranes"; and

- Under the headings "Agreement for Lease" and "5. Crane certification", that "Prior to the date of entry the mid-landlord is to provide official certification that the four cranes (referred to above) are in good and satisfactory condition and compliant with all relevant health and safety requirements".

Eversheds did not, however, at any time prior to the conclusion of the missives either (a) tell the pursuer (and in particular Ms Fletcher) expressly that the draft sub-lease made the sub-tenant responsible for maintaining and repairing the cranes, or (b) obtain the pursuer's instructions on that point.

Conclusion of missives

[18] By exchange of letters dated 28 and 29 March 2018 between Dentons and Eversheds, the parties concluded missives for the grant of the sublease. The missives incorporated a draft sub-lease in the terms negotiated. The sub-lease was not executed by the parties prior to the date of entry, but in terms of clause 12 of the missives, it became binding on that date. The duration of the sub-lease was 24 months from 4 June 2018. Clause 2.2 set out the break option in substantially the same terms as the draft circulated by Mr Aitken on 27 November 2017:

> "The Sub-Tenant will be entitled at any time after the first anniversary of the Date of Entry to serve written notice (a "Break Notice") on the Head Tenant advising the Head Tenant that the Sub-Tenant is terminating this Sub-Lease early and with effect from a date specified in the Break Notice (the "Break Date") (said date to be no earlier than 3 months after the date of service of the Break Notice)."

The only change was the addition of a defined term (the "Break Date") which had been inserted by Eversheds into the draft sub-lease on 2 March 2018. On the same date, Eversheds introduced a new clause 2.3 making provision for certain consequences of a break notice served in accordance with clause 2.2.

[19] By virtue of clauses 1.15 and 5.1, the sub-lease included the cranes within the pursuer's maintenance and repair obligation. Clause 6 of the missives obliged the defender to provide the pursuer with official certification that the four cranes in the sub-let premises were, at the date of entry, in good and satisfactory condition and compliant with all relevant health and safety requirements in connection with their use. Clause 5.4 of the sub-lease obliged the pursuer to provide similar certification on expiry of the sub-lease. With the exception of some re-numbering, no material changes had been made to these clauses since the first draft had been circulated. Such minor changes as were made were made by Eversheds.

Events after conclusion of missives

[20] In August 2018, an issue arose between the parties regarding liability for payment of invoices for maintenance of the cranes. Ms Fletcher identified for the first time that the provisions of the sub-lease conflicted with the heads of terms, and sought advice from Eversheds. Mr Ronald contacted Mr Aitken and proposed a short variation of the terms of the sub-lease to bring it in line with the heads of terms. Mr Aitken's response was that matters were correctly documented in the missives, and that accordingly the defender was not responsible for maintenance of the cranes.

[21] On 28 February 2019, the pursuer served a break notice on the defender seeking to terminate the sub-lease with effect from 5 June 2019. The notice was rejected by the defender on the ground that in terms of clause 2.2 of the sub-lease, notice could not be given until, at the earliest, the first anniversary of the commencement of the sub-lease. On 5 June 2019, the pursuer served a second break notice seeking to terminate the lease with effect from 8 September 2019.

[22] It is a matter of agreement that

- standing the terms of clause 2.2, the first break notice was of no effect;
- if clause 2.2 is rectified as sought by the pursuer in this action, the first break notice was effective to terminate the lease with effect from 5 June 2019; and
- if clause 2.2 is not so rectified, the second break notice was effective to terminate the sub-lease with effect from 8 September 2019.

Orders sought by the parties

[23] The pursuer seeks:

1. Rectification of the sub-lease, in terms of section 8 of the 1985 Act, by:
   (a) in clause 2.2, deleting the words "the first anniversary of" and inserting the words "and no earlier than the first anniversary of the Date of Entry" after the words "service of the Break Notice"; and
   (b) in clause 5.1, after the words "Declaring however that", inserting the following:
   "(i) the Head Tenant will have sole responsibility for maintenance, repair, replacement and (where necessary) renewal of the four cranes within the Sub-let Premises (Refs: P11496, P11495, P13261 and P11494 on the Crane Layout Plan) and (ii)"

2. Declarator that the pursuer served a valid break notice under clause 2.2 of the sub-lease on 28 February 2019 and that the sub-lease terminated pursuant to said break notice on 5 June 2019.

No issue arises regarding the wording of the proposed rectification.

[24] The defender counterclaims for payment of rent, re-charge of electricity, business rates and service charges for various periods to 8 September 2019, with interest thereon at a rate specified in the sub-lease. No issue arises in relation to quantification of the sums counterclaimed.

Argument for the pursuer

[25] On behalf of the pursuer it was submitted that the court should grant an order for rectification of the sub-lease to bring it into accord with the common intention of the parties at the date when the heads of terms were agreed. An objective approach, consistent with the approach taken to contractual interpretation, should be adopted to both (a) ascertainment of the terms of the antecedent agreement and (b) the parties' continuing common intention at the time of execution of the sub-lease. Evidence of the subjective intention of one or other of the parties was admissible but not determinative when ascertaining common intention.

[26] The following propositions were advanced:

- Rectification was not excluded by the fact that the antecedent agreement was not legally binding.
- In contrast to England, the objective approach was well established in Scotland regardless of whether the antecedent agreement was a binding one. The court should be slow to depart from the established approach.
- The objective approach was consistent with general principles of contractual interpretation.
- It would be unsafe to depart from the established approach on the basis of English Court of Appeal authority when English law afforded an "uncertain guide".

[27] In support of these propositions, reference was made to the line of Outer House authorities on the proper interpretation of section 8(1) beginning with *Angus* v *Bryden* 1992 SLT 884 (Lord Cameron of Lochbroom) and including *Rehman* v *Ahmed* 1993 SLT 741 (Lord Penrose), *Renyana-Stahl Anstalt* v *MacGregor* 2001 SLT 1247 (Lord MacFadyen), *MacDonald Estates plc* v *Regenesis (2005) Dunfermline Ltd* 2007 SLT 791 (Lord Reed) and *Patersons of*

Greenoakhill v *Biffa Waste Services Ltd* 2013 SLT 729 (Lord Hodge), and to the decision of Sheriff W Holligan in *Britannia Invest A/S* v *Scottish Ministers* 2018 SLT (Sh Ct) 133. In *Patersons of Greenoakhill*, Lord Hodge (at paragraph 38) had cited an *obiter dictum* of Lord Hoffmann in *Chartbrook Ltd* v *Persimmon Homes Ltd* [2009] 1 AC 1101 to the effect that common continuing intention had to be established objectively, regardless of whether or not the antecedent agreement had been a binding one, and had regarded that view as persuasive in Scots law also. The reasoning in those cases was adopted.

[28] Applying the principles in the foregoing line of cases to the present circumstances, all of the elements of the test for rectification had been satisfied and there was no good reason why the court should, in exercise of its discretion, do otherwise than grant the orders sought. The sub-lease was intended to give effect to a prior agreement, namely the heads of terms. The first draft of the sub-lease was produced only 12 days after the heads of terms had been agreed, and the covering email (above) made clear that the draft was intended to give effect to the prior agreement. The exchange of subsequent drafts was not sufficient to demonstrate a change in the parties' common intention, assessed objectively, from that which had been agreed in the heads of terms in relation to the break notice and crane maintenance. The heads of terms had themselves been carefully negotiated; this was not consistent with the idea that the detail was open for re-negotiation when the sub-lease itself was being drafted. The parties' common intention, objectively ascertained, remained that the sub-lease would give effect to the agreement embodied in the heads of terms. It was not a barrier to rectification that a more detailed break clause was inevitably going to be required in the sub-lease than the formulation in the heads of terms.

[29] The evidence demonstrated that there was no subjective intention on the part of the pursuer to depart from the heads of terms in relation to either of the disputed matters.

Evidence of a change of subjective intention on the part of the defender, and of communication of such change to its solicitors, was irrelevant in assessing common intention (cf *Patersons of Greenoakhill* and *Britannia Invest*, above). Nor was it relevant in assessing the parties' common intention that Eversheds had identified that the draft sub-lease had the effect of departing from the heads of terms in relation to crane maintenance, because that issue was not brought to the pursuer's attention. The pursuer's understanding remained that the sub-lease had given effect to the common intention of the parties in clauses 22 and 49 of the heads of terms.

[30] In relation to the defender's contention that clause 22 was ambiguous, it was submitted that there was no ambiguity. Assessed objectively, the clause clearly provided for the pursuer to have the option to terminate the lease after the first 12 months, subject to having given notice three months before the break, ie after 9 months.

Argument for the defender

[31] On behalf of the defender it was submitted that rectification ought to be refused because the evidence demonstrated that the missives and sub-lease were not intended to give effect to the agreement set out in the heads of terms. Regardless of whether evidence of communications which did not cross the line between the parties was held to be admissible, the statutory test for rectification was not met.

[32] Section 8(1)(a) had to be read as referring to a document "intended" by *both* parties to express or give effect to an antecedent agreement. That intention fell to be assessed as at the date of the document. The parties' common intention at the date of the antecedent agreement was relevant, but in a case such as this where there was a significant lapse of time between that agreement and the document, due weight had to be given to what had

happened during the interim period. The court had to take account of the fact that the parties had not intended to be bound by the heads of terms, but did intend to be bound by the terms of the formal documents. That was an integral part of the common intention at the date of agreement of the heads of terms: they were no more than an agreed starting point for negotiation of the detailed terms by which the parties would be legally bound, and it was open to either party to propose any form of wording, whether it contradicted the heads of terms or not. It ought not to be presumed that the formal document had been intended to give effect exactly to the previous non-binding agreement. Where, as here, the same evidence (the draft text of the sub-lease) was founded upon both by the pursuer as evidence of a mistaken failure to implement the heads of terms and by the defender as evidence of intention to depart from the heads of terms, the pursuer could only succeed if there was other evidence suggestive of a mistake.

[33] As regards evidence which "crossed the line", the wording that the pursuer sought to rectify was proposed by the defender's agent, Mr Aitken, in the first draft of the sub-lease. It was clear and unambiguous and there was no suggestion that he had sought to conceal it or to obtain an advantage by ambiguous drafting. The provisions regarding crane maintenance were an obvious departure from paragraph 49 of the heads of terms, as Mr Ronald had noted. The drafting of the break option was also clear and removed a possible ambiguity in paragraph 22 of the heads of terms. At no time did the pursuer's agents query Mr Aitken's drafting or seek to depart from it, despite the number of iterations of the draft that went back and forward. Changes were made to other clauses in the draft. The natural inference was that the pursuer no longer intended the missives and sub-lease to give effect to the heads of terms as regards paragraphs 22 and 49. If the court were to rectify the sub-lease to give effect to the heads of terms, it would be to impose upon the parties an

agreement that they had expressly agreed was not to form part of any legally binding agreement.

[34] In any event it was also permissible – and appropriate – to take account of evidence that did not cross the line, and in particular the clear and unchallenged evidence that the terms of the sub-lease reflected the defender's intention and was in accordance with its instructions to Mr Aitken. In terms of section 8(2) of the 1985 Act, the court was entitled to have regard to "all relevant evidence". That included evidence of subjective intention. Even if the pursuer had mistakenly failed to identify that the draft was inconsistent with the heads of terms, there was no continuing common intention.

[35] It was accepted that Scots law had tended, in the cases relied upon by the pursuer, towards the view that only "objective" evidence of intention was relevant. But all of the decisions were at first instance and the observations were *obiter*. In *MacDonald Estates*, Lord Reed had had difficulty with the idea of disregarding entirely subjective evidence. Lord Hodge's preference in *Patersons of Greenoakhill* for an objective approach had been influenced by Lord Hoffmann's *obiter* observations in *Chartbrook*. That approach had now been departed from in England and Lord Hoffmann's observations had been disapproved by the Court of Appeal in the course of its comprehensive restatement of the English law of rectification in *FSHC Group Holdings Ltd* v *GLAS Trust Corporation Ltd* [2020] Ch 365. The principles and policy enunciated in *FSHC* were equally applicable to interpretation of section 8(1) and should be adopted.

[36] A distinction should be drawn between cases where the antecedent agreement was a binding contract and cases where it was not. In the latter situation, there was no justification for rectification if there was no continuing common intention. For the reasons explained in *FSHC*, there was no anomaly in applying an objective test in the former case and a subjective

test in the latter. If one party had deliberately departed from a prior common intention, there was no good reason for imposing upon it an agreement which the parties had intended not to be binding. The instant case was properly characterised as a case of unilateral error. If the test were to be solely objective, it would be impossible to distinguish between a common error requiring rectification and an intentional departure by one of the parties. Where, as here, one of the parties had proposed a draft which clearly departed from the antecedent agreement, it could not be said that the change of intention had not been communicated.

Decision

Common intention in the antecedent agreement

[37] In *Patersons of Greenoakhill*, Lord Hodge identified from previous authorities four principal points in relation to what is relevant evidence. The first three (at paragraphs 34-36) are not controversial in the present proceedings. They are:

(i) While section 8(1)(a) requires the existence of an antecedent agreement which the document to be rectified fails accurately to express, that earlier agreement does not have to be legally binding.

(ii) It is not necessary for the antecedent agreement to have some outward or objective expression beyond the objective evidence of a continuing common intention.

(iii) It follows from point (i) that all the essentials of a binding legal agreement do not have to be agreed before the contract sought to be rectified has been produced and signed.

[38] Lord Hodge's fourth point (at paragraph 37) was that "the balance of Scots authority favours the view that the court assesses objectively the *existence of the antecedent agreement* and that the subjective understanding of each of the contracting parties is not relevant if it had not been communicated to the other parties" (my emphasis). Again, no dispute arises in the present case that the existence of the antecedent agreement must be determined objectively, without reference to uncommunicated subjective understandings. In particular, it is a matter of express agreement in the circumstances of this case that the parties' common intention in relation to the break clause at the time of agreement of the heads of terms must be ascertained objectively. The fact that Ms Fletcher and Mr Wylie appear to have had different subjective intentions in relation to the time at which the break would operate is not relevant to assessment of the common intention recorded in the heads of terms.

[39] The point that arises for decision in the present case is a different one: it is whether the existence of a continuing common intention as at the date of the *document* falls to be assessed objectively or subjectively. And within this point it may be necessary, as the defender contends, to draw a distinction between, on the one hand, the situation where the antecedent agreement was a legally binding contract and, on the other hand, the situation where it was not. Although the present case is concerned with the latter situation, it is appropriate firstly to consider the former.

Document giving effect to prior legally binding agreement

[40] *Renyana-Stahl Anstalt* v *MacGregor* is an example of a case in which the court ordered rectification of a document (a disposition of heritable property) intended to give effect to a legally binding antecedent agreement (missives of sale). Lord MacFadyen held, having regard to (a) admitted facts and undisputed documents, (b) the inferences that arose

naturally from those, and (c) the neutral character of the facts relied upon by the party resisting rectification, that there was no relevant defence to the action. Although there is no express discussion of whether an objective or subjective approach ought to be adopted, it is apparent that the arguments were presented on the basis that the matter was to be determined objectively, without regard to the subjective intention of either party as at the date of the document whose rectification was sought.

[41] The relevance (or otherwise) in such circumstances of a unilateral change of intention was discussed by Lord Reed in *Macdonald Estates* at paragraphs 166 and 167, as follows:

> "[166] The contention that rectification cannot be granted where the subjective intention of one party has changed since the parties' antecedent agreement, but that change of intention has not been disclosed to the other party, appears to me to raise difficult questions. It may be argued, as it was in the present case, that in such circumstances the document is not 'intended' to give effect to the common intention of the parties to the agreement.
>
> [167] Where the agreement is an enforceable contract, under which the parties are entitled to a document which gives it effect, it might be thought to be sensible for the court to have the power to rectify the document, whatever the subjective intentions of one of the parties might have been, since the alternative remedy – reduction, possibly coupled with an order for specific performance – would, even if available, be at best a circuitous method of achieving the same result. In that regard, I note the observations of Hobhouse LJ in the *Britoil* case at page 572: 'Where the prior agreement is a legally binding contract then the grant of the remedy of rectification is, as was pointed out by Lord Cozens-Hardy in *Lovell & Christmas v Wall* (1911) 104 LT 85 at page 88, analogous to the remedy of specific performance. The parties were entitled to have an agreement conforming to their earlier contract. If the later document fails to fulfil this entitlement, the parties are entitled to have it rectified so that it will do so. Such a conclusion will only be defeated if the parties have intended to vary their earlier agreement. In such a situation the court will have to construe the earlier agreement as a contract and as a matter of law. Having decided as a matter of law what its effect is, the court will give effect to the legal rights of the parties.' There are a number of possible bases on which that approach might be supported in Scots law. Even if a subjective approach were adopted to the ascertainment of what was 'intended', the view might well be taken that, standing the parties' legal obligations under the agreement, they cannot be heard to say that they had no intention of fulfilling them. If an objective approach were adopted, then an undisclosed change of inward intention would in principle be of no relevance."

[42] *Patersons of Greenoakhill* is another case in which rectification was sought of a document that failed to give effect to a previous binding agreement. The issue was whether the parties had in fact reached a prior agreement on terms that the formal document failed to reflect, and no question arose of change of intention during the period between the date of the prior agreement and the execution of the document. Lord Hodge did not therefore have to address the question with which this action is concerned, namely the test to be applied in determining common continuing intention following upon a non-binding agreement. However, as already mentioned, Lord Hodge (at paragraph 38) cited a *dictum* of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* in the following terms:

> ''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. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be."

Lord Hodge commented that he found that view persuasive in Scots law also.

[43] The English law of rectification, both before and since Lord Hoffmann's *obiter* observations in *Chartbrook*, was reviewed in meticulous detail by the Court of Appeal (Flaux, Leggatt and Rose LJJ) in *FSHC*. The Court of Appeal's review was prompted by academic criticism and judicial doubts as to the soundness of Lord Hoffmann's observations. English law in this area is of course based upon equitable principles and not on statute, and care must be taken when applying observations of the English courts to the process of statutory interpretation of section 8(1)(a). Nevertheless it seems to me that when it comes to interpreting expressions such as "intention", opinions of the English courts on matters of general principle and policy can provide helpful guidance.

[44] As regards the situation where a document is intended to give effect to an enforceable prior agreement, the Court of Appeal in *FSHC* made the following observations (at paragraphs 140 and 141) under the sub-heading "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.'
> …
>
> 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… We agree with the reasoning (as did the majority of the Court of Appeal in the *Britoil* case [1994] CLC 561) 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."

The passage in *Britoil* to which the above dictum refers is the same passage in the judgment of Hobhouse LJ at page 572 as was cited by Lord Reed in *Macdonald Estates* (above).

[45] Within the above passages one finds an explanation of the principle to be applied where a document is intended to give effect to a prior binding agreement. The starting point is the prior agreement, and the parties are expected to have executed a document that gives

effect to the rights and obligations that they created at the time of the prior agreement. If there is to be any intention to depart from such prior agreement, it has to be a common intention, and it is in accordance with usual contractual principles that such a common intention must be determined objectively. A subjective change of intention by one of the parties is of no relevance, and if the document fails to give effect to the common intention at the date of the binding agreement, it should be rectified. In respectful agreement with Lord Reed in *Macdonald Estates*, that appears to me also to provide a principled approach to interpretation of section 8(1)(a) of the 1985 Act. The question at issue in the present case, to which I now turn, is whether the same principle falls to be applied where the antecedent common intention was *not* contained in a binding contract.

Document giving effect to prior non-binding agreement: Scottish cases

[46] The first Scottish case in which this question was considered was *Angus* v *Bryden*. The owner of river fishings entered into an informal agreement to sell them to a tenant. Formal missives were then concluded, and thereafter a disposition was granted. The purchaser asserted that in terms of both the missives and the disposition, the subjects disponed included sea fishings as well as river fishings. After a debate, Lord Cameron of Lochbroom held that although the disposition conveyed the sea fishings, on a proper construction of the missives they provided only for a sale of the river fishings. The case was continued to enable parties to consider their position in relation to rectification of the disposition. Lord Cameron of Lochbroom did, however, go on to consider, *obiter*, an alternative conclusion of the pursuer for rectification of both the disposition and the missives. At page 888 he made the following observations in relation to rectification of the missives:

> "Counsel for the defenders attacked the basis upon which the pursuer sought to rectify the missives. His argument was succinct. It was plain from the pursuer's averments in relation to the *esto* case that in submitting the formal acceptance dated 3 November 1986 the defenders' solicitors were intending to make a purchase of both the river and sea fishings. Accordingly the formal acceptance read along with the two previous letters did not constitute a document intended to express or give effect to the agreement informally entered into prior to the missives. In my opinion, this argument is correct. If, notwithstanding the earlier informal agreement, a party changes ground in the course of negotiations for purchase of property (as any party is entitled to do where there has been an informal agreement for the sale of heritable subjects which has not been homologated or otherwise subject to *rei interventus*), it is impossible for the court to hold that the missives as finally concluded were intended to express the common intention of the parties to the informal agreement at the time when that agreement was entered into. In my opinion, section 8(1)(a) gives no countenance to the proposition, which was urged upon me by counsel for the pursuer, that the court can in such circumstances intervene to rectify the missives. To do so would be to ignore the fact that at the conclusion of the missives there had ceased to be any common intention which the missives expressed. Indeed to do otherwise would be, as counsel for the defenders pointed out, to make enforceable an informal agreement relating to heritage which had neither been homologated by the parties nor was subject to *rei interventus*. In the event that the pursuer established his alternative case, in my opinion, the result must be that the court would require to reduce both the disposition and the missives. Otherwise the court would be seeking to write into the contract terms which the defenders at the end of the day had not intended to accept."

Lord Cameron of Lochbroom thus adopted a subjective approach to assessment of the existence of a continuing common intention at the date of a document (here the missives) following upon a prior non-binding agreement. It will be noted that, disregarding the references to homologation and *rei interventus*, the factual hypothesis discussed by Lord Cameron of Lochbroom is similar to the circumstances of the present case.

[47] A similar hypothesis was considered by Lord Reed in *Macdonald Estates*, in a passage following that which I quoted at paragraph 41 above. Having observed that the position may be less straightforward where the prior agreement is not an enforceable contract, Lord Reed quoted the passage from *Angus* v *Bryden* that I have set out above, and continued (at paragraph 169):

> "There are some aspects of this reasoning which, with respect, I do not find entirely persuasive. If the common intention of the parties to an agreement is to be ascertained objectively (as previously discussed), then an undisclosed intention to depart from the agreement does not entail that 'there had ceased to be any common intention'. Equally, if a document can be rectified to give effect to an informal agreement (as previously discussed), then it appears to me to follow that rectification may 'make enforceable an informal agreement relating to heritage'. The background of section 8 in *Anderson v Lambie* suggests, as previously discussed, that that was one of the situations which section 8 was intended to cover. Nevertheless, I acknowledge that it may be arguable, at least in certain circumstances, that in the absence of a legally binding agreement the court should not 'write into the contract terms which the defenders at the end of the day had not intended to accept'. On the other hand, there may also be circumstances where to allow a defender successfully to oppose rectification by reason of an undisclosed intention to depart from an earlier informal agreement would result in injustice. Reduction may not always be a competent remedy where there has been a unilateral error of the kind in question, since its availability depends on the error being sufficiently serious to be regarded as going to the root of the contract. Even where available, reduction may not be an adequate remedy: as explained previously, that was one of the reasons for the introduction into Scots law, from English law and its cognate systems, of the remedy of rectification. It would be productive of injustice, in my opinion, if the court had no jurisdiction to rectify a contract which one party had entered into on the basis of a manifest prior agreement, which to all appearances continued but had been incorrectly expressed in the final document, merely because of an uncommunicated subjective change of mind on the part of the other party."

[48] For my part, I would respectfully comment that there are aspects of Lord Reed's reasoning which do not seem to be entirely self-evident. Whilst it seems clear that the common intention of the parties to the informal agreement must be ascertained objectively, there does not appear to me to be any reason why an undisclosed intention to depart from it does not mean that, as a matter of fact, there has ceased to be a common intention. The question is what effect, if any, such an undisclosed intention to depart ought to have. Moreover, it is not clear to me that where a party, in the course of negotiation of the terms of the document intended by both parties to be binding, proposes a condition that clearly departs from a prior agreement whose terms were not to be binding, that should be described as an undisclosed intention to depart. It would, in my view, be somewhat

unsatisfactory to describe that situation as a manifest prior agreement which to all appearances continued but was incorrectly expressed.

[49] The case of *Britannia Invest A/S* v *Scottish Ministers* (above) also concerned an informal agreement in the form of heads of terms that was followed by execution of a formal lease of commercial premises. It was not in dispute that the heads of terms (which were negotiated by the parties' surveyors and were expressly stated not to be legally binding) accurately reflected the parties' common intention at the date when they were agreed. In the course of negotiation of the terms of the formal lease, the landlord's solicitor made a revisal to a clause relating to calculation of a cap on the annual service charge which, contrary to his and his client's intention, produced a result that did not accord with the agreed heads of terms. The tenant's head of property and facilities management (a Ms Dewar) saw the revisal and took the view that it reflected what she expected and wanted to see. She did not communicate this view to anyone and assumed incorrectly that the landlord had also intended that result. The landlord sought rectification of the lease to bring it into accord with the heads of terms. Granting an order for rectification, Sheriff Holligan conducted a detailed review of the authorities and applied Lord Hodge's statement of the law in *Patersons of Greenoakhill*. Having observed that "it is not clear to me that Ms Dewar must necessarily be taken to be the defenders", Sheriff Holligan concluded (paragraph 59 of his Note) that:

> "…(T)here was an antecedent agreement between the parties as to the operation of the service cap charge — the agreement was reached between [the two surveyors]; it was recorded in the heads of terms and it did not change. The heads of terms were not intended to be legally binding but that does not matter. Whatever else may have changed, the intentions of the parties on this issue did not change. The intention has been objectively proved. The only person with a contrasting state of mind was Ms Dewar and that was not communicated to others and did not influence revisal of the document…"

I take the learned sheriff's reference to "the intention" that had been objectively proved as being to a continuing common intention at the time of execution of the formal lease, and as reflecting the formulation favoured by Lord Hodge in *Patersons of Greenoakhill*. It does not, however, appear to me that the label attached to "the intention" was determinative of his decision: on the facts of the case as found, there was no change in the parties' common intention and accordingly the case for rectification was made out.

Document giving effect to prior non-binding agreement: English cases

[50] In the *Britoil* case, the parties to a sale of a petroleum production licence for a North Sea oil field signed non-binding heads of agreement which were followed by a lengthy "definitive agreement". A dispute arose as to the proper interpretation of a term of the definitive agreement. The sellers sought a declaration that their interpretation was correct or, alternatively, rectification of the agreement on the basis that it had failed to give effect to a continuing common intention expressed in the heads of agreement. Both of those orders were refused by the judge, whose decision was upheld in the Court of Appeal by a majority (Hoffmann LJ dissenting). In a judgment with which Glidewell LJ agreed, Hobhouse LJ observed (page 573):

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

[51] In his dissenting judgment, Hoffmann LJ stated:

> "In my view it does not matter what Britoil thought that the heads of agreement and the definitive agreement meant. What matters is what the parties agreed. 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 has become common to refer to these conflicting approaches as the subjective and objective approaches respectively. It may, however, be more illuminating to see the controversy, as did Hobhouse LJ, as being whether the existence of continuing common intention should be seen as a question of fact or a question of law.

[52] The facts of *Chartbrook Ltd* v *Persimmon Homes Ltd* were that a dispute arose between the owner of development land and the developer regarding the method of calculation of a sum due to the owner in terms of the parties' contract. The judge and a majority of the Court of Appeal favoured the owner's interpretation, but on appeal to the House of Lords it was held unanimously that the drafting of the contract was ambiguous and that taking account of background and syntax and commercial business sense, the developer's interpretation was correct. The leading judgment, with which the other members (including Lord Hope of Craighead and Lord Rodger of Earlsferry) concurred, was delivered by Lord Hoffmann, who made *obiter* observations on two further matters. Firstly, he expressed the view that the rule excluding evidence of pre-contractual negotiations would have been applicable to the circumstances of the case. Secondly, in relation to an alternative argument

by the developer that, if the owner's interpretation was correct, the contract should be rectified, Lord Hoffmann would have held the developer to be entitled to rectification, on the ground that the owner's interpretation was not in accord with a prior consensus reached in informal correspondence. This was despite the fact that two of the owner's directors gave evidence, which was accepted, that they subjectively understood the prior correspondence to have given them the same entitlement as they claimed to have obtained in the contract.

[53] It was in that factual context that the observation of Lord Hoffmann, to which Lord Hodge referred in *Patersons of Greenoakhill*, was made. In that context, it seems to me that Lord Hoffmann was rejecting subjective evidence as to the meaning of the *prior consensus* as opposed to the terms of the document whose rectification was sought. This was made clear at paragraph 63 of Lord Hoffmann's speech where he dealt with the *Britoil* decision and observed that "…the case lends no support to the view that a party must be mistaken as to whether the document reflects what he subjectively believes the agreement to have been". It appears to me that, properly interpreted, Lord Hoffmann's reference to "common continuing intention" is to the intention embodied in the antecedent agreement and not, as might be thought, to a common intention continuing at the date of the agreement whose rectification is sought. On that interpretation, Lord Hoffmann's observation, although directly relevant to the facts of *Patersons of Greenoakhill*, is not in point in relation to the facts of the present case.

[54] An issue of changed intention did however arise in *Daventry District Council* v *Daventry & District Housing Ltd* [2012] 1 WLR 1333. The claimants (DDC) entered into negotiations for transfer of their housing stock and housing department staff to the defendants (DDH). One of the matters that required negotiation was liability for payment of a deficit in the local government pension scheme in relation to the pensions of the

transferred staff. Agreement was reached in informal correspondence that the liability would be shared. However the contract subsequently entered into provided for the entire liability to be met by DDC, in terms of a clause inserted during the drafting process by DDH's lawyer. The judge (Vos J) refused a claim by DDC for rectification on the ground that the original common intention had not continued and parties were to be taken to have intended to include the clause. In the Court of Appeal, Etherton LJ agreed with Vos J's decision, but the majority (Lord Neuberger of Abbotsbury MR and Toulson LJ) held that DDC were entitled to rectification because the lawyer responsible for inserting the clause, who had misled DDH as to what the prior agreement had meant, knew that it was not what DDC intended, and had wrongly permitted both parties to be misled into entering into a contract where they were at cross-purposes. The judgments are lengthy and complex. For present purposes I wish only to mention two matters. Firstly, the three members of the Court of Appeal were agreed that they ought to decide the case in accordance with Lord Hoffmann's observations in *Chartbrook*. Secondly, however, Toulson LJ expressed concerns about the correctness of those observations. At paragraphs 176-177, he stated:

> "176 Notwithstanding the immense respect due to Lord Hoffmann and other members of the House of Lords, I have difficulty in accepting it as a general principle that a mistake by both parties as to whether a written contract conformed with a prior nonbinding agreement, objectively construed, gives rise to a claim for rectification. Take a simple example. A and B reach what they understand to be an agreement in principle. They confirm it by an exchange of letters. A believes that the correspondence means *x*. B believes that it means *y*. Neither is aware that the other's understanding is different and there is no question of either behaving in such a way as to mislead the other. They then enter into a written contract which both believe gives effect to the agreement. They are both wrong. Objectively construed, the nonbinding agreement meant *x* but the written contract means *y*. On the *Chartbrook* principle, A is entitled to have the contract rectified to conform with the correspondence. I share Professor McLaughlan's difficulty in seeing why it should be right to hold B to a contract which he never intended to make and never misled A into believing that he intended to make.

177 In such a case it is hard to see why the written contract should not prevail…"

(The reference is to an article by Professor David McLaughlan at (2010) 126 LQR 8.)

[55] In *FSHC*, the deeds of which rectification was sought were two security deeds which ought to have been granted as elements of a complex transaction some four years previously. When the two deeds were executed, their effect was not only to provide the missing security but also to bind the granter to additional onerous obligations. No-one had realised before or at the time of execution of the deeds that they would have this effect. The judge (Henry Carr J) found that it was both objectively and subjectively the common intention of the parties to execute a document which satisfied the granter's obligation to grant the missing security and which did no more than that. Rectification was granted. The creditor appealed, contending on the basis of Lord Hoffmann's observations in *Chartbrook* that the test was wholly objective, and that the communications between the parties would not have led an objective observer to conclude that the parties intended to do anything less than procure the granter's accession to all the terms of the pre-existing security agreements, including the additional obligations.

[56] I have already quoted a passage from the judgment of Leggatt LJ addressing the situation where a document gives effect to an *enforceable* prior agreement. Leggatt LJ continued:

> "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* [1953] 2 QB 450 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…
> …
>
> 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…"

Leggatt LJ concluded (at paragraph 153) that there was no anomaly in applying an objective test where rectification was based on a prior concluded contract and a subjective test where it was based on a common continuing intention, because different principles were in play.

[57] At paragraph 176, Leggatt LJ stated the court's conclusion on the law as follows:

> "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."

For the same reasons the court declined to follow the reasoning of the majority in the *Daventry* case. On the facts of the *FSHC* case, the court upheld the decision to order rectification.

Discussion

[58] What guidance can be obtained from the recent developments in English case law in the context of interpretation of section 8(1)(a)? Much of the discussion in cases such as *Daventry* and *FSHC* is rooted in the equitable basis of rectification in English law. In so far as that discussion appears to identify two distinct forms of rectification, there is no basis in the 1985 Act for adopting such an approach. That is not, however, to say that no assistance can be obtained from the discussion when identifying the principles to be applied in interpreting the word "intention" in section 8(1)(a), in the factual context of a document that is alleged by one party to fail to express a common intention in a non-binding prior agreement. On the contrary, when one bears in mind that similar factual contexts are likely to occur in both jurisdictions, it seems to me that it would not be appropriate to ignore the discussion on the ground that it has a different underlying legal foundation. In any event it is clear that the recommendations of the Scottish Law Commission in their Report (No 79, 1983) on Rectification of Contractual and Other Documents, which led to the enactment of

sections 8 and 9 of the 1985 Act, were strongly influenced by the existence and nature of such a remedy in English law and other common law systems.

[59] For my part, I share the concerns expressed in *FSHC* in particular about objectively attributing a common continuing intention to parties where one of them has, as a matter of undisputed fact, changed his intention during the period since entering into an expressly non-binding agreement. Mere change of intention is not, of course, of any significance unless it is communicated to the other party. But what is sufficient to constitute communication? At one end of the spectrum there may be a direct statement by one party, communicated to the other party, that he wishes the contract whose formal terms are being negotiated to include a term that is different from something in the non-binding agreement. It would seem to me to make no sense to exclude evidence of such changed intention, or to allow rectification of a document which contains a binding agreement reflecting that changed intention, on the legal basis that the parties had a continuing common intention, objectively assessed, to adhere to the prior non-binding agreement. At the other end of the spectrum, there could be a change covertly made by one party without communication to the other, in the knowledge that the other party was not aware of it and would not have agreed to it if they had been. It was that sort of situation that troubled Lord Reed in *Macdonald Estates*, and it is not dissimilar to the facts of the *Daventry* case in which an order for rectification was made.

[60] Between those extremes, there is scope for uncertainty as to what might constitute communication of changed intention. The present case is an example of that. As narrated above, the defender's solicitor, Mr Aitken, produced a draft sub-lease whose terms unequivocally imposed liability for crane maintenance on the pursuer, despite the fact that the heads of terms had, equally unequivocally, imposed liability on the defender. Mr Aitken

did nothing further to draw the change to the attention of the pursuer's solicitors, and it was necessary to understand the significance of the definition of "the sub-let premises" in order to appreciate that the change had been made. But in fact the pursuer's solicitor did notice the change and understood its significance, although he did not expressly draw it to the attention of his client. In these circumstances, did the parties intend the sub-lease to express their common intention in relation to crane maintenance at the time when the heads of terms were agreed? Is it relevant that the pursuer's solicitor noted and understood the change? Is it relevant that the change was not brought to the attention of the pursuer by its solicitor? Is it relevant that at the time when Mr Aitken made the change he did so without instructions, but did subsequently receive instructions, before the missives were concluded, that accorded with the change that he had already made?

[61] It seems to me that if any of these factual circumstances were to make a difference to the outcome of the application for rectification, the law would be in a state of unacceptable uncertainty. That, however, would be the consequence of applying an objective test as contended for by the pursuer, because the application of such a test would amount to a departure from the facts of the case. It would, adopting the example given by Toulson LJ in the *Daventry* case, amount to holding one of the parties to a contract which he never intended to make and never misled the other party into believing that he intended to make.

[62] I respectfully agree with the conclusion of the Court of Appeal in *FSHC* that there is 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 derived from an earlier non-binding agreement. Looked at in the context of interpretation of the word "intention" in section 8(1)(a), which in my view clearly refers to intention at the time of execution of the document whose rectification is sought, in the former case the relevant

principle is that parties should be required to adhere to their contractual obligations, and accordingly that they should be presumed to intend that the document will reflect the common intention expressed in that contract. In the latter case, however, where the parties have reserved the right to depart from the antecedent agreement, no such assumption should be made, and the starting point is rather that their respective rights should be determined by the contract into which they enter with the intention of being bound by it. That, in my view, is the approach likely to be most productive of certainty.

Conclusion

[63] It follows from the foregoing discussion that the analysis which I prefer is, in effect, the same as that of Lord Cameron of Lochbroom in *Angus* v *Bryden*. In so far as I respectfully differ from Lord Reed's *obiter* observations in *Macdonald Estates*, I do so only in relation to the degree to which it may be appropriate to extend the remedy of rectification in order to avoid injustice. Where a change of intention is communicated to the other party in the form of a revisal to a draft document, even if not expressly signalled, I am perhaps less persuaded than Lord Reed that to refuse rectification would be productive of injustice. It should also be borne in mind that in cases towards the end of the spectrum to which I have referred, other remedies are likely to be available. If a unilateral error induced, or known to and taken advantage of, by one party is sufficiently serious to amount to essential error by the other party, then decree of reduction may be granted. In this regard it may be noted that it has been recently reaffirmed (in *Wills* v *Strategic Procurement (UK) Ltd* 2016 SC 367) that *Steuart's Trs* v *Hart* (1875) 3R 192 remains good law.

[64] A decision as to whether or not to order rectification of a document claimed to be intended to give effect to a previous non-binding agreement is highly fact-sensitive. On the

undisputed facts of the present case, I hold that the pursuer has failed to prove that the document whose rectification is sought, ie the missives incorporating the draft sublease, was intended, in relation to the two matters in issue, to give effect to the parties' common intention at the time when they agreed the heads of terms. I find that as a matter of fact there was no continuing common intention at the time of conclusion of the missives either (a) that the pursuer would be entitled to serve notice after 9 months to terminate the sublease after 12 months; or (b) that the defender would be responsible for crane maintenance during the subsistence of the sublease. I am not persuaded that the labels "objective" and "subjective" are determinative of the matter, but I reject the contention that evidence of the subjective intention of the respective parties should be disregarded in favour of an objective assessment of continuing common intention which is based on communications that "crossed the line" but which disregards the terms of, and changes made to, the draft document itself. If, contrary to my interpretation of Lord Hoffmann's observation in *Chartbrook*, it is properly to be understood as meaning that common continuing intention as at the date of a document following upon a previous non-binding agreement is to be assessed without regard to the parties' subjective intentions, then I would, with great respect, agree with the criticisms made of it by the Court of Appeal in *FSHC*. In my opinion it is fatal in the present case to the pursuer's claim for rectification that the terms of the formal documents accurately reflected the subjective intention of the defender, communicated to the pursuer, without any intentional or unintentional concealment, by means of the terms of the draft sublease. I place no particular importance on the fact that the pursuer's solicitor identified and understood the effect of at least one of the changes from the heads of terms, except to observe that this emphasises how unrealistic it would be to ignore the terms of the document itself when deciding what constitutes

communication of a changed intention. Nor do I place any importance on the fact that there was no communication of changed intention directly from the pursuer to the defender; in the circumstances of the case the appropriate channel of communication during the drafting of the sub-lease was via the parties' respective solicitors.

[65] In summary, I find that the test in section 8(1)(a) is not met because at the time when the missives were concluded, it was not intended by both parties that the missives and sub-lease should give effect, in the two contentious respects, to their common intention, objectively ascertained, at the date when the heads of terms were agreed.

Disposal

[66] In the principal action, the defender's sixth plea in law is in the following terms: "*Separatim*, the Missives and the Sub-Lease having accurately expressed the defender's intention, the defender should be absolved from the conclusions of the summons". I shall sustain that plea, repel the pursuer's pleas in law, and assoilzie the defender from the first and second conclusions of the summons. In the counterclaim, I shall sustain the defender's plea in law, repel the pursuer's plea in law, and grant decree in terms of the first, second, third, fourth and fifth conclusions. Questions of expenses are reserved.

[67] Finally, I wish to express my gratitude to counsel for their full and careful presentation of the issues raised by this case.