

Proving common intention in rectification cases: how does it apply to pension schemes following *FSHC Group Holdings*?

COMMENTARY BY [PAUL NEWMAN QC](#), 12 AUGUST 2019

The tortuous saga of how common intention is to be established for the rectification of documents has taken another twist with the Court of Appeal's decision in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361.

Prior to that case, the leading cases were thought to be *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 and *Daventry DC v Daventry and District Housing Ltd* [2012] 1 WLR 1333. As a result of those cases, the law was thought to be that: (i) common intention had to be established objectively, i.e. by reference to what an objective observer would have thought the intentions of the parties to be; and (ii) there was no separate requirement of an "outward expression of accord" – i.e. communications showing that the parties understood each other to share the same intention with regard to the relevant matter – as such an outward expression and an objectively-established common intention were two sides of the same coin, so that proof of one would result in proof of the other.

In the *FSHC* case, the Court of Appeal considered that it was not bound by the analysis in the *Chartbrook* and *Daventry* cases, and held that the document in issue could be rectified where: (i) the terms of the document did not reflect the parties' subjective intentions; and (ii) it was established there was an outward expression of accord between them.

Although the *FSHC* case concerned a contract, the requirement for common intention to be established by reference to the parties' subjective intentions will apply equally to cases involving the rectification of pension scheme provisions. However, the requirement for an outward expression of accord does not apply to such cases.

The Court of Appeal in the *FSHC* case confirmed that, consistently with earlier cases such as *AMP plc v Barker* [2001] Pens LR 77 and *Gallaher Ltd v Gallaher Pensions Ltd* [2005] Pens LR 103, in cases where the document to be rectified was made pursuant to the exercise of a joint amendment power vested in the trustees and the employer (or in the trustees with employer consent, or vice versa), there is no need to prove an accord between the employer and trustees, in the sense of an actual agreement between those parties *inter se*. It is sufficient that their intentions coincided, in that they both independently had the same intention regarding the effect of the amendment. Evidence of an accord in such circumstances is not necessary because the validity of an amendment does not depend on the parties having mutually agreed it – only on one having approved what the other had done.

Thus, in order to rectify pension scheme provisions, whilst it is still necessary to establish by convincing evidence what the intentions of the employer and trustees were, it is not necessary to establish the kind of shared understanding as to those intentions which is required for the rectification of contracts. The law, as understood before the *FSHC* case, is unaltered in that respect. The relative ease with which mistakes in pension scheme provisions have been rectified over the years is therefore set to continue. This is in stark contrast to the rectification of contracts, which the Court of Appeal in the *FSHC* case has acknowledged is likely to have been made more difficult to prove as a result of the need for a subjective consensus between the parties.

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