G Finance Ltd v A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Jurats Thomas, Christensen
Judgment Date:	03 November 2020
Neutral Citation:	[2020] JRC 230
Date:	03 November 2020
Court:	Royal Court

Text

[2020] JRC 230

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., Commissioner, and Jurats Thomas and Christensen

In the Matter of the Representation of G Finance Limited

And HSBC International Trustee Limited Jersey Branch

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (As Amended)

Between
G Finance Limited
First Representors
HSBC International Trustee Limited Jersey Branch
Second Representor

and
A
First Respondent
B
Second Respondent

and

B in his capacity as guardian ad litem of C and D
Third Respondent

and

B in his capacity as representative of E, R and G and any unborn issue of both A and his remoter issue
Fourth Respondent

Advocate O. J. Passmore **for the Representors**.

Authorities

Trilogy Management Ltd v Charitable Foundation (International) Ltd [2012] JCA 152.

Trico Ltd v Buckingham [2020] JCA 067.

Lewis on Interpretation of Contracts 9th Edition.

Helier Philip Warder & Others v George Troy & Sons Ltd 4th November 1996 (unreported).

B v Virtue Trustees [2018] JCA 219.

Lewin 19th edition.

Home Farm Developments Ltd & Ors v Le Sueur [2015] JCA 242.

Le Pennec v Romeril [1995] JRC 047.

Chartbrook Limited v Persimmon Homes Limited and others [2009] UKHL 38.

Giles v Royal National Institute for the Blind [2014] EWHC 1373.

FSHC Group Holdings Limited v GLAS Trust Corporation Limited [2019] EWCA Civ 1361.

Brazil & Anor v Durant & Anor [2012] (2) JLR 356.

Booth v The Viscount [2019] JCA 122.

Pothier and the Civil Code

Trust — application to rectify loan agreements and make declarations as to the proper construction of the agreements

THE COMMISSIONER:

1 The Representors apply to have a loan agreement entered into in 2017 rectified and declarations made as to the proper construction of two agreements that followed it in 2018 and 2019. All three agreements are governed by Jersey law.

2 The Second Representor ("HSBC") is regulated to carry on trust business in Jersey through its branch here. It is trustee of a discretionary settlement known as the G Settlement created on 29 th December 2006 ("the Trust") and which is governed by the law of the Cayman Islands.

3 The First Representor is a wholly owned special purpose vehicle incorporated in Jersey ("the Company") used by HSBC as trustee to facilitate the making of loans to the beneficiaries of the Trust.

4 The Court has before it affidavit evidence from the beneficiary ("the Beneficiary") who had borrowed money from the Trust, the Beneficiary's son and a number of the relevant officers of HSBC at the material time. No issues of contention arose in relation to their evidence and we set out the facts as we find them to be.

5 In 2014 and 2015 loans were made by the Company to the Beneficiary in connection with the purchase and subsequent refurbishment of a house in London. These loans were evidenced by loan agreements entered into on 12 th June 2014, 10 th July 2014 and 14 th September 2015, which we will refer to as "the Legacy Loan Agreements".

6 In December 2016, Grant Thornton ("GT") identified UK tax changes which were due to take effect on 6 th April 2017, pursuant to which loans on which interest was not paid in the UK tax year would be treated as a benefit in kind for tax purposes and tax would be payable by the borrower on that benefit. This change would impact the loans made by the Trust through the Company to the Beneficiary, the terms of which required him to pay interest on the loans only at the point at which he repaid the capital to the Company.

7 On 6 th January 2017, GT sent an e-mail to HSBC and the Beneficiary, making them aware of the upcoming tax changes and the implications for the Beneficiary. GT outlined a number of possible ways forward but noted that the final legislative language would need to be confirmed before GT made a recommendation.

8 At a meeting on 13 th March 2017, by which time the legislative changes were clearer, GT

advised the Beneficiary that the pre-existing loans between him and the Company should be amended before 6 th April 2017, so that they would cease to be interest bearing going forward, but without affecting the Beneficiary's liability to pay interest that had already accrued on the loans to that date. The intention was that the Beneficiary would still have to pay the new tax charge referred to above, but going forward, he would not have to pay the interest itself. The loans at that time were for up to £22 million and hitherto the interest rate had been 2% over the Bank of England base rate.

9 GT's advice was subsequently communicated to HSBC by way of an e-mail dated 15 th March 2017 addressed to Mr James Dingle, who was the manager of the team within HSBC that was responsible for administering the trust structure and to Mr Mark Adams, who was the senior administrator on that team and who worked on the trust structure specifically.

10 Mr Adams confirmed to GT, copying the Beneficiary, that HSBC was happy to defer to GT's advice and sought GT's assistance in the preparation of the documentation to give effect to that advice. However, GT declined to give that assistance, stating that it was a legal matter on which they could not advise. The responsibility for preparing the agreement giving effect to this advice was therefore given to Mr Adams, who both the Beneficiary and the Company relied upon to ensure that it reflected and gave effect to that advice. The sole intention in entering into a new agreement was to give effect to the GT advice as regards interest on the loans. Put simply, there was no other rationale for the agreement.

11 The new agreement, as drafted by Mr Adams, was entered into on 5 th April 2017 (“the 2017 Agreement”) and is governed by Jersey law. Unfortunately, it contained two mistakes:

(i) Mr Adams misunderstood the advice and therefore what he was required to draft. He assumed, wrongly, that the advice was that all interest, both historic and for the future, had to be waived, which misunderstanding is reflected in recital C to the 2017 Agreement.

(ii) He failed to insert any operative provision in the 2017 Agreement to make any changes to the interest arrangements on the loans. As a result, the 2017 Agreement, if given effect as drafted, simply consolidated the Legacy Loan Agreements. Contrary to the GT advice, and therefore the parties' intentions, interest continued to accrue on the loans from 6 th April 2017 onwards.

12 The principal application of the Company is for the 2017 Agreement to be rectified, so that it reflects the parties' common intention. The application is supported by the Beneficiary, the other party to it.

Construction of the 2017 Agreement

13 Before the Court can consider whether a written agreement requires rectification, it must first interpret that agreement. The 2017 Agreement recites in Recitals A and B the Legacy Loan Agreements and envisages that once fully drawn down, they will total up to £22 million, which the borrower (the Beneficiary) was stated to have agreed would remain outstanding on the terms of those loan agreements. Recital C then said this:

> *"C The Lender has agreed to waive all interest payable now and in the future by the Borrower in respect of the Loans, in effect making the Loans interest free."*

14 The 2017 Agreement then went on to provide as follows:

> *"NOW IT IS HEREBY AGREED as follows:-*
>
> *It is intended that this Agreement shall take effect in accordance with and be enforceable under the laws of the island of Jersey, Channel Islands.*
>
> *The Borrower hereby acknowledges that he is indebted to the Lender in the sum of up to £22,000,000 (Twenty-Two Million Pounds Sterling) (the "Principal").*
>
> *The Borrower will pay to the Lender on demand of the Lender (or on such earlier dates as the Borrower shall think fit) the balance of the Principal for the time being outstanding together with any interest that remains outstanding."*

15 It can immediately be seen that whilst Recital C anticipates a waiver of all interest payable now or in the future (which itself does not accord with the advice of GT), there is no operative provision in the agreement proper to that effect. The Borrower does nothing more than to acknowledge the indebtedness, together with any interest outstanding.

16 The principles of contractual construction under Jersey law are set out in paragraphs 36 – 42 of the Court of Appeal's judgment in *Trilogy Management Ltd v Charitable Foundation (International) Ltd* [2012] JCA 152 at paragraphs 11–14 and confirmed by the Jersey Court of Appeal in its judgment in *Trico Ltd v Buckingham* [2020] JCA 067, which stated that English law principles will be followed unless otherwise specified (paragraph 55).

17 The role of recitals in an agreement is considered in the leading text of *Lewis on Interpretation of Contracts* 9th Edition at chapter 10. In overview:

> (i) The function of recitals is to narrate the history leading up to the making of the agreement in question or to express in general terms the intention with which the agreement was made.
>
> (ii) Recitals are part of the context in which the contract is made and, since the circumstances surrounding the making of a contract may be relied on as an aid to interpretation, it follows the recitals may similarly be relied on.

(iii) However, where the words of the operative part of the contract are clear they will not be controlled, cut down or qualified by the recitals.

(iv) It is only where the operative part of a contract is unclear, that recitals may be used to control, cut down or qualify the operative part.

(v) In the case of an inconsistency between the recitals and the operative part of the contract, the operative part prevails.

(vi) Whilst in an appropriate case the court may interpret a recital as carrying with it an obligation to carry into effect that which is recited, the court will in any case be cautious in spelling a covenant out of a recital because that is not the part of the deed in which covenants are usually expressed.

18 That recitals will not modify or override clear provisions in the operative part of a contract can be seen from the case of *Helier Philip Warder & Others v George Troy & Sons Ltd* 4th November 1996 (unreported). At page 12 lines 35–50 the Court concluded on the facts that certain *"aims"* contained in a first document were a mere recital of the general background and the aspirations of the parties and that given the contract appeared *"quite clear"* there was no reason to refer to the "aims" in its construction.

19 Applying these principles and on a proper construction of the 2017 Agreement, it simply consolidated the Beneficiary's outstanding loans from the Company and did not make any changes to the interest provision. It therefore failed to give effect to GT's advice, which was to stop interest accruing from 6 th April 2017. Even if Recital C had been given operative effect in the agreement proper, it purported to waive all interest then and in the future payable. It was not GT's advice that interest then payable was to be waived. It was to cease being payable going forwards without affecting the Beneficiary's liability to pay interest that had already accrued.

Rectification

20 The remedy of rectification under Jersey law is well established in the context of voluntary settlements. The law was comprehensively reviewed by the Jersey Court of Appeal in *B v Virtue Trustees* [2018] JCA 219 between paragraphs 15 and 22. At paragraph 23, the Court of Appeal held that there was no difference between the law of England and the law of Jersey relating to the rectification of voluntary settlements and adopted the formulation set out in paragraph 4–069 of Lewin 19 th edition, as follows:

> ***"The conditions which must be satisfied in order for the Court to order rectification of a voluntary settlement are as follows:-***
>
> > ***(1) There must be convincing proof to counteract the evidence of a different intention represented by the document itself;***

(2) There must be a flaw (that is an operative mistake) in the written document such that it does not give effect to the settlor's intention;

(3) The specific intention of the settlor must be shown; it is not sufficient to show that the settlor did not intend what was recorded; it must also be shown what he did intend; and

(4) There must be an issue capable of being contested between the parties affected by the mistake, notwithstanding that all relevant parties' consent."

21 To these requirements, the Court of Appeal added that there must be full and frank disclosure, that no other remedy is available to achieve the same end and that even when the requirements for rectification are satisfied, the Court retains a discretion whether or not to rectify.

22 The 2017 Agreement is, of course, a bilateral agreement or contract. The Jersey Court of Appeal in *Home Farm Developments Ltd & Ors v Le Sueur* [2015] JCA 242 confirmed that rectification is available as a remedy in Jersey in respect of contracts. The judgment states at paragraph 49:

> ***"Rectification requires that both parties have either reached an agreement or have a continuing common intention which has not been correctly reflected in the written document.*** The court can in those circumstances rectify the written document to reflect the true agreement reached between the parties" .

The Court did not say anything further in relation to the test that should be applied.

23 In *Le Pennec v Romeril* [1995] JRC 047 the Court confirmed that a shared common intention would allow the Court to rectify a contract (page 6, at line 15). However, the Court does not say anything further about the test that should be applied. Indeed, as is clear from line 15 on page 6, the Court found that there was no common intention and so presumably did not need to consider the matter further.

24 We note that the Law Commission in its Consultation paper on the Jersey Law of Real Property (September 2002) stated as follows at paragraph 1.4:

> *"Rectification. The English Law Commission, having proposed that all the terms of the agreement should be in writing, noted that, in appropriate circumstances, the equitable doctrine of rectification could also operate to save a contract where not all of the pertinent terms had been rendered in writing or where one or more of them had been wrongly recorded. In order for the doctrine of rectification to apply there does not need to be a prior enforceable contract; it is sufficient that there is a prior agreement or a continuing common intention to contract, together with convincing proof that the written document does not*

adequately represent the terms of the agreement. In Jersey the courts have most often applied the doctrine of rectification in relation to trusts, but it is no doubt available in other contexts. An order of rectification is of retrospective effect."

25 Advocate Passmore submitted that in so far as the test to be applied, the Court may have regard to English authorities as it has done in the context of rectification of voluntary settlements. As there is clear authority that rectification is available as a remedy in Jersey in respect of contracts as well as voluntary settlements, in the absence of any authority from this jurisdiction as to the test to be applied, we agree that in order to be consistent with the approach of the Court of Appeal, we should look to English law for guidance as to the test to be applied on the rectification of contracts.

26 Advocate Passmore referred the Court to the formulation approved by the House of Lords in *Chartbrook Limited v Persimmon Homes Limited and others* [2009] UKHL 38 at paragraph 48:

"The party seeking rectification must show that:

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

27 It has also been said that there must be an issue between the parties capable of being contested (*Giles v Royal National Institute for the Blind* [2014] EWHC 1373 at 25(4)). Whilst the precise meaning of this is unclear, it is clear (at paragraph 45) that the English Court will not grant rectification if doing so will make no difference to the parties' rights, which would not be the position in the case before us.

28 At paragraph 176 of its judgment in *FSHC Group Holdings Limited v GLAS Trust Corporation Limited* [2019] EWCA Civ 1361 the English Court of Appeal held that rectification is concerned with the parties' actual (i.e. subjective) intention:

"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."

29 The present application falls within the second category above i.e. rectifying the 2017 Agreement as drafted so that it reflects the Company's and the Beneficiary's continuing common intention.

30 It is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend. However, the parties do not need to have agreed precise wording – see paragraph 35 of *Giles v Royal National Institute for the Blind*.

31 One of the two parties to the 2017 Agreement was a company and we need to address the principles governing the attribution of actions, intentions or knowledge in relation to companies which were discussed in *Brazil & Anor v Durant & Anor* [2012] (2) JLR 356. As stated at paragraph 47, the classic test of attribution has long been to ask who is the *"directing mind and will"* of the company, it being recognised that different persons may for different purposes satisfy the requirements of being the company's directing mind and will.

32 Considering a claim for rectification of a contract entered into by a Jersey trust company, which had authorised one of the beneficiaries (Mr Begg) to negotiate on its behalf, the English Court of Appeal in *Hawksford Trustees Jersey Limited v Stella Global UK Limited & Another* [2012] EWCA Civ 55 held at paragraphs 41 – 43 that:

> " **[Counsel for the appellant]** ***is, I think, right in his submission that the decision-maker ought in principle to be the person who had the authority to bind the company to the contract.*** The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company. But, whilst those principles are easily stated, their application to the facts of any given case may be less straightforward. In a corporation with a defined and well-understood decision-making structure, the division of responsibility should be readily apparent at least if the prescribed procedures are followed. But this is not a case of that kind. Although the trustee alone by its officers had the power to enter into the SPA and the Amended SPA, it is clear from the judge's findings of fact that this decision was largely a formality provided that the terms of the sale were acceptable to Mr Begg. His role as a negotiator was therefore critical both to his own willingness to see the shares sold on the terms he had agreed and to the trustee's decision to sell them on that basis.
>
> ***..***

> ***Even if this does not make Mr Begg the decision-maker, what it does, I think, do is to demonstrate, when looked at objectively, that the trustee entered into the Amended SPA with the positive intention that it should give effect to the terms which Mr Begg had negotiated and agreed.*** … The fact that they were in error in this respect entitled the trustee, in my view, to obtain rectification…"

33 In terms of the outward expression of accord, in *FSHC Group Holdings Limited v GLAS Trust Corporation Limited* [2019] EWCA Civ 1361 the English Court of appeal said that " ***the accord may include understandings that the parties thought so obvious as to go without saying or that were reached without being spelled out in so many words"*** but on the proviso 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"***. (see paragraphs 80 and 87)

34 Whose intention should therefore be attributed to the Company? We conclude, on the evidence before us, that:

> (i) As set out above, the Company was the vehicle through which HSBC as trustee lent money to the beneficiaries.
>
> (ii) Decisions as to any such loans, and the terms of those loans, would be taken by HSBC. Once HSBC had decided to make such a loan, or vary its terms, it would prepare a draft resolution for the corporate director of the Company ("the Corporate Director").
>
> (iii) In this case, it was HSBC which received the advice from GT that the terms of the loans should be amended in light of the upcoming changes to the UK tax legislation and HSBC agreed to amend in accordance with GT's advice.
>
> (iv) In that regard the Company's role was to then review and decide whether to approve the proposal.

35 Whilst the Company remained the formal decision maker, it was in substance HSBC, or rather, Mr Adams, acting on behalf of HSBC, who was or was held out as being the taker of the decision in relation to the 2017 Agreement and it is his intention that is relevant.

36 The Beneficiary's evidence is that his intention was to follow GT's advice and to restructure his loans in the way they had advised. Mr Adams' intention was to defer entirely to GT and to implement the mechanism they advised in order to achieve the desired outcome – indeed he had asked them to prepare the documentation. This intention was communicated to the Beneficiary and GT in his e-mail dated 24 th March 2017.

37 The evidence of the directors of the Corporate Director is clear, namely that they understood that the purpose of the 2017 Agreement was to give effect to the GT advice and this is clear on the face of the resolution.

38 Accordingly, both parties had a common intention to implement the mechanism advised by GT for achieving the desired outcome. Unfortunately, Mr Adams failed to express that common intention in the 2017 Agreement, both in the recitals and in the operative provisions.

39 The outward expression of the parties' common accord, namely to give effect to the GT advice, can be seen in the e-mail correspondence and it is clear that the parties' common intention continued from the time at which they received GT's advice through to the execution of the 2017 Agreement.

40 We are satisfied from the evidence that Mr Adams made two mistakes when drafting the 2017 Agreement. Firstly, he misunderstood precisely what he was required to draft in order to give effect to GT's advice, and secondly, he failed to insert any operative provision into the 2017 Agreement to make any changes to the interest arrangements on the loans.

41 We are also satisfied from the evidence of the other witnesses who were involved in the process of preparing and executing the 2017 Agreement that it was executed solely to give effect to GT's advice and that Mr Adams was relied on to draft the documentation which gave effect to that advice.

42 The Company seeks the 2017 loan Agreement to be rectified in this way, namely by: Substituting for the words " ***now and in the future***" in Recital C the words " ***for the period after the date of this agreement***".

(i) Adding at the end of the Recital C the words ***"for the future"***.

(ii) Adding a new clause 3 after clause 2 as follows:

> " ***3. No interest shall be charged by the Lender or be payable by the Borrower on the Loans/Principal after the date of this agreement but without prejudice to the obligation of the Borrower, which shall remain unaffected by this clause, to pay the interest to the Lender on the Loans/Principal or any part thereof that has accrued due hitherto under the terms of the Loan Agreements up to and including the date of this agreement in respect of the period up to and including the date of this agreement"*** and

(iii) Renumbering subsequent clauses of the agreement *seriatim*.

43 The rectification sought affects the rights and obligations of the parties to the 2017 Agreement and accordingly there is an issue capable of being contested. We accept that the Beneficiary's support of the application does not prevent this criterion being met.

44 In conclusion, each of the tests for rectification of a contract have been met, and we agree to rectify the 2017 Agreement in the manner requested, so that it reflects the parties' common intention. That rectification takes effect from the date of the 2017 Agreement, namely 5 th April 2017, so that it is deemed to have been so worded from the outset.

The 2018 Agreement

45 Unfortunately, the problems for the Representors and the Beneficiary did not stop there. Following the 2017 Agreement, the Beneficiary sought further funds by way of an extension of the loans from the Company of £2 million, bringing his indebtedness to the Company up to £24 million. A further agreement was entered into by the Company and the Beneficiary on the 5 th February 2018 ("the 2018 Agreement") which so far as is relevant was in the following terms:

> *"WHEREAS:-*
>
> > *A. In accordance with the loan agreement dated 05 April 2017 the Borrower is indebted to the Lender in the sum of up to £22,000,000 (Twenty Two Million Pounds Sterling)*
> >
> > *B. The Lender had agreed that the sum of up to £22,000,000 (Twenty Two Million Pounds Sterling) remain outstanding by way of a loan on the terms set out in the loan agreement dated 5 April 2017.*
> >
> > *C. The Lender has agreed to increase this loan by £2,000,000 (Two Million Pounds Sterling) on the terms set out herein.*
>
> *NOW IT IS HEREBY AGREED as follows:-*
>
> > *1. It is intended that this Agreement shall take effect in accordance with and be enforceable under the laws of the island of Jersey, Channel Islands.*
> >
> > *2. The Lender hereby acknowledges that his loan is unsecured and none [sic] interest bearing.*
> >
> > *3. The Borrower hereby acknowledges that he is now indebted to the Lender in respect of the sum of up to £24,000,000 (Twenty Four Million Pounds Sterling) ("the Principal").*
> >
> > *4. The Borrower will pay to the Lender on demand of the Lender (or on such other date as the Borrower shall think fit) the balance of the Principal for the time being outstanding together with any interest that remains*

outstanding."

46 This Agreement was drafted by an administrator within HSBC and the evidence before the Court is that:

(i) As at the date of the 2018 Agreement, it was not appreciated by those involved that the 2017 Agreement had not given effect to the GT advice, and

(ii) They never understood nor intended for the 2018 Agreement to make any changes to the interest provision on the Beneficiary's outstanding loans from the Company, nor did they understand the 2018 Agreement to have that effect.

47 It was the parties' understanding that the clause in the 2018 Agreement in which the Company acknowledges " ***that the loan is none [sic] interest bearing***" does no more than acknowledge that, as at the date of the 2018 Agreement, interest was not accruing and going forward would not accrue on the Beneficiary's loans. However, in the circumstances, they seek a declaration that their understanding of the 2018 Agreement is correct.

48 The 2018 Agreement stands to be construed on the basis of the 2017 Agreement as now rectified (with retrospective effect), and as at 5 th April 2018, it was correct that as per clause 2, the loans did not then bear interest pursuant to the 2017 Agreement, and as per clause 4, there was still outstanding interest on the loans up to 5 th April 2017 as per the 2017 Agreement. The Court is content, therefore, to make the declaration sought, namely that the 2018 Agreement does no more than acknowledge that as at the date of the 2018 Agreement, interest was not accruing and going forward would not accrue on the Beneficiary's loans.

The 2019 Agreement

49 Shortly after the execution of the 2018 Agreement, GT identified that the 2017 Agreement might not reflect the terms of its advice and informed Mr James Dingle of HSBC (Mr Adams having left HSBC for a role in another firm). Mr Dingle was instructed to seek the assistance of Mr Patrick Love, an in-house legal adviser for HSBC. He obtained outside legal advice from English and Jersey lawyers to the effect that the proper interpretation of the 2017 Agreement as drafted was that it had:

(i) not given effect to GT's advice, but

(ii) simply consolidated the Beneficiary's pre-existing loans without amending their interest provision.

50 In short, contrary to GT's advice, to which the parties had intended to give effect, the 2017

Agreement as drafted did not waive interest on the Beneficiary's loans from 6 th April 2017 onwards. Mr Love therefore understood that interest was, in fact, still continuing to accrue on the Beneficiary's loans.

51 After a period of discussion about the options (including the need to apply to the Court for rectification of the 2017 Agreement) and consultation with the Beneficiary, in January 2019 Mr Love settled on a two-stage approach whereby:

(i) the Company and the Beneficiary would execute a further agreement intended to ensure that interest stopped accruing on the loans from the date of that further agreement, and

(ii) consideration would be given as to what to do in respect of the interest that Mr Love understood had accrued on the Beneficiary's loans for the period 5 th April 2017 to the date of the further agreement.

52 Rather than re-use the outside lawyers who had advised, Mr Love drafted an agreement for the specific purpose of giving effect to the first stage of this approach. The agreement was entered into on 13th February 2019 ("the 2019 Agreement").

53 Recital B lists each of the previous loan agreements including the 2017 and 2018 Agreements. Recital C and the remaining operative provisions are as follows:

"C. Pursuant to the combined effect of the Previous Loan Agreements:

(a) The Borrower is indebted to the Lender in relation to the following amounts:

(i) principal, together with interest that accrued up to and including 5 April 2017 in the aggregate amount of GPB 22,943,156.24 (the "Principal") and

(ii) interest that has accrued from 6 April 2017 until the date hereof (the "Post 2017 interest"), which as at 29 January 2019 stood at GPB 1,027,573.13, together the "Loan"; and

(b) Interest is accruing on the Principal and the Post 2017 interest (once compounded) at the rate of 2% over the Bank of England Base Rate.

D The Borrower has requested that the Loan be interest free on and from the date hereof, and at the request of the Trustee as the Lender's sole shareholder, the Lender agrees to amend the terms on which the Loan is granted as herein provided.

IT IS HEREBY AGREED AS FOLLOWS:-

1. Loan

1.1 The Borrower acknowledges and agrees that he is indebted to the Lender in the manner and amounts outlined in Recital C above.

1.2 For the avoidance of doubt, the parties hereto have agreed to restate the terms on which the Loan is granted in this Agreement.

1.3 Save and except as otherwise provided herein, the Loan shall be repayable upon demand.

1.4 On and from the date hereof, and without prejudice to any interest that has accrued up to and including the day immediately preceding the date hereof, the Loan shall not bear interest.

1.5 The Borrower may repay the whole of the Loan, or from time to time part of the Loan, prior to demand without notice, bonus or penalty."

54 It can be seen that the way this Agreement has been drafted compounds the problem in that it might be construed as the Beneficiary accepting a liability to pay interest between 6 th April 2017 and 12 th February 2019. The Company contends, however, that the natural reading of the 2019 Agreement, construed as a whole against the surrounding circumstances, is to stop interest from accruing on the loans from 13 th February 2019 onwards. It should not be construed as imposing on the Beneficiary a liability to pay interest to which he was not already exposed. It was intended to do no more than record the parties' mistaken understanding as to the Beneficiary's pre-existing liability to pay interest on the loans. The purpose of the agreement was to ensure that interest had stopped accruing from 13 th February 2019, as recorded in recital D.

55 Again this Agreement has to be construed on the basis of the 2017 Agreement as rectified (with retrospective effect) which established with absolute clarity that interest on the loan stopped accruing on 6 th April 2017, so that contrary to what is said in recital C, interest in the sum of £1,027,573.13 had not, as a matter of fact, accrued.

56 In terms of clause 1.1, the acknowledgement by the Borrower that this interest had accrued was self-evidently a mistake. As to the restatement of the terms of the loans following clause 1.2, clause 1.4 provided that they would not bear interest from that date (which is a correct statement) and that this is without prejudice to any interest that had accrued; interest had, of course, accrued up to 5 th April 2017, as per the 2017 Agreement.

57 Given the surrounding circumstances or matrix of facts and in light of the 2017 Agreement as rectified and the 2018 Agreement as properly construed, we do not think that the Company would have a sustainable cause of action against the Beneficiary for the payment

of interest beyond 6 th April 2017, because, properly construed, the 2019 Agreement did not purport to impose a fresh obligation upon the Beneficiary to pay interest on a loan that had been interest free from 5 th April 2017 as confirmed in two prior agreements.

58 Furthermore, the language used in operative clause 1.1 is framed as an acknowledgement of a state of affairs that did not in fact exist (in so far as interest was concerned) and we agree that it did not purport to create a new obligation to pay interest. For it to be construed in that way, the recital would have had to have provided that the loan had been non-interest bearing since 6 th April 2017 and that the Beneficiary had now agreed to pay interest from that date and the rate of that interest. We therefore agree that properly construed, the 2019 Agreement did not impose on the Beneficiary a liability to pay interest in respect of the period 6 th April 2017 to 12 th February 2019 and are content to make a declaration to that effect.

59 If we are wrong in so construing the 2019 Agreement, then we would have acceded to Advocate Passmore's alternative case that the 2019 Agreement as a whole should be set aside as an *erreur sur la substance*, which was considered recently by the Court of Appeal in *Booth v The Viscount* [2019] JCA 122 in which the following statements from Pothier and the Civil Code were adopted:

> ***"Mistake nullifies a contract, not only when it affects the thing itself, but also when it affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing".*** (paragraph 25)
>
> ***"A mistake as to substance means not only that which affects the very material of which the thing is composed, but also, and more generally, that which has to do with the substantial qualities (authenticity, origin, use etc.) in consideration of which the parties have contracted."*** (paragraph 30)
>
> ***"A mistake of law or fact which does not affect the cause of the obligation, but only the reasons which have brought about consent, does not in principle vitiate the consent and is consequently without effect on the validity of the contract."*** (paragraph 30)

60 The Court of Appeal went on to set out the criteria for establishing an *erreur sur la substance* in paragraph 34 of its judgment:

As regards the fourth question the Court noted that it only arises if the second question is answered in the affirmative, and that the Court "is not obliged to accept the mistaken party's statement about the importance to him, but should instead consider the plausibility of that statement in the light of all the circumstances."

> (i) What is the chose to which the contract relates – in other words, the subject matter of the contract?

(ii) Does the claimed *erreur* relate to that subject matter?

(iii) If the claimed mistake does relate to the subject manner of the contract did the mistake relate to something which in principle affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing?

(iv) Did the mistake relate to something that was essential to the mistaken party, such that he would not have contracted had he known the true position?"

61 Applying these principles to the facts as we have found them:

What is the chose to which the 2019 Agreement relates – in other words, the subject matter of the agreement?

62 The subject matter of the 2019 Agreement was the interest provision of the Beneficiary's consolidated loans from the Company.

Does the claimed erreur relate to that subject matter?

63 The parties believed that the interest provision that was in effect immediately prior to signing the 2019 Agreement was that interest had continued to accrue from 6 th April 2017 onwards, and were therefore mistaken as to the interest provision of the Beneficiary's loans (i.e. the subject matter of the 2019 Agreement).

If the claimed mistake does relate to the subject matter of the 2019 Agreement, did the mistake relate to something which in principle affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing?

64 It is clear from the evidence that none of those involved would have countenanced entry into the 2019 Agreement if they had understood it might expose the Beneficiary to a liability to pay interest to which he was not already exposed.

Did the mistake relate to something that was essential to the mistaken party such that he would not have contracted had he known the true position?

65 It is clear from the evidence before us that this criterion is met:

(i) HSBC would not have recommended to the Corporate Director that it approve the

Company's entry into the 2019 Agreement.

(ii) The Corporate Director would not have approved the Company's entry into the 2019 Agreement unless explicit assurance was given that the intention was to waive accrued interest, which assurance would not have been forthcoming, and

(iii) The Beneficiary would not have entered into the 2019 Agreement but would have instead required that further advice be obtained from GT.

66 In the light of this, the Court would have granted a declaration that the whole of the 2019 Agreement be set aside on the grounds of mistake and was void due to an *erreur sur la substance*.

67 We would say in passing that Advocate Passmore sought a similar alternative declaration in relation to the 2018 Agreement, namely the setting aside of the whole of that agreement due to an *erreur sur la substance*. We did not consider it necessary to consider this alternative in the case of that agreement because the proper construction of the 2018 Agreement seemed beyond doubt to us, but if pressed we would have required further discussion before considering it any further, bearing in mind that this agreement acknowledged an increase in the loans of £2 million (which we assume has been drawn down at least in part) which arguably forms the subject matter of the agreement in respect of which there was no *erreur*. What was said about interest was in fact correct.

Conclusion

68 In conclusion, we rectify the 2017 Agreement in the manner set out in paragraphs 42 and 44 above and make the declarations as to the proper construction of the 2018 and 2019 Agreements in the manner set out in paragraphs 48 and 58 respectively above.