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***Univar UK Ltd v Smith & Ors* [2020] EWHC 1596 (Ch) – the first application of the Court of Appeal's "new" subjective test for rectification, in a pensions context**

Executive Summary*: This Case Note discusses the judgment of Trower J in Univar v Smith & Ors [2020] EWHC 1596 (Ch), which applied the Court of Appeal's new subjective test for common intention (see FSHC Group Holdings [2019] EWCA Civ 1361) to a claim for rectification of the governing documentation of the Univar pension scheme.*

It focuses on three main areas of the judgment, and discusses:

a) Rectification - how a truly subjective test might work in practice, whether it creates the scope for greater emphasis to be placed upon evidence given in the witness box, and why Trower J was loathe to apply such a test in Univar;

b) South West Trains contracts – whether such a contract between an employer and members can operate so as to increase final salary benefits (a point held open by Trower J);

c) Construction – Trower J's approach to construction in Univar, its emphasis upon context, and whether this was consistent with the guidance of Briggs LJ (as he then was) in Safeway v Newton (No. 1) [2018] Pens L.R 2.

Michael acted for the Representative Beneficiary in Univar.

[A] Introduction: what does FSHC's new subjective test look like in practice?

1. In his judgment in *FSHC Group Holdings Ltd v GLAS*[1], Leggatt LJ altered the test for ascertaining the common continuing intention of the parties in a claim for rectification. Previously, in *Chartbrook Ltd v Persimmon Homes Ltd*,[2] Lord Hoffman had declared that the common continuing intention must be judged by an objective test (i.e. what the reasonable observer with knowledge of the background facts and prior communications between the parties would have thought the parties'

[1] [2019] EWCA Civ 1361
[2] [2009] AC 110

common intention to be). In *FSHC*, Leggatt LJ declared that Lord Hoffman's comments had been obiter, and that in fact it was necessary to show that each party had the same "actual" or "subjective" intention (the terms are used almost interchangeably in the judgment – see paragraphs 146, 149, 153, 161, 173, 174 and 176).

2. But what does this subjective test look like in practice? For example, how should one assess the actual / subjective intention of (for example) a trustee witness trying to recall his or her role in matters, many years previously? Little time was spent on this in the judgment itself - the consideration of the pensions rectification case law in *FSHC* is very brief, and *FSHC* was itself a case concerned with contractual rectification (and primarily with the issue of demonstrating an outward expression of accord, from which requirement pensions cases are exempted).

3. A live issue in *Univar* was therefore whether the new actual / subjective test for common intention should result in:

   a. a greater emphasis being placed upon the evidence given by a witness, in the witness box itself; or whether
   b. such evidence is likely to be of little value, and the documentation remained all-important.

4. The submission of the Representative Beneficiary was that if one is to ascertain what was going on in the mind of the parties at the time of signing the Deed then, whilst the best place to begin with that enquiry will always be the contemporaneous documentation, a witness might nonetheless be thought to have something relevant to contribute to the question of what they actually thought (subjectively) at the time they were making their decision.

5. Yet this submission (and approach) had the potential to get very complicated – traditionally an individual trustee's intention has been conclusively inferred from (for example) trustee minutes and from documents executed or approved by the trustee board as a whole, to which the individual trustees are taken to have assented. If it were necessary to give significant weight to their oral evidence about their state

of mind (as well as to the documentation) in order to assess their actual / subjective intention at the time of the transaction, then *FHSC*'s effect upon pension rectification cases would have been profound. The facts of *Univar* created an ideal forum for the issue to be tested.

6. Attempting to identify what role, if any, subjective evidence should play going forward is made more complicated in the sphere of pensions rectification by the fact that an unrelated debate featuring the language of objective / subjective evidence already features in the pensions rectification case law.[3] That debate refers to "objective" evidence as being evidence which exists in documentary form, and asks whether objective (documentary) evidence should always be required to rectify a Trust Deed (in some of the early cases on voluntary settlements, rectification was granted with no supporting documentation[4]). This debate in the pensions cases is academic (and the question is never resolved) because pension rectification cases do not tend to struggle for documentation. But in discussing that question, the authorities discuss how in certain (older) cases, purely subjective evidence has been sufficient to obtain an order for rectification.

7. Before looking at how Trower J approached the subjective test in his judgment in *Univar*, it should be noted by way of preamble that, some six years before his judgment in the Court of Appeal in *FSHC*, one Leggatt J (as he then was) gave judgment in *Gestmin v Credit Suisse Ltd*[5]. In that case, having discussed in detail both a) the fallibility of human memory, and b) most peoples' tendency to have little insight into that fallibility[6], Leggatt J concluded (at [22]):

> *"the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

[3] See, for example, *Lansing Linde v Alber* [2000] Pens L.R. 15; *AMP v Barker* [2001] Pens L.R 77
[4] See, in particular, paragraph 66 of *AMP v Barker* [2001] Pens L.R 77
[5] [2013] EWHC 3560.
[6] See paragraphs [16] – [22].

The outline facts of Univar

8. The Univar scheme rules originally contained provision for increases in pensions in payment and revaluation of pensions in deferment to occur on a statutory basis.

9. In 2002, a re-draft of the Scheme's governing documentation was instructed by the Trustees, which exercise ultimately took some six years to complete. In 2008, the newly executed Trust Deed and Rules contained provision for increases in pensions in payment and revaluation of pensions in deferment to be calculated by reference to the Retail Prices Index ("RPI"). In other words, the use of RPI had been hardwired into the Scheme.

10. The facts of *Univar* were less clear-cut than some of the rectification cases which have been reported in recent years (often by way of summary judgment), in that:

    a. various trustee (and company) witnesses read and understood the new rule itself, and well understood that the Deed they were executing could only be amended in future by a valid exercise of the power of amendment (which required trustee and company consent);
    b. the (new) rule which they read and understood did not strike them as unusual, because indexation and revaluation increases had always (as at 2008) been awarded by reference to RPI in any event, and they intended that practice to continue; and
    c. it was not until two years later, in 2010, when George Osborne altered the statutory basis for calculating increases to pensions in payment and revaluation of pensions in deferment from RPI to CPI, that it was spotted that the rule which had been executed in 2008 had included an alteration, notwithstanding that it replicated the Scheme's consistent practice up until that point.

How was subjective common intention assessed in Univar?

11. In *Univar*, and against the background of Leggatt LJ's new subjective test, some of the oral witness evidence did not square with the contemporaneous, objective, documentation. For example:

    a. some trustee witnesses gave evidence that their intention in 2008 was to ensure that the new rule replicated the old practice (which it did);
    b. one trustee witness stated it was his intention to ensure that RPI would remain the measure used for future increases;
    c. neither the trustee, nor the Company, (nor anyone) foresaw in 2008 that the government would alter the basis of calculation from RPI to CPI, in 2010. That was the event which crystallised the mistake, and the trustees' reading of the new rule (in 2008) did not intersect with this later eventuality in the slightest.

12. The Company were able to point to, and relied heavily upon, a "Schedule of Changes" document distributed to the Trustees before a meeting in the run up to the execution of the new TDR, by their legal advisers. That Schedule did not suggest that the indexation and revaluation provisions were to be altered from a statutory basis (but nor did it provide a positive assurance that the new TDR preserved the old statutory basis for escalation and revaluation). Rather, the Schedule was described as containing a list of rules which had been changed (and the escalation / revaluation rule did not appear on the list). This, the Company submitted, was the best evidence as to what the trustee witnesses' actual / subjective intention was at the time, irrespective of whether some of them (many years on) could not recall it, or preferred to describe their intention in different ways.

13. In his judgment, Trower J placed exclusive emphasis upon the 2008 Schedule of Changes (in a style consistent with Leggatt LJ's judgment in *Gestmin*). He took reassurance from what the witnesses said in the witness box when it coincided with the contemporaneous documentation, and set it aside when it did not, reasoning:

    > *"I have [had] regard both to the contemporaneous documentation and to the oral evidence of the witnesses. As I have already said, it is not surprising that much of the oral evidence was not very clear on the question of the relevant witness' actual state of mind because memories had faded. Nonetheless, there were many respects in which the witnesses were able to elucidate the documentation in a manner which was helpful, but in the end, I think that the*

> *documents as so elucidated were a secure route to establishing the necessary subjective intent."* [237]

14. One doubts whether anyone would quibble with giving primacy to the contemporaneous documentation, when assessing evidence about events that took place over a decade ago. Such an approach is clearly the correct one, and to hold otherwise would have created the scope for a great deal of confusion in pension rectification going forward. However, *Univar* does leave a question mark over what, if any, change *FSHC* is supposed to have wrought upon the rectification of pension deeds, and whether the test for common intention really is a "subjective" one in any true sense of the phrase. If the way to assess subjective intention is (in reality) through the documents alone (buttressing that assessment where oral evidence is consistent with it, and setting that oral evidence aside when it is not), then one is in reality describing an objective test (albeit with a gloss which makes no difference in practice).

[B] *South West Trains Ltd v Wightman*[7] – can an employer contract with members so as to provide benefits greater than those provided for by the Rules?

15. *Univar* is a relatively long judgment and considers a number of other interesting points,[8] including the doctrine of *South West Trains* contracts.

16. In 2010 (subsequent to the rectification chronology) Univar wrote to Scheme members offering an inducement by which the members would voluntarily opt-out of the defined benefit section of the Scheme, and thereafter join a newly created defined contribution section, upon signing the relevant paperwork. The opt-out forms included certain assurances about rates of escalation and revaluation increases (on one construction).

[7] [1998] Pens LR 113

[8] For example estoppel, the members' defence of being bona fide purchasers for value, and the exercise of powers.

17. On the wording of the opt-out documentation sent to the members (and before him at trial), Trower J:

    a. rejected the Representative Beneficiary's submission that valid South West Trains contracts had been created with each member (creating a right to indexation and revaluation at 5%, or RPI);[9] and
    b. also rejected the Company's submission that no contractual arrangement had been created (the Company argued that the members had merely made an election, which could be set aside should entry to the new DC section of the scheme be refused)[10].

18. Instead, Trower J held that the wording of the documentation was such that the Company made a contractual promise to procure the admission of each member to the defined contribution section of the Scheme, as from the closure date, but no lasting contractual promise beyond that event (see paragraphs 321, and 331, of the judgment).

19. The Company had submitted that a SW Trains contract could not operate so as to provide greater benefits to a member than he or she would be entitled to under the rules ("*it is submitted … there are significant theoretical difficulties with an argument that an employer has bound itself to a contract which entitles members to deferred final salary benefits which are more than those to which they would be entitled under the rules. The reason for this is the impact which any agreement to receive more from the Scheme would have on the other members of the Scheme"*[11]*).*

20. Trower J did not endorse this submission in his judgment, and the issue remains open. In the writer's view, it is highly unlikely that *South West Trains* contracts would be found by a Judge to only be capable of operating so as to reduce benefits (therefore operating as a one way street for the employer). This is because:

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[9] See [320] of *Univar*.
[10] See [321] of *Univar*.
[11] See [312] of *Univar*, recording the submission of the Company.

a. whilst it is true that the doctrine operated so as to ensure that an agreement which restricted pensionable pay was the subject of *South West Trains* itself, Neuberger J did not suggest in his judgment that the doctrine should only apply on those facts;
b. it seems unlikely that the doctrine created a notable asymmetry of rights, whereby an agreement to pay lesser benefits than are present in the scheme's governing documentation requires less formality than an agreement to pay more;
c. on the facts of *Univar*, the trustee was well aware of the agreement reached (the opt-out forms were returned to the trustee, and significant company and trustee negotiation had taken place beforehand). This will often be the case in litigation where a *South West Trains* contract is argued for. If it is necessary to argue that such contracts have three parties (so as to rebut the suggestion that it is impractical for the employer to unilaterally agree to increase benefits without trustee involvement), then in many cases this will be easily arguable;
d. the objection that the trustee is not a party to the contract (and so the benefits should not be enhanced in a way that ties the trustee's hands) is likely more theoretical than real. A trustee would be unlikely to refuse to implement a *South West Trains* style agreement that it was well aware of – on those hypothetical facts, the trustee would position itself in almost the same (unattractive) position as the train drivers in the *South West Trains* case itself.

[C] Construction

21. One cohort of members in *Univar* joined the scheme from a separate scheme after Univar invited them to do so in 2002. Univar issued an Announcement to these members, which stated (where material):

> "*Please note the following explanations of certain parts of the Explanatory Booklet which will apply in respect of your membership of the … Scheme"*
>
> *Retirement Pension: What about inflation?*
>
> *Any pension payable from the … Scheme which is attributable to Pensionable Service on or after 1st May 2002 will increase each year whilst in payment* ***in***

line with increases in the Retail Prices Index, up to a maximum of 5%..." (emphasis added).

22. The Announcement itself was incorporated into the new 2008 Deed (by way of a freestanding Appendix), and the relevant members were told in the body of the TDR to refer to the Announcement for a description of their benefits.

23. The Representative Beneficiary argued that the plain wording of the Announcement entitled the relevant cohort to increases in pensions in payment calculated by reference to RPI, capped at 5% (in accordance with the emphasised words, above).

24. Trower J did not accept this construction. He favoured a construction where the reference in the introductory lines cited above ("*please note the following explanations of certain parts of the Explanatory Booklet which will apply in respect of your membership of the … Scheme*") provided vital context which made it clear that the description of increases in line with RPI, up to a maximum of 5%, were words which were only intended to be descriptive of the Scheme's Explanatory Booklet. That Explanatory Booklet merely said that, "*the Trustees will review your pension and may make increases from time to time to help offset the effects of inflation, provided the Company agrees and sufficient resources are available."* Trower J found this was, in turn, broadly a description of the discretionary provision contained in the prevailing Trust Deed and Rules of the Univar Scheme, as at the time the members joined (because that rule provided a discretionary power to the trustees, with regard to increases).

25. In *Safeway v Newton (No. 1)*[12], Briggs LJ set out principles of construction (subsequently endorsed by Lord Bridge in *Barnados v Buckinghamshire*[13]) applicable to pension scheme documentation, such that the relevant wording:

> *"forms part of a sophisticated, professionally drafted code for the administration of a valuable and complex business trust, a context in which*

[12] [2018] Pens. L.R 2, at [21] - [24].
[13] [2019] Pens. L.R

> *those having recourse to the terms of the written instruments which regulate it are in principle entitled to assume that clear language means what it says*";
>
> ...
>
> [The Deed] "*exists primarily for the benefit of non-parties, that is the employees upon whom pension rights are conferred whether as members or potential members of the Scheme, and upon members of their families (for example in the event of their death). It is therefore a context which is inherently antipathetic to the recognition, by way of departure from plain language, of some common understanding between the principal employer and the Trustee, or common dictionary which they may have employed, or even some widespread practice within the pension industry which might illuminate, or give some strained meaning to, the words used."*

26. The essential point is that members (who are not strictly parties to the Deed) must be borne in mind in the approach to construction. Whilst all decisions on construction are necessarily fact-specific, it can be noted that Trower J's approach involved reading down plain language (i.e. the language in the Announcement), so as to favour a construction where the member is sent across three different documents, in order to undercut a single unambiguous line. This may represent a high watermark in the employment of context over plain language, when construing a Scheme's governing documentation.

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Postscript*: The material in this paper is for general information only, and is not intended to provide legal advice.*