Neutral Citation Number: [2020] EWHC 1357 (Ch)

Contract – Interpretation – Mistake as to parties – Correction by construction

Contract – Rectification – Common Mistake – Discretion – Existing Deed of Rectification – Tax advantages

Case No: BL-2019-LIV-000018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
IN LIVERPOOL
BUSINESS LIST (ChD)

Liverpool Civil & Family Court
35 Vernon Street
Liverpool L2 2BX

Date: Friday, 29 May 2020

Before :

HIS HONOUR JUDGE HODGE QC
Sitting as a Judge of the High Court

- -

Between :

(1) MV PROMOTIONS LIMITED **(2) MICHAEL VAUGHAN**	**Claimants**
- and -	
(1) TELEGRAPH MEDIA GROUP LIMITED **(2) THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

- -
- -

Mr Alfred Weiss (instructed by **Brabners LLP,** Liverpool) for the **Claimants**
The First Defendant consented to the relief sought and took no part in the hearing
Mr Richard Chapman QC (instructed by **The Solicitor's Office and Legal Services, HMRC,** Manchester) for the **Second defendant**

Hearing date: Thursday 21 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE HODGE QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 2.00 pm on Friday 29 May 2020.

The following cases are referred to in the judgment:

AML Global Ltd v Exxonmobil Petroleum & Chemical bvba [2018] EWHC 3321 (TCC)
Arnold v Britton [2015] UKSC 36, [2015] AC 1619
Ashcroft v Barnsdale [2010] EWHC 1948 (Ch), [2010] STC 2544
Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101
Re Colebrook's Conveyances [1972] 1 WLR 1397
Daventry District Council v Daventry & District Housing Limited [2011] EWCA Civ 1153, [2012] 1 WLR 1333
East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61
FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd [2019] EWCA Civ, 1361, [2020] 2 WLR 429
Hamid v Francis Bradshaw Partnership [2013] EWCA Civ 470
Liberty Mercian Ltd v Cuddy Civil Engineering Ltd [2013] EWHC 2688 (TCC), [2014] 1 All ER (Comm) 761
Racal Group Services Ltd v Ashmore [1995] STC 1151, CA and [1994] STC 416 (Vinelott J)
Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900
Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 71
Vivian v Koningsveld [2010] EWHC 3961 (Ch)
Whiteside v Whiteside [1950] Ch 65
Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173

No additional cases were cited to the court or referred to in the skeleton arguments.

His Honour Judge Hodge QC:

I: Introduction and overview

1. This is the court's judgment on the final hearing of a Part 8 Claim issued by MV Promotions Limited ("**MVP**") and the former international cricketer and cricket commentator, Mr Michael Vaughan, on 19 August 2019. The Claimants are represented by Mr Alfred Weiss (of counsel). The First Defendant, Telegraph Media Group Limited ("**TMG**"), consents to the relief sought and has taken no active part in the proceedings. The Second Defendants, the Commissioners for Her Majesty's Revenue and Customs ("**HMRC**"), are represented by Mr Richard Chapman QC. The hearing took place on Thursday 21 May 2020 during the supposed lockdown caused by the Coronavirus pandemic with the judge (attended by a clerk) sitting in open court in Liverpool and the parties, the witnesses, and an interested journalist attending remotely by Skype for Business.

2. The claimants seek a declaration that, on the true interpretation of a contract dated 24 June 2011 ("**the 2011 contract**"), the contracting parties have since its inception been MVP and TMG; alternately, a declaration that the 2011 contract shall be rectified such that the contracting parties have since the inception of the 2011 contract been MVP and TMG. The claimants invited HMRC to be joined as a party to these proceedings since HMRC have an interest in the outcome arising out of closure notices issued by HMRC which (on HMRC's case) operate to add additional taxable business profits to Mr Vaughan's self-assessment tax returns for the services he has provided pursuant to the 2011 contract. HMRC's contention is that as a matter of interpretation, the 2011 contract is between TMG and Mr Vaughan and that, as a result, the income paid to MVP in respect of the 2011 contract (and various other agreements) should be recognised for tax purposes as income attributable to Mr Vaughan rather than as income attributable to MVP. TMG, Mr Vaughan and MVP entered into a deed of rectification dated 8 March 2018 whereby they agreed that the 2011 contract, as properly construed, constitutes an agreement entered into as between TMG and MVP and they confirmed that their intention was that TMG would contract with MVP. HMRC's position is that the 2018 deed does not rectify the 2011 contract with retrospective effect. It is in the light of HMRC's stance that MVP and Mr Vaughan seek a declaration from the court. HMRC actively oppose the claimants' case on the true interpretation of the 2011 contract. They assume a neutral stance on the rectification claim although, at the court's invitation, Mr Chapman has sought to assist the court by drawing its attention to HMRC's broader concerns in relation to rectification claims of this nature. The court is grateful to Mr Chapman because, in the past, commentators have expressed concerns that HMRC have not sought actively to participate in cases where rectification is sought in circumstances where the grant of that relief will confer fiscal advantages on the party seeking rectification. This case is unusual both for the involvement of HMRC and because it raises the thorny question of the appropriate exercise of the court's discretion to order rectification in a case where the parties to the relevant document have already sought to correct any mistake that it may contain. This latter issue raises the vexed issue of the true scope and effect of the much-discussed, and criticised, decision of the Court of Appeal in the case of *Whiteside v Whiteside* [1950] Ch 65.

II: The evidence

3. In support of their claim, the claimants rely upon the witness statements of Mr Neil Fairbrother dated 16 April 2019, Mr Gavin Reoch, also dated 16 August 2019, and Mr Adam Sills dated 23 May 2019. These provide full particulars of the claim. Mr Fairbrother is the cricket director of International Sports Management Limited **("ISM**"), a company limited by guarantee that provides sports agent services to sports professionals and sporting celebrities. Mr Fairbrother is charged with the responsibility of managing ISM's cricket division and in that capacity he has acted as Mr Vaughan's agent since around October 2002, whilst he was still a professional cricketer. Since 4 August 2015 Mr Fairbrother has also been a director of MVP. The other two directors of MVP (since its incorporation on 11 April 2003) are Mr Vaughan and his wife, Nichola. Mr Reoch is a former senior editorial manager of TMG, whilst Mr Sills is the Head of Sport for TMG. There was also a witness statement from Mr Ronald Kelly dated 18 September 2019. Mr Kelly is a solicitor with HMRC. Mr Fairbrother and Mr Reoch were both called to confirm their witness statements; and Mr Fairbrother was briefly allowed to supplement his written evidence by testifying that Mr Vaughan had purported to assign his image and merchandising rights to MVP at the time of its incorporation in 2003. As Mr Chapman pointed out in oral submissions, however, the precise terms of that assignment are not in evidence, and HMRC does not accept its efficacy. Moreover, there is no evidence that the assignment was available to TMG at the time of the 2011 contract or that Mr Reoch had seen it. Mr Chapman submitted that the assignment is not part of the admissible factual matrix and that it would not have prevented Mr Vaughan entering into the 2011 contract, particularly since he and his wife were the two directors of MVP at that time. Neither Mr Fairbrother nor Mr Vaughan were cross-examined; and there was no challenge to any of the witness evidence. The court notes that there is no evidence from Mr Vaughan himself.

4. In his witness statement Mr Fairbrother: (1) explains the history of his involvement with Mr Vaughan and MVP; (2) explains the negotiations antecedent to, and the execution of, a previous contract between MVP and TMG dated 21 October 2008 ("**the 2008 contract**"); (3) explains the negotiations antecedent to, and the execution of, the 2011 contract; (4) explains the relief sought in these proceedings by way of a declaration as to the true identity of the contracting parties to the 2011 contract, alternately for rectification of the 2011 contract so as to correct it to reflect the true identity of the contracting parties from the inception of that contract; (5) explains the position of TMG and why Mr Fairbrother believes that it is appropriate for the court to grant the relief sought; and (6) confirms that he has given notice of this claim to HMRC as a potentially interested party.

5. Mr Fairbrother relates that part of his role as ISM's cricket director involves the negotiation of endorsement, sponsorship and commentary contracts for ISM's clients, including Mr Vaughan. MVP is the limited company through which Mr Vaughan provides his non-playing services to third parties, including, latterly, his services as a cricket commentator. According to Mr Fairbrother, it is his practice to obtain a power of attorney to act on behalf of his clients and he believes that it is likely that he held a power of attorney in respect of Mr Vaughan ever since he first became his client. The most recent copy of a power of attorney in respect of Mr Vaughan that Mr Fairbrother can locate is dated 22 August 2011 (and thus post-dates the 2011 contract); but in any event, Mr Fairbrother states that he had authority from both Mr Vaughan and MVP to

negotiate and execute the 2011 contract. Mr Fairbrother also had authority from both Mr Vaughan and MVP to negotiate and execute the 2008 contract.

6. Mr Fairbrother was involved with negotiating the initial 2008 contract between TMG and Mr Vaughan which commenced on 1 October 2008 and ran for a period of 36 months with provision, if mutually acceptable, for it to be renewed on such terms as the parties might agree. Mr Fairbrother exhibits a copy of the executed 2008 contract which he signed on behalf of MVP. The 2008 contract provided for MVP to secure that Mr Vaughan, amongst other things, wrote regular newspaper articles for TMG in return for the payment of a monthly retainer to MVP. Since copies of the correspondence passing between Mr Fairbrother and TMG prior to the execution of the 2008 contract are no longer available, due to the passage of time, Mr Fairbrother's account of the background circumstances leading to the execution of the 2008 contract is based upon his recollection of events. Mr Fairbrother states that during the course of his negotiations with TMG prior to the 2008 contract, a draft contract was provided to Mr Fairbrother by TMG. Mr Fairbrother sent this draft to ISM's external legal adviser for his input. He made various amendments to this draft, including correcting the name of the contracting party from Mr Vaughan to MVP. Mr Fairbrother exhibits a copy of the draft, with the legal adviser's amendments written in manuscript. According to Mr Fairbrother, it is clear from considering the draft, as amended by the legal adviser, that he was ensuring that the terms of the draft contract were amended to reflect the fact that the contract was between TMG and MVP; and that in return for receiving payment under the 2008 contract, MVP were securing the services of Mr Vaughan for the benefit of TMG. Mr Fairbrother sent a copy of the amended draft contract to TMG which took no issue with the proposed amendments to the draft contract. A final copy of the 2018 contract, incorporating the changes made by ISM's legal advisor, was produced by TMG, was signed by Mr Richard Ellis, the executive editorial director of TMG, and was sent on to Mr Fairbrother, who executed it on behalf of MVP.

7. In September 2010 TMG approached Mr Fairbrother with a view to extending the existing arrangement between TMG and Mr Vaughan beyond 30 September 2011. To the best of Mr Fairbrother's recollection he dealt with an employee of TMG named Mr Gavin Reoch, who held the position of senior editorial manager. Mr Reoch and Mr Fairbrother discussed that the "deal" would be based on the terms of the existing deal, save that by agreement there would be changes to the duration of the agreement, the remuneration package, and the services to be provided (for example, in respect of the number of articles to be written). The proposed headline terms can be seen in an email from Mr Reoch to Mr Fairbrother sent on 3 February 2011 at 15.48 in which Mr Reoch referred to sending the latter a draft contract and stated that: "Terms to be included will be 4 year deal, £90k per annum year one plus RPI each year after, no fixed number of articles. Content as regards Fantasy Cricket tbc". TMG eventually sent Mr Fairbrother a draft copy of the contract by email on 31 March 2011. Mr Fairbrother explains that it did not make commercial sense to sign the proposed contract straightaway as he was sounding out interest from other parties and looking at other potential opportunities, and there were still six months left to run on the 2008 Contract. In the belief that the draft contract was based on the existing deal, and that it included the headline terms as to remuneration, duration and services that he had agreed with TMG, by email sent on 6 June 2011 at 16.29 Mr Fairbrother told Mr Reoch that he was happy with the draft contract, and he asked him to send copies to

Mr Fairbrother for signing. At paragraph 22 of his witness statement, Mr Fairbrother says this:

> "I believe that I must have skim read the draft 2011 contract prior to executing it. However, I would have been looking to make sure the figures agreed for remuneration, the length of the contract, and the services to be provided were as expressly agreed with the Telegraph, and I would not have been looking at other aspects of the contract. I certainly believed that this contract was between MVP and the Telegraph. It was also addressed to MVP. I believed I was executing the contract on behalf of MVP, just as I had executed the 2008 contract. I did not take any legal advice in respect of the draft 2011 contract prior to executing it. There was no discussion with the Telegraph that by entering into the 2011 contract, they intended to change the identity of the party with who they were contracting from MVP to Mr Vaughan."

8. Mr Fairbrother executed the 2011 contract on 30 June 2011. He believes that it was also the understanding of TMG that the 2011 contract was between TMG and MVP. Mr Fairbrother refers to a letter from TMG dated 22 August 2016, and sent to him by email on the same date at 15.14, confirming that the agreement is with MVP, who procured Mr Vaughan to perform services for TMG. Throughout the life of the 2011 contract, MVP has invoiced TMG for MVP's services in procuring Mr Vaughan's services for TMG, and TMG has provided "self-billing invoices" - basically a receipt - addressed to MVP. Further, TMG has signed a deed dated 8 March 2018 declaring that it was at all material times the common intention of TMG and of Mr Vaughan and MVP that TMG would engage MVP's services.

9. It is Mr Fairbrother's belief that on the true reading of the 2011 contract, it is plain that it is between MVP and TMG. The 2011 contract is addressed to MVP and it is sent to the address of IMS, care of Mr Fairbrother, and not to Mr Vaughan's address. Mr Fairbrother maintains that the notional reader would have knowledge of the background facts and would therefore appreciate that this was, in layman's terms, a "roll-over" of an existing agreement between MVP and TMG, with specific agreed changes as to the remuneration, the term and the scope of the services to be provided, but that that there was nothing to suggest a change in the identity of the contracting parties. In those circumstances, Mr Fairbrother invites the court to declare that, as a matter of construction, the true identity of the contracting parties to the 2011 contract has at all times since the inception of the 2011 contract been MVP and TMG.

10. In the alternative, Mr Fairbrother invites the court to find that there has been a common mistake made between MVP and TMG in the execution of the 2011 contract. When Mr Fairbrother signed the 2011 contract, he considered that he was securing a further contract between MVP and TMG for MVP to secure Mr Vaughan's services on behalf of TMG as a cricket commentator. If the court finds that as a matter of construction the 2011 contract was between Mr Vaughan and TMG, then, acting on behalf of MVP, Mr Fairbrother was in error in failing to appreciate that the identity of the contracting parties was incorrectly recorded in the document he had signed, and that that document, in the manner in which it was written, did not reflect his true intention, which was to sign a further contract in which MVP secured Mr Vaughan's services for TMG. If the court finds that the 2011 contract is, as a matter of construction, between Mr Vaughan and TMG, then Mr Fairbrother believes that when it signed the 2011 contract, TMG was also acting in error as to the identity of the

contracting parties, and that TMG intended to contract with MVP. In this regard, Mr Fairbrother points to: TMG's indication that it wished to continue the previous "deal"'; the absence of any indication by TMG that it intended to change the identity of the contracting parties between the 2008 and the 2011 contracts; the fact the 2011 contract was clearly addressed to MVP; the fact that following the execution of the 2011 contract, MVP continued to invoice TMG, and the latter continued to issue self-billing invoices or receipts to MVP; the letter dated 22 August 2016 signed by TMG; and the deed of rectification signed by TMG dated 8 March 2018. Mr Fairbrother accordingly invites the court to find that that up to, and at the time of, the execution of the 2011 contract, MVP and TMG had a mutual intention to contract with one another. If the court is not with Mr Fairbrother as to the correct construction of the 2011 contract, he invites the court to find that, by mistake, MVP and TMG did not reflect that common intention in the executed 2011 contract.

11. In his witness statement, Mr Reoch confirms that he believes the contents of Mr Fairbrother's witness statement to be accurate. TMG originally contracted with MVP in 2008 for the provision of the services of Mr Vaughan as a cricket correspondent. In 2011, as its senior editorial manager, Mr Reoch was tasked by TMG with renewing the arrangement already in place, and he represented TMG in dealing with Mr Fairbrother, who acted as the agent for MVP and Mr Vaughan in that respect. On behalf of TMG, it was Mr Reoch who negotiated with Mr Fairbrother in connection with TMG's wish to continue the arrangement that had then been in place with MVP since 2008. The contract entered into between TMG and MVP in 2008 was for a three year term and TMG wanted to renew that arrangement. Mr Reoch's email to Mr Fairbrother dated 3 February 2011 (and timed at 15:48) summarised TMG's proposals for the renewal of the then existing arrangement. It was proposed to make it a four year deal, with changes to the remuneration and the fixed number of articles required. There was no reference in that email to changing the contracting party from MVP to Mr Vaughan personally because TMG had no such intention. The intention was to continue the existing arrangement on the same terms, save for those mentioned in Mr Reoch's email. It was Mr Reoch who made arrangements for TMG to send out more formal draft contractual documentation to Mr Fairbrother, and Mr Reoch's email to him dated 31 March 2011 (timed at 12:49) attached a draft four year contract "as per terms agreed previously". Mr Reoch notes the copy of Mr Fairbrother's email to Mr Reoch dated 6 June (at 16:29) confirming agreement to the proposed extension of the contract, together with Mr Reoch's reply to Mr Fairbrother by email dated 7 June 2011 (at 13:16), acknowledging the agreement and commenting on aspects unrelated to the present issues.

12. Mr Reoch has also seen a copy of the 2011 contract provided to Mr Fairbrother by TMG. It is addressed to MVP and not to Mr Vaughan personally. This reflected TMG's intention to simply renew the existing arrangements that had been in place with MVP. It was Mr Reoch's belief that the contract provided to Mr Fairbrother in 2011 did renew those arrangements with MVP. Mr Reoch has been informed by MVP that up to 2011, and thereafter, all TMG payments were made to MVP (and not to Mr Vaughan personally) and all invoices were issued in the name of MVP. That is said by Mr Reoch to be consistent with the intention to continue to contract with MVP in 2011 and beyond. On TMG's part there was no intention to alter the parties to the arrangement. Mr Reoch says that he has now been advised that HMRC have questioned whether the 2011 contract was with Mr Vaughan or with MVP. Insofar as

the documentation raises any doubt over that issue, Mr Reoch can confirm that that was in error since it was always intended that the contracting parties would be MVP and TMG, as in 2008.

13. Mr Sills states that having checked the position within TMG, he can confirm that TMG originally contracted with MVP in 2008 for the provision of the services of Michael Vaughan as a cricket columnist. When renewing that arrangement in 2011, there was no reason to change the agreement or the parties to it, and Mr Sills is confident that TMG was, or would have been, content to keep the arrangement as it was because TMG had entered into and had renewed many other contracts on the same basis. If the court does not take the view that MVP and TMG contracted with each other by the 2011 contract, TMG agrees that that was a mistake and it consents to a declaration that since the inception of the 2011 contract, the contracting parties have been, and are, MVP and TMG.

14. That is the extent of the witness evidence in the case. The court notes two matters in particular: First, that there is no evidence before the court as to how the alleged mistake as to the identity of the contracting parties for the purposes of the 2011 contract first arose. Mr Weiss invites the court to infer that, on balance, what is likely to have happened, is that Mr Reoch did not succeed in obtaining a copy of the executed 2008 contract to use as the starting point for the 2011 contract - as he had proposed he would do in his email of 30 March 2011 to Mr Fairbrother when he stated: "I have requested an emailed copy of the current MV contract from Legal, which I will amend and forward to you for checking. We will go off the general terms agreed with you and ISM's lawyers on the first contract (which should really simplify the process) so will forward you the draft tomorrow for checking" - and instead he proceeded from an earlier draft of the 2008 contract that had provided for the contracting parties to be Mr Vaughan and TMG. The court considers that this point could, and should, have been addressed in Mr Reoch's witness statement. Mr Weiss's response, when this was put to him, was that a witness can only speak to what he can recall, and he pointed out that Mr Reoch was being asked to address events that had occurred in 2011. However, Mr Reoch could either have stated in terms that he could not explain how the mistake had first arisen, or he could have speculated as to its origin (as Mr Fairbrother speculated as to the reasons for his failure to identify the alleged error as to the parties at paragraph 22 of his witness statement, cited at paragraph 7 above). Second, there is no suggestion in the evidence that fiscal considerations, such as any perceived tax advantages, motivated, still less dictated, the decision for MVP, rather than Mr Vaughan, to contract with TMG .

15. In addition to the witness evidence there are the manuscript amendments to the original draft 2008 contract, the 2008 contract itself, the texts of the various emails leading up to the 2011 contract, and the 2011 contract itself. This is addressed to MVP c/o Mr Neil Fairbrother at ISM's address. It begins "Dear Michael" and is headed "SPORTS COLUMNIST" followed by the words "Your Engagement". It bears Mr Fairbrother's signature under the printed words "AGREED by : Michael Vaughan"). There is also a deed dated 8 March 2018 made between (1) TMG (Party 1), (2) Mr Vaughan (Party 2) and (3) MVP (Party 3). So far as material this reads as follows:

> "BACKGROUND

> (A) By a written agreement dated 24 June 2011, Party 1 sought to retain Party 3 for the provision of the services of Party 2 who at all material times was a director of Party 3. A true copy of the Agreement is attached as Schedule 1 to this deed.
>
> (B) It was at all material times the common intention of all parties that Party 1 would engage the services of Party 3 by entering into a retainer contract with Party 3 the terms of which had been agreed prior to the date of execution of the Agreement. It was further intended and it was the understanding of all parties that Party 2 would in his capacity as director of Party 3 sign the Agreement and in that capacity as director would bind Party 3 to the contractual terms which had been agreed with Party 1
>
> (C) For the avoidance of any doubt, at all material times the Parties have regarded and acted on the basis that the Agreement was entered in to and operated as between Party 1 and Party 3.
>
> AGREED TERMS
>
> 1. CONFIRMATION / RECTIFICATION
>
> All references within the Agreement to 'You' and 'Your' were at all times a reference to and intended as a reference to Party 3. The Parties hereby mutually agree that the Agreement, properly construed, constitutes an agreement entered in to as between Party 1 and Party 3 and for the avoidance of any doubt, with effect from the date of the Agreement, the parties confirm their Intention was that Party 1 was to contract with Party 3 and, so far as may be necessary to give effect to that intention, the Parties repeat and make that assertion under the terms of this Deed of Rectification."

There are then clauses headed "Governing law" and "Jurisdiction".

III: Interpretation

16. The principles governing the true interpretation of the 2011 contract are well rehearsed and were not in issue between counsel. I was referred to the frequently cited statements in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. The ultimate aim of interpreting a provision in a contract, especially in a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Interpretation is a unitary exercise; and where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. The court was reminded that in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 the House of Lords (especially at paragraph 42) had re-affirmed the rule excluding "evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant" whilst permitting "the use of such evidence for other purposes:

for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel".

17. I was also taken to Jackson LJ's summary of the principles that apply where an issue arises as to the identity of a party referred to in a deed or contract at paragraph 57 of *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470. Extrinsic evidence is admissible to assist in the resolution of that issue. In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible. If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification.

18. In principle, the correction of mistakes can be achieved by applying principles of construction. In *Chartbrook* Lord Hoffmann stated as follows (at paragraphs 22 to 25):

> "[22] In *East v Pantiles (Plant Hire) Ltd* (1981) 263 EG 61 Brightman LJ stated the conditions for what he called 'correction of mistakes by construction':
>
> > 'Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction.'
>
> [23] Subject to two qualifications, both of which are explained by Carnwath LJ in his admirable judgment in *KPMG LLP v Network Rail Infrastructure Ltd* [2007] Bus LR 1336, I would accept this statement, which is in my opinion no more than an expression of the common sense view that we do not readily accept that people have made mistakes in formal documents. The first qualification is that 'correction of mistakes by construction' is not a separate branch of the law, a summary version of an action for rectification. As Carnwath LJ said, at p 1351, para 50:
>
> > 'Both in the judgment, and in the arguments before us, there was a tendency to deal separately with correction of mistakes and construing the paragraph 'as it stands', as though they were distinct exercises. In my view, they are simply aspects of the single task of interpreting the agreement in its context, in order to get as close as possible to the meaning which the parties intended.'
>
> [24] The second qualification concerns the words 'on the face of the instrument'. I agree with Carnwath LJ, paras 44-50, that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration.
>
> [25] What is clear from these cases is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is

> allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied."

19. In *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All ER (Comm) 761 Ramsey J treated correction by construction as being the basis for the correction of a misnomer (albeit that he found that it had not been made out on the facts of that case). Ramsey J gave examples of the application of these requirements, by reference to previous cases on misnomer, at paragraphs 82 to 85 of his judgment.

20. Mr Weiss acknowledges that the 2011 contract, below the heading "PRIVATE AND CONFIDENTIAL", begins "Dear Michael" and that it is stamped at the end of the letter "Agreed: Michael Vaughan", and then signed by Mr Fairbrother. He also acknowledges that the 'body' of the 2011 contract reads like a contract for services addressed to an individual. Notwithstanding that, he submits that the identity of the party with whom TMG was contracting is properly in issue. It is in issue because the 2011 contract's intended recipient was clearly MVP as it was addressed to MV Promotions Limited, c/o of Mr Fairbrother. Given that the 2011 contract took the form of a letter, there is no basis, the reasonable reader would say, for TMG to send the letter to any party other than the contracting party. Mr Weiss submits that extrinsic evidence is admissible to resolve the question of who the contracting party is. He acknowledges that this does not include the subjective intentions of the parties.

21. However, Mr Weiss submits that the following extrinsic evidence is relevant, and should be taken into account, when determining who was the party with which TMG was contracting: First, there had been the previous 2008 contract between MVP and TMG by which MVP had agreed to provide Mr Vaughan's services to TMG. Second, legal advice had been taken on the 2008 contract, in respect of which an earlier draft had provided for it to be in the form of an agreement between Mr Vaughan and TMG but that draft had been amended by the legal advisor in terms that had created a draft agreement between MVP and TMG. Third, no legal advice had been taken on the 2011 contract. Fourth, the 2011 contract was addressed to MVP. It was sent "c/o Mr Neil Fairbrother International Sports Management Limited". ISM is a company of which Mr Vaughan's agent was an employee, and through which he provided his services as an agent to Mr Vaughan. There is no evidence that the 2011 contract was addressed in this manner by TMG acting in error. Fifth, the 2008 contract, which was indisputably between MVP and TMG, was addressed in the same manner as the 2011 contract, to MVP, "c/o Mr Neil Fairbrother International Sports Management Limited", at the address of ISM. Sixth, Mr Fairbrother had authority from both MVP and Mr Vaughan to execute the 2011 contract and he had had authority from MVP and Mr Vaughan to execute the 2008 contract. Seventh, if the 2011 contract was between Mr Vaughan and TMG, as opposed to MVP and TMG, this would result in a substantial tax liability for Mr Vaughan personally (as is HMRC's case). Eighth, throughout the duration of the 2011 contract, TMG has raised self-billing invoices for the fees it owed pursuant to that contract made out to MVP, c/o IMS, and TMG has made payment to MVP. There is no evidence that the self-billing invoices were sent by TMG in this manner in error. Ninth, if Mr Vaughan was the contracting party, the practice of TMG raising the self-billing invoices to MVP would be contrary to the

billing practice described on the second page of the 2011 contract: "… you agree that we may prepare and submit to you self-billed invoices showing your name, address and VAT registration number (where applicable)…".

22. Having regard to this factual matrix, Mr Weiss submits that:

(1) If the contract was between Mr Vaughan and TMG, given it is not said by TMG that the 2011 contract was sent to MVP in error, there is no basis upon which the fact it was addressed to MVP can be reconciled, other than that the contracting party was MVP.

(2) If the contract was between Mr Vaughan and TMG, given it is not said by TMG that the 2011 contract was sent to MVP in error, there is no basis upon which the fact the self-billing invoices were sent to MVP can be reconciled, other than that the contracting party was MVP.

(3) It makes no commercial sense for the 2011 contract to be between TMG and Mr Vaughan. It does make commercial sense for the 2011 contract to be between TMG and MVP.

(4) The presence of infelicitous references in the 2011 contract to matters that would suggest the agreement was for Mr Vaughan to provide his services personally, such as the first paragraphs under the heading "Self Employment Status", are simply otiose if the 2011 contract is between MVP and TMG, and their presence is explained by the fact the 2011 contract was not subject to scrutiny by legal advisors so that redundant paragraphs were removed prior to execution.

(5) In the light of the factual matrix, and the propositions stated above, Mr Weiss submits that, on a correct interpretation of the 2011 contract, it is between MVP and TMG, and can and ought to be read such that it is a contract for MVP to provide Mr Vaughan's services to TMG, rather than a contract for services between Mr Vaughan and TMG.

23. In summary, Mr Weiss submits that having regard to the relevant background, including the admissible extrinsic evidence, but excluding evidence of the parties' subjective intentions, there was a clear mistake on the face of the 2011 contract in making it out to Mr Vaughan rather than MVP. This mistake would have been obvious to the mind of the reasonable reader. Given the existing assignment of Mr Vaughan's image rights to MVP, Mr Weiss submits that the permission given by the addressee of the document (in the second full paragraph on the fourth page of the 2011 contract) for TMG to "use your name and image to promote Your Works in any medium anywhere in the world and allow us to authorise third parties to do the same" makes no commercial sense if the contracting party were Mr Vaughan rather than MVP. However, the court notes that "your name and image" are clearly referring to Mr Vaughan rather than to MVP. In answer to the court's observation that there was no evidence as to whether or not TMG had appreciated that Mr Fairbrother had taken no legal advice in relation to the 2011 contract, Mr Weiss submitted that even if it was not known whether Mr Fairbrother had received any legal input into the 2011 contract, TMG had had no reason to think that any legal advice had been taken by Mr Fairbrother.

24. In his brief reply, Mr Weiss submitted that even if the billing and invoicing arrangements were inadmissible as aids to the true construction of the 2011 contract as post-contract events, it was nevertheless still relevant to the admissible factual matrix that nothing had been said about any change to the previous billing and invoicing arrangements as between TMG and MVP, and that TMG had not requested any details for payments to be made directly to Mr Vaughan. However, Mr Weiss was constrained to acknowledge the court's response that there had been plenty of time for the parties to have addressed any change in the payment arrangements after the entry into the 2011 contract on 30 June 2011 because the term of the 2008 contract had then had a further three months still to run.

25. For HMRC, Mr Chapman submits that the proper construction of the 2011 contract is that Mr Vaughan was the contracting party. This is for the following reasons:

(1) The only ambiguity in the 2011 contract is that the contact name and address refer to MVP c/o Mr Fairbrother. By contrast, the 2011 contract opens "Dear Michael" and, crucially, it is said to be signed on behalf of Mr Vaughan.

(2) The wording of the 2011 contract anticipates an individual rather than a company, as it refers to "your services", "you will write," and "you shall, from time to time, be available for video and audio work".

(3) There is reference to the provision of services rather than a contract of employment. This is said to be consistent with an individual contracting party rather than a corporate body. I must confess to some difficulty in understanding this point as it was expressed in Mr Chapman's written skeleton argument. In the light of Mr Chapman's oral submissions, I consider that the point that he is seeking to convey is that the 2011 contract is consistent with the provision of personal services by an individual rather than the procurement by a company of the provision of services by an individual.

(4) Although the background and the factual context was that of the renewal of the previous 2008 contract, an objective observer would still see the outcome as being a personal contract with Mr Vaughan.

(5) This would not have been a surprising outcome to an objective observer as the 2011 contract clearly envisaged the columns actually being written (and the promotional activities performed) by Mr Vaughan.

26. In short, when one considers how the 2011 contract is addressed (to "Michael", above the heading "SPORT COLUMNIST", with the only reference to MVP in the contact details), its contents (peppered throughout with references to "You" and "Your", thereby connoting the provision of personal services by an individual rather than the procurement by a company of the provision of services by an individual, in stark contrast to the qualitatively different terms of the earlier 2008 contract), and the final expression of agreement (by Michael Vaughan, with no expression of assent or accord on the part of MVP), the 2011 contract gives rise to no ambiguity whatsoever. The only reference to MVP is in the contact address; and this is immediately neutralised and overridden by the personal address "Dear Michael" and the description "SPORTS COLUMNIST". As for the factual matrix, this is said to create no ambiguity that needs to be resolved. Whilst Mr Chapman acknowledges that there is no limit to the

amount of red ink or verbal rearrangement or correction which may be permitted when correcting a clear mistake in a contract, he submits that to construe the 2011 contract as a contract made by TMG with MVP, rather than with Mr Vaughan, would require the court to re-write the 2011 contract so as to impose an entirely different set of obligations.

27. For these reasons, Mr Chapman submits that in the present case there is no clear mistake on the face of the 2011 contract and it would not have been clear what correction would have to be made to correct any mistake. He points to the fact that in all of the authorities referred to by Ramsey J in *Liberty v Cuddy* the party named in the documents made no commercial sense and was a clear mistake because it was not possible for the ostensible contracting party to have performed the contract. It was also clear what a reasonable person would have understood the parties to have meant. In the present case, by contrast, the identification of Mr Vaughan as the contracting party makes perfect commercial sense and it is not clear that any mistake was made in naming him rather than MVP.

28. In the course of his oral submissions, Mr Chapman emphasised that the factual matrix was relatively narrow. Although the court could have regard to the fact that there was an existing, 2008 contract between TMG and MVP which was coming to an end and so was up for renewal, the interpretative exercise did not permit the court to take account of the actual email discussions between Mr Fairbrother and Mr Reoch. What happened after the signing of the 2011 contract on 30 June 2011 was also inadmissible and thus irrelevant to the construction exercise. Mr Chapman submitted that the court could have regard to the fact that legal advice had been taken in relation to the terms of the 2008 contract and that this had produced a fundamentally different form of agreement from the 2011 contract; but he submitted that this tended to operate in HMRC's favour because it served to highlight the distinction between the two different types of contract and also the parties' subjective appreciation of the fundamental difference between a contract with an individual and a corporate entity. In 2011, the parties should objectively be taken to have opted for the latter rather than the former. The court could not have regard to the fact that no legal advice had been taken on the 2011 contract because there was no evidence as to whether or not TMG had either reverted to its own lawyers in relation to the 2011 contract or had appreciated that Mr Fairbrother had taken no legal advice in relation to the 2011 contract. On this Mr Chapman would seem to be correct in terms of the available evidence; although had such material been in evidence, I do not consider that it would have been rendered inadmissible by the rule excluding evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. As Lord Hoffmann made clear in *Chartbrook*, the exclusionary rule does not prevent the use of such evidence for other purposes, such as establishing that a fact which may be relevant as background was known to the parties; and I would have regarded the parties' knowledge as to whether legal advice had been taken on the terms of the 2011 contract as falling within the scope of this exception.

29. Those were the parties' submissions on the interpretation issue.

30. Both counsel agreed with the court's preliminary indication that in the particular circumstances of the present case, the focus must be on the first of the two conditions identified in *East v Pantiles*. Since the identification of the true parties to the 2011

contract involves a binary choice between MVP and Mr Vaughan, then if the condition that there must be a clear mistake on the face of the document were satisfied, it must be clear what correction ought to be made in order to correct that mistake.

31. On the issue of the true interpretation of the 2011 contract, I prefer the submissions of Mr Chapman to those of Mr Weiss. I accept Mr Chapman's submissions as set out above and I reject the competing submissions of Mr Weiss. Even with full knowledge of the admissible background, I am satisfied that it would not be clear to the literary embodiment of the man on the Clapham omnibus - the reasonable reader - that something had gone wrong with the language of the 2011 contract; the reasonable reader would not consider that there was a clear mistake on the face of the document.

32. The reasonable reader would know that at the time of the negotiations leading up to the 2011 contract there was an existing contract between MVP and TMG by which MVP had agreed to provide the services of Mr Vaughan to TMG. He (or she) would also know that that 2008 contract was due to expire on 30 September 2011. He would know that MVP had taken legal advice in relation to the 2008 contract, which had resulted in an earlier draft in the form of an agreement between TMG and Mr Vaughan being amended by the legal advisor so as to create a draft agreement between MVP and TMG. I am prepared to assume that the reasonable reader would appreciate that this amendment had resulted in payments under the 2008 contract becoming taxable in the hands of MVP rather than of Mr Vaughan. The reasonable reader would know of the similarities, but he would also appreciate the differences, between the wording of the 2008 and the 2011 contracts, including the manner of their address, their terms, and their execution. He would not know whether either of the contracting parties had taken legal advice in relation to the wording of the 2011 contract although he would appreciate that each of the individual parties to that contract would know whether that party had taken such advice. The reasonable reader would not know the billing and invoicing arrangements that were adopted by the parties after the termination of the 2008 contract.

33. In the light of that background knowledge, I am satisfied that the reasonable reader would conclude that the proper construction of the 2011 contract is that Mr Vaughan was the contracting party, for the reasons given by Mr Chapman as summarised at paragraphs 25 and 26 above. The 2011 contract reads like a contract for the provision of services by an individual. The reasonable reader would not conclude that a clear mistake had been made in naming Mr Vaughan, rather than MVP, as the contracting party in the 2011 contract. The reasonable reader might wonder about the reasons for the change from MVP to Mr Vaughan personally as one of the contracting parties. It is possible that he might even speculate about whether this might be the product of some sort of mistake. But even with full knowledge of the admissible background, it would not be clear to the reasonable reader that something had gone wrong with the language of the 2011 contract, and that MVP, rather than Mr Vaughan, was the true contracting party with TMG. I find that on the true interpretation of the 2011 contract, the contracting parties are, and have since its inception been, TMG and Mr Vaughan.

IV: Rectification

34. The requirements for rectification for common mistake were succinctly summarized by Peter Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at paragraph 33:

> "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."

35. In his scholarly and masterly judgment in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ, 1361, [2020] 2 WLR 429 Leggatt LJ (with the agreement of Flaux and Rose LJJ) clarified the correct test to be applied in deciding whether the written terms of a contract might be rectified because of a common mistake. At paragraph 176 the Court of Appeal concluded that:

> "… 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."

Earlier in his judgment (at paragraphs 81 to 84) Leggatt LJ had explained that:

> "… the communication necessary to establish an outwardly expressed accord or common intention which each party understands the other to share need not involve declaring that agreement or intention in express terms. The shared understanding may be tacit. … This point is summarised in *Chitty on Contracts*, 33rd ed (2018), vol 1, para 3-064, in the statement that an accord 'may include understandings that are so obvious as to go without saying, or that were reached without being spelled out in so many words'."

36. As an alternative to the claimants' case on interpretation, Mr Weiss submits that a consideration of the contemporaneous communications, and the witness evidence, reveals that Mr Fairbrother and Mr Reoch had the same intention, namely, to enter into a contract for MVP to provide Mr Vaughan's services to TMG; and the outward expression of accord manifested itself by a tacit, shared understanding. He relies upon the following facts and matters:

(1) On 9 September 2010 Mr Reoch emailed Mr Fairbrother: "With the final year of Michael's 3 year contract with TMG about to kick off, and the success of the current arrangement, we would like to touch base regarding extending the deal past Sept 30, 2011." Michael's then contract was of course a contract between MVP and TMG. The intention of Mr Reoch was plainly to extend the "deal" between MVP and TMG.

(2) On 14 September 2010 Mr Fairbrother emailed Mr Reoch: "I have spoken to Michael over the weekend and of course we here are very pleased with the way he has settled into his new media life and the relationship between the Telegraph and Michael. I would be delighted to move into contract discussions with you on a new contract that would keep Michael with the Telegraph for the foreseeable future." Whilst the reference is to "Michael", the only relationship that Mr Vaughan had with TMG, and that he and Mr Fairbrother could be happy with, was the relationship of MVP and TMG. Mr Weiss submits that this email is consistent with a continued intention on the part of Mr Fairbrother to continue the existing relationship; in other words, to enter into a further contract between TMG and MVP.

(3) By an email sent on 1 February 2011, Mr Reoch said to Mr Fairbrother: "Ben tells me discussions have progressed re MV's next contract with TMG, so just wanted to touch base with you on that and to see where we are re figure and contributions." Whilst the reference was to "MV's next contract with TMG", Mr Vaughan could only have a "next contract with TMG" if he had an existing one. He did not; the contract was between TMG and MVP. Mr Weiss submits therefore that Mr Reoch's statement indicated an intention to enter into a further contract between the existing parties, which were TMG and MVP.

(4) By an email sent on 3 February 2011 subject "MV contract", Mr Reoch said to Mr Fairbrother: "Just to keep you updated, only delay in getting a contract to you is that Executive Director's PA is off ill, so it looks like it will be middle of next week until we get a draft across to you. Terms to be included will be 4 year deal, £90k per annum year one plus RPI each year after, no fixed number of articles. Content as regards Fantasy Cricket tbc." Mr Weiss submits that there was no reference to the identity of the parties as Mr Reoch's intention was to extend the existing "deal" between MVP and TMG – it was too obvious to require spelling out by Mr Reoch, that this was what he intended.

(5) By an email sent on 4 February 2011, Mr Fairbrother responded saying: "All looks in order". This is consistent with it being too obvious between Mr Fairbrother and Mr Reoch as to require it spelling out that the intention was to enter into a further "deal" between MVP and TMG.

(6) By an email sent on 21 February 2011, Mr Reoch responded saying: "Sorry for the delays on this. The person who arranges issuing of new contracts is off with bronchitis, so scheduled to be off for a while. I'll speak to Legal and see if I can amend the last contract as a first draft." Mr Weiss acknowledges that it is not known if there was a conversation with "Legal" and, if so, what came of it.

(7) By an email sent on 29 March 2011, Mr Fairbrother chased the promised draft: "How we looking at getting the draft across to me?"

(8) By an email sent on 30 March 2011, Mr Reoch told Mr Fairbrother: "Sorry again for delay. The relevant person in Editorial is off sick for the foreseeable which has caused issues as regards contracts. I have requested an emailed copy of the current MV contract from Legal, which I will amend and forward to you for checking. We will go off the general terms agreed with you and ISM's lawyers on the first contract (which should really simplify the process) so will forward you the draft tomorrow for checking". Mr Weiss submits that Mr Reoch's intention to "go off the general terms agreed with you and ISM's lawyers on the first contract" is significant because the "general terms" that were agreed in respect of the 2008 contract must have included the fact that the executed 2008 contract was between MVP and TMG. Mr Weiss submits that, on balance, what is likely to have happened, is that Mr Reoch did not succeed in obtaining a copy of the executed 2008 contract to use as a starting point for the 2011 contract, and instead proceeded from an earlier draft of the 2008 contract that provided for the contracting parties to be Mr Vaughan and TMG. Mr Weiss suggests that this is likely to be how the mistake as to the identity of the contracting parties for the purposes of the 2011 contract first arose. Mr Chapman rightly objects that this is a matter that should have been addressed in Mr Reoch's witness statement. At the very least Mr Reoch could have confirmed in terms that he does not now recall precisely what happened or how the alleged mistake first arose.

(9) By an email sent on 31 March 2011, Mr Reoch enclosed a draft contract, and told Mr Fairbrother: "Again, sorry for the delay. Draft of the new 4 year contract attached as per terms agreed previously". Mr Weiss submits that read in the context of the earlier 30 March 2011 email, on balance the reference by Mr Reoch to "as per terms agreed previously" can only have been a reference to the terms agreed under the 2008 contract, which obviously included the fact that the parties were to be MVP and TMG. In error, Mr Reoch must have sent a draft contract that did not reflect the agreed term of the 2008 contract that pertained to the identity of the parties being MVP and TMG. Once again, the identity of the "terms agreed previously" could have been addressed in Mr Reoch's witness statement. An alternative candidate is the "Terms to be included" as set out in Mr Reoch's email of 3 February and agreed by Mr Fairbrother in his email response of 4 February.

(10) By an email sent on 6 June 2011, Mr Fairbrother replied saying: "I am happy with the contract. Can you send two copies to our office for signing and we will return a copy." As Mr Fairbrother explains in his witness statement, he must have skim read the 2011 contract prior to executing it, but he would have been looking to make sure that the figures agreed for remuneration, the length of the contract, and the services to be provided, were in order, and he would not have been looking at other aspects of the contract. Mr Weiss submits that it is plain that, in error, Mr Fairbrother simply failed to spot that, contrary to his intention to enter into a contract for MVP to provide Mr Vaughan's services to TMG, the contract did not make clear that the contracting parties were MVP and TMG, and the text of the draft read as if it were an agreement for Mr Vaughan to provide his services to TMG.

(11) The mutual intention of Mr Reoch on behalf of TMG, and Mr Fairbrother on behalf of MVP, to contract as between TMG and MVP respectively, is further confirmed by the billing practice deployed, whereby TMG raised self-billing invoices to MVP and made payment to MVP; and also the fact that the 2011 contract was

addressed to MVP and sent to MVP, c/of Mr Fairbrother of IMS, to IMS's address, as opposed to being addressed and sent to Mr Vaughan.

(12) The mutual intention is further confirmed by the witness evidence of Mr Reoch and Mr Fairbrother, and the 2018 deed of rectification.

(13) Mr Weiss acknowledges that there is no express statement as between Mr Reoch and Mr Fairbrother that each mutually intended the 2011 contract to be between TMG and MVP. However, Mr Weiss submits that this is a case of a shared understanding that was tacit. Put another way, it was so obvious to Mr Reoch and Mr Fairbrother that they were, in layman's terms, rolling over the earlier deal, with some variation to the headline terms only, that they never felt it necessary to spell it out to one another that the agreement was to be between TMG and MVP, as they both knew that the 2011 contract was to be between TMG and MVP and they were proceeding on that basis.

37. In the circumstances, Mr Weiss submits that the court can be satisfied that there was the necessary common intention, and that there was the necessary outward expression of accord albeit, in this case, the outward expression of accord was in the shape of a shared understanding that was tacit.

38. Mr Weiss submits that in the circumstances the court should rectify the 2011 contract such that since its inception it has been between MVP and TMG. It would be just to make such an order as: (1) it reflects what was truly agreed between Mr Fairbrother and Mr Reoch and by misfortune not enacted; (2) there is no true prejudice to HMRC if such a declaration is granted in so far as the consequences are simply that HMRC does not, on behalf of the taxpayer, receive the benefit of the windfall it would receive if the claimants were not granted relief from the consequences of the mistake; and (3) in the absence of any true prejudice to HMRC, but of prejudice to Mr Vaughan if he were to have to bear the consequences of Mr Fairbrother's and Mr Reoch's mistake, it is just to make the order sought.

39. In the course of his oral submissions, Mr Weiss relied on an authority which the court had drawn to the attention of both counsel prior to the hearing, the decision of Waksman J in *AML Global Ltd v Exxonmobil Petroleum & Chemical bvba* [2018] EWHC 3321 (TCC). In that case, an aviation fuel supply agreement was rectified to reflect the parties' common intention that the claimant would act as an intermediary between the defendant fuel suppliers and the buyer and not, as mistakenly recorded in the agreement, as the buyer itself. Two earlier agreements between the parties had been on buyer's agent terms and there was no evidence that the parties had intended to change their contractual relationship. At paragraph 16 Waksman J referred to the continuation of the features of the prior dealing on buyer's agent terms under the 2009 and 2010 agreements into 2011 and 2012 as being:

> "… a manifestation of one very important fact in this case; this is that the 2011 agreement was not some new contract made between parties for the first time - it was made because the two previous contracts, each of one year's duration, were about to expire, and in circumstances where there had been considerable discussion and negotiations leading to the adoption of the buyer's agent form right at the beginning in 2009. It is therefore a reasonable assumption to make, at least as a starting point, that one would expect the

> parties to contract on essentially the same terms going forward, or at least to ask rhetorically why they would now choose to contract on a different basis, especially one which was inconsistent with the way in which AML operated."

Mr Weiss emphasised that in that case, the relevant contract had not been produced in a vacuum but had formed part of a course of conduct involving two earlier contracts. In the present case too there had been an earlier contract which had been subject to considerable discussion which had led to a particular form of contract under which MVP had contracted to procure the provision of Mr Vaughan's services for TMG rather than Mr Vaughan contracting directly with TMG. Here too the post-2011 contract billing and invoicing arrangements that were adopted by the parties remained the same under the 2011 contract as under the previous 2008 contract. Why, Mr Weiss asked rhetorically, should the parties choose to change the identity of one of the contracting parties yet continue to operate on the same basis as before? Mr Weiss emphasised that the email exchanges between Mr Reoch and Mr Fairbrother all proceeded on the basis of extending the existing "deal" and contained no reference at all to changing the identity of one of the contracting parties. The 30 March email was said to show that the parties had been intending to work off the general terms agreed in the 2008 contract, including the same contracting parties, except for the changes that had been specifically discussed and agreed. Mr Reoch must have made an error when he had submitted a new contract in the form of the original draft rather than the final agreed version of the 2008 contract just as in the *AML Global* case the wrong form of contract has been sent out. The despatch of the wrong form of contract did not mean that the parties had changed their minds about the identity of one of the contracting parties. One would have expected there to have been some documentary evidence of such a fundamental change if there had been a considered decision to this effect but there was no evidence of this.

40. On the issue of discretion, Mr Weiss submitted that it was far from clear that the 2018 deed of rectification operated to vary the 2011 contract at all. Clause 1 was drafted in terms of a statement of intention and not an agreement to vary the 2011 contract; and, in any event, the 2018 deed had no retrospective effect. There was no agreement between Mr Vaughan and MVP as to who should bear the liability for tax on the moneys received from TMG and no indemnity from MVP against any liability for tax on the part of Mr Vaughan. The 2018 deed therefore failed to dispose of all potential issues between the parties. The authorities relied on by HMRC on the issue of rectification, emphasising the need to demonstrate a specific common intention as to how a particular fiscal objective was to be achieved, were said to be of no relevance to the present case because they were concerned with the rectification of documents which were specifically intended to have tax consequences as their primary objective whereas here the 2011 contract was intended to govern the relationship between the parties and the mistake related to the identity of one of the parties to that document with any tax benefit being a purely incidental consequence of the document's rectification. The present case was more akin to the decision of Graham J in *Re Colebrook's Conveyances* [1972] 1 WLR 1397 where rectification of three conveyances was granted by substituting the words "tenants in common" for the words "joint tenants" in order to carry out what had been shown to be the true intention of the plaintiff and his son, and the resulting possibility of some incidental tax advantage to one or other of the parties was not on that account a bar to relief.

Distinguishing the Court of Appeal decision in *Whiteside v Whiteside* [1950] Ch 65, at page 1399E Graham J said that:

> "Where, on the. other hand, the document is found not to carry out the true intention of the parties, and rectification, whilst enabling that intention to be carried out, incidentally gives or may give, one of the parties a tax advantage, the case is not an authority for saying that such presence or possibility of such tax advantage, is a bar to relief."

41. In his reply, Mr Weiss also drew my attention to a further passage from the judgment of Waksman J in the *AML Global* case. Having cited from paragraph 84 of the judgment of Etherton LJ in *Daventry District Council v Daventry & District Housing Limited* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, at paragraph 32 Waksman J said this:

> "Pausing there, I think it is clear from what Lord Justice Etherton was saying that at least in the case of mutual or common, as opposed to unilateral mistake, it is very hard to see how there can be, save perhaps exceptionally, the operation of a discretion to exclude relief once the court has found (a) that the parties had a continuing common intention, (b) that the written document did not reflect it, and (c) that state of affairs had come about as a result of a mistake made by both of them. I should only add for the sake of completeness that at paragraph 223 of his judgment Lord Neuberger contemplated that there could be cases, even where there is rectification for common mistake, where the court could decide as a matter of discretion not to award it, although he did not consider that this would apply on the facts of *Daventry*."

42. Mr Chapman submits that the requirements for rectification have not been made out in the present case. He makes the following points by way of overview:

(1) At its height, the common intention was that the existing arrangement would continue. However, there is no evidence that the parties had in mind the precise terms of that existing arrangement or that the party to it would be MVP rather than Mr Vaughan.

(2) There is no evidence that Mr Reoch had in mind MVP rather than Mr Vaughan at the time of executing the 2011 contract.

(3) Mr Fairbrother signed the 2011 contract on behalf of Mr Vaughan. Neither the stamp used nor the 2011 contract itself stated that this was also on behalf of MVP or that it related to Mr Vaughan's capacity as a director of MVP.

(4) There was no concluded agreement prior to the 2011 contract. For the avoidance of doubt, the 2008 contract is not sufficient for this purpose; the necessary concluded agreement is in respect of the ongoing provision of services.

(5) There is no evidence of an outward expression of accord.

(6) There is no evidence as to how the mistake occurred so as not to reflect the purported common intention

43. Even if the requirements for rectification are made out, Mr Chapman points out that the relief remains discretionary. As such, the court may refuse to grant relief in circumstances such as these where there is no practical significance to the outcome. In *Ashcroft v Barnsdale* [2020] EWHC 1948 (Ch), [2010] STC 2544, I stated as follows (at paragraph 17):

> "In the present case, the claim to rectification was formulated in response to a claim by HMRC for additional inheritance tax. In my judgment, the effect of the authorities is that the court cannot rectify a document merely because it fails to achieve the fiscal objectives of the parties to it. A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties as to how the fiscal objective was to be achieved must be shown if the court is to order rectification. The court will order the rectification of a document only if it is satisfied by cogent evidence (sufficient to counteract the effect of the parties' to the relevant document) that: (1) the document does not give effect to the true agreement or arrangement between the parties, and (2) there is an issue, capable of being contested, between the parties; it being irrelevant, first, that rectification of the document is sought or consented to by all of them; and, secondly, that rectification is desired because it has beneficial fiscal consequences. Conversely, the court will not order rectification of a document if the parties' rights will be unaffected, and if the only effect of the order will be to secure a fiscal benefit for one or more of them."

44. *Ashcroft v Barnsdale* related to the rectification of a deed of family arrangement varying a will for inheritance tax purposes. At paragraph 22 of my judgment I accepted that there was still an issue capable of being contested between the parties which would be addressed by the grant of rectification as HMRC did not accept the deed of rectification as having effect for inheritance tax purposes. Mr Chapman submits that a distinction is to be drawn between cases where the rectification is sought in order to obtain a tax advantage in the abstract (which tend against discretion being granted) and cases where there is a specific common intention as to how those fiscal objectives were to be achieved which has not been reflected in the documentation (which tend in favour of discretion being granted). Mr John Randall QC (sitting as a Deputy High Court Judge) stated as follows in *Vivian v Koningsveld* [2010] EWHC 3961 (Ch) at paragraph 25:

> "On the basis of the law as explained by Judge Hodge and usefully, in my judgment, supplemented by the two judgments of Graham J from which I have quoted, I am entirely satisfied that this is a case in which I can and should make an order for rectification, mirroring the terms of the deed of rectification which has already been executed by the parties. This is not a case where such relief is sought in order belatedly to achieve tax advantage in the abstract. Rather, just as Judge Hodge found on the facts of his case, this is one where the claimant has clearly and cogently demonstrated a specific common intention as to how those fiscal objectives were to be achieved, that is by severing a number of the joint tenancies that existed between John and Violet prior to John's death, thereby ensuring that the estate of John at the time of his death contained assets at least matching the amount of the nil rate

> IHT band, and by taking advantage of that band by the granting of specific bequests in at least that sum."

45. Mr Chapman submits that, even if the legal requirements for rectification are made out, the discretion to rectify the 2011 contract should not be exercised for the following reasons:

(1) The 2018 deed resolves any dispute between MVP, Mr Vaughan and TMG.

(2) There is no evidence of a common intention that the 2011 contract should have fiscal consequences.

(3) Mr Chapman submits that this is a case in which rectification would achieve a tax advantage in the abstract, in the sense referred to at paragraph 25 of *Vivian v Koningsveld*.

(4) Mr Chapman submits that the reason for the closure notices that have been issued by HMRC in respect of Mr Vaughan's self-assessment tax returns was not because of any mistake in the 2011 contract but instead because Mr Vaughan's tax returns did not recognise the income from the 2011 contract.

46. In his oral submissions, Mr Chapman highlighted the fact that there was no apparent tax-based motive for the 2011 contract; and this is said to take it outside the *Ashcroft v Barnsdale* and *Vivian v Koningsveld* line of authorities. Since there was no conscious tax-based motive for the 2011 contract, it is said that the door is closed to the remedy of rectification because the 2018 rectification deed has fully resolved the rights of the parties to that deed as between themselves and there is therefore no reason for the court to exercise its discretion to grant the equitable remedy of rectification. A shared common purpose of achieving a relevant tax advantage is said to be required to justify the grant of the equitable remedy where achieving that tax advantage is the only conceivable reason for the grant of that relief. Mr Chapman submits that in the present case, rectification is being sought in order to achieve what is now perceived to be a tax-efficient structure where no specific intention to adopt such a structure existed at the time of the entry into the relevant contract. HMRC are anxious to avoid a situation that elides the distinction between putting in place a specifically intended tax-efficient structure and the creation of such a structure where none was intended at the date of the relevant document. They are anxious to avoid creating a precedent that would license the latter course.

47. In a case where the parties were motivated by the achievement of a specific tax advantage when negotiating the terms of the relevant document, then even if there is a later deed of rectification, there will still be a live issue capable of being contested between the parties if HMRC do not accept that deed's retrospective effect because there remains an issue as to the efficacy of the underlying document in terms of its capacity to fulfil, rather than to frustrate, the intended underlying tax motive. In such a case, HMRC's attitude to the retrospective efficacy of the deed of rectification makes a difference to the achievement of the underlying documents' full intended purpose. In the present case, however, there is no evidence that the parties to the 2011 contract had any specific tax advantage in mind when they entered into that contract. The present case is said to fall squarely within the situation contemplated by

the sentence prefaced by the adverb "Conversely" at the end of paragraph 17 of my judgment in *Ashcroft* (and cited at paragraph 43 above):

> "… the court will not order rectification of a document if the parties' rights will be unaffected, and if the only effect of the order will be to secure a fiscal benefit for one or more of them."

Unless the parties had some specific tax advantage in mind when they entered into the 2011 contract, it is only the rights of the parties as between themselves, and not their rights as against HMRC, that are relevant to the exercise of the court's direction to grant, or to withhold, the equitable remedy of rectification.

48. Mr Chapman suggests that the present case raises the novel, and interesting, question whether a specific tax advantage is required as part of the bargain between the parties as a necessary pre-condition to the grant of the equitable remedy of rectification if the parties have already corrected any necessary mistake in the underlying document by entering into a deed of rectification. In the present case, by the 2018 rectification deed the three parties concerned have already declared that the wording of the 2011 contract, properly construed, has, and always has had, the effect that they say it was always truly intended to have. Since the 2018 rectification deed fully resolves any issue between the parties, there is nothing left for the court to adjudicate upon between the parties as to their respective rights and obligations. Had the 2011 contract been motivated by tax considerations, then HMRC would accept that there was something still left to be resolved; but since there was no such underlying tax motivation, there is nothing left to rectify. In light of the 2018 rectification deed, there can be no prospect of any future litigation between the three parties thereto because there is nothing outstanding left to be resolved. HMRC's treatment for tax purposes of the income arising under the 2011 contract does not affect the position of the parties as between themselves, but only their position in relation to HMRC. Mr Vaughan cannot now complain that he has not received any payment from TMG. It is only his position in relation to HMRC that is affected; but on the evidence that was not a consideration that motivated the entry into the 2011 contract. The existence of a dispute between Mr Vaughan and HMRC does not justify the grant of the equitable remedy of rectification because that dispute does not affect the rights of the parties to the 2011 contract as between themselves.

49. In conclusion, Mr Chapman stressed that the claimants have not addressed in their evidence how one form of agreement came to be used instead of another. This was necessary in order to establish a common accord. An explanation as to how the alleged mistake came about is said to be an important piece of the jig-saw puzzle, yet it is missing. It is not sufficient for the claimants to invite the court to infer that the wrong form of contract was used; the claimants have to establish this by way of convincing proof in order to establish both a common mistake and a common accord.

50. Those were the parties' submissions on the rectification issue.

51. On the issue of whether a case for rectifying the 2011 contract has been made out, I prefer the submissions of Mr Weiss to those of Mr Chapman. I accept Mr Weiss's submissions as set out above and I reject the competing submissions of Mr Chapman.

52. In the present case, I heard no evidence from Mr Vaughan. However, all the negotiations leading to the conclusion of the 2011 contract were conducted on Mr Vaughan's behalf by Mr Fairbrother and it was he who signed the 2011 contract for him. Mr Chapman has not sought to suggest that it was anyone other than Mr Fairbrother who was the relevant decision-maker for both Mr Vaughan and MVP and whose state of mind and intentions are relevant for the purposes of the rectification claim.

53. As Sir Raymond Evershed MR observed in *Whiteside v Whiteside* at page 71, rectification is a discretionary remedy "which must be cautiously watched and jealously exercised". It requires convincing proof of all of the necessary requirements for the remedy. For this reason, Mr Chapman is right to criticise the claimants for their failure to adduce any evidence as to how one form of agreement came to be used instead of another or to seek to proffer any explanation as to how the alleged mistake came about. The inference that I draw from the evidence is that Mr Reoch had no relevant evidence to give on this aspect of the case, having no recollection of the provenance of the new four-year contract he had attached to his email of 31 March 2011 to Mr Fairbrother and not being prepared to speculate on its origins. Mr Weiss may be correct when he submits that, on balance, what is likely to have happened, is that Mr Reoch did not succeed in obtaining a copy of the executed 2008 contract to use as a starting point for the 2011 contract, and instead proceeded from an earlier draft of the 2008 contract that had provided for the contracting parties to be Mr Vaughan and TMG. However, it is unnecessary for the court to reach any conclusion on the precise cause of the mistake so long as the court is convinced that a mistake was indeed made. As Lord Neuberger MR has observed (at paragraph 217 of his majority judgment in Daventry):

> "Where someone makes a mistake it is often difficult, or even impossible, to explain the mistake or expand on its nature, beyond identifying it as such. Misreading, muddle, carelessness, failure to engage, confusion are all possible explanations, but they do not take matters much further forward. As, for instance, with an act of negligence, one knows it when one sees it (at least sometimes), but it is often impossible to explain or expand on it. Often, the mistake or negligent act is almost by definition inexplicable, even by the person guilty of the negligent act or mistake - consider the familiar statement after the event along the lines 'I simply cannot understand how I could have done/ not done/ thought/ not thought that'."

54. I am convinced that a rectifiable mistake was made in identifying MVP, rather than Mr Vaughan, as the counter-party to the 2011 contract. I am convinced that each of TMG and (acting by Mr Fairbrother) MVP and Mr Vaughan had the common intention that MVP, rather than Mr Vaughan, should enter into the 2011 contract. I am convinced that all three parties intended simply to extend the existing "deal" reflected in the 2008 contract for a further four years without effecting any change in the counter-party from MVP to Mr Vaughan. A crucial aspect of the existing deal, which had been the product of express amendments to the original draft made after taking legal advice, was that it was an agreement between TMG and MVP rather than Mr Vaughan. I am convinced that this common intention continued right up to and beyond the signing of the 2011 contract. Just as Mr Fairbrother was operating under a mistake as to the contracting counter-party when he approved the form of the 2011

contract, he was acting under the same mistake when he purported to sign it for Mr Vaughan rather than MVP. I am convinced that by mistake, this was not accurately reflected in the terms of the 2011 contract, as properly construed. This is all convincingly established by: (1) the objective of the 2011 contract which (as stated in Mr Reoch's initial email of 9 September 2010) was directed to "extending the deal past September 30, 2011"; (2) the contemporaneous email exchanges which constituted the negotiations for "extending the deal"; (3) the complete and otherwise inexplicable absence of any discussion about any change in the identity of the contracting counter-party; (4) the fact that the post-2011 contract billing and invoicing arrangements that were adopted by the parties remained the same under 2011 contract as under the previous contract; and (5) the witness evidence of Mr Fairbrother and Mr Reoch, which is itself supported and corroborated by the contemporaneous documentary evidence. This conclusion resonates with the reasoning of Waksman J at paragraph 16 of his judgment in *AML Global* (reproduced at paragraph 39 above).

55. I am also convinced that not only did each party to the 2011 contract have the same actual intention with regard to the identity of the parties to that contract, but that there was also the required 'outward expression of accord' - meaning that, as a result of communication between them, TMG, MVP and Mr Vaughan all understood each other to share that intention. This was implicit in the shared concept of "extending the deal past September 30, 2011". This resulted in a tacit shared understanding that was so obvious as to go without being expressly stated; it was one that was reached without being spelled out in so many words just as, in the time of social distancing necessitated by the Coronavirus pandemic, shoppers joining a queue outside a supermarket know to stand two metres behind the person immediately in front of them and two metres apart from each other without being told to do so expressly.

56. Thus, I am satisfied that the claimants have convincingly proved the necessary pre-conditions for the grant of the equitable remedy of rectification for common mistake. There remains, however, the question of the exercise of the court's discretion. Mr Weiss relies on the statement of Waksman J at paragraph 32 of *AML Global* (cited at paragraph 41 above) to the effect that it was "very hard to see how there can be, save perhaps exceptionally, the operation of a discretion to exclude relief" once the court has found that the conditions for rectification for common mistake have been established. However, I would make two observations in response. First, Waksman J immediately acknowledged that in *Daventry* Lord Neuberger MR had contemplated that there could be cases where the court could decide as a matter of discretion not to award the remedy even where the necessary conditions for common mistake rectification were satisfied. Secondly, Waksman J was not addressing the situation where the parties to the relevant document had already sought to rectify their mistake by entering into a corrective deed of rectification.

57. On the issue of whether the court should exercise its direction to rectify the 2011 contract, I prefer the submissions of Mr Chapman to those of Mr Weiss. I accept Mr Chapman's submissions as set out above and I reject the competing submissions of Mr Weiss.

58. I reject Mr Weiss's submission that the 2018 rectification deed does not, on its true construction, purport, or operate, so as to correct the mistake as to the identity of the true parties to the 2011 contract. In my judgment, it does precisely that. Each of

TMG, MVP and Mr Vaughan thereby mutually agreed that the 2011 contract, properly construed, constituted an agreement entered into as between TMG and MVP; for the avoidance of any doubt, with effect from the date of the 2011 contract the parties confirmed that their intention was that TMG was to contract with MVP; and, so far as might be necessary to give effect to that intention, all three of them repeated and made that assertion under the terms of the rectification deed. The rectification deed does not purport to *vary* the 2011 contract because that was not its objective; rather, it purports to *clarify and confirm* the true intention and effect of the 2011 contract; and it makes it clear that it operates as a contract between TMG and MVP to the exclusion of Mr Vaughan. As between those three parties, the 2018 rectification is effective to achieve that objective. The difficulty for Mr Vaughan and MVP is that it cannot operate retrospectively or bind HMRC; hence this rectification claim.

59. Thus, TMG, MVP and Mr Vaughan have effectively resolved the difficulty over the mistake about the identity of the true counter-party to the 2011 contract as between themselves, but not as respects HMRC. Should this lead the court to refuse to exercise its discretion in favour of rectifying that contract? In my judgment, in the very peculiar circumstances of the present case, it should, for the reasons given by Mr Chapman. The unusual feature of the present case is that there is no evidence that there was any apparent tax-based motive for the 2011 contract. I accept Mr Chapman's submission that this takes it outside the *Ashcroft v Barnsdale* and *Vivian v Koningsveld* line of authorities. As Mr Chapman put it in submissions, this is in reality a tax-based claim in a non-tax-based setting.

60. Since there was no conscious tax-based motive for the 2011 contract, in my judgment the door is closed to the remedy of rectification because the 2018 rectification deed has fully resolved the rights of the parties to that deed as between themselves and there is therefore no reason for the court to exercise its discretion to grant the equitable remedy of rectification. A shared common purpose of achieving a relevant tax advantage is required to justify the grant of that remedy where achieving that tax advantage is the only conceivable reason for the grant of that relief. In the present case rectification is being sought in order to achieve what is now perceived to be a tax-efficient structure where no specific intention to adopt such a structure existed at the time of the entry into the relevant contract. I am satisfied that the authorities warrant a distinction between the putting in place of a specifically intended tax-efficient structure and the creation of such a structure in circumstances where none was intended at the date of the relevant document.

61. In a case, unlike the present, where the parties were motivated by the achievement of a specific tax advantage when negotiating the terms of the relevant document, then even if there is a later deed of rectification, there will still be a live issue capable of being contested between the parties if HMRC do not accept that deed's retrospective effect. That is because there then remains an issue as to the efficacy of the underlying document in terms of its capacity to fulfil, rather than to frustrate, the intended underlying tax motive. In such a case, HMRC's attitude to the retrospective efficacy of the deed of rectification makes a difference to the achievement of the underlying document's full intended purpose. In the present case, however, there is no evidence that the parties to the 2011 contract had any specific tax advantage in mind when they entered into that contract. In my judgment, the present case falls squarely within the

situation contemplated by the sentence prefaced by the adverb "Conversely" at the end of paragraph 17 of my judgment in *Ashcroft* (and cited at paragraph 43 above):

> "… the court will not order rectification of a document if the parties' rights will be unaffected, and if the only effect of the order will be to secure a fiscal benefit for one or more of them."

Because the parties to it had no specific tax advantage in mind when they entered into the 2011 contract, in my judgment it is only the rights of the parties as between themselves, and not their rights as against HMRC, that are relevant to the exercise of the court's direction to grant, or to withhold, the equitable remedy of rectification.

62. In my judgment, a specific tax advantage is required as part of the bargain between the parties as a necessary pre-condition to the grant of the equitable remedy of rectification if the parties have already corrected any relevant mistake in the underlying document by entering into a deed of rectification. In the present case, by the 2018 rectification deed the three parties concerned have already declared that the wording of the 2011 contract, properly construed, has, and has always had, the effect that they say it was always truly intended to have. Since the 2018 rectification deed fully resolves any issue between the parties, there is nothing left for the court to adjudicate upon between the parties as to their respective rights and obligations. In my judgment, it is still one of the maxims of equity that "equity does not act in vain"; and that broad, underlying principle is relevant when the court is called upon to exercise an equitable, remedial discretion. Had the entry into or the terms of the 2011 contract been motivated by tax considerations, whether in whole or in part, then there would still have been something left to be resolved even after the 2018 rectification deed; but since there was no such underlying tax motivation, there is nothing left to rectify. In light of the 2018 rectification deed, there can be no prospect of any future litigation between the three parties thereto because there is nothing outstanding left to be resolved between them. HMRC's treatment for tax purposes of the income arising under the 2011 contract does not affect the position of the parties as between themselves, but only their position in relation to HMRC. Mr Vaughan cannot now complain that he has not received any payment from TMG. It is only his position in relation to HMRC that is affected; but on the evidence that was not a consideration that motivated the entry into or the terms of the 2011 contract. The existence of a dispute between Mr Vaughan and HMRC does not justify the grant of the equitable remedy of rectification because that dispute does not affect the rights of the parties to the 2011 contract as between themselves.

63. In my judgment, this conclusion is supported by the analysis of the decision of the Court of Appeal in *Whiteside v Whiteside* which was adopted by the Court of Appeal in in the leading case of *Racal Group Services Ltd v Ashmore* [1995] STC 1151, affirming Vinelott J's decision which is reported at [1994] STC 416. At first instance, Vinelott J reviewed the subsequent decisions in which *Whiteside v Whiteside* had been distinguished and he proceeded to summarise the effect of the authorities in these terms (at page 425C-E):

> "In my judgment the principle established by these cases is that the court will make an order for the rectification of a document if satisfied that it does not give effect to the true agreement or arrangement between the parties, or to the true intention of the grantor or covenantor and if satisfied that there is an

> issue, capable of being contested, between the parties or between the covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit."

In his leading judgment on the appeal in *Racal* (at page 1157F), Peter Gibson LJ accepted that summary as an accurate statement of the law.

64. For these reasons, whilst in entering into the 2011 contract, TMG, MVP and Mr Vaughan were all labouring under a common rectifiable mistake as to the true identity of the counter-party to the contract, in the exercise of the court's equitable discretion, I decline to order that it should be rectified such that the contracting parties have, since the inception of the 2011 contract, been MVP and TMG.

V: Conclusion and postscript

65. For these reasons the claim is dismissed. On the true interpretation of the 2011 contract, the contracting parties are and have since its inception been TMG and Mr Vaughan. Whilst I find that in entering into the 2011 contract TMG, MVP and Mr Vaughan were all labouring under a common, rectifiable mistake as to the true identity of the counter-party to the contract, in the exercise of the court's equitable discretion, I decline to order that it should be rectified such that the contracting parties have, since the inception of the 2011 contract, been MVP and TMG.

66. This case affords a vivid illustration of two important points. The first is that where evidence of pre-contractual negotiations, and/or post-contract conduct is crucial, rectification may, in principle, be available where the interpretative process is unable to assist a claimant. However, and secondly, the remedy of rectification may, in an appropriate case, be withheld where the parties have sought by themselves to correct any relevant mistake in the underlying document by entering into a deed of rectification.