Reid Lester
Laishley Reed LLP
Email: rlester@laishleyreed.com
Toronto Tel: 416.981.9415
Vancouver Tel: 604.684.3112

***2484234 Ontario v. Hanley Park Developments:* April 29, 2020 ONCA**

I have a couple of different first party insurance files right now where, in the face of [what I think are] uncovered claims, the insureds are arguing that the particular policies do not properly reflect their understanding or intention as to what coverage was to be available. These insureds claim that to the extent that the wording of the policies does not provide coverage, this was a mistake, and the policies should be rectified (i.e., altered, after the fact) so as to provide coverage for their particular losses. The recent decision of the ONCA in ***2484234 Ontario v. Hanley Park Developments*** discusses in some detail the test as to when rectification is available to alter a written contract. This decision makes it clear that in the context of insurance policies, rectification is likely not an easily available remedy.

Rectification is an equitable remedy available to correct a document which fails to record accurately the true agreement of two (or more) parties. It is *not* available to correct an improvident bargain or to fill a gap in the parties' true agreement, even when the omission defeats what one (or both) of the parties were seeking to achieve. As an equitable remedy, the party seeking rectification must have "clean hands". The CA's decision in ***Hanley Park*** provides a nice discussion of the legal test for rectification, and of the factors that the court will consider, and the decision clarifies certain common misunderstandings as to what rectification is, and when it is available.

The facts of the case are these. In early 2017, the appellant 2484234 Ontario ("248") intended to build a sub-division in Belleville, Ontario. It entered into a deal with the respondent, Hanley Park Developments ("Hanley") to purchase the land. Hanley had already obtained conditional approval from the City for the development. However, one of the City's conditions for the construction approval was that there was to be an access road to connect the proposed sub-division to a particular existing road, Janlyn Crescent. The existing purchase agreement did not provide for the purchase of the land over which this access road would have to be built. However, Hanley also owned this other property.

As such, 248 approached Hanley and requested in writing that Hanley sell the land (or grant an easement) necessary to allow the access road to be built. The letter from 248 stated that the request was because "access from Janlyn Crescent is required for final plan approval by the City". Hanley, through its lawyer, responded by saying that Hanley was indeed prepared to transfer and grant an easement over a portion of the adjacent property. The lawyer's letter stated that "so as to assist" 248, Hanley was prepared to convey "*the parcel of land outlined as Parts 1, 2, 3 and 4 on the attached draft reference plan. The Engineer for the project has advised my client that these 4 parts will be sufficient foe the road which is to be built to access the subdivision*". The lawyer's letter set out additional terms as well to this proposed arrangement (hereafter, the "Transfer Agreement") which was agreed to by 248.

So far, so good. In March of 2017, Hanley granted a form of easement over Parts 1, 2, 3 and 4 of the property for the construction of the access road. At some point prior to September of 2018, the City told 248 that Part 5 of the property was *also* required for the access road to be built. As a result, 248 then requested that the Transfer Agreement be amended to include Part 5 but Hanley refused, arguing that there had never been any discussions between the parties about selling or granting an easement over Part 5. 248 then brought an application for an order for rectification of the Transfer Agreement. Hanley's principal later conceded on cross-examination that he had always been aware that Part 5 was required for the access road, but he didn't mentioned it to 248 because he was concerned that if he did so, 248 might not close the transaction on the main property purchase. Of course, reading this on the page makes it seem like a very odd concern for Hanley to have, in the circumstances.

The application judge found in favour of Hanley and determined that rectification was not available, nor appropriate. She cited the test for rectification as set out by the SCC in ***Canada (AG) vs. Fairmont Hotels*** **2016 SCC 56**. In that case, the SCC held that rectification is available if the court is satisfied that:

> (i) the parties have reached a prior agreement, the terms of which were definite and ascertainable;
>
> (ii) the agreement was still effective when the instrument [written contract] was executed;
>
> (iii) the instrument fails to record accurately the prior agreement; and
>
> (iv) if the contract is rectified as proposed, the [rectified] instrument would carry out the parties' "true" agreement.

In the case of unilateral mistake, the SCC held in ***Fairmont*** that, in addition to the four requirements set out above, the court must also be satisfied that,

> (v) the party resisting rectification knew or ought to have known about the mistake(s); and
>
> (vi) permitting that party to take advantage of the mistake amounted to "fraud or the equivalent of fraud".

The application judge concluded that the appellant 248's claim failed to meet steps (iii) and (vi) of the **Fairmont** test. With respect to step (iii), she held that the Transfer Agreement accurately recorded the prior agreement because "Part 5 was never discussed nor made the subject matter of a prior agreement". With respect to step (vi), she held that permitting the respondent to take advantage of the appellant's mistake did not amount to fraud or its equivalent because there was no clause in the Transfer Agreement requiring the respondent "to convey all lands necessary for the development of the access road". The application judge also held that the respondent did not intentionally deceive 248, and that the 248 should have done its due diligence, as required under the terms of the Agreement.

The appeal was allowed and in doing so, the Court of Appeal discussed in detail the parameters of the rectification remedy. First, the court emphasized that the remedy is limited to cases where the agreement between the parties was not correctly recorded in the instrument that became the final expression of their agreement. The purpose of rectification is to restore the parties to their original agreement; it is not to undo any unanticipated effects of that agreement. Moreover, rectification

cannot go beyond what the parties truly agreed to, into the realm of what one of the parties *may* have intended as a result, or was hoping to achieve, but that was never made part of the "true" agreement.

The first step in a claim for rectification is to identify whether the parties had an agreement that preceded the document sought to be rectified, and if so, what was this agreement ("the prior agreement") For the purposes of rectification, the prior agreement need not be a binding agreement or contain all of the relevant terms of a complete agreement. It must only express the parties' agreement on specific terms and do so in a way which is definite, ascertainable and continuing, even if the prior agreement was intended to be preliminary to a more formal agreement.

After that, the next step is to interpret the prior agreement. To do this, the court must look at the text of this prior agreement and use applicable interpretive principles. The purpose of this exercise is to demonstrate that the parties were in complete agreement on the terms of the contract but, in error, wrote these terms down improperly. The court emphasized that only objective factors are relevant in this analysis. In the other words, the court does not, and cannot consider a party's subjective assertions as to what he intended the contract to mean. Interestingly, the Court of Appeal also notes that an applicant for rectification must also show the precise form in which the written instrument can be altered so as to express properly the prior agreement.

In the case at bar, the prior agreement was the lawyer's letter which expressly set out the parties' intention behind their agreement; namely, the appellant wished to purchase from the respondent the parcels of property which were sufficient to build the access road. There was no other purpose behind the Transfer Agreement. While it was never discussed that Part 5 of the parcel was to be conveyed, the letter expressly stated that Hanley's engineer had opined that "these 4 parts will be sufficient for the road which is to be built to access the subdivision". Because there was no contrary information provided, the court held that the implication was that Hanley held no contrary view (though we know that Hanley was indeed aware that Part 5 was a necessary part of the Agreement, and Hanley deliberately chose not to make this clear). The court held, therefore, that the parties clearly intended that Hanley was to convey (or grant an easement in respect of) sufficient properties so as to allow the access road to be built. The fact that Part 5 was not discussed does not take away from that common intention. In this regard, the application judge was incorrect at law because she failed to correctly interpret the true intention of the parties, and because she incorrectly gave weight in her decision to Hanley's subsequent subjective assertions about its intention not to include Part 5 in the deal. Meanwhile, the Court found that it was possible to amend the written agreement between the parties in such a way as to give effect to the parties' true intentions.

Finally, the Court dealt with the issue as to whether Hanley's behavior amounted to "fraud or the equivalent of fraud". The Court found that it was significant that Hanley's principal was well aware the deficiency in the agreement (by the exclusion of Part 5) and chose not to say anything for reasons which were at best dubious. The Court found that in all of the circumstances, it would be "unconscientious" in these circumstances for a person to avail himself of the advantage obtained, and that Hanley's actions amounted to unfair dealing and unconscionable conduct. This finding allowed the Court to hold that in these circumstances, part (vi) of the Fairmont test had been satisfied.

So, going back to our insurance coverage claims, it would likely be very difficult for an insured to satisfy the court that rectification of a policy was warranted. Among other things, the insured would need to satisfy the court that there was a prior agreement, definite and ascertainable, but outside of the policy language, that objectively specified that the loss (of the type) at issue was to be covered. This is problematic all by itself since insurers generally do not like to make definitive, and unqualified,

pronouncements about coverage in respect of hypothetical future losses. Moreover, the subjective intention of the insured would be irrelevant to any determination. Further, the insured would need to show that the insurer was well aware that the agreed-upon coverage was not present in the policy at issue, suggesting that the insurer must have somehow concealed this information from the insured. This would likely be difficult to demonstrate: insurers generally provide the policy language to their insureds (or the brokers), and they intend for the coverage to be limited to that which is set out in the policy language. As the CA explained in ***Hanley Park***, the mere fact that one party does not get what it hoped to get out a contract does not necessarily open the door to rectification.

R. Lester, August 17, 2020