

A final word from the House of Lords

In one of the House of Lords' final decisions (*Chartbrook and another v Persimmon Homes Ltd and Others* [2009]), the long-established position under English law that anything said or done in the course of negotiating a contract is inadmissible as evidence of what the contract was intended to mean has been reaffirmed.

Many commercial contracts have an "entire agreement" clause by which the parties declare that the written agreement represents the entire agreement between them and acknowledge that they do not rely on any representation made by either party which is not set out in the written agreement. The aim of such clauses is to promote certainty and reduce disputes over interpretation.

Stated briefly, the facts of the case were that Persimmon, a property developer, and Chartbrook, a landowner, signed a development agreement but when the development was complete a dispute arose about the calculation of an "additional residential payment" ("ARP") payable by Persimmon to Chartbrook. The development agreement set out how the ARP would be calculated but the clause was open to different interpretations. Persimmon argued that it owed Chartbrook £897,051; Chartbrook arrived at a figure of £4,484,862.

Persimmon defended Chartbrook's claim and lost at first instance and on appeal to the Court of Appeal. However, their appeal succeeded in the House of Lords with unanimous decisions of all five Law Lords.

Persimmon relied in court on much of the pre-agreement correspondence with Chartbrook in an attempt to establish that a formula for agreeing the ARP had been agreed, but that because certain words and phrases had not been defined in the agreement extraneous evidence was necessary to construe their true meanings.

The House of Lords held that pre-contract negotiations were not admissible in a contract dispute, but are admissible in an action for rectification of a contract. Although Persimmon's claim for rectification failed in every court, they successfully argued that the pre-contract negotiations were admissible as forming part of the "matrix of fact" and so were able to use them in the dispute over the construction of the contract.

Despite this judgment, there is likely to be continuing difficulty ascertaining where background facts end and pre-contract negotiations begin.

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