

# CLIENT ALERT!



## IF IT'S BROKERED YOU CAN'T FIX IT

A principal rule of contract law is that a party to a written contract cannot rely on other documents or discussions to vary or alter the terms of the contract. To do so would undermine the confidence of the commercial world in written contracts. There are, however, some specific circumstances when this rule is relaxed and prior dealings between contracting parties may amend, correct or interpret a contract.

One of these limited occasions is where the contracting parties have agreed on the terms that will govern their relationship but the terms are not then written down properly into the contract. That is, due to an error such as a mistyping, the written contract does not correctly reflect the agreement that had been reached between the parties. The remedy to correct such a mistake is called rectification and its purpose is to restore the parties to their original intended bargain.

When a mistake is alleged, the courts allow extrinsic evidence to be presented—including the words and actions of the parties—in order to ascertain the true agreement of the parties and what it was that they mutually intended their contract to say.

Rectification can be used to correct an insurance policy where the policy does not properly record the true agreement between the insured and the insurer, due to a mistake. A recent case in the British Columbia Court of Appeal considered the approach to be taken in rectifying an insurance policy where an insured was being represented in negotiations with the insurer by an insurance broker.

In *Concord Pacific Group Inc. v. Temple Insurance Company*, the insured (Concord) had developed a condominium tower in False Creek, Vancouver from 2000 to 2002. Concord obtained Builder's Risk construction insurance for the project from an insurer (Temple) through its insurance broker (Willis). When the project was delayed in mid-2000 due to the site being flooded, Concord claimed for loss that resulted from subsequent delays in the sale and occupancy of the condominium units.

There was an issue, however, about when the coverage for such loss commenced since the policy, through a clerical error, failed to stipulate the commencement date. Both Concord and Temple applied to have the insurance policy rectified with different commencement dates: Concord said the coverage should commence in November 2001 while Temple argued for April 2002.

The Court had to determine the true agreement of the parties and the date on which they mutually intended coverage for delays to begin. The evidence from Willis was that, when the insurance for the project was being placed, Willis had intended and understood that the delay coverage would commence in April 2002. Concord, however, insisted Willis's intention was not Concord's intention. Concord's evidence was that it intended November 2001 to be the commencement date for coverage and that Willis would have acted beyond its authority in agreeing to any other date.

So, what happens when an insured says that the intentions of its broker are inconsistent with its own intentions? Concord argued it was its subjective intention that should prevail and not its agent's intention. The Court of Appeal disagreed and applied basic principles of agency, holding that an intention expressed by an insurance broker acting on behalf of an insured is binding on the insured and it is not necessary to further consider any alleged differing intention the insured may have held. In the circumstances there had been a mutual mistake, and the policy was rectified to show a commencement date of coverage for delays to April 2002.

So, if brokers say what you mean, remember to mean what you say.

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