

## MANIFEST ERROR: A FRESH PERSPECTIVE?

Case law proves helpful in demonstrating the range of evidence an English law trustee on a capital markets transaction may need to assess when using its discretionary power to correct manifest errors. In this briefing, we discuss the evolution of that power and the ability of trustees to consider extrinsic evidence in making significant changes to documents, provided they are justified by the evidence.

### Trustee Discretion

English law capital markets documentation typically grants the trustee power to consent to certain amendments without investor/noteholder consent. This discretionary power is usually constrained to amendments where the trustee itself is satisfied that the proposed changes are (i) not materially prejudicial to the interests of the noteholders, or (ii) formal, minor or technical in nature, or (iii) made to correct a manifest error.

From a practical perspective, a 'manifest error' amendment might be relevant where parties discover that certain transaction mechanics may not reflect in practice what was understood to be the commercially agreed position, or where there might be internal inconsistencies in the transaction documents themselves.

Ordinarily, the note issuer will be contractually restricted from amending (or granting its consent to amend) any transaction documentation without the trustee's consent. The concerned parties would therefore need to ask the trustee for its consent.

The power to correct a manifest error can provide a time-efficient and cost-effective way to make such amendments without needing to undertake a consent solicitation involving a potentially wider investor population. That said, while the intended commercial position may be clear in the minds of certain of the parties, proving manifest error can be a high hurdle. As between the noteholders and secured creditors, the trustee typically has power to determine any questions or doubts regarding provisions of the trust deed. It is crucial that the trustee is provided with all relevant information and has a clear understanding of how it could be independently satisfied that there is a manifest error that ought to be corrected since "an arguable error will not suffice"<sup>1</sup>.

### Key points

- Trustees may be requested to exercise their discretionary power to amend documents to correct 'manifest errors'.
- The trustee will need to be independently satisfied that what is being presented is manifestly wrong.
- Case law on expert determinations suggests that parties may be able to consider extrinsic evidence as part of the decision making, i.e., supporting documentation or materials which sit outside the contractual documents.
- It is clear that any such evidence would need to be considered by the trustee within the wider factual matrix of the transaction.

<sup>1</sup> Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2

## What is a Manifest Error?

Although there is no direct judicial authority on the meaning of 'manifest error' in the context of a trustee's discretionary powers, this term has been considered in the context of expert determination clauses, i.e. where a third-party expert may determine parties' rights and obligations, with such determination being expressed to be binding "in the absence of manifest error". Although these insights would not be authoritative given the contextual differences, they provide a helpful illustration of how the issue may be approached.

As regards the meaning of the term 'manifest error', it has been defined as "*oversights and blunders so obvious as to admit no difference of opinion*"<sup>2</sup>.

This definition was subsequently expanded in *Veba Oil*<sup>3</sup> to refer to "*oversights and blunders so obvious and so obviously capable of affecting the determination as to admit of no difference of opinion*" [emphasis added], introducing an additional materiality threshold.

The court's approach to 'manifest error' was considered in *Flowgroup*<sup>4</sup>. Here, the claimant referred to the *Amey*<sup>5</sup> test which stated that a 'manifest error' was an error "which was obvious or easily demonstrable without extensive investigation". The court in *Flowgroup* concluded that the approaches in both the *Amey* and *Veba Oil* cases were consistent with one another.

It was also established in *Flowgroup* that where parties have agreed to have a question of contractual interpretation subject to expert determination, a 'manifest error' exception would only allow the court to intervene in limited circumstances and that it was not the role of the court to second-guess the exercise of such expert judgement. This was further explored in *Re Delilah Cosmetics*<sup>6</sup>, where the court determined that a two-stage test must be followed which requires (i) a manifest error to be established, and (ii) that such manifest error caused a material difference to the result.

## Extrinsic Materials

If a trustee is approached to determine this issue, it is likely to be presented with evidence to substantiate the requesting party's view that there is a manifest error to correct. So what materials is the trustee permitted to take into account as part of any 'investigations' for the purposes of forming its view?

Historically, the prevailing view was that only the executed document that contained the supposed error, and the directly related contractual documentation should be considered. These are often defined as the 'Transaction Documents' or 'Finance Documents'.

However, authorities in the context of expert determination clauses indicate that a wider range of evidence could be relevant. This may be helpful where there is ambiguity in the ordinary meaning of contractual provisions, which would then lead to a consideration of the broader context.

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<sup>2</sup> Lord Lindley in *l'Anson, B.R.C. and Lindley, N.L.* (2022) *Lindley & Banks on partnership*. London: Sweet & Maxwell.

<sup>3</sup> *Veba Oil Supply and Trading GmbH v. Petrotrade Inc.* [2001]

<sup>4</sup> *Flowgroup Plc v. Co-operative Energy Ltd* [2021]

<sup>5</sup> *Amey Birmingham Highways Ltd v Birmingham City Council* [2018]

<sup>6</sup> *Re Delilah Cosmetics, White v Nicholson* [2022] EWHC (Ch) 1104

In *Society of Lloyd's*<sup>7</sup> the Court of Appeal rejected the assertion that only internal inconsistencies in the document could be analysed, so that external evidence would be admissible if practically and contextually relevant.

This was expanded further in *North Shore Ventures*<sup>8</sup>, where the Court of Appeal held that the error did not need to be shown immediately and conclusively, but that the passage of time and/or a short investigation is permitted. Equally in *IG Index*<sup>9</sup>, it was held that the court was not prevented from having regard to extrinsic evidence when determining whether there was a manifest error.

Such case law suggests that it may be appropriate to consider a wider and more contextual approach when determining manifest error, and that extrinsic materials may be considered for the purposes of assessing whether or not an error is, in fact, manifest. In this context, "extrinsic materials" can be understood to be those which sit outside the documents in question, such as the prospectus/offering document, any investor presentations or correspondence between parties and/or their counsel.

The nature of this flexibility however necessarily results in some residual uncertainty as to how broadly the trustee's determination could be drawn. The trustee should not be sent on an investigative journey, as this would not be within the remit of a 'short investigation', but how limited is a short investigation?

While the contractual terms of the trustee's appointment can be helpful if they allow the trustee to rely on counterparty certifications or expert advice for the purposes of carrying out its duties, the trustee will still need to assess the overall appropriateness of such materials, as discussed below.

## Factual Matrix

When determining the scope of permissible evidence, it would be important for the trustee to consider any such proposed evidence in the context of the factual matrix of the transaction.

For example, in *Re SIGMA*<sup>10</sup> and *State Street Bank*<sup>11</sup>, the courts looked at an investment brochure and a prospectus for the purposes of correcting an error in the transaction documents. In the latter case, which dealt with a matter of construction, the court stated that "*although the mistake must be clear it may emerge from a consideration of all the relevant documents, not only on the face of one of them; nor is there a limit to the correction which may be made provided that it is clear to the reasonable person having regard to all the relevant documents what the parties meant.*" In *Re SIGMA*, the court reaffirmed that the wording in question must be construed "in the landscape of the instrument as a whole".

What is clear in this regard, is that the trustee will need to consider how the error occurred in practice, and the factual circumstances surrounding the document(s) in question. For example, does the error result in a construction that is meaningless or inoperable? The trustee should also consider the

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<sup>7</sup> *Society of Lloyd's v. Fraser* [1999]

<sup>8</sup> *North Shore Ventures Ltd v Anstead Holdings Inc* [2012]

<sup>9</sup> *IG Index v Colley* [2013]

<sup>10</sup> *Re SIGMA Finance Corporation (in administrative receivership)* [2009]

<sup>11</sup> *State Street Bank and Trust Co v Sompo Japan Insurance Inc & others* [2010]

relevance of materials which are proposed to demonstrate the intended meaning, and whether they are appropriate as contemporaneous evidence of the commercial intention. These points will need to be assessed on an individual basis.

## **Conclusion**

The case law discussed above indicates a movement away from the traditional view of the manifest error and the corresponding correction needing to be clear on the face of the document itself. However, this does not mean that the trustee would have unfettered discretion when agreeing to amendments on this basis. Indeed, in making such a determination, the trustee would want to be certain that the scope and nature of any supporting extrinsic evidence is consistent with the factual matrix of the document, as well as being in keeping with the broader commercial backdrop.

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