

Swings and Roundabouts in the law of Rectification

1. One consequence of a global financial downturn is that contracts, including property contracts and especially contracts requiring valuation, have to be implemented in an environment very different from that which the parties anticipated when they reached agreement. A well drafted contract should withstand such changes, but extreme variations in property values may test our less considered efforts to destruction.
2. The inclusion of a talk on rectification in a conference on property law in the recession is prompted by the frequency with which clients, now regretting having entered into a binding contract, suggest that the outcome their contract appears to produce was not what they did or can have intended. In some cases the best advice is to suggest that the next time, if there is one, the client should read the document more carefully before signing it, but on other occasions the scope for rectification of the document might sensibly be considered.
3. “Rectification” means putting right mistakes in documents. This can be done in a number of different ways.
4. Considerable attention has been devoted recently to the subject of rectification by interpretation of the document. There is a well established principle of interpretation that if there is an obvious error, and it is clear what was intended, then the error can be corrected as part of the process of interpreting the document. This principle finds well known expression in the property field in cases such as *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 108 and *Mannai Investment Co Limited v Eagle Star Life Assurance Co Limited* [1997] AC 749. It raises fundamental policy questions concerning the material which may be relied on to interpret a contract. The boundaries between rectification and interpretation have recently been surveyed by Sir Kim Lewison in the first Jonathan Brock Memorial Lecture in May last year. It may soon be the subject of further investigation by the House of Lords when it considers the appeal in *Chartbrook Ltd v Persimmon Homes Ltd* [2007] EWCA Civ 183. It would be unwise for me to tread into that territory at this time.

5. Developments in the equitable remedy of rectification, are my preferred subject.
6. Any consideration of this subject ought to be prefaced by the maxim that “rectification is never easy”. Rectification claims are regularly pleaded but much less frequently brought to a successful conclusion. Recently, however, some of the obstacles to a rectification claim appear to have been relaxed in certain circumstances, and it is those developments in particular which I wish to note. As one hurdle lowers others rise up in the way of a claimant, especially a corporate claimant, for rectification.

The equitable remedy of rectification

7. Rectification is a remedy by which a document which fails properly to record the parties' true agreement is corrected by the court. The agreement itself cannot be interfered with by the court; it is the failure to set down the agreement correctly in the document which justifies the court's interference: see *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 per James V-C: “courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts”.
8. Rectification may be obtained either where there is a common mistake or where there is a unilateral mistake. It is not practicable to cover both topics, so I will limit myself to cases of common mistake, and to one aspect of it, before finally considering a distinct subject of practical importance and of relevance to both varieties of rectification.

Common mistake

9. The remedy of rectification for common mistake will be available if four conditions are satisfied:
 - (i) the parties had a continuing common intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified,

(ii) there was an outward expression of accord,

(iii) the intention continued at the time of the execution sought to be rectified and

(iv) by mistake, the instrument did not reflect that common intention.

The leading case, from which these conditions are taken, is *Jocelyn v Nissen* [1970] 2 Q.B. 86. That was the case which decided that it was unnecessary for the common intention to have been a binding contract, something which some previous decisions suggested was necessary. Until recently the orthodox view has been that all four conditions must be satisfied: see e.g. *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71 at paragraph 33 (Peter Gibson LJ), *Hicklane Properties Ltd v Bradbury Investments Ltd* [2008] EWCA Civ 691 at paragraph 10 (Mummery LJ) and *KPMG LLP v Network Rail Infrastructure Ltd* [2006] EWHC 67 (Ch) (Blackburne J).

10. However, the requirement that the common continuing intention of the parties must be made manifest by some outward expression of accord has recently been questioned, and I would like to consider where the debate has reached.

The need for an outward expression of the common intention in cases of mutual mistake

11. The requirement that, for rectification to be available, the parties should not only have proceeded under a common intention as to the effect of their contract, but should have expressed that common intention to each other, achieved its clearest statement in the horsebeans case: *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450. The plaintiff asked the defendant to quote for supplying "five hundred tons Moroccan horsebeans described here as feveroles". The plaintiff, not knowing that feveroles were a special medium size variety of horsebeans, asked the defendant what they were and was informed that feveroles and horsebeans were the same thing. The two parties being under this misapprehension that feveroles and horsebeans meant the same, then entered into an oral agreement for the purchase of five hundred tons of Tunisian horsebeans, and the agreement was incorporated in a

written contract. The buyers subsequently brought an action for the rectification of the written contract by the addition of the word "feveroles" after the words "Tunisian horsebeans". That claim failed. The Court of Appeal held that the oral agreement was for the sale of horsebeans, and, notwithstanding the mutual mistake as to the meaning of "feveroles" and "horsebeans", as the written contract correctly expressed that oral agreement, it could not be rectified.

12. Denning LJ explained his conclusion in this way:

“Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties – into their intentions – any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.”

The justification for this focus on what passed between the parties, rather than on what they each privately intended, was said to be the need for contractual certainty:

“There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they agreed something different.”

13. It has been suggested by Sir Kim Lewison in his Brock Memorial Lecture that, if there had been no complication created by a chain of contracts, *Rose v Pim* would be differently decided today and that rectification would be available because the parties used one word believing it to signify something different. In *Joscelyne v Nissen* in 1970 (above), the Court of Appeal held that if the parties agree on the meaning of a phrase used in the document, but in fact the phrase does not have the meaning they think it does, the court may rectify the document. The decision in *Rose v Pim* was explained as follows:

"That was a case in which there was nothing that could be described as an outward expression between the parties of an accord on what was to be involved in a term of a proposed agreement. It turned out that locked separately in the breast of each party was the misapprehension that the word 'horsebeans' meant another commodity, but as we understand the case there was no communication between them to the effect that when they should speak of horsebeans that was to be their private label for the other commodity."

14. In *Joscelyne v Nissen*, the Court of Appeal approved the following passage from the judgment of Simonds J in *Crane v Hegeman-Harris Co Inc* [1930] 1 All ER 622 "with the qualification that some outward expression of accord is required":

"In order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify ... it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties".

15. Accordingly, if the parties have a common continuing intention as to the meaning of the words used in the document, and that common intention is given an outward expression of accord, the court may rectify the document to reflect the common intention even if the words that the parties agreed on are accurately set out in the document.
16. That remained the orthodox view in this country for the best part of 50 years. However it did not find universal favour. In New Zealand the position was taken to be as stated by Simonds J in *Crane v Hegeman-Harris Co Inc* without the addition of the requirement that some outward expression of accord is required. Thus in *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, Tipping J considered the characteristics of the necessary common intention and concluded (at 30, 31) that while there did not need to be formal communication of the common intention by each party to the other or any outward expressions, it must be objectively apparent from the words or actions

of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each other party.

17. The first suggestion that a more relaxed approach could be taken to the requirement of an outward expression of accord in a case involving the rectification of a bilateral contract came in *JIS (1974) Ltd v MCP Investment Nominees I Ltd* [2003] EWCA Civ 721. This was an appeal from decisions of Hart J on issues of construction and rectification of a break clause in a lease. On the rectification issue, the Master had given summary judgment dismissing the claim, but Hart J held that the case must go to trial, and the Court of Appeal agreed. On the need for outward expression of accord, Hart J had said:

"As it seems to me, I must apply, for the purposes of this application for permission to appeal, the accepted English doctrine. As indicated, the contrary has not been argued. However, the requirement is essentially directed to a question of evidence about the communication by one party to the other of his intention. A particular intention may be, as it seems to me, as a matter of the general nature of human discourse, be communicated by one party to another without express words necessarily being used. It may therefore sometimes be possible for the court to conclude there has been sufficient outward evidence of the accord of the parties' intentions in relation to a particular term of their bargain without either party having actually spelled out to the other that term in so many words. It may be like an implied term in a contract, something which, in the context of the particular discourse, is so obvious that it need not be stated."

18. In the course of his judgment, Carnwath LJ said at para 34:

"For my part, I would not exclude the possibility of their being some development of the strict Rose v Pim principles to cover the case where there is an obvious common assumption, as the judge suggested. However, it is unnecessary to decide whether the case for rectification would succeed."

19. The issue arose again, but this time in the context of a claim to rectify a deed varying the rules of an occupational pension scheme in *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42. Etherton J noted that it is well established that some objective manifestation or outward expression of shared intention is a requirement in the case of

a claim to rectify a contract (citing *Rose v Pim* and *Joscelyne v Nissen*). The question for him was whether the same requirement existed even in a non-contractual case concerning the variation of the rules of a pension scheme.

20. In an earlier pensions case, *Lansing Linde Ltd -v- Alber* [2000] PLR 15, 112, Rimer J had concluded that an outward expression of a continuing common intention was required even in a case involving a unilateral transaction; the rules of the pension scheme could not be changed without the approval of the employer and the trustees, which Rimer J considered made the contractual rules equally applicable. In *Amp (Uk) Plc v Barker* [2000] EWHC Ch 42 Lawrence Collins J had taken the opposite view and in Etherton J followed it:

“My understanding of paras [67] and [68] of the judgment in AMP is that Lawrence Collins J held that, provided the claimant in a case like the present can show convincingly a continuing common intention by the Principal Employer and the trustee which, by mistake, is not given effect by the deed of amendment, the discretionary remedy of rectification is in principle available, and objective manifestation or outward expression of the continuing common intention is not a separate requirement. His decision in that respect is not plainly wrong, and, accordingly, as a first instance Judge I am bound to follow his decision.”

21. At least in the case of unilateral transactions i.e. transactions which create rights for persons other than the maker of the instrument, but which are not the result of a bargain, e.g. voluntary settlements, the position is therefore settled at first instance. What must be shown is convincing proof of a continuing common intention, and one way, but not a necessary way, is to show an outward expression of that common intention.
22. The need for an outward expression of accord before there could be rectification of a bilateral contract was considered by the Court of Appeal in *Munt v Beasley* [2006] EWCA Civ 370. The long lessee of a top floor flat had converted the overhead loft space to living accommodation; the lessor sought to forfeit the lease on the ground that the loft space was not included in the lease and its annexation was a breach of covenant. The Court of Appeal held that the case for an order for rectification was

clearly established. The particulars of sale, prepared by the lessor's agents and relied on by the lessee's predecessors in title were sufficient to satisfy any legal requirement of an "outward expression of accord" to include the loft in the lease of the first floor flat.

23. In any event it was accepted that there was no requirement for a separate outward expression of agreement in a case such as this. Mummery LJ said:

"36. I would also accept Mr Morshead's submission that the recorder was wrong to treat "an outward expression of accord" as a strict legal requirement for rectification in a case such as this, where the party resisting rectification has in fact admitted (see the solicitors' letter of 7 May 2003) that his true state of belief when he entered into the transaction was the same as that of the other party and there was therefore a continuing common intention which, by mistake, was not given effect in the relevant legal document. I agree with the trend in recent cases to treat the expression "outward expression of accord" more as an evidential factor rather than a strict legal requirement in all cases of rectification: see Gallaher v. Gallaher Pensions Ltd [2005] EWHC 42 (Ch) at paragraphs 116-118; Westland Savings Bank v. Hancock [1987] 2 NZLR 21 at 29, 30; and JIS (1974) Ltd v. MCP Investment Nominees Ltd [2003] EWCA Civ 721 at paragraphs 33-34; cf Frederick E Rose (London) Ltd v. Wm Pim & Co Ltd [1953] 2 QB 450 at 462 per Denning LJ and Swainland Builders Ltd v. Freeland Properties Ltd [2002] 2 EGLR at 74."

24. This puts the requirement of an outward expression of the parties' agreement on a particular issue as a matter of evidence to satisfy the primary requirement that there be a consensus. If it can be shown from other evidence, or by admission, that the parties shared the same intention up to the time the agreement was entered into, then it is not necessary that they should have expressed that common intention to each other.
25. What then of the concern in *Rose v Pim* for commercial certainty? As between the parties to the contract itself, there is little risk of injustice if their bargain is rectified to give it the effect which they both intended it should have. The vice of uncertainty is the risk of third parties being disadvantaged if the effect of a contract in which they have acquired an interest of some sort is varied because of something which happened during the negotiations of the contract. However, as Sir Kim Lewison pointed out in

his lecture, the equitable remedy of rectification is discretionary and “*rectification pays proper regard to the position of all parties who may be affected by the Court’s decision*”. Rectification would have been excluded in *Rose v Pim* on the grounds that the contract which it was sought to rectify was part of a chain of back to back contracts the remaining links of which were not affected by the relevant mistake.

Mistake by decision makers, not agents

26. In cases of both mutual mistake and unilateral mistake, the intention proved must be that of the decision makers, not their agents: *The London Borough of Barnet v Barnet Football Club Holdings Ltd*. [2004] EWCA Civ 1191, *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA CIV 77. It is, therefore, essential to obtain evidence from the decision maker(s) as to their intentions.
27. Many property development companies will delegate responsibility for the negotiation of a contract to an individual while retaining the final decision making authority at board level. Almost invariably the negotiation of the detailed terms of the contract will be in the hands of solicitors. In such cases it is the understanding and intention of the board members which must be proved not to have been reflected in the document which they approved: what the negotiator or solicitor thought the contract provided will be of only limited importance, and possibly of none at all. Only where authority to make a decision is delegated to the negotiator or to another individual will that individual’s state of mind be critical, as it proved to be in the case of *Hurst Stores and Interiors Ltd v ML Europe Property Ltd* [2004] EWCA Civ 490.
28. In *Wimpey v VI Construction* a complicated overage formula omitted one critical term which over which the parties had been negotiating. The contract manager who had the conduct of the negotiations had made a mistake in the final version of the formula which had then be incorporated into the contract by the solicitors who assumed it was correct. The solicitors’ report to their client drew attention to the formula but did not comment on it or explain how it was intended to work. No evidence was called at trial of any additional explanation which might have been given to the Board of directors who decided to enter into the contract. In those circumstances the Court of Appeal

held that it had not been proved that Wimpey had made a mistake, Peter Gibson LJ saying:

“Without further evidence I do not see how one can escape from the conclusion that the board ... intended to approve the contract in the form in which it was put to the board and in which it was executed.”

29. The provision of appropriate evidence in such cases may be a formidable hurdle where the board has a number of members and must act by a majority. Potentially it may be necessary to prove the intention of each of a number of board members as to the effect of a complex formula in an overage or other valuation clause.
30. This requirement can be illustrated by one of the pensions cases *Lansing Linde v Alber* [2000] Pensions LR 15, where pension scheme rules were amended to defer the normal retirement date for women to 65. Without going into the details of the facts it is enough to cite Rimer J's description of the state of mind of the Board of Trustees which took the relevant decision, and which caused him to refuse rectification:

"The evidence shows that, when they executed the deed, they had no clear common understanding of what it provided, and no clear common intention as to what it should provide. The only common thread of intention which appears to link the signatories was an intention to sign, wholly blindly, the document which was put before them on the basis that, as it was prepared by [the scheme administrators and scheme solicitors], it must be one they could safely sign. In short, their intention was no more complicated than to sign a deed in the form produced to them, whatever it in fact provided..."

31. While that may have been an extreme case it would not be surprising to find that the decision maker invested a considerable degree of trust in a negotiator to inform the decision making body of all that is considered necessary for them to know. Unless the solicitors' report on the contract or the negotiator's report on the commercial terms themselves contain repeat the relevant mistake about the effect of the contract there will be no basis to depart from the assumption that when the contract was approved or signed the decision makers intended to be bound by all of its terms.
32. One solution to this particular problem would be for reports on the terms of a contract to explain in considerable detail how the critical terms, including any complex

financial terms of the contract, are intended to operate. That process of explanation might serve to expose the existence of a mistake, or at least it may provide the decision maker with the same information as the negotiator or draftsman of the contract holds, so giving access to the mistake itself which otherwise the decision maker may have no means of knowing. That process risks being costly and unwieldy and many clients would be unlikely to welcome, or read, a report which outweighs the contract itself.

33. An alternative defensive measure which can more easily be adopted by draftsmen, especially draftsmen of valuation formulae, would be to include as part of the contract one or more practical illustrations of how the formula is intended to work. Again this may help in exposing errors before it is too late, but if not at least it will demonstrate that both parties agreed how the formula was supposed to operate.