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TOPIC: Rectification of Documents: Removing Unnecessary Complexity

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ABSTRACT

Within the equitable doctrine of rectification, a distinction between common or mutual mistake and unilateral mistake is currently adopted by courts, litigants and scholars. Based on this distinction the focus of a court is to identify who made a mistake and who had knowledge of any mistake. This approach is unhelpful and has led to unnecessary complexity which has been identified by judges and scholars in several recent cases in England and Australia. In addition, the boundary between common law construction and the equitable doctrine of rectification has become less clear. To address the complexity of the law and the uncertain boundary between construction and rectification this thesis examines the scope of the common law approach to construction, identifies the current law relating to when rectification will be granted, outlines in what ways is it difficult to reconcile the current case law, and explains where the law of rectification went wrong. After addressing those matters the thesis explains how the case law on the equitable doctrine of rectification needs to be restated, in accordance with principles established in earlier case law, so that the law is coherent and principled. This provides a comprehensive solution to the uncertainty and complexity in the law of rectification. The solution includes arguing that the distinction between common or mutual mistake and unilateral mistake should be rejected and that the correct distinction is between two different types of mistakes: mistakes made in the recording of agreements and mistakes made during the formation of agreements. In addition, courts in recent decades have focused on the intention of the parties rather than on agreements made by contracting parties. It is argued that a focus on the type of mistake made, and a focus on agreements rather than intentions, will remove the current complexity and uncertainty in the law of rectification that has emerged in recent cases.

CERTIFICATION OF DISSERTATION

I certify that the ideas, analyses and conclusions reported in this dissertation are entirely my own effort, except where otherwise acknowledged. I also certify that the work is original and has not been previously submitted for any other award, except where otherwise acknowledged.

9 June 2017

Signature of Candidate

Date

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John Tarrant

Sydney

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Please be advised that this thesis contains chapters which have been either published or submitted for publication.

Earlier versions of the following chapters have been retained in this version of the thesis:

Chapter 1
Construction as a means of corrective interpretation
Chapter 2
Historical development of the equitable doctrine of rectification
Chapter 3
Three fundamental principles of rectification
Chapter 4
Rectification for mistakes in recording agreements
Chapter 5
Rectification for mistakes made during the formation of an agreement
Chapter 6
Rectification for fraud

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INTRODUCTION

A *Background*

The jurisdiction of equity to correct mistakes in contractual and non-contractual documents by reforming or rectifying documents has been recognised for centuries. In some early reported cases the courts simply decreed that a party would be relieved of the consequences of a slip or an error in a document without formally reforming or rectifying the relevant document.[1] But by the early 18th century the courts formally rectified documents where there had been a mistake in the recording of an agreement in writing. Rectification was particularly common in relation to marriage settlements[2] but was also exercised in relation to bonds,[3] insurance policies and other insurance documents,[4] conveyances,[5] leases[6] and voluntary deeds.[7]

These early cases were free of complexity and controversy. In the contractual context, a prior concluded contract was required and the focus was on providing relief where there had been a mistake made in the recording of that prior agreement. In relation to voluntary settlements rectification was available where there had been a mistake in the recording of the subjective intention of a settlor. However, as the law developed over the following centuries, the scope of the doctrine changed in three important ways. The first development was to allow rectification in circumstances where there was no prior concluded contract. The second development related to whether the party seeking rectification had to prove that all the parties to the agreement

[1] See for example: *Thin v Thin* (1650) 1 Chan Rep 162; 21 ER 53; and *Tyler v Beversham* (1673) Finch 80; 23 ER 42.
[2] See, for example, *Uvedale v Halfpenny* (1723) 2 P Wms 151; 24 ER 677; *Harbidge v Wogan* (1846) 5 Hare 258; 67 ER 909; *Torre v Torre* (1853) 1 Sm & Giff 518; 65 ER 227; *Wolterbeek v Barrow* (1857) 23 Beav 423; 53 ER 167; *Wollaston v Tribe* (1869) LR 9 Eq 44; *Smith v Iliffe* (1875) LR 20 Eq 666; *Cogan v Duffield* (1876) 2 Ch D 44; *Re Bird's Trusts* (1876) 3 Ch D 214; *Clark v Girdwood* (1877) 7 Ch D 9; *Cook v Fearn* (1878) 27 WR 212; *Edwards v Bingham* (1879) 28 WR 89; *Hanley v Pearson* (1879) 8 Ch D 545; *Tucker v Bennett* (1887) 34 Ch D 754; and *Tucker v Bennett* (1887) 38 Ch D 1.
[3] *Simpson v Vaughan* (1739) 2 Atk 31; 26 ER 415.
[4] *Motteux v London Assurance* (1739) 1 Atk 545; 26 ER 343; *Collett v Morrison* (1851) 9 Hare 162; 68 ER 458; *Moses v Northern Assurance Co* (1856) VLT 114; *Fowler v Scottish Equitable Life Insurance Co* (1859) 28 LJ Ch 225; *Stephens v Australasian Insurance Co* (1872) LR 8 CP 18; *Wylde v Union Marine Insurance Co* (1877) Ritch Eq Rep 203; and *Spalding v Crocker* (1897) 2 Com Cas 189.
[5] See for example, *Marquess of Exeter v Marchioness of Exeter* (1838) 3 My & Cr 321; 40 ER 949.
[6] *Cowen v Truefitt Ltd* [1898] 2 Ch 551; and *Cowen v Truefitt Ltd* [1899] 2 Ch 309.
[7] See for example, *Turner v Collins* (1871) LR 7 Ch App 329; *Welman v Welman* (1880) 15 Ch D 570; *Lovell v Wallis (No 2)* (1884) LT (NS) 681; *James v Couchman* (1885) 29 Ch D 212; *Hall-Dare v Hall-Dare* (1885) 31 Ch D 251; and *Bonhote v Henderson* [1895] 2 Ch 202.

shared the same mistake. In some cases the courts initially referred to either a common mistake[8] or a mutual mistake[9] but in many cases the issue was not specifically addressed. The early cases suggest that it was not necessary to prove that all the parties to a document were mistaken. The requirement that there needed to be a common or mutual mistake before rectification could be granted started with the decision of the Lord Chancellor, Sir Edward Sugden, in *Mortimer v Shortall*[10] where the Lord Chancellor accepted the proposition of the defendant's counsel that a court must be satisfied that there was a mistake by both parties before rectification could be granted. Having created a general rule that a common or mutual mistake was required a third development occurred: the courts created an exception to the general rule and rectification was subsequently allowed even though both parties were not mistaken.[11] That is, rectification was allowed for unilateral mistake. The second and third developments led to the classification of rectification into two broad categories: common or mutual mistake; and unilateral mistake. The distinction between common and mutual mistake and unilateral mistake came to dominate the approach to relief for rectification and the distinction between these two categories has endured. Another consequence of the second and third developments was that rectification was made available for a very different type of mistake: a mistake made during the formation of an agreement. Prior to the second and third developments, rectification, in the contractual context, was *only* available for a mistake made in the recording of a prior agreement. The combined effect of the second and third developments was that rectification was now available for a completely different kind of mistake: a mistake made during the formation of an agreement rather than a mistake made while recording an agreement.

A distinction between common or mutual mistakes and unilateral mistakes is misconceived because the distinction fails to recognise that rectification is concerned with different types of mistakes. The classification has created much of the current controversy in relation to rectification. There is controversy concerning both when the remedy is available and what the party seeking rectification needs to prove to obtain rectification. The labels of common or mutual mistake and unilateral mistake only distract attention away from the true distinction between the two core categories of rectification cases. The better approach, the approach advocated in this thesis, is to accept that for rectification to be awarded where there has been a

[8] *Ball v Storie* (1823) 1 Sim & St 210; 57 ER 84.
[9] *Fowler v Fowler* (1859) 4 De G & J 250; 45 ER 97.
[10] (1842) 2 Dr & War 363.
[11] *Garrard v Frankel* (1862) 30 Beav 445; 54 ER 961.

mistake in the recording of a prior agreement (an agreement based on the common intention of the parties as determined objectively), it is not necessary for all the parties to have been mistaken at the time that the written agreement was signed. That is, a mistake in the recording of a prior agreement may arise regardless of whether the mistake was a common mistake or a unilateral mistake. All that should be required is that there *was a mistake* made in the recording of what had previously been agreed. Who was responsible for the mistake, or had knowledge of the mistake and how the mistake arose, is irrelevant. What is relevant is that a mistake in the recording of the prior agreement is proved to the requisite standard. Because it is irrelevant who had knowledge of a mistake made in the recording of a prior agreement the distinction between common or mutual mistake and unilateral mistake is both misconceived and unhelpful because that distinction is *only* concerned with who was mistaken. It is important to focus on two different circumstances that reflect two different *types* of mistakes: first, the recording of a prior agreement; and second, the formation of an agreement.

That rectification is concerned with two different types of mistakes was addressed recently by Lord Hoffmann NPJ in *Kowloon Development Finance Ltd v Pendex Industries Ltd*[12] where his Lordship said, with reference to mutual or common mistake and unilateral mistake, that they 'sound like two varieties of mistake about the same thing, made in the one case by both parties and in the other by only one of them.'[13] His Lordship explained that 'they are actually the expression of quite different principles' and they 'deal with different kinds of mistakes.'[14] One important difference between the two types of mistakes is that the first type of mistake is concerned with the objective intentions of the parties whereas the second is concerned with subjective intentions. Lord Hoffmann NPJ said that in 'the case of mutual or common mistake – the adjectives are in this context interchangeable – the mistake is about whether a written document correctly reflects what the parties had, on an objective assessment, agreed it should contain.'[15] Lord Hoffmann, when in the House of Lords, in *Chartbrook Ltd v Persimmon Homes Ltd*,[16] had made it clear that rectification in these circumstances was concerned with the objective intention of the parties. In *Kowloon* his Lordship said, in continuing with that approach, that 'it is true to say that the concept of rectification for common mistake involves carrying into effect what the parties appear to have actually agreed that the document should

[12] (2013) 16 HKCFAR 336.
[13] Ibid 345.
[14] Ibid.
[15] Ibid.
[16] [2009] 1 AC 1101.

say.'[17] His Lordship explained that rectification 'for unilateral mistake, on the other hand, is very much concerned with the subjective states of mind of the parties.'[18] It is argued in this thesis that cases concerned with mistakes in the recording of an agreement are indeed concerned with the objective intentions of the parties and that cases of so-called unilateral mistake are in most, but not all, cases concerned with mistakes made by an offeror when making an offer or mistakes made by an offeree when accepting an offer made by an offeror. In such cases a court should focus on the subjective intention of the parties and in particular on the knowledge of the non-mistaken party. In doing so the court should first consider whether the remedy of rescission is available as the primary remedy to provide relief to the mistaken party.

Although Lord Hoffmann explained that rectification is concerned with two different types of mistakes his Lordship continued to use the language of common or mutual mistake and unilateral mistake in *Kowloon.* But that distinction remains unhelpful as can be seen from the earlier decision of the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*[19] which exposed the limitations of the distinction between cases based on common or mutual mistake and cases of unilateral mistake. In *Daventry* an agreement had been reached between the parties that was subsequently documented in a final written contract. The appellant claimed that there was a mistake in the recording of the earlier agreement and the case proceeded through the courts on the basis that it should first be dealt with as a case of common or mutual mistake and then, in the alternative, as a case of unilateral mistake. Because the respondent could show before the trial judge that they were not mistaken they successfully resisted rectification based on common or mutual mistake and because they could demonstrate that their conduct did not justify rectification for unilateral mistake they resisted rectification entirely. It was only on appeal that the appellant succeeded because a majority of the Court of Appeal focused on what had been initially agreed between the parties and compared that agreement to what had been recorded. That approach did not focus on who had been mistaken but sought to identify if there had been a mistake in the recording of the prior agreement. That is the correct approach but nevertheless the court persisted with the language of common or mutual mistake and unilateral mistake as Lord Hoffmann later did in *Kowloon*. The decision in *Daventry* exposes the limitations of the current approach and particularly the difficulty that

[17] (2013) 16 HKCFAR 336, 346.
[18] Ibid.
[19] [2012] 1 WLR 1333.

arises when the language of common or mutual mistake and unilateral mistake is adopted. That language is not helpful in highlighting the two different types of mistakes that are relevant to the law of rectification. Lord Hoffmann has recognised the limitation of that language and has since adopted different language when writing extra-judicially where his Lordship has referred to 'document rectification' and 'contract rectification.'[20] Although that language is an improvement on the traditional language of common or mutual mistake and unilateral mistake it still does not, with respect, make it clear from the use of those terms what each type of case is concerned with. Lord Hoffmann's description of the first category as 'document rectification' does not on the surface fully illuminate the type of case that might fall within this category because in all cases where rectification is ordered the relevant document can be physically rectified. His Lordship's description of the second category as 'contract rectification' is essentially a correct description of the category (because a different contract will result if rectification is ordered) but the description does not make it clear that the relevant mistake must have been made during the formation of a contract. A better distinction, the distinction advocated for in this thesis, is to refer to cases concerned with rectification for mistakes made in recording agreements and rectification for mistakes made during the formation of an agreement.

B *The complexity of the law and the significance of the thesis*

The decision of the Court of Appeal in *Daventry*, and the earlier decision of the House of Lords in *Chartbrook*, are examples of the uncertainty evident in some recent rectification cases.[21] There is now much controversy as to the scope and application of the equitable doctrine of rectification. As Professor McLauchlan[22] has recently observed, 'the principles governing this form of equitable relief have now become extraordinarily, and needlessly, complex.'[23] Lord Justice Etherton, writing extra-judicially[24] following his judgment in the Court of Appeal in

[20] Lord Hoffmann, 'Rectification and other Mistakes', Lecture to the Commercial Bar Association, 3 November 2015, [5] available at http://www.combar.com/public/cms/260/604/384/2242/Lord%20Hoffmann%20Lecture%203.11.15.pdf?realName=n7IZK4.pdf (Accessed 3 June 2017).

[21] The decision of the House of Lords in *Chartbrook* has been identified as one of the 15 most important cases decided during the 150 years since the Incorporated Council of Law Reporting for England & Wales was established in 1865. See Lord Neuberger, 'Reflections on the ICLR Top Fifteen Cases: A talk to commemorate the ICLR's 150th Anniversary', 6 October 2015, available at https://www.supremecourt.uk/docs/speech-151006.pdf (Accessed 3 June 2017).

[22] David McLauchlan, 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83.

[23] Ibid.

[24] Terence Etherton, 'Contract Formation and the Fog of Rectification' [2015] 68 *Current Legal Problems* 367.

Daventry said that 'the law on rectification for common and unilateral mistake is in need of comprehensive consideration at the highest level.' [25] The uncertain state of the law of rectification was highlighted even more recently in the Supreme Court of Canada where a majority comprising seven justices of the court resolved two rectification cases, [26] with judgments delivered on the same day involving similar issues, by focusing on identifying what the parties had agreed and comparing that to what the parties had recorded, while the two justices in dissent in both cases focused on the subjective intentions of the parties. It is argued in this thesis that the majority were correct to focus on what the parties had agreed on an objective basis rather than to focus on the subjective intentions of the parties. These recent cases in England and Canada address the most significant issues in the law of rectification and highlight the complexity of the law. The issues considered in these cases need to be addressed and resolved by Australian courts so that the law of rectification can provide the certainty that is required by contracting parties and those entering into voluntary settlements.

The two different types of mistakes, mistakes in recording agreements and mistakes made during the formation of agreements, can only be fully understood when considered in conjunction with two other areas of the law: common law construction and rescission. Mistakes made in the recording of prior agreements can be rectified only if that remedy is necessary after a court undertakes the common law process of construction. Accordingly, there is an important boundary between common law construction and the equitable doctrine of rectification. That is generally well understood. But the second type of mistake, a mistake made during the formation of an agreement, is not concerned with common law construction. What should initially be considered in such cases is whether the remedy of rescission is available to the mistaken party because the alleged mistake has occurred during the formation of an agreement and not in the recording of an agreement. If rescission is available, then rectification *may* be available as an *alternative* remedy. This is not generally well understood but a number of rectification cases from the 19th century demonstrate how this part of the law of rectification can be applied to provide justice in cases where a mistake is made during the formation of an agreement rather than during the recording of an agreement.[27] It is explained in this thesis how these two very different types of mistakes need to be understood in their individual contexts:

[25] Ibid 376.
[26] *Canada (Attorney General) v Fairmont Hotels Inc* [2016] SCC 56; and *Jean Coutu Group (PJC) In v Canada (Attorney General)* [2016] SCC 55.
[27] See for example *Garrard v Frankel* (1862) 30 Beav 445; 54 ER 961; and *Harris v Pepperell* (1867) LR 5 Eq 1.

mistakes in the recording of agreements must be understood in the context of the scope and application of common law construction; and mistakes made during the formation of agreements must be understood in the context of whether the mistaken party is entitled to rescission.

A distinction is also made in this thesis between rectification for mistakes and rectification for fraud. This important distinction is often not appreciated because many cases concerned with so-called unilateral mistake focus on the conduct of the non-mistaken party to determine whether rectification is justified. The cases reveal that the courts have struggled to identify when rectification should be imposed on a non-mistaken party. The courts have adopted different approaches based on sharp practice, unconscionable conduct and knowledge. The approach advocated for in this thesis is to first identify whether the conduct of the non-mistaken party is considered fraudulent. If no fraud is involved, then rectification should respond to the mistake made during the formation of the agreement and rescission should be the primary remedy with rectification offered to the non-mistaken party as an alternative remedy. In this way rectification is never imposed on a non-mistaken party unless they have acted fraudulently. If fraudulent conduct is found to have occurred, then a court may be justified in imposing rectification on the fraudulent party as an alternative to granting rescission for fraud.[28] In this way the remedy of rectification for fraud is essentially punitive and responds to the fraud that has been committed. It becomes irrelevant to identify a mistake. What is relevant is to identify any fraud.

C *Purpose of the research and key research questions*

The primary purpose of the thesis is to tackle the complexity that has emerged in the law of rectification. This is achieved by addressing the fundamental principles of the law of rectification and classifying rectification cases based on the type of mistake made rather than who made the mistake or who had knowledge of the mistake. If the distinctions and classifications in this thesis are adopted, the complexities identified by judges and scholars are *all* overcome and the law can be stated simply and applied consistently without difficulty.

[28] Rescission of a contract is available for fraud: see *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342, 345.

This thesis has five aims: (i) to outline the scope of the common law approach to construction and explain how the wide scope of common law construction limits the scope of the equitable doctrine of rectification; (ii) to outline the historical development of the law of rectification; (iii) to outline the current state of the law of rectification; (iv) to identify the issues with the current state of the law of rectification; and (v) to offer a comprehensive solution to the uncertainty and complexity in the law of rectification. To achieve these aims there are five key research questions that are addressed in this thesis:

(i) What is the scope of the common law approach to construction?;
(ii) What is the current law relating to when rectification will be granted?;
(iii) In what ways is it difficult to reconcile the current case law?;
(iv) Where did the law of rectification go wrong?; and
(v) How does the case law on the equitable doctrine of rectification need to be restated, in accordance with the principles established in earlier case law, so that the law is coherent and principled?

The common law approach to construction is addressed in Chapter I of the thesis and the current state of the law of rectification is addressed throughout Chapters IV to VIII. The difficulty in reconciling the current state of the law of rectification and identifying where the law of rectification went wrong are questions addressed throughout the thesis but specifically in Chapter III which examines the fundamental principles of the law of rectification which is relevant to both of those questions. The question of how the law needs to be restated so that it is coherent and principled is addressed in two ways. In Chapter III the fundamental principles of the law are examined which sets the foundation for how the law needs to be approached. Then in Chapters IV to VIII specific categories of cases are examined to demonstrate how the law needs to be categorised so that it is coherent and principled. But the analysis does not advocate a change in the law per se. Instead the analysis includes a detailed examination of earlier case law where the correct principles were established and it is explained why the law took a wrong turn when the distinction between common or mutual mistake and unilateral mistake was adopted. That distinction has proved to be unhelpful and has resulted in significant uncertainty with the current law which primarily impacts those involved in commerce and business. This uncertainty creates additional costs for business and for the judicial system and this thesis is intended to assist in the process of removing the uncertainty.

D *Statement of the thesis arguments*

The central thesis is that the current distinction between cases of common or mutual mistake and cases of unilateral mistake is misconceived because the focus should be on the type of mistake made and not on how many people were aware of the mistake. The distinction is also unhelpful because it does not provide the courts with clarity on what needs to be proved in each type of case and the distinction does not provide for a consistent rationale for why rectification should be available. The distinction creates unnecessary complexity because it enables, indeed encourages, litigants to plead common or mutual mistake and in the alternative, unilateral mistake. The proper distinction should in fact be between cases where there has been a mistake in the recording of a prior agreement (where a prior concluded contract or a prior agreement on a term was not accurately recorded in a proposed contract) and cases where there has been a mistake made during the formation of an agreement (such mistakes are often made by one party and in many cases noticed by the other party). Only when this distinction is properly understood and adopted is it possible to remove the complexity that has emerged in the law of rectification. Once the correct distinction is accepted, it is then possible to focus on the factors that are relevant in the two different circumstances. In cases of mistakes in recording agreements, the focus must be on *comparing* the agreement reached between the parties to what was recorded in the relevant document. However, where there has been a mistake in the formation of an agreement then a different focus is required. It is no longer an exercise in comparing what has been agreed with what has been recorded. The mistake is not one of recording. In cases of a mistake made during the formation of an agreement, the focus must be on identifying any mistake made by an offeror or by an offeree and determining whether it is appropriate to provide relief for such a mistake through rectification of the written document that purports to contain an agreement between the parties. It may be that the appropriate relief should be limited to rescission with an option for the non-mistaken party to form a contract based on the offer or the acceptance that the other party intended to communicate. It is important to ensure that an agreement is not imposed on one of the contracting parties without their consent where there is no justification for doing so.

In addition to the two core categories of cases of mistakes made in the recording of agreements and mistakes made during the formation of agreements, there are a further three categories where rectification might be available: (i) where there is evidence of fraud during the formation of a contract; (ii) where there has been a mistake in the effect of the words used in a document;

and (iii) the ability to have a document rectified by consent. In relation to fraud it is argued that the courts are justified in imposing a contract (through the remedy of rectification) on a party who commits fraud even though that party never consented to such a contract. In relation to cases where the words chosen by the parties have a different effect from what was agreed between the parties, it is argued that rectification should be available so that the parties are held to their agreement. In relation to consent, parties to an agreement have the freedom of contract to enter into a supplementary agreement to rectify any mistake in their written agreement.

It is argued in this thesis that the equitable doctrine of rectification is essentially a default jurisdiction in that the jurisdiction of rectification is limited by the scope of common law construction. As the approach to common law construction as a ground for correcting or curing a clear mistake has developed in recent decades to be more contextual, the role for rectification is now limited by the broad scope of the role of construction that has been recognised by the common law.

It is also argued in this thesis that there is a different rationale for the two key categories of rectification. Writing extra-judicially Lord Hoffmann[29] has explained that the rationale for rectification for mistakes in the recording of agreements, what he describes as document rectification, 'is based upon the equitable principle of making people keep their promises, in the same way as specific performance.'[30] By contrast, what his Lordship describes as contract rectification, 'is based upon a different equitable principle, namely the overarching principle of good faith which has generated specific rules imposing upon parties negotiating a contract specific obligations of good faith.'[31] There are indeed two different rationales for rectification in these two different categories. It is accepted in this thesis that the rationales expressed by Lord Hoffmann are correct and that rectification is granted where there has been a mistake in the recording of an agreement to ensure that parties are kept to their promises. In this way, equity provides relief in circumstances where the party seeking rectification would be without a remedy because of the common law rule in *L'Estrange v Graucob*[32] that provides that a party is bound by their signature. The rationale for rectification in circumstances where there has been a mistake made during the formation of an agreement is a remedy to ensure that parties

[29] Lord Hoffmann, above n 20.
[30] Ibid [28].
[31] Ibid [29].
[32] [1934] 2 KB 394.

negotiate in good faith and do not take advantage of a mistake. As the remedy should be available as an alternative to rescission, this rationale is consistent with the rationale for rescission which provides a remedy to restore the parties to their position prior to a mistake where one party has sought to take advantage of a mistake made by the other party. In the absence of the non-mistaken party electing to accept rectification instead of rescission the agreement will then be set aside and the parties restored to their original positions.

E *Research methodology and limitations of the scope of the thesis*

The focus of this thesis is on the case law from Australia, New Zealand, England, Ireland and Canada. The arguments contained in this thesis involve a different classification of those cases from the classification commonly used by judges, practitioners and scholars. Thus, the main examination of the law of rectification in this thesis focuses on the case law. Scholarly articles and books are examined where appropriate but as the scholarly works all adopt the classification of rectification cases between cases of common or mutual mistake and unilateral mistake the approach adopted in many of these scholarly works is rejected. Accordingly, the thesis is primarily concerned with the case law on construction and rectification. There are references in the thesis to the common law and equitable remedy of rescission but a detailed examination of the remedy of rescission is unnecessary and is beyond the scope of the thesis.[33]

F *Structure of the thesis*

This thesis comprises ten chapters that examine the scope of the equitable doctrine of rectification and its interaction with the common law process of construction and the remedy of rescission. Chapter I examines the common law process of construction as a means of corrective interpretation. The expanded role of construction in modern cases is examined to highlight the boundary between common law construction and the equitable doctrine of rectification. This examination emphasises that the scope of the equitable doctrine of rectification has been narrowed because of the more contextual approach of the common law process of construction whereby many errors and mistakes in documents can be corrected through a proper process of construction without the need for any remedy of rectification.

[33] For a recent examination of the law of rescission see: Denis S K Ong, *Ong on Rescission* (The Federation Press, 2015).

Chapter I includes an examination of the views of Professor Burrows and Professor McMeel that there is now only a very limited role for the equitable doctrine of rectification. There are three conclusions to Chapter I. First, the correction of minor errors through the common law process of construction is a proper and necessary role for common law construction as an alternative to a rectification plea. Numerous errors or mistakes in documents can be corrected by the courts by using a contextual approach to construction. Secondly, the use of common law construction to effectively overcome poorly worded contractual clauses remains controversial in circumstances where the clause lacks commercial sense. Although this is controversial, it is an important role for the process of common law construction to provide an appropriate meaning for a contractual clause where the clause lacks commercial sense. Thirdly, the jurisdiction of the common law process of construction has clearly expanded in recent decades and has resulted in a narrower scope of the equitable doctrine of rectification. Nevertheless, rectification remains a critically important equitable remedy, albeit a remedy with a narrower scope in recent decades.

Chapter II explores the historical development of the jurisdiction of the equitable doctrine of rectification to its current form which no longer requires an antecedent contractually binding agreement. The development that allows for rectification to be awarded where there has been a mistake in an offer, or the acceptance of an offer is examined. Such cases are often referred to as cases of unilateral mistake. Three additional categories of cases of rectification are introduced and briefly examined in Chapter II. These three additional categories of cases are: (i) rectification for fraudulent conduct; (ii) rectification where there is a mistake as to the legal consequences of a document; and (iii) cases where the courts have recognised that rectification is available as a self-help remedy by the consent of the parties without the need for court proceedings. Accordingly, there are five categories of rectification cases. The five categories are:

1. Rectification for a mistake in the recording of an agreement. This can be further divided into cases where there is a prior binding contract and cases where there is no prior binding contract but a non-binding agreement in relation to one or more terms that are proposed to be included in the final document.

2. Rectification for mistakes made in the making or accepting of offers.

3. Rectification for fraudulent conduct during the process of contract formation.

4. Rectification for mistakes in the effect or purpose of the words used in a contract.

5. Rectification by consent where the parties to a document agree to rectify a mistake by consent.

Four conclusions can be drawn from the analysis in Chapter II. First, the distinction between cases based on common or mutual mistake and cases based on unilateral mistake should be rejected. The distinction focuses on who made the relevant mistake, or who was aware of the mistake, rather than focusing on the type of mistake that has been made. The second conclusion is that the courts were justified in abandoning the requirement for an antecedent agreement. The abandonment of that requirement ensures that injustice is avoided where the parties, during their negotiations, agree on a proposed term to be included in their contract but by mistake omitted or incorrectly recorded the proposed term. The abandonment of the requirement for an antecedent binding contractual agreement ensures that the courts can provide a just remedy in such cases. The third conclusion is that the effect of the combined development of a requirement for a common or mutual mistake and an exception for unilateral mistake was that rectification was made available for a very different type of mistake: a mistake made during the formation of an agreement. Rectification was no longer restricted to mistakes made while recording an agreement. The fourth conclusion is that there are five categories of rectification cases as outlined above. It is important to examine rectification cases using these five categories because different considerations apply to each category. The commonly used categories of common or mutual mistake and unilateral mistake should be abandoned in favour of the five categories outlined in Chapter II.

In Chapter III, three fundamental principles of the equitable doctrine of rectification are examined. The three principles are: (i) that rectification is concerned with agreements and not intentions; (ii) courts must adopt an objective approach when determining what the parties have agreed; and (iii) courts should consider the outward acts of the parties when determining the objective agreement reached between the parties. There has been some controversy concerning all of these principles but the controversies reflect a misunderstanding of the role of rectification. The primary role of rectification where there has been a mistake in the recording of an agreement is *not* to give effect to the subjective intentions of the parties: the primary role

of rectification is to provide relief in circumstances where there is a mistake in the recording of an agreement. The conclusion of Chapter III is that the three fundamental principles can be stated as a single proposition: when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement, a court must identify what the parties have agreed on an objective basis including an examination of their outward acts. This proposition will only operate when a court is considering a claim for rectification in the core case where there has been a mistake in the recording of an agreement.

Chapters IV, V, VI, VII and VIII explore the five categories of cases where rectification has been held to be available. Chapter IV examines cases concerned with the core jurisdiction of rectification to correct mistakes in the recording of agreements which is generally not contentious. The courts abandoned the historical requirement for an antecedent binding contractual agreement and there is only a requirement that there be a prior agreement on a specific term or clause to be included in the proposed contract and that the parties continued to agree that that term should be included in the agreement up to the time when the final written document was executed. That was a necessary development of the law because many modern contracts involve extensive negotiations in which various proposed terms are progressively agreed to prior to a contract being formed. The doctrine of rectification needed to evolve to take account of this commercial reality. Chapter IV also examines cases where one or more of the parties to an agreement have entered into the agreement based on a false assumption or mistaken belief concerning a matter. There are two conclusions to Chapter IV. First, where there has been a mistake in the recording of an agreement rectification is available simply because there has been a mistake and the party that seeks to resist rectification is unable to show that the parties negotiated a new agreement to replace the earlier agreement. The rationale for rectification in these circumstances is to ensure that parties are kept to their promises. The second conclusion is that false assumptions and mistaken beliefs are not mistakes for the purposes of rectification and, accordingly, rectification will not be awarded in such cases.

Chapter V examines cases concerned with mistakes made during the formation of agreements. This is a fundamentally different jurisdiction to cases of mistakes made in the recording of agreements examined in Chapter IV. The cases examined in Chapter V are concerned with issues that arise during the *formation* of an agreement and *not* mistakes made in the *recording* of an agreement. The examination of these cases in Chapter V demonstrates that initially the courts did not allow rectification in these circumstances but in the 19th century the courts began

to allow rectification in these cases depending upon the knowledge and conduct of the non-mistaken party. However, the courts have adopted an inconsistent approach with some cases focusing on the whether the non-mistaken party had actual or constructive knowledge of the mistake or whether the non-mistaken party had engaged in sharp practice or unconscionable conduct. A major difficulty with these cases is that the courts have been prepared to impose a contract on a non-mistaken party on terms that they have not consented to. It is argued in Chapter V that this approach should be rejected and that the courts should only impose a contract on a negotiating party if that party has engaged in fraudulent conduct during the process of formation of the contract. It is the conclusion of Chapter V that if a mistake is made during the formation of an agreement, the mistaken party should seek any relief available in the form of rescission. If rescission is available, the non-mistaken party may be offered the opportunity to either accept rescission of the agreement or form a contract on the terms intended to be proposed by the mistaken party.

Chapter VI examines cases concerned with rectification where a party has engaged in fraud during the formation of a contract. It is argued that in these cases the courts are justified in imposing a contract on the fraudulent party. It is also argued that it is irrelevant if the innocent party has made a mistake because rectification in these cases is a remedy that responds to the fraud and not a remedy that responds to any mistake. The innocent party should not have to prove that they were mistaken: they should only need to prove that the other party engaged in fraudulent conduct or conduct that the court considers equivalent to fraud. Accordingly, it is necessary to prove some form of dishonest conduct to obtain rectification in these cases. A party simply acting opportunistically will not be sufficient to justify the imposition of a contract on that party. The conduct needs to amount to fraud in that it can be shown that the party set out to positively deceive the innocent party. In such cases imposing a contract on the fraudulent party can be justified.

Chapter VII examines cases where there has been a mistake made in relation to the purpose or effect of the words used in a written agreement. These cases raise difficult issues and involve several different circumstances including ignorance of statutory provisions and the courts interpreting the words used by the parties differently from how the parties intended those words to be interpreted. The cases examined in this Chapter show that rectification will be available in three circumstances where there is a mistake in the effect of the words used by the parties: (i) to give effect to the intentions of the parties where those intentions are reflected in an

agreement reached between the parties determined on an objective basis; (ii) in deed polls and voluntary deeds where the document does not give effect to the subjective intention of the person who executed it; and (iii) where the words used in an agreement are construed by a court to have a different meaning or effect from the agreement reached between the parties. Rectification should be denied in other circumstances, including where the agreement between the parties is in fact reflected in the written document. In such cases there is no mistake and rectification should be denied. It will be especially difficult for the party seeking rectification to prove that there has been a mistake in the recording of an agreement if the words chosen by the parties are clear and unambiguous. Rectification will also be properly denied where the parties were ignorant of a statutory provision or failed to properly account for the relevant statutory provision when they formed their agreement. To grant rectification in such cases would be to make a new agreement for the parties and that is not permissible under the law of rectification.

Chapter VIII examines a small number of cases concerned with rectification by consent. Parties to a written agreement can, by consent, enter into a supplementary agreement to rectify a mistake that they believe was included in their original document. If they do enter into a supplementary agreement, the courts will no longer have jurisdiction to correct a mistake in the earlier written document through rectification. In addition, if a third party is of the view that their rights have been impacted and the supplementary agreement does not operate to rectify a mistake but rather acts to *amend or vary* the earlier agreement, the third party will be able to apply to a court for appropriate relief, which might be a declaration that the supplementary agreement reflects a variation to the earlier agreement and is not a rectification of a mistake in the earlier agreement. In some cases a different remedy might be appropriate, depending upon the circumstances of the case.

Chapter IX briefly outlines two practical implications of the thesis. It should be noted that a detailed analysis of the practical implications is beyond the scope of the thesis and the implications are not required to justify the thesis arguments. The two implications examined concern the pleading of rectification cases and the evidentiary burden of a party seeking to resist a claim for rectification. In relation to pleadings, if the classification of rectification cases in this thesis is adopted, a party making an application for rectification should plead the type of mistake made and not how many parties were mistaken. This will assist the court in determining what needs to be proved by the party seeking rectification and what additional

remedy might be available, such as rescission. In addition, it should no longer be necessary to plead common or mutual mistake as well as, in the alternative, unilateral mistake. The type of mistake made should be pleaded and that will often be only one type of mistake. If a fraud has been committed, the party seeking rectification should plead fraud rather than mistake. That is because in such cases the remedy of rectification responds to the fraud committed and not to any mistake.

In relation to the adducing of evidence, drawing a distinction between rectification for mistakes in recording agreements and rectification for mistakes made during the formation of an agreement ensures that the courts apply the evidentiary requirements that are appropriate for these two different types of cases. In a case where it is alleged that there has been a mistake in the recording of an agreement the party seeking rectification needs to prove that there was an agreement and the terms of that agreement. In doing so, that party will seek to show that, by comparing the alleged agreement with the written document, there has been a mistake in the recording of the agreement. The party resisting rectification will need to show that although there may have been a prior agreement the parties engaged in further negotiations which led to a different agreement at a later time and that that final agreement made by the parties is correctly recorded in the written document. In cases where there has been a mistake made during the formation of a contract, the party seeking relief for the mistake needs to establish that rescission is first available as a remedy by adducing evidence of the mistake and proving that there was a mistake that justified the setting aside of the agreement. If that is established, the court may offer rectification to the non-mistaken party as an alternative to rescission.

Finally, Chapter X summarises the conclusions of the thesis. There are nineteen conclusions:

1. The correction of minor errors through the common law process of construction is a proper and necessary role for common law construction.

2. It is an appropriate role for the process of common law construction to provide a meaning for a contractual clause where the clause lacks commercial sense.

3. The equitable doctrine of rectification is a default jurisdiction limited by the scope of construction. The jurisdiction of the common law process of construction has expanded

in recent decades resulting in a narrower scope of the equitable doctrine of rectification. Nevertheless, rectification remains an important equitable remedy.

4. The current distinction made by the courts and litigants between cases of common or mutual mistake and cases of unilateral mistake is misconceived because it is irrelevant how many people are aware of the mistake. The distinction is unhelpful and creates unnecessary complexity.

5. The focus of rectification must be on the *type* of mistake made and not on *who* made it. There are two relevant types of mistakes: mistakes in recording agreements and mistakes made during the formation of a contract. When rectification cases are classified in this way much of the complexity in the law of rectification is removed and the focus shifts to what needs to be proved in each type of case. In cases concerning the recording of an agreement the focus is on the existence of a mistake and knowledge of the mistake is irrelevant. By contrast, in cases concerning mistakes made during the formation of a contract the focus of the court is on knowledge of the mistake and the conduct of the non-mistaken party.

6. In cases of mistakes in recording agreements, the focus must be on *comparing* the *agreement* reached between the parties to what was *recorded* in the relevant document. This also means that when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement a court must identify what the parties have agreed on an objective basis, including by examining their outward acts, where such an examination assists in determining what the parties have agreed on an objective basis.

7. In cases of mistakes made during the formation of an agreement, the focus must be on identifying any mistake made by an offeror or an offeree. It does not assist in describing these as cases of unilateral mistake although in most cases only one party will be mistaken. It is simply irrelevant that only one party is mistaken. The focus needs to be on identifying the relevant mistake so that the appropriate remedy can be identified, whether that is rescission, or rectification as an alternative remedy.

8. The courts were justified in abandoning the requirement for an antecedent contractual agreement before rectification can be granted. The abandonment of that requirement ensures that injustice is avoided where the parties, during their negotiations, agree on a proposed term to be included in their contract but by mistake, either omit or incorrectly record the proposed term. The abandonment of the requirement for an antecedent agreement ensures that the courts can provide a just remedy in such cases.

9. The effect of the combined development of a requirement for a common or mutual mistake and an exception for unilateral mistake was that rectification was made available for a very different type of mistake: a mistake made during the formation of an agreement. Rectification was no longer restricted to mistakes made while recording an agreement.

10. False assumptions and mistaken beliefs are not mistakes for the purposes of rectification. To allow rectification in such cases would be to make a new contract for the parties different from the contract that they made. That is beyond the scope of the remedy of rectification. When entering into contracts parties need to consider their assumptions and beliefs carefully because there is no remedy available to overcome a mistaken assumption or belief. The court has no role in making a new agreement for the parties.

11. Where there has been a mistake in the recording of an agreement, rectification is available simply because there has been a mistake. But a party can resist rectification if they can show that the parties negotiated a new agreement to replace the earlier agreement. The rationale for rectification in these circumstances is to ensure that parties are kept to their promises.

12. In cases of mistakes made during the formation of an agreement, the appropriate relief should be limited to rescission (if rescission is available on the facts of the case), with an option for the non-mistaken party to form a contract with the mistaken party based on the offer that the mistaken party intended to communicate. In these circumstances, rectification becomes an optional remedy for the non-mistaken party instead of accepting rescission but only as an alternative remedy where rescission is available.

13. There are three additional categories of cases where rectification may be available: (i) where there has been a mistake in the effect of the words used in a document; (ii) where there is evidence of fraud during the formation of a contract; and (iii) the ability to have a document rectified by consent.

14. Where there has been a mistake made during the formation of an agreement there is no justification in imposing a different agreement on the parties unless one party has engaged in fraud which is a different category of case. In such cases it is irrelevant whether the innocent party was mistaken. The remedy of rectification in these cases responds to the fraud that has been committed and does not respond to any mistake made by the innocent party.

15. Rectification will be available in three circumstances where there is a mistake in the effect of the words used by the parties: (i) by giving effect to the intentions of the parties where those intentions are reflected in an agreement reached between the parties determined on an objective basis; (ii) in deed polls and voluntary deeds where the document does not give effect to the subjective intention of the person who executed it; and (iii) where the words used in an agreement are construed by a court to have a different meaning or effect from the agreement reached between the parties.

16. It will be especially difficult for the party seeking rectification to prove that there has been a mistake in the recording of an agreement if the words chosen by the parties are clear and unambiguous. In such cases the court is more likely to conclude that there has not been a mistake because the words chosen by the parties have a clear meaning and so there is little chance that there has been a mistake as alleged by the party seeking rectification.

17. Ignorance of the effect of a statutory provision is, as a general rule, not a ground for rectification of a document but in some cases rectification will be available. In the contractual context the availability of rectification will depend on how clear or precise the agreement between the parties was, and in the non-contractual context, the availability of rectification will depend on the evidence of the intention of the person who executed the document. In such cases rectification will not be granted if it would

make a new agreement for the parties different from the agreement that they made. These cases are similar to cases involving mistaken assumptions and false beliefs.

18. Parties to a written agreement can, by consent, enter into a supplementary agreement to rectify a mistake that they believe was included in their original document. If they do enter into a supplementary agreement, the courts will no longer have jurisdiction to correct a mistake in the earlier written document through rectification. The court does not have jurisdiction to grant rectification because there is no document that requires rectification, the parties having already exercised their self-help remedy of rectification by consent.

19. Where a supplementary agreement is executed by the parties to an earlier agreement and a third party is of the view that their rights have been impacted, and the supplementary agreement does not operate to rectify a mistake but rather amends or varies the terms of the earlier agreement, that third party will be able to apply to a court for appropriate relief which might be a declaration that the supplementary agreement reflects a variation to the earlier agreement and is not a rectification of a mistake in the earlier agreement.

I CONSTRUCTION AS A MEANS OF CORRECTIVE INTERPRETATION

A *Distinction between construction and rectification*

It has long been held that mistakes in written documents can be corrected as part of the common law process of construction. This is achieved by attributing appropriate meaning to the words used by contracting parties rather than by physically amending the words used in the document. In many cases a mistake made in drafting a document will not require rectification because the mistake can be corrected through a contextual approach to construction. When adopting a contextual approach to construction a court looks beyond a literal interpretation and considers the context in which the words have been used. Obvious mistakes can be easily corrected. An early example of a mistake being corrected through construction occurred in *Coles v Hulme*[34] where it was stated in the recitals to a bond that one party was indebted to the other party for various sums which were all stated in pounds sterling totalling 7700 pounds. But in the obligatory part of the bond the word 'pounds' was omitted. The bond simply stated that 7700 was payable without stating the description of the money to be paid or any reference to any currency. Lord Tenterden CJ held that there was no doubt that there was a mistake and that 'the bond ought to be read as if the word pounds were inserted in it.'[35] Bayley and Littledale JJ agreed with Lord Tenterden CJ.[36] Accordingly, the process of construction required that '7700' be read as if it said '7700 pounds'.[37]

As the decision in *Coles v Hulme* demonstrates there is scope within the process of construction, to read words *as if* different words or additional words actually appeared in the document. The words used are not physically changed in the document which is the process that occurs when a document is rectified. The jurisdiction to construe documents in this way is quite wide and extends from the correction of simple errors such as misnomers to the correction of more complex errors such as a clause in a contract that lacks commercial sense.

[34] (1828) 8 B & C 568; 108 ER 1153.
[35] Ibid 573.
[36] Ibid 574.
[37] See also *Gwyn v The Neath Canal Navigation Company* (1868) LR 3 Exch 209.

When construing a contractual document, courts must consider the factual matrix in which the parties formed their contract.[38] In *Investors Compensation Scheme Ltd v West Bromwich Building Society*[39] Lord Hoffmann explained that:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. … The meaning which a document … would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.[40]

However, this approach has been criticised. Sir Richard Buxton,[41] a former Lord Justice of Appeal, has argued that:

> The whole point of drawing up a document, and in particular a contractual agreement, is so that the legally binding obligation of the parties can be found in that document; which being a document can only speak through the words used in it. When something has gone wrong with the language used in the document, that shows that the parties did not succeed in giving the document the meaning that they intended. That meaning may be found elsewhere but, precisely because the language of the document that purports to express that meaning has gone wrong, it cannot be found in the document.[42]

Sir Richard Buxton argues that the approach adopted by Lord Hoffmann in *Investors Compensation Scheme* was revolutionary 'because it overrode the previous understanding that, rectification apart, the court could not depart from the words of the document to find an agreement different from that stated in the document.'[43] Nevertheless the approach adopted by Lord Hoffmann has prevailed and will be examined further throughout this Chapter.

Despite the expanded scope of the common law process of construction it is important to appreciate the limits of that process because the limitation effectively retains an important role for the equitable doctrine of rectification. The common law limits the correction of mistakes through construction by *restricting* the evidence that is admissible as part of the construction

[38] *Prenn v Simmonds* [1971] WLR 1381; and *Reardon Smith v Yengvar Hansen-Tangen* [1976] 1 WLR 989.
[39] [1998] 1 WLR 896.
[40] Ibid 912-3.
[41] Richard Buxton, '"Construction" and Rectification after *Chartbrook*' [2010] 69 *Cambridge Law Journal* 253.
[42] Ibid 256.
[43] Ibid.

process. Importantly, evidence of prior negotiations is inadmissible but the courts allow evidence of the circumstances in which the parties formed their contract to be considered as part of the construction process.[44] Because evidence of prior negotiations is inadmissible the common law, through construction, will not always come to what might be considered the correct resolution of the issue because not all the facts are considered. By contrast, equity imposes no limitation on the admissibility of evidence when considering a claim for rectification, other than that such evidence needs to be relevant. Equity allows evidence of prior negotiations. Through this process, equity is more likely to correctly identify any mistake in a document because equity has access to the facts that outline the whole history between the parties as to how the agreement was negotiated and what the parties sought to achieve from their agreement. All this evidence can be considered by equity to determine if there has been a mistake in the final document and how that mistake should be corrected through rectification. Importantly, equity is not concerned with placing a meaning on the words used. If a mistake is identified, the correction of the mistake is achieved by physically changing the words that were used to a different set of words to reflect what the parties actually agreed as determined on an objective basis. In this way equity is essentially relieving a party from the common law rule that a person is bound by their signature.[45] Rectification is an exception to that common law rule. Once a mistake in a document is identified by equity and the correct position established the court can order that the document be physically amended through a handwritten annotation on the final document.[46] Although this has been ordered in some cases it is rarely made as an explicit order although in some circumstances it might be prudent for a party to seek such an order if the contract contains significant obligations yet to be performed, and particularly if it is possible that either party will assign their interests under the agreement. By physically having the document amended by court order any third party acquiring rights under the agreement will have notice of the amendments made to the final document by the court order.

There is another practical difference between mistakes corrected through construction at common law and mistakes corrected by equity through rectification. Because construction places a meaning on the words used the construction of the document determined by the court

[44] For discussion of the material that a court can consider see John Bond, 'The use of extrinsic evidence in aid of construction: A plea for pragmatism' (2016) 42 *Australian Bar Review* 281; and Caitlin Moustaka, 'The Admissibility and Use of Evidence of Prior Negotiations in Modern Contract Interpretation' (2016) 41 *The University of Western Australia Law Review* 203.
[45] *L'Estrange v Graucob* [1934] 2 KB 394.
[46] See *Stock v Vining* (1858) 25 Beav 235; 53 ER 626; and *White v White* (1872) LR 15 Eq 247.

is binding on all parties as from the date of the agreement and is equally binding on any third party that has acquired rights under the agreement at some later time. The construction arrived at is by its nature retrospective and makes no allowance for third party rights acquired since the agreement was formed. Although the equitable remedy of rectification is also retrospective it is a discretionary remedy and the courts will consider the rights of third parties before exercising that discretion. Accordingly, in some cases, rectification may be denied because of the impact such a remedy would have on the rights of a third party who acquired such rights without knowledge of another party's right to seek rectification of the document.

As equity has a default jurisdiction to correct mistakes through rectification that commences where the common law construction jurisdiction ends, if the common law jurisdiction expands then the equitable jurisdiction will necessarily contract. The common law jurisdiction would expand if, for example, the courts relaxed the restrictions on the admissibility of evidence. If the common law jurisdiction expands, the equitable jurisdiction will contract because the courts have held that a proper process of construction must take place before rectification can be sought.[47] That approach is appropriate because the process of construction may result in the court identifying the meaning that the parties intended and resort to rectification in such circumstances will be unnecessary. Because the courts have held that the jurisdiction of the doctrine of rectification only starts once the limits of construction have been exhausted, it is necessary in this thesis, before examining the scope of the equitable doctrine of rectification, to examine the scope of construction to correct errors and mistakes in written contractual documents. Accordingly, the purpose of this Chapter is to explore the limits of the ability of the courts to correct mistakes through a process of construction.

In examining construction in this Chapter, it is important to appreciate that construction is an objective and not a subjective exercise. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*[48] Lord Hoffmann said, in relation to construction, that 'the law is not concerned with subjective intentions. All that matters is the objective meaning of the words.'[49] His Lordship said that when, 'therefore, lawyers say that they are concerned, not with subjective meaning but with the meaning of the language which the speaker has used, what they mean is that they are concerned with what he would objectively have been understood to

[47] See *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85; and *Keys v Salway* [2015] NSWSC 613.
[48] [1997] AC 749.
[49] Ibid 775.

mean.'[50] In Australia the principles relating to the construction of a commercial contract were recently summarised by French CJ, Hayne, Crennan and Kiefel JJ in the High Court of Australia in *Electricity Generation Corporation v Woodside Energy Ltd*.[51] Their Honours said that 'this Court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean.'[52] Their Honours said that 'it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.'[53] Accordingly, an objective approach must be taken, including in circumstances where construction is being used to correct an error in the words used.

Another important consideration when examining common law construction is that to warrant correction through construction there must be a clear error and it must be clear how the error should be corrected. Professor McMeel[54] stated these two requirements when he said that the 'modern rule is that if two conditions are satisfied, the court can "correct" the document as a matter of construction without recourse to the equitable remedy of rectification.'[55] Professor McMeel notes that first, 'there must be a clear mistake, which is ascertained by considering the document against the admissible background or surrounding circumstances' and secondly, 'it must be clear what correction ought to be made in order to cure the mistake.'[56] If these conditions are met, mistakes in a document can be corrected through construction and even significant errors can be corrected.[57] As Lord Hoffmann explained in *Chartbrook Ltd v Persimmon Homes Ltd,*[58] there is not 'a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed' and that all 'that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.'[59]

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[50] Ibid. See also *Bank of Credit & Commerce International SA v Ali* [2002] 1 AC 251, 259.
[51] (2014) 251 CLR 640.
[52] Ibid 656.
[53]Ibid 656-7. See also *Lindsay-Owen v Schofields Property Development Pty Ltd* [2014] NSWSC 1177, [46].
[54] Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 2nd ed, 2011).
[55] Ibid 484.
[56] Ibid 484-5. A slightly different expression of the same principle can be found in *Cherry Tree Investments Ltd v Landmain Ltd* [2013] Ch 305, 325.
[57] For recent examples of the correction of mistakes through a process of construction in pension scheme documents see: *Honda Motor Europe Ltd v Powell* [2014] EWCA Civ 437; *ICM Computer Group Ltd v Stribley* [2013] EWHC 2995 (Ch); and *Re BCA Pension Trustees Ltd* [2015] EWHC 3492 (Ch). See also Edward Sawyer, 'Recent Pension Cases' (2014) 28(2) *Trust Law International* 89.
[58] [2009] 1 AC 1101.
[59] Ibid 1114.

The construction cases in this Chapter are examined in two categories. The first category focuses on the correction of minor errors such as misnomers, plain and palpable mistakes and manifest errors and the supplying of missing words. The second category examines the correction of more significant drafting errors such as meaningless terms, improbable results (including absurdities and inconsistencies) and clauses lacking commercial sense. The second category is controversial because it allows for the correction of quite significant errors. Nevertheless, construction requires that the courts must place a meaning on the words used if that is possible. However, the meaning arrived at by a court may still not accord with what one party claims was the objective agreement between the parties and, in such circumstances, it is possible that a claim for rectification will succeed because additional evidence might be admissible, for example evidence of the prior negotiations between the parties, which might reveal that a different agreement was reached between the parties that has been incorrectly recorded in the written contract.

B *Correction of minor errors*

1 *Misnomers*

Misnomers are a common form of mistake that can be corrected through construction without the need to resort to rectification. Misnomers can occur in any number of ways. A misnomer may arise in relation to the reference to the date of a document,[60] a date in a document,[61] the incorrect referencing of the contract's subject matter,[62] the incorrect completion of standards forms,[63] or in a plan or a schedule included as part of a written contract.[64]

The issue of a misnomer was considered by the House of Lords in *Wilson v Wilson.*[65] The appellant and his wife had separated and the appellant and two trustees for his wife entered into an agreement in the form of a deed. The appellant was John Wilson and his wife was Mary Wilson. The seventh article of the deed provided that John Wilson would be indemnified by

[60] See *Way v Hearn* (1863) 13 CB NS 292; 143 ER 117.
[61] See *Norfolk Estates Ltd v Cadiz Corp Pty Ltd* (1977) 8 ATR 77.
[62] See *Ionides v Pacific Fire & Marine Insurance Co* (1871) LR 6 QB 674. The judgment was affirmed on appeal: see *Ionides v Pacific Fire & Marine Insurance Co* (1872) LR 7 QB 517.
[63] See *Welshman v Robertson* (1875) 1 VLR 124.
[64] See *Edmundsbury & Ipswich Diocesan Board of Finance v Clark (No 2)* [1973] 1 WLR 1572.
[65] (1854) 5 HLC 40; 10 ER 811.

his wife against the debts of John Wilson. Mrs Wilson sought specific performance of the deed but also argued that there was a clerical error in the deed and the reference in article 7 to the debts of John Wilson was an error and that 'John' should be read as 'Mary'. On a literal construction of the clause Mrs Wilson would be liable to indemnify her husband for all of his debts when, as she alleged, all she had agreed to was that he should be indemnified from liability for any of her debts. The Lord Chancellor said that it is 'impossible, on the evidence, not to see exactly how that arose; in truth, it was a mere accident; the name was copied wrongly.'[66] The Lord Chancellor said that it 'is an extremely improbable thing that the Trustees should make such an agreement; the consequence might be that these gentlemen might have involved themselves in irretrievable and hopeless ruin.'[67] Accordingly, it was held that, as a matter of construction, 'John' should be read as 'Mary' in article 7. Lord St Leonards agreed.[68]

Mistakes often occur when documents refer to mortgagors and mortgagees or lessors and lessees and the wrong party is referred to in one or more of the clauses in the contract. This occurred in *Re United Pacific Transport Pty Ltd*[69] where a company, United Pacific Transport Pty Ltd, executed a deed in the form of a fixed debenture charge over its assets in favour of the applicant. The deed referred to the property of the mortgagee instead of the mortgagor. W.B. Campbell J said that 'the word "mortgagee" in the latter part of Cl. 2 of the deed should be read as "mortgagor" otherwise that latter part of the clause is meaningless and clearly contrary to the intention of the parties as it appears from the whole of the contents of the debenture charge.'[70] A similar issue arose in *Littman v Aspen Oil (Broking) Ltd*[71] but it was not as obvious that a mistake had occurred. The parties entered into a lease on 12 April 2001 for a term of five years commencing on 24 June 2001. Clause 10 of the lease provided that either party could terminate the lease at the end of the third year provided that 'in the case of a notice given by the Landlord the Tenant shall have paid the rents hereby reserved and shall have duly observed and performed the covenants on the part of the Tenant'. In December 2003 the tenant purported to bring the lease to an end. The landlord claimed that the notice given to terminate the lease was not effective because the tenant was in breach of its obligations under the lease at the date that the termination notice was given. The landlord commenced proceedings claiming that the

[66] Ibid 52-3.
[67] Ibid 54.
[68] Ibid 68.
[69] [1968] Qd R 517.
[70] Ibid 523.
[71] [2005] EWCA Civ 1579.

notice was ineffective and the tenant argued that its right to terminate the lease was unconditional under clause 10 of the lease. Hart J construed clause 10 so that the word 'Landlord' should be read as if it said 'Tenant' so that if the tenant wished to give notice to terminate the lease the tenant could only do so if the tenant was not in breach of its obligations under the lease. The tenant appealed to the Court of Appeal. In the Court of Appeal, Jacob LJ said that at the time that the appeal was heard the parties were in agreement that Hart J was right to hold that the wording in clause 10 of the lease was an absurdity.[72] Jacob LJ said that 'it is now also common ground that the clause cannot have been intended to convey a nonsensical meaning.'[73] However, in the appeal, the tenant maintained its position that the word 'Landlord' in clause 10 should not be read as if it said 'Tenant' on the basis that although it was clear that a drafting error had occurred it was not possible to say with certainty what the error actually was and that, absence rectification, the clause must be regarded as void for uncertainty. Jacob LJ noted that 'one knows that the parties intended to agree something.'[74] In rejecting the appeal on the issue of construction Jacob LJ said that:

> What that something is must depend on the words used – one is trying to find out what they mean. The result of the words actually used is a nonsense, but it requires only the correction of one word to make sense – and the correction is of the sort of mistake we all make frequently (e.g. 'plaintiff' for 'defendant', or even 'plaintiff' for 'claimant').[75]

His Lordship concluded by saying that 'I recognise that it means holding the tenant accepted an onerous condition (for his right to break depends on full compliance with all the covenants) but that is not the same thing as reading the clause to mean something daft.'[76] Both Longmore LJ[77] and May LJ[78] agreed that the appeal should be dismissed.

The issue of a misnomer in relation to the name of a company arose in *Nittan (UK) Ltd v Solent Steel Fabrication Ltd trading as Sargrove Automation.*[79] The defendant, Solent Steel Fabrication Ltd had a policy of insurance with Cornhill Insurance Co Ltd. In 1973 Solent Steel took over the assets, but not the liabilities, of Sargrove Electronic Controls Ltd. In February 1974 Solent Steel began to trade under the trading name of Sargrove Automation. Cornhill

[72] Ibid [6].
[73] Ibid.
[74] Ibid [14].
[75] Ibid.
[76] Ibid [15].
[77] Ibid [28].
[78] Ibid [33].
[79] [1981] 1 Lloyd's Rep 633.

Insurance agreed to extend Solent Steel's insurance to include product liability insurance in relation to the new business acquired by Solent Steel. But the relevant clause of the policy referred to Sargrove Electronic Controls Ltd as the insured for the purposes of the extended cover. The cover also included an exclusion clause that the cover did not extend to liability for damage caused or arising out of the failure of any goods to perform their intended function. The plaintiff acquired electronic timers from Solent Steel to use in the manufacture of smoke detectors. The parts provided by Solent Steel were alleged by the plaintiff to be faulty and the plaintiff commenced proceedings for damages against Solent Steel and that action was settled between the parties. Solent Steel claimed an indemnity from Cornhill Insurance but Cornhill Insurance denied liability and relied on the exclusion clause that the goods supplied by Solent Steel failed to perform their intended function. Solent Steel contended that the exclusion clause did not apply because it only applied in relation to goods supplied by Sargrove Electronic Controls Ltd. Because the goods had in fact been supplied by Solent Steel they argued that the damage was covered by the main indemnity provisions in their product liability policy. Wein J held that in the absence of an order for rectification Cornhill could not rely on the exclusion clause and that there was no case for rectification and, accordingly, Cornhill had to suffer the consequences of its mistake in describing the insured incorrectly. Cornhill appealed to the Court of Appeal.

In the Court of Appeal, the Master of the Rolls, Lord Denning, rejected the approach taken by Wein J and said that everyone 'must have realized that this was just a misnomer.'[80] The Master of the Rolls said that it 'seems to me that the meaning of the document was clear' and that the 'words "Sargrove Electronics Limited" were just a misnomer: and the correct description was well-known to all to be "Sargrove Automation", a division of Solent Steel Fabrications, which was the insured party.'[81] Accordingly, the Master of the Rolls held that the appeal would be allowed.[82] Both Brightman LJ[83] and Griffiths LJ[84] agreed that the appeal should be allowed.

But a misnomer in relation to the name of an actual contracting party cannot generally be overcome through construction. It will be necessary to have the document rectified to reflect the correct name of the contracting party. In *Rhodian River Shipping Co SA v Halla Maritime*

[80] Ibid 637.
[81] Ibid.
[82] Ibid 638.
[83] Ibid 640.
[84] Ibid 641.

Corp[85] the first plaintiff, Rhodian River Shipping Co SA, owned the vessel *Rhodian River*, while the second plaintiff, Rhodian Sailor Shipping Co SA, was negotiating to buy the vessel *Rhodian Sailor*. Both companies had the same directors and shareholders and both vessels were managed by Christaco, also having the same directors and shareholders as the two plaintiffs. Christaco engaged a broker to secure charterparties for both vessels. In due course a fixture of *Rhodian Sailor* was negotiated and all the terms were agreed with the brokers for the defendants, Halla Maritime. But when the contract was being prepared the Rhodian River Shipping Co SA was used by mistake as the contracting party instead of Rhodian Sailor Shipping Co SA, which was at the time securing ownership of the *Rhodian Sailor*. Halla Maritime arranged a sub-charter of the vessel to carry cement from Korea to Qatar. On 26 December 1982 the *Rhodian Sailor* sunk off Taiwan. Halla Maritime commenced proceedings against Rhodian River Shipping Co SA in Louisiana and arbitration proceedings in London. The plaintiffs applied for rectification of the charterparty. Bingham LJ said that on 4 December 1982 it had been agreed by Halla Maritime that 'a charter-party should be entered into between Halla as charterers and those who would shortly be taking over the ship as owners or disponent owners and renaming her *Rhodian Sailor*.'[86] His Lordship added that when 'the completed agreement between the parties was reduced to writing, the parties' common continuing intention was not faithfully reflected in the charter-party.'[87] As a result of a mistake 'the wrong name found its way into the document.'[88] His Lordship concluded that 'the plaintiffs do establish the conditions necessary for inviting the Court to rectify the contract.'[89]

But a different position has been taken when the name of a party used in a contract is a non-existent company. In those circumstances the reference to the non-existent company will be read, as part of the process of construction, as if it was a reference to the company that intended to enter into the contract. In *F. Goldsmith (Sicklesmere) Ltd v Baxter*[90] the plaintiff company, F. Goldsmith (Sicklesmere) Ltd, purported to enter into a contract to purchase some land. However, by mistake, a director of the company gave his solicitor the incorrect name of the company, Goldsmith Coaches (Sicklesmere) Ltd. No company existed with that name. The property was conveyed to the non-existent company. Subsequently part of the property was

[85] [1984] 1 Lloyd's Rep 373.
[86] Ibid 377.
[87] Ibid.
[88] Ibid.
[89] Ibid. Similar issues arose in *Elders Lensworth Finance Ltd v Australian Central Pacific Ltd* [1986] 2 Qd R 364; and *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC).
[90] [1970] 1 Ch 85.

sold to the defendant and again the incorrect name of the company was used as the vendor. The purchaser discovered the error and refused to perform the contract arguing that there was no contract because no company of the name of the vendor existed. The correct company, F. Goldsmith (Sicklesmere) Ltd, sought specific performance of the agreement. Stamp J was satisfied that there never had been any company with the name Goldsmith Coaches (Sicklesmere) Ltd and that 'Goldsmith Coaches (Sicklesmere) Ltd. is no more nor less than an inaccurate description of the plaintiff company, F. Goldsmith (Sicklesmere) Ltd.'[91] His Honour concluded that there was a contract and that the plaintiff company had simply been inaccurately described in the contract. His Honour said that the 'plaintiff company is entitled in my opinion to have the contract specifically performed, but the claim for rectification is in my judgment misconceived. Either the plaintiff company was a party to the contract, or there was no contract, and I cannot rectify a non-existent contract.'[92]

However, more recently in *Maguire v Flinders Realty Pty Ltd*[93] the name of a non-existent company was altered through rectification rather than through a process of common law construction. The applicant before the Victorian Civil and Administrative Tribunal, Ms Maguire, entered into an exclusive auction authority agreement on 5 July 2002 with a real estate agency company described as Biggin & Scott (Elsternwick) Pty Ltd. No such company existed with that name. It was clear that it had been intended that the agreement be entered into with a company called Flinders Realty Pty Ltd trading as Biggin & Scott (Elsternwick). It was obvious how the mistake occurred, the words 'Pty Ltd' had been added to the business name to form the name of a company that did not exist. The tribunal member, Mr Coldbeck, relying on the power to rectify a contract under s 108(2)(h) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic), held that the agreement could be rectified and the agent referred to in the document be amended to Flinders Realty Pty Ltd trading as Biggin & Scott (Elsternwick). But the difficulty with this approach is that because the named company did not exist there was in fact no contract or agreement at common law because, as explained by Stamp J in *F. Goldsmith (Sicklesmere) Ltd v Baxter,*[94] there cannot be an agreement with a non-existent entity.[95] The

[91] Ibid 91.
[92] Ibid 93.
[93] [2004] VCAT 1332. The decision of the Victorian Civil and Administrative Tribunal refers to the respondent as Flinders Reality Pty Ltd however the correct name of the respondent is Flinders Realty Pty Ltd and the respondent will be referred to here by its correct name.
[94] [1970] 1 Ch 85.
[95] See also *Vukasin v Australian Securities and Investments Commission* (2007) 25 ACLC 1554; [2007] NSWSC 1341.

better approach would have been to construe the incorrect reference to Biggin & Scott (Elsternwick) Pty Ltd as a reference to Flinders Realty Pty Ltd trading as Biggin & Scott (Elsternwick) which is consistent with the approach adopted by Stamp J in *F. Goldsmith (Sicklesmere) Ltd v Baxter*.[96]

But in relation to some types of contracts a misnomer may not be able to be corrected through the common law process of construction. The issue was recently considered by the High Court of Australia in *Simic v New South Wales Land and Housing Corp*.[97] Prior to being placed in liquidation, Nebax Constructions Australia Pty Ltd (in liq) (Nebax), entered into a construction contract with New South Wales Land and Housing Corp. The contract was for a project described as 'BG2J8 3-7 Karowa Street, Bomaderry'. When Nebax was selected as the preferred tenderer for the project it received a letter on the letterhead of 'Housing New South Wales' (Housing NSW). New South Wales Land and Housing Corp had an Australian Business Number (ABN), and Housing NSW had a different ABN. The documentation provided by New South Wales Land and Housing Corp indicated that the corporation traded as Housing NSW. As part of the terms of the contract, Nebax was required to provide security in the form of two undertakings in favour of New South Wales Land and Housing Corp. Mr Simic, on behalf of Nebax, attended the Caringbah Business Centre of the Australia and New Zealand Banking Group Ltd (ANZ) for the purposes of arranging the two undertakings. Mr Simic dealt with Ms Hanna at the ANZ. Unfortunately, he advised Ms Hanna that the undertakings should be in favour of New South Wales Land and Housing Department Trading as Housing NSW. However, the New South Wales Land and Housing Department did not exist. The undertakings were issued and delivered to New South Wales Land and Housing Corp who did not notice the mistake made in the undertakings. The undertakings referred to the address of the project (albeit that in one of the undertakings the description of the project address contained a minor error) and the undertakings also referred to the contract reference number, BG2J8. When New South Wales Land and Housing Corp sought to claim the benefit of the undertakings from ANZ by presenting the undertakings together with a written demand, ANZ refused to make payment and New South Wales Land and Housing Corp commenced proceedings by summons in the Supreme Court of New South Wales. New South Wales Land and Housing Corp sought a declaration that the reference to the New South Wales Land and Housing Department in the

[96] [1970] 1 Ch 85.
[97] [2016] HCA 47; (2016) 91 ALJR 108.

two undertakings should be construed as references to New South Wales Land and Housing Corp. The alternative relief sought was that the undertakings be rectified. Five parties, including Mr Simic, had guaranteed the undertakings and were cross-defendants in the proceedings as ANZ sought to recover from them under the guarantees if the court determined that ANZ was liable to the plaintiff.

In *New South Wales Land and Housing Corp v Australia and New Zealand Banking Group Ltd*[98] Kunc J considered the principles of construction relevant to cases of misnomers and absurdities and held that the reference to the New South Wales Land and Housing Department in the undertakings should be read as references to New South Wales Land and Housing Corp.[99] The guarantors, including Mr Simic, appealed to the Court of Appeal of the Supreme Court of New South Wales. In *Simic v New South Wales Land and Housing Corp,*[100] Emmett AJA, in holding that the appeal should be dismissed, said that the undertakings 'are contracts to which the ordinary principles of contractual construction apply.'[101] His Honour explained that all forms of undertakings are governed by the principle of strict compliance which requires that 'an issuer (such as a bank) should only accept documents (such as a letter of demand) that comply strictly with the terms of the instrument involved' and the principle of autonomy which provides that 'the undertaking of the issuer to the beneficiary is independent of the underlying transaction and of any other contract.'[102] Emmett AJA said that Kunc J was 'correct to hold that the principle of strict compliance is properly classified as one of performance, because it is directed to the question whether documents tendered conform to the requirements stipulated by the letter of credit.'[103] His Honour explained that 'the principle of autonomy is properly classified as one of construction, because it is directed to the question as to which documents can be employed for the purpose of determining what the letter of credit means, in order to determine whether it has been strictly complied with.'[104] Emmett AJA noted that the 'question is then whether the autonomy principle applies in the present case to prevent regard being had to the correct description of the beneficiary of the Undertakings in the Construction Contract.'[105] Applying the autonomy principle to the construction of the undertakings his

[98] [2015] NSWSC 176.
[99] Ibid [96].
[100] [2015] NSWCA 413.
[101] Ibid [98].
[102] Ibid [69].
[103] Ibid [100].
[104] Ibid [101].
[105] Ibid [104].

Honour said that 'it may be a reasonable application of the autonomy principle to state that regard may be had to an extrinsic document only to the **extent** to which it is referred to in the letter of credit.'[106] His Honour said that 'if the underlying contract is identified in the letter of credit, then the identifying features of that contract (which must at least include the parties to it) may be considered in construing the letter of credit.'[107] After noting that the construction contract and the identity of the parties to it were both referred to in the undertakings, Emmett AJA held that, 'it is permissible to have regard to the Construction Contract **to that extent** in order to determine the correct construction of the Undertakings.'[108] Emmett AJA, after noting the identification of the parties in the construction contract, concluded that 'the primary judge made no error in concluding that, on the proper construction of the Undertakings, the words "New South Wales Land & Housing Department trading as Housing NSW ABN 45 754 121 940" mean the Corporation.'[109] Both Bathurst CJ[110] and Ward JA[111] agreed with Emmett AJA that the appeal should be dismissed. The guarantors were granted special leave to appeal to the High Court of Australia.[112]

In the High Court of Australia in *Simic v New South Wales Land and Housing Corp*[113] the appeal was allowed on the issue of construction but the court allowed cross appeals by the New South Wales Land and Housing Corp and the ANZ in relation to rectification and, accordingly, the undertakings were rectified. In a joint judgment, Gageler, Nettle and Gordon JJ focused on the principle of autonomy and said that:

> That principle – the principle of autonomy – reflects that those instruments, by their nature, stand alone. Not only are they equivalent to cash, but, by their terms, they also require that the obligations of the issuer are not determined by reference to the underlying contract. The principle of autonomy dictates that the surrounding circumstances and commercial purpose of the Construction Contract are different from those of the Undertakings.[114]

Their Honours said that instruments such as undertakings 'are essential to international commerce and, in the absence of fraud, should be allowed to be honoured free from interference

[106] Ibid [106].
[107] Ibid [108].
[108] Ibid [109].
[109] Ibid [116].
[110] Ibid [1].
[111] Ibid [2].
[112] *Simic v NSW Land and Housing Corp* [2016] HCATrans 102.
[113] [2016] HCA 47; (2016) 91 ALJR 108.
[114] Ibid [85].

by the courts.'[115] Their Honours emphasised that in 'issuing a banking instrument of this nature, the issuer relies upon, and acts in accordance with, the instructions of the applicant, and is contractually bound to do so.'[116] Their Honours noted the position that ANZ was faced with when their Honours said that unless and until the undertakings were rectified, 'ANZ would be at risk of acting in breach of contract if, contrary to Nebax's express instructions, it were to treat the instrument as referring to the Corporation.'[117] For these reasons their Honours concluded that 'the definition of "Principal" in each Undertaking should not be construed as referring to the Corporation.'[118] French CJ agreed with the reasons given in the joint judgment and said that the 'name of the non-existent government department specified in the Undertakings could not be construed by reference to underlying facts, requiring inquiry by the issuing institution, as a reference to the Corporation' because such 'a loose approach to construction would be inconsistent with the commercial purposes of the Undertakings as performance bonds.'[119] Kiefel J also agreed with the reasons set out in the joint judgment and said that no 'process of construction could effect the inclusion of the Corporation's name in lieu of the name appearing in the Undertakings' and 'ANZ was not obliged to inquire into the background giving rise to the error of identification, which was not evident from the Undertakings themselves.'[120] Accordingly, because of the nature of the documents at issue in this case, undertakings that were of the nature of performance bonds, the principle of autonomy meant that the documents needed to stand alone and it was not permissible to look at other documents behind the undertakings as part of the process of construction. That meant, in effect, that a literal interpretation to construction of the documents was to be adopted and as the entity that demanded payment under the undertakings was not the entity named as the Principal in the documents, ANZ was entitled to refuse to make payment to the Corporation. The cross-appeal in relation to rectification of the undertakings was allowed because, as the principle of autonomy applies to common law construction, and does not apply to rectification, the construction contract could be referred to and that document made it clear that there had been a mistake in the recording of the name of the Principal in the undertakings. However, the conclusion that the document could be rectified is problematic because once the court concluded that the construction claim should have been dismissed the conclusion should have

[115] Ibid [88].
[116] Ibid [89].
[117] Ibid [90].
[118] Ibid [101].
[119] Ibid [11].
[120] Ibid [31].

been that there was in fact no agreement because one of the parties to the alleged contract did not exist. In *F. Goldsmith (Sicklesmere) Ltd v Baxter*,[121] discussed above, Stamp J held that 'I cannot rectify a non-existent contract.'[122] The approach adopted by the High Court of Australia would suggest that a non-existent agreement can be rectified. But the difficulty is that the jurisdiction to rectify an agreement involves first identifying what has been agreed between the parties and comparing that to what has been recorded. As Stamp J held in *F. Goldsmith (Sicklesmere) Ltd v Baxter* there needs to be an agreement that can be rectified. In *Simic v New South Wales Land and Housing Corp* the conclusion of the court that the construction claim failed meant that there was never any agreement between two legal persons and it is thus difficult to identify what agreement existed that could be rectified. Unfortunately that issue was not addressed by the court.

These cases demonstrate that the common law is well equipped in most cases, through a process of construction, to correct minor mistakes in the form of misnomers without the need to resort to the equitable doctrine of rectification. These misnomers can relate to the incorrect description of a person or a thing. If the evidence reveals a misnomer, a court will have no difficulty in reading a reference to a person or a thing *as if* it was a reference to a different person or a different thing. The court is at all times concerned with interpreting the words used. Even though a proper process of construction may have the effect of correcting an obvious mistake, in the form of a misnomer, the focus on construction is on attributing meaning to the words actually used in their context rather than a direct focus on the correction of mistakes.

2 *Plain and palpable mistakes and manifest errors*

The mistakes that can be corrected through construction are not limited to misnomers. Plain and palpable mistakes are further examples of minor errors that occur regularly in written contracts and that can also be corrected through construction without any recourse to the equitable doctrine of rectification.[123] Like the correction of misnomers, there is no real controversy to the correction of such mistakes through a process of construction. In *JIS (1974) Ltd v MCP Investment Nominees I Ltd*[124] Carnwath LJ said that no doubt 'the court has power

[121] [1970] 1 Ch 85.
[122] Ibid 93.
[123] For some early examples see *Burchell v Clark* (1876) 1 CP Div 602; *Burchell v Clark* (1876) 2 CP Div 88; and *Annesley v Annesley* (1893) 31 LR Ir 457.
[124] [2003] EWCA Civ 721.

in certain circumstances to correct obvious errors as part of the exercise of construction rather than rectification.'[125] However, his Lordship emphasised that the 'task of interpretation does not allow the court to rewrite the contract.'[126] This later comment provides an important limitation on the proper process of construction. Courts must be alert to ensure that construction is not used to rewrite a contract by impermissibly going beyond identifying what the parties objectively agreed by the words that they used. To ensure that the courts do not depart from a proper process of construction in these cases, the courts need to be satisfied that there is a plain or palpable mistake. This will often be something that appears obvious once the document is read in its full context.

The decision in *Maurice Hayes & Associates Pty Ltd v Energy World Corp Ltd*[127] demonstrates the limits of construction to correct an alleged mistake in the drafting of an agreement. The applicant entered into a written consultancy agreement on 28 September 1994 with the respondent for an initial period of four years with the possibility of renewals by mutual agreement. Pursuant to the agreement the applicant agreed to provide the services of its director and shareholder, Mr Hayes, to the respondent. The respondent was a public company carrying on business in the oil and gas industry. The relationship between the parties came to an end in 2003 when the respondent terminated the agreement as it no longer required the services provided by the applicant. Following termination of the agreement, the applicant alleged that it had not been paid all monies due to it upon termination of the agreement and commenced proceedings in the Federal Court of Australia claiming a termination payment and other monies alleged to be due from the respondent. The agreement contained clause 8.6 that provided that if the respondent terminated the agreement for any reason other than fault or the insolvency of the applicant, or the agreement was not extended or renewed, the respondent was to pay the applicant a fee for the remaining period of the contract or six months, whichever was the *lesser* period. There was also a dispute between the parties as to whether the terms of the agreement were varied in February 1998 pursuant to which the applicant would be entitled to a larger termination payment. The applicant pleaded that the larger termination payment was due to it and did not plead in the alternative any termination payment under clause 8.6 of the original agreement. Nevertheless, because of the case advanced by the respondent, Siopis J, at first instance, was of the view that the proper construction of clause 8.6 was a live issue in the

[125] Ibid [13].
[126] Ibid [19].
[127] [2006] FCA 783.

proceedings.[128] What was in issue was whether the reference to 'lesser' in clause 8.6 should be construed as a reference to 'greater'. The respondent contended that the clause had meaning as drafted. In rejecting that contention Siopis J said that:

> In my view, counsel for the respondent's contention cannot be accepted. It is clear that the contractual intention was to provide the applicant with a termination payment of a minimum of six months, regardless of whether the relationship between the parties ended by the non renewal of the term of the consultancy agreement on the expiry of the existing term or by the termination of the agreement (other than for a reason set out in cl 8.1) during the currency of the term, of the consultancy agreement. This construction is consistent with the presence in the clause of the words *'or the Term (as extended or renewed) is not renewed*'. The construction contended for by the respondent is inconsistent with the presence of those words in the clause and renders those words otiose. In my view, it is obvious that there was a mistake by the draftsman in using the word *'lesser'* when the word *'greater'* should have been used to give effect to the obvious intention of the parties. Where there is an obvious mistake the Court can give effect to the true contractual intention of the parties without there being any need for rectification.[129]

The applicant therefore succeeded on the issue of construction. The respondent appealed to the Full Court of the Federal Court of Australia. In *Energy World Corp Ltd v Maurice Hayes & Associates Pty Ltd*[130] an appeal on the issue of construction was allowed but the appeal was otherwise dismissed. Moore, Tamberlin and Gyles JJ held that it was not the case that the only way to correct the apparent inconsistency in clause 8.6 was to read the word 'greater' for 'lesser'. Their Honours said that:

> Put another way, the terms of the clause do not enable the conclusion to be drawn that the contractual intention was to provide the consultant with a termination payment of a minimum of 6 months on non-renewal of the term. The principle of construction in question does not enable a court to speculate as to the proper resolution of the inconsistency. Furthermore, as submitted on behalf of the company, the substitution of "greater" for "lesser" would involve a significant variation in the effect of the clause as it would have operated in the event of termination during the term of the agreement.[131]

In upholding the appeal on the issue of construction their Honours said that it was 'significant that no claim for rectification was made either originally or when the issue was raised by the primary judge.'[132] The case demonstrates the need for the court to be satisfied as to how the

[128] Ibid [121].
[129] Ibid [125].
[130] (2007) 239 ALR 457.
[131] Ibid 460.
[132] Ibid. Similar issues arose in *Saxby Soft Drinks Pty Ltd v George Saxby Beverages Pty Ltd* (2009) 14 BPR 27,213; and *Re McDonald Trust No 1* [2010] VSC 324.

alleged mistake should be corrected which is a requirement set out by McMeel[133] discussed earlier in this Chapter.

As with the correction of misnomers through construction, courts regularly correct plain and palpable mistakes through construction without the need for rectification. This is uncontroversial because these types of errors or mistakes are often of a minor nature and obvious from the context. In such cases the common law approach to construction, subject to relevant evidence being admissible, can readily deal with the error or mistake and there is no role for the equitable doctrine of rectification.

3 *Supplying missing words*

The process of construction can be used to correct minor errors where it is clear that a few words have been accidentally omitted from a clause and it is obvious to the court, from the context and from what the clause is designed to achieve, what the missing words are. This approach to construction is uncontroversial if the words supplied are not extensive and if it is obvious from the context what missing words should be supplied by the court. Like all processes of construction the words are not physically changed in the document, rather the document is read as if the words had been included. An early example of this approach to construction can be found in *Kirk v Unwin*[134] where a submission of a dispute to arbitration provided that the award was 'to be delivered to the parties or any of them on or before the 30th of December next, or on such further or later day as the arbitrator, by a memorandum in writing under his hand indorsed hereon.' It was argued that the words 'shall appoint' had by mistake been omitted after the word 'arbitrator'. Alderson B held that no one 'can doubt that the words "shall appoint" have by accident been left out.'[135]

Context will be important when supplying missing words through construction. In *M'Clure v Marshall*[136] the plaintiffs granted a mortgage to four of their creditors. One of the creditors was a firm, Anderson and Marshall, and the mortgage document stated that the mortgage was granted to Marshall. Marshall executed a declaration of trust that he held the mortgage on

[133] Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 2nd ed, 2011).
[134] (1851) 6 Exch 908; 155 ER 815.
[135] Ibid 914.
[136] (1883) 9 VLR (E) 84.

behalf of the four sets of creditors. An agreement was later entered into between the plaintiffs and Marshall in which Marshall agreed to surrender to the plaintiffs his share of the mortgage. Marshall subsequently contended that he had merely agreed to surrender his individual share of the mortgage and not that of his firm. The plaintiffs sought to have the agreement rectified based on mutual mistake. The plaintiffs failed before Molesworth J on the basis that the reference to 'his share' meant only Marshall's individual share and that rectification failed on the basis that there was no evidence that Marshall was mistaken and accordingly there was no mutual mistake. The plaintiffs appealed. On appeal Stawell CJ held that there was no doubt as to what the real intention was and that the reference to 'his share' was a reference to 'the whole of the interest which he (Marshall) and his partner had in the mortgage.'[137] His Honour said that although 'spoken of as his share it was the share held by him as trustee for himself and his partner.'[138] His Honour concluded that 'I do not think it necessary to make any alteration in the document; it speaks for itself, and no rectification seems to me to be necessary.'[139] Holyroyd J agreed.[140]

4 *Conclusion*

The correction of minor errors through the common law process of construction is uncontroversial. Numerous errors or mistakes in documents can be corrected by the courts placing appropriate meaning on the words in the context in which they are used. This will involve the courts reading words *as if* different words or additional words had been used. In most cases this will be a simple task of correcting what is an obvious mistake in a document and where it is equally obvious what was intended. It would be absurd if the common law was unable to correct such mistakes. The common law has taken a sensible and flexible approach to construction to ensure that such obvious errors and mistakes can be corrected through construction.

[137] Ibid 94.
[138] Ibid.
[139] Ibid 94-5.
[140] Ibid 95.

C *Correction of more significant errors*

When the common law process of construction is used to correct significant mistakes and errors in documents by attributing a meaning to the words used a meaning significantly different from their literal meaning, concern may arise that the process of construction is being taken too far and that some mistakes might best be left to be corrected through the equitable doctrine of rectification. But such unease overlooks the fact that courts, when undertaking a process of construction, *must* place a meaning on the words used unless the words are held to be meaningless. A consequence of that process is that the courts may correct a significant error or mistake in a written document. In some circumstances the outcome of the process of construction will be that the court arrives at an interpretation that coincides with what the parties actually agreed. However, that will not always be the case. The words used by the parties may be so far removed from what they agreed that the court will inevitably arrive at an interpretation that does not coincide with what the parties actually agreed and intended to record. In such cases, the error or mistake will be so significant that it can only be corrected through rectification with the benefit of additional evidence of the parties' negotiations. Importantly, although there are limits to the process of construction, those limitations do not extend to limiting the volume of words that a court can delete or add when undertaking construction of a written document. That is particularly relevant when the court is construing a document that contains a significant error.

1 *Meaningless terms can be ignored*

Courts can ignore meaningless terms. During a process of construction, a court has no alternative but to ignore a meaningless term. If the words used are meaningless, no sensible meaning can be attributed to them. If, when the term is ignored, there is not a complete agreement between the parties then it may be that the agreement is void for uncertainty. But if the meaningless term can be ignored and the remainder of the agreement is complete and workable, ignoring the meaningless term will be the appropriate approach.

The issue of a meaningless term arose in *Re De La Touche's Settlement*[141] where a marriage settlement between John De La Touche and his wife Henrietta De La Touche made several

[141] (1870) LR 10 Eq 599.

provisions relating to the property of the parties after the death of each party including that Henrietta De La Touche would receive certain property upon the death of John De La Touche. The deed included a clause that made no sense in the context of the deed. There was evidence that the clause was inserted by mistake when pencil directions were given to a clerk or to a stationer. The Vice Chancellor, Sir William Milbourne James, held that there was no need to resort to rectification because inspection of the deed alone 'is sufficient to lead to a presumption of a mistake, which is abundantly established by the evidence.'[142]

The issue arose in *Nicolene Ltd v Simmonds*[143] where a contract for the sale of a quantity of reinforcing steel bars included a term that 'the usual conditions of acceptance' were to apply. The seller repudiated the contract and the buyer claimed damages for breach of contract. The buyer was successful and the trial judge, Sellers J, awarded damages. The seller appealed and claimed that there had never been a concluded contract because there was no consensus ad idem in relation to the usual conditions of acceptance. Singleton LJ held that the terms referring to 'the usual conditions of acceptance' was 'meaningless, and words which are meaningless can be ignored' and that accordingly there was a contract between the parties.[144] Denning LJ agreed and said that there 'were no usual conditions of acceptance at all, so the words are meaningless' and that there 'is nothing to which they can apply.'[145] His Lordship said that:

> In my opinion a distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed. A clause which is meaningless can often be ignored, whilst still leaving the contract good; whereas a clause which has yet to be agreed may mean that there is no contract at all, because the parties have not agreed on all the essential terms.[146]

His Lordship concluded that the clause 'can be rejected without impairing the sense or reasonableness of the contract as a whole, and it should be rejected. The contract should be held good and the clause ignored.'[147] Hodson LJ agreed that the appeal should be dismissed.[148]

[142] Ibid 603.
[143] [1953] 1 QB 543.
[144] Ibid 549.
[145] Ibid 550.
[146] Ibid 551.
[147] Ibid 552.
[148] Ibid 553.

The decisions in *Re De La Touche's Settlement*[149] and *Nicolene Ltd v Simmonds*[150] demonstrate that courts can, as part of the process of construction, ignore meaningless terms in a written agreement. Such an approach will in many cases avoid the necessity to resort to rectification to have the meaningless term deleted from the written agreement.

2 *Improbable results including absurdities and inconsistencies*

More significant errors and mistakes can be found in clauses in written agreements where a literal reading of a clause produces an improbable result including absurdities and inconsistencies. As part of a process of construction, a court is likely to conclude that the result produced is improbable or absurd given the outcome that the overall agreement was designed to produce. In such circumstances it is likely that some form of drafting error has occurred and in some cases this can be corrected through construction. The courts will seek to place a meaning on the words used that is consistent with the overall purpose of the written agreement when read in light of the surrounding circumstances in which the agreement was made. Such a mistake can be corrected by way of construction without the need for rectification as explained by the High Court of Australia in *Fitzgerald v Masters*[151] where Dixon CJ and Fullagar J said that as part of the process of construction, words 'may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency.'[152]

The appropriate approach has been explained in several cases. In *Dalgety Ltd v John J Hilton Pty Ltd*[153] Rogers J noted the scope of construction to avoid absurdities and inconsistencies when his Honour said there 'is ample authority for the proposition that courts of law regularly insert, delete, alter and interpret words in such a fashion as to make a document sensible, even without recourse to the doctrine of rectification, where that course is clearly necessary in order to avoid absurdity or inconsistency.'[154] In *Miwa Pty Ltd v Siantan Properties Pte Ltd*[155] Basten JA said, in relation to construction of absurdities in documents, that while 'in common parlance, the word "absurd" may have a range of connotations, in this context it is used to mean

[149] (1870) LR 10 Eq 599.
[150] [1953] 1 QB 543.
[151] (1956) 95 CLR 420.
[152] Ibid 426-7.
[153] [1981] 2 NSWLR 169.
[154] Ibid 172.
[155] (2011) 15 BPR 29,545.

something opposed to reason, or irrational' and that it 'can form a basis for resolving internal inconsistencies in a contract or giving commercial sense to language which is otherwise in a practical sense meaningless.'[156] In *National Australia Bank v Clowes*[157] Leeming JA said that 'where the literal meaning of the contractual words is an absurdity, *and* it is self-evident what the objective intention is to be taken to have been' then 'ordinary processes of contractual construction displace an absurd literal meaning by a meaningful legal meaning.'[158]

It was apparent to the court that some mistake had occurred in *Watson v Phipps*[159] where a lease of farmland contained the following clause:

> At all times during the said term or at the expiration of the said term the lessee may offer to purchase the demised land from the lessor for the consideration equivalent to one thousand dollars ($1000) per acre.

The clause provided the lessee, the respondent in the appeal, with only the right to make an offer to purchase the land, which he or any other person could do at any time in any event without such a contractual right. On a literal interpretation the clause did not provide for an option to purchase. The respondent lessee commenced proceedings in the Supreme Court of Queensland for rectification of the lease but did not seek to have the Supreme Court to first construe the clause. The claim failed and the lessee appealed to the Full Court of the Supreme Court of Queensland where it was held that the clause could be rectified to clearly provide the lessee with an option to purchase the land. The lessors appealed to the Privy Council. Lord Brightman delivered the judgment of the Privy Council that included Lord Keith of Kinkel, Lord Roskill, Lord Griffiths and Sir Owen Woodhouse. Lord Brightman explained that before the appellants' case was opened, 'their Lordships informed counsel that they wished first to consider the true construction of the clause, and to leave the question of rectification to be argued if their Lordships took the view that, on the true construction of the clause as it stood, no option to purchase was granted.'[160] Lord Brightman said that:

> The function of a court of construction is to ascertain what the parties meant by the words which they have used. For this purpose the grammatical and ordinary sense of the words is to be adhered to, unless they lead to some absurdity or to some repugnance or inconsistency with

[156] Ibid 29,548.
[157] (2013) 8 BFRA 600.
[158] Ibid 608.
[159] (1985) 63 ALR 321.
[160] Ibid 322.

> the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency, but no further.[161]

Lord Brightman said that the right included in the clause was 'utterly meaningless' because the 'lessee does not need a sub-clause to tell him that he may make an offer to buy the demised land, nor does he need to be told at what price he may make such offer.'[162] His Lordship explained that:

> Anyone in the world, be he the lessee or anyone else, is at liberty to offer to buy the demised premises at any price he chooses to name. So cl 3(a), if read strictly in accordance with the words used, is totally bereft of any legal content and indeed totally devoid of any purpose whatever. Counsel for the lessors could suggest no purpose that would bear examination.[163]

His Lordship said that it must be supposed 'that the sub-clause was intended to be an agreement between the parties, that is to say, as intending to create a right of some sort on one side and an obligation of some sort on the other side.'[164] Lord Brightman concluded that the clause 'can be read without giving rise to an absurdity if it is construed as creating a right to purchase, and not as creating a meaningless power to make an offer to purchase which the lessee will have, at any price, as much after the lease has ended as before it ends.'[165] Accordingly, there was no need to consider the issue of rectification and the appeal was dismissed.

In some cases, the improbable result or absurdity will be much more complex than some of the cases examined above. That occurred in *Carlow Castle Pty Ltd v Aztec Resources Ltd*[166] where the plaintiff, a corporate advisor called Carlow Castle Pty Ltd, sued the defendant, a mining company called Aztec Resources Ltd, for a success fee of $5,850,000 which it claimed was payable pursuant to the terms of a Deed of Settlement and Release (the Deed) made between them on 14 February 2006. The Deed provided that a Success Fee was payable when Success occurred which was defined to mean when a bidder acquired 50% or more of the shares in Aztec pursuant to, or after, a takeover offer where the acquisition was recommended by a majority of the board of directors of Aztec. On 22 November 2006 Mount Gibson Iron Ltd acquired over 50% of the shares of Aztec pursuant to a scrip for scrip takeover offer initially made on 24 July 2006. Up to and including 22 November 2006 the Aztec board unanimously opposed the takeover and recommended against acceptance of the offer from Mount Gibson.

[161] Ibid 324.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Ibid.
[166] [2013] NSWSC 188.

However, on 28 November 2006, once Mount Gibson had obtained more than a 50% stake in Aztec, the Aztec board changed its position and instead of opposing the takeover, recommended to its shareholders that the offer be accepted. Carlow Castle argued that the Success Fee was payable if the Aztec board recommended acceptance of the offer from Mount Gibson at any time before the offer closed. Aztec argued that the Success Fee, on its proper construction, was only payable if the Aztec board recommended acceptance of the bid offer at the time of the acquisition of the 50% acquisition by Mount Gibson and not at some later time. Clause 11.3 of the Deed provided for the payment of the Success Fee. At issue was the construction of clause 11.5(a) of the Deed which provided that:

> For the purposes of clause 11.3, "Success" occurs when:
>
> (a) A bidder acquires 50% or more of the shares in Aztec pursuant to or after the Initial Offer where the acquisition was recommended by a majority of the Aztec board (that is to say, the bidder formally acquires a controlling interest).

There were alternative circumstances outlined in the remainder of clause 11.5 where Success would occur that were not relevant to the claim before the court. Mr Shemesian represented the plaintiff at all relevant times during the negotiation of the agreement. On or around 16 October 2006 Mr Shemesian flew to Perth to meet with Mr Burston, a director of Aztec, and Mr Bilbe, the managing director of Aztec. Mr Shemesian was accompanied by one of the plaintiff's advisors, Mr Fayad from PKF Chartered Accountants. They discussed the payment of the Success Fee and Mr Shemesian subsequently gave evidence that during that meeting Mr Burston assured him that the Success Fee would be paid upon any successful takeover of Aztec by Mount Gibson. On 20 October 2006 Mr Bilbe emailed Mr Fayad with a calculation of any Success Fee that might become payable. My Fayad responded later that day with his understanding of when the Success Fee would be payable. He said in his email that:

> In short, if Mt Gibson achieves a level of acceptances above 50% and at any time during the offer period, the Aztec board recommends acceptance of the offer, the Success Fee is payable to Greenhill/Carlo [sic] Castle. Of course, if the Aztec does not recommend accpetance [sic] of the offer and MT Gibson does not achieve 50%, the Sucess [sic] fee is also payable.
>
> I'd be grateful if you would confirm your agreement to the above.[167]

[167] Ibid [35].

Mr Bilbe responded that 'Yes, that is our understanding of the meaning of success'.[168] That response was forwarded by Mr Fayad to Mr Shemesian. However, by 6 November 2006, Aztec told the plaintiff that the Aztec board would not be providing the plaintiff with its view on the circumstances in which Success might or might not occur. The letter stated that 'This letter supersedes all previous correspondence (both oral and written) in respect of this matter.'[169] In construing clause 11.5 of the Deed, Hammerschlag J said that 'the plaintiff's construction is untenable and does not accord with the plain meaning of the words used in cl 11.5(a).'[170] His Honour said that 'cl 11.5(a) has in mind a takeover where the passing of control has the support of the Aztec board.'[171] Importantly his Honour said that:

> What occurred here was the passing of a controlling interest despite the bid being hotly rejected by the Aztec board. As evinced by the circular dated 28 November 2006, the board capitulated but only after the battle had been lost. At that point the board may well have considered it in the interests of shareholders to sell into the takeover. But a commercially sensible approach would equate this more with failure than with the type of success the Deed had in mind.[172]

An alternative claim for rectification of the Deed failed. The plaintiff appealed to the New South Wales Court of Appeal where it made submissions that the principles of *Fitzgerald v Masters*[173] applied because there was an absurdity or inconsistency about the inclusion of the words 'the acquisition' in cl 11.5(a) of the Deed rather than the words 'the offer'. In the New South Wales Court of Appeal in *Carlow Castle Pty Ltd v Aztec Resources Ltd*,[174], Bergin CJ in Eq, in dismissing the appeal, said that:

> The fact that on 28 November 2006 the respondent's board recommended to the remaining minority that they should take up the shares pursuant to the offer that was then available to them, after Mount Gibson had already acquired a controlling interest, is not a recommendation in respect of or connected to the acquisition of a controlling interest and is not success within the meaning of cl 11.5(a) of the deed.[175]

Her Honour said that:

> There was nothing absurd or inconsistent about the inclusion of the words "the acquisition" instead of the words "the offer" in cl 11.5(a) of the deed. The clear intention of the parties was to expand or to flesh out the appellant's entitlement to a success fee in the circumstances in

[168] Ibid [36].
[169] Ibid [40].
[170] Ibid [54].
[171] Ibid [58].
[172] Ibid [59].
[173] (1956) 95 CLR 420.
[174] (2014) 100 ACSR 1.
[175] Ibid 21.

> which they found themselves after their relationship ended. This is not a case to which the principles in *Fitzgerald* apply.[176]

Her Honour also dismissed the appeal as it related to rectification.[177] Emmett JA also held that the appeal in relation to construction should be dismissed and agreed with Bergin CJ in Eq, for the reasons her Honour gave, that the appeal in relation to rectification should also be dismissed.[178] Barrett JA agreed with Bergin CJ in Eq that the appeal should be dismissed.[179]

These cases demonstrate that improbable results, including absurdities and inconsistencies, can often be corrected through a process of construction. However, the circumstances in these cases are often more complex than simple cases of misnomers and palpable mistakes. It may be clear that there has been some error in the drafting process, however, the process of construction may be more challenging because of the complexity of the circumstances. Nevertheless, the courts will place a meaning on the words used to reflect what the court considers that the parties agreed based on the admissible evidence. These cases highlight the wide jurisdiction of the common law process of construction and seek to show that the jurisdiction of the equitable doctrine of rectification is directly limited by the scope of the common law process of construction.

3 *Lacking commercial sense*

The most controversial part of the scope of the process of construction are cases where it is concluded that a clause or clauses in a written agreement lack commercial sense. These cases are controversial because they can create a concern that the court is rewriting the agreement. It may also be possible that a party has entered into a bad bargain through ignorance or haste or through following poor advice. Courts need to be alert to differentiate between cases where there has been a drafting error or mistake and cases where one party has simply made a bad bargain. These cases demonstrate that the common law process of construction is wider than is often appreciated by both contracting parties and practitioners. Even substantial drafting errors in recording a prior agreement between the parties, which would otherwise fall within the jurisdiction of rectification, may be able to be corrected through a process of construction. That

[176] Ibid 22.
[177] Ibid 27.
[178] Ibid 6.
[179] Ibid 2.

provides a very wide and often controversial jurisdiction for the common law process of construction.

The issue of a clause lacking commercial sense arose in *Chartbrook Ltd v Persimmon Homes Ltd*.[180] The case was ultimately determined on appeal by the House of Lords[181] and the final appeal decision demonstrates that courts have significant flexibility in reading contractual clauses as if they contained numerous additions and deletions as part of a proper process of construction. The number of words to be read as if they were added, or ignored as part of the process of construction is irrelevant. The focus of the court is to place a meaning on the words that have been used even if that process involves the rewriting of an entire clause of a written agreement. The rewritten clause may bear very little resemblance to the original clause. There can be some unease with the courts extensively rewriting such clauses. The approach adopted by the courts emphasises the wide scope of the process of construction and the correspondingly restricted scope of the equitable doctrine of rectification. In such cases it must be appreciated that the common law process of construction should operate as if there was no equitable doctrine of rectification. It would not be appropriate for a process of construction to be limited on the basis that significant errors can be addressed by equity attempting to provide relief through rectification. Such an approach would diminish the standing of the common law that surely must take an approach to construction that places the most appropriate meaning on the words used by the parties in *all* circumstances. Where a clause completely lacks commercial sense it is appropriate for a court to consider the whole agreement in the context in which the agreement was made and seek to place an appropriate meaning to all clauses of a written agreement.

The decision of the House of Lords as well as the decisions of the lower courts in *Chartbrook* provide an important example of the complexity that can arise in such processes of construction and how extensively the courts can add or delete words from the words used by the parties. The claimant, Chartbrook Ltd, owned a property and entered into a property development agreement with a developer, the first defendant, Persimmon Homes Ltd, and with an adjoining owner, Mr Vantreen. The second defendant Persimmon plc acted as guarantor of the first defendant's obligations. The development was to contain residential premises, commercial

[180] [2007] EWHC 409 (Ch). For some earlier examples concerning leases see *Ex parte Whelan* [1986] 1 Qd R 500; and *Dockside Holdings Pty Ltd v Rakio Pty Ltd* (2001) 79 SASR 374.
[181] *Chartbrook Ltd v Persimmon Homes* [2009] AC 1101.

premises and car parking spaces. The claimant sought to be paid money alleged to be due under the agreement. The dispute arose from a disagreement as to the construction of schedule 6 of the agreement which contained provisions as to the price to be paid by Persimmon to Chartbrook, and in particular as to the element of the price labelled as the "Additional Residential Payment" or "ARP". Persimmon argued that properly construed the ARP was slightly less than £900,000 which had been largely paid, whereas Chartbrook argued that the ARP was just over £4.6 million of which around £3.9 million remained unpaid. Persimmon counterclaimed that if Chartbrook's construction claim succeeded the agreement should be rectified. Although Persimmon plc was a defendant to Chartbrook's money claim and Mr Vantreen was a defendant to the rectification counterclaim, Briggs J noted that the real dispute was between Chartbrook and Persimmon.[182] Mr Vantreen was a director and shareholder of Chartbrook.

Schedule 6 of the agreement provided for the developer, Persimmon Homes, to be entitled to the whole of the proceeds of sale of the residential premises, the commercial premises and the residential car parking spaces except for the price to be paid to the owner, Chartbrook. Schedule 6 provided for payment to the owner in two distinct parts. The first part was a payment for the land value which was calculated by reference to a price per square foot and was variable depending upon what planning permission was obtained. The second part of the payment was variable by reference to the sale prices ultimately achieved for the residential units. It was common ground that this second component of the price was a form of sales overage. The ARP was defined to mean 23.4% of the price achieved for each residential unit in excess of the minimum residential unit value (the MGRUV) (as defined) less the costs and incentives (C&I) (as defined). Briggs J noted that Chartbrook argued that the correct formula was:

ARP = 23.4% x (Unit Price – MGRUV – C&I)[183]

By contrast, Persimmon's case was that the correct formula was:

ARP = (23.4% x Unit Price) – MGRUV – C&I[184]

Briggs J said that:

[182] [2007] EWHC 409 (Ch), [4].
[183] Ibid [18].
[184] Ibid [19].

> Chartbrook's case was that it was entitled to a 23.4% share of the net proceeds of sale of each Residential Unit in excess of a minimum guaranteed amount (being the unitised Total Residential Land Value of £76.34 per square foot of Residential Net Internal Area). Put another way, its stake in the residential part of the development was to be the whole of the first £76.34 per square foot of net sales value, and 23.4% of the surplus.[185]

Briggs J said that:

> By contrast, Persimmon's case was that Chartbrook was to receive an additional payment only if 23.4% of the net sales price amounted to more than the Minimum Guaranteed Residential Unit Value. Put more broadly, Chartbrook's stake in the residential part of the development was whichever was the greater of:
> i) 23.4% of the net residential sales price; and,
> ii) the guaranteed minimum of £76.34 per square foot of Residential Net Internal Area.[186]

Briggs J said that the 'aim or object of the ARP formula is clear. It is to provide to Chartbrook a share in the residential sales revenue, by way of addition to the guaranteed minimum payments. The issue of construction is, in short, how much, and by reference to what formula.'[187] Briggs J said that 'I shall therefore proceed to determine its true construction by reference only to the language used, read in the context of the contract as a whole, and to any admissible non-negotiation background facts known or reasonably available to the parties at the time.'[188] Briggs J commenced the construction process by saying that:

> On its face, the ordinary meaning of the definition of ARP seems to me clearly to point towards Chartbrook's rather than Persimmon's construction. Taking it stage by stage, ARP means 23.4% of something. To the question "23.4% of what?" the clear answer is the excess of the price achieved for each Residential Unit over the MGRUV, less the Costs and Incentives.[189]

Briggs J was satisfied that there were problems with the construction favoured by Persimmon when he said that 'Persimmon's construction requires the words "the amount by which" to be added after the word "means", and the word "is" added before the phrase "in excess of".'[190] Briggs J noted that that construction was precisely how Persimmon had framed its counterclaim for rectification of the definition. But Briggs J said that it 'is simply not what the definition

[185] Ibid [20].
[186] Ibid [21].
[187] Ibid [47].
[188] Ibid [48].
[189] Ibid [53].
[190] Ibid [54].

provides.'[191] Briggs J explained why the construction favoured by Persimmon was wrong when he said that:

> [55] An equally serious problem with Persimmon's construction is what to do with the subtraction of the C&I. It is common ground that the Costs and Incentives have a linear relationship with the amount of the price achieved for each Residential Unit. For example, Persimmon may agree the sale of a flat for £250,000 after incurring Costs and Incentives of say £50,000 or, with the same commercial consequence, sell the same flat for £200,000 but incur no Costs and Incentives. Typical Incentives would include payment of the purchaser's legal fees or stamp duty, or the installation of special features such as wooden floors, over and above the standard fit-out specification.
>
> [56] One would expect Chartbrook's profit share to be unaffected, one way or the other, by the decision of Persimmon to sell a particular flat by one or other of those methods (high price plus Incentives or low price without Incentives). Chartbrook's construction, under which the Costs and Incentives are deducted from the price achieved for each Residential Units before the application of the 23.4% share, fulfils precisely that expectation.
>
> [57] By contrast, Persimmon's construction deducts the C&I from the 23.4% of the price achieved for the Residential Unit before the net amount is compared with the MGRUV, to ascertain whether there is any excess. By comparison with Chartbrook's construction, that calculation magnifies the negative effect of C&I by a factor of more than 3 in comparison with the positive effect of the increase in the Residential Unit Price attributable to the C&I.[192]

Briggs J said that 'Persimmon's inability to offer an interpretative route which does not produce a commercial absurdity in the deduction of the C&I is a telling indication that its construction is wrong.'[193] Briggs J concluded on the construction issue that the proper construction of the ARP was that contended for by Chartbrook.[194] In relation to the rectification claim Persimmon argued common mistake and in the alternative unilateral mistake. Briggs J was satisfied that Persimmon had been mistaken.[195] However, the rectification claim failed because Briggs J was not satisfied that Chartbrook's negotiators had the same subjective intention as Persimmon or that they were aware that Persimmon was acting under a mistake.[196] Accordingly, Chartbrook's claim succeeded and Persimmon's rectification counterclaim was dismissed. Persimmon appealed to the Court of Appeal.

[191] Ibid.
[192] Ibid [55]-[57].
[193] Ibid [58].
[194] Ibid [62].
[195] Ibid [131]-[132].
[196] Ibid [164].

In *Chartbrook Ltd v Persimmon Homes Ltd*[197] Rimer LJ, in dismissing the appeal said that there 'is nothing unclear, uncertain or ambiguous about [the ARP].'[198] His Lordship said that the definition of ARP in Schedule 6 'is clear, certain and unambiguous and its arithmetic is straightforward.'[199] Rimer LJ noted that Persimmon sought to have the ARP read as if it were drafted as follows:

> [ARP] means *the amount (if any) by which* 23.4% of the price achieved for each Residential Unit *is* in excess of the [MGRUV] less the [C&I].[200]

His Lordship recognised, as Briggs J did, that the 'change of language fundamentally distorts the meaning and arithmetic of the definition' and that under the construction favoured by Persimmon 'the payment to Chartbrook will vary according to whether C&I are offered: Persimmon could reduce the share payable to Chartbrook by offering C&I and increasing the price by the same amount.'[201] Essentially the two problems for Persimmon were that (a) their proposed construction created an anomaly because it did not adequately deal with how the C&I was to be properly treated in the formula; and (b) the construction favoured by Chartbrook made perfect sense if the formula was read without reference to the prior negotiations. Rimer LJ was clear that Persimmon was seeking to rely on the prior negotiations for the impermissible reason to influence the court's approach to construction when his Lordship said that:

> Persimmon's purpose in going into the archaeology of the transaction is not to derive assistance in the *interpretation* of the ARP definition, for which there is no need. It is to seduce the court into accepting that the parties' subjective intentions with regard to the ARP calculation were different from what the ARP definition in the agreement actually provides, and then to invite the interpretation of that definition in a way that is in line with the alleged intentions. In short, the bid is to have recourse to the negotiations for the purpose of *rectifying* the ARP definition under the guise of interpretation.[202]

Importantly his Lordship added that:

> Perhaps the most that can be said on the issue of construction is that, looking at land values as at 2001, the contractual terms seem improbable ones for Persimmon to have signed up to. If so, the explanation is either (i) that it made a bad bargain, or (ii) that it may have made a

[197] [2008] EWCA Civ 183. For discussion of the decision see Birke Häcker, 'Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines' (2008) 19 *King's Law Journal* 293; David McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5; and David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 *Law Quarterly Review* 608.
[198] [2008] EWCA Civ 183, [183].
[199] Ibid.
[200] Ibid [184].
[201] Ibid [185].
[202] Ibid [187].

> sensible one but the written agreement recorded it wrongly. If the former, Persimmon is stuck with its bargain, and it is not the court's function to reform it. If the later, Persimmon may have a claim to have the agreement rectified.[203]

Accordingly, his Lordship held that the appeal should be dismissed on the issue of construction.[204] Tuckey LJ also agreed that the appeal, in relation to construction, should be dismissed.[205] In doing so his Lordship said that the 'words used to define ARP are entirely clear.'[206] His Lordship said that Persimmon's construction required the definition of ARP to be rewritten as if it had been drafted:

> ARP means *the amount (if any) by which* 23.4% of the price achieved for each Residential Unit *less the [C+I]* is in excess of the [MGRUV] ~~less the [C+I]~~.[207]

Tuckey LJ said that:

> Short of a good claim for rectification I do not think it is possible to make such radical changes to the clear words used in the agreement by invoking the forces of commercial good sense and hints from other parts of the agreement that Chartbrook would not inevitably have been entitled to ARP. They simply are not up to the major interpretive task for which Persimmon invokes them.[208]

However, Lawrence Collins LJ dissented on the issue of construction. His Lordship examined the events that occurred in the period leading up to the signing of the agreement on 16 October 2001 and some events that occurred after that date. An important event that took place not long after the agreement was signed was an approach Chartbrook made to various banks to refinance the existing debt over the property. One bank that Chartbrook approached was the Royal Bank of Scotland (RBS). RBS engaged Eversheds to review the agreement and report back to RBS. Eversheds reviewed the agreement and advised RBS on 7 December 2001 that Chartbrook was to receive as part of the sale price 'a balancing payment of 23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value'. A copy of that report was sent to Chartbrook's solicitor, Mr Skelly. A few days later on 10 December 2001 one of Chartbrook's negotiators, Mr Reeve, wrote to Mr Wright at CPFC mortgage brokers and referred to the balancing payment and said that the balancing payment 'amounts to 23.45% of the price achieved for each residential unit in excess of the minimum guaranteed unit value.'

[203] Ibid [188].
[204] Ibid [190].
[205] Ibid [192].
[206] Ibid [193].
[207] Ibid.
[208] Ibid [194].

Mr Reeve mentioned a possible balancing payment of more than £3,000,000. Lawrence Collins LJ said that the 'letter from Eversheds to the Royal Bank of Scotland and Mr Reeve's letter to Mr Wright are the only contemporary communications which reflect what Chartbrook maintained was its intention.'[209] Lawrence Collins LJ said that:

> Yet this is a case in which, if one puts aside the drafts of the Agreement, every contemporary document prior to the conclusion of the Agreement, and every piece of paper which throws light on the commercial purpose of the provision, supports Persimmon's case that the deal which was on the table was Persimmon's offer to Chartbrook of either a fixed percentage of the sales revenue or the minimum guaranteed amount, whichever was the greater.[210]

Having made those observations his Lordship then considered the construction of the agreement. His Lordship outlined one of the strongest arguments put forward by Persimmon in the appeal which was that:

> On Persimmon's construction the commercial purpose of schedule 6 was to deliver guaranteed minimum payments to Chartbrook (and with a guaranteed timetable for payment) together with the possibility of an extra payment if sales exceeded expectations. By contrast it was impossible to discern what the commercial sense behind Chartbrook's construction was. On Chartbrook's case the MGRUV appeared to be entirely arbitrary – it made no sense to specify it as the figure of 23.4% of a realistic price and then provide for Chartbrook to receive 23.4% of the excess not over that price but over the MGRUV.[211]

Lawrence Collins LJ said that one factor that suggested that the trial judge was wrong was that 'it is very difficult (and probably impossible) to discern the commercial sense behind Chartbrook's construction' and that 'it is permissible to take into account as background the anticipated selling prices of the Units.' [212] His Lordship explained why Chartbrook's construction made no commercial sense when his Lordship said that:

> Mr Reeve's and Mr Vantreen's expectations of residential unit sales revenue were in the region of £200,000 per unit. The MGRUV was anticipated to be about a quarter of this, and it was in fact about £47,000 per flat. On Chartbrook's construction, there would be bound to be a very substantial ARP (Chartbrook said it expected about another £3 million). Chartbrook's case would still produce substantial additional payments even in the event of a catastrophic market fall. Only if the market fell by 66% (thereby reducing unit values to something in the region of £65,000) would there be no additional payment.[213]

His Lordship accepted one of Persimmon's critical submissions when his Lordship said that:

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[209] Ibid [66].
[210] Ibid [69].
[211] Ibid [81].
[212] Ibid [92].
[213] Ibid.

> I accept Persimmon's submission that Chartbrook's interpretation made no sense of the level of MGRUV. On Persimmon's case the MGRUV was the equivalent of 23.4% of a realistic anticipated aggregate price, so that was what Chartbrook would receive if the flats sold at or below that price, and it would receive 23.4% of the excess if they sold for a higher price. But on Chartbrook's case the MGRUV was arbitrary, since it made no sense to specify it as the figure of 23.4% of a realistic price and then provide for Chartbrook to receive 23.4% of the excess not over that price but over the MGRUV.[214]

In relation to the issue of rectification his Lordship held that the rectification counterclaim should be dismissed.[215] Rimer LJ agreed with Lawrence Collins LJ on the issue of rectification[216] as did Tuckey LJ.[217] Accordingly, Chartbrook succeeded on the construction claim and Persimmon's rectification claim failed. Persimmon appealed to the House of Lords. In the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*[218] Lord Hoffmann said, in relation to the correct approach to construction of a contract, that it is agreed 'that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean.'[219] His Lordship said that where the context and background drove a court to the conclusion that something must have gone wrong with the language used in the contract then 'the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.'[220] In relation to the contract before the court his Lordship said that 'this appears to be an exceptional case in which the drafting was careless and no one noticed.'[221] His Lordship agreed with the approach taken by Lawrence Collins LJ in his dissenting judgment in the Court of Appeal when Lord Hoffmann said that 'I think that to interpret the definition of ARP in accordance with ordinary rules of syntax makes no commercial sense.'[222] His Lordship considered the construction favoured by Chartbrook that

[214] Ibid [93].
[215] Ibid [176]-[179].
[216] Ibid [189].
[217] Ibid [191].
[218] [2009] 1 AC 1101. For a discussion of the decision and its implications see Richard Buxton, '"Construction" and Rectification after *Chartbrook*' [2010] 69 *Cambridge Law Journal* 253; John Dyson Heydon, 'Implications of *Chartbrook Ltd v Persimmon Homes Ltd* for the Law of Trusts', Presentation at a Trusts Symposium Organised by the Law Society of South Australia and the Society of Trust and Estate Practitioners held in Adelaide on 18 February 2011; David McLauchlan, 'Commonsense Principles of Interpretation and Rectification' (2010) 126 *Law Quarterly Review* 8; David McLauchlan, 'Interpretation and Rectification: Lord Hoffmann's Last Stand' [2009] *New Zealand Law Review* 431; Christopher Nugee, 'Something's gone wrong with my contract' (2009) 20(10) *Construction Law* 14; Christopher Nugee, 'Rectification after Chartbrook v Persimmon: where are we now?' (2012) 26(2) *Trust Law International* 76; and The Rt Hon Lord Justice Patten, 'Does the law need to be rectified? Chartbrook revisited', The Chancery Bar Association 2013 Annual Lecture.
[219] [2009] AC 1101, 1112.
[220] Ibid.
[221] Ibid.
[222] Ibid.

provided for an additional payment to them even when the market price of flats collapsed. His Lordship said:

> My Lords, I cannot believe that any rational parties who wished to make provision for such a catastrophic fall in the housing market (itself an unlikely assumption) would have adopted so precise a sum to represent their estimate of what might happen. Why £53,438? That was the agreed minimum figure for that part of the value of a flat attributable to the *land* which Chartbrook was selling. It was clearly based upon a careful and precise estimate of current market prices and building costs. But how could this figure have been appropriate as a minimum expected *sale* price of the entire flat at some future date? If the parties were wanting to guess at some extraordinary fall in the market against which Chartbrook was to be protected, why £53,438? Why not £50,000 or £60,000, or £100,000? A figure chosen to represent someone's fears about a possible collapse in the market could only have been based upon wild speculation, not the kind of calculation which produces a figure like £53,438. That figure cannot have been meant to play the part in the calculation which Chartbrook's construction assigns to it. It must have been intended to function as a minimum land value, not a minimum sale price.[223]

Significantly his Lordship said that:

> I therefore think that Lawrence Collins LJ was right in saying that ARP must mean the amount by which 23.4% of the achieved price exceeds the MGRUV. I do not think that it is necessary to undertake the exercise of comparing this language with that of the definition in order to see how much use of red ink is involved. When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did.[224]

His Lordship explained, that there is not 'a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed' and that all 'that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant. In my opinion, both of these requirements are satisfied.'[225] Lord Hoffmann addressed the issue of the C&I in the ARP definition and said that:

> Everyone agrees that the only sum from which the C&I can rationally be deducted is the headline price achieved on the sale, so as to arrive at the net amount received by Persimmon. That is accordingly what the parties must have meant. You deduct the C&I from the nominal price achieved and the ARP is the excess, if any, of 23.4% of that net sum over the MGRUV. Giving this meaning to the provision about C&I does not in any way weaken or affect the

[223] Ibid 1113.
[224] Ibid 1113-4.
[225] Ibid 1114.

> argument for interpreting the rest of the definition in a way which gives ARP a rational meaning.[226]

His Lordship held that the appeal should be allowed on the issue of construction. Lord Hope[227] agreed with Lord Hoffmann as did Lord Rodger[228] and Baroness Hale.[229] Lord Walker[230] also reached the same conclusion as Lord Hoffmann on the issue of construction, and the appeal was allowed.[231]

The decision of the House of Lords in *Chartbrook* highlights the dividing line between common law construction and the equitable doctrine of rectification. The result in *Chartbrook* recognised a wide scope for construction and a correspondingly narrower scope for rectification. As Sir Richard Buxton,[232] a former Lord Justice of Appeal, has observed, construction and rectification have 'lived in uneasy parallel with each other.'[233] That uneasy parallel reflects the fact that until the decision of the House of Lords in *Chartbrook* the wide scope of common law construction had not always been fully appreciated. Professor McMeel[234] has observed, in relation to rectification, that over 'the last decade it is clear that construction has taken over much of the work which may once have been seen as the exclusive province of the equitable remedy.'[235] Professor McMeel notes that in the majority of cases the modern approach to construction 'will resolve disputes concerning mistakes of expression in documents'[236] and he highlights the narrowing jurisdiction of the equitable doctrine of rectification when he says that:

> It is now emphatically the case that the *only* reason for including a plea of 'common law' rectification is to circumvent the exclusionary rules of evidence constraining the exercise in construction. If the remainder of the contract, the admissible background, and commercial common sense do not supply sufficient material that the document has used the wrong words or syntax to record what the parties objectively agreed, the plea of rectification allows in further evidence of subjective intentions, memoranda, correspondence, and drafts which might tip the balance. Using this broader range of materials the court may reconstruct the parties'

[226] Ibid 1114-5.
[227] Ibid 1109.
[228] Ibid 1128.
[229] Ibid 1136.
[230] Ibid.
[231] For recent Australian cases concerning with absurdities in commercial contracts see: *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* (2016) 18 BPR 35,847; and *Fitness First Australia Pty Ltd v Fenshaw Pty Ltd* [2016] NSWCA 207.
[232] Richard Buxton, '"Construction" and Rectification after *Chartbrook*' [2010] 69 *Cambridge Law Journal* 253.
[233] Ibid.
[234] Gerard McMeel, *The Construction of Contracts* (Oxford University Press, 2nd ed, 2011).
[235] Ibid 484.
[236] Ibid 507.

> (objectively determined) intentions, whether diverging or converging, up to the date the agreement was finalized in documentary form. It follows that if English courts had abandoned in *Chartbrook*, or were to abandon the exclusionary rules for construction in the future, the remedy of 'common mistake' rectification would be wholly redundant.[237]

Professor Burrows[238] has expressed similar views, stating that 'some cases that would previously have required rectification can now, under the contextual approach to construction, be satisfactorily dealt with by construction.'[239] He argues that 'the new contextual approach means that construction has swallowed up much of what only rectification could have previously achieved.'[240] Professor Burrows concludes that 'rectification has not merely been rendered less important by modern developments in the law of construction but is on the point of being rendered largely superfluous' and that once 'there is reform, as there surely must be, of the rule which treats as inadmissible some relevant evidence in construing a contract (ie the ban on looking at previous negotiations and declarations of intention) the way is clear for the courts to apply construction in a way that largely swallows up rectification for common, and even unilateral, mistakes.'[241]

Accordingly, common law construction has a very wide scope to correct mistakes without resort to rectification. Quite complex issues can be resolved through construction once the court considers the full factual background, other than the prior negotiations of the parties. If that factual background reveals a lack of commercial sense in the words used by the parties, the court will be able to examine that same factual background, and any other admissible evidence, to determine what the parties must have meant by the words that they used. The decision of the House of Lords in *Chartbrook* is a good example of the wide scope of the common law process of construction. Courts in such circumstances will go to great lengths to overcome poorly drafted clauses that lack commercial sense. This is appropriate because a court should, without examining the negotiations between the parties, use all appropriate material to determine what the relevant clause was intended to mean. In doing so the court should reject a meaning that lacks commercial sense. By striving to find an interpretation that makes commercial sense a court is more likely to provide the parties with an outcome that reflects what they set out to achieve but would otherwise have failed to achieve because of a poorly drafted clause.

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[237] Ibid.
[238] Andrew Burrows, 'Construction and Rectification' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press, 2007) 77–99.
[239] Ibid 90.
[240] Ibid 90–91.
[241] Ibid 99.

4 *Conclusion*

The correction of more significant errors through construction, especially cases where the court determines that a clause of an agreement lacks commercial sense, is controversial because a court, when placing a meaning on the words used in the agreement, is looking well beyond the words used in the process of attributing meaning to the words. The process of construction in such circumstances is somewhat artificial because, although the courts look at the circumstances in which the parties were negotiating their agreement, they will not consider the *actual negotiations* of the parties. Nevertheless, the courts have maintained the limitation that prior negotiations will not be considered when undertaking a process of construction. Despite being controversial the approach adopted by the courts is fully justified because it strives to find a commercially sensible interpretation of the words used by the parties and seeks to overcome a difficulty created by a poorly drafted clause.

D *Conclusions*

In this Chapter, the ability to correct mistakes and errors through the common law process of construction has been examined. This included examining the distinction between common law construction and the equitable doctrine of rectification. The analysis shows that over recent decades the courts have adopted a more contextual approach to common law construction and this has led to the courts correcting, through the process of construction, some errors and mistakes that would otherwise be left to equity to correct through the doctrine of rectification. Thus, the scope of construction has widened and there has been a corresponding narrowing of the scope of the equitable doctrine of rectification.

Three conclusions can be drawn from this analysis. First, the correction of minor errors through the common law process of construction is a proper and necessary role for common law construction. Numerous errors or mistakes in documents can be corrected by the courts by using a contextual approach to construction. This is uncontroversial for minor errors where the court is being asked to correct an obvious mistake in a document and where it is equally obvious what was agreed by the parties. As pointed out in the analysis in this Chapter, it would be absurd if the common law was unable to correct such mistakes.

Secondly, the use of common law construction to overcome poorly worded contractual clauses is controversial in circumstances where the clause lacks commercial sense. Although this is controversial, it is an appropriate role for common law construction to provide an appropriate meaning for a clause where the clause lacks commercial sense. In adopting this approach, the courts are ensuring that those entering into contracts can have confidence that the courts will use the process of common law construction to ensure that words are interpreted to have a commercially sensible meaning in the context in which the parties were contracting.

Thirdly, the jurisdiction of the common law process of construction has expanded in recent decades and this has in turn resulted in a narrower scope of the equitable doctrine of rectification. Nevertheless, there remains a meaningful role for the equitable doctrine of rectification, primarily to correct mistakes in the recording of agreements. This is particularly relevant where the agreement as worded makes perfect commercial sense but nevertheless does not accurately record what was previously agreed between the parties. Accordingly, rectification remains a critically important equitable remedy, albeit a remedy with a narrower scope in recent decades. As His Honour Judge Hodge (QC) writing extra-judicially has argued, despite 'recent suggestions (many pre-dating *Chartbrook Ltd v Persimmon Homes Ltd*) that the court's new approach to the interpretation of documents is on the point of rendering the law of rectification largely superfluous, the equitable remedy of rectification continues to play a useful role in correcting mistakes in the drafting of documents.'[242] Writing extra-judicially, Lord Hoffmann,[243] has expressed a similar sentiment when he says that 'reports of the death of rectification have been greatly exaggerated.'[244] Lord Hoffmann makes it clear that rectification has an important role to play when he says that many 'errors are not linguistic. The written contract may make perfectly good sense. It just happens not to be what the parties had agreed.'[245]

If a mistake cannot be overcome through the common law rules of contractual interpretation, it will be necessary for a party seeking to have the mistake corrected to resort to the equitable doctrine of rectification for a remedy. The historical development of the doctrine is examined in detail in the next Chapter.

[242] David Hodge QC, *Rectification* (Sweet & Maxwell, 2nd ed, 2016) 175.
[243] Lord Hoffmann, above n 20.
[244] Ibid [18].
[245] Ibid.

II HISTORICAL DEVELOPMENT OF THE EQUITABLE DOCTRINE OF RECTIFICATION

A *Introduction*

To understand the modern law of rectification it is necessary to examine some important historical developments. The three most important developments have been: (i) the requirement that there be a common or mutual mistake before rectification can be granted; (ii) the establishment of an exception to that general rule, so that rectification can be granted in some cases of unilateral mistake; and (iii) the abandonment of the requirement that there be an antecedent agreement before rectification can be granted. These three developments are examined in this Chapter. It is argued that these developments created a distinction between cases of common or mutual mistake and cases of unilateral mistake and that that distinction should be rejected. Instead, rectification cases should be categorised by reference to the type of mistake that has been made. It is also argued that the development in the law that there be no requirement for an antecedent agreement before rectification can be granted was an appropriate development.

B *Requirement for a common or mutual mistake*

Many modern claims for rectification plead rectification for common or mutual mistake and then claim rectification for unilateral mistake in the alternative. But when the doctrine of rectification first developed the remedy of rectification was not available for what is now referred to as unilateral mistake. In cases now described as being based on a common or mutual mistake the courts only occasionally used the language of common or mutual mistake.[246] In many cases it was not considered necessary to prove that all the parties to the relevant document had knowledge of the mistake. The requirement was that there be, as a fact, a mistake between what was agreed either orally or in writing when a contract was first made, and a subsequent written contract that superseded the earlier oral or written contract. That is, rectification was an exercise in comparison and the identity of the person or persons who caused the mistake, or how it came about, were irrelevant.

[246] See *Ball v Storie* (1823) 1 Sim & St 210; 57 ER 84; and *Fowler v Fowler* (1859) 4 De G & J 250; 45 ER 97.

An early example of where rectification was awarded without the need to prove that all parties to the document were mistaken is *Ramsbottom v Gosden*[247] where the agreement of the parties for the sale of a property was not correctly recorded in the written contract. The alleged mistake was that the written contract did not specify which party was to pay the cost of making out the defendant's title. The defendant, the vendor, argued that there had been a mistake by his solicitor in preparing the written contract and that the parties had agreed that the plaintiff was to pay the costs of making out the defendant's title. The defendant gave evidence that he had agreed to sell the property only on the basis that the plaintiff paid all such costs and that the plaintiff had agreed to those terms. The Master of the Rolls, Sir William Grant, was satisfied that a mistake had been made by the defendant's solicitor in not expressly providing in the written contract that the plaintiff was to pay the costs of making out the defendant's title and the Master of the Rolls held that the agreement should be performed in the way contended for by the defendant.[248] There was no requirement that it be proved that both parties were mistaken or that both parties had knowledge of the mistake when they signed the written contract. In this case the defendant alleged that there was a mistake in the written contract and proved, as a fact, that there was a mistake in the recording of what had previously been agreed. The plaintiff denied that there had been a mistake but, importantly, the defendant was not required to prove that the plaintiff was mistaken. The defendant only had to prove the terms of the prior oral agreement, which he did, and that that prior oral agreement was not correctly recorded in the written contract.

In these early cases the courts focused on identifying the terms of the prior agreement and then comparing those terms to the terms recorded in the final written contract. In *Ball v Storie*[249] the Vice-Chancellor, Sir John Leach, did not require that all parties be mistaken before rectification could be granted when he said that:

> A Court of Equity does … assume a jurisdiction to reform instruments, which either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties. And, of necessity, in the exercise of this jurisdiction, a Court of Equity receives evidence of the true agreement in contradiction of the written instrument.[250]

[247] (1812) 1 V & B 165; 35 ER 65.
[248] Ibid 168-9.
[249] (1823) 1 Sim & St 210; 57 ER 84.
[250] Ibid 219.

Nevertheless, the courts at this time had started to refer to the mistakes as common mistakes or mutual mistakes although it did not seem that it was necessary to prove a common or mutual mistake. As the Vice-Chancellor explained in *Ball v Storie*, 'Common mistake is the ordinary head of jurisdiction; and every party who comes to be relieved against an agreement which he has signed, by whomsoever drawn, comes to be relieved against his own mistake.'[251] Although the Vice-Chancellor referred to common mistake he also made it clear that a person seeking rectification is really seeking to be relieved from the effect of their 'own mistake.'[252]

Eventually the courts expressly stated that there was a requirement that there be a common or mutual mistake before rectification would be available. The issue was expressly addressed in *Mortimer v Shortall*[253] where the court was considering an alleged mistake in a lease. The document provided for a lease of two farms by the plaintiff, as lessor, to the defendants, as lessees. The plaintiff argued that by mistake the lease failed to exclude two fields from the area the subject of the lease. The solicitor who prepared the lease and who had acted for both parties gave evidence that he was given clear instructions to exclude the two fields from the area covered by the lease but a mistake was made in the preparation of the lease. In granting rectification of the lease, the Lord Chancellor, Sir Edward Sugden, said that 'I agree with the proposition, as laid down by the Defendant's counsel, that I must be satisfied that there was a mistake on both sides, for I cannot otherwise rectify this lease.'[254] The Lord Chancellor said that a 'mistake on one side might be a ground for rescinding a contract, but never could be relied on as a reason for taking from a man, what he thought he was to get under his agreement.'[255] But that approach ignores the fact that rectification is a remedy available in circumstances where there is an oral or written contractual agreement antecedent to a final written agreement, provided that it is proved that there is a mistake in the recording of the earlier agreement in the final written agreement. It involves comparing the earlier agreement to the final written agreement. The court first needs to establish the terms of the initial agreement and the mistake, if there is one, is in the recording of that earlier agreement. Once the terms of the initial agreement have been established, and assuming there is no mistake in the formation of that initial agreement, then no issue of rescission will apply. Rescission will only be relevant if there is a mistake in the formation of the initial agreement. But in *Mortimer*

[251] Ibid.
[252] Ibid.
[253] (1842) 2 Dr & War 363.
[254] Ibid 372.
[255] Ibid 372-3.

v Shortall the only alleged mistake was in the written recording of the earlier oral agreement. Nevertheless, the case established the principle that for rectification to be awarded there needed to be a common or mutual mistake, that is, that all parties were operating under a mistake when they executed the document. It is also important to note that the Lord Chancellor, Sir Edward Sugden, when stating that there was a requirement for a common or mutual mistake, did not refer to any prior cases on that issue in the reported judgment. It was the defendant's counsel who had set out to persuade his Lordship that a common or mutual mistake was required.

The issue was considered again in *Torre v Torre*[256] where the plaintiff alleged that there was a mistake in a marriage settlement and sought to have the settlement rectified. In granting rectification, the Vice Chancellor, Sir John Stuart, did not require that there be a mistake by all the parties. The Vice Chancellor said that:

> If it is shewn that words have by mistake been introduced into the settlement contrary to her intention, it is the right of the Plaintiff to have that mistake corrected and those words struck out and to have the settlement made conformable to what was the agreement and intention of the parties when they executed it. In my opinion, there is clear evidence of the intention of the Plaintiff and of mistake and miscarriage in giving effect to it.[257]

A similar approach was adopted by the Master of the Rolls, Sir John Romilly, in *Barrow v Barrow*[258] where the Master of the Rolls, in the context of a dispute concerning a marriage settlement, stated the scope of the equitable jurisdiction to rectify documents as follows:

> When the parties to a marriage enter into an agreement as to the provisions to be introduced into the settlement to be then made, and the settlement, afterwards prepared and executed, does not correctly represent that agreement, but contains something agreed not to be inserted, or omits something which it was agreed should be inserted in it, this Court will rectify the settlement by making it conformable to the agreement which was actually entered into.[259]

The Master of the Rolls said that the 'jurisdiction of the Court, in matters of mistake, is to be very cautiously exercised; the extent to which it can be carried, in such a case as this, is, to correct an error in carrying into effect the real contract between the parties.'[260] The Master of the Rolls did not state any requirement that there be a common or mutual mistake. However,

[256] (1853) 1 Sm & Giff 518; 65 ER 227.
[257] Ibid 520-21.
[258] (1854) 18 Beav 529; 52 ER 208.
[259] Ibid 532.
[260] Ibid 533.

in *Murray v Parker,*[261] a judgment delivered on the same day as *Barrow v Barrow*,[262] and also delivered by Sir John Romilly, the Master of the Rolls said that 'I agree that to justify the Court in reforming an executed deed, it must appear that there has been a mistake common to both contracting parties, and that the agreement has been carried into effect by the deed in a manner contrary to the intention of both.'[263] The parties had entered into a written memorandum which was later replaced by a formal deed of lease. Accordingly, it would appear clear that the Master of the Rolls held that a common mistake was required before rectification could be granted.

Sir John Romilly considered the issue again in *Wright v Goff*[264] where he said that to rectify a written instrument the court 'must be convinced that there has been a mistake on the part of all the parties executing the deed, before it will reform and alter the deed in any degree.'[265] The Master of the Rolls said that this 'is the case of a deed-poll, and therefore, with respect to the parties to it, it is only necessary to prove the mistake on the part of Mrs. Wright, who was the only person who executed it.'[266] But in *Rooke v Lord Kensington*[267] there was no stated requirement for a common or mutual mistake. Instead the Vice Chancellor, Sir W. Page Wood, held that 'in order to enable this Court to rectify a settlement, it must be proved that it contains something which has been inserted by mistake, contrary to the intention of all the parties.'[268] In *Fowler v Fowler*[269] the Lord Chancellor, Lord Chelmsford, said that the 'power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake is one which has been frequently and most usefully exercised.'[270]

Essentially these cases demonstrate that by the early 19th century the courts had adopted the position that a common or mutual mistake was required, as a general rule, before rectification could be granted. It is noticeable that following *Mortimer v Shortall* there is an absence of any case expressly stating that rectification could be granted *in the absence* of a common or mutual mistake.

[261] (1854) 19 Beav 305; 52 ER 367.
[262] (1854) 18 Beav 529; 52 ER 208.
[263] (1854) 19 Beav 305, 308-9.
[264] (1856) 22 Beav 207; 52 ER 1087.
[265] Ibid 214.
[266] Ibid.
[267] (1856) 2 K & J 753; 69 ER 986.
[268] Ibid 764.
[269] (1859) 4 De G & J 250; 45 ER 97.
[270] Ibid 264.

Once the position was adopted that there needed to be a common or mutual mistake it became difficult for a litigant to obtain rectification in circumstances where they could not prove that the other party was mistaken. In *Sells v Sells*[271] the Vice Chancellor, Sir Richard Torin Kindersley, said that you 'cannot, I think, correct an instrument made in consideration of marriage, except on evidence of the mistake of both parties.'[272] The Vice Chancellor said that in 'the absence of authority, I think I should be establishing a very dangerous precedent, if I were to hold the mistake of one of the parties sufficient for rectifying a settlement.'[273] The requirement for a common or mutual mistake persisted in England in *Bradford v Romney*[274] and *Bentley v Mackay*.[275] But in Ireland, in *Council of the County of Monaghan v Vaughan*,[276] Dixon J was of the view that it was irrelevant who was aware of the mistake. The defendant provided a written tender to remove a ruined building owned by the plaintiff council. The defendant's offer was accepted by the plaintiff. After the work was completed the defendant argued that the plaintiff was to pay him £1,200 but the plaintiff claimed that the defendant was required to pay the plaintiff £1,200 and that the benefit to the defendant under the contract was that the defendant had the right to dispose of any materials removed from the site for his own benefit. The plaintiff argued that there had been a mutual mistake and that it was always intended that the defendant was to pay the plaintiff the sum of £1,200. The defendant's tender document, accepted by the plaintiff, was ambiguous but a contract entered into between the parties clearly stated that the plaintiff was to pay the defendant £1,200. The plaintiff sought to have the written agreement rectified based on mutual mistake. Dixon J examined the evidence and said that:

> I am satisfied that it was the intention of both parties that the defendant should pay the sum of £1,200 to the County Council, and I am of opinion that the defendant saw the error into which the County Council had fallen when the contract was read over to him and decided to take advantage of it. I regard this as a case of mutual mistake. I think that it is immaterial that one party knows the document to be inaccurate for the purposes of the application of the principles of law applicable to mutual mistake. What is material is that both parties were agreed upon certain matters and that the completed contract did not correctly represent the substance of their agreement. A unilateral mistake arises where one of two or more parties is not *ad idem* with the other party or parties, and there is therefore, no real agreement between them.[277]

[271] (1860) 1 Dr & Sm 42; 62 ER 294.
[272] Ibid 44-5.
[273] Ibid 45. It was also held in *Thompson v Whitmore* (1860) 1 J & H 268; 70 ER 748 that there needed to be a mistake by all parties for a settlement to be rectified.
[274] (1862) 30 Beav 431; 54 ER 956.
[275] (1862) 4 De G F & J 279; 45 ER 1191.
[276] [1948] IR 306.
[277] Ibid 312.

The distinction made by Dixon J is critical and is consistent with the position advocated in this thesis. It is the type of mistake made that matters and not who was aware of the mistake. But the approach adopted by Dixon J was not adopted in cases in England, Canada or Australia.

It can be seen from the examination of these cases that, although initially the courts did not expressly require that there be a common or mutual mistake, by the mid 19th century it was firmly established that a common or mutual mistake was required as a pre-requisite for the granting of rectification. The justification appeared to be, as outlined by the Lord Chancellor, Sir Edward Sugden in *Mortimer v Shortall*,[278] that a mistake of one party could never 'be relied on as a reason for taking from a man, what he thought he was to get under his agreement.'[279] But that justification ignores the fact that rectification in these circumstances is justified on the basis that the earlier binding contractual agreement (which all parties have consented to) has been incorrectly recorded in the final written agreement. So the granting of rectification where there has been a mistake in the recording of an agreement does not take from a party what they had agreed to: instead it ensures that all parties receive what was agreed to when the contract was first formed. Nevertheless, the requirement for a common or mutual mistake was adopted in the 19th century and this development contributed to the continuing classification of rectification cases between those involving common or mutual mistakes and those involving unilateral mistakes, a category later created as an exception to the general rule that a common or mutual mistake was required.

C *Rectification allowed for some unilateral mistakes*

It was not long before the courts began to accept that in some cases there was justification for an exception to the general rule that there must be a common or mutual mistake before rectification could be ordered. In *Garrard v Frankel*[280] an alternative approach was introduced to deal with cases where only one party was mistaken. But this new rule, or exception to the general rule that there needed to be a common or mutual mistake, would not have been necessary if the courts had not adopted the general requirement for a common or mutual mistake by following the approach adopted in *Mortimer v Shortall*. In *Garrard v Frankel* the

[278] (1842) 2 Dr & War 363.
[279] Ibid 372-3.
[280] (1862) 30 Beav 445; 54 ER 961.

plaintiff, Mr Garrard, and the defendant, Mrs Frankel, entered into negotiations concerning Mr Garrard leasing a property to Mrs Frankel. The plaintiff initially indicated that the rent would be £240 per annum but later revised the offer to £230 per annum on the basis that the defendant would pay an upfront premium of £125. Further discussions took place between the parties which culminated in a meeting on 20 August 1860. At that meeting the plaintiff provided a draft of the proposed lease. A short memorandum of around 8 to 10 lines was written within the fold of the draft lease. That memorandum correctly stated the rent to be £230 per annum. The memorandum also stated that a formal lease, and a counterpart, were to be completed at the expense of the defendant. Both parties signed the short memorandum thus indicating their agreement to a rental of £230 per annum. However, it appears from the judgment that this memorandum did not constitute a binding contract. The plaintiff later incorrectly inserted the figure of £130 per annum for the rent into the draft lease, and the lease and the counterpart were engrossed with that amount and executed a week later on 27 August 1860. The defendant, being aware of the mistake in the lease, then proceeded to pay the rent based on the rental figure in the lease, being £130 per annum, and the plaintiff filed a bill seeking to have the lease rectified.

The Master of the Rolls, Sir John Romilly, was satisfied that the plaintiff had most certainly made a mistake.[281] The Master of the Rolls said that the requirement for there to be a mutual mistake so as to obtain rectification was a 'general rule' that 'does not apply to every case.'[282] Sir John Romilly said that the 'Court will, I apprehend, interfere in cases of mistake, where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it.'[283] It was of course, the Master of the Rolls, Sir John Romilly, who had himself, only a few years earlier, so clearly stated the general rule in both *Murray v Parker*[284] and *Wright v Goff*,[285] discussed earlier in this Chapter. In *Garrard* the Master of the Rolls was satisfied from all of the evidence that the defendant knew that the plaintiff had made a mistake in inserting £130 into the draft lease instead of £230.[286] Although the Master of the Rolls was of the belief that the defendant would have signed the lease if it had correctly referred to an amount of £230 he said that 'I do not think that I am entitled to found any decree on such a

[281] Ibid 450.
[282] Ibid 451.
[283] Ibid.
[284] (1854) 19 Beav 305; 52 ER 367.
[285] (1856) 22 Beav 207; 52 ER 1087.
[286] (1862) 30 Beav 445, 456-7.

belief.'[287] The Master of the Rolls said that 'I doubt therefore whether I can compel [the] Defendant to be bound by a lease inconsistent with a portion of the agreement which she signed, and which, in one view which might be taken of it, might govern the other portion.'[288] But the Master of the Rolls was clear that some relief was necessary when he said that 'I am quite clear that I cannot compel the Plaintiff to be bound by the terms of the lease as it stands, or permit the Defendant to derive any advantage from this mistake.'[289] The only question was what relief was available in circumstances where there could not, because of the general rule, be rectification based on common or mutual mistake. The Master of the Rolls determined that the appropriate remedy was to offer the defendant two choices. Sir John Romilly said that 'I shall give the Defendant the option of retaining or rejecting the lease, but if she retains it I shall decree the lease to be reformed by substituting the rent of £230 for £130 per annum.'[290] Alternatively, the defendant would be permitted to give up the lease but pay rent for the period that she had been in possession of the property at a rate of £230 per annum being the accepted proved rental value of the property. The Master of the Rolls justified this approach by saying that the defendant had 'thought fit to run the chance of keeping the house, and of getting the lease at the lower rate, she must take the consequences.'[291]

Because the signed memorandum was not a binding contractual agreement, the draft lease that was subsequently prepared and presented by the plaintiff to the defendant was an offer to the defendant and that offer incorrectly included an annual rent of £130 instead of £230. The defendant clearly decided to snap-up a bargain when she noticed the mistake made by the plaintiff. At the time that *Garrard* was decided the law required an antecedent contractual agreement before rectification of a written contract could be obtained. In *Garrard* there was not an antecedent contract, only a short non-contractual memorandum setting out some of the commercial terms of the proposed lease including the agreed annual rent. But the law in relation to rectification was to further develop in the 20th century to remove the requirement for an antecedent contract. That development is examined further below. All that is now required is that there be an agreement on a term and that the agreement in relation to that term continued up until the signing of the final written contract. That was the case in *Garrard*, the rental was agreed at £230 per annum and the parties never negotiated a different annual rental. There was

[287] Ibid 457.
[288] Ibid.
[289] Ibid.
[290] Ibid 458.
[291] Ibid.

clearly a mistake in recording what had been previously agreed on that issue. If *Garrard* was decided today, the approach of the court would be different because of the abandonment of the requirement of an antecedent contractual agreement.

Importantly, for current purposes, the facts of *Garrard* demonstrate that there are two types of mistakes that might give rise to an order for rectification: (i) a mistake in the recording of a prior contractual agreement; and (ii) a mistake made in the making of an offer or in the process of accepting an offer. The two types of mistake are fundamentally different. The first is concerned only with a mistake in the written recording of an agreement whereas the second type of mistake is only concerned with the formation of an agreement. In *Garrard,* because the earlier memorandum was not a binding contract the mistake made was a mistake in the making of an offer, in the form of a mistake as to the annual rent included in the draft lease offered by the plaintiff to the defendant. But if the case was decided today, it would be a case of a mistake in the recording of an agreement and not a mistake in the making of an offer. The case demonstrates that a general rule based on the requirement of a common or mutual mistake is misconceived, as is an exception based on unilateral mistake. What is relevant is whether there has been a mistake in the recording of an agreement or a mistake in the formation of an agreement. These are two fundamentally different types of mistakes. It is also important to appreciate that once the general rule was adopted, with its focus on who was mistaken rather than the type of mistake, it was probably inevitable that an exception would be required to the general rule to avoid the injustice that would have arisen if the general rule was applied in a case such as *Garrard.* As the law of rectification stood at the time of *Garrard,* without the exception to the general rule, the defendant lessee would (in the absence of a successful claim for rescission) have obtained a windfall which could not be justified. The Master of the Rolls, Sir John Romilly, considered the issue again in *Harris v Pepperell*[292] in a case concerning an alleged mistake in a deed. The Master of the Rolls said that if it was determined that there was a mistake, and that the deed ought to be rectified, then the Court 'can give the Defendant the option of having the whole contract annulled, or else of taking it in the form which the Plaintiff intended.'[293]

[292] (1867) LR 5 Eq 1.
[293] Ibid 5.

Despite these decisions that allowed for rectification in circumstances where only one party was mistaken, the courts in some jurisdictions, for example in Ireland, appeared reluctant to embrace unilateral mistake as a basis for rectification preferring the general rule that a common or mutual mistake was required. In *Young v Halahan*[294] Vice-Chancellor Chatterton said that:

> The general rule of this Court in reference to the rectification of deeds is that, where it is satisfactorily proved that by mutual mistake a deed as executed does not express the real contract of the parties, the Court will reform it, and make it conformable to the contract. For this purpose, it is necessary that the mistake should be mutual, the principle on which the equity proceeds being that the parties are to be placed in that position in which both believed that they were placed by the deed. If one party only were under a mistake, while the other without fraud knew what the operation of the deed was, and intended that it should be so, the Court cannot interfere, for otherwise it would be forcing on the latter a contract he never entered into, or depriving him of a benefit he had *bonâ fide* acquired by an executed deed. This rule is not confined to, though probably it originated in, cases upon marriage settlements made in pursuance of previous agreements. It is one, from its nature, of general application, and was so treated by Sir E. Sugden, L. C., in *Mortimer* v. *Shortal,* where he applied it to the case of a lease.[295]

Accordingly, the general rule that rectification required a common or mutual mistake was firmly adopted but in some limited circumstances in England (but not in Ireland) it was held that rectification might be available if only one party was mistaken, but subject to the non-mistaken party having an option to either proceed with the rectified agreement or have the agreement annulled. This led to a classification of rectification between common and mutual mistake cases and unilateral mistake cases which has endured and has become the dominant framework used to examine and understand rectification decisions. The High Court of Australia accepted the requirement for mutual mistake in *Horsfall v Braye*[296] and referred to the distinction between mutual mistake and unilateral mistake in *Slee v Warke*.[297] It has now become common for a party to plead rectification for common or mutual mistake and in the alternative plead rectification for unilateral mistake to cover circumstances where the other party can prove that they were not mistaken.

It is a central argument of this thesis that the distinction between common or mutual mistakes and unilateral mistakes in rectification cases is misconceived. The true distinction is between cases where there is a mistake in the recording of an agreement and cases where there has been

[294] (1875) Ir R 9 Eq 70.
[295] Ibid 78-9. See also *Coates v Kenna* (1872) 6 IR Eq 401 at 408.
[296] (1908) 7 CLR 629, 652.
[297] (1949) 86 CLR 271.

a mistake made in making an offer or a mistake made when accepting an offer. The first type of mistake may or may not be noticed by all parties when the final document is signed. In the second type of mistake it is often, but not always the case that one party notices the mistake made by the other party and fails to bring it to their attention, instead snapping up a bargain. It is critical to understanding rectification to appreciate these two different types of mistakes.

Mistakes made in the recording of an agreement are examined in Chapter IV and mistakes made during the formation of an agreement (mistakes in making or accepting an offer) are examined in Chapter V. A further development in the equitable doctrine of rectification to be examined in this Chapter is the courts abandonment of the requirement that an antecedent agreement was a prerequisite to obtaining rectification in cases of a mistake in the recording of an agreement. All that is now required is that there be an agreement as to a proposed term of a contract and that the agreement to that proposed term continues up until the signing of the final written contract. That development will now be examined.

D *The initial requirement of an antecedent agreement*

The usual circumstances where a mistake is alleged in the recording of an agreement is that there is an antecedent oral agreement or a preliminary written agreement and it is alleged that there has been an error in reducing that earlier agreement into its final written form. In earlier cases on rectification it was a requirement that there be an antecedent contractual agreement and that a mistake occurred in recording that agreement in the final written contract. Rectification was available to provide relief from such mistakes and was a remedy available to provide relief from the common law rule that a party is bound by the documents that they sign.[298] However, as negotiations between contractual parties came to be undertaken over a longer period and the subject matter of contracts became arguably more complex, it was inevitable that the requirement for an antecedent agreement would need to be relaxed. Such a strict rule meant that parties would be bound by their signature on a written contract even though it might be clear that a mistake was made in the recording of a term previously agreed to at a time when a binding contract had not been entered into.

[298] *L'Estrange v Graucob* [1934] 2 KB 394.

The rule that there be an antecedent agreement as a pre-requisite for obtaining rectification was established in the 19th century. In *Mackenzie v Coulson*[299] the Vice Chancellor, Sir William Milbourne James, said that 'it is always necessary for a Plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument.' [300] The requirement for an antecedent agreement was also a requirement under Canadian law in the 19th century. In the Ontario Court of Appeal in *Billington v Provincial Insurance Co*[301] Moss CJ said that:

> It is essential that clear proof should be adduced of a real agreement between the parties different from the written agreement. If it appears that the instrument was executed under a common mistake as to its contents, but that no real agreement had ever been concluded between the parties, there may be rescission; but there is no foundation for rectification.[302]

The requirement for an antecedent agreement was emphasised in the early 20th century by the Court of Appeal in *Lovell and Christmas Ltd v Wall*.[303] In 1896 the plaintiff company took over the business carried on by the promoters of the company, the firm of Lovell and Christmas. The agreement to acquire the firm was entered into on 23 July 1896 and contained a covenant on the part of each partner in the vendor firm whereby they each covenanted that that they would not at any time, either solely or jointly with any other person, directly or indirectly carry on or be interested in the same business as the plaintiff company, being the business of a provision merchant, within London or Manchester except as a shareholder or employee of the plaintiff company. Another company, George Wall & Co Ltd, was incorporated in 1897 to acquire two businesses of provision merchants, importers and commission agents. George Wall & Co Ltd was also engaged in the business of the manufacture of margarine through several subsidiary companies. In March 1906 negotiations commenced for the amalgamation of the plaintiff company with George Wall & Co Ltd. The terms of the amalgamation were contained in an agreement dated 16 June 1906. A restrictive covenant was included in the agreement in clause 13 that was in similar effect to the restrictive covenant included in the 23 July 1896 agreement when the plaintiff company acquired the firm of Lovell and Christmas, but with the addition of the City of Liverpool as an excluded area. However, the covenant made no reference to the manufacture of margarine. In addition, there was a proviso concerning the defendant,

[299] (1869) LR 8 Eq 368.
[300] Ibid 375.
[301] (1877) 2 Ont App Rep 158. The decision was affirmed on appeal to the Supreme Court of Canada: see *Billington v Provincial Insurance Co of Canada* (1879) 3 SCR 182.
[302] (1877) 2 Ont App Rep 158, 167. The same position was adopted in *McKay v McKay* (1880) 31 UCCP 1.
[303] (1911) 104 LT 85.

Charles Wall. According to the proviso Wall could be released from his restrictive covenant by the payment of £5,000 to the plaintiff company. If he paid that amount, he would be released from the covenant five years from that date or earlier if he was removed as a director of the plaintiff company against his will. Wall was later removed as a director of the plaintiff company and intended to engage in the business of margarine manufacture in the excluded areas of London, Manchester and Liverpool. The plaintiff company alleged that such conduct would be a breach of the covenant because in their view the manufacturing and selling of margarine fell within the definition of 'provision merchant'. The plaintiff company commenced proceedings seeking a declaration to that effect, based on the construction of the agreement, and an appropriate injunction. The plaintiff pleaded in the alternative to have the agreement of 16 June 1906 rectified. The plaintiff claimed that an oral agreement was reached on 1 June 1906 that included a term that the restrictive covenant applied to all businesses operated by the plaintiff company which included the margarine business. The defendant claimed that there was no antecedent agreement to the written agreement dated 16 June 1906. The plaintiff failed on both points before Eve J in *Lovell and Christmas Ltd v Wall*[304] and appealed to the Court of Appeal.

In the Court of Appeal, the Master of the Rolls, Sir Herbert Cozens-Hardy held that the plaintiff failed on the issue of construction.[305] On the issue of rectification, the Master of the Rolls said that the 'essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement.'[306] The Master of the Rolls made it clear that rectification 'presupposes a prior contract, and it requires proof that, by common mistake, the final completed instrument as executed fails to give proper effect to the prior contract.'[307] The Master of the Rolls said that the 'prior agreement need not be in writing, though the court is always reluctant to rectify on mere verbal statements of what took place several years ago.'[308] The Master of the Rolls said that 'a prior agreement must be proved; mere intention will not suffice. Mere steps in the course of negotiation will not suffice. If the only agreement which is proved is that contained in or evidenced by the document as executed, there can be no rectification.'[309] The Master of the Rolls noted that the parties engaged in negotiations on 31 May 1906 and 1 June 1906 concerning the proposed agreement.[310] After

[304] Ibid.
[305] Ibid 89.
[306] Ibid 88.
[307] Ibid.
[308] Ibid.
[309] Ibid.
[310] Ibid 89.

those meetings, a draft agreement was provided to the defendant by the plaintiff's solicitor. The Master of the Rolls said that the provision of the draft at that time 'plainly treated the whole matter as in negotiation only.'[311] In fact, the evidence showed that there were further changes made to the agreement as late as 11 June 1906, including changes to the wording of the restrictive covenant. The Master of the Rolls held that there was no concluded agreement until the document was signed on 16 June 1906 and that he declined 'to treat a step in the negotiations as anything more than a proposition under discussion.'[312] Accordingly, the Master of the Rolls dismissed the appeal. Fletcher Moulton LJ was of the same opinion.[313] His Lordship said that 'it is not only clear law, but it is absolutely necessary logic, that there cannot be a rectification unless there has been a pre-existing contract which has been inaptly expressed.'[314] His Lordship held that so long 'as the negotiations were merely verbal all parties recognised that they were talking about a future unformed agreement, and realised and intended that the result of their negotiations – if they were carried to a conclusion – would have to be formulated in words and put into a document.'[315] His Lordship explained why it was necessary to distinguish between an agreement on the one hand and the use of the word 'agreed' during negotiations.[316] His Lordship said that:

> Now, I want here to say a few words about the use of the word "agreed" in the negotiations. I cannot help thinking that in the argument of leading counsel for the appellants here that there has been a confusion of thought. There has been an idea that when we use the word "agreed" in negotiations we are referring to a contractual act. The word "agreed" is very properly used with regard to negotiations. For instance, there is the question of price. You might say, "By such and such a date we were agreed to the price." That does not mean a contractual act at all. It means a then readiness to do something in connection with a contemplated future contractual act. If your agreement goes so far as to agree to all the terms of the contract, you say that that agreement is a then readiness to perform a contractual act. That is only the last stage of the negotiations. When the agreement is only on one point, it means a then readiness to have that point settled in such and such a way, supposing a contract is arrived at. It binds nobody either legally or morally. It only means a state of mind.[317]

His Lordship explained that once an offer was made in writing by the provision of the final version of the written document 'the contractual act was done by the acceptance of an offer to accept a written clause', and that 'from and after that time I agree that there was a contract' and

[311] Ibid.
[312] Ibid 90.
[313] Ibid.
[314] Ibid 91.
[315] Ibid.
[316] Ibid 92.
[317] Ibid.

if 'there had been a change after that by one party unknown to the other, rectification might have been suitable.'[318] His Lordship concluded that:

> … to say that the court can rectify a deliberate written offer accepted in writing under these circumstances when there can be no mistake as to what the words of the offer or the acceptance were is, to my mind, to lose sight of that which has enabled the court to insist on the sanctity of written contracts, and yet to enable it in a case of real mistake to rectify the written expression of a contract, so that it embodies the true contract made by the parties.[319]

Buckley LJ also agreed with the Master of the Rolls but said that he 'arrived at that conclusion with reluctance.'[320] His Lordship said that 'I entertain no doubt myself that the result of this case is that the plaintiffs are not getting the benefit of that which they intended to stipulate for, and thought they had obtained.'[321] Importantly his Lordship stated that:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.[322]

His Lordship concluded that:

> Before they signed the agreement it appears to me that there was no contract – that is to say, no contract of sale – for this business upon agreed terms. This restrictive covenant was one framed among many things as to which there was an agreement, and there was no agreement until the document was signed. As I said at starting, the court does not set to work to rectify contracts. Its business is to rectify erroneous expressions in contracts. It seems to me that [at] the 10th June they did not erroneously express that which they had agreed. That which was stipulated for on the one side and accepted by the other was clause 13 as it stands. The question of rectification, therefore, to my mind fails.[323]

The state of the law at this time was very clear: <u>in all cases there needed to be an antecedent contractual agreement before rectification could be granted for a mistake in the recording of that antecedent contractual agreement.</u> The same position was adopted in Canada at that time. In *Fordham v Hall*[324] Irving JA said that it 'is always necessary to shew that there was an actual

[318] Ibid.
[319] Ibid 93.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] Ibid.
[324] (1914) 17 DLR 695.

contract antecedent to the instrument which is sought to be rectified.'[325] In England in *Craddock Brothers Ltd v Hunt*[326] it was again stated that there was a need for an antecedent agreement before a document could be rectified. Warrington LJ stated the law when his Honour said that:

> The jurisdiction of Courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms.[327]

That position was also stated by the Privy Council in *United States of America v Motor Trucks Ltd*[328] where the Earl of Birkenhead, delivering the judgment of the Privy Council which included Viscount Haldane, Lord Sumner, Sir Henry Duke and Duff J, said that in cases of rectification 'the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument.'[329] An antecedent contract was also required in Australia at that time. In *O'Loan v Yorkshire Insurance Co Ltd*,[330] in the Full Court of the Supreme Court of Queensland, Macnaughton and O'Sullivan JJ were considering an insurance contract and said that in 'order to enable the Court to rectify an instrument on the ground of mutual mistake, the plaintiff must show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified, and that such contract is inaccurately represented in the instrument.'[331] Webb J agreed.[332]

The High Court of Australia only briefly considered the equitable doctrine of rectification in *Christie v Robinson*,[333] *Horsfall v Braye*[334] and *Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd*.[335] It was not until *Australian Gypsum Ltd v Hume Steel Ltd*[336]

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[325] Ibid 701.
[326] [1923] 2 Ch 136.
[327] Ibid 159.
[328] [1924] AC 196.
[329] Ibid 200-201. See also *Caraman Rowley & May v Aperghis* (1923) 40 TLR 124.
[330] [1926] St R Qd 177.
[331] Ibid 191.
[332] Ibid 193.
[333] (1907) 4 CLR 1338.
[334] (1908) 7 CLR 629.
[335] (1919) 26 CLR 411.
[336] (1930) 45 CLR 54.

that the High Court of Australia had an opportunity to consider rectification in any depth. Rich, Starke and Dixon JJ referred to the decision of the Court of Appeal in *Lovell and Christmas Ltd v Wall*[337] and confirmed the requirement for an antecedent contractual agreement.[338] The High Court of Australia again considered the doctrine of rectification a short time later in *City of Malvern v Batchelder*[339] where Starke J said that, as was pointed out in *Australian Gypsum Ltd v Hume Steel Ltd*,[340] 'written documents cannot be rectified unless there has been some pre-existing arrangement or agreement between the parties which has been inaptly expressed.'[341]

Accordingly, the state of the law at this time in England, Canada and Australia was clear: an antecedent binding contractual agreement was necessary as a pre-condition to obtaining rectification. This had been a consistent position adopted in England, Canada and Australia. Despite this very clear position the approach adopted by the courts was to soon change, commencing with the decision in *Shipley Urban District Council v Bradford Corp*[342] where the issue of the requirement for an antecedent agreement was considered by Clauson J. The case concerned an application for a declaration that a contract should be construed based on the plaintiff's view of its construction and a claim for rectification in the alternative. The parties had entered into a provisional agreement on 4 April 1912 and a written agreement was made on 6 May 1912 under the seals of the council and the corporation for the supply of water to the plaintiff by the defendant. The written contract in relation to the supply of additional water provided for a charge 'at a pro rata charge as 540*l.* is to 450,000 gallons subject to measurement.' The plaintiff argued that this should be construed to mean that the plaintiff Council were entitled to such additional water supply at a pro rata charge of 540*l.* 'per annum' for 450,000 gallons 'per diem'. Alternatively, they argued that if that construction was not accepted by the court, then the written contract should be rectified by the inclusion of the words 'per annum' and 'per diem' into the clause on the basis that the words had been omitted by mutual mistake. As Clauson J held that the agreement bore the construction claimed by the plaintiff it was not necessary for Clauson J to resolve the rectification issue. Nevertheless, his Honour considered the issue. It had been argued by counsel for the plaintiff that for rectification

[337] (1911) 104 LT 85.
[338] (1930) 45 CLR 54, 63.
[339] (1931) 45 CLR 573.
[340] (1930) 45 CLR 54.
[341] (1931) 45 CLR 573, 587.
[342] [1936] 1 Ch 375.

to be granted it was 'not essential that there should have been any actually concluded agreement antecedent to the instrument of which rectification is sought.'[343] Counsel argued that the court should focus on 'what was the real intention of the parties at the moment of their executing the instrument constituting the contract.'[344] Counsel noted[345] the following statement in Sir Frederick Pollock's *Principles of Contract*:

> If there is no previous agreement in writing, the modern rule is that a deed may be rectified on oral evidence of what was the real intention of the parties at the time, if clear and uncontradicted.[346]

Counsel for the defendants argued, consistent with the law as clearly stated in numerous cases, that in 'a suit for rectification it is necessary for the plaintiff to show an actual concluded contract antecedent to the instrument which he seeks to have rectified and that such contract is inaccurately represented in the instrument.'[347] Clauson J considered the evidence and said that it was perfectly clear that 'all the parties concerned in drawing up the document of April 4, 1912, understood and intended that document to provide for payment for water at a rate corresponding to an annual payment of 540*l.* for a daily yield of 450,000 gallons; in other words, every one intended the crucial clause in the document of April 4, 1912, to express precisely what I have held the same clause in the document of May 6, 1912, to mean.'[348] His Honour said that it was plain 'that the document of April 4 was not, and was not understood by any one to be, a final and enforceable agreement' and that everyone 'knew that it was essential that any document, in order to be binding, should be under the seals of the Council and the Corporation.'[349] Clauson J held that the court had jurisdiction to correct by way of rectification a mutual mistake in the written contract of 6 May 1912. His Honour said that the 'form of the deed is defective in that it did not specifically state what the parties intended and that the defects will be made good and the form brought into accord with the intention.'[350] His Honour also said that 'the fact that the form of the instrument is thus defective and that the mistake was mutual appearing without any possible doubt from the circumstances in evidence before the Court.'[351]

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[343] Ibid 381.
[344] Ibid.
[345] Ibid 385.
[346] Frederick Pollock, *Principles of Contract* (Stevens & Sons, 9th edn, 1921) 558.
[347] [1936] 1 Ch 375, 385.
[348] Ibid 393.
[349] Ibid.
[350] Ibid 394.
[351] Ibid.

In holding that an antecedent agreement was not necessary his Honour referred to numerous authorities from as early as 1749 including *Henkle v Royal Exchange Assurance Co*,[352] *Baker v Paine*,[353] *Shelburne v Inchiquin*,[354] *Townshend v Stangroom*,[355] *Rooke v Lord Kensington*,[356] *Fowler v Fowler*,[357] *Bentley v Mackay*,[358] *Bradford v Romney*,[359] *Lackersteen v Lackersteen*,[360] *Hanley v Pearson*,[361] *Johnson v Bragge*.[362] It can be immediately seen that the most recent of those authorities was decided in 1901 and his Honour was delivering his judgment in 1935. None of those authorities expressly supported the proposition that a written contract can be rectified in the absence of an antecedent contractual agreement. His Honour referred to the decision of Lord Hardwicke in *Henkle v Royal Exchange Assurance Co*[363] and said that that decision 'asserted in plain terms' that the court had jurisdiction to rectify a document even where there was no antecedent agreement.[364] But in *Henkle v Royal Exchange Assurance Co* it seems clear from the report of the case that Lord Hardwicke *did require* an antecedent contractual agreement to allow rectification of a written document. The case concerned an application for rectification of a contract of insurance. Lord Hardwicke said that the 'first question is, whether it sufficiently appears to the court, that this policy, which is a contract in writing, has been framed contrary to the intent and real agreement?'[365] That would appear to suggest that there needed to be some 'real agreement' reached between the parties before that agreement was reduced to writing.

In *Shipley Urban District Council v Bradford Corp* Clauson J also said that Lord Chelmsford in *Fowler v Fowler*[366] regarded 'the mutual concurrent intention of the parties at the time of execution as being that to which the deed must be made to conform.'[367] But that, with due respect to Clauson J, did not mean that Lord Chelmsford did not require an antecedent

[352] (1749) 1 Ves Sen 317; 27 ER 1055.
[353] (1750) 1 Ves Sen 456; 27 ER 1140.
[354] (1784) 1 Bro CC 338; 28 ER 1166.
[355] (1801) 6 Ves Jun 328; 31 ER 1076.
[356] (1856) 2 K & J 753; 69 ER 986.
[357] (1859) 4 De G & J 250; 45 ER 97.
[358] (1862) 4 De G F & J 279; 45 ER 1191.
[359] (1862) 30 Beav 431; 54 ER 956.
[360] (1861) 30 LJ Ch 5.
[361] (1879) 8 Ch D 545.
[362] [1901] 1 Ch 28.
[363] (1749) 1 Ves Sen 317; 27 ER 1055.
[364] [1936] 1 Ch 375, 394.
[365] (1749) 1 Ves Sen 317, 318-9.
[366] (1859) 4 De G & J 250; 45 ER 97.
[367] [1936] 1 Ch 375, 394.

agreement. From what Lord Chelmsford said in *Fowler v Fowler* it is clear that his Lordship did require there to be an antecedent agreement. In *Fowler v Fowler* the Lord Chancellor referred to the standard of proof stated by Lord Thurlow in *Shelburne v Inchiquin*,[368] that there must be strong irrefragable evidence, and said that:

> It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution.[369]

The fact that Lord Chelmsford referred specifically to the concurrent intention continuing up until the time of the execution of the written document makes it clear that there needed to be some previous concurrent intention, that is an antecedent agreement, that had continued unchanged up to the execution of the final written contract. Again, this decision appears to give support for the proposition that an antecedent agreement *was* required, not that an antecedent agreement *was not* necessary. Most importantly, in *Shipley Urban District Council v Bradford Corp* Clauson J failed to refer to the numerous authorities that made it clear that an antecedent agreement was required in cases of so-called mutual mistake. His Honour did make brief reference to the decision of the Privy Council in *United States of America v Motor Trucks Ltd*.[370] As outlined earlier, the Earl of Birkenhead, delivering the judgment of the Privy Council which included Viscount Haldane, Lord Sumner, Sir Henry Duke and Duff J, said that in cases of rectification 'the plaintiff must show first that there was an actually concluded agreement antecedent to the instrument which is sought to be rectified; and secondly, that such agreement has been inaccurately represented in the instrument.'[371] Clauson J dismissed the relevance of *United States of America v Motor Trucks Ltd* when his Honour said that 'the matter under consideration there was quite a different question from that which is at issue in this case.'[372] His Honour did not make any reference to the judgment of the Court of Appeal in *Lovell and Christmas Ltd v Wall*,[373] discussed earlier, where the Master of the Rolls, Sir Herbert Cozens-Hardy, said that the 'essence of rectification is to bring the document which was expressed and intended to be in pursuance of a prior agreement into harmony with that prior agreement.'[374]

[368] (1784) 1 Bro CC 338; 28 ER 1166.
[369] (1859) 4 De G & J 250, 265.
[370] [1924] AC 196.
[371] Ibid 200-201.
[372] [1936] 1 Ch 375, 398.
[373] (1911) 104 LT 85.
[374] Ibid 88.

The Master of the Rolls had made it clear that rectification 'presupposes a prior contract, and it requires proof that, by common mistake, the final completed instrument as executed fails to give proper effect to the prior contract.'[375] However, Clauson J did refer to the judgment of the Vice Chancellor, Sir William Milbourne James in *Mackenzie v Coulson*[376] where the Vice Chancellor said that 'it is always necessary for a Plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument.'[377] Clauson J attempted to limit the circumstances in which the Vice Chancellor's statement of the law would apply. Clauson J said that:

> The language of the Vice-Chancellor was, if I may respectfully say so, perfectly accurate in reference to the cases which he obviously had in mind, where mutual mistake is sought to be established by reference to the terms of a previous contract. His words, however, apart from their context, have, there is no doubt, found their way into works of no little authority in such a form as to suggest, as indeed, the defendants' counsel argued, that the jurisdiction of the Court cannot be exercised, even in cases of clear mutual mistake, in the attempt to embody in the instrument the concurrent intention of the parties existing at the moment of the execution of the instrument, unless a previously existing contract can be proved.[378]

Clauson J said that it 'is sufficient for me to say that, had it been necessary for me to decide the point, I should not have felt justified in accepting this interpretation of the Vice-Chancellor's language as correct.'[379] His Honour concluded that if it had been necessary to decide the rectification issue then:

> I should have felt bound to hold that the proof in the present case that the concurrent intention of the parties was, at the moment of execution, to contract on the footing of the 540*l*. being a sum per annum and the 450,000 gallons a yield per diem would have made it necessary (but for my construing the instrument as I have construed it) to rectify the instrument so as to accord with that concurrent intention, notwithstanding that the parties can be bound only by their respective seals.[380]

The position adopted by Clauson J in *Shipley Urban District Council v Bradford Corp* was soon adopted by Simonds J in *Crane v Hegeman-Harris Co Inc*.[381] In 1936, not long after the decision in *Shipley Urban District Council v Bradford Corp,* Clauson J was appointed as a

[375] Ibid.
[376] (1869) LR 8 Eq 368.
[377] Ibid 375.
[378] [1936] 1 Ch 375, 397.
[379] Ibid.
[380] Ibid 398-9.
[381] [1939] 1 All ER 662.

Lord Justice of Appeal. In *Crane v Hegeman-Harris Co Inc* Simonds J said that it was clear that he must follow the reasoning of Clauson J but again there was no reference to the numerous authorities, including *United States of America v Motor Trucks Ltd*[382] and *Lovell and Christmas Ltd v Wall*,[383] that, in very clear language, suggested that an antecedent agreement was required.[384] There was an appeal from the judgment of Simonds J to the Court of Appeal in *Crane v Hegeman-Harris Co Inc*[385] but it was limited to the issue of whether an action could be brought to rectify a document after there had been an arbitral award. The Master of the Rolls, Sir Wilfred Greene, said that the judgment of Simonds J was 'one with which I am in entire agreement.'[386] In Canada, the courts continued to require a prior concluded agreement for rectification to be ordered[387] and in England the issue did not need to be determined in *George Cohen, Sons & Co Ltd v Docks & Inland Waterways Executive*[388] because the court found that on the facts there was an antecedent contract in that case.

In Australia the position adopted in England in *Shipley Urban District Council v Bradford Corp*[389] and *Crane v Hegeman-Harris Co Inc*[390] was adopted, and the requirement for an antecedent agreement was expressly abandoned by the High Court of Australia in *Slee v Warke*.[391] Rich, Dixon and Williams JJ their Honours referred to the judgment of Clauson J in *Shipley Urban District Council v Bradford Corp*[392] and also noted that in *Mackenzie v Coulson*[393] the Vice Chancellor, Sir William Milbourne James, had held that the power of a court to rectify an agreement based on mutual mistake was confined to circumstances where there was an antecedent concluded contract.[394] Their Honours said that Clauson J had held that the judgment of Vice Chancellor James 'did not warrant the suggestion that the jurisdiction of the Court cannot be exercised so as to rectify an instrument which clearly does not give effect

[382] [1924] AC 196.
[383] (1911) 104 LT 85.
[384] [1939] 1 All ER 662, 664.
[385] [1939] 4 All ER 68.
[386] Ibid 72.
[387] See *Fuhr v Davidson* [1948] 1 WWR 1057. The plaintiffs appealed to the Appellate Division of the Supreme Court of Alberta where the appeal was disposed of in the terms of consent orders filed by the parties: see *Fuhr v Davidson* [1949] 1 WWR 221. See also *Tatarchuk v Sidor & Imperial Oil Ltd* [1950] 2 WWR 953. An appeal to the Appellate Division of the Supreme Court of Alberta was dismissed: *Tatarchuk v Sidor* [1951] 1 WWR (NS) 435. See also *McMillen v Chapman* [1953] OR 399.
[388] (1950) 84 Lloyds List Law Rep 97.
[389] [1936] 1 Ch 375.
[390] [1939] 1 All ER 662.
[391] (1949) 86 CLR 271.
[392] [1936] 1 Ch 375.
[393] (1869) LR 8 Eq 368.
[394] (1949) 86 CLR 271, 280.

in some respect to the concurrent intention of the parties existing at the date of its execution unless a previously existing contract can be proved.'[395] Importantly their Honours said that the 'high authorities cited by *Clauson* J. appear to us to show that this is right.'[396] They also said that the statement of the law in *Australian Gypsum Ltd v Hume Steel Ltd*[397] 'should be read in light of the facts of that case and confined to cases where the mutual mistake is sought to be established by reference to the terms of a previous contract.[398] Their Honours noted that the views expressed by Clauson J 'were completely adopted'[399] by Simonds J, as he then was, in *Crane v Hegeman-Harris Co Inc.*[400] Their Honours also noted that there was an appeal from the judgment of Simonds J to the Court of Appeal and said that it 'seems to us to be clear that the Court of Appeal must have agreed with *Simonds* J. that *Clauson* J. had correctly stated the law in *Shipley's Case,* otherwise they should have reversed the judgment on the counterclaim, and we are of opinion that this law should be followed in the Australian Courts.'[401]

Subsequently in England the position stated by Clauson J in *Shipley Urban District Council v Bradford Corp*[402] was expressly endorsed. In *Earl v Hector Whaling Ltd*[403] Harman LJ said that the decisions in *Shipley Urban District Council v Bradford Corp* and *Crane v Hegeman-Harris Co Inc* were correct and that 'you do not need a prior contract, but a prior common intention.'[404] The issue arose again in England in *Joscelyne v Nissen*[405] where it was argued that an antecedent contract was required prior to the written agreement that was sought to be rectified. Russell LJ, delivering the judgment of the Court of Appeal that included Sachs and Phillimore LJJ, noted that the decision of the Court of Appeal in *Lovell and Christmas Ltd v Wall*[406] had essentially disappeared 'from professional sight'[407] until its existence was recognised by Denning LJ in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*.[408] Russell LJ cited cases from 1869 to 1924 that supported the proposition that an antecedent

[395] Ibid.
[396] Ibid.
[397] (1930) 45 CLR 54.
[398] (1949) 86 CLR 271, 280.
[399] Ibid.
[400] [1939] 1 All ER 662.
[401] (1949) 86 CLR 271, 281.
[402] [1936] 1 Ch 375.
[403] [1961] 1 Lloyd's Rep 459.
[404] Ibid 470.
[405] [1970] 2 QB 86.
[406] (1911) 104 LT 85.
[407] [1970] 2 QB 86, 91.
[408] [1953] 2 QB 450.

agreement was required before rectification was available for common or mutual mistake.[409] These cases included *Mackenzie v Coulson,*[410] *Lovell and Christmas Ltd v Wall,*[411] *Craddock Brothers Ltd v Hunt*[412] and *United States of America v Motor Trucks Ltd*.[413] Russell LJ described these decisions as an 'undoubtedly formidable array of judicial opinion.'[414] Russell LJ examined the decisions in *Shipley Urban District Council v Bradford Corp*[415] and *Crane v Hegeman-Harris Co Inc*[416] and concluded that 'the law is as expounded by Simonds J. in *Crane's* case with the qualification that some outward expression of accord is required.'[417] In Australia the position adopted by the High Court of Australia in *Slee v Warke,*[418] that an antecedent contractual agreement was not required to obtain rectification, was reaffirmed in *Maralinga Pty Ltd v Major Enterprises Pty Ltd*[419] where Mason J said that it 'is now settled that the existence of an antecedent agreement is not essential to the grant of relief by way of rectification.'[420] In New Zealand it was also accepted that an antecedent agreement was no longer required.[421]

It can be seen from the examination of these cases that the approach adopted by Clauson J in *Shipley Urban District Council v Bradford Corp,*[422] and subsequently endorsed by Simonds J in *Crane v Hegeman-Harris Co Inc*,[423] was eventually adopted in both Australia and New Zealand and firmly established in England. However, the approach adopted by Clauson J was inconsistent with a strong line of authority that made it clear that an antecedent contractual agreement was always required. Despite the way the law was changed through this rather unsatisfactory method the actual change itself can be justified. When parties enter into negotiations they often agree to specific proposed terms during the negotiations and move on to focus on further terms that still require negotiation. Once all terms have been agreed a final contract will be signed. It is quite possible, especially given the complexity of some contractual

[409] [1970] 2 QB 86, 91-3
[410] (1869) LR 8 Eq 368.
[411] (1911) 104 LT 85.
[412] [1923] 2 Ch 136.
[413] [1924] AC 196.
[414] [1970] 2 QB 86, 93.
[415] [1936] 1 Ch 375.
[416] [1939] 1 All ER 662.
[417] [1970] 2 QB 86, 98.
[418] (1949) 86 CLR 271.
[419] (1973) 128 CLR 336.
[420] Ibid 350.
[421] See *Dundee Farm Ltd v Bambury Holdings Ltd* [1976] 2 NZLR 747; and *Dundee Farm Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647.
[422] [1936] 1 Ch 375.
[423] [1939] 1 All ER 662.

documents, that one or more parties will fail to notice that the final document incorrectly records a term that had been agreed some time earlier in the negotiations. If an antecedent contractual agreement was always required as a prerequisite to obtaining rectification, both the common law and equity would fail to provide a remedy to a party in circumstances where a mistake was made in recording a proposed term that was agreed early in the negotiations and to which all parties remain agreed. The non-mistaken party might simply receive a windfall because no one noticed that a term had been incorrectly stated in the final written contract.

The change in the law that allowed for rectification even where no antecedent contractual agreement had been entered into required an additional element to be proved by the party claiming rectification. Essentially, the party claiming rectification needed to show not only that a proposed term had been agreed during the negotiations but that of all the parties agreed, up to when the final written agreement was signed, that the proposed term as earlier agreed was to be included in the final contractual document.

E *Requirement for a continuing common intention or continuing agreement*

Once it was held that an antecedent agreement was no longer required the courts further held that where parties had agreed to any proposed term prior to entering into the contract the agreement to that proposed term had to have continued concurrently in the minds of the parties from the moment of agreement to that term up to the time of the formation of the contract. This approach adopts the same proof that is required where the parties first formed an initial contract and later replaced it with a formal written contract: the court needs to be satisfied that the parties have not negotiated a different agreement than what was earlier agreed.

This issue was addressed in *Hills v Rowland*[424] where the parties entered into a written agreement and then later replaced that with a formal lease. The lessee sought to have the lease rectified so as to conform to the terms of the initial agreement. There were substantial differences between the initial agreement and the formal lease. In rejecting the bill for rectification Turner LJ said that where there was an executed lease that differed in many respects from an earlier agreement the prima facie conclusion is ‘that there was a new

[424] (1853) 4 De G M & G 430; 43 ER 575.

agreement with which the lease is in conformity.'[425] Accordingly, to grant rectification the court needs to be satisfied that there has been a mistake in recording an agreement and not a situation where the parties have negotiated a new and different agreement.

To ensure that a court only corrects mistakes in the recording of agreements the court must focus on the continuing concurrent intention of the parties, or more accurately, the continuing agreement of the parties. The language of a 'concurrent intention' originated in the late 18th century in *Shelburne v Inchiquin*[426] where Lord Thurlow referred to 'the concurrent intention of all parties.'[427] The language of a 'continued concurrent intention' originated in *Fowler v Fowler*[428] where the Lord Chancellor, Lord Chelmsford, said that:

> It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to show exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement.[429]

The requirement for a continuing concurrent intention was adopted by the Supreme Court of Canada in both *Hart v Boutilier*[430] and *The MF Whalen*.[431] In *Hart v Boutilier* Duff J said that the 'evidence must make it clear that the alleged intention to which the plaintiff asks that the deed be made to conform, continued concurrently in the minds of all the parties down to the time of its execution.'[432] In *The MF Whalen* Duff J repeated similar remarks.[433] It is clear that these remarks were made in the context of the prior oral contractual agreement being concluded before such agreement was reduced to writing. In *The MF Whalen* Duff J said, in reference to the prior oral agreement, that 'the agreement, that is to say the intention to contract in this sense, continued concurrently in the minds of both parties down to the time the document went into operation.'[434]

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[425] Ibid 436.
[426] (1784) 1 Bro CC 338; 28 ER 1166.
[427] Ibid 341.
[428] (1859) 4 De G & J 250; 45 ER 97.
[429] Ibid 265.
[430] (1916) 56 DLR 620.
[431] (1921) 63 SCR 109.
[432] (1916) 56 DLR 620, 630.
[433] (1921) 63 SCR 109, 126-7.
[434] Ibid. An appeal to the Privy Council was dismissed: see *The Ship MF Whalen* (1922) 39 TLR 37.

In *The Olympic Pride*[435] Mustill J said that the 'prior transaction may consist either of a concluded agreement or of a continuing common intention.'[436] His Honour stated that the 'Court must be satisfied not only that the document fails to reflect the prior agreement or intention but also that there was a prior or common agreement (or intention) in terms which the Court can ascertain.'[437] Accordingly, whether there is an antecedent binding contract or only an agreement to include a proposed term in a contract the court must be satisfied that there has been a continuing common intention, or a continuing agreement, as to the proposed terms. The court must ensure that rectification is not granted where the parties have in fact negotiated a different agreement from what was previously agreed. Rectification for mistakes in recording agreements, whether there is an antecedent binding agreement, is examined further in Chapter IV.

F *Categories of rectification in Equity*

The above analysis has identified two different categories of cases where rectification might be granted in equity. The first is where there has been a mistake in the recording of what has previously been agreed. This is the core case of rectification. Because of the abandonment of the requirement for an antecedent binding contract, this category can be divided into two sub-categories: where there is an antecedent agreement; and where there is only an agreement to include a proposed term in a contract. This whole category will be examined in Chapter IV. The second category of cases where rectification might be granted is where there has been a mistake made during the formation of an agreement. This might be a mistake within an offer or a mistake made when accepting an offer. Cases in this category are examined in Chapter V.

In addition, there are three further categories of cases where rectification may be available. The first of these three further categories are cases where rectification is granted, not because of a mistake but because of a fraud. The remedy of rectification responds to the fraudulent conduct and not to any mistake by the innocent party. An example of this category of case can be found

[435] [1980] 2 Lloyd's Rep 67.
[436] Ibid 72.
[437] Ibid 73.

in *Local 7297, United Mine Workers of America v Canmore Mines & Dillingham Corp Canada Ltd*.[438] Cases of rectification for fraud are examined in Chapter VI.

The fourth category of cases are those cases where the meaning or effect of the words used by the parties does not coincide with what they might have intended or the purpose that they were attempting to achieve. This category is controversial because if a court were to grant rectification in some of these cases, the court would be making a different contract for the parties that departs from the objective meaning of the words that they have chosen to use. In many of these cases there has not been a mistake in the recording of an agreement, although in some cases there will be such a mistake that can be rectified. An early example of this category of case is *Wright v Goff*[439] and a more recent example is *Swancare Group Inc v Commissioner for Consumer Protection*.[440] Cases in this category are examined in Chapter VII.

The fifth category of cases where rectification might be available is where the parties consent to rectification without the need for court action. However, the court might still have a role in these cases if the rights of third parties are affected by the actions of the parties in rectifying their document by consent. An example of this category of rectification can be found in *Valgas Pty Ltd v Connell*.[441] Cases in this category are examined in Chapter VIII.

Accordingly, there are five categories of cases where rectification might be available. These can be described as follows:

1. Rectification for a mistake in the recording of an agreement. This can be further divided into cases where there is a prior binding contract and cases where there is no prior binding contract but a non-binding agreement in relation to one or more terms that are proposed to be included in the final document.

2. Rectification for mistakes made in the making or accepting of offers.

3. Rectification for fraudulent conduct during the process of contract formation.

[438] (1985) 28 BLR 250.
[439] (1856) 22 Beav 207; 52 ER 1087.
[440] [2014] WASC 80.
[441] (1994) 11 WAR 497.

4. Rectification for mistakes in the effect or purpose of the words used in a contract.

5. Rectification by consent where the parties to a document agree to rectify a mistake by consent.

The first two of these categories reflect two different types of mistakes: a mistake in the recording of an agreement; and a mistake in the formation of an agreement. The third category is not concerned with mistakes at all because the remedy responds to the fraudulent conduct of the fraudster and in such cases there should be no requirement that the innocent party prove that they were mistaken. The fourth category concerns mistakes as to the legal effect or the consequences of the words used in an agreement. The fifth category recognises that while the parties, if they agree, can rectify any type of mistake themselves by consent a court might still have a role to play if third party rights are affected. These categories of cases will be examined further in Chapters IV, V, VI, VII and VIII.

G *Conclusions*

In this chapter the historical development of the equitable doctrine of rectification has been examined. The analysis focused on three important historical developments. First, the requirement that there be a common or mutual mistake before rectification could be granted. This led to the second important development, the exception to that general rule that allowed for rectification in some circumstances where there was a unilateral mistake. This distinction between cases based on common or mutual mistake and cases based on unilateral mistake should be rejected in favour of a distinction between two different types of mistakes: mistakes in the recording of agreements; and mistakes made during the formation of an agreement.

The third important development that was examined was the abandonment by the courts of a requirement that there be an antecedent agreement before rectification can be granted. This significantly expanded the scope of the jurisdiction of the doctrine of rectification and means that rectification can be granted in circumstances where the parties agree during their negotiations that a proposed term will be included when they finalise, and enter into, their written contract. If, by mistake, such a term is omitted from the final document, or incorrectly recorded, then rectification will be available to ensure that the document corresponds to the

earlier agreement on that term. But before rectification can be granted the court must be satisfied that there has been a continuing common intention or a continuing agreement as to the proposed term or terms. The court must ensure that rectification is not granted where the parties have in fact negotiated a different agreement from what was previously agreed.

In addition to examining these three developments, there are three additional categories of cases that have been outlined in this Chapter. The first is where there has been fraudulent conduct during the process of forming a contract. In such cases rectification may be available to respond to the fraud that has been committed. The second category is where the meaning or effect of the words used by the parties does not coincide with what they might have intended (as determined on an objective basis), or the purpose that they were attempting to achieve. The third of these additional categories is where the parties rectify their document by consent. These three additional categories are examined in Chapters VI, VII and VIII.

Four conclusions can be drawn from the analysis in this Chapter. First, the distinction between cases based on common or mutual mistake and cases based on unilateral mistake should be rejected. The distinction focuses on who made, or was aware of the mistake rather than focusing on the type of mistake made. The second conclusion is that the courts were justified in abandoning the requirement for an antecedent agreement. The abandonment of that requirement ensured, and continues to ensure, that injustice is avoided where the parties, during their negotiations, agree on a proposed term to be included in their contract but by mistake the proposed term is either omitted or incorrectly recorded. The abandonment of the requirement for an antecedent agreement ensures that the courts can provide a just remedy in these cases. The third conclusion is that the effect of the combined development of a requirement for a common or mutual mistake and an exception for unilateral mistake was that rectification was made available for a very different type of mistake: a mistake made during the formation of an agreement. Rectification was no longer restricted to mistakes made while recording an agreement. The fourth conclusion is that there are five categories of rectification cases as outlined in this Chapter. It is important to examine rectification cases using these five categories because different considerations apply to each category as will be examined further in the following chapters. The commonly used categories of common or mutual mistake and unilateral mistake should be abandoned in favour of the adoption of the five categories outlined in this Chapter.

III THREE FUNDAMENTAL PRINCIPLES OF RECTIFICATION

A *Introduction*

In the previous Chapter five categories of rectification were identified. Before exploring those five categories in the following Chapters, this Chapter examines three fundamental principles that are critical to the understanding of the equitable doctrine of rectification. The principles will initially be examined separately but are inter-related and can be reduced to a single proposition. The first fundamental principle is that rectification is concerned with agreements and not with intentions. This is a critical principle that was firmly established in the case law but has been overlooked in some cases in recent years. The second fundamental principle is that the courts must adopt an objective approach rather than a subjective approach when identifying what the parties have agreed to, prior to considering whether rectification is available. The objective approach to identifying what has been agreed is now firmly established in English law but the Australian case law has adopted a subjective approach in many cases. It will be argued in this thesis that the subjective approach adopted in some Australian cases must be rejected. The third fundamental principle, which is very closely related to the second principle, is that the courts should examine the outward acts of the parties when determining the objective agreement reached between the parties but there is no requirement for an outward expression of accord.

These three fundamental principles can be stated as a single proposition: when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement, a court must identify what the parties have agreed on an objective basis including an examination of their outward acts. This is the simple starting point that must be undertaken before what has been agreed between the parties is compared to what has been recorded to determine whether rectification should be granted. Despite this simple proposition much complexity has been introduced into the equitable doctrine of rectification by those seeking to focus on the subjective intention of the parties to counter the objective approach of the common law. A subjective approach tends to not only unjustifiably expand the jurisdiction of the equitable doctrine of rectification but also to undermine the objective approach of the common law to contract formation and contract interpretation. Courts in Australia that have adopted a subjective approach seek to use rectification to *give effect to the subjective intentions*

of the parties. Such an approach represents a misunderstanding of the key role of rectification which is to provide relief from mistakes in the recording of agreements, those agreements having first been determined objectively in accordance with common law principles. The three fundamental principles are examined in the following three Sections in this Chapter.

B *Rectification is concerned with agreements*

Where a mistake is alleged in the recording of an agreement the focus of the court should be first on identifying the agreement made by the parties. The intentions of the parties, along with other factors such as what the parties said and did, are relevant *as part of* the exercise of determining what was agreed between the parties on an objective basis. The intentions of the parties are either successfully reflected in what has been agreed, or an agreement has been reached, on an objective basis, that does not reflect the intention of one or more of the parties to that agreement. As Pembroke J said in *Casquash Pty Ltd v NSW Squash Ltd (No 2),* [442] the 'hopes, aspirations, mistakes and misconceptions that a party might have about the meaning or effect of the contract are irrelevant. The negotiations and communications of intention that lead to a written contract merge in the language of the contract chosen by the parties and are subsumed by it.'[443] Accordingly, once an agreement has been reached on an objective basis that agreement becomes the starting point for the consideration of a claim for rectification. Rectification itself is not concerned with intentions, nor is it concerned with identifying the meaning of words. It is, as Denning LJ explained in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd,*[444] concerned with agreements recorded in written contracts and other documents. Denning LJ said that:

> Rectification is concerned with contracts and documents, not 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.[445]

[442] [2012] NSWSC 522.
[443] Ibid [3].
[444] [1953] 2 QB 450.
[445] Ibid 461.

The statement of the law set out by Denning LJ is consistent with the approach adopted more than a century ago in *Lovell and Christmas Ltd v Wall*[446] where Buckley LJ said that:

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification it is not enough to set about to find out what one or even both of the parties to the contract intended. What you have got to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.[447]

Despite these clear statements of the law by Denning LJ and Buckley LJ it is often overlooked that the focus of rectification should be on agreements and not on intentions.[448] Professor Birke Häcker[449] has stated that it is 'well known that the equitable remedy of rectification is all about bringing documents into line with the intention of the parties executing them.'[450] But, with respect, that does not reflect the true position. Rectification is concerned with bringing a document into line with what the parties earlier agreed to. Professor McLauchlan also focuses on intentions, and not on agreements, when he describes the role of rectification. Professor McLauchlan[451] has stated that 'rectification will not lie where the mistake occurred in the formation of the common intention, such as a mistake in underlying assumptions or a mistake as to the benefits or consequences of implementing the common intention, as opposed to a mistake in reducing that intention to writing.' [452] In a more recent paper Professor McLauchlan[453] has advocated, in relation to a written contract, that 'the failure of the document to reflect either the actual *or* objective intention of the parties should suffice for rectification.'[454] Professor McLauchlan does refer to agreements but adopts the position that the true agreement between the parties equates with their common intention when he says that, 'rectification for common mistake is a discretionary remedy that responds to the unconscionable behaviour of a defendant in seeking to enforce or otherwise rely on a written contract that fails to record the parties' true agreement, usually referred to as their "common

[446] (1911) 104 LT 85.
[447] Ibid 93.
[448] For cases where the reasoning focuses on the intentions of the parties, see *Bailey v Manos Breeder Farms Pty Ltd* (Unreported, Supreme Court of South Australia, Perry J, 23 October 1990); and *Bailey v Manos Breeder Farms Pty Ltd* (Unreported, Full Court of the Supreme Court of South Australia, King CJ, Millhouse and Debelle JJ, 5 April 1991).
[449] Birke Häcker, 'Mistakes in the Execution of Documents: Recent Cases on Rectification and Related Doctrines' (2008) 19 *King's Law Journal* 293.
[450] Ibid.
[451] David McLauchlan, 'Contract Interpretation: What Is It About?' (2009) 31 *Sydney Law Review* 5.
[452] Ibid 21-2.
[453] David McLauchlan, 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83.
[454] Ibid 86.

intention".'[455] However, it is not appropriate to use intentions and agreements interchangeably in this context. The actual intentions of the parties will always be subjective but formation of contract is based on an objective approach. What a court determines has been agreed by the parties, on an objective basis, will be the agreement recognised by the law, and given effect to by the law, irrespective of the actual subjective intentions of the parties.

The true position, as Denning LJ pointed out, is that rectification is concerned with agreements recorded in written contracts. That was the approach adopted recently by a majority of the Supreme Court of Canada in *Canada (Attorney General) v Fairmont Hotels Inc*[456] where Fairmont Hotels Inc had been involved in financing arrangements to enable Legacy Hotels REIT, a Canadian real estate investment trust, to purchase two hotels. The financing arrangement was intended to operate on a tax-neutral basis. Fairmont Hotels was later the subject of an acquisition which resulted in the original tax-neutral financing arrangement being frustrated. The parties to the acquisition agreed on a plan to overcome the tax planning difficulties which involved Fairmont, but not its subsidiaries, being hedged against any exposure to foreign exchange tax liability. Legacy Hotels subsequently asked Fairmont to terminate their financing arrangement to allow for the sale of the two hotels. As part of the subsequent transactions, Fairmont redeemed the shares it held in its subsidiaries by way of resolutions passed by their directors. However, this resulted in an unanticipated tax liability. Fairmont sought to avoid that tax liability by having the resolutions of the directors rectified so as to replace the share redemption with a loan agreement. Their original application for rectification to the Ontario Supreme Court of Justice was successful[457] and an appeal by the Attorney General of Canada to the Ontario Court of Appeal was dismissed.[458] The Attorney General of Canada appealed to the Supreme Court of Canada.

The majority judgment of McLachlan CJ and Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ, allowing the appeal, was delivered by Brown J who succinctly noted that rectification '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.'[459] His Honour said that rectification 'does not undo unanticipated effects of that agreement' and that 'a court

[455] Ibid.
[456] [2016] SCC 56.
[457] *Fairmont Hotels Inc v Attorney General of Canada* [2014] ONSC 7302; 123 OR (3d) 241.
[458] *Fairmont Hotels Inc v Attorney General of Canada* [2015] ONCA 441; 45 BLR (5th) 230.
[459] [2016] SCC 56, [3].

may not modify an instrument merely because a party has discovered that its operation generates an adverse and unplanned tax liability.'[460] Brown J went on to state the jurisdiction of the equitable doctrine of rectification more fully when his Honour said that:

> If by mistake a legal instrument does not accord with the true agreement it was intended to record – because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement – a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two.[461]

Brown J explained further that 'rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement' and 'is not concerned with mistakes merely in the making of that antecedent agreement.'[462] His Honour emphasised that 'rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself.'*[463] Brown J made the same point again when his Honour said that 'rectification corrects the recording in an instrument of an agreement.'[464] In concluding that the appeal should be allowed, Brown J said that rectification 'is not equity's version of a mulligan. Courts rectify instruments which do not correctly record agreements. Courts do not "rectify" agreements where their faithful recording in an instrument has led to an undesirable or otherwise unexpected outcome.'[465] The reasoning of the judgment of the majority delivered by Brown J makes it clear that the correct approach to rectification is to focus on the agreement reached between the parties and then to compare that agreement to what has been recorded. The application of that approach in this case led to the conclusion that the courts below had erred and that rectification should have been denied in these circumstances. Thus, the majority allowed the appeal. However, Abella and Côté JJ dissented in a judgment delivered by Abella J. Her Honour said that 'parties should not be prevented from having their true intentions implemented' because of mistakes in documents.[466] Her Honour said that 'a common, continuing, definite, and ascertainable intention to pursue a transaction in a tax-neutral manner

[460] Ibid.
[461] Ibid [12].
[462] Ibid [13].
[463] Ibid.
[464] Ibid [30].
[465] Ibid [39].
[466] Ibid [44].

has usually satisfied the threshold for granting rectification.'[467] Abella J said that Fairmont 'always had a clear, continuing intention to unwind the reciprocal loan structure on a tax-neutral basis and never to redeem the preferred shares' and that 'by mistake, the preferred share redemption terms were included in the directors' resolutions.'[468] Her Honour concluded that this 'is exactly the kind of mistake rectification exists to remedy.'[469]

The difference in the approach between the majority who allowed the appeal and the two dissenting justices could not be clearer. The majority focused on the jurisdiction of rectification to provide relief in circumstances where there had been a mistake in the recording of an agreement. There was no focus at all on intentions. By contrast, the dissenting justices focused solely on the broad intentions of the parties with no focus at all on what the parties had agreed. The mistake identified by the dissenting justices was a mistake of the parties in choosing the wrong method of achieving what they intended to achieve by the transactions. The dissenting justices would have allowed rectification to give effect to those intentions. The approach of the majority is clearly to be preferred.[470] When there is an alleged mistake in the recording of an agreement reached between the parties the focus should be on identifying the agreement reached by the parties and then comparing that agreement to what has been recorded in writing by the parties. Intentions are only relevant in a limited way in determining what the parties initially agreed. But that focus on intentions is quite independent of any consideration of rectification. It is part of the common law process of determining what the contract is between the parties. That is a common law process that occurs before there is any consideration of the equitable doctrine of rectification. Those that focus on the intentions of the parties when considering a claim for rectification risk undermining the common law approach to contract formation.

C *Subjective or objective intention*

There is some controversy as to whether the courts should focus on the objective or subjective intentions of the parties when considering a claim for rectification. As explained briefly in the

[467] Ibid [45].
[468] Ibid [90].
[469] Ibid.
[470] See also a further judgment delivered by the same justices on the same day which reflects identical statements of the law applicable to rectification of documents in similar circumstances: *Jean Coutu Group (PJC) In v Canada (Attorney General)* [2016] SCC 55.

previous Section the courts must examine the objective intention of the parties. In England an objective approach has now been firmly adopted but Australian courts have adopted a subjective approach. This Australian approach must be rejected. The subjective intentions of the parties are only relevant as one factor in determining what the parties have agreed to on an objective basis. That is, their subjective intentions, along with what they said and did during the contract formation process, are all considered as part of the process of identifying what the parties agreed to on an objective basis. But that process is, in any event, a common law process, and occurs *before* there is any consideration of rectification. The issue of subjective and objective intentions is relevant to the doctrine of rectification only because in a claim for rectification it is not a requirement that there be an antecedent contractual agreement. An agreement on one or more terms of a proposed contract is sufficient. It is when the courts examine the agreement of the parties to those proposed terms that the issue of subjective and objective intentions often arises. However, it can also arise even where there has been an antecedent agreement.

The controversy over whether it is the subjective or objective intentions of the parties that is relevant to a claim for rectification is closely related to the first fundamental principle, discussed in the previous Section, that rectification is concerned with agreements. Once it is accepted that rectification is concerned with agreements, and that the role of a court in a rectification claim is to determine what has been agreed and to compare that to what has been recorded, then the issue of subjective or objective intention can be easily resolved. The simple resolution of the issue is the common law's adoption of an objective approach to contract formation and that equity should, and must, do the same when considering a claim for rectification. Whether or not there is an antecedent agreement a court must determine what has been agreed based on an objective approach to contract formation. There cannot be one contract or agreement identified under common law principles and a different contract or agreement identified under equitable principles. Such an outcome would be untenable. It must always be remembered that it is not the role of rectification to give effect to the subjective intention of the parties. The core role of rectification is to provide relief in circumstances where there has been a mistake in the recording of what has been agreed between the parties.

In the analysis below it will be argued that the objective approach that has been adopted in England is correct and that the subjective approach adopted in many Australian cases must be rejected. The subjective approach fails to appreciate three important points: first, that

rectification is concerned with agreements and not intentions; second, that it is not necessary that rectification provide a contrasting subjective approach to the common law objective approach to contract formation and construction; and third, rectification provides relief where there has been a mistake in the recording of an agreement that cannot be corrected through common law construction.

1 *Objective approach confirmed in England*

The controversy concerning subjective and objective intentions is not new but gained increased focus after Lord Hoffmann held in *Chartbrook Ltd v Persimmon Homes Ltd*[471] that the correct approach to a claim for rectification was to focus on the objective intentions of the parties and not on their subjective intentions when identifying what the parties have agreed. The facts of *Chartbrook* were examined in Chapter I when considering construction as a means of rectification where a clause lacks commercial sense. As was discussed in Chapter I, Persimmon Homes was successful in its appeal and its construction of the written agreement was accepted by the House of Lords. That resolved the appeal in favour of Persimmon Homes. Accordingly, its alternative ground of appeal based on rectification did not need to be considered in the House of Lords because that ground of appeal only arose if the House of Lords rejected the view of Persimmon Homes as to the correct construction of the written contract. Nevertheless, the House of Lords considered the rectification issue. Before considering in detail the approach adopted in the House of Lords it is necessary to examine the approach taken to rectification in *Chartbrook* by both Briggs J at first instance and by the Court of Appeal.

In *Chartbrook Ltd v Persimmon Homes Ltd*,[472] in relation to the rectification claim, Persimmon argued rectification for common mistake and unilateral mistake in the alternative. The parties had negotiated and agreed some of the terms of their proposed agreement prior to the recording of that agreement in the final written contract, in effect not forming a contract until the final written document was signed. But the parties had agreed to several matters prior to the signing of the final written document. The focus of the rectification claim was on three letters sent by Persimmon to Chartbrook in February 2001 that were concerned with how the proposed transaction would provide value to Chartbrook, as well as an additional letter sent by

[471] [2009] 1 AC 1101.
[472] [2007] EWHC 409 (Ch).

Persimmon to Chartbrook on 24 May 2001, which outlined the final proposed terms that were subsequently accepted by Chartbrook. The final contract was signed on 16 October 2001. The focus of the rectification claim was on the 'Additional Residential Payment' or ARP that formed a key part of a formula included in Schedule 6 of the final written contract. Chartbrook claimed that there was no mistake in what was recorded in the written contract but Persimmon claimed that there was a mistake and that the final agreement did not record what it intended in relation to the definition of the ARP. Briggs J was satisfied that Persimmon had in fact been mistaken.[473] His Honour accepted that Persimmon had a subjective intention that it intended that there be a pricing structure operating in the form of a sales overage and that Persimmon's negotiator, Mr Pendlebury, and its solicitor, Mr Assael, had made an error. Briggs J said that:

> In reaching that conclusion I have also taken full account of the fact that Mr Pendlebury continued after January 2001 to describe what became the Balancing Payment as a form of sales overage, and that he personally reviewed the Agreement while in draft, including a clause by clause check on what became Schedule 6. My conclusion necessarily involves a finding that, despite their reluctance to admit it, both Mr Pendlebury and Mr Assael made an extraordinary mistake in failing to appreciate that the definition of ARP in all the drafts of what became Schedule 6 provided clearly for something very different from that which they intended. But I do make that finding. The evidence on that issue is clear and compelling, and permits no other conclusion.[474]

However, the rectification claim failed because Briggs J was not satisfied that Chartbrook's negotiators had the same subjective intention as Persimmon or that they were aware that Persimmon was acting under a mistake.[475] Briggs J was of the view that to reach any such conclusion he would need to find that Chartbrook's negotiators, Mr Vantreen and Mr Reeve, had deliberately given false evidence and were rogues and that they had deliberately misled their solicitor, Mr Skelly, as to their knowledge of a mistake in the drafting of the agreement. Critical to the failure of the rectification claim was the fact that Chartbrook's solicitor, Mr Skelly, gave evidence that he had gone through Schedule 6 of the written contract with Mr Vantreen and Mr Reeve line by line prior to the agreement being signed and that he had advised them that the definition of the ARP in Schedule 6 was consistent with their understanding of how the ARP was to operate, namely that the ARP would provide a significant additional payment to them in the form of a super overage. Accordingly, Chartbrook's claim based on

[473] Ibid [131]-[132].
[474] Ibid [132].
[475] Ibid [164].

construction of the contract succeeded and Persimmon's rectification counter-claim was dismissed. Persimmon appealed to the Court of Appeal.

In the Court of Appeal in *Chartbrook Ltd v Persimmon Homes Ltd*[476] Lawrence Collins LJ noted that Briggs J accepted the evidence of both Mr Vantreen and Mr Reeve that they both believed in February 2001 (before they even saw the first draft of the agreement in March 2001) that the super overage would produce around £3 million of additional sales proceeds to Chartbrook even if the market value of the units remained flat throughout the development period and even if there was a catastrophic fall in market values.[477] Critically, his Lordship noted that 'it was difficult to identify where they got that idea from. It was difficult to see how such a belief could have been derived from any of Mr Pendlebury's three February 2001 letters, or from their effect in aggregate.'[478] His Lordship further noted a submission made by Persimmon concerning the super overage observing that Mr Vantreen and Mr Reeve 'got the idea of super overage from the unfortunate way in which Mr Assael drafted the definition of ARP and so they could not have got to it before March 2001 at the earliest. If they had the super overage independently from the drafting mistake by Mr Assael, that would be an incredible coincidence.'[479] His Lordship then said that:

> Persimmon's strongest points were these. There was never any adequate explanation of where Mr Reeve or Mr Vantreen got the super overage idea from, or how it was they understood Persimmon offering them another £3 million without flagging it up to them anywhere. There was no document apart from the drafts of the Agreement which reflected what they said was their understanding.[480]

His Lordship examined another piece of evidence that strongly supported Persimmon's counter-claim for rectification. On a copy of a letter sent to Mr Vantreen by Persimmon dated 24 May 2001 Mr Vantreen had made some handwritten notes. On the top of the second page he wrote '£325.pfps' and a little to the right of that '£228,000'. The importance of those two figures was that they clearly appeared to be the grossing up from 23.4% to 100% of two figures included in a table in that letter. The two figures were £76.34 being the Private Sale Residential Accommodation Land Value per square foot and £53,333 which was the Minimum Value per plot of the Residential Apartments. When those two figures included in a table in the letter

[476] [2008] EWCA Civ 183.
[477] Ibid [142].
[478] Ibid.
[479] Ibid [159].
[480] Ibid [164].

were grossed up from 23.4% to 100% they reflected the figures written by hand on the letter by Mr Vantreen. His Lordship said in relation to Mr Vantreen that:

> It was put to him in cross examination that he [grossed these figures up] in order to calculate the sale price which the residential units as a whole would have to exceed in terms of pounds per square foot and the sale price which each flat would, on average, have to achieve, before any Balancing Payment would become available to Chartbrook above the minimum guaranteed amounts. While he did not accept this, Mr Vantreen could not think either in cross-examination or re-examination of any other reason for his having made that calculation.[481]

His Lordship said that there 'is therefore very considerable force in Persimmon's submission that the figures were only capable of one explanation. If Mr Vantreen was calculating the trigger level for the overage at £325 per square foot in May, he and Mr Reeve could not have believed that Persimmon was offering super overage in February.'[482] Importantly Lawrence Collins LJ said that 'I have no doubt that, whatever impression [the trial judge] may have got from the witnesses in the witness box, this was a very important piece of evidence and that he gave it insufficient weight.'[483] His Lordship said that:

> If the evidence of Mr Vantreen and Mr Reeve were to be rejected, then a plausible hypothesis might have been that they got the idea in December 2001 from Eversheds' report to the Royal Bank of Scotland, which was sent to Mr Skelly and which shortly preceded Mr Reeve's first assertion of what is now Chartbrook's case on December 10, 2001, and then convinced themselves that that had been the intention all along.[484]

But his Lordship identified one piece of evidence that represented an obstacle to Persimmon succeeding on the rectification claim. A second draft of the agreement had been provided by Persimmon to Mr Skelly on 13 March 2001. Mr Skelly gave evidence that he had a meeting with Mr Vantreen and Mr Reeve on 20 March 2001 and that at that meeting he went through Schedule 6 of the agreement line by line explaining the meaning of its terms and that during the meeting Mr Vantreen and Mr Reeve confirmed by way of instructions to him that the sale price set out in the schedule was that that had been agreed by the parties and as Mr Skelly had explained it to them. His Lordship said that:

> If that holding stands, in my judgment it disposes of the case on both common and unilateral mistake, because if it is believed, then for there to remain a case on mistake, the court would have had to accept the unlikely hypothesis that Mr Vantreen and Mr Reeve must not only be

[481] Ibid [166].
[482] Ibid [168].
[483] Ibid [169].
[484] Ibid.

> taken to have known that Mr Skelly's interpretation was inconsistent with the intentions of both parties to the deal, but also to have kept up a pretence until its conclusion.[485]

His Lordship maintained that 'to succeed on rectification Persimmon must persuade the court to overturn that holding.'[486] However, his Lordship was not satisfied that the court should interfere with that finding of fact by the trial judge.[487] Accordingly, his Lordship held that the appeal as it related to the rectification issue should be dismissed. Rimer LJ agreed with Lawrence Collins LJ on the issue of rectification[488] as did Tuckey LJ.[489] Persimmon appealed to the House of Lords[490] where Lord Hoffmann held that the appeal should be allowed on the issue of construction before going on to consider the issue of the admissibility of pre-contractual negotiations when construing an agreement[491] before finally considering the issue of rectification.[492] As pointed out earlier, the House of Lords was not required to reach a decision on the rectification issue because the appeal was determined on the issue of construction. Nevertheless, Lord Hoffmann considered the rectification issue on the assumption that Chartbrook's view of construction had been accepted. Lord Hoffmann considered both the February 2001 and May 2001 letters from Persimmon to Chartbrook and said that it 'is I think clear that a reasonable person who read the February and May letters in the light of the background known to the parties would have taken them to have been intending that Chartbrook should receive an ARP if, but only if, "the project performs better than is currently anticipated".'[493] Lord Hoffmann said that 'the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract' and that 'the common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been.'[494] His Lordship said that:

> Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but

[485] Ibid [176].
[486] Ibid [177].
[487] Ibid [178].
[488] Ibid [189].
[489] Ibid [191].
[490] [2009] AC 1101.
[491] Ibid 1115.
[492] Ibid 1124.
[493] Ibid.
[494] Ibid 1126.

> a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be.[495]

His Lordship went on to say that:

> In this case there was no suggestion that the prior consensus was based on anything other than the May letter. It is agreed that the terms of that letter were accepted by Chartbrook and no one gave evidence of any subsequent discussions which might have suggested an intention to depart from them. It follows that (on the assumption that the judge was right in his construction of the ARP definition) both parties were mistaken in thinking that it reflected their prior consensus and Persimmon was entitled to rectification.[496]

Accordingly, on the facts of *Chartbrook*, rectification would have been available to Persimmon (if Persimmon had not succeeded in the appeal on the construction point) where Persimmon was subjectively mistaken about the effect of the contract whereas Chartbrook was not so mistaken and without it having to be shown that Chartbrook was aware of, and was taking advantage of, Persimmon's mistake. The reason for that outcome is that the subjective intentions of the parties were irrelevant. The knowledge of one party about the mistake being made by the other party was also irrelevant. That is because, as Lord Hoffmann explained, the starting point is to determine what was agreed between the parties on an objective basis and comparing that to what was recorded. That involved comparing the terms set out in the May 2001 letter to the terms as recorded in the October 2001 written contract, an approach contrasting with that taken by Briggs J at first instance and by the Court of Appeal. Before Briggs J, and in the Court of Appeal, the focus was on whether Chartbrook was mistaken and whether Chartbrook knew that Persimmon was mistaken. This led to a focus on the subjective intentions of the parties, an incorrect approach. As Lord Hoffmann explained in the House of Lords the correct approach is to first identify, on common law contract formation principles (being an objective approach), what the parties agreed. The second step is to compare that to what the parties recorded. That is the approach adopted by Denning LJ in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*[497] more than sixty years ago. The decision in *Chartbrook* confirmed that an objective approach was to be adopted in England.[498]

[495] Ibid.
[496] Ibid 1128.
[497] [1953] 2 QB 450.
[498] The objective approach has since been applied in *Scottish Widows Fund & Life Assurance Society v BGC International* [2011] EWHC 729 (Ch).

But James Ruddell[499] disagrees with the approach taken by Lord Hoffmann. Ruddell advocates a subjective approach when dealing with cases where there is no prior contractual agreement when he says that:

> When there is a prior contract that would have bound the parties even if they had not decided to record the bargain in a written instrument, rectification should be granted to give effect to the "true agreement" between the parties (that is, the earlier contract). If rectification is sought otherwise than on the basis of a prior contract, there is no "true agreement" other than that embodied in the written contract. The correction of mistakes in such an instrument can only be justified on some other basis. That basis is, when it comes to common mistake rectification, the actual subjective intentions of the parties.

There are several issues with the approach advocated by Ruddell. When the courts held that rectification was available even if there was no prior binding agreement that meant that parties would be held to any agreement they reached on a proposed term of a contract. As Lord Hoffmann held in *Chartbrook* there is simply no basis for adopting an objective approach where an agreement between the parties is contractual and a subjective approach when an agreement between the parties is pre-contractual. To adopt a subjective approach would be to give effect to the subjective intentions of the parties. There is simply no basis for using the equitable remedy of rectification to give effect to the subjective intentions of the parties. It is for contracting parties to express their subjective intentions and ensure that they are reflected in any agreement that they reach. If they fail to do that, rectification is not available because it is not the role of rectification to recognise a different agreement than what would be recognised under the common law objective approach. Referring to the 'true agreement' of the parties as Ruddell does is unhelpful because it suggests that when rectification is being considered some agreement different from the objectively determined agreement is to be identified. But that is not the case. However it may be described, what the court must determine is what the parties agreed on an objective basis. References to a 'true agreement' or an 'actual agreement' are unhelpful. The only agreement that needs to be identified is the objectively determined agreement. A document can be rectified if it fails to correctly record such an agreement. Accordingly, the approach advocated by Lord Hoffmann is to be preferred.

[499] James Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] 1 *Lloyd's Maritime and Commercial Law Quarterly* 48.

2 *Objective approach is consistent with a focus on agreements*

The adoption of an objective approach is consistent with the first fundamental principle discussed earlier in this Chapter, namely that rectification is concerned with agreements. An objective approach must be adopted in rectification cases to ensure that the law does not identify two different contracts from the same circumstances. In this Section several cases before and after the decision in *Chartbrook* will be examined. It will be argued that the adoption of an objective approach to intention in a claim for rectification, when determining what the parties have agreed, is consistent with the first fundamental principle that rectification is concerned with agreements and that the case law in England supports such an approach.

The objective approach to intention in rectification cases was not a new position adopted in *Chartbrook.* In *Earl v Hector Whaling Ltd*[500] Holroyd Pearce LJ said, more than fifty years ago, that in cases of rectification the 'test of the intention of parties is objective.'[501] Some fifteen years before Chartbrook, in *Britoil plc v Hunt Overseas Oil Inc*,[502] Hoffmann LJ said that:

> The purpose of rectification of a contract (as opposed to rectification of a unilateral instrument like a will or voluntary settlement) is not to make the instrument accord with what the parties subjectively intended but with what they actually agreed. Agreement in English law does not require a meeting of minds, a consensus ad idem. It is an objective fact, requiring only the appearance of such a consensus. If therefore the parties both intended a written instrument to embody their agreement and it does not do so, the necessary common mistake exists.[503]

Lord Hoffmann is not the only judge in recent times to emphasise that the relevant intention is objective and not subjective. In *The Aktor*[504] Christopher Clark J made the position very clear when his Honour said that:

> Rectification on the ground of common mistake is the means by which the court puts right the parties' erroneous expression of an agreement that they have made. In order to determine what that agreement was, and what it means, the court examines what passed between the parties. The court is not concerned with what the parties *thought* they had agreed or what they *thought* their agreement meant – a subjective inquiry. What it is concerned with is what the parties said

[500] [1961] 1 Lloyd's Rep 459.
[501] Ibid 469.
[502] [1994] CLC 561.
[503] Ibid 578.
[504] [2008] 2 Lloyd's Rep 246.

> and did, and what that would convey to a reasonable person in their position – an objective question.[505]

His Honour went on to say that:

> When, however, the authorities speak of a continuing common intention – an expression which reflects the fact that rectification is often granted when no contract is made until the execution of the instrument sought to be rectified – the reference is not to the *subjective* intention of the parties but to the intention that they have manifested by what they have said and done.[506]

More recently in *Kowloon Development Finance Ltd v Pendex Industries Ltd*[507] Lord Hoffmann NPJ addressed the issue of intention and indicated that in relation to agreements the focus is on the objective intention of the parties but in cases of so-called unilateral mistake the focus is on the subjective intention of the parties. His Lordship said that 'it is true to say that the concept of rectification for common mistake involves carrying into effect what the parties appear to have actually agreed that the document should say' and that 'in deciding what the parties have agreed, the common law adopts its usual objective stance, looking at what a reasonable observer would have understood the parties to mean and not concerning itself with their uncommunicated states of mind.'[508] His Lordship said that rectification 'for unilateral mistake, on the other hand, is very much concerned with the subjective states of mind of the parties.'[509] The issue of intention in cases of so-called unilateral mistake will be addressed in Chapter V. Lord Hoffmann NPJ emphasised the concept of agreement when he said that 'in claims for rectification of contracts for mutual mistake, it is necessary for the court to be confident that the formal document does not reflect what was previously agreed.'[510] His Lordship continued to focus on the concept of agreement when he discussed circumstances where a formal contract replaced an earlier heads of agreement. His Lordship said that:

> If there is room for ambiguity in the heads of agreement or if they might have been varied in the course of subsequent negotiations, a claim for rectification must fail. The heads of agreement are only part of the material upon which the court must decide whether it can "predicate with certainty" what an objective observer would have thought that the parties had agreed and continued to agree to record in the final document.[511]

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[505] Ibid 253.
[506] Ibid.
[507] (2013) 16 HKCFAR 336. For comment on the decision see: Lee Mason, 'Restatement of the law on rectification: equitable relief for mistakes in contractual documents' (2014) 25(1) *International Company and Commercial Law Review* 26.
[508] (2013) 16 HKCFAR 336, 346.
[509] Ibid.
[510] Ibid 347.
[511] Ibid 348.

In considering the issue of objective intention, Lord Hoffmann NPJ quoted Blackburn J's well-known passage in *Smith v Hughes*[512] which was concerned with common law contract formation where Blackburn J said that:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[513]

Lord Hoffmann NPJ explained why it is the objective intention that is relevant in cases of so-called common mistake when he said that, 'in cases in which there is no intention to embody the agreement in some formal document, a party may well find himself bound by terms which, subjectively, he did not intend to agree to' and went on to pose the question, 'Why should it be different because the parties have agreed to record those terms in a written instrument?'[514] That is a valid point and to appreciate its significance it is instructive to examine what occurred in *Smith v Hughes* where the contract was formed orally. In *Smith v Hughes* the plaintiff sold a quantity of oats to the defendant by way of a sale by sample and the defendant inspected the sample prior to entering into the contract. After the oats were delivered, the defendant rejected the delivery and refused to pay the sum due under the contract on the basis that the defendant believed he was buying old oats whereas the oats delivered were new oats. At the trial there was conflicting evidence concerning what had been said by the parties during the negotiations. The plaintiff maintained that he simply offered good oats for sale by way of a sample and did not describe them as either old oats or new oats. The defendant claimed in his evidence that he had specifically told the plaintiff that he was a buyer of old oats and that as a horse trainer he only ever purchased old oats. Two questions were before the jury and they received directions on those questions from the trial judge. The first question was whether the word 'old' had been used during the negotiations between the parties. The second question was whether the jury was of the opinion that the plaintiff believed that the defendant believed, or was under the impression, that the defendant was contracting to purchase old oats. If the jury found that the plaintiff had such a belief, then the jury were directed to find in favour of the defendant. That is, the jury were directed that the defendant would not be liable under the contract if the plaintiff

[512] (1871) LR 6 QB 597.
[513] Ibid 607.
[514] (2013) 16 HKCFAR 336, 347.

believed that the defendant believed that he was purchasing old oats. The jury found in favour of the defendant but did not provide specific answers to the two individual questions. The plaintiff appealed to the Court of Queen's Bench. On appeal, Cockburn CJ, Blackburn and Hannen JJ all agreed that there should be a new trial. As Mason ACJ and Murphy and Deane JJ explained in *Taylor v Johnson*[515] the judgments of Blackburn and Hannen JJ 'provide support for the proposition that a contract is void if one party to the contract enters into it under a serious mistake as to the content or existence of a fundamental term and the other party has knowledge of that mistake.'[516] Mason ACJ and Murphy and Deane JJ noted that the approach adopted by Blackburn and Hannen JJ represented the 'subjective theory.'[517] Their Honours noted that 'according to the subjective theory, the contract is void ab initio, whereas according to the objective theory, it is voidable only.'[518] Their Honours observed that while 'the sounds of conflict have not been completely stilled, the clear trend in decided cases and academic writings has been to leave the objective theory in command of the field.'[519]

Since the judgment of the High Court of Australia in *Taylor v Johnson*, the objective theory of contract formation has become even more entrenched. As Justice Edelman of the High Court of Australia,[520] writing extra-judicially when a justice of the Federal Court of Australia, has noted, courts in Australia have adopted an objective approach to the formation of contract. Justice Edelman has said that:

> The objective theory of contract was cogently set out in *Taylor v Johnson* [1983] HCA 5, (1983) 151 CLR 422 in the course of the High Court's consideration of the circumstances in which a mistake can make a contract voidable. Mason ACJ, Murphy and Deane JJ said (at 428-429) that the objective approach had 'command of the field'. Since then, the High Court has reiterated on a number of occasions that 'the legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions': *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* [2004] HCA 55, (2004) 218 CLR 471 [34] (the Court). As French CJ observed in *Byrnes v Kendle* [2011] HCA 26 [59], 'the "objective theory" of contract formation is not concerned with "the real intentions of the parties, but with the outward manifestations of those intentions"'.[521]

[515] (1983) 151 CLR 422.
[516] Ibid 428.
[517] Ibid.
[518] Ibid 429.
[519] Ibid.
[520] James Edelman, Three Issues in Construction of Contracts, Presentation to the Conference of Supreme and Federal Court Judges, 27 January 2016. Available at http://www.fedcourt.gov.au/publications/judges-speeches/justice-edelman/edelman-j-20160127 (Accessed 3 June 2017).
[521] Ibid [2].

Importantly, Justice Edelman said that part of the difficulty is 'the constant reference to "intention" in the law of contract.'[522] His Honour said that the 'language of intention in the law of contract became prominent in the modern law as a result of Pothier's treatise on *The Law of Contracts* (1761)' and that prior to the end of the 18th century 'the operation of contract, within the highly formal structure of the forms of action, was objective.'[523] Justice Edelman explains that 'Pothier, influenced by Rousseau, propounded a Will theory of contract. He saw contract as concerned with the true subjective intentions of the parties.'[524] His Honour noted that the 'will theory of contract had powerful supporters' and that aside from Pothier, 'another version of it was adopted in post-Napoleonic Germany by the theorist von Savigny, who was strongly influenced by Kant.'[525] Justice Edelman notes that their 'work crossed the channel when Pothier's treatise was translated by Sir William Evans in 1806' and that the 'German and French Will Theory very nearly caught on in English law.'[526] His Honour observes that there 'remain traces of it in the law relating to mistake in contract' but that 'unlike in France, it did not prevail in England, Australia or the United States, and I think rightly so.'[527] Justice Edelman explains why the will theory of contract formation is problematic when his Honour said that we 'are not morally bound to act in an *interpersonal* sense because of any subjective and uncommunicated thoughts in our heads. We become obliged because of the words we use and the actions we take by which we make undertakings to others.'[528] It is clear from the points made by Justice Edelman that an objective approach to contract formation must be adopted and that the same position applies when a court determines what the parties have agreed to in relation to proposed terms of a contract. The position advocated by Justice Edelman is consistent with Professor Carter's[529] observations on the assumptions behind the objective approach to contractual interpretation. Professor Carter explains that:

> Even in the construction of contracts, the better view is that the concern is with the actual intention of the parties. What the objective theory requires is for actual intention to be determined by an objective process. In other words, there is a presumption that the parties' objectively determined intention corresponds with their actual intention.[530]

[522] Ibid [3].
[523] Ibid [4].
[524] Ibid.
[525] Ibid.
[526] Ibid.
[527] Ibid.
[528] Ibid [6].
[529] John Carter, 'The remedy of rectification' (2013) 27(2) *Commercial Law Quarterly* 10.
[530] Ibid 12.

However, Professor McLauchlan,[531] appears to take a different view of the legal principle set out in *Smith v Hughes* and how it applies to both the common law approach to contract formation and how that principle applies to the equitable doctrine of rectification. Professor McLauchlan has argued that:

> The law of rectification really ought to be quite straightforward but it has become needlessly difficult, largely as a result of a misunderstanding of the principles of contract formation, particularly those concerning the meaning of the objective test and the relevance of the parties' actual or subjective intentions. Properly understood, those principles dictate that the remedy of rectification ought ordinarily to be available to a claimant who is mistaken as to the terms expressed in a written contract where it is convincingly proven either (a) that the other party made the same mistake, or (b) that, despite what the document on its proper construction provides, the claimant was led reasonably to believe that its understanding of the terms of the contract had been accepted by the other party. In other words, the failure of the document to reflect either the actual *or* objective intention of the parties should suffice for rectification.[532]

The first circumstance where Professor McLauchlan suggests that rectification should be available focuses on both parties having made the same mistake, that is, a so-called common or mutual mistake. That follows the widely-adopted classification of rectification between common or mutual mistake and unilateral mistake which is rejected in this thesis. It is argued in this thesis that the true position is that rectification is available where there is a mistake in the recording of a prior agreement, whether that prior agreement is a fully formed contract or an agreement that certain agreed terms be included in a proposed contract and it is irrelevant in such circumstances how many people were mistaken. The second circumstance where Professor McLauchlan suggests that rectification should be available seeks to introduce a role for rectification to examine what one party subjectively believed the terms of the contract to be and to then determine whether the other party had some role in creating that belief. But that approach cannot be justified because the common law in both England and Australia has adopted a wholly objective approach to contract formation and rejected the subjective approach adopted in *Smith v Hughes*. Professor McLauchlan argues that what Blackburn J said in *Smith v Hughes* means that 'the objective principle involves a subjective element' and that the 'promisee's actual knowledge and beliefs are relevant.'[533] Professor McLauchlan says, again quoting Blackburn J, that the 'principle requires not only that a reasonable person would believe that the promisor was assenting to the terms proposed by the other party, but also that

[531] David McLauchlan, 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83.
[532] Ibid 85-6. See also David McLauchlan, 'The Contract That Neither Party Intends' (2012) 29 *Journal of Contract Law* 26.
[533] Ibid 88.

"that other party upon that belief enters into the contract with him".'[534] Professor McLauchlan explained this position further, in relation to the availability of rectification in circumstances where the parties are at cross-purposes, when he said that:

> The answer to the question of whether rectification ought to be available in situations where the parties are at cross-purposes and therefore have different understandings of the terms in question ought to depend in all cases on whether, at the time the written contract was entered into, the claimant was led reasonably to believe that its understanding was assented to by the defendant. If the answer is yes, ordinarily rectification should be granted. On the other hand, if the proper inference is that the defendant reasonably believed that its understanding was assented to by the claimant, rectification should be denied and the contract enforced as written. And if there is no tiebreaker and the parties' beliefs are equally reasonable, or each had reason to know of the other's understanding, the strict, yet unpalatable, conclusion might have to be that no contract was formed because there was no actual *or* objective consensus ad idem.[535]

Professor McLauchlan seeks to justify rejecting an objective approach to contract formation by adopting, in some cases, a wholly subjective approach. The approach shifts the focus away from an objective assessment of a party's conduct in assenting to the terms proposed by the other party to a focus on an *understanding* of what the other party *believed* a term of the contract to mean. Such an approach appears to go well beyond contract formation. Professor McLauchlan seeks to justify a role for rectification of giving effect to the subjective intention of one of the parties. This is significant because the equitable doctrine of rectification, in the contractual context, is not at all concerned with giving effect to the subjective intentions of the parties. Rectification is concerned with correcting mistakes in the recording of agreements. Identifying the terms of an agreement is a common law objective exercise and construing the words used, once the terms themselves have been identified, is also a common law objective exercise based on the admissible evidence as outlined in Chapter I. Rectification is not a remedy available to give effect to the subjective intention or subjective understanding of a party.

Professor McLauchlan[536] also argues that 'the objective principle has no application where actual mutual intention is established.'[537] Professor McLauchlan explains that so long as 'the court is satisfied that there was an actual mutual intention that by mistake was not recorded in the written contract, that should suffice for rectification.'[538] That is, the court gives effect to

[534] Ibid.
[535] Ibid 110.
[536] David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 *Law Quarterly Review* 608.
[537] Ibid 610.
[538] Ibid 613.

the subjective intentions of the parties because both parties have the same subjective intention. There is in fact an actual meeting of the minds. Professor McLauchlan explains that:

> Here there is simply no need to be concerned with what a reasonable person would have inferred, although in any event application of the objective principle would surely not lead to a different result. How can a reasonable person in the position of the parties infer an intention that is contrary to the actual mutual intention of the parties?[539]

Commenting on the approach advocated by Professor McLauchlan, Lord Justice Etherton, writing extra-judicially[540] following his judgment in the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*,[541] referred to Lord Hoffmann's judgment in *Chartbrook* and noted that:

> Lord Hoffmann's analysis is inconsistent with the idea that a common subjective but uncommunicated intention can give rise to particular contractual terms. He said that, in the case of both a prior contract and a continuing common intention in relation to a particular matter, the question is what an objective observer would have thought the intention of the parties to be.[542]

Lord Justice Etherton went on to say that:

> I agree with Professor McLauchlan that the answer to the question whether there can be rectification based on a common but uncommunicated actual consensus turns on whether a term can ever be contractually binding in the case of such an uncommunicated subjective consensus. I suggest that, as a bald statement of principle shorn of all the factual complexities of an actual case, there are strong policy objections to the recognition of such a contract term. To extend contractual force to the uncommunicated subjective belief and intention of both parties is not at all consistent with the objective principle, which has been a hallmark of the law of England and Wales and is so important to its commercial and trading traditions. It is inconsistent with the basic principle that, to enter into a contract, there must be a communicated offer.[543]

Accordingly, Lord Justice Etherton was of the view that Professor McLauchlan's approach on this aspect of rectification should be rejected. His Lordship posed the question, can 'it really be said that the current legal policy of precluding such a claim based entirely on uncommunicated subjective intentions is so manifestly wrong or inferior to the alternative that the law should now be changed? I doubt it.'[544]

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[539] Ibid.
[540] Terence Etherton, 'Contract Formation and the Fog of Rectification' [2015] 68 *Current Legal Problems* 367.
[541] [2012] 1 WLR 1333.
[542] Etherton, above n 540, 373.
[543] Ibid 378.
[544] Ibid 380.

It is against this background that the Australian case law on rectification of documents will be examined. The position in England and Australia is that when considering the formation of agreements, the common law looks at the objective intention of the parties as identified from their words and actions. That is a consistent position in England and Australia. What is different in the approaches between England and Australia is that in Australian case law the idea has emerged that when a claim is made for rectification a court should examine the subjective intention of the parties and seek to give effect to that subjective intention. That position must be rejected and the next Section examines how the position in Australia emerged and why it should be rejected in favour of the position confirmed in England in *Chartbrook.*

3 *The Australian Approach*

The examination of the case law in the previous Section demonstrated that in England the courts have adopted an objective approach to both the formation of contract and to the equitable doctrine of rectification and that Australian courts have also adopted an objective approach to contract formation. But in some rectification cases Australian courts have adopted a subjective approach and focused on the subjective intentions of the parties rather than focus on agreements. This has been particularly the case in circumstances where the parties reached a non-contractual agreement on one or more terms of a proposed contract.

Despite many modern cases in Australia adopting a subjective approach to rectification, which will be examined further below, some earlier cases in Australia adopted an objective approach. In *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd*[545] Street J considered whether a continuing common intention was sufficient to obtain rectification where there was a common mistake. His Honour said that 'the true principle involves finding an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other. On such facts there can be seen to exist objectively a consensual relationship between the parties.'[546] It can be seen that Street J focused on intention as a relevant factor when

[545] [1972] 2 NSWLR 467.
[546] Ibid 473. This statement of the law was approved in *Hooker Town Developments Pty Ltd v Director of War Service Homes* (1973) 47 ALJR 320, 323 by Menzies J. The decision of Menzies J was revered on grounds other than rectification: see *Hooker Town Developments Pty Ltd v Jilba Pty Ltd* (1974) 48 ALJR 213. See also *Parry v Dusty Hotel Pty Ltd* [2003] NSWSC 1215.

considering the formation of an agreement between the parties on an objective basis. That approach is the same as the position adopted by Lord Hoffmann in the House of Lords in *Chartbrook* and does not provide for any subjective approach when a court is considering a claim for rectification.

But in the 1990s the idea emerged in Australia that in rectification cases the subjective intention of the parties was relevant. In *Bailey v Manos Breeder Farms Pty Ltd*[547] Perry J, in adopting a subjective approach, said that in cases concerning rectification it 'is the parties' actual or subjective intention to which reference must be made. This is different from the presumed intention to which regard is paid in implying a term or construing a contract.'[548] Similarly, in *Collard v Faust*[549] Miles CJ said that the intention that needed to be proved in relation to rectification was 'the common subjective intention of the parties.'[550] Later in his reasons his Honour referred to the 'joint subjective intention of the parties.'[551] A subjective approach to intention in cases of rectification was also adopted in *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd*[552] where Sheller JA said that:

> Whereas interpretation is concerned with the meaning of the language on the face of the document and its ambiguities, rectification may be ordered when the meaning of the document is clear, but it fails to express the real intention of the parties. When construing a contract, a court is concerned with what the parties appear to have meant, and may have regard to external and objective criteria. On the other hand, a court asked to rectify may investigate what the parties (subjectively) agreed to, rather then what they must (objectively) have meant. Accordingly, evidence as to their actual intentions is admissible in a suit for rectification, though excluded when the court is concerned merely with interpretation.[553]

But those decisions fail to explain why the courts should take a subjective approach when considering a claim for rectification. In *National Australia Bank Ltd v Budget Stationery Supplies Pty* Sheller JA made a comparison between common law construction and the equitable doctrine of rectification. A similar comparison was made more recently in *Fuji Xerox Finance Ltd v CSG Ltd*[554] where Sackar J said that the 'type of intention that is relevant to rectification of a contract as opposed to the construction of it is the relevant subjective intention.

[547] (Unreported, Supreme Court of South Australia, Perry J, 23 October 1990).
[548] Ibid 29.
[549] (Unreported, Supreme Court of the Australian Capital Territory, Miles CJ, 13 February 1996).
[550] Ibid 3.
[551] Ibid 21.
[552] (1997) 217 ALR 365.
[553] Ibid 381.
[554] [2012] NSWSC 890.

Put another way it is the actual intention of the parties.'[555] But, with respect, that is not the correct comparison. What should be compared is the common law approach to contract *formation* (rather than construction) and the equitable approach that applies when rectification is claimed in circumstances where there is no antecedent contractual agreement. That is, when, instead of an antecedent contractual agreement, there is a non-contractual agreement between the parties in relation to one or more of the terms of the proposed contract. That is the correct comparison and when that comparison is made it is clear as Lord Hoffmann explained in *Chartbrook*, that the same objective approach to the formation of the agreement should be adopted. When a comparison is being made between construction and rectification the critical difference between the two processes is in what evidence is admissible. In the process of common law construction evidence of prior negotiations is inadmissible but in claims for rectification evidence of prior negotiations is both admissible and necessary so that the court can be persuaded that there was an agreement formed during the negotiations that was, by mistake, incorrectly recorded in the final written agreement. The admissibility of the prior negotiations is the critical difference between common law construction and the equitable doctrine of rectification. The admission of the subjective intentions of the parties may be of some assistance to the courts when determining, on an objective basis, what the parties agreed but the critical focus will be on what has been agreed objectively. Once it is established what has been agreed on an objective basis the role of a court in a claim for rectification is to give effect to that objectively determined agreement by rectifying a document if, by mistake, it does not accurately record what was objectively agreed between the parties.

The subjective approach that emerged in Australia during the 1990s became more firmly entrenched as a result of the decision of the New South Wales Court of Appeal in *Ryledar Pty Ltd v Euphoric Pty Ltd*[556] where Campbell JA, emphasising that it was important to appreciate that common intention is a different concept when considering the issue of construction and when considering the issue of rectification, said that:

> For the purpose of deciding whether a contract has been entered, or what construction it bears, the common intention that the court seeks to ascertain is what is sometimes called the "objective intention" of the parties. That is the intention that a reasonable person, with the knowledge of the words and actions of the parties communicated to each other, and the

[555] Ibid [141].
[556] (2007) 69 NSWLR 603.

> knowledge that the parties had of the surrounding circumstances, would conclude that the parties had, concerning the subject matter of the alleged contract.[557]

Campbell JA explained that by 'contrast, the type of intention that is relevant to rectification of a contract is the subjective intention – sometimes called the actual intention – of the parties.'[558] Campbell JA said that 'the common intention that is required to grant rectification is subjective. Even though there is a requirement for the intention to be disclosed before it can count as a common intention, that disclosure need not be by words that say in substance "this is my intention".'[559] His Honour concluded that 'proof of the subjective intention of the parties to the contract is fundamental to the grant of rectification.' [560] Tobias JA agreed and said that 'it is the need to establish the subjective common intention of the parties which is critical, especially where the parties' dealings prior to the execution of the instrument sought to be rectified are inconclusive.'[561] His Honour said that 'the common intention which must be established by clear and convincing proof to justify rectification must be the actual or true common intention of the parties.'[562] His Honour also said that 'evidence of that intention may be ascertained not only from the external or outward expressions of the parties manifested by their objective words or conduct but also from evidence of their subjective states of mind.'[563]

The idea that the subjective intention of the parties is the intention to be considered in rectification cases includes the idea that the subjective intention of the parties is their 'real intention' and that rectification is concerned with ensuring that the courts give effect to that real intention. Such an approach is reflected in the decision in *Saraceni v Mentha*[564] where Corboy J said that 'the common intention to be established for rectification is a subjective (or actual) intention so that all of the objective and subjective evidence must be considered.'[565] This approach, consistent with the approach adopted in *Ryledar*, provides no explanation as to why a court considering a rectification claim should be at all concerned with what the parties subjectively intended to agree. What is ignored in this approach is that rectification is concerned with providing relief where there has been a mistake in the recording of an

[557] Ibid 655.
[558] Ibid 657.
[559] Ibid 667.
[560] Ibid 668.
[561] Ibid 641.
[562] Ibid 642.
[563] Ibid. Special leave to appeal to the High Court of Australia was refused: see *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] HCATrans 698.
[564] [2011] WASC 94.
[565] Ibid [51].

agreement. Any agreement must first be established according to objective contract formation principles. No other approach to that task can be justified. In many respects the problem that has arisen in Australia in relation to a focus on the subjective intention of the parties is that in these Australian cases the clear statement of Denning LJ in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*,[566] that rectification is concerned with agreements, has been lost sight of. By contrast English courts have never abandoned the idea that rectification is concerned with agreements despite the frequent reference to the importance of intentions. In Australia, in the rectification context, the language of intentions has dominated over the language of agreements.

The Australian position is, accordingly, most unsatisfactory with some cases adopting an objective approach but with a long line of cases now adopting a subjective approach. The unsatisfactory state of the law in Australia is evident in *Thiess Pty Ltd v Arup Pty Ltd*.[567] Applegarth J, when considering a claim for rectification said that:

> In a case where the correspondence and/or conduct positively establishes the necessary common intention, then assertions by the party opposing rectification of his or her subjective state of mind which is inconsistent with that party's outward manifestation of his or her intention, being unexpressed and uncommunicated, are unlikely to trump his or her expressed intention.[568]

But importantly his Honour then said that:

> *Ryledar Pty Ltd v Euphoric Pty Ltd* supports the proposition that the actual intention of the parties may be ascertained not only from the external or outward expressions of the parties manifested by their words or conduct, but also from evidence from the parties about their subjective states of mind. The existence of the actual intention required to establish rectification may be positively established in a particular case by outward expressions by a party of such an intention, leaving evidence given by that party that it did not subjectively have that intention to carry little weight in the determination of what the party's actual intention was.[569]

This passage reflects a shift from the traditional language of actual agreement to a focus on the actual subjective intention of the parties. The unsatisfactory state of the law in Australia is

[566] [1953] 2 QB 450.
[567] [2012] QSC 185.
[568] Ibid [93].
[569] Ibid [96].

evident in the following passage where his Honour went on further to say, after referring to several authorities, that:

> Authorities can be found in which reference is made to the fact that rectification turns on the subjective intentions of the parties. However, these authorities do not contradict the observations of Tobias JA in *Ryledar Pty Ltd v Euphoric Pty Ltd* as to how the actual (or subjective) common intention of the parties is to be ascertained. I respectfully adopt the observations of his Honour and the additional remarks of Campbell JA in that case and also respectfully follow the observations of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*.[570]

The difficulty with this approach is quite clear. Applegarth J favours following both the Australian decision in *Ryledar* (a subjective approach) *and* the English position in *Chartbrook* (an objective approach). With respect, that position is untenable. The two approaches cannot both be accepted as correct. But what can be accepted is that evidence of the subjective intention of the parties can be considered as one factor in determining what has been agreed to on an objective basis. Everything that a party said and did will have some relevance to determining what the parties have agreed. But the agreement must be established based on what a reasonable person would conclude is the agreement on an objective basis. As Henderson J explained in *Woodford Land Ltd v Persimmon Homes Ltd*,[571] the 'existence or otherwise of a continuing common intention has to be ascertained objectively, and not by reference to the subjective beliefs or intentions of the parties. Nevertheless, evidence of such subjective beliefs or intentions, even if not communicated to the other side, may still be admissible for the light (if any) that it may shed on the objective enquiry.'[572]

The subjective position adopted in *Ryledar* has persisted in subsequent Australian decisions. In *Ortho Group (NSW) Pty Ltd v Harrison*[573] Hammerschlag J said that it 'is not sufficient to show that a written instrument does not represent the common intention of the parties. It must be shown what their common intention was. The intention concerned is the parties' subjective or actual intention.'[574] In *Swancare Group Inc v Commissioner for Consumer Protection*[575] Pritchard J said that rectification 'turns on the subjective intentions of the maker, or makers, of

[570] Ibid [101].
[571] [2011] EWHC 984 (Ch).
[572] Ibid [51].
[573] [2012] NSWSC 915.
[574] Ibid [34].
[575] [2014] WASC 80.

the document.'[576] In *Newey v Westpac Banking Corp*[577] Gleeson JA said that the intention that 'is relevant to rectification of the contract is the subjective intention of the parties, sometimes called the actual intention.'[578] In *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No 2)*[579] Gleeson JA said that the intention 'that is relevant to rectification of the contract is the subjective intention of the parties, sometimes called the actual intention.'[580]

Attempts have been made to reconcile this unsatisfactory state of the law. In *JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)*[581] Martin J explained that in rectification cases 'the term "common intention" is used differently according to the stage of analysis being undertaken.'[582] His Honour explained that in the first stage, 'that of deciding whether a contract has been formed, the common intention sought to be ascertained is what is sometimes referred to as the "objective intention" of the parties.'[583] His Honour said that the first stage 'is to be contrasted with the use of the term "common intention" when considering the manner in which the written contract is to be rectified. At this point it is the subjective intention or actual intention of the parties which is relevant.'[584] But it is unclear why that would be so. As rectification is available to correct a mistake between what has been agreed and what has been recorded it is very difficult to see why an objective approach would be used when a contract is formed and then a subjective approach adopted to what has been recorded. Such an approach is very unlikely to reveal the relevant mistake. Rather, such an approach is likely to give effect to the subjective intention of the parties. But that is not the role of rectification.

The influence of the decision in *Ryledar* has been significant in Australian cases. In *Tipperary Developments Pty Ltd v Western Australia*[585] McLure JA, without any reference to *Ryledar*, said that where a document is executed pursuant to a prior oral agreement 'the starting point is the objectively determined common intention of the contracting parties.'[586] But in *Technomin*

[576] Ibid [119].
[577] [2014] NSWCA 319.
[578] Ibid [175].
[579] [2015] NSWCA 119.
[580] Ibid [58]. A subjective approach was also adopted by Bowden DCJ in *Evans v Pallas Bride and Fashion Pty Ltd* [2016] WADC 85, [124].
[581] [2010] QSC 389.
[582] Ibid [10].
[583] Ibid [11].
[584] Ibid [13].
[585] (2009) 38 WAR 488.
[586] Ibid 547.

Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd[587] McLure P shifted from adopting an objective approach to adopting a subjective approach when her Honour said, after referring to *Ryledar*, that 'the test of intention in rectification is subjective (the actual intention of the contracting parties) and the test of contractual construction is objective.'[588]

Despite most modern Australian cases adopting a subjective approach to rectification some Australian cases have continued to adopt an objective approach. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[589] Kirby J referred to 'the ample capacity of our law to rectify a written contract where a party can prove that it does not reflect the true agreement of the parties, objectively ascertained.'[590] In *Stormriders Pty Ltd v Copperart Pty Ltd*[591] White J adopted an objective approach when his Honour said that in rectification cases it 'must be objectively apparent from the words or actions of each party that each party held and continued to hold a common intention on the point in question, so that each party's intention corresponds.'[592] In *GIO General Insurance Ltd v Mammoth Investments Pty Ltd*[593] Crisford DCJ said that, in the case before the court, the 'objective evidence which I accept supports that each party shared a common intention but that intention was not recorded accurately.'[594] Most recently, in *Simic v New South Wales Land and Housing Corp*,[595] Gageler, Nettle and Gordon JJ in the High Court of Australia adopted an objective approach, whilst French CJ and Kiefel J emphasised that the issue may need further consideration in Australia. The facts of the case are set out in Section C of Chapter I dealing with misnomers. Gageler, Nettle and Gordon JJ said that, when determining the actual or true common intention of the parties to a document, there 'is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party.'[596] French CJ addressed the issue of the correct approach to be adopted in Australia and said that:

> There has been debate in the United Kingdom about reliance upon the "real" as distinct from objectively attributed intentions of the parties in relation to the rectification of contracts. One

[587] (2014) 48 WAR 261.
[588] Ibid 283.
[589] (2002) 240 CLR 45.
[590] Ibid 79.
[591] [2004] NSWSC 809.
[592] Ibid [46].
[593] (2005) 40 SR (WA) 192.
[594] Ibid 204.
[595] [2016] HCA 47; (2016) 91 ALJR 108.
[596] Ibid [104].

> line of reasoning in the debate is that reliance upon an objectively ascertained common intention for the purpose of rectification serves to bring about coherence with the common law of contract. In *Chartbrook Ltd v Persimmon Homes Ltd*, Lord Hoffmann's obiter remarks supporting a requirement for an objectively attributed common intention for the purposes of rectification commanded the assent of his colleagues. However, that objective test was not argued in this case and does not represent the common law of Australia as it presently stands. A change in the law would require full argument in a case in which the question was relevant to the outcome.[597]

Kiefel J also addressed the issue and said that:

> What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in *Bush v National Australia Bank Ltd*, that common continuing intention "must be objectively apparent from the words or actions" of each party, may be understood.[598]

Her Honour referred to Lord Hoffmann's judgment in *Chartbrook v Persimmon Homes Ltd*[599] and said that:

> 48. Lord Hoffmann's view involves a departure from the traditional approach of the courts to rectification. Its utility has been questioned. It has been observed[600] that it is difficult to see why a prior agreement, objectively determined, should override the later instrument, unless it reflects the parties' actual intentions. The need for consistency which his Lordship thought desirable may also be questioned. Rectification is an equitable remedy which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement and it does so pragmatically, by reference to considerations such as business efficacy.
>
> 49. It is not necessary to express a concluded opinion on these and other matters to which Lord Hoffmann's view gives rise. Although that aspect of Lord Hoffmann's reasons commanded the assent of other members of the House of Lords, it was not necessary to the decision in *Chartbrook*. Moreover, whilst other aspects of the reasons in that case have been

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[597] Ibid [19]. French CJ referred to: Terence Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 *Current Legal Problems* 367; Marcus Smith, 'Rectification of Contracts for Common Mistake, *Joscelyne v Nissen*, and Subjective States of Mind' (2007) 123 *Law Quarterly Review* 116; and *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101.

[598] Ibid [42]. Kiefel J made reference to: *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, 657; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382, 405; *Newey v Westpac Banking Corporation* [2014] NSWCA 319, [175]; *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261, 283; *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No 2)* [2015] NSWCA 119, [58]; *RCR Tomlinson Ltd v Russell* [2015] WASCA 154, [53]; and *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390.

[599] [2009] AC 1101.

[600] Kiefel J referred to: John McGhee, *Snell's Equity* (Sweet & Maxwell, 33rd ed, 2015) 426.

> referred to in some recent decisions of this Court,[601] his Lordship's view in this regard has not been the subject of any consideration. It was not the subject of argument in this appeal, which should be approached by reference to settled principle.[602]

The judgment in *Simic* would suggest that the issue needs to be carefully revisited by the courts in Australia in an appropriate case in the future. It can be seen from the analysis of these Australian cases that some judges have adopted a subjective approach when considering claims for rectification and some judges have adopted an objective approach in determining what agreement will be given effect to. The essential difference is that those that focus on a subjective approach examine the subjective *intention* of the parties whereas those that focus on an objective approach often focus, correctly, on what the parties have *agreed*, and seek to determine what has been agreed on an objective basis in accordance with the contract formation principle set out by the High Court of Australia in *Taylor v Johnson.*

4 *Conclusion*

The second fundamental principle examined in this Section relates to the question of whether courts should focus on the subjective or objective intentions of the parties in a claim for rectification. In many ways the controversy itself is misconceived because it assumes that the focus of rectification should be on intentions. But that is not the case. As the first fundamental principle demonstrates the focus of rectification should be on what has been agreed between the parties and, as Lord Hoffmann explained in *Chartbrook*, the common law adopts an objective approach to contract formation. There is simply no reason why a court concerned with identifying what negotiating parties have agreed in relation to the proposed terms of a contract should adopt a subjective approach. The same objective approach to determining what has been agreed must be adopted. It would be untenable for the courts to identify two different agreements between the parties to an agreement when considering a claim for rectification: one under common law objective principles, and one using a subjective approach. It is not the role of rectification to give effect to the subjective intention of the parties.

Accordingly, it is concluded that the Australian cases that have adopted a subjective approach must be rejected in favour of the objective approach adopted in England. In many of the

[601] Kiefel J referred to: *Byrnes v Kendle* (2011) 243 CLR 253, 284-285; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 135; and *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 333 ALR 569, 621.
[602] [2016] HCA 47; (2016) 91 ALJR 108, [48]-[49].

Australian cases examined in this Section it can be seen that some judges have sought to make a comparison between the objective process of common law construction and the equitable doctrine of rectification and concluded that in rectification cases the courts need to adopt a subjective approach. The rationale behind these decisions may very well be that if an objective approach was taken to rectification it would produce the same outcome as a common law process of construction. Such a rationale is misconceived because the critical difference between construction and rectification is the admissibility of prior negotiations. Because evidence of prior negotiations is excluded from the process of construction it is possible that a mistake in the recording of an agreement will not be identified during the construction of an agreement. That remains the key jurisdiction for rectification. The role of a court in a claim for rectification is to first identify on common law objective principles what the parties have agreed. The next step is to examine the negotiations between the parties, and such a process will, if there has been a mistake in the recording of an agreement, provide the court with the evidence that justifies providing relief for a mistake in the recording of an agreement. But critically, the process of determining what the parties agreed remains an objective exercise. That was the position long before the decision of the House of Lords in *Chartbrook.* As long ago as 1930 in the House of Lords in *Hvalfangerselskapet Polaris Aktieselkap v Unilever Ltd*[603] Lord Wright said that, in relation to claims for rectification, 'it is not material to ascertain what one party intended in his own mind (if indeed that can ever be ascertained) but what was the bargain as expressed in the words spoken or written by the parties, or to be implied from their conduct.'[604] His Lordship said that it is 'on such material that it has to be determined whether or not the bargain so established was correctly set out in the formal contract.'[605] That clear explanation of the law has been lost in the Australian cases since a subjective approach was introduced into the law of rectification in the 1990s.

D *Expressed in outward acts*

There has been some controversy as to whether there needs to be an outward expression of accord when considering the availability of rectification. This is the third fundamental principle outlined at the beginning of this Chapter. It will be argued in this Section that this controversy is unnecessary when it is appreciated that the outward acts of the parties, and any outward

[603] (1933) 39 Com Cas 1.
[604] Ibid 34.
[605] Ibid.

expression of accord, simply represent part of the evidence that a court will consider when determining objectively what the parties have agreed. There is no basis for a requirement that there be some particular form of outward expression. What is relevant is the whole of the conduct of the parties, including silence, during the formation of their agreement. All relevant conduct should be examined to determine what has been agreed to on an objective basis. Once an agreement is identified objectively, that agreement can be compared to what has been recorded in the written contract. It can be misleading, indeed confusing, to express this as a requirement for there to be an outward expression of accord. A court will determine, after considering all relevant and admissible evidence, what the agreement between the parties is and, importantly, what express terms are included in that agreement.

The issue of outward acts was considered when the decision of Pilcher J in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*[606] subsequently went on appeal to the Court of Appeal. The plaintiff entered into two contracts with the defendant to buy horsebeans. There were different classes of horsebeans and the plaintiff intended to purchase a class of horsebeans known as feveroles and the plaintiff made this known to the defendant. The plaintiff was intending to supply them to a customer in Egypt who described them in their order as 'Moroccan horsebeans described here feveroles'. The plaintiff alleged that the defendant had provided an implied warranty that it would supply feveroles. The defendant supplied horsebeans that were not feveroles and the plaintiff sought to have the two contracts rectified by adding a specific reference to feveroles. Pilcher J found that the defendant was told that the plaintiff wanted to purchase feveroles but that the defendant was under the mistaken impression that feveroles was simply the French word for horsebeans and that the defendant was to supply North African horsebeans.[607] The defendant told the plaintiff that feveroles meant horsebeans and the parties thereafter, in all their correspondence and documentation, simply referred to horsebeans. When the horsebeans were delivered to the plaintiff's customer they immediately complained that the horsebeans were not feveroles. They accepted the horsebeans but commenced proceedings against the plaintiff. The dispute between the plaintiff and the defendant went before an arbitrator who found in favour of the defendant. The plaintiff sought to have the defendant agree to have the arbitration award set aside but the defendant refused to consent. Pilcher J held that there was a mutual mistake.[608] The mistake first being made by the

[606] [1953] 1 Lloyd's Rep 84.
[607] Ibid 87.
[608] Ibid 91.

defendant and then communicated to the plaintiff who accepted the defendant's advice that all horsebeans were feveroles. Both parties then shared the same mistake. Importantly his Honour held that the parties had entered into an oral agreement to buy and sell horsebeans of the feverole type but that, because of a mutual mistake, all the subsequent documentation referred only to horsebeans. Pilcher J held that, based on mutual mistake, the plaintiff was entitled to have the two contracts rectified by adding a reference to feveroles.[609] The defendant appealed to the Court of Appeal.

In the Court of Appeal in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*[610] Singleton LJ held that the offer by the defendant was to sell horsebeans and that that offer was accepted by the plaintiff.[611] That is, the agreement made was simply for the sale of horsebeans and not for the sale of horsebeans of the feverole type as had been found by Pilcher J. This approach, and the facts in the case, closely resembled the issues that arose from the sale of oats in *Smith v Hughes*[612] discussed earlier in this Chapter. The written contract in *Frederick E Rose* accurately recorded the subject matter of the contract as being horsebeans. The finding of fact by the Court of Appeal that the agreement was for the sale of horsebeans was in stark contrast to Pilcher J's finding of fact at first instance that the parties had agreed to the sale of horsebeans of the feverole type. Accordingly, Singleton LJ held that the claim for rectification could not succeed. His Lordship said that whatever 'remedies the plaintiffs might have, or might have had, rectification is not one of them.'[613] His Lordship accepted the defendant's submission that there was either a contract for horsebeans or no contract at all. His Lordship rejected the plaintiff's argument that because the plaintiff and the defendant had discussed the matter before the oral contract was formed, and the defendant expressed the view that feveroles meant horsebeans, that the contract was for feveroles. Accordingly, his Lordship allowed the appeal.[614] Denning LJ also agreed that the appeal should be allowed and said that 'the parties to all outward appearances were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans.'[615] That is, they had not agreed to buy and sell horsebeans of the feverole type. His Lordship said that 'when the parties to a contract are to all outward appearances in full and certain agreement, neither of them can

[609] Ibid 92.
[610] [1953] 2 QB 450.
[611] Ibid 458.
[612] (1871) LR 6 QB 597.
[613] [1953] 2 QB 450, 458.
[614] Ibid.
[615] Ibid 460.

set up his own mistake, or the mistake of both of them, so as to make the contract a nullity from the beginning.'[616] Importantly Denning LJ said that the contract could have been set aside 'if the parties had acted in time.'[617] The plaintiff and their customers could both have had their respective contracts rescinded for innocent misrepresentation but, his Lordship said, 'once the buyers and sub-buyers accepted the goods, and treated themselves as the owners of them, they could no longer claim rescission.'[618] Having dealt with the formation of the contract, and what terms had been agreed, his Lordship then considered the appellant's claim for rectification. In a passage much cited in later cases his Lordship said:

> Rectification is concerned with contracts and documents, not 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. It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council* v. *Bradford Corporation* [1936] Ch 375); but, formalities apart, there must have been a concluded contract. There is a passage in *Crane* v. *Hegeman-Harris Co Inc* [1939] 1 All ER 662, 664 which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. 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* … but not that they *intended* something different.[619]

His Lordship noted a distinction between agreeing something different from what was recorded in the written contract and intending something different from what was recorded and said that:

> The present case is a good illustration of the distinction. The parties no doubt intended that the goods should satisfy the inquiry of the Egyptian buyers, namely, "horsebeans described in Egypt as feveroles". They assumed that they would do so, but they made no contract to that effect. Their agreement, as outwardly expressed, both orally and in writing, was for "horsebeans". That is all that the defendants ever committed themselves to supply, and all they should be bound to. There was, no doubt, an erroneous assumption underlying the contract – an assumption for which it might have been set aside on the ground of misrepresentation or mistake – but that is very different from an erroneous expression of the contract, such as to give rise to rectification.[620]

[616] Ibid.
[617] Ibid.
[618] Ibid 461.
[619] Ibid 461-2.
[620] Ibid 462.

The reference to an erroneous assumption is critical here. An erroneous assumption is not grounds for rectification as held in several cases which are discussed further in Chapter IV. The key point made by Denning LJ is that the outward acts of the parties are important factors to consider when determining, on an objective basis, what the parties have agreed. Outward acts are not of themselves a pre-requisite for the granting of rectification. Morris LJ agreed with Singleton LJ and Denning LJ that the appeal should be allowed and said that the 'parties had throughout a clear common intention and purpose of buying and selling horsebeans, and their written agreements faithfully embodied and exactly recorded what they had agreed. In these circumstances it seems to me that no claim for rectification can succeed.'[621] His Lordship said further that:

> There was a joint understanding that they should contract in reference to "horsebeans" simpliciter which they thought were the same as "feveroles." If, as now appears to be the case, they were wrong, it appears probable that they would not have acted as they did had they been enlightened. But this does not enable one party to convert the contract into something different from what it was.[622]

The decision in *Frederick E Rose* makes it clear that outward acts and an outward expression of accord have nothing directly to do with rectification. These outward acts are solely concerned with determining what the parties have agreed and their relevance is that they will assist a court in determining objectively what has been agreed. But outward acts, or an outward expression of accord, are not a pre-requisite for rectification. What is required for rectification is that there be a mistake in recording in writing what has been agreed by the parties. Outward acts form a critical part of the objective exercise and a party who wants a contract formed by reference to their subjective intentions will need to express those subjective intentions to the other party so that a reasonable person would conclude that those intentions, and the terms that reflect those intentions, formed part of the agreement made between the parties determined on an objective basis. As Hudson J explained in *Re Streamline Fashions Pty Ltd*,[623] 'the common intention which it is necessary to establish as a basis for rectification is an intention that has been manifested in the words or conduct of the parties and not merely an intention which was not disclosed in the course of the negotiations.'[624]

[621] Ibid 463.
[622] Ibid 464.
[623] [1965] VR 418.
[624] Ibid 420.

The focus on a requirement for an outward expression of accord commenced following the decision in *Joscelyne v Nissen*[625] where Russell LJ, delivering the judgment of the Court of Appeal that included Sachs and Phillimore LJJ, said that 'some outward expression of accord is required.'[626] But the requirement of an outward expression of accord was challenged by Leonard Bromley QC.[627] Bromley argued that rectification requires 'the establishment of the subjective intention of the party or of the parties to the instrument.'[628] Bromley emphasised that it was his view that rectification operated in the same way as all equitable doctrines when he said that:

> Rectification as a head of relief in equity does not stand apart from equity jurisprudence as a whole and is not based on different principles. In the presumption of advancement, in the presumption of a resulting trust where property is purchased in the name of another, it can hardly be doubted that it is the subjective intention of the person concerned which is in question. Also, equity looks to the intention rather than to the form; again, it is submitted it is the subjective – or real - intent which is comprehended.[629]

Bromley's rejection of the requirement for an outward expression of accord is based on his assertion that in all cases of rectification it is the subjective intention of the parties that is relevant. But an outward expression of accord is not a requirement for rectification, rather it is part of the evidence that will be considered to show that an agreement was reached objectively. Bromley said that 'it is hardly conceivable that the requirement of such an outward expression could have been overlooked in the various formulations over the centuries.'[630] The approach advocated by Bromley has been strongly criticised by Marcus Smith QC, now Mr Justice Marcus Smith of the High Court of Justice of England and Wales.[631] Marcus Smith J argues that the 'equitable doctrine of rectification, so far as it concerns contracts, is concerned *only* with the objective examination of manifest communications passing between the parties to the contract.'[632] Marcus Smith J explains that 'whilst purely subjective and purely objective approaches can be rationally justified, any approach *combining* the two will result in a test for rectification that will be impossible to apply.'[633] Marcus Smith J argues that there 'is no reason

[625] [1970] 2 QB 86.
[626] Ibid 98.
[627] Leonard Bromley, 'Rectification in Equity' (1971) 87 *Law Quarterly Review* 532.
[628] Ibid 532.
[629] Ibid.
[630] Ibid 537.
[631] Marcus Smith, 'Rectification of Contracts for Common Mistake, *Joscelyne v Nissen,* and Subjective States of Mind' (2007) 123 *Law Quarterly Review* 116.
[632] Ibid.
[633] Ibid 123.

why, in rectifying an agreement, equity should have recourse to anything other than the objective intention of the parties.'[634] Mr Justice Marcus Smith's position is consistent with what has been argued in this thesis, that it is necessary to determine on an objective basis what the parties have agreed. Bromley's views on rejecting a requirement for an outward expression of accord is based on the idea, rejected in this thesis, that rectification is a remedy designed to give effect to the subjective intentions of the parties. So although Bromley was correct to reject a requirement for an outward expression of accord, his position advocating that the courts should focus on the subjective intentions of the parties should be rejected. Although there is no requirement as such for an outward expression of accord the courts will look at all the outward acts of the parties, as the Court of Appeal did in *Frederick E Rose.* It is the objective view of those outward acts that will determine what a court will conclude was agreed between the parties. But that is a process concerned with the formation of agreements and not a process concerned with rectification. Rectification is concerned with providing relief where there has been a mistake made in recording what has been agreed.

The issue of outward acts, and whether a court should conclude that an accord has been reached, is especially relevant in cases where there is no antecedent contract and the court is dealing with circumstances where the parties have reached agreement on one or more terms proposed to be included in a contract. The issue has been considered in Australia in several cases. In *Johnstone v Commerce Consolidated Pty Ltd*[635] a property was sold by the plaintiff to the defendant on vendor terms. Possession was to be taken in May 1974. But the contract provided that interest was payable only from 1 May 1975. The plaintiff commenced proceedings to have the written contract rectified so that interest was payable from 1 May 1974. A letter dated 19 November 1973 had been sent by the real estate agent acting for the vendor to the solicitors acting for both parties. That letter confirmed that the property had been sold and that possession was to be in May 1974 and that interest was to be at 8% per annum. Critically the letter did not expressly state what date interest was to commence. Crockett J said that it is 'now clearly established, certainly in Australia, that proof of a contract antecedent to the instrument sought to be rectified is not necessary.'[636] His Honour noted that in *Slee v Warke*[637] the High Court of Australia had approved the view expressed in *Shipley Urban District Council v Bradford*

[634] Ibid 128.
[635] [1976] VR 463.
[636] Ibid 466.
[637] (1949) 86 CLR 271.

Corp[638] and *Crane v Hegeman-Harris Co Inc*[639] that if, 'in the course of negotiation, a firm accord has been expressly reached on a particular term of the proposed contract, and both parties continue minded that the written instrument should record that term, it matters not that the accord was not part of an antecedent concluded oral contract.'[640] His Honour concluded that the parties had reached agreement that interest was to be payable from 1 May 1974 and had communicated that to each other and his Honour ordered rectification.[641] The defendant appealed to the Full Court of the Supreme Court of Victoria. In *Commerce Consolidated Pty Ltd v Johnstone*,[642] Gowans J, delivering the judgment of the court that included Lush and Harris JJ, said, after noting what terms the parties agreed on before the contract was signed, the critical question in the appeal was 'whether there was also a consensus between the parties, which they had communicated to each other, with respect to the date from which interest was to run.'[643] Counsel for the appellant argued that there needed to be an outward expression of accord on the question of when interest was to commence and that the parties had not expressly stated that in the negotiations and correspondence leading up to the signing of the contract. Gowans J accepted that there needed to be an outward expression of accord but said the trial judge 'was entitled to draw the inference from the facts and circumstances, which was what he did.'[644] The letter of 19 November 1973 was a critical part of the facts and circumstances. That letter stated that possession would be in May 1974 and that interest would be 8% per annum. Gowans J concluded that the appeal should be dismissed.[645] The case demonstrates that a court should determine if it can be concluded from the conduct and acts of the parties whether the parties have agreed to a proposed term of their contract. Again, referring to this as a requirement that there be an outward expression of accord can be misleading. Here, the parties did not make statements to that specific effect but their conduct was interpreted by the court as identifying on an objective basis that such a term was agreed between the parties.

But the language of an 'outward expression of accord' has persisted. In Canada in *Syrett v Transcona-Springfield School Division No 12*[646] Wrights J said that there needed to be 'some

[638] [1936] 1 Ch 375.
[639] [1939] 1 All ER 662.
[640] [1976] VR 463, 467.
[641] Ibid 469.
[642] [1976] VR 724.
[643] Ibid 728.
[644] Ibid 730.
[645] Ibid 732.
[646] (1976) 67 DLR (3d) 568.

outward expression of accord.'[647] In *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*[648] Yeldham J said that there 'is some divergence of judicial and academic opinion as to whether, when there is not an antecedent oral agreement, and reliance is placed upon a common continuing intention of the parties, that intention must be evidenced by "some outward expression of accord".'[649] His Honour said that what many of the cases do make clear 'is that the firm accord or common intention which must be established as a basis for rectification must be one that has been manifested in the words or conduct of the parties and not merely one which remained undisclosed in the course of the negotiations.'[650] His Honour said that 'this is a different thing from a requirement that the respective intentions must be communicated.'[651] His Honour noted that 'the presence or absence of an outward expression of accord may well go to the question of whether the burden of proof can be discharged.'[652] The position adopted by Yeldham J makes it clear that the issue is one relating to the evidence of what has been agreed between the parties. Clearly a party seeking to show that an agreement has been reached on a proposed term of a contract will have great difficulty if they have failed to clearly communicate their proposed term to the other party.

The position adopted by Yeldham J in *Bishopsgate* was favoured by Gummow J in *Elders Trustee & Executor Co Ltd v EG Reeves Pty Ltd*[653] where Gummow J said 'there is debate as to the existence or extent of any principle that not only must the document mistakenly record the continuing common intention of the parties but also that that intention be evidenced by "some outward expression of accord" before the parties executed the document in question.'[654] His Honour said that it was not necessary to decide the issue in the proceedings but that if it had been necessary to do so he would have followed what Yeldham J said in *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*,[655] discussed above. Gummow J said that in *Bishopsgate:*

> Yeldham J there observed that whilst there may be no requirement that the respective intentions of the parties have been communicated inter se, nevertheless the firm accord or common intention which must be established as a basis for rectification must be one that has

[647] Ibid 574.
[648] [1981] 1 NSWLR 429.
[649] Ibid 431.
[650] Ibid.
[651] Ibid.
[652] Ibid.
[653] (1987) 78 ALR 193.
[654] Ibid 253.
[655] [1981] 1 NSWLR 429.

> been manifested in the words or conduct of the parties, and not merely one which remained undisclosed in the course of negotiations.[656]

The High Court of Australia in *Pukallus v Cameron*[657] made it clear that there is no specific requirement that there be an outward expression of accord. Wilson J said that for rectification in the case of mutual mistake there 'need not be a concluded antecedent contract, but there must be an intention common to both parties at the time of contract to include in their bargain a term which by mutual mistake is omitted therefrom.'[658] His Honour said that so 'long as there is a continuing common intention of the parties, it may not be necessary to show that the accord found outward expression, notwithstanding the views expressed to the contrary'[659] in *Joscelyne v Nissen*[660] and *Maralinga Pty Ltd v Major Enterprises Pty Ltd*.[661] In *AG Hodgson v International Harvester Credit Corp of Australia Ltd (Under Scheme of Arrangement)*[662] Fullagar J said that the requirement that there be some outward expression of accord was 'of dubious validity.'[663]

The proposition that there needs to be an outward expression of accord has also been rejected in New Zealand. In *Westland Savings Bank v Hancock*[664] the defendants applied for a bank loan in 1974 from the plaintiff. The bank then made the defendants a loan offer which they accepted. The loan offer referred to the interest rate being the current rate from time to time. However, the mortgage executed by the parties contained a provision restricting the bank's right to increase the interest rate to intervals of not less than three years. A second loan was later provided by the plaintiff to the defendants and the mortgage was varied to include the second loan. During the eleven years following the execution of the mortgage the bank notified the defendants of increases in the rate of interest on nine occasions. The defendants paid the interest at the rate calculated by the bank at all times. In August 1985 the parties became aware of the restriction in the mortgage concerning increases to the interest rate. The bank commenced proceedings to have the agreement construed and, in the alternative, for the mortgage to be rectified to remove the restriction on increasing the interest rate payable. The

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[656] (1987) 78 ALR 193, 254. See also *Elders Lensworth Finance Ltd v Australian Central Pacific Ltd* [1986] 2 Qd R 364.
[657] (1982) 180 CLR 447.
[658] Ibid 452.
[659] Ibid.
[660] [1970] 2 QB 86.
[661] (1973) 128 CLR 336.
[662] (Unreported, Full Court of the Supreme Court of Victoria, Murphy, Fullagar and Gobbo JJ, 23 February 1987).
[663] Ibid 20.
[664] [1987] 2 NZLR 21.

bank's construction claim failed and Tipping J then considered the issue of rectification. The bank sought to have the words 'but at intervals of not less than three years' deleted from clause 13 that dealt with increases in the interest rate. Tipping J said that 'I am completely satisfied that it was the bank's intention to be able to change the interest rate on one month's notice and that until August 1985 both in respect of Mr and Mrs Hancock and other mortgagors in like circumstances the bank genuinely believed it had the right to increase the interest rate accordingly.'[665] His Honour said that 'Mr Hancock's inactivity on the sequence of increases strongly suggests to me that he thought that the bank was acting in accordance with its rights and in accordance with the earlier agreed terms.'[666] Tipping J said that:

> At the time the mortgage was executed I am fully satisfied on the evidence that both the bank and Mr and Mrs Hancock understood and intended that the rate of interest was to be the bank's current rate from time to time and that the bank would accordingly have the right to increase the rate on giving reasonable notice. I am satisfied that when the variation was implemented both sides had exactly the same understanding and intention as that which had hitherto applied with the first loan.[667]

His Honour then considered the issue of whether some outward expression of accord was required and said that:

> I am of the view that some outward expression of accord is not necessary but that before rectification can be ordered the Court must be satisfied that the following points are established:
> (1) That, whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.
> (2) That such intention continued to exist in the minds of both or all parties right up to the moment of execution of the formal instrument of which rectification is sought.
> (3) That while there need be no formal communication of the common intention by each party to the other or outward expression of accord, 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.
> (4) That the document sought to be rectified does not reflect that matching intention but would do so if rectified in the manner requested.[668]

His Honour said that 'I prefer a formulation which does not require outward expression of accord, which pertains more to the establishment of a contract, but rather a formulation which requires the appearance from the words or actions of the parties of the existence of a concurrent

[665] Ibid 27.
[666] Ibid 28.
[667] Ibid 29.
[668] Ibid 29-30.

continuing common intention.'[669] His Honour held that the requirements were established in the case before him in that the 'bank and the Hancocks each held the intention that the interest rate was to be the bank's current rate which would be subject to change from time to time. Such common intention existed in the minds of both parties right up until the moment the mortgage was signed.'[670] His Honour said that intention 'can only be inferred from words and conduct. It seems both on principle and on authority that the fact that a party has acted as if the document stood in the form into which it is sought to be rectified is strong evidence of the existence of an intention on the part of that party to contract in those terms.'[671] A consistent position was adopted in *Kennedy v Collings Construction Co Pty Ltd*[672] where Giles J said that:

> It is not necessary in order to obtain rectification of an agreement to establish the existence of an antecedent agreement: it is sufficient to find an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other.[673]

The majority of cases simply focus on the outward acts of the parties to determine on an objective basis what has been agreed. In Canada in the Alberta Court of Appeal in *Farm Credit Corp v Lacombe Nurseries Ltd*[674] Foisy, Côté and Fraser JJA said that it 'is clear that the evidence required to support rectification must be grounded in the appellants' "outward acts".'[675] In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*[676] Sheller JA said that the 'proof of an intention which persists to the moment the document to be rectified is executed must be convincing but is not limited to evidence of outward acts.'[677] In *Ensham Coal Sales Pty Ltd v Electric Power Development Co Ltd*[678] McMurdo J said that there is 'a considerable body of authority to the effect that the parties' intentions cannot remain undisclosed, so that whilst the parties need not have disclosed their intentions to each other, the intentions must have been manifested in their words or conduct.'[679] His Honour said that 'a party's intention might be proved by evidence of some words or conduct constituting an admission of that

[669] Ibid 30.
[670] Ibid.
[671] Ibid 31.
[672] (1989) 7 BCL 25.
[673] Ibid 35. See also *Sunstate Airlines (Qld) Pty Ltd v First Chicago Australia Securities Ltd* (Unreported, Supreme Court of New South Wales, Giles J, 2 April 1997).
[674] (1992) 89 DLR (4th) 732.
[675] Ibid 736.
[676] (1995) 41 NSWLR 329.
[677] Ibid 336.
[678] [2005] QSC 236.
[679] Ibid [17].

intention' and 'such a manifestation of an intention might be a necessary element of a rectification case.'[680] In *Pegela Pty Ltd v National Mutual Life Association of Australasia Ltd*[681] Redlich J said, in relation to the requirement of an outward expression of accord, that:

> Although the matter is not free from controversy, I think the better view is that it is unnecessary that the common intention be demonstrated by some accord communicated between the parties. However, there must be evidence of each party's intention which establishes that the intention was a common and continuing one. It will not be sufficient to establish the unilateral intent of one party.[682]

In England the requirement for an outward expression of accord has been emphasised in some cases but the language in other cases has emphasised a focus on the outward acts of the parties. In *Grand Metropolitan plc v William Hill Group Ltd*[683] Arden J said that for a document to be rectified there need to be 'an outward expression of accord' in relation to the parties' common continuing intention.[684] In *AMP (UK) plc v Barker*[685] Lawrence Collins J said that the claimant 'must show some outward expression of accord or evidence of a continuing common intention, outwardly manifested.'[686] In *The Demetra K*[687] the Master of the Rolls, Lord Phillips, said, in relation to an insurance policy, that a party seeking rectification of a document needed to show a common intention and 'that they gave outward expression of this common intent in a manner which made it plain, applying an objective test, that this was what they wished to achieve by the policy.'[688]

In more recent cases in England it has been suggested that an outward expression of accord will not always be required. In *Munt v Beasley*[689] a dispute arose in relation to a lease between the appellant tenant and the respondent landlord. The main dispute was whether a loft at the top of the premises was included in the lease. The landlord was successful before Mr Recorder NJ Murphy in a claim for trespass and noise nuisance and the tenant's counterclaim for rectification of the lease failed. The tenant appealed to the Court of Appeal. The appellant

[680] Ibid [25].
[681] [2006] VSC 507.
[682] Ibid [430].
[683] [1997] 1 BCLC 390.
[684] Ibid 394. See also *Lansing Linde Ltd v Alber* [2000] Pens LR 15.
[685] [2001] Pens LR 77.
[686] Ibid 90. See also *T & N Ltd (in administration) v Royal & Sun Alliance plc* [2003] EWHC 1016 (Ch), [133].
[687] [2002] 2 Lloyd's Rep 581.
[688] Ibid 585.
[689] [2006] EWCA Civ 370.

argued through counsel, Mr Moreshead, that an outward expression of accord was not required. Mummery LJ agreed and said that:

> I would accept Mr Moreshead'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.[690]

Baker LJ agreed that the appeal should be allowed[691] as did Sir Charles Mantell.[692]

But more recently Lord Justice Etherton, writing extra-judicially[693] following his judgment in the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*,[694] said that 'an outward expression of accord is not merely of evidential value in discharging the burden of proof on the claimant for rectification. It is an essential requirement of rectification for common mistake.'[695] Accordingly, the position in England remains unsettled but several recent cases, discussed above, suggest that the focus should be on the outward acts of the parties to determine what has been agreed on an objective basis.

The position is also likely to be quite different in relation to voluntary settlements where it is not necessary to prove an agreement, and thus, not necessary to prove any outward expression of an agreement. Nevertheless, it might be necessary to prove the subjective intention of the settlor and then compare that intention to what has been recorded in the written document. In *Day v Day*[696] the Chancellor, Sir Terence Etherton, said that in relation to a voluntary settlement it is the subjective intention of the settlor that is relevant and that it 'is not a legal requirement for rectification of a voluntary settlement that there is any outward expression or objective communication of the settlor's intention equivalent to the need to show an outward

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[690] Ibid [36]. Mummery LJ referred to *Galleher v Galleher Pensions Ltd* [2005] EWHC 42 (Ch), [116] – [118]; *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 29-30; *JIS (1974) Ltd v MCP Investment Nominees Ltd* [2003] EWCA Civ 721, [33]–[34]; *Frederick E Rose (London) Ltd v Wm Pim & Co Ltd* [1953] 2 QB 450, 462; and *Swainland Builders Ltd v Freeland Properties Ltd* [2002] 2 EGLR 71, 74.
[691] Ibid [62].
[692] Ibid [79].
[693] Terence Etherton, 'Contract Formation and the Fog of Rectification' [2015] 68 *Current Legal Problems* 367.
[694] [2012] 1 WLR 1333.
[695] Etherton, above n 693, 377.
[696] [2014] Ch 114.

expression of accord for rectification of a contract for mutual mistake.'[697] The Chancellor said that although, 'as I have said, there is no legal requirement of an outward expression or objective communication of the settlor's intention in such a case, it will plainly be difficult as a matter of evidence to discharge the burden of proving that there was a mistake in the absence of an outward expression of intention.'[698] Lewison LJ said that he agreed with the Chancellor that 'in the case of a voluntary disposition it is the subjective intention of the donor or settlor that counts.'[699] Elias LJ[700] agreed with the Chancellor, Sir Terence Etherton, and with Lewison LJ.

E *Conclusions*

Three fundamental principles of the equitable doctrine of rectification were examined in this Chapter: rectification is concerned with agreements and not intentions; courts must adopt an objective approach when determining what the parties have agreed; and courts should consider the outward acts of the parties when determining the objective agreement reached between the parties. There has been some controversy concerning all three of these principles but the controversies reflect a misunderstanding of the role of rectification. The role of rectification is not to give effect to the subjective intentions of the parties: the role of rectification is to provide relief in circumstances where there is a mistake in the recording of an agreement.

As outlined in the introduction to this Chapter, the three fundamental principles can be stated as a single proposition: when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement, a court must identify what the parties have agreed on an objective basis including by examining their outward acts. This proposition will only operate when a court is considering a claim for rectification in the core case where rectification is sought where there has been a mistake in the recording of an agreement. Rectification may also be available in other circumstances, such as where there is a mistake in the formation of an agreement, and those other circumstances are examined in Chapters V to VIII. In Chapter IV the core case of rectification for a mistake in the recording of an agreement is examined.

[697] Ibid 122.
[698] Ibid.
[699] Ibid 129.
[700] Ibid.

IV RECTIFICATION FOR MISTAKES IN RECORDING AGREEMENTS

A *Introduction*

In the previous Chapter III, three fundamental principles concerning the equitable doctrine of rectification were examined. It was argued that the controversies concerning these three principles can be resolved by the adoption of a single proposition of law derived from the case law: when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement, a court must identify what the parties have agreed on an objective basis including examination of their outward acts. Once the court has determined what has been agreed between the parties, that agreement can be compared to what has been recorded to determine whether there has been a mistake in the recording of the agreement or whether there has been a renegotiation of the earlier agreement. This represents the core jurisdiction of rectification to provide relief where there has been a mistake, made by one or more parties, in the recording of an agreement and several of these cases will be examined in this Chapter to demonstrate how this jurisdiction to provide relief for mistakes in the recording of agreements operates in practice.

Rectification should, as Professor McLauchlan[701] has argued, 'be quite straightforward.'[702] Indeed it should be, but the decision of the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*[703] demonstrates that the law of rectification is anything but straightforward. It will be argued, when examining the *Daventry* decision in this Chapter, that there are two main reasons why the law of rectification has become unnecessarily complex. First, courts, and litigants in their pleadings, categorise rectification between cases of common or mutual mistake and cases of unilateral mistake. As outlined in Chapter II, that categorisation should be rejected in favour of a distinction between the type of mistake made and not how many people were mistaken. The second reason for the complexity in the law of rectification is the focus of the courts on the intentions of the parties. As outlined in Chapter III, the focus on intentions is misconceived and should be on what the parties have agreed, then comparing that what the parties have recorded. That is, the focus should be on agreements and documents.

[701] David McLauchlan, 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83.
[702] Ibid 85.
[703] [2012] 1 WLR 1333.

Once that approach is accepted decisions like *Daventry* appear to be far less complex. Although other cases are examined in this Chapter, the decision in *Daventry* is considered in some detail. The facts in *Daventry* reveal the complexities in the current approach to the law of rectification and, despite the numerous references in the judgments to common mistake and unilateral mistake as well as to the intentions of the parties, the actual approach taken by the majority justices in the Court of Appeal, rather than the actual language that they used, provides some clarity in relation to the correct approach to be taken in cases where there is an alleged mistake between what has been agreed and what has been recorded. The correct approach, which emerges from the decision, is that the court must first determine what has been agreed and then compare that to what has been recorded. When that approach is undertaken, much of the complexity in the law is overcome.

B *Comparing what has been agreed with what has been recorded*

In *Daventry District Council v Daventry & District Housing Ltd*[704] the claimant, Daventry District Council (DDC), was a local authority that owned some 3,000 council homes. On 5 November 2007 DDC entered into a contract (the Transfer Contract) to transfer its stock of houses and garages to the defendant, Daventry & District Housing Ltd (DDH), a specially formed Registered Social Landlord (RSL). The transaction was known as a large scale voluntary transfer. During the negotiations DDH was managed by a board comprising four councillors from DDC, four independent directors, three tenants and one co-optee. Amber Valley Housing Ltd (AVHL) was involved in the negotiations of the Transfer Contract as several of its staff were acting for DDH. AVHL was also an RSL and operated in a different geographical area. The intention was that DDH and AVHL would eventually be owned by a new parent RSL Group. This ultimately happened and the new RSL was called Futures Housing Group (FHG). Ms Williams, who had some involvement with the negotiations on behalf of DDH, became the Chief Executive of FHG at about the time that the Transfer Contract was entered into.

It was also agreed as part of the transaction that DDC would, after the transaction was concluded, transfer its housing department staff to DDH. The staff were members of a section of the Local Government Pension Scheme (LGPS) administered by Northamptonshire County

[704] [2010] EWHC 1935 (Ch).

Council (NCC). It was agreed that the staff would remain part of the LGPS when their employment was transferred to DDH. At the date of the agreement the pension scheme was underfunded. Actuarial estimates revealed that a payment of some £2.4 million was necessary to make up the deficit in the scheme as it applied to the DDC staff to be transferred to DDH. It was common ground that DDC bore the primary responsibility to make up the deficit. Despite this understanding, the parties engaged in complex negotiations concerning the calculation of the price that DDH would pay to DDC for the housing stock. Several elements were negotiated, including the value of the rental stream from the housing stock, the costs of upgrading the housing stock, set up costs to be incurred by DDH, the costs of making good the pension fund deficit, and finally a fund concerned with value added tax (VAT). The fund, known as the VAT Shelter, was expected to ultimately amount to approximately £8.4 million that was to be produced from VAT concessions on the upgrading works that DDH intended to undertake over a ten-year period. The parties signed a non-binding document dated 11 October 2007 referred to as 'Valuation Negotiations' (the Valuation). The Valuation included a table that purportedly showed what had been agreed between the parties at that time. The Transfer Contract itself was executed on 5 November 2007 and the contract included clause 14.10.3 which had been added to the draft of the agreement on 1 November 2007. Clause 14.10.3 provided in very clear terms that:

> Without prejudice to the provisions of clause 14.10.2, in relation to the Transferring Employees the Council [DDC] shall make a payment of £2.4 million pounds (being the amount calculated by Mercers as representing the deficit in the funding of the Transferring Employees pension benefits up until the Completion Date) within five business days of the Completion Date.

After the transaction was completed a disagreement arose as to who was liable to pay the £2.4 million pension fund deficit and DDC commenced proceedings to have the agreement rectified. At first instance Vos J noted that DDC contended that clause 14.10.3 of the Transfer Contract should be rectified so that it read as follows:

> Without prejudice to the provisions of clause 14.10.2, in relation to the Transferring Employees the ~~Council [DDC]~~ Company [DDH] shall make a payment of £2.4 million pounds to the appropriate administering authority or the administrators of the Superannuation Scheme for immediate credit to the Scheme in respect of the liabilities for the benefits accrued by Transferring Employees (being the amount calculated by Mercers as representing the deficit in the funding of the Transferring Employees pension benefits up until the Completion Date) within 5 business days of the Completion Date.[705]

[705] Ibid [7].

It was clear from the evidence that, despite DDC seeking rectification of the Transfer Contract, DDC and both its solicitors and its lead negotiator consented in emails to the inclusion of clause 14.10.3 into the Transfer Contract on 1 November 2007. DDC sought rectification based on common or mutual mistake or alternatively on the basis of unilateral mistake. The case provides an important example of why an analysis based on common or mutual mistake, and in the alternative unilateral mistake, makes it difficult to resolve the *type of mistake* that was made in *Daventry*. The case is more appropriately resolved by adopting the approach set out by Denning LJ in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*,[706] and advocated in this thesis, whereby the agreement between the parties is first identified (whether that agreement is a binding contract or only an agreement on terms proposed to be included in a contract) and then compared to what was recorded in the final written contract. On this approach it simply does not matter who was mistaken. What matters is what was agreed to between the parties and what they recorded in their final agreement. Nevertheless, the case proceeded to be determined, as pleaded, on the basis of common or mutual mistake and in the alternative, unilateral mistake.

The main participants in the negotiations for DDC were Mr Bruno and Ms Gregory and their advisers, Mr Longhill and Mr Finch from Tribal Consulting. DDC's solicitors were Cobbetts from whom Mr Heath and Ms Hargreaves played the leading roles. DDH had numerous representatives but Mr Roebuck, who was AVHL's Director of Finance was the central negotiator for DDH. Ms Davies, Mr Blyton and Mr Deacon also represented DDH in the negotiations. DDH was also represented by Mr Page, an adviser from PriceWaterhouseCoopers. DDH's solicitors were Wright Hassall LLP and Ms Matthews was the partner in charge of the negotiations for DDH. DDH intended to seek funding for the transaction from the Royal Bank of Scotland (RBS). Because DDH was a shell company at the commencement of the negotiations its only source of funds was expected to be a loan from RBS and access to any funds in the VAT Shelter in due course. It conducted its negotiations concerning the price payable within these financial constraints and prepared its own business plan which it updated from time to time. DDC conducted its negotiations based on a January 2006 valuation of the housing stock of some £25.3 million. A subsequent valuation was prepared and, although there was some dispute between the parties as to the actual valuation, DDH argued that the second valuation was between £8 million and £12 million lower than the

[706] [1953] 2 QB 450.

first valuation. Despite this, DDC's councillors maintained an aspirational figure of some £25 million for the sale of the housing stock.

Prior to entering into the Valuation in October 2007 the parties had initially entered into a non-binding Memorandum of Understanding (MOU) in July 2006. It was not until July 2007 that Mr Heath on behalf of DDC sent the first draft of the Transfer Contract to Ms Matthews. That draft provided that DDC would use all reasonable endeavours to procure a fully funded pension scheme for the transferring employees at the date of completion. On 2 July 2007 a revised MOU was signed. A baseline valuation of £23.4 million was agreed as well as a prima facie 50/50 split of the VAT Shelter. The revised MOU stated that 'Any pension under-funding will be met by the Council at the point of transfer, though this may be through a reduction in the price paid.'[707] Following some written communications between the parties, further face to face negotiations took place on 1 August 2007. Following that meeting some emails were exchanged about various matters but not the pension deficit matter. Following those emails there was little progress made in the period from 3 August 2007 until 6 September 2007. On 6 September 2007 the parties further communicated with each other and a gap of several million pounds in terms of an agreed price was apparent. On 7 September 2007 Mr Roebuck, on behalf of DDH, sent two options to Mr Bruno for consideration by DDC. There was only a minor difference between Option 1 and Option 2 and they essentially had the same financial effect. To bridge part of the gap between the parties, DDH proposed that the pension deficit of £2.4 million be 'top-sliced' from the VAT shelter before the balance of the tax shelter was spilt 50/50 which effectively meant that DDH would be paying £1.2 million towards DDC's pension fund liability. Subsequently, both Option 1 and Option 2 that had been put forward by DDH, were rejected by DDC.

On 20 September 2007 Mr Bruno prepared a counter-proposal from DDC to DDH which became known as Version 1 of the 20 September 2007 proposal. Vos J referred to the events of 20 September 2007 as the 'most crucial' events.[708] The Version 1 proposal provided that DDH pay the pension fund deficit by way of the purchase price being reduced by £2.4 million *with the intention* that DDH pay the £2.4 million deficit directly to NCC. Overall DDH would pay the agreed purchase price by paying part of the funds to NCC to meet DDC's pension

[707] [2010] EWHC 1935 (Ch), [25].
[708] Ibid [38].

deficit and the balance to DDC. DDC would receive a lower purchase price but a payment of £2.4 million would be paid to DDC as a top-slice from the VAT Shelter. This was described as a 'refund' of the £2.4 million paid by DDH directly to NCC to meet the pension deficit. That meant that DDC would in total receive the full purchase price but because £2.4 million of the purchase price came from VAT shelter funds that would otherwise be split equally, the parties were in effect splitting the £2.4 million pension deficit equally. Version 1 represented an offer in which the parties would, in effect, each pay half of the pension deficit once the various payments were made. Unfortunately, Version 1 did not expressly state that DDH, after paying the lower purchase price, was to pay the £2.4 million *direct to NCC*. The wording used by Mr Bruno in Version 1 was that:

> DDC proposes that DDH pays the pension fund deficit by a reduction in the purchase price of £2.4M which is then refunded to DDC as a top-slice from the VAT shelter.

On the afternoon of 20 September 2007 Mr Bruno of DDC met with Ms Davies from DDH and they discussed Version 1. Vos J noted that Mr Bruno understood his own proposal to be that DDH would deduct the £2.4 million from the purchase price and pay those funds to NCC to top up the pension scheme and that in addition there was to be a top-slice payment of £2.4 million from the VAT Shelter to DDC as explained above.[709] But Ms Davies always thought that the pension deficit itself was coming directly out of the VAT Shelter and therefore was not going to be paid by DDH at all other than DDH effectively paying half of the deficit when the £2.4 million was paid out of VAT Shelter funds (which the parties had a 50/50 entitlement to). It seemed clear that the wording of Version 1 could be read in any one of two ways: that DDH would pay the pension deficit to NCC and that a similar payment would be made to DDC from the VAT shelter; or that only the payment from the VAT Shelter would be made to DDC and that DDC would be responsible itself for the pension deficit payment to NCC. Ms Davies later provided a copy of Version 1 to Mr Roebuck at DDH at the commencement of a DDH board meeting. Mr Roebuck perused the proposal and immediately declared that it would not be acceptable to DDH. However, by the end of the DDH board meeting he announced that the proposal was in fact acceptable to DDH. Vos J said that:

> I am in no doubt that Mr Roebuck knew from the 20th September 2007 onwards that Version 1 could be read two ways and that Mr Bruno had intended it to be read as requiring DDH to pay the pension deficit. His contemporaneous behaviour in saying at once that the proposal

[709] Ibid [40].

> was not acceptable, and then changing his mind, when he had realised it could be read the other way, confirms this position.[710]

Following some exchanges of emails between the parties, by 24 September 2007 the parties were of the view that an agreement had been reached based on Version 1. On 3 October 2007 the parties met and went through the 4th draft of the Transfer Contract in detail. There were several people at the meeting including Mr Bruno and Mr Longhill on behalf of DDC, DDC's solicitors, Mr Heath and Mr Hargreaves, and Ms Williams on behalf of DDH as well as DDH's solicitor, Ms Matthews. It was discussed at that meeting that Ms Snell from RBS had suggested that the agreement be amended so that it expressly provided that DDC (and not DDH) should make payments directly to NCC to ensure that the relevant pension scheme for the transferring employees was fully funded at settlement. It was agreed that such an amendment would be made and neither Mr Bruno nor Mr Heath objected to such a provision being inserted into the agreement. Vos J was satisfied that Mr Bruno did not appreciate that this provision was inconsistent with what he intended in the Version 1 offer.[711] It was clear, as explained above, that Mr Bruno intended the Version 1 offer to mean that DDH would pay the pension deficit directly to NCC. But, as outlined above, that was not expressly stated in Version 1 although that was what Mr Bruno intended. Vos J said that 'Mr Bruno was, in my judgment, oblivious to the reality, which was that most of the others present at this meeting thought DDC was to pay the deficit, and that was what the draft under discussion also made clear.'[712] Later that day Ms Hargreaves sent Mr Bruno the 5th draft of the Transfer Contract which included the amendments discussed at the meeting.

On 5 October 2007 Mr Page, DDH's consultant, sent an email to Tribal Consulting, DDC's consultants, (Mr Page's First 5th October email) in which he expressly stated that it was his understanding that it had been agreed by the parties that DDH was to pay the £2.4 million pension deficit direct to NCC. He said that he understood that the first £2.4 million of the VAT Shelter would be paid to DDC to compensate DDC for the fact that the valuation price was reduced by the £2.4 million that was to be paid directly by DDH to NCC. Mr Page sent a copy of that email to Mr Roebuck. So it was clear that Mr Roebuck was on notice that his own consultant had a different view from him of what had been agreed between DDC and DDH based on Mr Bruno's Version 1 document. Mr Page included a covering email to Mr Roebuck,

[710] Ibid [45].
[711] Ibid [48].
[712] Ibid.

and that email, together with his earlier email, became known collectively as Mr Page's 5th October emails. Vos J said that it is 'not seriously disputed that Mr Page's 5th October emails made very clear his obvious understanding that Version 1 of the 20th September proposal envisaged that DDH would actually pay the £2.4 million pension deficit.'[713] Vos J said that it was clear that 'Mr Roebuck should, from 5th October 2007 onwards have known, that his own adviser thought that the 20th September proposal envisaged that DDH would pay the pension deficit.'[714] Importantly, Vos J also said that from that point forward DDC's consultants, Tribal Consulting, and Mr Bruno were 'justified in thinking that Mr Page, as DDH's consultant, at least, shared their belief that DDH was to pay the pension deficit.'[715] On 11 October 2007 the parties signed a further version of the 20 September 2007 proposal. Mr Roebuck made a presentation to the DDH board on 11 October 2007 in which he conveyed to the board, as he intended to do, that DDH would not be paying the pension deficit.

On 30 October 2007 a further meeting was held to review the then current draft of the Transfer Contract. Neither Mr Bruno nor Mr Roebuck attended that meeting. On 31 October 2007 a critical telephone conference took place between Ms Matthews and Mr Roebuck on behalf of DDH and Ms Snell and Mr Gipson on behalf of DDH's banker, RBS. Mr Gipson suggested the insertion of a new clause in the draft agreement requiring DDC to make the pension deficit payment direct to NCC on completion. On the same day NCC emailed Mr Bruno seeking clarification on how the £2.4 million was to be paid to NCC and Mr Bruno responded that it would be paid by DDH, which is what he intended in the Version 1 offer and what he thought the parties had agreed to. On the following day, 1 November 2007, Ms Matthews and Mr Heath, on behalf of DDC, spoke with Ms Snell from RBS and they agreed that the additional clause proposed by Mr Gipson could be included in the draft agreement. Ms Snell's colleague then drafted the clause that became clause 14.10.3 which provided that DDC would pay the £2.4 million pension deficit directly to NCC. That draft clause was sent by Ms Snell to DDC's solicitors, Ms Hargreaves and Mr Heath and copied to DDH's solicitor, Ms Matthews. Ms Hargreaves then emailed Mr Bruno to obtain his express consent to the proposed changes to the agreement. Mr Bruno responded that the clause looked satisfactory to him subject to her, or Mr Heath, advising him differently. Ms Hargreaves proceeded to return the draft contract to DDH's solicitor, Ms Matthews, with the new amendments included. On the evening of 1

[713] Ibid [54].
[714] Ibid.
[715] Ibid.

November 2007 a further DDH board meeting took place which was attended by Ms Matthews and Mr Page. The board was told by Ms Matthews that DDC would be paying the £2.4 million pension deficit. The Transfer Contract was signed by the parties on 5 November 2007. On 29 November 2007 DDC became aware that DDH had not paid the pension deficit to NCC and that DDH's position was that, as per the written agreement, DDC should have paid the pension deficit to NCC five business days after the transfer, that is, it should have paid the deficit no later than 12 November 2007. DDC commenced proceedings to have the Transfer Contract rectified based on either common mistake or unilateral mistake.

In considering DDC's claim for rectification, Vos J noted that what Mr Bruno should have said in his Version 1 offer document was that '*DDC proposes that DDH pays the pension fund deficit to NCC, utilising a reduction in the purchase price of £2.4M. DDH's half share of the deficit is then refunded to DDC as a top-slice from the VAT Shelter*.'[716] Vos J did not find Mr Roebuck to be a satisfactory witness and said that:

> His conduct in relation to this transaction seems to me to have fallen short of proper professional standards. I am satisfied that he knew from very shortly after he received Version 1 of the 20th September proposal that Mr Bruno most probably intended by it that DDH should pay the pension deficit, but that, on one analysis of the document, it did not make that clear. I suspect that he persuaded himself during the course of the 20th September 2007 DDH board meeting, whilst he was studying Version 1, that his reading of it was sustainable, even correct. But that is not a justification for his conduct. He should at that stage or thereafter have raised the matter with Mr Bruno or Ms Gregory to ensure that the problem he had identified was resolved.[717]

It was also relevant that Mr Bruno had earlier rejected both Option 1 and Option 2 put forward by Mr Roebuck on behalf of DDH. But Mr Roebuck's stated interpretation of Mr Bruno's Version 1 offer was that this would produce a lower return to DDC than the offers earlier rejected by DDC. Vos J said that since 'Mr Bruno had rejected both Options 1 and 2, it was unlikely, as I am sure that Mr Roebuck understood, that Mr Bruno could have intended to make an offer that reduced the amount DDC would receive.'[718] Vos J then considered the position in relation to whether there ever was an agreement between the parties that DDH would pay the £2.4 million pension deficit direct to NCC. Vos J said that 'DDH's board never intended that DDH would pay the pension deficit.'[719] Although Mr Page had thought that DDC had agreed

[716] Ibid [87].
[717] Ibid [95].
[718] Ibid.
[719] Ibid [115].

to pay the pension deficit to NCC Vos J said that 'his intentions are not the intentions of the DDH board.'[720] In relation to Mr Roebuck, Vos J said that:

> Mr Roebuck, as I have found, was aware of the two possible ways of reading Version 1, and was aware that DDC thought it meant that DDH would pay the pension deficit. This was not just a timing issue as has been suggested. Mr Roebuck was fully aware from 20th September 2007, and anyway from 5th October 2007, that DDC understood Version 1 as requiring DDH actually to pay the pension deficit (just as Mr Page's email told Tribal Consulting that it would). Mr Roebuck, nonetheless, proceeded to tell everyone on DDH's side the reverse, namely that DDC would pay the pension deficit.[721]

Vos J concluded that 'Mr Roebuck engineered a situation in which DDH's board and its solicitors were guided into thinking, from 10th October 2007 onwards, that the commercial deal agreed between the parties involved DDC, not DDH, paying the pension deficit.'[722] Vos J held that Mr Roebuck's subjective intention was properly regarded as the intention of DDH and that, accordingly, it could not be said that there was a common subjective intention between DDC and DDH because DDH had a different subjective intention.[723] However, based on the decision of the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*,[724] Vos J held that it was necessary to look at what the relevant documents objectively meant.[725] Vos J was satisfied that the proposal as to the payment of the pension deficit, as included by Mr Bruno in the Version 1 document, when construed objectively, meant that DDH was to pay the pension deficit directly to NCC on the basis that the valuation price was reduced by that amount so that the payment could be made directly by DDH.[726] This was a critical finding of fact. Vos J was satisfied that at least from 11 October 2007 the parties had that common intention.[727] That is, there was an agreement between the parties on that point from, at the very latest, 11 October 2007.

The issue then was whether that common intention, or agreement, continued up until the time that the Transfer Contract was signed on 5 November 2007. Vos J said that the 'question under this issue is, therefore, in a nutshell, whether the exchange of emails concerning the introduction of clause 14.10.3 was enough to change the common intention of the parties that

[720] Ibid.
[721] Ibid [116].
[722] Ibid [118].
[723] Ibid [119].
[724] [2009] 1 AC 1101.
[725] [2010] EWHC 1935 (Ch), [120].
[726] Ibid [124].
[727] Ibid [129].

DDH was to pay the pension deficit.'[728] Vos J held that the common intention had in fact changed. Vos J said that 'Objectively viewed, the exchange of emails made it perfectly clear that the parties had agreed that DDC, and not DDH, was to pay the pension deficit – not only at some stage – possibly from the VAT shelter, but within 5 days of the completion of the Transfer Contract.'[729] That is, Vos J concluded that the parties had shifted from their earlier agreement of 11 October 2007 that DDH would pay the pension deficit to NCC to a newly negotiated position that DDC would pay the pension deficit directly to NCC out of its own funds. Vos J said that objectively viewed, 'once Cobbetts had approved clause 14.10.3, they had changed DDC's objectively viewed intentions, whatever DDC might itself have thought. I should say that I have no doubt that Mr Bruno and DDC's other representatives did not, subjectively, understand that DDC's intention had changed.'[730] Vos J then said that 'Nobody looking objectively at the exchange of emails on 1st November 2007 could possibly reach any conclusion, other than that the parties had by their solicitors then agreed that DDC would be paying the pension deficit.'[731] However, with respect, it is not clear that that was the case. Another perspective is that for the position to have changed, so that the parties had agreed that DDC would now pay the pension deficit, the emails between the parties would need to make clear that DDH was departing from the previously agreed position, and that, in response to such a communication, DDC would need to clearly state that it was prepared to amend the terms of the agreement and agree to pay an extra £2.4 million that it had previously agreed not to pay. That is, the communications would need to show that the parties had renegotiated the previous agreement relating to that critically important proposed term of the contract.

But based on the approach taken, Vos J held that the claim for rectification based on common mistake failed because there was no continuing common intention.[732] Vos J then considered and rejected the claim for rectification for unilateral mistake, saying that it 'is hard to see how DDC can actually show that it erroneously believed that the Transfer Contract provided for DDH to pay the pension deficit, when it had just agreed, through its solicitors, to clause 14.10.3 which provided precisely the opposite.'[733] Vos J said that:

[728] Ibid [132].
[729] Ibid [133].
[730] Ibid.
[731] Ibid [134].
[732] Ibid [135].
[733] Ibid [148].

> On any basis, the proposal of clause 14.10.3 must have drawn to DDC's attention that DDH wanted DDC to pay the deficit. Can it really be said that, after that, DDH knew that DDC was mistaken? The fact that the proposed clause was not seen as a change is a function of the underlying mistake and the failure by DDC's representatives properly to read the contractual provisions. But it seems to me that that is DDC's own fault. The proposal of clause 14.10.3 was a clear exposition of what DDH thought the Transfer Contract was to achieve, and DDC failed to understand that at its peril.[734]

Importantly Vos J said that 'I do not think that clause 14.10.3 was slipped past anyone. It was fairly raised and approved and was, in my judgment, sufficient to deprive DDC of a case in unilateral mistake in the absence of proof that DDH still knew after the approval of clause 14.10.3 that DDC was mistaken.'[735] Accordingly, the claim by DDC for rectification of the agreement was dismissed. DDC appealed to the Court of Appeal. In the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*[736] Toulson LJ addressed the issue of what mistaken beliefs were shared by the parties and said that:

> [147] DDH did not share DDC's mistaken belief that under the transfer contract the pension deficit would be paid by DDH. However, DDC and the DDH board did share a mistaken belief that the transfer contract accorded with their prior commercial agreement embodied in Version I and the signed Valuation. Their reasons for sharing that mistaken belief were diametrically opposite. DDC believed (rightly) that the commercial agreement embodied in Version I and the Valuation was that DDH should pay the pension deficit, and believed (wrongly) that the legal contract was that DDH should pay the pension deficit. The DDH board believed (wrongly) that the commercial agreement embodied in Version I and the Valuation was that DDC should pay the pension deficit, and believed (rightly) that the legal contract was that DDC should pay the pension. Their shared mistaken belief as to the conformity of the transfer contract with Version I and the Valuation existed at the time of the execution of the legal contract.
>
> [148] A critical question is whether in law this shared mistaken belief entitles DDC to have the transfer contract rectified so as to conform with the agreement embodied in Version I and the Valuation.[737]

Toulson LJ said, in relation to the intention of the board of DDH, that the 'board of DDH always understood Version I and the Valuation as meaning that DDC was to pay the pension deficit. (This was how Mr Roebuck had presented it.)' and that the 'board of DDH never

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[734] Ibid [150].
[735] Ibid [152].
[736] [2012] 1 WLR 1333. For discussion of the decision see Paul S Davies, 'Rectification versus interpretation: the nature and scope of the equitable jurisdiction (2016) 75 *Cambridge Law Journal* 62; Paul S Davies, 'Rectifying the Course of Rectification' (2012) 75(3) *Modern Law Review* 412; Terence Etherton, 'Contract Formation and the Fog of Rectification' [2015] 68 *Current Legal Problems* 367; David McLauchlan, 'Refining Rectification' (2014) 130 *Law Quarterly Review* 83; Sir Paul Morgan, 'Rectification: Is it Broken? Common Mistake after *Daventry*' [2013] *Restitution Law Review* 1; and Lord Toulson, 'Does Rectification Require Rectifying?', Technology and Construction Bar Association Annual Lecture, 31 October 2013.
[737] [2012] 1 WLR 1333, 1369.

intended, either when it approved the Valuation or at the time when the transfer contract was concluded, that DDH should pay the pension deficit.'[738] Importantly Toulson LJ noted that:

> In the present case Vos J held that a critical ingredient was missing in that on an objective view the common intention that DDH should pay the pension deficit, as provided by Version I and the Valuation, did not continue after the exchange of e-mails on 1 November 2007. He held that on an objective analysis the exchange of e-mails changed the common intention of the parties that DDH was to pay the pension deficit.[739]

Toulson LJ considered the judgment of Lord Hoffmann in *Chartbrook* and said that Lord Hoffmann accepted the proposition 'that rectification required a mistake about whether the written instrument conformed with the prior consensus, not whether it conformed with what the party in question believed that consensus to have been.'[740] That proposition is consistent with the position stated by Denning LJ in *Frederick E Rose (London) Ltd v Wm H Pim Junr & Co Ltd*.[741] Toulson LJ said that on that principle, 'the parties' shared mistaken belief in this case as to the conformity of the legal contract with the prior commercial agreement was a mistake of the kind identified by Lord Hoffmann as affording grounds for rectification of the contract (subject to any other objection) so as to conform with the prior commercial agreement.'[742] Importantly, his Lordship then considered the issue of whether there had been a renegotiation of the agreement between the parties and said that:

> In deciding whether on a fair view there was a renegotiation or a mistake in the drafting of the contract, it is necessary to look at all the circumstances. Have the parties behaved in such a way that they would reasonably understand one another to be involved in a process of seeking to negotiate a different deal from the one originally agreed or as involved in a process of drafting an agreement intended to accord with the deal originally agreed?[743]

That is the critical aspect of the resolution of the rectification issue in this case. The approach does not focus directly on the intention of the parties as such, but instead focuses on whether there has been any change to the original commercial terms that had been agreed to by the parties. It also focuses on what has been agreed and is not concerned with which party or parties may have been mistaken. Toulson LJ explained that:

> Where it is suggested that there has been a change in the parties' position prior to the execution of a written contract, it is necessary to look carefully at all the facts to see whether a reasonable

[738] Ibid 1368.
[739] Ibid 1370.
[740] Ibid 1370-71.
[741] [1953] 2 QB 450.
[742] [2012] 1 WLR 1333, 1371.
[743] Ibid 1371-2.

> person would have understood himself to be involved in the negotiation of a different deal from the one originally agreed or merely seen himself as involved in a process of drafting an agreement intended to conform with the original deal. If the latter is the case, and if the approval and execution of the written contract are affected by a relevant mistake, rectification should be available. It is, of course, for the party claiming rectification to show that in that process a mistake occurred.[744]

Toulson LJ noted that the evidence suggested there had been no renegotiation of who would pay the pension deficit when his Lordship said that the question of the repayment of the pension deficit 'was directly negotiated between the parties' principal negotiators, Mr Bruno and Mr Roebuck. It was settled by the acceptance of Version 1 and confirmed by the Valuation. At no time did Mr Roebuck seek to revisit with Mr Bruno the question who should pay the pension deficit.'[745] This was a crucial finding of fact and it strongly supported DDC's claim for rectification because it showed that there had been no new negotiations to change the prior agreement on the treatment of the pension deficit that had been reached on 11 October 2007. His Lordship noted clause 14.10.2, that provided for DDC to pay the pension deficit, had been included in the draft agreement from 3 October 2007.[746] That was a significant time before clause 14.10.3 was added to the draft contract on 1 November 2007. Clause 14.10.3 was added at the request of RBS who were themselves mistaken about the commercial terms agreed between the parties. The addition of clause 14.10.3 did not change the commercial terms, as reflected in the draft contract, because clause 14.10.2 had been included in the draft contract since 3 October 2007, even though it did not reflect the commercial terms agreed by the parties at that time. Toulson LJ said that the introduction of clause 14.10.3 'was plainly not an attempt by DDH to renegotiate what had been agreed between DDH and DDC, for the proposal for the insertion of clause 14.10.3 did not come from DDH. It came from RBS's solicitors and, as the judge found at para 150] it was "only introduced out of an abundance of caution by RBS".'[747] Toulson LJ noted two significant factual findings that supported DDC's claim for rectification when his Lordship said that:

> [168] On the day after the exchange of e-mails on 1 November 2007 (and three days before the execution of the transfer contract), NCC sent an e-mail to DDH's solicitors continuing to state that DDC was saying that DDH would pay the deficit, and the e-mail was copied to Mr Bruno. There was no response from DDH's solicitors to say that this was wrong and that DDC would be paying it.

[744] Ibid 1372.
[745] Ibid.
[746] Ibid.
[747] Ibid 1373.

> [169] A further striking factor is the commercial unreality of Mr Bruno consciously agreeing to a renegotiation of the agreement on 1 November 2007 so that DDC would pay the pension deficit to NCC. The net effect of the commercial agreement previously reached between the parties was that they would share the pension deficit.[748]

The proposition that renegotiation is required to show that a previous agreement has been departed from is consistent with the decision in *Marquess of Breadalbane v Marquess of Chandos*[749] where the Lord Chancellor, Lord Cottenham, said, in relation to a marriage settlement based on an earlier written proposal agreed to by the parties, that in 'order to justify the Court in correcting the settlement, it must be proved, not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention, by which the circumstance that the settlement did not follow the terms of the original contract might be explained.'[750] In *Daventry* Toulson LJ noted that, as executed, 'the effect of the contract was very different. It meant that DDC would be paying the amount of the deficit twice – first by deducting it from the purchase price and then by paying it to NCC.'[751] His Lordship said that:

> Nobody who understood the finances of the transaction could possibly have imagined that Mr Bruno would knowingly agree to such a change on the eve of the execution of the contract. There would have been no conceivable reason for him to do so. It would have been pure windfall for DDH amounting to £2.4m. The only rational explanation for his conduct was that he failed to appreciate the significance of the clause.[752]

Critically his Lordship said that when 'these factors are taken into account, I do not consider that the exchange of e-mails on 1 November 2007 should be regarded as showing an intention to vary the earlier non-binding agreement.'[753] His Lordship concluded that 'I would hold that DDC is entitled to rectification for mutual mistake as to whether the transfer contract conformed with the prior commercial agreement. DDC and the board of DDH believed that it did, but they were both wrong.'[754] The approach taken by Toulson LJ focused, correctly, on identifying the earlier agreement and comparing that earlier agreement to the final written contract. The earlier agreement contained in the Version 1 document, although poorly worded, was objectively construed to mean that DDH would pay the £2.4 million pension deficit

[748] Ibid.
[749] (1837) 2 M & C 711; 40 ER 811.
[750] Ibid 740.
[751] [2012] 1 WLR 1333, 1373.
[752] Ibid.
[753] Ibid.
[754] Ibid 1377.

directly to NCC. The final version of the contract did not contain that term. Instead it provided that DDC was obligated to pay the pension deficit. There were only two possibilities: the parties had negotiated a new agreement; or there was a mistake in the final agreement. Whereas Vos J was satisfied that the conduct of DDH indicated that a new agreement had been negotiated, Toulson LJ concluded that there was no newly negotiated agreement and that, accordingly, the final agreement contained a mistake that should be rectified. The fact that the DDH board never intended to contract on the basis that DDH was obligated to pay the pension deficit was irrelevant. What was relevant, and in fact critical, was that DDH agreed to contract on the terms of the Version 1 document when it accepted the offer contained in that document. Objectively construed, that document meant that DDH was to pay the pension deficit directly to NCC. The fact that DDH's own negotiator, Mr Roebuck, had deliberately misled his own board as to what that document meant was not sufficient to overcome the fact that DDH had agreed with DDC that DDH would pay the pension deficit to NCC and the parties at no time negotiated a new agreement concerning who would pay the pension deficit. Mr Bruno's failure to notice the mistake in the final document (and in the earlier drafts), although reflecting very poorly on Mr Bruno, was irrelevant.

The Master of the Rolls, Lord Neuberger, also held that the appeal should be allowed based on mutual mistake, and early in his judgment his Lordship noted one of the key difficulties in the case when he said that:

> In wider commercial terms the rectification claim also raises a difficult conflict. If the claim for rectification fails, then the ultimate financial analysis would be very unsatisfactory, even capricious, as it would effectively involve DDC paying 150% of the pension deficit and, conversely, DDH actually profiting from the pension deficit by receiving 50% of it as a windfall: see para 169 of Toulson LJ's judgment. On the other hand, as Etherton LJ points out in para 69, if rectification is granted, it could fairly be said to be unfair on the DDH board, as it would be landed with a contract, not merely different from that which it thought in good faith it had agreed, but one into which it would never have agreed to enter.[755]

The Master of the Rolls said, in relation to the requirements for common or mutual mistake, that 'the general rule is that the court should judge the question by reference to what a hypothetical reasonable objective observer, aware of all the relevant facts known to both parties, would conclude.'[756] His Lordship said that 'even in relation to written contracts, some subjective evidence of intention or understanding is not merely admissible, but is normally

[755] Ibid 1380.
[756] Ibid 1381.

required in a rectification claim: the party seeking rectification must show that he indeed made the relevant mistake when he entered into the contract.'[757] The Master of the Rolls said that:

> The fact that the DDH board had misunderstood the effect of the prior accord would not assist DDH in avoiding rectification, as (a) the prior accord should be interpreted in accordance with normal objective principles of construction, (b) the parties' subsequent actions and statements should be judged objectively, not subjectively, (c) DDC had no reason to believe that the DDH board had misunderstood the effect of the prior accord, and (d) Mr Roebuck, DDH's agent, was well aware how DDC understood the prior accord (and he knew that DDH's financial adviser had confirmed that understanding to DDC's consultants), but he said nothing to DDC to suggest that DDH understood it otherwise, or that it had a different meaning.[758]

The Master of the Rolls also favoured the approach of Toulson LJ on the issue of whether there was a change to the prior agreement between the parties. His Lordship said that based on Toulson LJ's approach the question to be asked is 'whether there was an intention to vary the prior accord.'[759] His Lordship said that under this approach it was a requirement that there be an assessment of 'DDC's reaction to DDH's alleged resiling from the prior accord, and in particular whether the reasonable observer would have thought that DDC was agreeing to what DDH proposed.'[760] His Lordship said that 'if what DDH said or did would have signalled to a hypothetical observer that it intended to resile from the prior accord, it would seem to be unreasonable to hold DDH to that accord, even if DDC did not appreciate that that was what DDH was signalling.'[761] The Master of the Rolls highlighted the facts that provided strong support to DDH's position when the Master of the Rolls said that:

> The notion that the hypothetical observer would have thought that DDH was making it clear that it was resiling from the prior accord is by no means fanciful. Clause 14.10.3 was put forward openly to DDC's solicitors as a new provision whose terms were entirely clear, and it spelt out that DDC was to pay the deficit within five days of completion of the transfer agreement. The clause was discussed in advance of being drafted, and was agreed in e-mails between the solicitors to DDC, DDH and RBS on 1 November, it was e-mailed by RBS's solicitors to the solicitors to DDC and the solicitors to DDH, and approved by them, and it was incorporated into the draft contract by DDC's solicitors all on the same day; and it was amended by agreement the following day. It can therefore be said with some force that it was being made clear by DDH and RBS that they were including a term whose effect was that DDC would pay the pension deficit, and indeed that this was consistent with clause 14.10.2, which had been included in the draft contract almost from the beginning.[762]

[757] Ibid.
[758] Ibid 1382.
[759] Ibid 1383.
[760] Ibid.
[761] Ibid.
[762] Ibid 1384.

Importantly, his Lordship said, in relation to DDC's positon, that by the same token 'if, as in this case, the provision is proposed by the defendant for inclusion in a well-developed draft of the final agreement, the fact that the terms of the provision clearly depart from the prior accord cannot of itself be enough to enable the defendant to contend that its acceptance by the claimant defeats any subsequent claim for rectification.'[763] The Master of the Rolls concluded that despite 'the clear terms of the proffered clause 14.10.3 on 1 November, I am of the view that the hypothetical observer would not have concluded that DDH was signalling a departure from the prior accord: the observer would have believed that DDH was making a mistake.'[764] His Lordship said that, accordingly, 'a proposal between those solicitors a couple of days before execution of the contract to include a new clause in the contract would, at least on the face of it, have been unlikely to have been intended to represent a variation of those terms or a reopening of the negotiations, unless of course such an intention was explained in clear terms in an accompanying letter or e-mail.'[765] His Lordship then considered the fact that clause 14.10.2 was already in the draft contract before the prior accord had been reached by the parties on 11 October 2007. His Lordship said that:

> The fact that the draft contract already contained a provision inconsistent with the prior accord, namely clause 14.10.2, may appear at first sight to assist DDH's case. However, on reflection I think that it is quite consistent with DDC's argument. The inclusion of clause 14.10.2 from the early days of the draft, well before the prior accord had been reached, would, in my view, have been regarded as a plain mistake by the hypothetical objective observer. It envisaged that the pension deficit would be paid by DDC, whereas the wording of the prior accord and commercial common sense pretty plainly envisaged that it would be funded by DDH. There appears to be no explanation, other than some sort of oversight on the part of DDC's and DDH's respective solicitors, as to why clause 14.10.2 was ever included in the contract in the terms in which it was expressed.[766]

Accordingly, his Lordship held that the written contract should be rectified subject to considering whether that would be unfair to DDH. His Lordship said that:

> I consider that any concern about unfairness to DDH in this connection should be dispelled by the fact that Mr Roebuck, DDH's agent for whom DDH must clearly accept responsibility as against DDC, carried a great deal of blame for the misunderstanding that had arisen. He, and as he appreciated, DDH's financial advisers knew perfectly well from an early stage in the negotiations that DDC believed that the effect of the prior accord was that DDH would be liable for the deficit, and he knew that those financial advisers made it clear to DDC that they thought that the prior accord had that effect. He never suggested to DDC that the prior accord

[763] Ibid.
[764] Ibid 1385.
[765] Ibid.
[766] Ibid.

> had a different meaning, but he none the less let the board of DDH believe that it was to be DDC who would pay off the deficit.[767]

His Lordship concluded that 'I consider that DDC is entitled to rectification of the transfer contract on the grounds of common mistake.'[768] Etherton LJ dissented and in doing so said, in relation to the carelessness of DDC, that the 'facts of the present case show, however, the claimant's carelessness may preclude relief, not on some general ground of discretion, but because the claimant cannot be allowed to rely on its own carelessness in failing to observe that the defendant objectively no longer, at the date of the instrument to be rectified, continued to adhere to the prior common intention.'[769] His Lordship said that:

> It was sufficient, however, to defeat DDC's claim for rectification for mutual mistake, that DDH was outwardly clearly indicating its own interpretation and intention, which were at variance with those of DDC, but DDC did not challenge the clause, and indeed, expressly assented to it. Had DDC raised an objection or even an inquiry, the disagreement between the parties would have become clear, and DDH would not have entered into a contract on the terms of the earlier non-binding agreement because it did not have the funding to do so. I cannot see any unconscionability in those circumstances in holding DDC to the contract, rather than changing its terms so as to give effect to the uncommunicated subjective intention of DDC to adhere to the original objective provision for DDH to pay the £2.4m notwithstanding the clear terms of the draft clause 14.10.3 to the contrary.[770]

Accordingly, his Lordship said that he would dismiss the appeal.[771] It can be readily seen that his Lordship was focussing on the change of intention of DDH, as evidenced by the DDH board approving the Version 1 document and the Valuation, and the final version of the transfer document, rather than on whether the parties had engaged in a renegotiation of the earlier accord. This focus on intention has the capacity to shift the analysis away from identifying whether there was a negotiation of a new accord that replaced the earlier accord. The approach of Toulson LJ, and the Master of the Rolls, Lord Neuberger, should be preferred because their approach focused on identifying what had been agreed and then considering whether there had been any renegotiation of the agreement before comparing what had been agreed with what had been recorded. They are the correct steps in determining whether rectification should be granted. A focus on intentions, as Etherton LJ did, has the capacity to shift the analysis away from those steps with the consequence that the analysis will focus, not on what has been agreed, but whether the party resisting the claim for rectification can prove that they were not mistaken.

[767] Ibid 1386-7.
[768] Ibid 1387.
[769] Ibid 1355.
[770] Ibid 1357.
[771] Ibid 1359.

The decision in *Daventry* highlights the problems that arise when the focus is on who was mistaken and the corresponding analysis based on common mistake or unilateral mistake. Associate Professor Paul S Davies[772] favours the approach adopted by Etherton LJ in *Daventry* on the basis that the trial judge 'found as a matter of fact that one party to the contract was not actually mistaken about the meaning of the contract at all.'[773] But again that approach focuses on who made the mistake or who was aware of the mistake. The correct approach in relation to rectification for a mistake in the recording of an agreement is that all that is required to be proved is that there was a mistake in the recording of an agreement and, once that mistake is proved to the necessary standard of proof, the court will rectify the written document so that it conforms to the agreement made earlier between the parties. That does not require any party or person to be mistaken; what it requires is that there be a mistake in the recording of what was agreed. The factual circumstances in *Daventry* highlight why that approach is so important. If the analysis commences with determining whether DDH were mistaken, it becomes very tempting to conclude that DDH was not mistaken and that rectification should therefore be denied. But that is not the correct approach. Where a claim for rectification is to provide relief for a mistake in the recording of an agreement, then the sole focus should be on whether such a mistake exists, and not on who was aware of the mistake.

In summary, the judgments of Toulson LJ and the Master of the Rolls in the Court of Appeal in *Daventry* confirm that in cases of rectification for a mistake in the recording of an agreement, it is first necessary to identify, objectively, what was agreed between the parties. How careless a party has been during the negotiations is irrelevant. In this case their Lordships both focused on the offer made by DDC in the Version 1 document and the acceptance of that offer by DDH. The fact that the DDH board had a subjective view of what that offer meant that differed from the objective meaning of the offer was irrelevant. What was critical was that both parties agreed to the Version 1 document and that document, objectively construed, meant that DDH would pay the pension deficit directly to NCC. Once that fact was established the only way that DDH could resist the remedy of rectification sought by DDC was to show that DDH and DDC had negotiated a new position that departed from that earlier agreement. But the conduct of DDH, and DDC, never amounted to a renegotiation. This was of course, in part, because DDH,

[772] Paul S Davies, 'Rectification versus interpretation: the nature and scope of the equitable jurisdiction (2016) 75 *Cambridge Law Journal* 62.
[773] Ibid 82.

subjectively, was of the view that DDC was to pay the pension deficit and that was what was recorded in the drafts of the contract and in the final written contract. DDH never set out to negotiate a different position because it was mistaken as to the objectively determined agreement between the parties as to who was to pay the pension deficit. Both DDC and DDH contributed to the mistake that was made by DDH. DDC contributed to the mistake by Mr Bruno's poor wording in the Version 1 document. DDH contributed to its own mistake because its own negotiator, Mr Roebuck, misled the DDH board. But that only explains *how* the mistake came about and *who* was mistaken. As argued in this thesis, who made the mistake and how the mistake came about, are both irrelevant to a claim for rectification for a mistake made in the recording of an agreement. What is relevant is what was agreed between the parties and whether that agreement was correctly recorded in the final written contract. In this case, the majority determined, based on an objective approach to formation of agreements, that the agreement reached was that DDH was to pay the pension deficit to NCC. The final document, by mistake, failed to correctly record that agreement and so rectification was available to DDC. The parties never renegotiated a different position from what was originally agreed.

The decision in *Daventry* and the earlier judgment of the House of Lords in *Chartbrook* have created much controversy concerning when rectification is available. Much of the controversy relates to the issue of whether the test for the intention of the parties is objective or subjective and that issue was considered in Chapter III. That issue is essentially concerned with formation of contract, or in the case of rectification where there is no antecedent contractual agreement, the formation of an agreement as to a term proposed to be included in a written contract. In the final analysis, the decision in *Daventry* is not complex. It reflects the application of well-established principles. First, a court must determine what has been agreed between the parties. Then, once satisfied that the parties have not renegotiated from that agreed position, the task is to compare what has been agreed with what has been recorded. If there is a mistake in the recording of the agreement, rectification is available subject to discretionary considerations.

As outlined in Chapter II, and as reflected in the analysis of the decision in *Daventry* in this Chapter, rectification cases should be categorised by reference to the type of mistake that has been made and not the number of persons who were mistaken. When the focus is on the type of mistake made and not who made the mistake a case might more readily be seen as a case concerning a mistake in the recording of an agreement. The case of *Thomas Bates & Son Ltd v*

Wyndham's (Lingerie) Ltd[774] provides a very good example. The case was decided by reference to common or mutual mistake and in the alternative, unilateral mistake. But like the decision in *Daventry* the case should be seen as a case concerned with a mistake in the recording of a prior agreement. The plaintiff and the defendant had entered negotiations in 1970 concerning the renewal of a lease for a further term of 14 years. The renewal clause in the existing lease provided that the rent should be agreed between the parties, or in the case where no agreement could be reached, the rent would be determined by an arbitrator. The new lease provided for the rent for the first five years and then a review of the rent at the end of five years and then again at the end of ten years. But the lease made no reference to how the rent would be determined if the parties did not agree on the revised rent at the end of five years and ten years. When the lease was being executed a representative of the tenants noticed the defect in the rent review clause but did not bring the mistake to the attention of the landlords. When the parties could not agree to a revised rent in 1975 the landlords commenced proceedings to have the lease rectified. The landlords were successful and the lease was rectified to provide for arbitration in circumstances where the rent could not be agreed between the parties. The tenants appealed to the Court of Appeal. In the Court of Appeal Buckley LJ explained why this was a case of unilateral mistake when his Lordship said:

> Of course if a document is executed in circumstances in which one party realises that in some respect it does not accurately reflect what down to that moment had been the common intention of the parties, it cannot be said that the document is executed under a common mistake, because the party who has realised the mistake is no longer labouring under the mistake'[775]

Buckley LJ explained that although the conduct of the defendant might be described as some form of sharp practice 'the conduct of the defendant must be such as to make it inequitable that he should be allowed to object to the rectification of the document.'[776] Buckley LJ held that the omission from the review clause of any reference to arbitration was clearly contrary to the landlord's interests, and which occurred by mistake, and was a mistake that the tenant was aware of before the lease was signed. Accordingly, Buckley LJ concluded that the trial judge had correctly rectified the lease for unilateral mistake. Everleigh LJ agreed.[777] In this case, because the defendant was aware of the mistake, the court concluded that it could not be a case of common or mutual mistake and therefore decided the appeal on the basis that it was a case

[774] [1981] 1 WLR 505.
[775] Ibid 515.
[776] Ibid.
[777] Ibid 520-21.

of a unilateral mistake. But as the parties had reached agreement as to what was to be included in the new lease, and there was a mistake in the recording of that agreement, it is irrelevant that the defendant knew of the mistake and failed to bring the mistake to the attention of the plaintiff. Relief in the form of rectification should be available in these circumstances, subject to any discretionary considerations, because there was a mistake in the recording of the prior agreement. Who was aware of the mistake should be irrelevant.

C *An agreement to a term may be presumed from the context*

In some cases parties to an agreement may complete their agreement without addressing a particular issue during their negotiations. Accordingly, there would be no express concluded position on that matter. It has been held that this will not always be a bar to rectification and the courts may in some cases, from the factual context, conclude that the parties agreed on that issue and did not see any need to discuss the matter. If a court concludes, as a matter of fact, that the parties agreed to that matter, the court, even though the parties did not expressly discuss the matter, will proceed on the basis that the parties were in agreement and if the matter is not recorded in the final agreement, rectification will still be available.

This issue arose in *Peter Pan Drive-In Ltd v Flambro Realty Ltd*[778] where the defendant leased a property to the plaintiff and the plaintiff intended to construct a drive-in restaurant on the property. To fund the construction of the restaurant the plaintiff approached the Lincoln Trust Company to borrow the necessary funds to construct the restaurant. The Lincoln Trust Company agreed to loan the funds to the plaintiff, but on the basis that the transaction be structured by the land first being transferred to the plaintiff. A mortgage would then be granted by the plaintiff in favour of the Lincoln Trust Company and the land would then be conveyed back to the defendant and the lease would then be registered on the title. The transaction proceeded in this way with the directors of the plaintiff company guaranteeing the mortgage. The lease provided that the lessee could erect buildings on the land at its own expense. The entire proceeds of the mortgage were paid by the Lincoln Trust Company to the plaintiff and the plaintiff proceeded to pay the mortgage for several years. The ownership of the plaintiff company changed and the new directors that were appointed guaranteed the mortgage and the plaintiff company continued to make the mortgage payments under the new ownership of the

[778] (1978) 22 OR (2d) 291.

company. The plaintiff company subsequently found itself in financial difficulties and was advised by its solicitor that there was no agreement pursuant to which it was liable for the mortgage. The plaintiff company then ceased making the mortgage payments. The defendant was unsuccessful in convincing the plaintiff to resume making the mortgage payments, so the defendant made the payments until the loan from the Lincoln Trust Company was fully repaid. The plaintiff commenced proceedings against the defendant to recover what it had earlier paid under the mortgage and the defendant cross-claimed against the plaintiff seeking rectification of the lease and restitution for the funds that it had paid to the Lincoln Trust Company to pay out the mortgage. The plaintiff subsequently abandoned its claim.

In relation to the defendant's cross-claim, Eberle J held that all the parties to the transaction 'were of one mind, namely, that Peter Pan, the borrower, was the one responsible for repayment of the mortgage.'[779] His Honour said that:

> The witnesses admitted frankly that it did not occur to them to put a clause to this effect in the lease but it is beyond argument that if the point had been raised (and the witnesses admitted that it had not been raised in their discussions) the Peter Pan group would have agreed at once to the inclusion in the lease of a term expressing clearly that Peter Pan was responsible for the mortgage repayment. The parties were clearly *ad idem* on this matter.[780]

In holding that the agreement should be rectified, Eberle J said that the 'fact that Peter Pan and its principals from time to time looked after all mortgage payments for a period of eight years is a course of conduct which speaks very loudly of the understanding on their part that they were required to make the mortgage payments and that Flambro was not.'[781] His Honour observed that 'the evidence was that there was no discussion about the respective obligations to pay the mortgage payments. It seems obvious to me that the point was so clear, *i.e.*, that Peter Pan alone was responsible for the mortgage payments, that discussion was unnecessary.'[782] His Honour then cited the following passage in *H. F. Clarke Ltd v Thermidaire Corp Ltd*[783] where Brooke JA, in the Ontario Court of Appeal, delivering the judgment of the court that included Schroeder and Jessup JJA, said that:

> In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote

[779] Ibid 294.
[780] Ibid.
[781] Ibid 295.
[782] Ibid 296.
[783] (1973) 2 OR 57.

> them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement. The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done.[784]

Eberle J, in *Peter Pan Drive-In Ltd,* immediately after citing the above passage, said that:

> Considering the whole of that extract, it is in my view that the most important statement is the one in the last sentence. Stress is here laid on the "intention" of the parties and on the fact that it must "be clearly manifested by them". If these conditions are met, in my view, it is not necessary that it further be shown that there was any expressed agreement in so many words on the point.[785]

His Honour said that even 'though in the present case there was no discussion on the point in question the evidence of both parties to that agreement and their conduct amount to convincing proof of a common intention.'[786] Accordingly, his Honour ordered that the lease be rectified and that there be judgment for the defendant for the amounts paid under the mortgage.[787] The plaintiff appealed to the Ontario Court of Appeal. In *Peter-Pan Drive-In Ltd v Flambro Realty Ltd*[788] Arnup JA, delivering the judgment of the court that included Morden and Thorson JJA, said in a very short judgment that we 'have no doubt on the evidence in this case that there was an "outward expression of accord"' and 'that all parties clearly understood precisely what their rights and obligations were with respect to the Lincoln Trust mortgage.'[789] Accordingly, the appeal was dismissed. The decision in *Peter-Pan Drive-In Ltd* demonstrates that a court can determine from the context of a transaction that certain matters have been agreed to even if those matters have not been expressly discussed. But this approach will not be appropriate in circumstances where the relevant matter was not discussed and it is not obvious from the context, and the circumstances, that the parties were ad idem on the relevant matter.[790]

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[784] Ibid 64-5. An appeal was allowed by the Supreme Court of Canada but on the issue of construction and not on the issue of rectification which was held to be unnecessary given the finding on construction: see *H. F. Clarke Ltd v Thermidaire Corp Ltd* [1976] 1 SCR 319. The decision in *H. F. Clarke Ltd v Thermidaire Corp Ltd* (1973) 2 OR 57 was followed by Holland J in *Glascar Ltd v Polysar Ltd* (1975) 9 OR (2d) 705.
[785] (1978) 22 OR (2d) 291, 296.
[786] Ibid 297.
[787] Ibid 299.
[788] (1980) 26 OR (2d) 746.
[789] Ibid.
[790] See *RACV Investment Co Pty Ltd v Silbury Pty Ltd* (1986) 13 ACLR 555 where the parties had not adverted to the situation that ultimately occurred. See also *GPI Leisure Corp Ltd v Herdsman Investments Pty Ltd (No 4)* (1990) 9 BPR 17,461; and *McGeever v Kritsotakis* [1993] ANZ Conv R 376.

D *False assumptions and false beliefs*

In some circumstances, rectification will not be available because there has not been a mistake made in the recording of an agreement: instead, one or more of the parties may have acted on a false assumption or a false belief. In some cases, because of a false assumption or a false belief, the parties have simply not turned their minds to discuss a matter. To rectify a document based on a false assumption, rather than a mistake in the recording of an agreement, would be to rectify the bargain rather than to rectify the document.[791]

This issue arose in *Pukallus v Cameron*[792] where the appellants purchased a farm from the respondent. Prior to entering into the contract the parties inspected parts of the farm including a bore and an area of cultivated land. They all believed that the bore and the area of cultivated land were within the boundary of the land being sold. The conveyance of the land was completed in March 1976 and in 1977 a survey revealed that the bore and the cultivated land fell outside of the boundary of the land conveyed to the appellants. The appellants commenced proceedings in the Supreme Court of Queensland seeking rectification of the agreement by the insertion into the written contract of an additional area of land. They were successful before Campbell J. The respondent successfully appealed to the Full Court of the Supreme Court of Queensland and the appellants then appealed to the High Court of Australia.

In the High Court of Australia Wilson J said that there 'is no evidence to support a finding of an intention to contract for the sale of the bore and cultivated area.'[793] His Honour explained that the intention was to effect a transfer of land 'which was thought erroneously, to include the bore and cultivated area.'[794] Brennan J, in agreeing that the appeal should be dismissed, said that the appellants 'sought rectification not because of a mistake affecting their common intention as to the subject matter of the sale, but because of an alleged mistake in the expression of that common intention in the written contract.'[795] His Honour said that although 'the remedy of rectification is no longer held to depend upon proof of an antecedent concluded contract, it is necessary to show a concurrent intention of the parties, existing at the time when the written

[791] For some early examples see *Carpmael v Powis* (1846) 10 Beav 36; 50 ER 495; and *Barrow v Barrow* (1854) 18 Beav 529; 52 ER 208.
[792] (1982) 180 CLR 447.
[793] Ibid 453.
[794] Ibid.
[795] Ibid 456.

contract is executed, as to a term which would have been embodied in the contract if the parties had not made a mistake in expressing their intention.'[796] Brennan J said that the 'contract identified the parcel according to its survey description, and no antecedent common intention was proved to displace the hypothesis that the survey description expresses the true contractual intention of the parties.'[797] His Honour said that rectification 'could be decreed only upon proof that the parties intended that a further parcel of land, precisely identified, was to be included in the sale. In the absence of evidence of such an intention, the claim for rectification was bound to fail.'[798] His Honour concluded that the mistake by the parties 'was not a mistake as to the embodying of their intention in the written contract. The only mistake was a mistake as to what features were within the boundaries of the land sold.'[799] Gibbs CJ agreed that the appeal should be dismissed[800] as did Murphy J.[801] The decision makes it clear that a false assumption or belief is not a mistake in the recording of an agreement.[802]

The issue arose recently in England in *Lloyds TSB Bank plc v Crowborough Properties Ltd*[803] where the claimant sought rectification of an agreement embodied in a court order, known as a Tomlin order. The first defendant was indebted to the claimant bank at the time that the parties entered into a compromise agreement and the debt due to the bank was secured over three properties. The bank had already appointed a receiver in relation to the three properties. The second and third defendants, who were individuals, were guarantors of the debt due to the bank. The bank was concerned to ensure that its security was effective and that receivers could proceed to the collection of rents and the ultimate sale of the properties secured to the bank. The properties however were not all owned by the first defendant. Most of the properties were owned by the second and third individual defendants and the properties were provided by the second and third defendants to secure their own obligations to the bank by way of the guarantees.

[796] Ibid.
[797] Ibid 457.
[798] Ibid.
[799] Ibid 457-8.
[800] Ibid 449.
[801] Ibid 450.
[802] The issue of a mistaken belief also arose in *Mander Pty Ltd v Clements* (2005) 30 WAR 46. For comment on the decision, see John Tarrant, 'The Limits of Rectification: *Mander Pty Ltd v Clements'* (2006) 20(1) *Commercial Law Quarterly* 55. The issue has also arisen in Canada: see *Can-Dive Services Ltd v Pacific Coast Energy Corp* (1995) 21 CLR (2d) 39 (BCSC); and *Can-Dive Services Ltd v Pacific Coast Energy Corp* (2000) 5 WWR 683.
[803] [2012] EWHC 2264 (Ch).

After some negotiations leading up to the final agreement, the parties agreed to a settlement whereby the personal guarantees of the second and third defendants were limited to two additional properties, those properties only being disclosed to the bank during the negotiations. Those two properties were worth relatively little in the context of the overall indebtedness that had previously been secured by much more valuable properties that had development potential. The effect of the agreement reached between the parties was that the bank would no longer have security over the previously secured development properties owned by the second and third defendants. As the settlement proposal was developed it was agreed that the existing guarantees provided by the guarantors would be released for an amount of £500,000 and that payment would be secured over the additional properties provided as security to the bank. The unintended effect of the proposal, as it was eventually agreed, was that the release of the guarantees also released the development properties from the bank's securities because those properties were not owned by the first defendant which was the entity that was indebted to the bank. Purle J was satisfied that that consequence was a drafting error in the consent orders.[804] The consent orders were the relevant agreement between the parties. Counsel for the first defendant company and the second and third individual defendants acknowledged that it was an error but not one that was recognised at the time.

The claimant bank sought to have the consent orders rectified by including a clause to provide that the second and third defendants had agreed to tender to the bank the proceeds of sale of the development properties when they were eventually sold and, in the meantime, to tender to the bank all of the rent and other profits from the development properties. Purle J noted that what 'that amounts to, however worded, is that the bank, instead of having a charge over the individuals' properties to secure their indebtedness, which indirectly was the company's indebtedness, were to have a new charge over the same properties to secure the company's indebtedness, notwithstanding the discharge of the personal guarantees.'[805] Importantly, Purle J noted that the 'bank did not already have a charge over those properties to secure the company's indebtedness. It did, however, assume in the drafting of the Tomlin order that there already was such a charge which would remain in place.'[806] Purle J said that the 'objectively ascertainable intention must be that the parties intended the bank to retain such rights as it

[804] Ibid [14].
[805] Ibid [52].
[806] Ibid [53].

had.'[807] But Purle J noted that 'retaining such rights as it had would not be enough because the rights that it had were over the properties to secure the indebtedness of the individuals.'[808] But what the bank really needed 'was a charge – in truth a new charge – to secure separately the indebtedness of the company over the individuals' properties.'[809] Importantly Purle J said that:

> [56] As in fact the flaw in the drafting was not perceived, that is not an issue to which anyone ever turned their mind.
>
> [57] There was, however, a mistaken common assumption that the existing charges secured company indebtedness, not simply individual indebtedness. That, however, was an erroneous assumption. The question is whether that assumption and the mistake that was made is sufficient to justify rectification.[810]

Purle J said that 'what must be shown is a common intention that the bank was to have a separate charge over the individuals' properties to secure the company's debt.'[811] Purle J said that 'was not something they had already, and it was not something which anyone ever asked for, because the assumption seems to have been that they did in fact have such a charge' and that no one 'therefore gave a moment's thought to how the result was to be achieved.'[812] In rejecting the claim for rectification Purle J said that it 'is not, however, in my judgment a mistake which can be characterised as giving rise to a common continuing intention that the bank should be granted a charge over the property which it did not have.'[813] Purle J said that there 'was a mistaken assumption that that charge was wide enough to survive the discharge of the guarantees, but no intention (because of that mistake) to grant a wider charge.'[814] Purle J concluded by saying that:

> I have to say, I reach that conclusion with undisguised unease. It seems to me however that where parties mistake the effect of their contract upon the basis of a common assumption that turns out to be wrong, what they have not done is record their agreement incorrectly; they have made a bad deal. In those circumstances, it seems to me that the rectification claim falls to be dismissed.[815]

[807] Ibid [54].
[808] Ibid [55].
[809] Ibid.
[810] Ibid [56]-[57].
[811] Ibid [75].
[812] Ibid [76]-[77].
[813] Ibid [78].
[814] Ibid [81].
[815] Ibid [82].

Lloyds TSB Bank plc appealed to the Court of Appeal. In *Lloyds TSB Bank plc v Crowborough Properties Ltd*[816] Lewison LJ, in allowing the bank's appeal, said that 'the fact that the cause of the drafting error is an erroneous assumption does not remove the drafting error from the reach of rectification.'[817] His Lordship said that many 'drafting errors are no doubt made because the drafter has assumed that the affect of altering the wording in one respect will not affect other parts of the draft.'[818] His Lordship said that the 'Bank's right was to sell all the charged properties and apply the proceeds of sale towards discharge of Crowborough's indebtedness. That on the evidence, and indeed on the judge's findings, was plainly the right that both parties intended the Bank to retain.'[819] Lewison LJ was of the view that Purle J took too narrow a view when Purle J posed the question as 'whether the parties had manifested an objective intention that fresh charges should be granted.'[820] His Lordship explained that the granting of new charges in favour of the bank 'was not the only way in which the agreed objective could be achieved.'[821] In concluding that rectification should be allowed Lewison LJ said that by 'concentrating on only one mechanism for achieving that objective the judge did not adequately analyse the evidence of what had been agreed.'[822] Both Rimer LJ and Mummery LJ agreed with Lewison LJ. Accordingly, the appeal was allowed because the Court of Appeal took a different view of what the parties had agreed. The case highlights that the outcome of cases such as this will hinge on how the court approaches the task of identifying what the parties have agreed. This will be especially unpredictable in circumstances where there has been a false assumption. In most cases a false assumption will be fatal to a claim for rectification. But in some cases a false assumption will be overcome if the party seeking rectification can persuade the court that an agreement was reached on a particular matter despite the false assumption.

These cases demonstrate that rectification is not available in circumstances where the parties have made a false assumption or hold a false belief unless, despite the false assumption, the parties reached an agreement that has not been correctly recorded. Rectification cannot be used to make a new bargain for the parties. Accordingly, parties entering into a contract need to ensure that any assumptions that they are making, or beliefs that they hold, are true because

[816] [2013] EWCA Civ 107.
[817] Ibid [69].
[818] Ibid.
[819] Ibid [64].
[820] Ibid [70].
[821] Ibid.
[822] Ibid.

rectification is not a remedy that will be available to overcome a false assumption or mistaken belief. These cases reinforce the fact that the core case for rectification is to provide a remedy where there has been a mistake in the recording of a prior agreement, not to provide a new bargain for the parties.

E *Rationale for this category of rectification*

Generally speaking, there is a lack of consensus as to the rationale for the remedy of rectification. There have been suggestions that the rationale for the remedy of rectification is unconscionability. In *Ross v Carvallio*[823] Parker J said that the 'basis in equity for rectification is the prevention of unconscionable conduct. If the parties erroneously believed the document to correctly express the true agreement they had reached, it would be unconscionable for one party to seek to rely on the terms as written once the mistake is revealed.'[824] In *MacDonald v Shinko Australia Pty Ltd*[825] Davies JA said that equitable 'relief for common mistake, whether by way of rescission or rectification of a written contractual instrument, is based on unconscionability; that it would be unconscientious of the party relying on the written instrument, to rely on it in the circumstances.'[826] In *W & K Holdings (NSW) Pty Ltd v Mayo*[827] Sackar J said that the prevention of unconscionable insistence 'on the terms of a written contract has long been recognised as the rationale for the doctrine of rectification.'[828] The rationale for the equitable remedy of rectification was explained in more detail in *Ryledar Pty Ltd v Euphoric Pty Ltd*[829] where Campbell JA said that:

> That the rationale for granting rectification is to avoid unconscientious departure from the common intention, assists in deciding what is required for there to be a "common intention". If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?[830]

[823] (Unreported, Supreme Court of Western Australia, Parker J, 6 October 1995).
[824] Ibid 22.
[825] [1999] 2 Qd R 152
[826] Ibid 156.
[827] [2013] NSWSC 1063.
[828] Ibid [64].
[829] (2007) 69 NSWLR 603.
[830] Ibid 667. Special leave to appeal to the High Court of Australia was refused: see *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] HCATrans 698.

Campbell JA addressed the issue again in *Franklins Pty Ltd v Metcash Trading Ltd*[831] where his Honour said that:

> In considering whether to grant rectification of a written contract, equity does not use any of its own principles to decide what the terms of the contract are, or how they are construed – those matters are decided solely by the common law. Rather, equity focuses on what it is unconscientious for a party to assert about the contract. The rationale is that it is unconscientious for a party to a contract to seek to apply the contract inconsistently with what he or she knows to be the common intention of the parties at the time that the written contract was entered. In other words, when a plaintiff succeeds in a claim for rectification, the plaintiff is found to have been justified in effect saying to the defendant "you and I both knew, when we entered this contract, what our intention was concerning it, and you cannot in conscience now try to enforce the contract in accordance with its terms in a way that is inconsistent with our common intention".[832]

It is clear that his Honour's view that unconscionability is the rationale for rectification is directly linked to his Honour's view that rectification is concerned with intentions, and specifically the subjective intention of the parties. But once that position is rejected, as it should be, it is difficult to see how unconscionability can be the rationale for rectification where there has been a mistake in the recording of an agreement where that agreement has been determined objectively. As rectification is concerned with agreements, and not with intentions, some other rationale must provide the explanation for the availability of the remedy.

Not all judges have suggested that unconscionability is the rationale for rectification. In *Hodgkinson v Wyatt*[833] the Master of the Rolls, Lord Langdale, said that rectification was concerned with ensuring that the written instrument was 'consonant with the intention and agreement' of the parties.[834] In *Harris v Smith*[835] Brereton J was considering a claim for rectification in the context of a mistaken transfer of an additional piece of land where the defendant resisted rectification on the basis of indefeasibility of title and argued that rectification required proof of unconscionability. His Honour said that the 'equity to rectification for common mistake is founded on the true agreement between the parties. Notice of the mistake forms no component of such a claim, and the personal equity arises and subsists quite apart from notice.'[836] His Honour said that:

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[831] (2009) 76 NSWLR 603.
[832] Ibid 710.
[833] (1846) 9 Beav 566; 50 ER 562.
[834] Ibid 569.
[835] (2008) 14 BPR 26,223.
[836] Ibid 26,235.

> Thus while, in many cases, establishing a personal equity will involve establishing unconscionability, that is because unconscionability is an element of the relevant equitable cause of action. But it is not an element of every equitable cause of action. Where it is not, there is no superadded requirement to establish unconscionability in order to establish a "personal equity" for the purposes of that exception to indefeasibility.[837]

His Honour concluded that in circumstances where unconscionability might not be established against the defendant that was 'no objection to relief in the nature of rectification for common mistake.'[838]

The better explanation for the rationale for the remedy of rectification is that provided by Lord Hoffmann,[839] writing extra-judicially, who has suggested that the rationale for rectification for mistakes in the recording of agreements, what he describes as document rectification, 'is based upon the equitable principle of making people keep their promises, in the same way as specific performance.'[840] In this way equity provides relief in circumstances where the party seeking rectification would be without a remedy because of the common law rule in *L'Estrange v Graucob*[841] that a party is bound by their signature.

F *Conclusions*

This Chapter has examined the core role of rectification which arises where it can be proved that there has been a mistake in the recording of an agreement. It has been argued that the classification of rectification cases between cases of common or mutual mistake and cases of unilateral mistake is misconceived and results in unnecessary complexity in the law of rectification. Once it is accepted that the correct classification is based on the type of mistake made, and not on who made the mistake or who had knowledge of the mistake, that complexity is removed. The resolution of claims for rectification should be approached by first determining whether the alleged mistake occurred when recording a prior agreement or during the process of forming an agreement. This Chapter has examined cases concerned with mistakes in recording agreements. The decision of the Court of Appeal in *Daventry* was examined in detail. The unique facts of the case provided an important example of why it is critical to focus on

[837] Ibid 26,238.
[838] Ibid. See also *Day v Day* [2014] Ch 114, 125 where Lewison LJ said that the 'equitable jurisdiction to rectify instruments is part of equity's wider power to relieve against the consequences of a mistake'.
[839] Lord Hoffmann, above n 20.
[840] Ibid [28].
[841] [1934] 2 KB 394.

what the parties have agreed and to compare that to what has been recorded in the final written contract. Once that approach is taken, as it was by the majority in the Court of Appeal in *Daventry*, unnecessary complexity is removed.

It has also been demonstrated in this Chapter that false assumptions and mistaken beliefs are not mistakes for the purpose of rectification. If one or more parties to an agreement have made a false assumption, or held a false belief when the agreement was formed, rectification will not be available as a remedy. Parties to agreements need to protect themselves from false assumptions and mistaken beliefs by ensuring that such assumptions and beliefs are reviewed before entering into an agreement. The courts will not use the remedy of rectification to provide a different agreement for the parties.

Finally, in this Chapter, the rationale for the remedy of rectification for mistakes in recording agreements was examined. The idea that the rationale for the remedy is unconscionability was rejected because in this context the remedy is available regardless of the knowledge or behaviour of the parties. Rectification is available to ensure that parties are kept to their promises. The remedy provides relief from the common law rule that a person is bound by their signature.

Rectification for mistakes made in the recording of agreements examined in this Chapter are only one type of mistake for which rectification may be available. The next Chapter examines a fundamentally different type of mistake being a mistake made during the formation of an agreement. Rectification may also be available in such circumstances but it is explained in the next Chapter that different considerations apply and a different rationale underpins the justification for rectification in these cases.

V RECTIFICATION FOR MISTAKES MADE DURING THE FORMATION OF AN AGREEMENT

A *Introduction*

This Chapter is concerned with mistakes made during the formation of an agreement which are fundamentally different from mistakes made in the recording of an agreement. Where a mistake has been made in the recording of an agreement, rectification is granted so that the written agreement is amended to accurately record what was agreed between the parties. But for mistakes made during the formation of an agreement, different considerations apply. If a mistake is made during the formation of an agreement the mistaken party should first seek any relief available in the form of rescission because rescission operates to set aside the transaction and *restore* the parties to their position before the mistake was made. Rescission in these circumstances is the primary remedy to provide relief against the mistake. The circumstances in which rescission is available either at common law or in equity is beyond the scope of this thesis and is not examined.[842] Cases concerning rectification, which are examined in this Chapter, support an approach that, *if rescission is available* as a remedy, courts may *also* provide the non-mistaken party with an *optional remedy*, so that the non-mistaken party, instead of accepting rescission, can elect to form a contract on the terms that the mistaken party intended to communicate to the non-mistaken party. Based on this approach rectification is not a remedy imposed on the non-mistaken party; rather, it provides an opportunity for the non-mistaken party to enter into a *different* transaction than the transaction actually entered into. Such an approach provides fairness without imposing a contract on a non-mistaken party. If the non-mistaken party opts to not accept rectification, the transaction will be rescinded and the parties will be restored to their original positions. Alternatively, if the non-mistaken party opts to accept rectification of the document, the parties will enter into a different transaction based on the terms that the mistaken party intended to communicate. That transaction will be entirely by consent and no contract will be imposed on any party.

[842] For a discussion of when rescission is available for mistake see: *Taylor v Johnson* (1983) 151 CLR 422; David Hodge QC, *Rectification* (Sweet & Maxwell, 2nd ed, 2016) 20-40; and Denis S K Ong, *Ong on Rescission* (The Federation Press, 2015) 236-44.

However, in several cases the courts have imposed a contract on a non-mistaken party because that party had actual or constructive knowledge of the mistake made by the mistaken party, or the non-mistaken party acted unconscionably or engaged in sharp practice. It is argued in this Chapter that the courts have not adopted a consistent approach in these cases and that, in any event, there can be no justification in imposing a contract on a non-mistaken party unless their conduct amounts to fraud, and the fraud, and not any mistake, justifies the remedy of rectification being imposed on the fraudulent party. Cases concerning fraud are examined in Chapter VI. It will be argued in this Chapter that knowledge, unconscionable conduct or sharp practice may justify rescission, which acts to restore the parties to their position before the mistake was made, but something more is required to justify *imposing* a different contract on a non-mistaken party.

B *Initially no jurisdiction to rectify so-called unilateral mistakes*

As a general rule rectification is not available for what is often referred to as a unilateral mistake. But as argued throughout this thesis the classification of rectification cases between cases of common or mutual mistake and unilateral mistake is misconceived because the classification focuses on who made the mistake. The more useful classification is based on the type of mistake made. Many, but not all, of the cases concerned with a so-called unilateral mistake are cases concerned with a mistake made during the formation of an agreement. These cases are often referred to as cases of unilateral mistake because only one party was mistaken. But it is irrelevant how many people were mistaken, or had knowledge of the mistake. The type of mistake made in most of these cases concern mistakes made by offerors in making an offer and mistakes made by offerees when accepting an offer. That is, a mistake might have been made by an offeror and the offeree snapped up a bargain, or a mistake might have been made by an offeree who accepts an offer made by an offeror not realising what the true terms of the offer were. In this Section, the history of these types of cases will be examined and that analysis demonstrates how this category of case was created.

The issue of a mistake made during the formation of an agreement was considered in *Garrard v Frankel*,[843] a case discussed in Chapter II where it was explained that the plaintiff, Mr Garrard, made a mistake when making an offer to lease a property to the defendant, Mrs

[843] (1862) 30 Beav 445; 54 ER 961.

Frankel. The parties agreed to an annual rental of £230 per annum. The plaintiff later incorrectly inserted the figure of £130 per annum for the rent into the draft lease, and the lease and the counterpart were engrossed with that amount and executed a week later on 27 August 1860. The defendant, being aware of the mistake in the lease, then proceeded to pay the rent based on the rental figure in the lease, being £130 per annum, and the plaintiff filed a bill seeking to have the lease rectified. The Master of the Rolls, Sir John Romilly, said that the requirement for there to be a mutual mistake for rectification to be available was a 'general rule' that 'does not apply to every case.'[844] Sir John Romilly said that the 'Court will, I apprehend, interfere in cases of mistake, where one party to the transaction, being at the time cognizant of the fact of the error, seeks to take advantage of it.'[845] The Master of the Rolls was satisfied from all of the evidence that the defendant knew that the plaintiff had made a mistake in inserting £130 into the draft lease instead of £230.[846] Although the Master of the Rolls was of the belief that the defendant would have signed the lease if it had correctly referred to an amount of £230 he said that 'I do not think that I am entitled to found any decree on such a belief.'[847] The Master of the Rolls said that 'I doubt therefore whether I can compel [the] Defendant to be bound by a lease inconsistent with a portion of the agreement which she signed, and which, in one view which might be taken of it, might govern the other portion.'[848] But the Master of the Rolls was clear that some relief was necessary when he said that 'I am quite clear that I cannot compel the Plaintiff to be bound by the terms of the lease as it stands, or permit the Defendant to derive any advantage from this mistake.'[849] The only question was what relief was available in circumstances where there could not, because of the general rule, be rectification based on common or mutual mistake. The Master of the Rolls determined that the appropriate remedy was to offer the defendant two choices.[850] Sir John Romilly said that 'I shall give the Defendant the option of retaining or rejecting the lease, but if she retains it I shall decree the lease to be reformed by substituting the rent of £230 for £130 per annum.'[851] Alternatively, the defendant would be permitted to give up the lease but pay rent for the period that she had been in possession of the property at a rate of £230 per annum being the accepted proved rental value of the property. The Master of the Rolls justified this approach by saying

[844] Ibid 451.
[845] Ibid.
[846] Ibid 456-7.
[847] Ibid 457.
[848] Ibid.
[849] Ibid.
[850] Ibid 457-8.
[851] Ibid 458.

that the defendant had 'thought fit to run the chance of keeping the house, and of getting the lease at the lower rate, she must take the consequences.'[852]

The Master of the Rolls, Lord Romilly, considered the issue of so-called unilateral mistake again in *Harris v Pepperell*.[853] The plaintiff sold a property to the defendant and later alleged that an additional piece of land was conveyed by common mistake. The defendant denied that there had been a mistake. The plaintiff filed a bill to have the defendant declared as a trustee of the additional land and for the defendant to convey that part of the land back to the plaintiff. The Master of the Rolls said that in circumstances where 'it is in the power of the Court to put the parties in the same position as if the contract had not been executed, the Court will interfere, provided the party aggrieved comes speedily for redress.'[854] The Master of the Rolls said that if it was determined that there was a mistake, and the deed ought to be rectified, the Court 'can give the Defendant the option of having the whole contract annulled, or else of taking it in the form which the Plaintiff intended.'[855] The Master of the Rolls did not first determine whether the defendant was aware of the mistake when it was made by the plaintiff. The Master of the Rolls simply noted that 'the Defendant, if not aware of the mistake at the time of the execution of the deed, knew it as soon as the Plaintiff told him.'[856] It therefore seemed that irrespective of whether the defendant was aware of the mistake when the deed was entered into, the defendant would be given an option to proceed with the rectified deed or have the contract avoided. The Master of the Rolls concluded that the plaintiff was entitled to have the deed rectified 'with an option to the Defendant to annul the contract.'[857] But with respect, the better approach would be to hold that rescission was available as the primary remedy, and that, in the alternative, the defendant has the option to proceed with a different agreement in the rectified form sought by the plaintiff. To hold that rectification is available in such circumstances prima facie imposes a different contract on the non-mistaken party with only an option to accept rescission instead of having a different agreement imposed on that party. The better approach is to first consider rescission because that is the primary remedy where there has been a mistake in the forming of an agreement. If rescission is available, rectification can be offered as an

[852] Ibid.
[853] (1867) LR 5 Eq 1.
[854] Ibid 5.
[855] Ibid.
[856] Ibid.
[857] Ibid.

alternative remedy so that the non-mistaken party has the option of proceeding with the offer that the mistaken party intended to make, but in fact never made.

The Master of the Rolls also explained in *Harris v Pepperell*[858] that his earlier decision in *Bradford v Romney*[859] was not inconsistent with this approach. In *Bradford v Romney* a marriage settlement had been entered into and a bill had been filed to have the settlement rectified. The Master of the Rolls said that it is a rule of equity 'that to reform a deed it is necessary to shew that the mistake was an error common to both parties to the contract.'[860] In *Harris v Pepperell* the Master of the Rolls explained that in a case of a marriage settlement, such as *Bradford v Romney,* where the marriage had taken place and children had been born, then 'it is necessary for the Court to see whether it is carrying into effect the contract which was intended to be entered into on both sides, for it is impossible to undo the marriage, or to remit the parties to the same position that they were in before.'[861]

The approach taken by Lord Romilly in these cases was questioned in Ireland by Vice Chancellor Chatterton in *Young v Halahan*.[862] The Vice Chancellor noted the decisions of Lord Romilly in *Bradford v Romney*,[863] *Garrard v Frankel*[864] and *Harris v Pepperell*[865] and said that cases such as *Garrard v Frankel,* where only one party was operating under a mistake, 'appear to me to come within a different head of equity, that of fraud, the proper relief being to set aside the deed unless the Defendant be willing to submit to its rectification.'[866] The Vice Chancellor went so far as to say that in his view Lord Romilly had in fact decided *Garrard v Frankel* on that basis. The Vice Chancellor said that 'I think that the language of the Master of the Rolls, in p. 457, shows that this was the principle on which he acted' and that the decision of the Master of the Rolls 'was, in effect, a refusal to make an ordinary decree for rectification, because he was not satisfied that the mistake was mutual.'[867] The Vice Chancellor explained that Lord Romilly 'accordingly gave the Defendant the option of retaining or rejecting the

[858] Ibid 4.
[859] (1862) 30 Beav 431; 54 ER 956.
[860] Ibid 438.
[861] (1867) LR 5 Eq 1, 4. Lord Romilly examined the issue again in *Bloomer v Spittle* (1872) LR 13 Eq 427. The issue also arose in *Paget v Marshall* (1884) 28 Ch D 255.
[862] (1875) Ir R 9 Eq 70.
[863] (1862) 30 Beav 431; 54 ER 956.
[864] (1862) 30 Beav 445; 54 ER 961.
[865] (1867) LR 5 Eq 1.
[866] (1875) Ir R 9 Eq 70, 80.
[867] Ibid.

lease; but, if she should retain it, it was to be reformed by substituting the higher rent; and if she should decline to retain the lease as reformed, it was to be delivered up to be cancelled.'[868] However, the Vice Chancellor was of the view that it was more difficult to reconcile the decision in *Harris v Pepperell* with the general rule that there needed to be a common mistake because there was no common or mutual mistake in that case and there was no element of fraud.[869] The Vice Chancellor said, in relation to Lord Romilly's decision in *Harris v Pepperell*, that:

> The Master of the Rolls appears to rest his decision on the assumption that, in such cases as that before him, the Court had it in its power to put the parties in the same position as if the contract had not been executed. I do not find this proposition laid down in any of the other cases, and I am unable to see the justice of holding that a party who has *bonâ fide* agreed for a purchase, and who, without any knowledge of the vendor being under a mistake as to the subject matter, has obtained a conveyance of what he bargained for, and no more, should be deprived of the estate he has acquired, unless he will consent to take it with the subtraction of a part. Under such circumstances, I should not be prepared to hold that the Court ought to interfere.[870]

The issue arose again in Ireland in *Gun v M'Carthy*[871] where Flanagan J held that there could not be rectification where only one party was mistaken. His Honour said, in reference to a conveyance, that:

> I have always understood the law to be that when you seek to reform a conveyance you must first establish – whether by parol evidence or otherwise – that there was a definite concluded agreement between the parties, but which, by mistake common to both parties to the agreement, had not been carried out in the conveyance executed pursuant to the real agreement. But when the mistake is not common, what can you reform by? To reform implies a previous *agreement;* but when the evidence shows that there was no agreement to which both parties assented, but only a mistake on one side, and not a common mistake, in my opinion it is impossible to support a suit to *reform*, whatever equity the party who has made the mistake may have in certain cases to rescind, the conveyance.[872]

His Honour explained that 'where there being a clear undoubted mistake by one party in reference to a material term of the contract which he entered into with another, and the other party knowingly seeks to avail himself of that, and seeks to bind the other to the mistake, the law of this Court is, that it will not allow such a contract to be binding on the parties, but will give relief against it.'[873] But the appropriate relief was not rectification, because, as his Honour

[868] Ibid.
[869] Ibid 81.
[870] Ibid.
[871] (1884) 13 LR Ir 304.
[872] Ibid 309.
[873] Ibid 310.

explained 'there is nothing to reform it by.'[874] His Honour then referred to the decisions of Lord Romilly in *Garrard v Frankel*[875] and *Harris v Pepperell*[876] and said that those decisions could only be supported on the basis that 'the contracts were reformed on the ground that the party, against whom the decision was, elected to take the contracts reformed.'[877] His Honour said that 'where the party insists generally on his right to retain the contract in the terms of the conveyance as executed, my opinion is, that the contract ought to be rescinded.'[878] That position had also been adopted in Ireland in *Fitzgerald v Fitzgerald*[879] where Holmes LJ said that 'the mistake of one of the parties to a contract for valuable consideration is a ground for rescission, although the other party may be offered rectification as an alternative.'[880]

The issue of so-called unilateral mistake was considered in Victoria in *Chamberlain v Thornton*[881] where Holroyd J said that:

> It has not been necessary for me in this case to consider the argument which was pressed upon me, that where the mistake is only unilateral, a Court of Equity will never reform an instrument which the law requires to be in writing and then enforce specific performance of it. But I am not prepared to lay that down as a general rule. I think there have been cases in which, where a plaintiff has been drawn into executing an instrument by a mistake as to its contents wilfully induced by the defendant, and has fully or even in great part performed what owing to such mistake he conceived to be the contract, the Court has reformed the instrument and compelled the defendant to perform his part of it in the sense in which the plaintiff understood it, notwithstanding that the contract was one which required to be in writing.[882]

Unfortunately, his Honour did not refer to any cases in his judgment and it is therefore unclear which case, or cases, his Honour was suggesting supported the proposition that a court could compel a defendant to perform a rectified contract where there had only been a mistake by one party. The issue of so-called unilateral mistake arose again in *Australia Hotel Co Ltd v Moore*.[883] The plaintiff, Australia Hotel Co Ltd, engaged Moore, the defendant, as the manager of a hotel. Part of the defendant's remuneration was a share of the plaintiff's net profits. A dispute arose as to the meaning of the term 'net profits' and whether the plaintiff could deduct interest paid on a mortgage over the hotel before arriving at the net profit. Moore commenced

[874] Ibid 310-11.
[875] (1862) 30 Beav 445; 54 ER 961.
[876] (1867) LR 5 Eq 1.
[877] (1884) 13 LR Ir 304, 311.
[878] Ibid.
[879] (1902) 1 Ir R 477.
[880] Ibid 493. See also *Duke of Sutherland v Heathcote* [1892] 1 Ch 475.
[881] (1892) 18 VLR 192.
[882] Ibid 196.
[883] (1899) 20 LR (NSW) Eq 155.

proceedings against Australia Hotel Co Ltd on the agreement and obtained a verdict in his favour. The plaintiff company then sought to have the agreement rectified on the basis that, as interpreted by the court, it did not represent the agreement of the parties. A.H. Simpson CJ in Eq said that if 'it can be shewn that one party knew of the mistake in the mind of the other, that, I apprehend, would disentitle the former to specific performance, and might be a ground for cancelling the contract.'[884] His Honour said that 'this would be the case if the first party had by his conduct induced the mistake in the mind of the other.'[885] His Honour then referred to the decision of Lord Romilly in *Harris v Pepperell*[886] and said that 'the Court may rescind the contract, with an option to the defendant to have it performed in the sense in which the plaintiff understood it.'[887] However, as the defendant had not induced the plaintiff's mistake, the action was dismissed.[888]

But courts in Australia have not always followed the position outlined by A.H. Simpson CJ in Eq in *Australia Hotel Co Ltd v Moore*.[889] In *AG Hodgson v International Harvester Credit Corp of Australia Ltd (Under Scheme of Arrangement)*[890] Fullagar J said that it 'cannot be over-emphasised that rectification can be had only if the mistake is clearly defined and is shown to be mutual or common to all parties to the instrument. Where the mistake (assuming one to be clearly established and clearly defined) is unilateral only, the proper remedy, if any, is rescission and not rectification.'[891] The uncertain position adopted by the courts is reflected in the comments of Young J in *State Rail Authority of New South Wales v Ferreri*[892] where Young J said that:

> Although many of the leading textbooks, see e.g. Meagher, Gummow and Lehane on *Equity*, 2nd edition para. 2614, point out the serious logical flaws in the rule, it is probably now too late to deny that equity may, in appropriate cases, offer the remedy of rescission to a non-mistaken party where it would otherwise order rectification at the suit of the mistaken party. It may well be that the rule came into being at a time when it was thought that equity had no jurisdiction to order rectification in such circumstances by a direct order and so, by ordering rescission with the option to the non-mistaken party of joining in rectification, justice was done.[893]

[884] Ibid 160.
[885] Ibid.
[886] (1867) LR 5 Eq 1.
[887] (1899) 20 LR (NSW) Eq 155, 160.
[888] Ibid. For further decisions on so-called unilateral mistake see: *Mullins v Howell* (1879) 11 Ch D 763; and *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch 74.
[889] (1899) 20 LR (NSW) Eq 155.
[890] (Unreported, Full Court of the Supreme Court of Victoria, Murphy, Fullagar and Gobbo JJ, 23 February 1987).
[891] Ibid 20.
[892] (1990) ANZ Conv R 211.
[893] Ibid 213.

This passage adopts a position, as discussed earlier in relation to the decision of the Master of the Rolls, Lord Romilly, in *Harris v Pepperell*,[894] of prima facie ordering rectification with rescission as an optional remedy. But, as explained earlier, the better approach is to first determine the availability of rescission, and if rescission is available, grant rectification as an optional remedy. The preferable approach was adopted in Canada in *Devald v Zigeuner*[895] where the plaintiffs agreed to sell a property to the defendants but intended to retain part of the property that included a recently constructed barn. McRuer CJHC accepted that the plaintiffs did not intend to sell that portion of the land.[896] However, the whole of the land was conveyed to the defendants. The plaintiffs sought rectification of the contract of sale as well as rectification of the deed delivered pursuant to the contract. McRuer CJHC allowed the plaintiffs to amend their claim to include a claim for rescission of the contract. His Honour held that the plaintiffs were entitled to rescission of the contract and an order setting aside the conveyance.[897] His Honour said that 'I think this is an eminently proper case to give the defendants a right to elect to accept rectification of the deed as asked in the alternative prayer for relief.'[898] His Honour concluded that in 'all the circumstances this seems to me to be a more equitable course than to set aside the whole transaction with no right of such election.'[899]

The issue also arose in *Riverlate Properties Ltd v Paul*[900] where the plaintiff argued that the court should order rescission in circumstances where the non-mistaken party had no knowledge of the mistake. Russell LJ, delivering the judgment of the Court of Appeal that included Stamp and Lawton LJJ, said that in the appeal before the court there was a case 'of mere unilateral mistake which cannot entitle the lessor to rescission of the lease either with or without the option to the lessee to accept rectification to cure the lessor's mistake.'[901] Accordingly, the appeal was dismissed. That is the correct approach because if rescission is not available, rectification should not be offered as an alternative remedy. In commenting on the decision in *Riverlate*, Professor Waddams[902] commented that 'it is in cases where the non-mistaken party

[894] (1867) LR 5 Eq 1.
[895] (1958) 16 DLR (2d) 285.
[896] Ibid 287.
[897] Ibid 293. In *Riverlate Properties Ltd v Paul* [1975] 1 Ch 133 Russell LJ said (at 145) that unilateral mistake would not be a ground for rescission under English law.
[898] (1958) 16 DLR (2d) 285, 293.
[899] Ibid.
[900] [1975] 1 Ch 133.
[901] Ibid 145.
[902] Stephen M Waddams, 'Contracts – Mistake – Rectification with Optional Rescission' (1975) 53 *The Canadian Bar Review* 339.

ought to have known, but cannot be shown actually to have known, of the other's mistake that the optional order is necessary.'[903] Professor Waddams explained that the 'effect of the optional form of remedy is that the defendant must choose between submitting to rectification or throwing up the whole transaction.'[904] Professor McLauchlan[905] has stated a similar position and said that a person who is not mistaken should not have a contract forced on them and that instead they should 'at least be given the option of submitting to rescission or accepting rectification.'[906] That is an appropriate remedy if it is first established that rescission is available based on the facts.

C *Conduct required for rectification to be granted*

In considering claims for rectification in cases of so-called unilateral mistake, courts focus on the knowledge of the mistake by the non-mistaken party and, in particular, on the conduct of the non-mistaken party in taking advantage of the mistake made. In doing so the courts have been concerned not to impose a contract on a non-mistaken party unless the circumstances justify, in the court's opinion, the imposition of such a contract. After examining the type of conduct that the courts look for before granting rectification in this Section, it will be argued that there is no justification for imposing a contract on a person who has not consented to the terms of an agreement that is being imposed on them unless their conduct amounts to fraud. The better approach, which has been adopted in some cases, and as suggested in Section B above, is to provide a non-mistaken party (who has not acted fraudulently) with an option to accept an agreement on the terms intended by the other party. Cases concerning fraud are examined in Chapter VI.

In many cases the courts have looked for conduct that can be described as 'sharp practice' as justification for imposing a contract on a non-mistaken party that differs from the terms of the contract entered into by the parties and as recorded in their written agreement. Some cases have referred to sharp practice as a form of unconscionable conduct. In *McIlwraith-Davey Industries Ltd v Joyce Industries Pty Ltd*[907] Wallace J said, in relation to so-called unilateral mistake, that

[903] Ibid 340.
[904] Ibid 342.
[905] David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 *Law Quarterly Review* 608.
[906] Ibid 619.
[907] (Unreported, Full Court of the Supreme Court of Western Australia, Wallace, Brinsden and Kennedy JJ, 10 August 1988).

'the conduct creating the equity must be such as to affect the conscience of the party who suppressed the fact that he has recognised the presence of mistake.'[908] Kennedy J made reference to conduct that 'could be characterised as sharp practice or unconscionable.'[909] In *Misiaris v Saydels Pty Ltd*[910] Young J favoured an approach based on unconscionable conduct rather than sharp practice. Young J said that in 'order to obtain rectification of a contract for unilateral mistake there must exist some aspect of the unmistaken party's behaviour in the circumstances which make it unconscientious for that party to resist rectification.'[911] In relation to the knowledge required of the mistaken party's mistake his Honour said that 'it is enough that the defendant strongly suspects that the plaintiff has made a mistake of a fundamental nature about the contract for the court to provide the remedy of rectification.'[912] His Honour said, in reference to any requirement of 'sharp practice', that 'I think it would be unfortunate if these words lifted from some of the English judgments were to be said to be definitive of the circumstances in which equity will find that a person's conduct is unconscionable so as to give rise to the remedy of rectification.'[913] Young J said that 'when looking to see whether conduct is conscionable or not one does not go by one's own subjective ideas of fairness but rather what courts have in analogous cases held to be the law's view of what binds the conscience.'[914]

But unconscionability or sharp practice has not always been required for the awarding of rectification. In *Everglades Country Club Ltd v Eadie*[915] Needham J said that 'a person executing an agreement under a mistake as to a fundamental term favouring the other party or being detrimental to him, which is not shared by the other party, may obtain rectification if he can produce convincing proof of his mistake and of the fact that the other party knew or had reason to know that the first party was labouring under such a mistake.'[916] On this basis, simple knowledge by the non-mistaken party is sufficient for the mistaken party to obtain rectification.

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[908] Ibid 16.
[909] Ibid 33. See *Majestic Homes Pty Ltd v Wise* [1978] Qd R 225 for a further example where the court focused on sharp practice.
[910] (1989) ANZ Conv R 403.
[911] Ibid 405.
[912] Ibid 406.
[913] Ibid 407.
[914] Ibid. An approach based on unconscionability was also adopted in *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614; *Kemp v Neptune Concrete Ltd* [1988] 2 EGLR 87; *Terceiro v First Mitmac Pty Ltd* (1997) 8 BPR 15,733; and *Eroc Pty Ltd v Amalg Resources NL* [2003] QSC 074. Unconscionability was also considered in *Leibler v Air New Zealand Ltd (No 2)* [1999] 1 VR 1. See also *Equititrust Ltd v Willaire Pty Ltd* [2012] QSC 206 where the decision in *Eroc Pty Ltd v Amalg Resources NL* [2003] QSC 074 was applied by McMurdo J.
[915] (Unreported, Supreme Court of New South Wales, Needham J, 13 March 1987).
[916] Ibid 10.

It is argued below that knowledge, of itself, is insufficient for rectification to be ordered because it imposes a contract on a party that is different from what that party consented to in circumstances where their conduct does not justify such a remedy.[917] Knowledge of the alleged mistake was also addressed in *Budget Stationery Supplies Pty Ltd v National Australia Bank Ltd*[918] where Santow J said, in relation to rectification for mistake, that 'the unmistaken party must, on the present state of the authorities, "know" of the other's mistake.'[919] In *International Advisor Systems Pty Ltd v XYYX Pty Ltd*[920] Brereton J considered knowledge, silence and sharp practice when his Honour said that the 'requirement for rectification in a case of unilateral (as distinct from common) mistake is, at least, knowledge on the part of the defendant of the plaintiff's mistake coupled with silence amounting to sharp practice.'[921] His Honour held that 'sharp practice falling short of actual fraud may suffice' and that 'actual knowledge of the mistake is not required; it is sufficient that the other party "must have known" or "strongly suspect" that the first party is making a mistake.'[922]

There has not been a consistent approach adopted across common law jurisdictions as to what knowledge or conduct is required for rectification to be granted. In Canada in *Stepps Investments Ltd v Security Capital Corp Ltd*[923] Grange J said that, in cases of unilateral mistake the plaintiff needs to show 'something from the opposite party in the way of knowledge or conduct'[924] in order to obtain a remedy. But in some cases, it has been held that actual knowledge of the mistake is not required for rectification to be granted. In *Downtown King West Development Corp v Massey Ferguson Industries Ltd*[925] Robins JA, delivering the

[917] For further cases where knowledge was considered sufficient for rectification to be ordered see: *Thermoplastic Foam Industries Pty Ltd v Imthouse Pty Ltd* (1990) 5 BPR 11,181; *McHattan v Saramoa Charters Pty Ltd* (Unreported, Federal Court of Australia, Kiefel J, 6 April 1995); *McHattan v Saramoa Charters Pty Ltd* (Unreported, Full Court of the Federal Court of Australia, Spender, Foster and Branson JJ, 17 September 1996) (Special leave to appeal to the High Court of Australia was refused: see *McHattan v Saramoa Charters Pty Ltd* [1997] 15 Leg Rep SL2); and *Eurocars (Northside) Pty Ltd v Francis Marketing Pty Ltd* [1995] NSWSC 69.
[918] (1996) 7 BPR 14,891.
[919] Ibid 14,936. An appeal to the New South Wales Court of Appeal was dismissed: see *National Australia Bank Ltd v Budget Stationery Supplies Pty Ltd* (1997) 217 ALR 365. See also *Perry v Dusty Hotel Pty Ltd* [2003] NSWSC 1215.
[920] [2008] NSWSC 2.
[921] Ibid [22].
[922] Ibid [23]. See also *Moobi Pty Ltd v Les Gunn Properties Pty Ltd* (2008) 14 BPR 27,035 where issues of sharp practice and unconscionability were considered in the context of an issue concerning the payment of GST on the sale of a property. For recent cases concerning the issue of GST and the sale price of a property see: *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2016] NSWSC 362; and *SSE Corp Pty Ltd v Toongabbie Investments Pty Ltd* [2016] NSWSC 1235.
[923] (1976) 14 OR (2d) 259.
[924] Ibid 270.
[925] (1996) 28 OR (3d) 327.

judgment of the Court of Appeal for Ontario, which included Labrosse and Abella JJA, said that 'rectification ought not to be limited to situations in which a party had actual knowledge of the existence of the other party's mistake at the time the contract was executed.'[926] Robins JA concluded that:

> Equity and fair dealing 'in modern commercial transactions require that this form of relief be available in situations where one party may not actually have known of the other's mistake but the mistake was of such a character and accompanied by such circumstances that the party had good reason to know of it and to know what was intended.[927]

In England in *James Hay Pension Trustees Ltd v Hird*[928] Lawrence Collins J focused on knowledge and unconscionability when his Honour said that in 'the case of alleged unilateral mistake by one party, the other party must have knowledge of the mistake such that it is unconscionable for the party with knowledge to rely on the agreement.'[929] In *Rowallan Group Ltd v Edgehill Portfolio No 1 Ltd*[930] the focus of the court was on both knowledge and sharp practice. Lightman J addressed a claim for rectification and said that a claimant was 'required to plead and establish that the Defendant had actual knowledge of the mistake.'[931] Lightman J said that there are two qualifications to the requirement that a non-mistaken party have actual knowledge of a unilateral mistake by the mistaken party:

> The first is that actual knowledge includes wilfully shutting one's eyes to the obvious and wilfully and recklessly failing to make such inquiries as an honest or reasonable man would make. The second is that if the Defendant intended that the Claimant should be mistaken in this regard and deliberately set about diverting the Claimant's attention from discovering the mistake, it is unnecessary that the Claimant actually knew that the Claimant was mistaken: it is sufficient that the Defendant merely suspected that it was so.[932]

These cases from Australia, Canada and England demonstrate that the courts have in various cases focused on knowledge, sharp practice, silence, unconscionability and fraud in determining whether rectification will be granted for so-called unilateral mistake. These cases fail to provide a unified approach as to when a contract should be imposed on a non-mistaken party. It is argued in this thesis that there is no justification for imposing a contract on a non-mistaken party in any circumstance other than cases of fraud, which are examined in Chapter

[926] Ibid 338.
[927] Ibid.
[928] [2005] EWHC 1093 (Ch).
[929] Ibid [114].
[930] [2007] EWHC 32 (Ch).
[931] Ibid [15].
[932] Ibid.

VI, and that courts should seek to identify an appropriate remedy without imposing an agreement on a party that that party has not consented to. In Section D below, cases concerning mistakes made by offerors and offerees are examined. It is argued that in these cases rectification should be provided *only as an optional remedy* so that a contract is *not imposed* on a non-mistaken party. Only in cases involving fraud is there justification for imposing a contract on a party through the equitable remedy of rectification. In cases of fraud, the correct focus should be on the fraud committed by the fraudulent party and not on the mistake of the mistaken party. Any remedy available in the circumstances provides relief against the fraud committed by the fraudulent party. The cases concerned with fraud will be examined in Chapter VI.

D *Mistakes made by offerors and offerees*

A mistake can occur when an offeror communicates their intended offer to an offeree. If an offeree is aware of an obvious mistake, the offeree will, in most cases, act appropriately and bring the mistake to the attention of the offeror before any agreement is formed so that the offeror can clarify his or her offer and the offeree can ensure that they are entertaining a legitimate offer from the offeror. But offerees do not always act in good faith and there are many cases of offerees snapping up bargains in circumstances where it should have been obvious to them that the offeror had made a mistake. Despite such conduct reflecting poorly on each offeree, the conduct does not, in itself, justify a court imposing a contract on an offeree different to the contract that they consented to. The better approach is to leave the offeror to seek any right they have to rescission and, if rescission is available, provide the offeree with an opportunity to an alternative remedy of forming an agreement on the terms that the offeror intended to communicate in their offer. This approach provides relief to the mistaken party without punishing the non-mistaken party for their opportunistic conduct.

A recent example of a so-called unilateral mistake where a mistake made in an offer was snapped up by an offeree occurred in *Priolo Corp Pty Ltd v Vantage Systems Pty Ltd*.[933] The defendant, Vantage Systems Pty Ltd, occupied office premises in West Perth pursuant to a lease entered into with the previous owner of the property, Gamol Pty Ltd (the Gamol Lease). There was also an agreement licensing six car bays to the defendant. The plaintiff, Priolo Corp

[933] [2013] WADC 158.

Pty Ltd, subsequently became the owner of the property. The Gamol Lease was due to expire on 30 June 2009. During June 2009, the parties entered into negotiations for a new lease and a new licence agreement for the six car bays. The plaintiff claimed that the parties had entered into an agreement to lease for a new three-year lease to commence on 1 July 2009. The parties failed to reach a concluded agreement as to the terms of the proposed new lease and on 6 October 2009 the defendant gave the plaintiff one month's notice of its intention to vacate the premises and asserted that it had occupied the premises since 1 July 2009 pursuant to a holding over clause in the Gamol Lease. The plaintiff commenced proceedings seeking relief including damages for breach of the alleged agreement to lease. The plaintiff also sought to have the proposal for a new car parking licence rectified on the basis that the proposal mistakenly referred to a licence fee of $375 per car bay *per annum* instead of $375 per car bay *per month*. Sleight DCJ held that there was a binding agreement to lease that was enforceable.[934] In relation to the rectification claim, Sleight DCJ held that the emailed proposal for the car parking licence should be rectified because the mistake in the proposal 'was never in dispute' in the proceedings and the conduct of the defendant in not alerting the plaintiff to the obvious mistake 'constituted a sharp practice.'[935] The defendant appealed to the Court of Appeal of the Supreme Court of Western Australia. In *Vantage Systems Pty Ltd v Priolo Corp Pty Ltd*[936] Buss JA, in dismissing the appeal, said that:

> In the present case, the trial judge's findings of fact in relation to Priolo's claim for rectification were compelling. Those findings have not been challenged in the appeal. In all the circumstances, Vantage's conduct in seeking to take advantage of Priolo's obvious and significant mistake in the revised proposal, being a mistake about which Vantage at all material times had actual knowledge, was unconscionable. This unconscionable conduct was such as to make it inequitable that Vantage should be permitted to object to the rectification of the revised proposal.[937]

McLure P[938] agreed with Buss JA as did Newnes JA[939] that the appeal should be dismissed. This decision highlights the significant difference between a mistake made in an offer and a mistake made in the recording of an agreement. Prior to the acceptance of the proposal from the plaintiff, concerning the car parking licence, there was no agreement about the price for each car bay. But based on the price in the earlier lease the defendant was well aware that there

[934] Ibid [67].
[935] Ibid [86].
[936] (2015) 47 WAR 547.
[937] Ibid 581.
[938] Ibid 551.
[939] Ibid 581.

was a mistake in the offer from the plaintiff. The defendant snapped up that offer knowing full well that there was a mistake and sought to take advantage of that mistake. The question that arises in such cases is whether a court is justified in imposing a different agreement on the non-mistaken party or whether the court should give the non-mistaken party an option to accept rescission of the agreement or to accept a rectified agreement. There is a significant risk in imposing an agreement on the non-mistaken party because it will not always be obvious that that person would have contracted on the basis of the offer that the mistaken party intended to make. In *Vantage Systems Pty Ltd v Priolo Corp Pty Ltd* it was obvious what offer the plaintiff intended to make and in the circumstances it was very likely that the non-mistaken party would have accepted the correct offer if it had been made. But that will not always be the case. Assume a vendor has a property they wish to sell and the vendor has an asking price of $500,000 for the property. In initial discussions with a potential purchaser, it is clear that the potential purchaser is interested in acquiring the property but wishes to negotiate a price below $500,000. The parties engage in various discussions but no counteroffer is made by the potential purchaser. Assume that the parties agree to meet for further negotiations and the vendor, keen to sell the property, has a contract prepared and intends to present a draft contract to the potential purchaser with a sale price of $480,000 and inform the potential purchaser that the offer to sell at $480,000 is not negotiable and is effectively a take it or leave it offer. When the parties meet, the vendor, as offeror, hands the draft contract to the potential purchaser, the offeree, and says, 'Have a read of this, if you want to accept this offer why don't we sign this contract now?'. The offeree looks through the draft contract and notices that the sale price has been recorded as $48,000. It is not clear to the offeree what offer the offeror was intending to make but it is obvious that there is a mistake in the draft contract. The offeror might have been intending to offer $480,000 but it could equally have been $485,000 or $488,000 or some other amount. It is not immediately clear what the offeror was intending. The offeree decides to sign the contract and the offeror also signs. The offeror, of course, does not notice the mistake. The only contract formed is for a sale of the property for $48,000. The offeror then seeks to have the agreement rectified and says that he intended to make an offer to sell the property for $480,000 and not $48,000. The court is satisfied that a mistake was made by the offeror and is also satisfied that the offeree has engaged in sharp practice and that it would be unconscionable for the offeree to acquire the property for $48,000. Rescission would be available in these circumstances[940] but a court would not be justified in rectifying the agreement so that the sale

[940] *Taylor v Johnson* (1983) 151 CLR 422.

price was amended to $480,000 and have that agreement imposed on the offeree. The offeree did not wish to purchase the property for $500,000 but it might be that if the negotiations had continued he may have made his highest offer at say $410,000 or $420,000 or some other amount much lower than the $480,000 intended to be offered by the offeror. To impose a contract on the purchaser with a sale price of $480,000 would punish the offeree for his opportunistic conduct. The better approach would be to award rescission and grant an option to the offeree to either agree that the offeror can have the agreement rescinded or the offeree could purchase the property for $480,000. This provides a just outcome for both parties and ensures that the offeror is provided with relief for his mistake and the offeree does not have a contract imposed on him simply because he has engaged in opportunistic conduct or what might be described as sharp practice.

But the current approach of the courts in some cases does impose a contract on the offeree on terms that the offeree has never consented to. This is the fundamental difference between cases of rectification for a mistake in the recording of an agreement and rectification for a mistake in the formation of an agreement. Where there is a mistake in the recording of an agreement, and rectification is granted, the rectified agreement is made to conform with what the parties *did in fact agree to* (on an objective basis) and thus no issue of imposing a contract on the non-mistaken party arises. But the situation is fundamentally different where there is a mistake in the formation of an agreement. In many cases, it will not be clear what the parties might have agreed in the absence of a mistake in an offer. To impose a contract on the non-mistaken party in such circumstances cannot be justified. But the granting of an option to the non-mistaken party to accept a contract based on the offer that the offeror intended to make is just and is in accordance with a line of cases discussed in Section B of this Chapter including *Garrard v Frankel*[941] and *Harris v Pepperell*.[942]

Similar issues arise where mistakes are made by an offeree when accepting an offer made by an offeror. In *A. Roberts & Co Ltd v Leicestershire County Council*[943] the plaintiff company tendered for work on the basis it would be completed within 18 months. The defendant council accepted the tender and provided the plaintiff with a written contract. But the council had decided that the time for completion of the works should be 30 months and not 18 months and

[941] (1862) 30 Beav 445; 54 ER 961.
[942] (1867) LR 5 Eq 1.
[943] [1961] 1 Ch 555.

prepared the contract on that basis but did not draw this to the attention of the plaintiff who had tendered on the basis of 18 months. The plaintiff executed the written contract and later sought to have it rectified either on the basis of common mistake or unilateral mistake. The claim for rectification based on common mistake failed because the council had not been mistaken. Pennycuick J held that the council were aware that the company signed the contract in the mistaken belief that it contained a completion date of 18 months and not 30 months.[944] Accordingly, his Honour held that the written agreement should be rectified based on unilateral mistake. In granting rectification Pennycuick J said that 'a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included.'[945] Pennycuick J said that:

> The principle is stated in Snell on Equity, 25th ed. (1960), p.569, as follows: "By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common".[946]

However, the principle stated in Snell on Equity is quite broad and goes beyond the principle stated earlier by Pennycuick J. In any event, there is no justification of imposing a contract on a non-mistaken party in these circumstances unless there is evidence of fraud. The principle stated in Snell on Equity, if adopted, could create injustice in the form of rectification that operates in a punitive manner. That cannot be justified where the conduct of the non-mistaken party is opportunistic rather than fraudulent. The better approach is to allow the mistaken party to rely on the remedy of rescission if that remedy is available in the circumstances and to offer rectification as an alternative remedy.[947]

A mistake was made in accepting an offer by an offeree in *The Ypatia Halcoussi*[948] where the plaintiffs chartered their vessel, *Ypatia Halcoussi*, to the defendants under a time charter. Disputes arose between the parties and one of those disputes went to arbitration. The parties entered into negotiations to settle the matters that had been referred to arbitration. However,

[944] Ibid 573.
[945] Ibid 570.
[946] Ibid.
[947] The issue also arose in *Agip SpA v Navigazione Alta Italia SpA* [1983] 2 Lloyd's Rep 333; and *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353.
[948] [1985] 2 Lloyd's Rep 364.

there was an additional amount due to the defendant by the plaintiffs of some US$74,000 which was reflected in a hire statement dated 3 July 1981. Some of the negotiations were conducted by reference to the matters in dispute in the arbitration but the final offer made by the plaintiff by telex on 8 June 1982, that the defendant pay the plaintiffs an amount of US$195,000, referred to 'all outstanding claims and amounts whatsoever arising out of the said timecharter, both parties to forgo all claims and demands against the other'. The offer made by the plaintiffs was accepted by the defendant on 9 June 1982. On 10 June 1982 the Japanese office of the defendant informed their London office of the US$74,000 credit balance in their favour. When settlement of the compromise agreement reached on 9 June 1982 was due to occur on 17 June 1982 the defendant offered the plaintiff payment of the agreed amount less the US$74,000 credit that they claimed was not part of the compromise agreement. The plaintiffs disagreed with the position adopted by the defendant and commenced proceedings to recover the US$74,000, and the defendant counterclaimed seeking rectification of the plaintiffs' telex of 8 June 1982 to the effect that the US$74,000 due to the defendant would be offset against the agreed compromise amount. The claim for rectification was made based on common mistake and in the alternative, unilateral mistake. The claim for rectification for common mistake failed. Bingham J then considered the defendant's alternative rectification claim based on unilateral mistake. Bingham J said that first, 'the defendants must show that they mistakenly believed the written instrument to be an accurate expression of their bargain with the plaintiffs when in truth it was not.'[949] His Honour said that in respect of this requirement the defendants 'face the insuperable difficulties that there was no bargain other than that expressed in these telexes and that the defendants had no belief about the $74,000 balance because they had wholly forgotten it.'[950] His Honour said that it must be shown that the plaintiffs' representative 'had actual knowledge of the defendants' mistake at the time the telex agreement was made. This cannot be shown.'[951] Bingham J said that the plaintiffs' conduct 'must be shown to be unconscionable so as to lead equity to intervene.'[952] His Honour concluded, on this requirement, that 'the plaintiffs made their offer in clear and categorical terms. There was nothing evasive or misleading about the language used.'[953] His Honour then explained why rectification could not be ordered in this case when he said that:

[949] Ibid 371.
[950] Ibid.
[951] Ibid.
[952] Ibid.
[953] Ibid.

> In any case where rectification is ordered on the ground of unilateral mistake, the effect is to impose on the non-mistaken party an agreement which, at the time of executing the written instrument, he did not intend to make. This may be justified where it is clearly shown both that there was a bargain between the parties from which the written instrument departed and that the non-mistaken party has sought to take unconscionable advantage of the departure. But the effect of an order made in these circumstances provides one cogent reason why the Courts insist on convincing proof before granting relief. The present case demonstrates the justice of this approach. If rectification were ordered the plaintiffs would receive $195,000, less the $74,000 balance, in full and final settlement of all claims and cross-claims under the time charter. This was not the effect of the written agreement made, as the defendants by their claim to rectification accept. But nor was it the effect of any offer or counter-offer made or considered at any stage during the negotiation.[954]

Accordingly, the defendant's counterclaim for rectification was dismissed and there was judgment for the plaintiffs for the balance of US$74,000 sought under the compromise agreement. Rectification was properly denied in this case because there was no justification in imposing a different agreement on the non-mistaken party simply because of the mistake made by the defendant. The circumstances of this case did not justify the granting of rescission and accordingly, the circumstances do not justify the remedy of rectification as an optional remedy to rescission.

As with the cases concerning mistakes made by offerors, there is no justification in granting rectification in these cases of mistakes made by an offeree in accepting an offer because to do so would impose a contract on the non-mistaken party in circumstances where their conduct does not amount to fraud. Although their conduct may, in some cases, have fallen short of the standard of conduct expected of contracting parties negotiating in good faith this does not justify imposing a contract on such parties. The better approach is to allow the mistaken party to pursue any claim they have for rescission, and if rescission is available, allow the non-mistaken party to either accept rescission of the agreement or to accept the contract on the terms intended by the other party.

E *Rationale for this category of rectification*

The rationale for granting rectification in circumstances where a mistake has occurred in the recording of a prior agreement was examined in Chapter IV. The rationale for rectification in these circumstances is to ensure that parties are kept to their promises. Rectification in such circumstances operates to bring the written document into line with the agreement reached

[954] Ibid.

earlier between the parties. But where rectification is available for mistakes made in the formation of an agreement different considerations apply. Many of the cases suggest that unconscionability is the justification for rectification in these cases. But that is based on the notion that it is acceptable to impose a contract on a non-mistaken party if that party has knowledge of the other party's mistake[955] or engages in sharp practice[956] that is considered unconscionable,[957] such as snapping up a bargain. That approach is rejected in this thesis. Instead, it has been argued in this Chapter that the courts should not impose a contract on a party unless that party has engaged in fraud. Knowledge of the mistake by the other party is not sufficient. Granting a non-mistaken party with an option to accept an offer that the mistaken party intended to make can be justified to avoid denying that party the opportunity to proceed with the transaction simply because their conduct was not in accordance with the standards expected of parties negotiating in good faith. Essentially, the non-mistaken party is given the opportunity to enter into a contract by consent on the terms that the mistaken party intended to communicate in their offer.

Other alternatives have been advocated. Professor McLauchlan[958] advocates an approach whereby the non-mistaken party 'is held bound to a contract he did not actually intend to make' in circumstances where that party led the mistaken party 'reasonably to believe that he assented to the claimant's understanding of the terms, so that rectification will give effect to the parties' agreement as objectively ascertained.'[959] Professor McLauchlan says that in these circumstances rectification is required, not to punish the non-mistaken party 'by imposing on him an agreement he did not make, but to give effect to the true bargain as objectively ascertained.'[960] Professor McLauchlan's position is based on the idea that in these cases rectification is not providing relief for some wrongful behaviour by the non-mistaken party but is providing relief for a mistake in the recording of an agreement made between the parties. Professor McLauchlan uses an example of where the non-mistaken party knows of a mistake made throughout the negotiations by the mistaken party but fails to point it out. In these circumstances he says that:

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[955] See *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013) 16 HKCFAR 336.
[956] See *Weeds v Blaney* (1978) 247 EG 212.
[957] See *Fraser v Houston* (2006) 51 BCLR (4th) 82.
[958] David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 *Law Quarterly Review* 608.
[959] Ibid 609-10.
[960] Ibid 613.

> Here there will have to be something in the conduct of the other party, whether or not that conduct be stigmatised as in bad faith, that entitled the claimant to believe that her understanding had been accepted. If there is, rectification will be justified because the written contract failed to record the objective consensus, not because of the conduct itself.[961]

One difficulty with this approach is that if the non-mistaken party remains silent and the mistaken party proceeds to sign a document that contains the mistake, it is difficult to see how the silence and opportunistic conduct of the non-mistaken party justifies concluding that there was an actual agreement formed between the parties based on the terms that the mistaken party intended to communicate. One case examined by Professor McLauchlan to demonstrate how the courts have adopted the wrong approach, and why the approach he advocates should have been adopted, is *George Wimpey UK Ltd v V. I. Constructions Ltd*[962] where the parties negotiated a contract for the sale by the defendant (VIC) to the claimant (Wimpey) of residential development land. The contract contained a formula which provided for the payment of an overage of 50 per cent of the amount by which the sale proceeds of the residential units to be built on the site exceeded an agreed base figure. An important component of the formula was a factor 'E' and that factor was included in numerous drafts of the agreement before it was omitted by mistake by an officer of VIC. The mistake was discovered by VIC before the revised draft document was sent to Wimpey and VIC hoped that Wimpey would not notice the mistake, which is ultimately what occurred. Wimpey sought to have the document rectified based on unilateral mistake and were successful at first instance based on the trial judge's view that VIC had been dishonest. But on appeal that decision was overturned. The Court of Appeal determined that VIC's conduct was not dishonest and did not justify rectification. Professor McLauchlan argues that 'it is at least arguable that rectification was unfairly denied' and that this was a case 'where the claimant probably did reasonably believe that its understanding of the term in question had been accepted.'[963] It is arguable that rectification was wrongly denied by the Court of Appeal but rectification was wrongly denied for a fundamentally different reason. Professor McLauchlan focuses on whether VIC agreed to Wimpey's understanding of the term in question. The better approach, which is consistent with the approach subsequently taken by the Court of Appeal in *Daventry* and examined in Chapter IV of this thesis is to identify what the parties earlier agreed and compare that to what has been recorded. If there is a difference, as there was in this case because the earlier agreement to

[961] Ibid 621.
[962] [2005] EWCA Civ 77.
[963] McLauchlan, above n 958, 628.

include factor 'E' in the formula was not included in the formula in the final document, rectification will be granted *unless* there has been a renegotiation away from including factor 'E' in the formula. In this case VIC proposed some minor adjustments to the formula and at no time did VIC propose that factor 'E' be deleted from the formula. A mistake was made by VIC when redrafting the formula to include the minor proposed adjustments. VIC had the evidentiary burden to show that there had been a renegotiation that included deleting factor 'E' from the formula. The judgment indicates that there was never any such renegotiation and, accordingly, Professor McLauchlan is correct to argue that the Court of Appeal most likely wrongly denied rectification of the agreement when allowing the appeal. But rectification should have been granted on the basis that the agreement did not reflect what had earlier been agreed in relation to factor 'E' in the formula. This is a case of a mistake in the recording of an agreement and should be resolved in accordance with the approach set out in Chapter IV. As argued throughout this thesis, unnecessary complexity arises when cases are resolved by reference to common or mutual mistake and unilateral mistake. Only one party was mistaken in this case but it is a case of a mistake in the recording of an agreement and not a mistake in the formation of an agreement. It is not necessary to resolve the case based on Professor McLauchlan's approach of identifying whether the non-mistaken party led the mistaken party to believe that they were consenting to the mistaken party's understanding of the agreement. In fact, there never was any relevant offer and acceptance around that 'understanding'. The relevant offer and acceptance took place *before* the mistake was made. The parties had agreed that factor 'E' was to form a key part of the formula and this occurred in numerous drafts of the agreement before the mistake even occurred. The case can be resolved on the basis of identifying what was agreed between the parties and comparing that to what was recorded and treating as irrelevant who had knowledge of the mistake.

Lord Hoffmann, writing extra-judicially,[964] has noted that the approach advocated by Professor McLauchlan attempts to provide a unified theory for common and mutual mistake rectification (what Lord Hoffmann refers to as document rectification) and unilateral rectification (what Lord Hoffmann refers to as contract rectification) and that in doing so Professor McLauchlan 'wishes to show that they are both applications of the same principle.'[965] The approach advocated by Professor McLauchlan is expressly rejected by Lord Hoffmann when his

[964] Lord Hoffmann, above n 20.
[965] Ibid [34].

Lordship says that 'I think that, in England at least, this enterprise is doomed' because 'they are applications of quite different principles'[966] being the 'principle of keeping one's promises' (document rectification) and the 'principle of negotiating in good faith' [967] (contract rectification). That is, the rationale for rectification for so-called unilateral mistake, where that remedy is offered, should be seen as a remedy to ensure that parties negotiate in good faith and do not take advantage of a mistake. As the remedy should be available as an alternative to rescission, this rationale is consistent with the rationale for rescission which provides a remedy to restore the parties to their position prior to the mistake where one party has sought to take advantage of a mistake made by the other party.

F *Conclusions*

When rectification cases are classified based on the type of mistake made, between cases of mistakes in the recording of agreements and mistakes made during the formation of an agreement, the focus shifts to understanding the different rationales involved in each case. Mistakes made during the formation of a contract are fundamentally different from mistakes made in the recording of a prior agreement. Where there is a mistake in the recording of an agreement the rationale for granting rectification, as explained in Chapter IV, is to ensure that people are kept to their promises. But where a mistake is made during the formation of an agreement, rectification requires a different justification. In the absence of fraud, the non-mistaken party may be given the option to form a contract on the terms that the mistaken party intended to communicate but only in circumstances where the mistaken party is entitled to rescission. Rectification at the election of the non-mistaken party operates as an alternative remedy to rescission. Where fraud is involved courts are justified in imposing a contract on the fraudulent party, as examined in Chapter VI. The approach advocated by Professor McLauchlan is unnecessary and is predicated on a distinction between cases of common or mutual mistake and cases of unilateral mistake: a distinction rejected as unhelpful and irrelevant in this thesis.

Chapters IV and V have examined cases were rectification has been awarded to correct mistakes. But the remedy of rectification is not restricted to the correction of mistakes.

[966] Ibid [35].
[967] Ibid [47].

Rectification is also available in cases where a fraud has been committed. Unlike cases concerning mistakes, in cases of fraud the courts impose a contract on the fraudulent party that is different from the contract that that party consented to. This punitive remedy is examined in the next Chapter.

VI RECTIFICATION FOR FRAUD

A *Introduction*

In Chapter V several cases were examined where the courts have considered mistakes made during the formation of contracts. These types of mistakes often involve an offeror making a mistake when communicating their intended offer to an offeree or an offeree making a mistake when accepting an offer made by an offeror. In determining whether rectification should be available in these cases the courts examine the conduct of the non-mistaken party with the purpose of identifying whether that party had knowledge of the mistake or engaged in unconscionable conduct or sharp practice. It was explained in Chapter V that the courts have adopted an inconsistent approach in these cases and that, in any event, there is no justification for imposing a contract on a non-mistaken party unless that party has engaged in fraud. In this Chapter, cases involving fraud are examined and it is argued that the courts are justified in responding to fraudulent conduct by imposing a contract on a fraudulent party.

B *Cases concerned with rectification for fraud*

The issue of rectification for fraud was addressed in *Ball v Storie*[968] where the Vice-Chancellor, Sir John Leach, made specific reference to rectification for fraud when he said that a 'Court of Equity does … assume a jurisdiction to reform instruments, which, either by the fraud or mistake of the drawer, admit of a construction inconsistent with the true agreement of the parties.'[969] The Vice-Chancellor made a clear distinction between cases of mistake and cases of fraud. That distinction is important because where there is an absence of fraud the court responds to any mistake but where fraud is present it is not necessary to also prove that the innocent party was mistaken. In essence, if an innocent party is deceived by a fraudulent party, it is artificial to describe the innocent party as mistaken. But in some cases courts have referred to a need to show both mistake and fraud. In *May v Platt*[970] Farwell J said that 'I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation

[968] (1823) 1 Sim & St 210; 57 ER 84.
[969] Ibid 219.
[970] [1900] 1 Ch 616.

amounting to fraud.'[971] In Canada in *McMillen v Chapman*[972] McRuer CJHC said that in 'order to obtain rectification on the ground of unilateral mistake it must be shown that the mistake was of such a character that it would be obvious to the other party, and that his taking advantage of it would amount to fraud or misrepresentation amounting to fraud.'[973]

The issue of fraud arose in Canada again in *Local 7297, United Mine Workers of America v Canmore Mines & Dillingham Corp Canada Ltd*[974] where the plaintiff union was the bargaining agent for the employees of the defendant corporation. The parties were negotiating a new collective agreement as well as the establishment of a new pension plan. The negotiating position of the union was that the collective agreement and the pension plan must have the same termination date. The collective agreement was being negotiated to expire on 31 December 1980. The then existing pension plan, pursuant to article 31 of the expiring collective agreement, expired on 31 December 1978. The agreed negotiating position was that article 31 would continue but with an expiry date of the pension plan of 31 December 1980 rather than 31 December 1978. The company prepared a draft agreement with the pension plan terminating on 31 December 1978. The company forwarded the draft agreement to the union in the full knowledge that it contained an error and that the agreed position for the expiry of the pension plan was 31 December 1980. Prior to the signing of the agreement, company officials instructed the representatives in the negotiations to report back should the union raise any questions in relation to article 31 which contained an expiry date for the pension plan of 31 December 1978. The company had decided to close the mine where the employees worked but had not disclosed that decision to the union or to the employees. The parties entered into the agreement and the company purported to rely on article 31 to terminate the pension plan with effect from 31 December 1979. The union commenced proceedings to have the collective agreement rectified. McFadyen J said that:

> I am satisfied that Company officials, being aware that the mine would be closed down, either instructed that the date in Art. 31 not be changed or, having been made aware of an "error" in typing the agreement, decided not to correct the Article or to raise any issue with the union, hoping that it would pass unnoticed and hoping that it might give the Company some basis on which to argue for an early termination of its obligations to pay contributions to the pension plan.[975]

[971] Ibid 623.
[972] [1953] OR 399.
[973] Ibid 405.
[974] (1985) 28 BLR 250.
[975] Ibid 256.

Her Honour said that 'it is obvious that the date December 31, 1978 in Art. 31 is in error.'[976] Her Honour held that the agreement was to be rectified 'to reflect the agreement which was reached by the parties.'[977] That is, this was a case of rectification for a mistake in the recording of an agreement. Her Honour said that even 'if this were a case of unilateral mistake on the part of union representatives I would have held in favour of the plaintiffs in light of the deliberate conduct by the agents of the Company.'[978] McFadyen J said that:

> Such conduct, in my view, falls within the authorities which permit rectification in the event of a unilateral mistake induced by fraud or conduct akin to fraud. While I am not prepared to find fraudulent conduct in this matter I am prepared to find that the conduct of the Company's representatives in light of the knowledge which they had at the time the agreement was signed was such as would have entitled the plaintiffs to rectification.[979]

That is, if the plaintiffs had not succeeded on the basis of rectification for a mistake in the recording of an agreement, her Honour would have imposed a different contract on the defendant company than the contract they made in writing, even in circumstances where the conduct of the defendant company did not amount to fraud, but was in sufficiently bad faith to justify the court awarding rectification. For there to be certainty in the law rectification should only be imposed on a party if that party has engaged in fraud or conduct that the court considers to be akin to fraud. Nevertheless, the decision in this case makes it clear that the courts are justified in making a distinction between cases of mistake and cases of fraud.

The issue arose again in Canada in *Metropolitan Stores of Canada Ltd v Nova Construction Co Ltd*[980] where a lease of premises in a shopping centre was negotiated as part of a settlement of litigation. The lease contained provisions protecting the tenant, the appellant, against competition but the lease included a proviso that had the effect of removing the protection in any expansion of the shopping centre onto neighbouring land. During the negotiations, the lessee asked the lessor's representative the purpose of the proviso and was told that what was contemplated was expansion within the existing shopping centre lands. After the lease was executed the respondent lessor expanded the shopping centre on to land that it had acquired adjacent to the existing shopping centre. The lessor proceeded to lease part of the expanded

[976] Ibid 257.
[977] Ibid 260.
[978] Ibid 260-61.
[979] Ibid 261.
[980] (1988) 50 DLR (4th) 508.

shopping centre to a tenant that was a competitor of the appellant. The appellant sought to have the lease rectified. Hallett J held that the appellant had been fraudulently induced to sign the lease by the respondent giving the appellant the impression that the only purpose of the proviso was to enable an expansion of the existing shopping centre located on the original area. The respondent also knew that the appellant was of the view that the lease would protect them from competition within a two-mile radius. But his Honour rejected the claim for rectification and held that rescission and damages were the only remedies available. The appellant appealed to the Appeal Division of the Nova Scotia Supreme Court. Hart JA delivered the judgment of the court that included Jones and MacKeigan JJA. Hart JA said that:

> In my opinion, the trial judge incorrectly rejected the remedy of rectification when he had found that Metropolitan was fraudulently induced to enter into the contract without the protection from competition that it had intended to obtain. This was not a case of unilateral mistake in the true contractual sense where a court should be leery of imposing unintended terms upon one party to a contract. This is a situation where Nova affirmatively led Metropolitan to believe that the inclusion of cl. 6.02(B) would not deprive them of the protection against Nova's participation in a competitive business within two miles of the Antigonish Shopping Centre. The very fact that Mr. Mayhew led Metropolitan to believe that the clause would not defeat their intention would be sufficient evidence to justify the rectification of the document so as to make it do what Nova said it was intended to do.[981]

Hart JA went on to say that it is 'in circumstances such as this that courts of equity have traditionally exercised their jurisdiction to prevent an injustice and, in my opinion, the way to accomplish this here would be to rectify the lease to make it conform with the acknowledged intention of the parties.'[982] Accordingly, the appeal was allowed. In this case the conduct of the Nova was fraudulent and the court was justified in imposing a contract on Nova that it had not consented to.

A clear case of a premeditated fraud occurred in another Canadian case in *Montreal Trust Co v Maley*[983] where the respondent owned several farming properties that were surplus to its requirements and it decided to sell the surplus land during 1986 and 1987. The appellant, Maley, agreed to buy a farming property from the respondent. Maley was an employee of the respondent and was responsible for organising the sale of surplus land for the respondent. He knew that it was the respondent's general policy to reserve oil leases from all such sales of land. In May 1987 Maley was advised by his employer that his services would be terminated

[981] Ibid 522.
[982] Ibid.
[983] (1992) 99 DLR (4th) 257.

with effect from 30 June 1987 because the sale of the surplus land meant that his services were no longer required. Prior to receiving his termination notice Maley had indicated an interest in buying one of the properties earmarked for sale by the respondent. He was advised that it was against the company's policy to sell any land to an employee. However, once he was advised that his employment was to be terminated the company agreed to sell the relevant land to him for C$15,000. The land had several oil leases on it that grossed C$13,600 per annum to Montreal Trust. Maley suggested to Montreal Trust that a lawyer, other than the lawyer who conducted the previous sales for the company, be used for the transaction. Montreal Trust agreed, and the documents were prepared that did not exclude the oil leases from the sale. Maley ensured that the documents were sent to a person in Montreal Trust who was not familiar with the oil leases. The transfer of the property proceeded, including the oil leases, and a few weeks later Maley sent Montreal Trust an assignment of the oil leases for signature. Once Montreal Trust realised what had occurred they commenced proceedings to have the agreement rectified to expressly exclude the oil leases. The trial judge ordered rectification and Maley appealed to the Saskatchewan Court of Appeal.

Wakeling JA, delivering the judgment of the Saskatchewan Court of Appeal which included Lane and Jackson JJA, said that if 'the mistake here is to be subject to rectification, it must be on the basis that the conduct of Maley was sufficiently reprehensible as to place it in a special category.'[984] His Honour said that in other judgments 'the special category has been variously described as fraud, the equivalent of fraud, misrepresentation amounting to fraud, sharp practice and unconscionable conduct.'[985] His Honour said that in 'this case, Maley's conduct has been found to be the equivalent of fraud and there is certainly evidence to support that conclusion. Maley has therefore been placed in that special category which would warrant an order for rectification of this contract.'[986] Accordingly, the appeal was dismissed[987] with the result being that a new contract was imposed on Maley. This was not a case of snapping up a bargain because of a mistake made by an offeror, rather it was a case of an offeror deceiving the offeree into accepting an offer knowing that the offeree would not have accepted the offer if they were fully aware of all the facts and the full implications of the offer. The court was fully justified in imposing a contract on Maley to provide relief against his fraudulent conduct.

[984] Ibid 261.
[985] Ibid.
[986] Ibid 262.
[987] Ibid 263.

The issue of fraud arose in England in *Commission for the New Towns v Cooper (Great Britain) Ltd*[988] where the plaintiff had leased a property to Burton Group plc (Burton) and subsequently Burton assigned the lease to Edison Halo Ltd (EHL). The arrangement between the plaintiff and EHL included a put option whereby the plaintiff was bound to take an assignment of the lease from EHL on the latter giving appropriate notice. The put option agreement was personal to EHL. The business of EHL was later sold to the defendant. Sometime later the defendant was considering closing the business and desired to obtain the benefit of the put option that had been enjoyed by EHL. Representatives of the defendant met with representatives of the plaintiff to resolve a dispute that had arisen between them. At that meeting the representatives of the defendant misled the plaintiff's representatives and sought to get the plaintiff to grant to the defendant the same rights that EHL had in relation to the property which included the put option. They did this by suggesting that they might be expanding their operations and thus might wish to take advantage of an option that EHL had enjoyed to take a lease over an adjacent property. This was completely misleading because the defendant in fact intended to close the business. The defendant subsequently wrote to the plaintiff stating that 'you confirmed at our meeting that you will treat [the defendant] in all respects as having the same rights and benefits under the original documentation as Edison Halo Ltd.' [989] The plaintiff confirmed the agreement. The defendant subsequently purported to exercise the put option. The plaintiff commenced proceedings seeking a declaration that the defendant was not entitled to exercise the put option. The trial judge held that the plaintiff was not entitled to rectification because the defendant did not have actual knowledge of the plaintiff's mistake. However, the trial judge held that the exchange of documents between the parties did not constitute an exchange of contracts so as to satisfy the provisions of s 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) which required that all the terms of a contract be contained in one document or where contracts are exchanged, in each contract. The defendant appealed to the Court of Appeal on the issue of rectification and the plaintiff cross-appealed contending that the put option was not included in the rights granted to the defendant. On appeal, the plaintiff succeeded on the cross-appeal and accordingly it was not necessary to resolve the defendant's appeal concerning rectification. However, Stuart-Smith LJ said:

[988] [1995] Ch 259. For comment on the case see David Wright, 'Rectification for Unilateral Mistake' (1996) 4 *Australian Property Law Journal* 1.
[989] Ibid 270.

> But were it necessary to do so in this case, I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted.[990]

More recently in Australia in *Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust*[991] Barrett J said with reference to *Taylor v Johnson*,[992] that in 'the case of unilateral mistake, where the actuating misapprehension is said to have operated upon one party but not the other, rectification is generally not permissible. There is, however, an exception where the party not under the misapprehension is guilty of fraud, whether actual, constructive or equitable.'[993]

It is important to distinguish between conduct that is fraudulent and conduct that, although to be discouraged, does not amount to fraud. The focus should be on determining whether the conduct amounts to fraud and the conduct will usually involve some specific action undertaken by that party that amounts to deception or blatant fraud. Simply snapping up a bargain will not be sufficient.

C *Conclusions*

It is clear from the cases examined in this Chapter, that where the conduct of a party is clearly fraudulent rectification will be available and a contract will be imposed on the fraudulent party. But in other cases the relevant conduct will need to be carefully examined to determine whether it should be considered as equivalent to fraud. The cases examined in this Chapter included deliberate acts of deception such as the conduct of Mr Maley in *Montreal Trust Co v Maley*[994] where he set out to deceive the vendor concerning the inclusion of the oil leases in the contract for the sale of the farming property, and the deliberate act of the defendant corporation in *Local 7297, United Mine Workers of America v Canmore Mines & Dillingham Corp Canada Ltd*[995] where the defendant was successful in ensuring that the plaintiff union did not become aware of the true position in relation to the expiry date of the pension plan in the collective agreement. In those cases, the conduct of the fraudulent party went beyond being described as

[990] Ibid 280.
[991] (2004) 11 BPR 21,629.
[992] (1983) 151 CLR 422.
[993] (2004) 11 BPR 21629, 21636. See also *Smith v Smith (now Vocalan)* (2004) 12 BPR 23,051, 23,066-7.
[994] (1992) 99 DLR (4th) 257.
[995] (1985) 28 BLR 250.

unconscionable, sharp practice or unconscionable dealing. Other equitable remedies such as rescission can be justified where the conduct is categorised as unconscionable, sharp practice or unconscionable dealing, but something more is required to justify the remedy of rectification because rectification imposes a contract on a person who never consented to the terms of that contract. The remedy is essentially punitive because it denies the person who has the contract imposed on them the opportunity to freely negotiate an agreement. By their conduct, the agreement that they consented to was only entered into by the innocent party because of the fraudulent conduct. What agreement the parties might have entered into, if any, in the absence of the fraud will often only be the subject of speculation. Nevertheless, as the cases discussed in this Chapter demonstrate, courts are prepared to impose a contract on a fraudulent party in some circumstances. The precise test for the level of fraud required will require further consideration by the courts but the level of fraud should be set at a higher level than unconscionability or sharp practice so that a contract is not imposed on an opportunistic party whose conduct does not justify what is essentially a punitive remedy. It should not be assumed that the conduct that justifies the remedy of rescission will also justify rectification. As demonstrated in his Chapter, there are only limited cases that have dealt directly with the issue of rectification for fraudulent conduct and the issue will require further consideration by the courts.

This Chapter has examined cases where the courts have imposed a contract on a fraudulent party through the remedy of rectification. Together with the cases examined in Chapters IV and V these cases cover the most common types of cases where rectification has traditionally been available. The next Chapter examines a more recent development of the law which concerns cases where rectification has been awarded where there has been a mistake in the meaning or effect of the words used by the parties.

VII RECTIFICATION FOR MISTAKES CONCERNING THE MEANING OR EFFECT OF THE WORDS USED

A *Introduction*

In Chapter IV several cases were examined that concerned erroneous assumptions and false beliefs. In those cases the courts held that erroneous assumptions and false beliefs were not mistakes for the purposes of mistakes in the recording of agreements. Accordingly, rectification is not available in such circumstances unless the party seeking rectification can persuade the court that an agreement was reached on a particular matter despite the false assumption. However, another line of cases, focused on the meaning or legal effect of the words used by the parties, indicate that the courts will, in some limited circumstances, grant rectification where the parties have not achieved the result they intended in their written document. Rectification will not be necessary in these cases if, through the process of common law construction, the court arrives at a meaning of the words used that coincides with what the parties had agreed.

Rectification is justified in some of these cases if there has been a mistake made by the parties when recording what they had previously agreed. Like the core case of rectification it is an exercise in comparing what has been agreed with what has been recorded. But if what has been agreed has been correctly recorded, rectification should not be awarded because it is not available to make a new agreement for the parties. That is, if what the parties agreed does not, in hindsight, achieve what they intended, rectification should properly be denied. The parties are bound by what they have agreed and rectification should only be awarded to provide a remedy where there has been a mistake in recording what has been agreed. The correct approach in these cases must always be to identify what the parties have agreed and then compare that to the written document. That is because, as explained in Chapter III, rectification of contractual agreements is concerned with agreements and not with intentions.

In relation to non-contractual documents such as deed polls and voluntary transactions rectification can be granted where the person who executed the document was ignorant of a statutory provision, provided that the intention of that person is clear to the court. In these cases, unlike cases involving contractual documents, the courts give effect to the intention of

the party who executed the document. If the words used in a document do not achieve the subjective intention of the party who executed the document, the court is fully justified in granting rectification. Evidence of the subjective intention of the person who executed the document will be necessary.

Statutory provisions can impact on contractual rights and obligations. Rectification will be denied where the parties to an agreement were ignorant of a statutory provision, or failed to properly account for the relevant statutory provision, when they formed their contractual agreement unless they can show that there has been a mistake between what was agreed and what was recorded. The cases examined in this Chapter indicate that, in order to show such a mistake in the contractual context, what was agreed will need to be clearly established. Some of the cases in this area concerning contractual agreements are difficult to reconcile because of the fine distinction between what the parties agreed and what the words used in the document mean. Difficulties also arise if the court focuses on the intentions of the parties (and the court seeks to give effect to their intentions) rather than focusing on what the parties have agreed.

B *The legal effect of words used in marriage settlements and contractual agreements*

The issue of the meaning of the words used in a document was considered in *Walker v Armstrong*.[996] A marriage settlement was made in June 1824 between the plaintiff, Captain Walker, and his wife. Subsequently, the parties determined that there were several errors in the settlement that they wanted corrected and a deed of appointment dated 17 May 1825 was executed (the 1825 Deed). In February 1827 Mrs Walker made her will. Many years later Captain Walker and Mrs Walker received advice from their solicitor, Mr Perry, that there was an error in the 1825 Deed relating to life interests in several estates and a further deed was executed on 24 October 1840 (the 1840 Deed). Mrs Walker died in December 1854. An issue then arose as to whether the 1840 Deed had the unintended consequence of revoking Mrs Walker's will which had been made in 1827. Captain Walker sought to have the 1840 Deed rectified. In holding that the 1840 Deed should be rectified, Knight Bruce LJ held that when drafting the 1840 Deed Mr Perry, the solicitor, had gone 'materially beyond his instructions and authority.'[997] His Lordship said that when Captain Wright and Mrs Wright executed the

[996] (1856) 8 De G M & G 531; 44 ER 495.
[997] Ibid 541.

1840 Deed they considered that it provided only for the changes to the life estates that they had requested and that 'so far as it exceeded that particular and restricted purpose, it was contrary to their wishes, opposed to their intention, and executed by them in error.'[998] Lord Justice Turner agreed and said that 'the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been committed.'[999] Although the language used by the court referred to the intention of the parties, it is clear from the decision that the court was satisfied that the solicitor who drafted the deed included clauses that had not been agreed to by the parties. Accordingly, it was appropriate in this case to rectify the deed because there was a mistake between what had been agreed and what had been recorded. But the courts will not rectify a document when the evidence shows that the document does give effect to the intentions of the parties as reflected in their agreement and in their instructions to the person drafting the document.[1000]

In the context of an alleged mistake in a written contractual agreement, in *Powell v Smith*[1001] the Master of the Rolls, Lord Romilly, said that 'here the words of the agreement are quite certain, and the only thing that was not understood was the legal effect of certain words which it contained. Now that is no ground of mistake at all.'[1002] A similar position was adopted in *Campbell v Edwards*[1003] where Strong J said that when 'a party assents intentionally to a contract, but under a mistake as to the effect and construction of the terms in which it is expressed, he can have no relief in equity, for in such a case there cannot be said to be any mistake in the instrument.'[1004] These decisions demonstrate that it will often be difficult to convince a court that rectification should be granted where the words used in a written contract have a clear meaning. To overcome this difficulty, and to obtain rectification, it is necessary to adduce evidence of what the parties agreed and to convince the court that what was recorded differed from what was agreed. In *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd (No 3)*[1005] Allanson J was satisfied that the remedy of rectification 'is available when the parties are mistaken as to the legal effect of the words chosen by them to

[998] Ibid.
[999] Ibid 544.
[1000] See *Constantinidi v Ralli* [1935] 1 Ch 427.
[1001] (1872) LR 14 Eq 85.
[1002] Ibid 90.
[1003] (1876) 24 Grant 152.
[1004] Ibid 175.
[1005] [2012] WASC 481.

record their agreement.'[1006] Whether rectification will be granted in these cases will depend upon whether the written document reflects what the parties previously agreed. If it does, rectification will not be available, but if it can be shown that the words chosen by the parties and the meaning attributed to those words does not reflect what they previously agreed, rectification should be available.

For rectification to be granted it is critical to show what was agreed between the parties. Arguing that one of the parties is mistaken as to the correct construction of an agreement will not be sufficient. The relevant mistake needs to be in the recording of what has been agreed. This is reflected in the decision in *Wiluna Road Board v Bonola*[1007] where the plaintiff claimed rectification of documents alleged to constitute a contract. The trial judge, Dwyer J, held that the parties had not been ad idem and that accordingly there was no contract between the parties. The defendant appealed to the High Court of Australia where Latham CJ held that 'the evidence left no room for doubt that the parties signed the documents in question intending to make a binding contract and that they intended to be bound by the documents which they signed.'[1008] His Honour said that there was no evidence of any mutual mistake and that even 'if one party thought the contract meant one thing and the other party thought that it meant another that is not a ground for rectifying the contract.'[1009] Dixon and McTiernan JJ agreed.[1010]

The legal effect of words used by the parties also arose in *Bush v National Australia Bank Ltd*[1011] where Hodgson J said that 'rectification may be available where the common intention does not relate to the words of the document so much as to its legal effect.'[1012] His Honour said that 'provided all other requirements of rectification are satisfied, rectification will not be refused merely because the common mistake is as to the legal effect of the words used, rather than as to the actual words used.'[1013] His Honour explained that:

> If it be the case that both parties have a very clear and obvious intention as to the legal effect to be achieved by a written instrument, but are clearly and obviously mistaken as to the

[1006] Ibid [169]. An appeal was dismissed: see *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261.
[1007] (1936) 10 ALJ 288.
[1008] Ibid 288.
[1009] Ibid 289.
[1010] Ibid. For further examples in the contractual context see *Winks v W H Heck & Sons Pty Ltd* (1985) Q ConvR ¶54-183; *Winks v W H Heck & Sons Pty Ltd* [1986] 1 Qd R 226; and *Anfrank Nominees Pty Ltd v Connell* (1989) 1 ACSR 365.
[1011] (1992) 35 NSWLR 390.
[1012] Ibid 406.
[1013] Ibid. See also *Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd* [2010] QSC 006, [92].

> meaning of a word in the instrument, all the reasons which justify the granting of rectification seem to apply. However, I accept that where the mistake is as to the legal effect of a document, rather than its words, it will often be more difficult to satisfy the requirements for rectification. Not only may it be more difficult to have evidence of sufficient clarity as to the common intention and common mistake, but there may be other more particular difficulties as well.[1014]

His Honour noted that a difficulty that might arise in such circumstances when his Honour said that:

> A further difficulty which may arise when rectification is sought on the basis of common mistake as to the legal effect of words is that the court cannot draft an agreement for the parties, to give effect to some intention of the parties which they have totally failed to accomplish with the words they have chosen. It is necessary that the common intention be such that the court can conclude, with the appropriate clarity, both the substance and the detail of the precise variation which needs to be made to the wording of the instrument.[1015]

But if the words chosen by the parties are clear and unambiguous, it will be difficult for the party seeking rectification to show that there has been a relevant mistake. In *Ryledar Pty Ltd v Euphoric Pty Ltd*[1016] Tobias JA said that the fact that words used in an agreement 'convey a clear, unambiguous and unmistakeable meaning or legal effect renders it less likely that the parties were mistaken as to that meaning or effect. It further renders it less likely that they had a common intention which was fundamentally inconsistent with the words they had deliberately employed.' [1017]

In England a very broad position was taken of the jurisdiction of rectification in the recent case of *Ahmad v Secret Garden (Cheshire) Ltd*.[1018] Arden LJ said, in the context of a party seeking rectification based on a mistake as to the meaning or effect of the words used in a contractual agreement, the 'remedy of rectification entitles the court to give effect to the reasonable expectations of contracting parties as to the meaning of their executed agreement.'[1019] But, with respect, it is difficult to see why that should be so. The role of the court is to first construe an agreement based on the common law principles of construction and then, if rectification is pleaded in the alternative, identify what the parties have agreed and compare that to what has

[1014] (1992) 35 NSWLR 390, 407.
[1015] Ibid.
[1016] (2007) 69 NSWLR 603.
[1017] Ibid 638. Special leave to appeal to the High Court of Australia was refused: see *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] HCATrans 698.
[1018] [2013] 3 EGLR 42.
[1019] Ibid 45.

been recorded in writing. That does not involve giving effect to the reasonable expectations of the parties.

The cases examined in this Section demonstrate that rectification may be available where the parties are mistaken as to the true construction or legal effect of the words that they have chosen in their written document. As Pritchard J explained in *Swancare Group Inc v Commissioner for Consumer Protection,*[1020] it is 'now accepted that rectification is available when the party or parties who executed the document are mistaken about the meaning or effect of the words deliberately chosen to express their intention.'[1021] But rectification will not be available where the mistake relates to what benefits the parties expected from the agreement, rather than a mistake in recording what they agreed. As Buss JA explained in *Franknelly Nominees Pty Ltd v Abrugiato,*[1022] 'rectification will not be available where the parties are merely mistaken as to the consequences of, or the advantages to be gained by, a contract or transaction recorded in an instrument.'[1023] That is, 'equity will not grant rectification where a mistake by the parties relates only to the expected consequences or advantages of a contract or transaction, and not to the expression in the instrument of what the parties actually agreed or intended.'[1024] That is consistent with the position adopted by HHJ Hodge (QC) in *Ashcroft v Barnsdale*[1025] where his Honour said that so long as a mistake 'relates to the meaning or effect of a document (rather than the consequences of, or the advantages to be gained from, entering into it), relief may be available even though the actual words of the document were deliberately adopted by the parties.'[1026] The same position was adopted more recently in Victoria in *CA & CA Ballan Pty Ltd v Oliver Hume (Australia) Pty Ltd*[1027] where Redlich, Tate and Fergusson JJA referred to the 'unavailability of rectification where there has been a common mistake as to the consequences flowing from the contract as opposed to its legal effect.'[1028]

[1020] [2014] WASC 80.
[1021] Ibid [117].
[1022] [2013] WASCA 285.
[1023] Ibid [179].
[1024] Ibid.
[1025] [2010] EWHC 1948 (Ch).
[1026] Ibid [16].
[1027] [2017] VSCA 11.
[1028] Ibid [34].

C *Courts can give effect to intentions in deed polls and voluntary transactions*

Although, as explained in Chapter III, rectification should be focused on agreements and not intentions, in some cases, such as cases concerning deed polls where the deed reflects the intentions of one person, and is therefore not an agreement, the focus should appropriately be on the intentions of the person who executed the deed poll. In such cases the courts can give effect to the subjective intention of the person who executed the document through the remedy of rectification. Lord Justice Etherton, writing extra-judicially, said that 'there is jurisdiction to rectify a voluntary settlement where the settlement does not express the subjective intention of the settlor'.[1029] In *Wright v Goff*[1030] a deed was made on 9 April 1838 by several parties, including a Mrs Wright. Pursuant to the deed a sum of £2,000 was appointed for the benefit of the plaintiff, Robert Henry Wright. On 28 December 1846 Mrs Wright signed a deed poll as part of a transaction to sell some real estate but the deed poll also had the effect of revoking the deed of 1838. Mrs Wright died in 1855. The plaintiff sought to have the deed poll of 1846 rectified so that it did not have the effect of revoking the 1838 deed under which he was entitled to the benefit of the £2,000. The Master of the Rolls, Sir John Romilly, noted that at the time that Mrs Wright signed the deed poll in 1846 she was elderly and suffered occasional blindness.[1031] In addition, the evidence was that Mr Jesson, who had drafted the deed poll, was completely unaware of the 1838 deed as was Mr Harley who arranged for Mrs Wright to execute it. Because Mr Harley was not aware of the 1838 deed, he could not have been aware of the true effect of the deed poll and the Master of the Rolls held that 'the effect and operation of the deed of 1846 upon the deed of 1838 was not communicated to this lady.'[1032] The Master of the Rolls concluded that it is 'therefore impossible to say that she had an intention to affect the operation of the first deed.'[1033] The Master of the Rolls held that the deed poll 'was executed under a mistake, and contrary to the intention of the person executing it, and that accordingly it ought to be reformed.'[1034] Accordingly, in cases involving deed polls, the scope of the equitable doctrine of rectification extends to correcting mistakes in recording the intention of the person who executes the deed poll.

[1029] Terence Etherton, 'The Role of Equity in Mistaken Transactions' (2013) 27(4) *Trust Law International* 159, 163.
[1030] (1856) 22 Beav 207; 52 ER 1087.
[1031] Ibid 214.
[1032] Ibid 215.
[1033] Ibid.
[1034] Ibid 216.

The decision in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*[1035] also concerned deed polls. An amendment was made to a trust deed, by way of a deed poll, that was intended to permit the distribution of trust income to a company but had the additional effect of entitling the company nominated as a beneficiary of the trust to a share in a distribution of capital which, in turn, had the effect that ad valorem duty was payable under the *Stamp Duties Act 1920* (NSW). Carlenka Pty Ltd, the trustee of the trust, commenced proceedings seeking to rectify a deed poll made by it and dated 26 June 1990. The trust was known as the Greinert Family Settlement and Mr Greinert was a director of the trustee company. Acting on the advice of the trust's accountant Mr Greinert proceeded to have documents prepared by a solicitor to amend the trust deed and to add Radmara Pty Ltd as a beneficiary of the trust. The documents were prepared and then executed by Mr Greinert. He gave evidence that it was not his intention at the time of executing the documents that a company nominated as a beneficiary should be entitled to share in the capital of the trust fund on any contingency or that the rights of the existing beneficiaries with vested interests in the assets of the trust be varied. However, the effect of the amendment to the trust deed was that Radmara Pty Ltd was entitled to a share of the trust capital and that ad valorem duty was payable. The trial judge, Brownie J ordered rectification and the Commissioner appealed to the New South Wales Court of Appeal. In the New South Wales Court of Appeal Sheller JA said that 'if the claimant convinces the Court that the instrument does not conform with the intention of the parties or of the party which made it and the intention is clear and precise and can be achieved by the language of an order for rectification, relief should be available.'[1036] In dismissing the appeal by the Commissioner his Honour said that Brownie J 'was satisfied that the deed poll did not conform with the intention of Carlenka which continued to the time of execution of the deed poll.'[1037] Mahoney AP[1038] and McLelland AJA[1039] both agreed that the appeal should be dismissed. Accordingly, in relation to deed polls, a court should focus on the subjective intentions of the person who executed the deed poll and give effect to those intentions.

In *Re Butlin's Settlement Trusts*[1040] the court held that rectification is available if the parties are mistaken as to the true construction of the words used in the relevant document. A settlor

[1035] (1995) 41 NSWLR 329.
[1036] Ibid 340.
[1037] Ibid 345.
[1038] Ibid 332.
[1039] Ibid 345.
[1040] [1976] 1 Ch 251.

had executed a voluntary settlement which was intended to contain an express power for a majority of the five trustees to exercise any of the powers given to them by the settlement over the capital and income of the trust fund and to thereby bind a minority of the trustees. Some 28 years later there was some doubt as to whether the deed, properly construed, contained such a power and the settlor, Sir William Butlin, commenced proceedings against the five trustees to determine the true construction of the relevant clause of the deed and, in the alternative, to have the settlement rectified. Only one of the five trustees opposed the application for rectification. Goff J held that the relevant clause of the deed only allowed a majority of the trustees to bind the majority in limited circumstances. The settlor did not appeal against that decision but proceeded with the rest of his claim which was for rectification. That part of the claim was heard before Brightman J who held that it is 'clear beyond doubt that Sir William intended that the settlement should contain a power for a majority of the trustees to bind the minority.'[1041] Brightman J said that:

> [R]ectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention.[1042]

His Honour was satisfied that the settlement did not reflect the true intention of the settlor and granted rectification.[1043]

D *The impact of statutory provisions*

Ignorance of the effect of a statutory provision is, as a general rule, not a ground for rectification of a document but in some cases rectification might be available. In the contractual context the availability of rectification will depend on how clear or precise the agreement between the parties was, and in the non-contractual context, the availability of rectification will depend on the evidence of the intention of the person who executed the document.

[1041] Ibid 259.
[1042] Ibid 260. Brightman J referred to *Jervis v Howle & Talke Colliery Co Ltd* [1937] 1 Ch 67 and *Whiteside v Whiteside* [1950] 1 Ch 65.
[1043] [1976] 1 Ch 251, 264. See also *Gibbon v Mitchell* [1990] 1 WLR 1304; and *Oates Properties Pty Ltd v Commissioner of State Revenue* (2003) 53 ATR 308.

The issue of ignorance of statutory provisions arose in *Jervis v Howle & Talke Colliery Co Ltd*[1044] where the plaintiff and the first defendant verbally agreed that the first defendant should take a lease of the plaintiff's coal mine and pay the plaintiff a royalty of three pence per ton on all coal sold. It was agreed that the royalty would be paid free of tax. The first defendant later assigned the lease to the defendant company who continued to pay the royalty free of tax until the Inland Revenue authority demanded payment of the royalty tax. The defendant company paid the royalty tax and then deducted it from payments due to the plaintiff on the basis that the written agreement between the parties not to deduct the royalty tax was void by virtue of the Income Tax Acts. Rule 23 of the General Rules applicable to schedules A, B, C, D and E of the *Income Tax Act 1918* (UK) provided that every agreement for the payment of interest, rent or other annual payment in full without allowing for the deduction of tax shall be void. The plaintiff commenced proceedings to have the lease rectified so that the amount payable to the plaintiff would be three pence per ton after tax. In allowing the plaintiff's claim for rectification Clauson J held that there was strong irrefragable evidence 'that when the parties executed the lease they thought that its effect would be what in fact it would be if the lease were rectified as the plaintiff asks.'[1045] His Honour said that in 'the present case I hold that the parties executed the lease in the full belief that it secured to the plaintiff payment of the royalties free of income tax.'[1046] Accordingly, even though the parties were ignorant of the statutory provision that meant that part of their agreement was void, the court allowed rectification of the document because there had been a mistake in recording what the parties had agreed, namely that the plaintiff would receive a royalty of three pence per ton after tax.[1047]

The issue also arose in *David v Federal Commissioner of Taxation*[1048] where the court was hearing two applications in which each applicant sought a declaration that it or he, as the case may be, was entitled to an exemption from sales tax by virtue of Item 59(3) of the *Sales Tax (Exemptions and Classifications) Act 1992* (Cth) in respect of a particular vessel. In the case of the application brought by Sirise Pty Ltd, the vessel was known as *Yes* and in the case of the application brought by Dr Davis, the vessel was known as *Surreal.* Sirise was a company of which Mr McLeod was the managing director. To be exempt from sales tax the vessels needed to be leased on a long term lease which was defined to be a lease for a term of at least four

[1044] [1937] 1 Ch 67.
[1045] Ibid 71.
[1046] Ibid.
[1047] See also *Jackson v Stopford* (1923) 2 IR 1.
[1048] (2000) 171 ALR 654.

years. However, the relevant leases had been entered into for three year terms. Sirise entered into a subsequent lease agreement to amend the lease term to five years on the basis that there was an error in the original lease. It was unclear whether Dr Davis had entered into a written lease for three years but a later document recorded a lease term of five years. Hill J said that:

> As an alternative to an order of rectification the parties could execute a deed rectifying their prior writing. That deed, if truly operating to record that the parties were under a mutual mistake, and also setting out what the parties acknowledge to be the true agreement between them would not, any more than a court, actually alter the position as between the parties. It would merely record that agreement as it always was. Whether by court order or by deed, rectification requires that there be a mutual mistake, that is to say what is required is that there be a common intention between the parties as to the effect that the instrument they signed would have had which was inconsistent with the effect which the instrument which they executed in fact had.[1049]

His Honour said that in the present case 'I am not satisfied that there was a mutual mistake as to the effect of the original agreement.'[1050] His Honour said that the parties always intended to enter into a three-year lease which they did, and that there 'was a mutual mistake, but that was as to the term required to come within the exemption item, not as to the term of lease which they agreed to.'[1051] Rectification was properly denied in this case because the agreement between the parties was for a three-year lease and that was what was recorded in the written lease.

The issue of statutory provisions arose in *Allnutt v Wilding*[1052] where the claimants, as executors of the will of Mr Strain, sought to have a settlement deed entered into by Mr Strain in 1995, rectified on the basis that the settlement deed did not have the effect of avoiding an inheritance tax that it was intended by Mr Strain that the deed would avoid. At issue was the sum of £550,000 transferred into the settlement by Mr Strain. The problem was that the settlement was a discretionary one in respect of which none of the beneficiaries had any interest in possession. As a result the transfer did not qualify as a potentially exempt transfer (PET) under the *Inheritance Tax Act 1984* (UK). Instead, the transfer was a chargeable transfer and therefore not exempt from inheritance tax. Mummery LJ said that:

> I am unable to see any mistake by the settlor in the recording of his intentions in the settlement. The mistake of the settlor and his advisers was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of

[1049] Ibid 667.
[1050] Ibid.
[1051] Ibid.
[1052] [2007] EWCA Civ 412.

> funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax.[1053]

His Lordship said that that 'sort of mistake about the potential fiscal effects of a payment following the execution of the settlement does not, in my judgment, satisfy the necessary conditions for grant of rectification. The mistake did not result in the incorrect recording of his intentions.'[1054] Importantly his Lordship said that:

> In brief the position in this case is as follows: the settlor had no more than a general intention, well understandable, to save inheritance tax on his death, but without making direct gifts to his children. He had a general intention to benefit them through the medium of a settlement which, in combination with the PET, he hoped would result in the mitigation of inheritance tax on his death. The trustees were totally unable to point to any more specific intentions on the part of the settlor which, owing to a mistake made in the recording of his intention and in the drafting of the settlement, were not recorded in it or were misrecorded, and could be rectified by a decree of the court. In my judgment the judge was correct both on the law and on the evidence before him to reject the claim of rectification.[1055]

Both Carnwath LJ[1056] and Hooper LJ[1057] agreed with Mummery LJ. The decision confirms that rectification is not available to overcome a statutory provision in these circumstances unless the party making the deed has a clear intention that is incorrectly recorded in writing.

Mistakes can still be made even where the relevant persons are aware of the statutory provisions. In such cases rectification may still be available. In *Re Keadly Pty Ltd*[1058] three trusts were established for the purposes of transferring certain land used in a family vineyard business. The three trusts were established for three brothers and their respective families. It was their intention to structure the trusts and the transfer of the properties so that no stamp duty would be payable in South Australia. They consulted their accountant, Mr Reimann, who gave advice that the proposed transfers met the criteria for exemption from stamp duty as interfamilial transfers of farming property pursuant to s 71CC of the *Stamp Duties Act 1923* (SA). The transactions proceeded but an audit by the Deputy Commissioner of State Taxation revealed that the transfers did not qualify for stamp duty exemption under s 71CC because the trust deeds did not restrict the beneficiaries to relatives as defined in s 71CC of the Act. Stamp duty

[1053] Ibid [19].
[1054] Ibid [20].
[1055] Ibid [24].
[1056] Ibid [26].
[1057] Ibid [28].
[1058] [2015] SASC 124.

assessments were issued and the trustees of the three trusts commenced proceedings to have the trust deeds rectified. The planning for the transactions took place between 2010 and 2012. Mr Reimann researched the matter during 2010 and 2011 and obtained a trust deed pro forma from a business operated by Matthew Nassaris. That deed complied with the requirements of s 71CC. On 10 April 2012 Mr Reimann provided the details for the three proposed trusts to Nassaris Rossi Business Services Pty Ltd, a company established by Matthew Nassaris. When Mr Reimann received the trusts deeds he assumed that they complied with s 71CC and so he did not read them. However, they were not compliant with s 71CC because the beneficiaries of the trusts included companies, trusts and charitable entities. In granting rectification Bampton J said that she was 'satisfied that it was the intention of Mr Reimann in accordance with the instructions from the Rorhlach brothers that the beneficiaries of each of the trusts would be only the persons who fall within the definition of relative in s 71CC of the Act.'[1059] Rectification was justified in this case because, being a non-contractual document, the intentions of the persons executing the document were relevant and in this case the clear intention was to execute trust deeds that complied with s 71CC.[1060]

The enactment of legislation subsequent to the date when the parties enter into their agreement, that has an impact on how the agreement operates, is not a ground for rectification. In *Pyke v Peters*[1061] a deed provided for the payment of certain amounts free of income tax. The plaintiff assigned to the defendant part of his rights under the deed. Subsequently a statute was passed that impacted on the amount that would be paid under the deed. The plaintiffs commenced proceedings against the defendant claiming that certain sums had been wrongly deducted from payments due to them under the deed. The defendant made a counterclaim to have the deed of assignment rectified. Asquith J said that:

> There is no doubt that the assignment has, in consequence of events subsequent to it, not operated according to the common intention of the parties to it, but to support a claim to rectification it must be shown, at the very least, that the instrument, rectification of which is sought – in this case the assignment – did not give effect to that common intention as it existed before the assignment.[1062]

[1059] Ibid [41].
[1060] Similar issues arose in *Domazet v Jure Investments Pty Ltd* [2016] ACTSC 33.
[1061] [1943] 1 KB 242.
[1062] Ibid 250.

His Honour said that this condition had not been fulfilled and that what 'has frustrated the intention of the parties is not the failure of the instrument to give effect to that intention – the assignment did give precise effect to it – but supervening legislation which has driven a coach and six through both the intention of the parties and the instrument itself.'[1063] His Honour concluded that 'the fact that a statute, passed later, in effect provides that the intention shall be frustrated and that the instrument shall not operate according to its tenor, seems to afford no ground for rectification; and on this short ground I hold that the claim for rectification fails.'[1064]

The cases examined in this Section show that rectification is available to provide relief for mistakes made in the recording of agreements but that parties to contractual agreements need to ensure that they take account of all statutory provisions before they make their agreement. If they are ignorant of a statutory provision, or fail to take proper account of it when they make their contractual agreement, rectification will not be available in some circumstances because to allow rectification in such circumstances would be to make a different agreement for the parties. But if, in the case of a contractual agreement, what has been agreed between the parties is clear, then the courts will award rectification if, as a result of the statutory provision, what has been recorded does not conform to what had previously been agreed.[1065] Similarly, in the case of non-contractual documents, if the intention of the person who executed the document is clear, the court will grant rectification to give effect to that intention despite the impact of the relevant statute.

E *Conclusions*

The cases examined in this Chapter demonstrate that rectification will be available: (i) where the words used in an agreement have a different meaning or effect from the agreement reached between the parties; and (ii) in deed polls and voluntary deeds where the document does not give effect to the subjective intention of the person who executed it. In these circumstances courts are justified in granting rectification. In the case of giving effect to the intentions of the parties in the context of contractual documents, it would be preferable if the courts focused on identifying what the parties *agreed* (instead of their intentions) and compared what they agreed

[1063] Ibid.
[1064] Ibid.
[1065] For further cases concerned with the impact of statutory provisions see: *Oun v Ahmad* [2008] EWHC 545 (Ch); *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch); and *Francis v F. Berndes Ltd* [2011] EWHC 3377 (Ch).

with what they recorded in their written agreement. If the court determines that the intentions of the parties are reflected in the terms of their agreement, as determined objectively, and that agreement is not accurately recorded in the written agreement, rectification should be granted.

In relation to circumstances where rectification is granted where the document has a different meaning or effect from what has been agreed between the parties, rectification is justified if the parties have chosen the wrong words to reflect what they have agreed. Essentially, the parties thought that they had chosen the correct words to record their agreement but, if those words are subsequently held by a court to have a meaning different from what the parties understood those words to mean, rectification is justified. In these cases, rectification does correct a mistake between what has been agreed and what has been recorded. It is irrelevant that the parties expressly chose the words that they used. What is relevant is that those words, by mistake, do not reflect what the parties previously agreed. But rectification will be denied in other circumstances, including where the agreement between the parties is reflected in the written document. In such cases there is no relevant mistake and rectification is not available. It will be especially difficult for a party seeking rectification to prove that there has been a mistake in the recording of an agreement if the words chosen by the parties are clear and unambiguous.

In the case of deed polls and voluntary transactions courts are justified in granting rectification because in these cases the role of rectification is to give effect to the subjective intention of the person who executed the document. This is a fundamentally different approach to rectification because these documents are not agreements. They represent limited circumstances where the role of the court is to grant rectification to give effect to subjective intentions.

Rectification will be properly denied where the parties were ignorant of a statutory provision or failed to properly account for the relevant statutory provision when they formed their agreement, unless it can be shown that the document failed to accurately record their prior agreement. Clear evidence of the prior agreement will be required. But if the document does record what the parties agreed, ignorance of a statutory provision will mean that rectification is not available. To grant rectification in such cases would be to make a new agreement for the parties and that is not permissible.

Chapters IV, V, VI and VII have examined cases where the courts provide rectification as a remedy in response to proceedings commenced by a litigant. The following Chapter examines the ability of parties to a document to rectify a mistake by consent without recourse to the courts.

VIII RECTIFICATION BY CONSENT

A *Introduction*

Litigation will not always be required where a mistake has been made when recording an agreement in writing. If all the parties agree, an amended agreement, or supplementary agreement, can be entered into in order to correct any mistake. But there are two issues that can arise which are considered in this Chapter. First, if the parties rectify their agreement by consent, they cannot also apply to the court to have the agreement rectified. Secondly, if a third party is affected by the rectifying document made by the parties, that third party can apply to the court to determine whether the document entered into by the parties is a true rectification of the earlier written document or an amendment of the written agreement.

B *Rectification is unavailable if an agreement has been rectified by consent*

If the parties have already, by consent, entered into a subsequent agreement to amend their earlier agreement to rectify a mistake in that earlier agreement, they do not need to commence proceedings to have their agreement rectified, but if they do the court will not have jurisdiction to rectify the agreement. In *Whiteside v Whiteside*[1066] the plaintiff executed a deed in favour of his former wife, the first defendant, whereby he covenanted that he would pay to her £1,000 per annum free of income tax. Although the Commissioner of Inland Revenue initially allowed the plaintiff a deduction from his sur-tax for the payments made under the deed, after two years the deductions were disallowed and the plaintiff sought to have the deed rectified. In rejecting the application for rectification, Harman J said that the agreement 'has turned out to have a different legal effect from that which was anticipated, but that is no ground for rectification.'[1067] It was also relevant that the parties had executed an amended deed so that there was no dispute between the parties. The plaintiff appealed to the Court of Appeal. In *Whiteside v Whiteside*[1068] the Master of the Rolls, Lord Evershed, in dismissing the appeal, said that 'having regard to the rectification deed which followed and was a consequence of the absence of any issue at any time between the parties as to their true rights inter se, the necessary condition for the exercise

[1066] [1949] 1 Ch 448.
[1067] Ibid 458.
[1068] [1950] 1 Ch 65.

of the reforming powers of the court is really absent.'[1069] Cohen LJ agreed that the appeal should be dismissed[1070] and Asquith LJ agreed.[1071]

C *Impact on a third party*

Although parties to an agreement may agree to rectify their written contract by consent, if the agreement, as rectified, impacts the rights of a third party it will be necessary to determine whether the later agreement is truly a rectification of the earlier agreement or a variation of it. This issue arose in *Valgas Pty Ltd v Connell*[1072] where a civil action between the plaintiff, Valgas Pty Ltd, and a partnership, LR Connell & Partners, constituted by Mr and Mrs Connell, the first defendants, was settled with a settlement sum to be paid to Mr and Mrs Connell. That agreement made reference to the partnership of LR Connell & Partners. The agreement to settle also required that there be a deed executed to formalise the settlement 'in such other terms as they [the parties] may agree upon'. A formal deed was entered into but in that deed (the Main Deed), the Connells were named as parties but there was no reference to them acting in their capacity as partners of the partnership when entering into the Main Deed. They were described as the Connells and each of their personal representatives' transferees and assigns. The Deputy Commissioner of Taxation served on Valgas Pty Ltd two identical notices pursuant to s 218 of the *Income Tax Assessment Act 1936* (Cth), which gave the Commissioner the power to give notice to require 'any person by whom any money is due or accruing or may become due to a taxpayer' to pay to the Commissioner some or all of that money to meet the payment of any tax liability due by the taxpayer. One of the notices specified Mr Connell as the taxpayer and the other specified Mrs Connell. On the application of Valgas Pty Ltd, Murray J ordered interpleader proceedings to take place. Subsequently the parties entered into a supplementary deed which stated that it had been the intention of the parties that the reference to the Connells in the Main Deed was intended to be a reference to Mr and Mrs Connell in their capacity as partners in the partnership, being the plaintiff in the settled action. The supplementary deed stated that it was to take effect from the date of the Main Deed. In the interpleader proceedings before Ipp J, the Connells argued that it was always their intention that the Main Deed refer to them in their capacity as partners of the partnership. Ipp J said that:

[1069] Ibid 75.
[1070] Ibid 77.
[1071] Ibid 78.
[1072] (1994) 11 WAR 497.

> It is presumably because Mr and Mrs Connell recognised that they faced problems by reason of the wording of the Main Deed, that they arranged for the Supplemental Deed to be entered into. As I have pointed out, the Supplemental Deed seeks to rectify the Main Deed with effect from the date of the latter. I accept that, as between the parties to the Supplemental Deed, the Main Deed has effectively been rectified by agreement between them. The Deputy Commissioner, however, who was not a party to the Supplemental Deed cannot be bound by the agreement it records or effects. That is because, notwithstanding anything the parties in question may have agreed, objectively, by the Supplemental Deed, there may not have been a true rectification, but a variation. By that I mean that the Main Deed may have correctly reflected the intention of the parties, but, by the Supplemental Deed, the parties may have agreed to vary the Main Deed with effect from its commencement date, so that the Supplemental Deed would have the same effect as a rectification of the Main Deed. That would not in truth constitute a rectification. It would be a variation with retrospective effect.[1073]

His Honour explained that:

> If the Supplemental Deed did not, in truth, rectify the Main Deed, but varied it, it would mean that between the time the Main Deed was entered into, and the time the Supplemental Deed was entered into, Valgas owed the settlement sum to Mr and Mrs Connell, jointly and severally. If that be the case, the Supplemental Deed cannot affect the right of the Deputy Commissioner in respect of s 218 notices served before it was entered into.[1074]

After considering the evidence his Honour concluded that:

> In my opinion, it has not been established that there was a misapprehension and that the true agreement between the parties to the Main Deed differed from its form. It follows that, as regards the Deputy Commissioner, from the time the Main Deed was executed, until the Supplemental Deed became effective, the settlement sum was owing to Mr and Mrs Connell jointly and severally; during that period the settlement sum was not owing to the partnership. In my view, therefore, the settlement sum is payable to the Deputy Commissioner.[1075]

Mr and Mrs Connell appealed to the Full Court of the Supreme Court of Western Australia. In *Connell v Deputy Commissioner of Taxation (WA)*[1076] Franklyn J said that he did not agree with the interpretation of the deed by Ipp J and said that the reference to the Connells in the Main Deed 'can only be a reference to the partnership.'[1077] His Honour said, in allowing the appeal, that:

> In my opinion, for the reasons given, on the proper construction of the Main Deed the settlement moneys were payable to the Connells and receivable by them as the partnership and not in their separate and individual capacities and His Honour erred in construing it as he did. There was, in truth, no need for them to enter into the Supplemental Deed. That they did so following receipt of the Notices served by the Commission, in my opinion, leads only to the

[1073] Ibid 502.
[1074] Ibid.
[1075] Ibid 504.
[1076] (Unreported, Full Court of the Supreme Court of Western Australia, Franklyn, Owen and Parker JJ, 24 May 1996).
[1077] Ibid 12.

> inference that having notice of his (incorrect) construction of the Main Deed they acted out of an abundance of caution to put its correct construction beyond doubt.[1078]

Both Owen J and Parker J agreed that the appeal should be allowed.[1079] The decision in *Connell v Deputy Commissioner of Taxation (WA)* demonstrates that it may be important in some circumstances for a court to determine whether a supplemental deed operates to rectify a mistake in an earlier written document or whether it operates as an amendment to an earlier written document. Such a determination will be important where third party rights might be affected.

D *Conclusions*

It is clear that parties to a written agreement can, by consent, enter into a supplementary agreement to rectify a mistake that they believe was included in the original document. If they do enter into a supplementary agreement, the courts will no longer have jurisdiction to correct a mistake in the earlier written document through rectification. In addition, if a third party is of the view that their rights have been impacted, and the supplementary agreement does not truly operate to rectify a mistake, but rather varies the earlier agreement, that third party will be able to apply to the court for appropriate relief, which might be a declaration that the supplementary agreement reflects a variation to the earlier agreement and is not a rectification of a mistake in the earlier agreement. In some cases, a different remedy might be appropriate, depending upon the circumstances of the case.

[1078] Ibid 18.
[1079] Ibid.

IX PRACTICAL IMPLICATIONS OF THE THESIS

A *Introduction*

A detailed analysis of the practical implications of this thesis is beyond the scope of this thesis and they are not required to justify the thesis arguments. However, two practical implications are examined in this Chapter. They concern how a rectification case should be pleaded if the arguments in this thesis are accepted and which party has the evidentiary burden in circumstances where it has been alleged that there has been a mistake made in the recording of a prior agreement.

B *Pleadings in rectification cases*

If the classification of rectification cases in this thesis is adopted, a party making an application for rectification should plead the type of mistake made and not how many parties were mistaken. Litigants should no longer plead common or mutual mistake or unilateral mistake either individually, or in the alternative, as these descriptions do not indicate what type of mistake was made nor do they give an indication of what facts will need to be proved. The type of mistake allegedly made should be pleaded along with the circumstances in which the mistake was made. Because rectification for a mistake made during the formation of an agreement should only be an alternative optional remedy offered to a non-mistaken party the mistaken party should only plead a claim for rescission. It is for the non-mistaken party to plead rectification as an optional remedy if rescission is granted. In other cases of mistake the party seeking rectification should plead either a mistake made in the recording of an agreement or a mistake made in the choice of the words used such that the words do not have the effect that coincides with what was agreed. If it is alleged that the conduct of the defendant was fraudulent, that should be specifically pleaded as well as the circumstances in which the alleged fraud took place. Setting out pleadings in this way will assist the court in determining what needs to be proved by the party seeking rectification. Various scenarios will now be examined in more detail.

Where it is alleged that there has been a mistake made in the recording of a prior agreement, the party alleging the mistake will in most cases want to plead for a declaration as to the true

construction of the relevant clause of the written document. Accordingly, the pleadings should make it clear that a declaration as to the proper construction of the clause is the primary remedy sought with rectification pleaded as an alternative remedy if the plaintiff is unsuccessful in its construction claim. Where it is alleged that there has been a mistake in the choice of the words used by the parties the same approach should be adopted.

Where it is possible that the facts ultimately proved might indicate a mistake made in the recording of an agreement or a mistake made during the formation of an agreement, then these two cases should be pleaded but it is likely that they would be pleaded by different parties. In practical terms it should never be appropriate for one party to plead a case based on a mistake in the recording of an agreement and, in the alternative, a mistake in the formation of an agreement. That is because where it is alleged that there has been a mistake made during the formation of an agreement, the party seeking to establish the mistake should be seeking relief in the form of rescission, not relief in the form of rectification. It should be for the party resisting rescission to seek rectification as an optional remedy if the party seeking rescission is successful.

The situation that arose in *Taylor v Johnson*[1080] provides an excellent example of the possible pleadings in a case where a mistake is alleged and rescission is sought by one of the parties. The respondent had sold two adjoining properties, each of about five acres, to the appellant. The written contract provided for a total sale price of $15,000 but the vendor believed that the sale price was $15,000 per acre and she signed the contract on the basis that she understood that the contract included that sale price. The purchaser sought specific performance of the contract and the vendor cross-claimed for rectification and in the alternative made a claim for rescission. The purchaser was successful in his claim for specific performance and the vendor appealed. On appeal to the Court of Appeal of the Supreme Court of New South Wales, the vendor was successful and the contract was set aside. The purchaser appealed to the High Court of Australia. It is not clear from the judgment of the High Court of Australia whether the respondent had pleaded rectification on the basis of an alleged mistake in the recording of a prior agreement or rectification on the basis of a mistake made during the formation of the agreement. Nevertheless, the circumstances in *Taylor v Johnson* provide an excellent example of the possible pleadings based on the type of mistake alleged. The primary claim in *Taylor v*

[1080] (1983) 151 CLR 422.

Johnson was by the appellant seeking specific performance of the written contract. In a case such as *Taylor v Johnson* where the appellant sought specific performance of the agreement the respondent's appropriate pleading would be a cross-claim for rectification based on a mistake in the recording of the agreement on the basis that the agreement made between the parties had been mistakenly recorded. If the cross-claim for rectification for a mistake made in the recording of the agreement failed (because the respondent was unsuccessful in proving a prior agreement based on what the respondent says was agreed between the parties), the appellant would prima facie be entitled to specific performance. The respondent's claim for rescission would then be considered, and if successful, the appellant's claim, if any, for rectification as an optional remedy to rescission should be considered.

Under these circumstances the court effectively considers three alternatives. The court first considers the appellant's claim for specific performance which itself requires consideration of the respondent's cross-claim for rectification for a mistake made in the recording of a prior agreement. In effect, the cross-claim for rectification by the respondent is considered first. If the cross-claim for rectification for a mistake in the recording of an agreement succeeds, the agreement will be rectified to accord with the prior agreement and specific performance of the unrectified agreement will be denied because the agreement that the appellant seeks to have specifically performed no longer exists. But if the respondent's claim for rectification is dismissed, as it appears to have been at first instance by Powell J in *Taylor v Johnson*, the court should consider the respondent's alternative cross-claim for rescission. If the rescission claim fails then the appellant's claim for specific performance would succeed. But if the respondent's claim for rescission is successful, the court should consider any claim by the appellant for rectification as an optional alternative remedy in circumstances where the respondent is successful in her claim for rescission. But no such alternative optional remedy was sought by the appellant in *Taylor v Johnson* and Mason ACJ, and Murphy and Deane JJ said that it 'should be mentioned that it was not suggested on behalf of the appellants that, in the event they failed on the appeal, the order of the Court of Appeal should be varied by allowing the purchasers under the contract an option to have the contract rectified to stipulate a price of $15,000 per acre.' [1081] The situation may have been different if the appellant had made a claim for rectification as an alternative to the respondent's rescission claim when the case was being determined at first instance.

[1081] Ibid 433.

If a fraud has been committed, the party seeking rectification should plead fraud rather than mistake. That is because in such cases the remedy of rectification responds to the fraud committed and not to any mistake. However, in some cases where it is not clear whether fraud or mistake will be proved it may be appropriate to plead rescission for fraud, in the alternative rectification for fraud and in the further alternative rescission for mistake.

C *Evidentiary burden of a party resisting rectification*

The second practical implication of the thesis examined briefly in this Chapter is the evidentiary burden of the party resisting rectification for a mistake made in the recording of an agreement. The starting position is that the party seeking to have a document rectified bears the onus of proof that there has been a mistake. In *Soloman v Soloman*[1082] a husband filed a bill to have a marriage settlement rectified and his wife denied that there was any mistake. Stawell CJ said that where the defendant denied that there was a mistake, the onus of proving the mistake rested with the plaintiff[1083] and Barry J was of the same opinion.[1084]

Despite the party seeking rectification having the onus of proof, the evidentiary burden may shift in some circumstances. If a plaintiff alleges that there has been a mistake in the recording of an agreement, the plaintiff will need to prove what was agreed and also prove what was recorded. If there is a difference between what was agreed and what was recorded, the court may be persuaded that there has been a mistake made in the recording of the earlier agreement. But there may not have been a mistake, there may have been further negotiations resulting in a different agreement which *has been* correctly recorded in the final written document. In these circumstances the party resisting rectification has the evidentiary burden of adducing evidence that a new position was negotiated after the initial agreement was reached. If the party resisting rectification can adduce evidence that persuades the court that there was a renegotiation away from the earlier agreement, rectification will not be available. This approach is consistent with what Denning LJ said in *Huyton-with-Roby Urban District Council v Hunter*[1085] where the Court of Appeal was considering the shifting evidentiary burden in circumstances where the

[1082] (1878) 4 VLR (E) 41.
[1083] Ibid 50.
[1084] Ibid. See also *Ferguson v Upton* (1886) 12 VLR 213, 215 where Molesworth ACJ said that the 'onus lies on the person alleging mutual mistake to clearly make his case out'.
[1085] [1955] 2 All ER 398.

respondent District Council had the legal burden to prove that a road was not a road repairable by the inhabitants at large. That is, the District Council had to prove a negative but Denning LJ explained that:

> Although the legal burden rests throughout on the local authority, they go some way to discharge it when they call evidence to show that no public money has ever been spent on the road. When this is done, a provisional presumption arises that the road is not a public road, but it is by no means conclusive. As the case proceeds, the evidence may first weigh in favour of the view that it is not a public road, and then against it, thus producing a burden – sometimes apparent, sometimes real – which may shift from one party to the other, or may remain suspended between them.[1086]

That is the same process that applies where a party seeks rectification for a mistake made in the recording of a prior agreement. The party seeking rectification has the legal burden throughout to prove their case but once they adduce evidence of an earlier agreement that differs from the final documented agreement, the party resisting rectification has the evidentiary burden to adduce evidence of a different agreement that was renegotiated and replaces the earlier agreement.

The issue of the evidentiary burden was also considered in *Glen v Sullivan*[1087] where the appellant had been injured in a motor vehicle accident and the respondent admitted liability. The appellant claimed that she had suffered continuing physical disabilities and that the accident had aggravated her pre-existing psychiatric condition. The appellant appealed to the New South Wales Court of Appeal in relation to the amount of damages awarded. The appellant argued that the respondent did not discharge its onus of disentangling the compensable from the non-compensable causes of the appellant's continuing psychiatric disabilities. In dismissing the appeal, Sackville AJA, with Beazley P and Ward JA agreeing, held that the respondent bore the onus of adducing evidence that the appellant's psychiatric disabilities attributable to the accident had resolved before the date of the trial but held that the respondent had discharged that onus. In reaching that conclusion, Sackville AJA examined a number of cases concerned with a defendant having an evidentiary burden once a plaintiff had prima facie established its case against the defendant. Sackville AJA examined[1088] the decision of the High Court of Australia in *Watts v Rake*[1089] where Menzies J said that:

[1086] Ibid 400.
[1087] [2015] NSWCA 191.
[1088] Ibid [43]-[45].
[1089] (1960) 108 CLR 158.

> Prima facie, where a plaintiff was in apparent good health before an accident and is in bad health thereafter, the change would be regarded as a consequence of the accident and it is for the defendant to prove that there is some there explanation for it, e.g., that the plaintiff has aggravated his condition by some unreasonable act or omission.[1090]

Sackville AJA also examined[1091] the decision of the High Court of Australia in *Purkess v Crittenden*[1092] where Barwick CJ, Kitto and Taylor JJ, said that:

> …where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at trial.[1093]

In *Purkess v Crittenden* Windeyer J agreed with Barwick CJ, Kitto and Taylor JJ and said that:

> The ordinary conclusion when a man suffers a hurt is that all the consequences that follow it are attributable to the events that immediately caused it. If it be suggested that this is not so, that some of the apparent consequences are not causally related to it, then some material is required to support that suggestion. It is in this sense and at this stage that a burden of adducing evidence is upon the defendant.[1094]

These decisions show that in some circumstances where a plaintiff has established a prima facie case it will be for the defendant to adduce evidence of some other fact or facts that demonstrate that the plaintiff should not succeed based on some fact not adduced by the plaintiff. In these cases, concerned with damages for personal injury, the additional facts that needed to be adduced by the defendant related to the cause of the plaintiff's injuries. In a rectification case the additional evidence that is likely to be most relevant to be adduced by a party resisting rectification will be evidence of the negotiation of a new agreement.

The issue was addressed in the context of a claim for rectification in *Chartbrook Ltd v Persimmon Homes Ltd*[1095] where the issue of a mistake in the recording of an agreement was

[1090] Ibid 163.
[1091] [2015] NSWCA 191, [45]-[46].
[1092] (1965) 114 CLR 164.
[1093] Ibid 168.
[1094] Ibid 171.
[1095] [2009] 1 AC 1101.

an issue in the appeal to the House of Lords. There was evidence of an earlier agreement that differed from the final recorded agreement. Lord Hoffmann noted that 'no one gave evidence of any subsequent discussions which might have suggested an intention to depart'[1096] from the accord reached earlier between the parties. Similar circumstances arose in *Daventry District Council v Daventry & District Housing Ltd*[1097] where it was held that an agreement had been reached between the parties at a time prior to the final document being agreed and executed. One issue raised in the appeal to the Court of Appeal was whether the parties had negotiated a new agreement to replace that earlier agreement. Toulson LJ considered the issue of whether there had been a renegotiation of the agreement between the parties and said that:

> In deciding whether on a fair view there was a renegotiation or a mistake in the drafting of the contract, it is necessary to look at all the circumstances. Have the parties behaved in such a way that they would reasonably understand one another to be involved in a process of seeking to negotiate a different deal from the one originally agreed or as involved in a process of drafting an agreement intended to accord with the deal originally agreed?[1098]

Toulson LJ explained that:

> Where it is suggested that there has been a change in the parties' position prior to the execution of a written contract, it is necessary to look carefully at all the facts to see whether a reasonable person would have understood himself to be involved in the negotiation of a different deal from the one originally agreed or merely seen himself as involved in a process of drafting an agreement intended to conform with the original deal. If the latter is the case, and if the approval and execution of the written contract are affected by a relevant mistake, rectification should be available. It is, of course, for the party claiming rectification to show that in that process a mistake occurred.[1099]

The Master of the Rolls, Lord Neuberger, also favoured the approach of Toulson LJ on the issue of whether there was a change to the prior agreement between the parties. His Lordship said that based on Toulson LJ's approach the question to be asked is 'whether there was an intention to vary the prior accord.'[1100] In *Daventry* the issue of which party had the evidentiary burden in relation to any renegotiation of the prior agreement did not arise for consideration because all of the relevant communications between the parties were before the court and had also been before the trial judge. A majority of the court held that based on that evidence that a reasonable person would conclude that the parties had not negotiated a new agreement. Because the proved prior agreement differed from what was recorded in the written contract,

[1096] Ibid 1128.
[1097] [2012] 1 WLR 1333.
[1098] Ibid 1371-2.
[1099] Ibid 1372.
[1100] Ibid 1383.

and a majority of the court was not satisfied on the evidence that a new agreement had been negotiated, the court concluded that there had been a mistake in the recording of the earlier agreement. The approach adopted by Toulson LJ and the Master of the Rolls, Lord Neuberger, supports the proposition that the party seeking to resist rectification has the evidentiary burden to adduce evidence of the negotiations that it says took place to reach an agreement different to the earlier agreement reached between the parties.

The issue that the party resisting a claim for rectification has the evidentiary burden to adduce evidence of a change in the intention of a settlor arose in the recent decision in *Day v Day.*[1101] The decision concerned a voluntary settlement and so the subjective intention of the settlor was relevant. It was held at first instance that a settlor, Mrs Day, who had since died, did not have a subjective intention to confer by way of a conveyance any beneficial interest in a particular property on the defendant. The conveyance had occurred pursuant to a power of attorney provided by Mrs Day to her solicitor. Nevertheless, a claim for rectification of the conveyance brought by two of her children as two of the executors of her estate failed because the recorder held that as the conveyance had been executed by Mrs Day's solicitor under a power of attorney that precluded any right to rectification. The claimants appealed. In allowing the appeal, the Chancellor, Sir Terence Etherton, said that:

> The recorder having found that it was not Mrs Day's actual intention to confer any beneficial interest in the property on the defendant, I consider that the evidential burden then passed to the defendant to show that such intention was negated by some different overriding intention on her part.[1102]

That provides a clear statement that it is for the party resisting rectification to adduce evidence of some subsequent intention that replaced the earlier intention that had been proved by the claimants.

The rectification decisions in *Chartbrook Ltd v Persimmon Homes Ltd,*[1103] *Daventry District Council v Daventry & District Housing Ltd*[1104] and *Day v Day*[1105] all support the proposition that a party seeking to resist a claim for rectification needs to adduce evidence of the

[1101] [2014] Ch 114.
[1102] Ibid 124-125.
[1103] [2009] 1 AC 1101.
[1104] [2012] 1 WLR 1333.
[1105] [2014] Ch 114.

negotiations of a new agreement or a change of intention by a person who has executed a non-contractual document. The Australian cases examined in this Section, including the decisions of the High Court of Australia in *Watts v Rake*[1106] and *Purkess v Crittenden,*[1107] give further support to the proposition that in practice the party resisting rectification has the evidentiary burden to adduce evidence of any renegotiations between the parties. But placing an evidentiary burden on a party resisting rectification in such cases does not reverse the onus of proof.[1108]

In cases where there has been a mistake made during the formation of a contract, the party seeking rectification needs to establish that rescission is first available as a remedy. If that is established, the court may offer rectification to the non-mistaken party as an alternative to rescission and it will not be necessary for the party resisting rescission to adduce any evidence relevant to the alternative remedy of rectification. It will be for the party claiming rescission to adduce evidence of the mistake that justifies the remedy of rescission.

D *Conclusions*

The two practical implications concerning how a rectification case should be pleaded and which party has the evidentiary burden in circumstances where it has been alleged that there has been a mistake made in the recording of a prior agreement were examined in this Chapter. In relation to pleadings, if the classification of rectification cases in this thesis is adopted, a party making an application for rectification should plead the type of mistake made and not how many parties were mistaken. If a fraud has been committed, the party seeking rectification should plead fraud rather than mistake. That is because in such cases the remedy of rectification responds to the fraud committed and not to any mistake.

In relation to the adducing of evidence, drawing a distinction between rectification for mistakes in recording agreements and rectification for mistakes made during the formation of an agreement ensures that the courts apply the evidentiary requirements that are appropriate for these two different types of cases. In a case where it is alleged that there has been a mistake in the recording of an agreement the party seeking rectification needs to prove that there was an

[1106] (1960) 108 CLR 158.
[1107] (1965) 114 CLR 164.
[1108] *Scope Machinery Pty Ltd v Ross* [2009] WASCA 100, [23].

agreement and the terms of that agreement. In doing so, that party will seek to show that, by comparing the alleged agreement with the written document, there has been a mistake in the recording of the agreement. The party resisting rectification will need to show that although there may have been a prior agreement, the parties renegotiated a different agreement at a later time and that that agreement is correctly recorded in the written document. In cases where there has been a mistake made during the formation of a contract the party seeking relief for the mistake needs to establish that rescission is first available as a remedy. If that is established, the court may offer rectification to the non-mistaken party as an alternative to rescission.

X CONCLUSION

This thesis has explored and analysed the fundamental principles of the equitable doctrine of rectification that provides equitable relief for mistakes in contractual and non-contractual documents. In this final Chapter, the conclusions of the thesis will be outlined. The most significant conclusion is that the current classification of rectification cases between cases of common or mutual mistake and cases of unilateral mistake must be rejected. That distinction has been used by the courts at least since the decision of the Lord Chancellor, Sir Edward Sugden, in *Mortimer v Shortall*.[1109] Accordingly, the approach advocated in this thesis, based on a distinction between the type of mistake made and not who was mistaken, represents a new approach to resolving some of the complexities that have emerged in the law of rectification. The full conclusions are set out below. There are nineteen conclusions:

1. The correction of minor errors through the common law process of construction is a proper and necessary role for common law construction. This is uncontroversial and has always been part of the common law process of construction.

2. It is appropriate for common law construction to provide a meaning for a contractual clause where the clause lacks commercial sense. That is, a court *must* determine what the words mean in the context of the transaction. The task may not always be easy and there may be competing constructions but the court must, if it can, place a meaning on the words used.

3. The equitable doctrine of rectification is a default jurisdiction in that the jurisdiction of rectification is limited by the scope of construction. The jurisdiction of the common law process of construction has expanded in recent decades resulting in a narrower scope of the equitable doctrine of rectification. Nevertheless, rectification remains an important equitable remedy. It is possible that the boundary between the two will shift further in the future, for example, if the courts abandon the restriction that evidence of prior negotiations is inadmissible as part of the process of common law construction.

[1109] (1842) 2 Dr & War 363.

4. The current distinction used by the courts and by litigants between cases of common or mutual mistake and cases of unilateral mistake is misconceived because it is irrelevant how many people are aware of the mistake. The distinction is unhelpful and creates unnecessary complexity. The distinction arose because for some considerable time the courts accepted the proposition that there needed to be a common or mutual mistake before rectification could be awarded. But subsequent judgments that provided exceptions to that general rule (which created the category of rectification for unilateral mistake) represented an admission that the general rule should never have been originally adopted.

5. The focus of rectification must be on the *type* of mistake made and not on *who* was mistaken. There are two relevant types of mistakes: mistakes in the recording of agreements; and mistakes made during the formation of a contract. When rectification cases are classified in this way much of the complexity in the law of rectification is removed and the focus shifts to what needs to be proved in each type of case. In cases concerning the recording of an agreement the focus is on the existence of the relevant mistake and knowledge of the mistake is irrelevant. By contrast, in cases concerning mistakes made during the formation of a contract the focus of the court is on knowledge of the mistake and the conduct of the non-mistaken party.

6. In cases of mistakes in recording agreements the focus must be on *comparing* the *agreement* reached between the parties to what was *recorded* in the relevant document. This also means that when considering a claim for rectification in circumstances where it is alleged that there is a mistake in the recording of an agreement, a court must identify what the parties have agreed on an objective basis, including an examination of their outward acts, where such an examination assists in determining what the parties have agreed on an objective basis.

7. In cases of mistakes made during the formation of an agreement the focus must be on identifying any mistake made by an offeror or by an offeree. It does not assist in describing these as cases of unilateral mistake although in most cases only one party will be mistaken. It is simply irrelevant that only one party is mistaken. The focus needs to be on identifying the relevant mistake so that the appropriate remedy can be identified, whether that is rescission, or rectification as an alternative remedy.

8. The courts were justified in abandoning the requirement for an antecedent contractual agreement before rectification can be granted. The abandonment of that requirement ensures that injustice is avoided where the parties, during their negotiations, agree on a proposed term to be included in their contract but by mistake that proposed term is either omitted or incorrectly recorded. The abandonment of the requirement for an antecedent agreement ensures that the courts can provide a just remedy.

9. The effect of the combined development of a requirement for a common or mutual mistake and an exception for unilateral mistake was that rectification was made available for a very different type of mistake: a mistake made during the formation of an agreement. Rectification was no longer restricted to mistakes made while recording an agreement.

10. False assumptions and mistaken beliefs are not mistakes for the purposes of rectification. To allow rectification in such cases would be to make a new contract for the parties different from the contract that they actually made. That is beyond the scope of the remedy of rectification. When entering into contracts parties need to consider their assumptions and beliefs carefully because there is no remedy available to overcome a mistaken assumption or belief. The court has no role in making a new agreement for the parties.

11. Where there has been a mistake in the recording of an agreement, rectification is available simply because there has been a mistake. But a party can resist rectification if they are able to show that the parties negotiated a new agreement to replace the earlier agreement. The rationale for rectification in these circumstances is to ensure that parties are kept to their promises.

12. In cases of mistakes made during the formation of an agreement the appropriate relief should be limited to rescission (if rescission is available on the facts of the case), with an option for the non-mistaken party to form a contract with the mistaken party based on the offer that the mistaken party intended to communicate. That is, in these circumstances, rectification becomes an optional remedy that the non-mistaken party

can elect to have instead of accepting rescission, but only as an alternative remedy where rescission is available.

13. There are three additional categories of cases where rectification may be available: (i) where there has been a mistake in the effect of the words used in a document; (ii) where there is evidence of fraud during the formation of a contract; and (iii) the ability to have a document rectified by consent.

14. Where there has been a mistake made during the formation of an agreement there is no justification in imposing a different agreement on the parties unless one party has engaged in fraud (which is a different category of case), and in cases of fraud it is irrelevant whether the innocent party was mistaken. The remedy of rectification in these cases responds to the fraud that has been committed and does not respond to any mistake made by the innocent party.

15. Rectification will be available in three circumstances where there is a mistake in the effect of the words used by the parties: (i) by giving effect to the intentions of the parties where those intentions are reflected in an agreement reached between the parties determined on an objective basis; (ii) in deed polls and voluntary deeds where the document does not give effect to the subjective intention of the person who executed it; and (iii) where the words used in an agreement are construed by a court to have a different meaning or effect from the agreement reached between the parties.

16. It will be especially difficult for the party seeking rectification to prove that there has been a mistake in the recording of an agreement if the words chosen by the parties are clear and unambiguous. In such cases the court is more likely to conclude that there has not been a mistake because the words chosen by the parties have a clear meaning and there is a lesser chance that there has been a mistake as alleged by the party seeking rectification.

17. Ignorance of the effect of a statutory provision is, as a general rule, not a ground for rectification of a document but in some cases rectification will be available. In the contractual context the availability of rectification will depend on how clear or precise the agreement between the parties was, and in the non-contractual context, the

availability of rectification will depend on the evidence of the intention of the person who executed the document. In such cases rectification will not be granted if it would make a new agreement for the parties different from the agreement that they made. These cases are similar to cases involving mistaken assumptions and false beliefs.

18. Parties to a written agreement can, by consent, enter into a supplementary agreement to rectify a mistake that they believe was included in their original document. If they do enter into a supplementary agreement, the courts will no longer have jurisdiction to correct a mistake in the earlier written document through rectification. The court does not have jurisdiction to grant rectification because there is no document that requires rectification, the parties having already exercised their self-help remedy of rectification by consent.

19. Where a supplementary agreement is executed by the parties to an earlier agreement and a third party is of the view that their rights have been impacted, and the supplementary agreement does not operate to rectify a mistake but rather amends or varies the terms of the earlier agreement, that third party will be able to apply to a court for appropriate relief, which might be a declaration that the supplementary agreement reflects a variation to the earlier agreement and is not a rectification of a mistake in the earlier agreement.

As outlined at the beginning of this final Chapter the most significant conclusion of this thesis is that the current classification of rectification cases between cases of common or mutual mistake and cases of unilateral mistake must be rejected. The approach advocated in this thesis represents a comprehensive consideration of the law of rectification from a scholarly perspective. The case law has been examined in detail for the purpose of identifying how the cases can be reconciled. That process revealed that the classification of cases between cases of common or mutual mistake and cases of unilateral mistake is misconceived. The examination of the cases also revealed that in many modern decisions some courts had shifted the focus of their analysis away from what was agreed between the parties and started to focus on the intentions of the parties. This shift in focus has contributed greatly to the current complexity of the law. That complexity is removed if the courts, in contractual cases, focus on agreements and not intentions. It remains for the courts to undertake the task that Lord Justice Etherton,

writing extra-judicially[1110] following his judgment in the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*,[1111] indicated was required when his Lordship said that 'the law on rectification for common and unilateral mistake is in need of comprehensive consideration at the highest level.'[1112]

[1110] Terence Etherton, 'Contract Formation and the Fog of Rectification' [2015] 68 *Current Legal Problems* 367.
[1111] [2012] 1 WLR 1333.
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