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RECTIFICATION VERSUS INTERPRETATION: THE NATURE AND SCOPE OF THE EQUITABLE JURISDICTION

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ABSTRACT. *This article argues that mistakes in written contracts should be corrected under the equitable doctrine of rectification rather than the common law of interpretation. But rectification on the basis of a common mistake should only be granted where both parties are actually mistaken. Any other approach is inconsistent with the nature of the equitable jurisdiction, and blurs the boundary between common mistake and unilateral mistake rectification.*

KEYWORDS: *contract, interpretation, rectification, mistake, equity.*

The law of rectification is difficult. In 2010, Sir Richard Buxton commented in this Journal upon the decision of the House of Lords in *Chartbrook Ltd. v Persimmon Homes Ltd.*[1] and wrote that "[m]uch is thus left in the air, not only with regard to the relationship between construction and rectification, but also within the jurisprudence of rectification itself".[2] Over six years after that significant decision, it is important to consider in more detail the nature and scope of rectification in the law of contract. Both issues have proved to be problematic across the common law world.

There is some tension concerning the elements that will lead to a successful claim for rectification. In *Chartbrook*, Lord Hoffmann suggested that, if the parties were *objectively* mistaken about the content of the written contract, such that a reasonable person would consider there to be a mistake, rectification could be ordered on the basis of a common mistake even if one of the parties was not, subjectively, actually making a mistake. Such comments were *obiter*, but have understandably been afforded great respect and were applied in the troublesome decision of the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd.*[3] Yet it is

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1 *Chartbrook Ltd. v Persimmon Homes Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101.

2 R. Buxton, "'Construction' and Rectification after *Chartbrook*" [2010] C.L.J. 253, 261.

3 *Daventry District Council v Daventry & District Housing Ltd*. [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333. Professor McLauchlan has called it "one of the hardest contract cases I have read": D. McLauchlan, "Refining Rectification" (2014) 130 L.Q.R. 83, 96.

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an open question whether English law will ultimately follow the lead of *Chartbrook*, and whether other jurisdictions will also follow suit.[4] Problematically, *Chartbrook* creates a significant overlap between rectification for common mistake and rectification for unilateral mistake. More fundamentally, *Chartbrook* departs from traditional equitable principle, which demands that the parties' subjective intentions be crucial to a claim for rectification.[5] The importance of this issue has prompted a number of judges to consider the law of rectification in extra-judicial speeches and articles.[6] It is suggested that rectification is best viewed as a "safety valve" to the rigorously objective approach of the common law; rectification allows the parties' subjective intentions to be taken into account in order to avoid parties being held to a document which, because of a mistake, fails accurately to record their bargain.

However, the scope of rectification has been squeezed by an expanding law of interpretation. This has generated debate in every common law jurisdiction. The judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd. v West Bromwich Building Society* ("*ICS*") has been influential in this regard, especially through the following "restatement" of principles:

(1) 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.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which

[4] R. Calnan, *Principles of Contractual Interpretation* (Oxford 2013), 145: "The result [of *Chartbrook*] is that the law is in a state of flux. The extent to which the approach in *Chartbrook* will be followed is still not entirely clear in England, and whether it will followed at all in jurisdictions such as Australia and New Zealand has yet to be decided."

[5] See e.g. *Crossco No.4 Unlimited v Jolan Ltd.* [2011] EWHC 803 (Ch), at [253], per Morgan J.; *Tartsinis v Navona Management Co.* [2015] EWHC 57 (Comm), at [90]–[99], per Leggatt J.

[6] See e.g. Buxton, "'Construction' and Rectification after *Chartbrook*"; K. Lewison, "If It Ain't Broke, Don't Fix It" in First Supplement (2010) to K. Lewison, *The Interpretation of Contracts* 4th ed. (London 2009), 127; Lord Toulson, "Does Rectification Require Rectifying?" (TECBAR Annual Lecture, 31 October 2013), available at <https://www.supremecourt.uk/docs/speech-131031.pdf>; N. Patten, "Does the Law Need to Be Rectified? *Chartbrook* Revisited" (The Chancery Bar Association 2013 Annual Lecture, 29 April 2013), available at <www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited>; P. Morgan, "Rectification: Is It Broken? Common Mistake after *Daventry*" [2013] R.L.R. 1; G. Legatt, "Making Sense of Contracts: The Rational Choice Theory" (2015) 131 L.Q.R. 454, 464; T. Etherton, "Contract Formation and the Fog of Rectification" (2015) CLP (early view: <http://clp.oxfordjournals.org/content/early/2015/07/08/clp.cuv007.full>). See also C. Nugee, "Rectification after *Chartbrook v Persimmon*: Where Are We Now?" (2012) 26 T.L.I. 76; Lord Neuberger, "Reflections on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR's 150th Anniversary" (6 October 2015), at para. 42, available at <https://www.supremecourt.uk/docs/speech-151006.pdf>.

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would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) 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 (see *Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.* [1997] 3 All E.R. 352; [1997] 2 W.L.R. 945).

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All E.R .229 at 233; [1985] A.C. 191 at 201: "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."[7]

The fourth and fifth principles of *ICS* overlap significantly with the equitable doctrine of rectification.[8] Indeed, in *Chartbrook*, Lord Hoffmann emphasised that

> What is clear ... is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is

[7] *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896, 912–13 (hereafter "*ICS*").

[8] E.g. Buxton "'Construction' and Rectification after *Chartbrook*", pp. 257–58.

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> allowed. 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.[9]

Such comments chime well with Professor Burrows's earlier arguments that the common law of "construction" might swallow up rectification.[10] If mistakes can be corrected at common law, what role is left for rectification?

Nevertheless, any predicted demise of rectification has been largely avoided and is unlikely to happen. There has even been an increase in rectification claims as commercial contracts become increasingly long and complicated, with diverse negotiating procedures. This increases the risk of mistakes being made.[11] It is important that the equitable jurisdiction should resist the advances of the common law into its territory. After all, if a mistake occurs, "would it not be better to correct it by a process which is designed for the job, rather than one which is not?"[12]

The borderline between the common law and equitable doctrines has recently been raised by Lord Neuberger in the decision of the UK Supreme Court in *Marley v Rawlings*:

> At first sight, it might seem to be a rather dry question whether a particular approach is one of interpretation or rectification. However, it is by no means simply an academic issue of categorisation. If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance).[13]

The approach in *ICS* creates an overlap between interpretation and rectification. However, it is important that the equitable jurisdiction is not allowed simply to slip into oblivion.[14] There are a number of advantages of

[9] *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [25].

[10] A. Burrows, "Construction and Rectification" in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford 2007).

[11] As Lord Neuberger has observed, "The increased volume, size and complexity of legal documents has compounded the inherent risk of error, and the accessibility of the negotiating material has assisted, even enabled, parties to argue about the effect of their pre-contractual communications to an extent which was simply inconceivable twenty years ago": "Foreword" to D. Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (London 2010), vii.

[12] Calnan, *Principles of Contractual Interpretation*, p. 100. See also *Campbell v Daejan Properties Ltd.* [2012] EWCA Civ 1503; [2013] H.L.R. 6, per Jackson L.J.: "In construing a written contract, the governing principle is that the parties mean what they say. The court must give effect to the express terms of the contract and must resist the temptation to re-draft or improve upon those terms. If by mischance the contract does not say what both parties intended, the normal remedy for the aggrieved party is an action for rectification."

[13] *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213, at [40].

[14] Cf. G. McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* 2nd ed. (Oxford 2011), para. 17.01.

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rectification over interpretation that need to be preserved. These will be considered before examining the substance of the law of rectification itself.

I. The Boundaries of Interpretation

It was traditionally thought that, where the language used in a contract was clear and unambiguous, the court had to interpret the document in accordance with its "plain meaning"[15] and should not look beyond the document itself.[16] If one of the parties wished the court to depart from the "plain meaning" of the document, then rectification rather than interpretation needed to be employed. However, in *ICS*, "Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account".[17] As a result, even unambiguous language may be interpreted in a manner different from its "plain meaning" where a court decides something must have gone wrong with the language used. This clearly encroaches upon the domain traditionally encompassed by the law of rectification.

Other common law jurisdictions have not been so happy with such an approach. The famous decision of the High Court of Australia in *Codelfa Construction Pty Ltd. v State Rail Authority of NSW* maintained a clear divide between interpretation and rectification as regards unambiguous language: "The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."[18]

Despite its controversial nature, this stance towards unambiguous language has been maintained by the High Court of Australia.[19] Limiting

[15] The notion of "plain meaning" is admittedly controversial, but seems to be accepted in the commercial context: see e.g. *Charter Reinsurance Co. Ltd. v Fagan* [1997] A.C. 313, 384; *Lloyds TSB Foundation for Scotland v Lloyds Banking Group plc* [2013] UKSC 3; [2013] 1 W.L.R. 366; *Lehman Brothers International (Europe) v Lehman Brothers Finance SA* [2013] EWCA Civ 188 [71]; *Arnold v Britton* [2015] UKSC 36; [2015] 2 W.L.R. 1593, at [17]–[20]. E. Farnsworth, *Contracts*, 4th ed. (New York 2004), §7.7. See also R. Lord, *Williston on Contracts*, 4th ed. (Rochester 1999), §602; cf. L. Solan, *The Language of Judges* (Chicago 1993), esp. ch. 4. See also A. Corbin, *Corbin on Contracts* (St. Paul 1960), vol. 3, esp. §535 and §542.

[16] See e.g. *In the Goods of Peel* (1870) L.R. 2 P&D 46; *Shore v Wilson* (1842) 9 Cl. & Fin. 355, 365, per Tindal C.J. For further consideration of the parole evidence rule, see e.g. R. Stevens, "Objectivity, Mistake and the Parol Evidence Rule" in A. Burrows and E. Peel (eds.), *Contract Terms* (Oxford 2007).

[17] *R. (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38; [2002] 1 W.L.R. 2956, at [5], per Lord Steyn, cited with approval in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd.* [2010] UKSC 44; [2011] 1 A.C. 662, at [36], per Lord Clarke.

[18] *Codelfa Construction Pty Ltd. v State Rail Authority of NSW* (1982) 149 C.L.R. 337, 352, per Mason J.

[19] *Mount Bruce Mining Limited v Wright Prospecting Pty Limited* [2015] HCA 37; *Western Export Services Inc. v Jireh International Pty Ltd.* [2011] HCA 45; (2011) 86 A.L.J.R. 1; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5; (2002) 240 C.L.R. 45. Neither the decision of the High Court in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd.* (2014) 306 ALR 25; [2014] HCA 7 nor that of the New South Wales Court of Appeal in *Mainteck Services Pty Ltd. v Stein Heurtey SA* [2014] NSWCA 184 alters this position such that there has been a decisive departure from the traditional understanding of *Codelfa*; for critical

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the recourse to background material where the agreed contract has been clearly drafted and is unambiguous helps lawyers and others to give clear advice on the meaning of contracts quickly, cheaply, and with a high degree of confidence, thereby enhancing commercial certainty.[20] It also facilitates the task of judges in the lower courts, and makes disputes focused on interpretation less time-consuming more generally.

Indeed, there have been *dicta* from the UK Supreme Court which suggest that a threshold of ambiguity might be introduced even in English law. For example, in *Rainy Sky SA v Kookmin Bank*, Lord Clarke stated that "[w] here the parties have used unambiguous language, the court must apply it".[21] This may be thought to be consistent with the dissenting judgment of Lord Lloyd in *ICS* itself, when he commented that the process of interpretation cannot give the words chosen by the parties a meaning they cannot fairly bear.[22] In the influential decision of *Ryledar Pty Ltd. v Euphoric Pty Ltd.*, the New South Wales Court of Appeal approved the observation of the first instance judge, Palmer J., that "when a party to a contract argues that the known context and common purpose of the transaction gives the words of the contract a meaning which, by no stretch of language or syntax they will bear then, in truth, one has a rectification suit, not a construction suit".[23]

The approach across the common law world is nuanced and all jurisdictions do not speak with entirely the same voice. There is not necessarily a stark choice to be made between a "literal" and "contextual" approach, but rather it is a question of degree as to what weight should be placed upon contextual factors. In any event, the influence of Lord Hoffmann's judgment in *ICS* has been very significant,[24] and has recently seeped into Canada as well. Although *ICS* for some time appeared to have little impact upon Canadian jurisprudence,[25] the recent decision of the Canadian Supreme Court in *Sattva Capital Corporation v Creston Moly*

discussion, see J. Carter, W. Courtney and G. Tohurst, "'Reasonable Endeavours' in Contract Construction" (2014) 32 J.C.L. 36.

20 See recently *Tartsinis* [2015] EWHC 57 (Comm), at [11], per Leggatt J.

21 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900, at [23]. See also e.g. in *Multi-Link Leisure Developments Ltd. v North Lanarkshire Council* [2010] UKSC 47; [2011] 1 All E.R. 175, at [11]: "words … should not be changed, taken out or moved … until it has become clear that the language the parties actually used creates an ambiguity which cannot be solved otherwise" (per Lord Hope). See also e.g. *Thompson v Goblin Hill Hotels* [2011] UKPC 8; [2011] 1 BCLC 587; *Al Sanea v Saad Investments Co. Ltd.* [2012] EWCA Civ 313, at [31], per Gross L.J.; *Ardagh Group SA v Pillar Property Group Ltd.* [2013] EWCA Civ 900; [2014] STC 26, at [50], per Etherton C.; *Arnold* [2015] UKSC 36; [2015] 2 W.L.R. 1593, at [17]–[18].

22 *ICS* [1998] 1 W.L.R. 896, 904. See also *Charter Reinsurance Co. Ltd.* [1997] A.C. 313, 388, per Lord Mustill.

23 *Ryledar Pty Ltd. v Euphoric Pty Ltd.* [2007] NSWCA 65; (2007) 69 N.S.W.L.R. 603, at [108]–[109].

24 E.g. in New Zealand, it has been established that reference to the factual matrix is desirable even when the terms of the contract are not ambiguous: *Vector Gas Ltd. v Bay of Plenty Energy Ltd.* [2010] NZSC 5; [2010] 2 N.Z.L.R. 444; See also *Boat Park Ltd. v Hutchinson* [1999] 2 N.Z.L.R. 74, 81–82.

25 *Eli Lilly and Co. v Novopharm Ltd.* [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1; G. Hall, "The Curious Incident in the Law of Contract: The Import of 22 Words from the House of Lords" (2004) 40 C.B. L.J 20.

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Corporation[26] relies upon *ICS* and "elevates the 'factual matrix' to a central place in contractual interpretation".[27] No need for ambiguity is required before regard can be had to the surrounding circumstances in ascertaining the meaning of a contract.[28] Yet, although this suggests an expanding role for interpretation, the court did emphasise that "[w]hile the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement".[29]

One significant limit to the scope of interpretation concerns pre-contractual negotiations, which are generally inadmissible in the interpretative exercise.[30] It also seems inappropriate to interpret a contract such that an entire page be deleted or inserted.[31] Admittedly, both these limits to interpretation are controversial and have been criticised,[32] but nonetheless are important practical restrictions on the reach of the common law. It is necessary to invoke rectification where reliance is placed upon pre-contractual communications or where extra documents are sought to be included in the contract.

II. Reasons to Prefer Rectification over Interpretation for Correcting Mistakes

The broad approach to interpretation favoured in cases such as *ICS* and *Chartbrook* allows for a greater range of mistakes to be corrected by interpretation at common law. It is suggested that this threatens to destabilise some of the core functions of the law on interpretation. As Sir Richard Buxton has argued, "the law of contract, which individuals and businessmen use to regulate their affairs in order to avoid litigation, should place a premium on certainty. Neither *ICS* nor *Chartbrook* achieve that end".[33]

Calnan has proposed that, when interpreting commercial contracts, the matrix of fact should be limited to the identity of the parties, the nature

[26] *Sattva Capital Corporation v Creston Moly Corporation* 2014 SCC 53; (2014) 373 D.L.R. (4th) 393.

[27] S. Waddams, "Contractual Interpretation" (2015) 130 L.Q.R. 48, 51.

[28] The decision of the Supreme Court in this respect was not entirely without precedent: see e.g. *Hi-Tech Group Inc. v Sears Canada Inc.* (2001) 52 OR (3d) 97 (CA), at [23]; *Kingsway General Insurance Co. v Lougheed Enterprises Ltd.* 2004 BCCA 421; *Dumbrell v Regional Group of Companies* 2007 ONCA 59, at [54]; J. McCamus, *The Law of Contracts*, 2nd ed. (Toronto, Irwin Law, 2012), 751. But compare the earlier decision of the Supreme Court in *Eli Lilly and Co.* [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1, at [55]–[56], per Iacobucci J., which is apparently now overruled by *Sattva*: "... it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face ... to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words."

[29] At [57], citing *Glaswegian Enterprises Inc. v B.C. Tel Mobility Cellular Inc.* (1997) 101 B.C.A.C. 62.

[30] *Prenn v Simmonds* [1971] 1 W.L.R. 1381 (HL); *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101.

[31] See the discussion of an example given by Moore-Bick L.J. in Burrows, "Construction and Rectification", p. 96.

[32] See generally McMeel, *The Construction of Contracts*, ch. 5.

[33] Buxton, "'Construction' and Rectification after *Chartbrook*", p. 261. See also *Tartsinis* [2015] EWHC 57 (Comm), at [11], per Leggatt J.

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and purpose of the transaction, and the market in which the transaction took place.[34] Such factors should be well known and accessible to both the contracting parties and third parties. Restricting the relevant background in this way would increase parties' control over how their agreements will be interpreted when drafting the contract, and subsequently make it easier to give advice on the meaning of a contract.[35]

Rectification might be preferred to interpretation because the equitable jurisdiction is better equipped to protect third-party rights. This is because equitable relief might be refused if it would prejudice innocent third parties.[36] Third parties may rely upon the "plain meaning" of a contract, without being aware of the particular factual matrix which indicates that the contractual language in the formal, written document was used by mistake. Such third parties could be readily protected by the court when exercising its discretion to grant equitable relief, but it is unclear how the common law of interpretation can similarly protect third-party rights.

In *Chartbrook*, Lord Hoffmann said:

> The law has sometimes to compromise between protecting the interests of the contracting parties and those of third parties. But an extension of the admissible background will, at any rate in theory, increase the risk that a third party will find that the contract does not mean what he thought. How often this is likely to be a practical problem is hard to say.[37]

It is suggested that this is indeed a practical problem. In fact, a former Chief Justice of New South Wales has remarked, extra-judicially, that "the impact on, and the import to third parties is, in my opinion, significantly understated" in the analysis of Lord Hoffmann in *ICS*, and this represents "a significant defect in Lord Hoffmann's schema".[38] It has been suggested that the risk of prejudicing third parties may be sufficiently accommodated by the possibility of contractual estoppel if an assignee, for example, has acted to his or her detriment in reliance on the "conventional" meaning of the written document which does not correspond to a more "liberal" interpretation of the contract,[39] but such a solution seems somewhat unsatisfactory

[34] Calnan, *Principles of Contractual Interpretation*, p. 66.

[35] The parties have considerably less control over the context or purpose ascribed by a subsequent tribunal than they do over the text itself: J. Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge 2013), 229.

[36] *Bell v Cundall* (1750) Amb. 101; *Garrard v Frankel* (1862) 30 Beav. 445; *Smith v Jones* [1954] 1 W.L.R. 1089; *Thames Guaranty Ltd. v Campbell* [1985] Q.B. 210.

[37] *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [40].

[38] J. Spigelman, "From Text to Context: Contemporary Contractual Interpretation" (2007) 81 A.L.J. 322, 334.

[39] D. McLauchlan, "Contract Interpretation: What Is It About?" (2009) 31 Sydney L.R. 5, 42–43; J. Carter, *The Construction of Commercial Contracts* (Oxford 2013), para. 7–42. See also M. Barber and R. Thomas, "Contractual Interpretation, Registered Documents and Third Party Effects" (2014) 77 M.L.R. 597.

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if it would lead to the courts having to say that the contract has a different meaning as against the promisee than the third party.[40]

It would be possible for the common law to take a robust approach and demand that the third party – such as an assignee – take active steps to inquire about the background to the contract, failing which the third party takes a risk that the meaning of the contract will not correspond to its "plain meaning".[41] However, this would place an excessive burden on the assignee. Indeed, courts have generally sought to restrict the "factual matrix" and reliance placed upon surrounding circumstances where third-party rights could be affected. In *Re Sigma Finance Corp (in administration)*, Lord Collins insisted that "[w]here a security document secures a number of creditors who have advanced funds over a long period of time it would be quite wrong to take account of circumstances which are not known to all of them. In this type of case it is the wording of the instrument which is paramount".[42] Similarly, in *Cherry Tree Ltd. v Landmain Ltd.*,[43] the majority of the Court of Appeal[44] held that a restrictive approach to background material was required when considering "negotiable and registrable contracts or public documents", including planning permissions, companies' articles of association, injunctions, and receivership orders.[45] As Lewison L.J. explained, "the justification for the restrictive approach is that third parties might (not will) need to rely on the terms of the instrument under consideration without access to extraneous material".[46] It is suggested that concerns surrounding the protection of third parties are better assuaged by the equitable doctrine of rectification than the more blunt approach taken by the common law of interpretation.

In many instances, commercial parties only sign a written contract after quite lengthy negotiations, and are fully aware of the document's importance. As a result, the parties check the language carefully, and may be advised by lawyers as to the meaning of the contract. If the parties do not take the final language chosen seriously, then they should be encouraged to do so. The language of the final text should therefore be afforded the utmost respect in the interpretative exercise. Admittedly, judges do say that they will not lightly conclude that a mistake has been made,[47] but the threshold for departing from the "plain meaning" of a text often

[40] See e.g. *Mannai Investment Co. Ltd. v Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749, 779, per Lord Hoffmann: "There are documents in which the need for certainty is paramount and which admissible background is restricted to avoid the possibility that the same document may have different meanings for different people according to their knowledge of the background."

[41] *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [40], per Lord Hoffmann.

[42] *Re Sigma Finance Corp (in administration)* [2009] UKSC 2; [2010] 1 All E.R. 571, at [37].

[43] *Cherry Tree Ltd. v Landmain Ltd.* [2012] EWCA Civ 736; [2013] Ch. 305.

[44] Arden L.J., dissenting, applied *ICS* in a liberal manner: ibid., at paras. [20]–[84].

[45] Ibid., at paras. [124]–[125].

[46] Ibid., at para. [125].

[47] E.g. *ICS* principle 5: see text to note 7 above.

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seems to be quite low.[48] A person seeking rectification, on the other hand, must be able to rely upon "strong irrefragable evidence",[49] and the burden of proof on the party seeking rectification is particularly "formidable" if the formal written instrument is detailed and recorded with the benefit of expert legal advice.[50] Such high hurdles better protect the sanctity of the written contract, and limit the possibility of judges' rewriting the parties' bargain because it would improve the contract. In *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club*, Binnie J. noted the need for "convincing proof" since "[a]part from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts".[51]

A further advantage of the equitable doctrine is that the decision of a judge whether or not to rectify a contract is a question of fact. Yet the interpretation of a written contract is a question of law. This makes it easier to obtain permission to appeal an issue of interpretation, since the reluctance of appellate courts to interfere with decisions of primary judges on points of fact does not similarly apply to points of law.

In *Carmichael v National Power plc*, Lord Hoffmann said that: "[t]here could have been no precedent and no certainty in the construction of standard commercial documents if questions of construction had been left in each case to a jury which gave no reasons for its decision."[52] But juries are no longer used in civil trials, and the correct interpretation of a particular contract has reduced value as a precedent since the matrix of fact is particular to each individual contract.[53] This has the potential to undermine efforts to ensure a consistent interpretation of commercial standard forms.[54] Indeed, for this reason, the Singapore Court of Appeal has suggested that "the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts".[55]

The issue of whether interpretation should continue to be considered a question of law was recently considered by the Canadian Supreme Court

[48] See e.g. the discussion in *Ardagh Group SA* [2013] EWCA Civ 900; [2014] S.T.C. 26, at [50]–[63], per Etherton C.; at [66], per Underhill L.J.

[49] *Countess of Shelburne v Earl of Inchiquin* (1784) 1 Bro.C.C. 338, at [341], per Lord Thurlow L.C.; and see *Marquis Townshed v Stangroom* (1801) 6 Ves. 328, 334; *Lake v Lake* [1989] S.T.C. 865, 869. See also F. Dawson, "Interpretation and Rectification of Written Agreements in the Commercial Court" (2015) 131 L.Q.R. 344, 347–48.

[50] See e.g. *James Hay Pension Trustees Ltd. v Kean Hird* [2005] EWHC (Ch) 1093, at [81].

[51] *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club* [2002] 1 S.C.R. 678, 693.

[52] *Carmichael v National Power plc* [1999] 1 W.L.R. 2042, 2048–49; see further Lord Devlin, *Trial by Jury* (London 1956), 97–98. In *Thorner v Majors* [2009] UKHL 18; [2009] 1 W.L.R. 776, at [82], Lord Neuberger expressed support for the "illuminating analysis" of Lord Hoffmann in *Carmichael.*

[53] In *Deeny v Gooda Walker Ltd.* [1996] 1 W.L.R. 426 (HL) 435, Lord Hoffmann said: "No case on the construction of one document is authority on the construction of another, even if the words are very similar." See also *BCCI v Ali* [2001] UKHL 8; [2002] 1 A.C. 251, at [51]; *Schuler v Wickman* [1974] A.C. 235, 256, per Lord Morris.

[54] See e.g. *Pioneer Shipping Ltd. v BTP Tioxide Ltd. (The Nema) (No.2)* [1982] A.C. 724, 737, per Lord Diplock.

[55] *Zurich Insurance (Singapore) Pte Ltd. v B-Gold Design & Construction Pte Ltd.* [2008] 3 S.L.R. 1029; [2008] SGCA 27, at [132].

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in *Sattva.* Rothstein J., delivering the judgment of the court, noted the historical development of interpretation which led to its being treated as a question of law, and concluded that "[w]ith respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix".[56]

It would be desirable to limit the number of appeals concerning the meaning of contracts. A trial judge, having heard all the evidence concerning the factual matrix and relevant background, is best placed to determine the meaning of a contract.[57] The approach of the Supreme Court of Canada deserves support: viewing interpretation as a mixed question of law and fact should reduce the number of appeals that swamp the judicial system. In England and Wales, despite the principles of interpretation being supposedly "well-settled",[58] the highest courts continue to hear cases on interpretation.[59] This might suggest that the principles are not in fact so well settled, or at least that they are difficult to apply, but in any event it is unsatisfactory for essentially factual disputes over the correct meaning of a particular contract consistently to escalate up through the appellate system.[60] It does little for commercial certainty if parties are encouraged to pursue appeals in the hope that a higher court may take a different view regarding the scope and weight of "relevant background". It would be preferable for the meaning of the contract to be resolved quickly and more efficiently by a first instance judge applying clear principles. If that meaning is to be departed from due to a mistake, then rectification should be pleaded.

The notoriously high hurdles insisted upon by the law of rectification seem better equipped to staunch the flow of appeals in this area than interpretation. This would also have the advantage of being more transparent about what is going on: when rectification is granted, the written document is actually changed. Yet this does not happen where a document is interpreted in a manner contrary to its plain meaning: the document is not

[56] *Sattva Capital Corporation* 2014 SCC 53; (2014) 373 D.L.R. (4th) 393, at [50], per Rothstein J.

[57] See also *Re Sigma* [2009] UKSC 2; [2010] 1 All E.R. 571, at [40], per Lord Walker.

[58] *National Merchant Buying Society Ltd. v Bellamy* [2013] EWCA Civ 452; [2013] 2 All E.R. (Comm) 674, at [39], per Rimer L.J.

[59] In England alone, post-*ICS*, see e.g. *BCCI v Ali; The Starsin* [2003] UKHL 12; [2004] 1 A.C. 715; *Chartbrook; Re Sigma Finance Corp (in administration*) [2009] UKSC 2; [2010] 1 All E.R. 571; *Multi-Link Leisure Developments Ltd.* [2010] UKSC 47; [2011] 1 All E.R. 175; *Rainy Sky SA* [2011] UKSC 50; [2011] 1 W.L.R. 2900; *Lloyds TSB Foundation for Scotland* [2013] UKSC 3; [2013] 1 W.L.R. 366. In *TAEL One Partners Ltd. v Morgan Stanley & Co. International Plc* [2015] UKSC 12, the Supreme Court considered a term in the Loan Market Association standard terms and conditions, and recognised that "[t]here is no dispute as to the relevant legal principles" (at [1]).

[60] Giving the 2015 Keating Lecture, called "The Contribution of Construction Cases to the Common Law", on 25 March 2015, Lord Dyson M.R. commented: "It is extraordinary how many cases are still being reported in the law reports in the 21st century on how to interpret a contract. I cannot help thinking that the great Lord Mansfield, who was perhaps the founding father of modern commercial law, would have been disappointed and probably astounded too."

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amended, which could still lead to difficulties in the future concerning third parties.

III. Rectification for Common Mistake: Subjective or Objective Intentions?

Rectification for common mistake has, traditionally, been difficult to establish. The court needed to be satisfied that both parties were actually making the same mistake. Thus, in *The Commissioners of Inland Revenue v Rafael*, Lord Wright said:

> But allowing for these and other rules of the same kind, the principle of the common law has been to adopt an objective standard of construction and to exclude general evidence of actual intention of the parties; the reason for this has been that otherwise all certainty would be taken from the words in which the parties have recorded their agreement or their dispositions of property. If in some cases hardship or injustice may be effected by this rule of law, such hardship or injustice can generally be obviated by the power in equity to reform the contract, in proper cases and on proper evidence that there has been a real intention and a real mistake in expressing that intention: these matters may be established, as they generally are, by extrinsic evidence. The Court will thus reform or re-write the clauses in order to give effect to the real intention. But that is not construction, but rectification.[61]

The terms "real intention", "actual intention", "true intention", or "subjective intention" have largely been used synonymously. The important distinction is that the objective intentions of the parties are crucial for interpretation, and the subjective intentions of the parties are of paramount importance for rectification. If the court is to alter a written contract, it should be convinced that the parties are both labouring under an actual mistake. If only one party is mistaken, then the requirements for unilateral mistake need to be satisfied.[62] If neither party is actually mistaken, there is no reason for equity to intervene.

However, this traditional understanding of rectification for common mistake has been disturbed by more recent decisions of the appellate courts in England and Wales. It now seems that an objective approach to mistake might be sufficient: a court will rectify a document where it concludes that a reasonable observer would think that there has been a mistake in the written contract. This clearly allows the courts much more leeway to interfere with a contract agreed by the parties, and stems from *obiter*

[61] *The Commissioners of Inland Revenue v Rafael* [1935] A.C. 96, 143. See also *Wright v Goff* (1856) 22 Beav. 207; *Fowler v Fowler* (1859) 4 De G&J 250; *Agip SpA v Navgazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353; *Munt v Beasley* [2006] EWCA Civ 370; L. Bromley, "Rectification in Equity" (1971) 87 L.Q.R. 532; Dawson, "Interpretation and Rectification".

[62] See section IV below.

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comments from Lord Hoffmann in *Chartbrook*.[63] However, as Spry has remarked, "[r]ecent general assertions by Lord Hoffmann in the *Chartbrook* case have rendered the general law of rectification less certain. These assertions have been widely criticised, and unless they obtain general acceptance they should not be taken to represent equitable principle".[64] It is to be hoped that other jurisdictions will not follow the lead of the House of Lords in *Chartbrook*, and will only rectify agreements where the parties have actually made a mistake in the written document. Indeed, it would be welcome if the English courts were to retreat from the position apparently favoured in *Chartbrook* and return to equitable orthodoxy.

In *Chartbrook*, Chartbrook Ltd. contracted with Persimmon Homes Ltd. for the development of land owned by Chartbrook Ltd. The parties disagreed on the interpretation of the following overage clause: "'Additional Residential Payment' ['ARP'] means 23.4% of the price achieved for each Residential Unit in excess of the Minimum Guaranteed Residential Unit Value ['MGRUV'] less the Costs and Incentives ['C&I']."

The House of Lords felt able to *interpret* this clause 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."[65]

That such violence could be wreaked upon the language chosen by the parties through the process of interpretation is controversial.[66] But, even if this result could not have been reached through interpretation, their Lordships would have reached the same result through rectification.[67] The discussion of rectification is therefore necessarily *obiter*. However, Lord Hoffmann held that a prior consensus regarding the calculation of the "ARP" in the manner suggested by Persimmon Ltd. was objectively established by an exchange of letters and, since there was no evidence of subsequent discussions or variation on this point, it followed that both parties would have been mistaken in thinking that the written document reflected their prior accord, if the court had decided the interpretation point differently.[68] As a result, rectification would have been granted.

It is suggested that the reasoning of Lord Hoffmann on this point is unsatisfactory for reasons of principle, policy, and its use of precedent. On the point of principle, equity should only interfere where the consciences of the parties are actually affected.[69] This requires both parties actually to be

[63] *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [48]–[66].
[64] I.C.F. Spry, *Equitable Remedies*, 9th ed. (London 2014), 630.
[65] As put by Tuckey L.J. in the Court of Appeal: *Chartbrook Ltd. v Persimmon Homes Ltd.* [2008] EWCA Civ 183; [2008] 2 All E.R. (Comm) 387, at [184].
[66] See e.g. D. McLauchlan, "*Chartbrook Ltd. v Persimmon Homes Ltd.*: Commonsense Principles of Interpretation and Rectification?" (2010) 127 L.Q.R. 8; P. Davies, "Finding the Limits of Contractual Interpretation" [2009] LMCLQ 420.
[67] Indeed, this appears to have been favoured by Baroness Hale: *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [100].
[68] Ibid., at para. [66].
[69] Bromley, "Rectification in Equity"; *Ryledar Pty Ltd.* [2007] NSWCA 65; (2007) 69 N.S.W.L.R. 603.

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mistaken. The equitable exercise is distinct from that undertaken by the common law when considering interpretation.

On the issue of policy, the objective approach means that an earlier, objective accord between the parties might trump the later, formal written contract. This seems particularly inappropriate where the parties realise that anything provisionally agreed is "subject to" signing a formal document. Parties should be encouraged to check the final written document carefully, and seriously consider whether they should sign the contract. It would therefore be preferable for the later agreement to take priority over any earlier, less formal agreement in the absence of an actual mistake. Yet the approach in *Chartbrook* reaches the converse result. Indeed, in *Chartbrook* itself, the judge at first instance found as a matter of fact that the directors of Chartbrook Ltd. honestly believed that there was no mistake in the written document.[70] This meant that Chartbrook Ltd., in good faith, relied upon the language of a written agreement which Persimmon Ltd. (a significantly larger commercial entity) had drafted and checked. Lord Hoffmann's objective approach to rectification would have circumvented such subjective beliefs, and imposed upon Chartbrook Ltd. a contract to which it did not actually agree, thereby allowing Persimmon Ltd. to escape a bad bargain. It is a distortion of language to say that there was a *common* mistake shared between Chartbrook and Persimmon.[71]

The use of precedent in *Chartbrook* might also be questioned. Of course, being the highest appellate court, the House of Lords was not bound by previous decisions, but the approach taken towards rectification represents a significant departure from orthodoxy[72] without the benefit of the opinions of the lower courts. This seems unfortunate,[73] particularly since the discussion of the rectification issue was *obiter*. Moreover, Lord Hoffmann thought that the majority judgment of the Court of Appeal in *Britoil plc v Hunt Overseas Oil Inc*[74] lends no support to the view that a party must actually be mistaken about whether the document reflects what he subjectively believes the agreement to be.[75] This seems to underplay much of the reasoning of Hobhouse L.J. For instance, Hobhouse L.J. said:

[70] Admittedly, this finding in itself was perhaps dubious: see e.g. [2008] EWCA Civ 183; [2008] 2 All E.R. (Comm) 387, at [163]–[169], per Lawrence Collins L.J.; and Lord Hoffmann in the House of Lords at [55].

[71] For unilateral mistakes, see section IV below. However, in *Kowloon Development Finance Ltd. v Pendex Industries Ltd.* [2013] HKCFA 35, at [22], Lord Hoffmann N.P.J. said: "a party might find that, as a result of rectification on grounds of mutual mistake, he is bound by a contract which is not only different from the terms of the final document but is one which, subjectively, he never intended to agree to". This has been criticised as an "extreme view, quite removed from authority": J. Heydon, M. Leeming, and P. Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies*, 5th ed. (LexisNexis, 2014), at para [27-060].

[72] See e.g. Nugee, "Rectification".

[73] Buxton, "'Construction' and Rectification after *Chartbrook*", p. 261.

[74] *Britoil plc v Hunt Overseas Oil Inc.* [1994] C.L.C. 561, per Hobhouse and Glidewell L.JJ.; Hoffmann L. J. dissenting.

[75] *Chartbrook* [2009] UKSC 2; [2010] 1 All E.R. 571, at [63].

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> Further, there must be a reality to the allegation of common mistake. It is a factual allegation, not a question of law. On the defendants' argument before us no actual common mistake is required. The parties are to be treated as if they were bound by the objective interpretation of the, *ex hypothesi*, non-binding heads of agreement. Where the relevant document is a legally binding document, it is appropriate and just to hold the parties to the objectively ascertained meaning of the words used. But where they are not bound and the court is only looking at the previous document to help it answer the factual question whether or not there has been a mistake in the preparation of the legal document, the matter becomes one of fact not law. …
>
> What the court is doing is looking to see if the document provides clear evidence to justify the conclusion that the plaintiffs were mistaken when they executed the definitive agreement. …
> Each case must turn on its own facts and the evidence which is adduced, if necessary, oral as well as documentary. The court has to be satisfied that there was in truth a common mistake. It has also to be satisfied that in equity the claimant for rectification should have the relief for which he is asking.

This passage was cited, extra-judicially, by Lord Toulson,[76] who commented that, in *Chartbrook*, Lord Hoffmann "minimises the real significance of Hobhouse L.J.'s reasoning" since an actual mistake was in fact required in *Britoil*.

However, *Chartbrook* has been applied to a rectification claim by the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*.[77] The case concerned a term of a contract relating to who was to bear responsibility for a deficit in the employees' pension fund as part of a much larger commercial arrangement: "In relation to the Transferring Employees the Council shall make a payment of £2.4 million pounds (being an amount 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."

The plain meaning of this clause was that the council should pay the money. The judge at first instance refused to rectify the contract to make the defendant pay instead.[78] Both sides had been advised by lawyers, understood the importance of the final written contract, and the judge found as a matter of fact that the defendant was not mistaken about the meaning of the provision. Nevertheless, the Court of Appeal, by a majority, allowed the appeal.[79]

[76] Lord Toulson, "Does Rectification Require Rectifying?".
[77] *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333.
[78] [2010] EWHC 1935.
[79] For critical comment, see McLauchlan, "Refining Rectification"; P. Davies, "Rectifying the Course of Rectification" (2012) 75 M.L.R. 387.

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The decision is very difficult, with three full and thoughtful judgments. However, it seems clear that the defendant in *Daventry* was not actually making any mistake in thinking that the contract meant what it did.[80] The contract was negotiated by third parties who had no authority to enter into a contract for either side – the board of directors of the defendant company decided to sign the contract based upon a correct interpretation of the plain meaning of the contractual language chosen. Although this might be considered to be entirely reasonable, the Court of Appeal held that the plain meaning of the contract should be altered because of a common mistake.

Unfortunately, it does not seem to have been seriously argued that an actual, common mistake needed to be established for rectification to be granted. Instead, the parties appear to have assumed that Lord Hoffmann's approach in *Chartbrook* should be followed, and that it was therefore sufficient for a reasonable person to think that both parties were mistaken. Etherton L.J. summarised the requirements for rectification as follows:

> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) which existed at the time of execution of the instrument sought to be rectified; (3) such common continuing intention to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and (4) by mistake, the instrument did not reflect that common intention.[81]

The majority of the Court of Appeal held that a reasonable person would think that the parties made a mistake because the written document did not accord with what had been agreed by the negotiators for both sides.[82] Just as in *Chartbrook*, this had the unfortunate effect of imposing upon the defendant a contract to which it did not agree, and would not have agreed: the board of directors would not have signed the contract had it known that it would bear responsibility for the deficit in the pension fund. It is suggested that the dissenting view of Etherton L.J. should have been preferred: a reasonable person would have thought that, once the clause was inserted into the draft agreement and accepted by the council and its lawyers, any prior objective accord was replaced by the later agreement encapsulated in the contract.

The difference in approach between the majority and minority shows how malleable the objective test of mistake may be. The advantage of an

[80] As was also the case in *Chartbrook* – see note 70 above.
[81] *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [80], rephrasing a statement by Peter Gibson L.J. in *Swainland Builders Ltd. v Freehold Properties Ltd.* [2002] EWCA Civ 560; [2002] 2 E.G.L.R. 71. This test appears to have been supported by all three judges in the Court of Appeal.
[82] E.g. *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [17], per Toulson L.J.; at [213], per Lord Neuberger M.R.

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objective approach is supposed to be an increased level of certainty,[83] but this is clearly undermined if the objective test of common intention can be readily manipulated to reach any result the court desires.[84] Indeed, it seems very difficult for a non-mistaken party to ensure that the court will accept that the concluded written document represents the bargain made and is not afflicted by mistake: even an entire agreement clause will not preclude a claim for rectification.[85] Nor will the presentation of a clear term prior to the conclusion of the contract necessarily ensure that rectification for common mistake is avoided, even if the other side and its advisers have ample opportunity to check the terms of the contract: this was precisely what happened in *Daventry*.[86]

Uncertainty ensues from the court's ability to deem that the parties have made a mistake in situations where one party has not actually made a mistake at all. Yet the approach adopted in *Chartbrook* was foreshadowed by academic articles favouring an objective approach to common mistake.[87] For example, Marcus Smith, upon whom Lord Hoffmann relied in *Chartbrook*, raised four problems with the subjective approach,[88] but it is suggested that none necessitates a shift towards the objective approach adopted in *Chartbrook*. First, Smith argues that the subjective approach raises difficulties of proof, which will lead to commercial uncertainty as speculative claims may be more readily made. This should not be problematic if proper case management occurs, such that "fishing expeditions" do not proceed further.

Secondly, Smith laments that "a subjective test for rectification is likely to lead to fewer contracts being rectified".[89] Although possibly correct, it is not clear why this should be a problem. Formal, written contracts should presumptively be upheld and instances of rectification should be rare. Any other approach would undermine the importance commercial parties place upon the final, written agreement.[90] It is entirely appropriate that common mistake rectification be difficult to prove: the strong starting

[83] e.g. ibid., at para. [111], per Etherton L.J.

[84] Etherton L.J. commented, at [104], that "Our different judgments and conclusions in the present case reflect significant differences of view about the way the objective test should be applied on the facts of this case".

[85] *Surgicraft Ltd. v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch).

[86] The result of the case based on *common* mistake is unsatisfactory; for unilateral mistake, see section IV below.

[87] M. Smith, "Rectification of Contracts for Common Mistake, *Joscelyne v Nissen* and Subjective States of Mind" (2007) 123 L.Q.R. 116; D. McLauchlan, "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 L.Q.R. 608.

[88] Smith, "Rectification of Contracts", pp. 130–32.

[89] Ibid., at p. 130.

[90] *Performance Industries Ltd.* [2002] 1 SCR 678, 703, per Binne J.: "It is undoubtedly true that courts ought to hold commercial entities to a reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer. Rectification should not become a belated substitute for due diligence."

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point must be that the written document does not contain a mistake, and the claimant should have to work very hard to show the contrary.

Thirdly, Smith raises the point that it is difficult to be sure whose intention counts when a contract is concluded by a company and the person who negotiated the contract does not have the authority to conclude a contract.[91] This is a tricky issue; Smith rightly observes that "[i]n a corporate situation, there is very likely to be a fragmentation of the subjective intent".[92] However, even on an objective approach, it might be thought incumbent upon the claimant to establish whose intention or conduct should be objectively relevant. In principle, it is surely right to insist that the intention of the person with authority to enter into the binding contract is paramount. If that person is different from, and has a different understanding from, the party which negotiated the contract, the intention of the former should trump the latter.[93]

Fourthly, Smith observes that "the requirement of a 'continuing' intention presents particular difficulties in the context of a subjective approach".[94] This may be right in the sense that it can be difficult to be sure whether an "outward expression of accord" is required,[95] but Smith focuses on the situation where one party subjectively changes his or her mind prior to signature without letting the counter-party know. In such situations, it does seem difficult to say that both parties were, subjectively, making a common mistake at the time the contract was signed. However, that is not to say the written instrument cannot be rectified: the requirements for unilateral mistake rectification may well be satisfied. Not every instance of rectification should be crammed under the heading of common mistake rectification: unilateral mistake rectification should be maintained and continue to play an important role.[96]

It has been suggested that it would be odd for rectification to focus upon the subjective intentions of the parties when the principles relating to contract formation[97] and interpretation[98] are rigorously objective. But this is

[91] Indeed, this was the situation in *Daventry*: see further Davies, "Rectifying the Course of Rectification", pp. 413–14.
[92] Smith, "Rectification of Contracts", p. 131.
[93] Admittedly, the intentions of the latter might become relevant through the generally applicable principles of corporate attribution: *Meridian Global Funds Management Asia Ltd. v Securities Commission* [1995] 2 A.C. 500 (PC).
[94] Smith, "Rectification of Contracts", p. 131.
[95] It is suggested that an outward expression of accord is of practical importance in helping to prove a subjective intention; it has been said that "that the evidence of subjective intention is to some degree viewed through an objective lens": Heydon et al., *Meagher, Gummow & Lehane's Equity*, at para [27-055]. Cf. Hodge, *Rectification*, para. 3–71: "It is suggested that the insistence, in *Ryledar v Euphoric*, upon the need for the parties' subjective intention to be 'disclosed' in some manner before it can count as a relevant common intention imposes an unnecessary, and undesirable, fetter upon the ability of a court to grant the equitable remedy of rectification."
[96] See section IV below.
[97] Smith, "Rectification of Contracts", pp. 128–29.
[98] *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [57]–[66].

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not obviously strange. If the parties' subjective intentions suggest that a contract has been concluded but there are no communications between them such that their objective intentions suggest the opposite, then there should be no contract. In such a scenario, neither party is bound to perform, and their obligations are not affected by contract law. However, rectification is concerned with a different problem. The objective intentions of the parties do bind the parties together, and the courts must decide whether the written document accurately reflects the parties' bargain. If the written instrument does not accord with both parties' subjective intentions then the court has a good reason to alter the document; it cannot simply stand by safe in the knowledge that no performance can be demanded under the contract.

Moreover, the principles underpinning rectification do not need to rest upon the same basis as interpretation. It has already been argued that too much objectivity in this area is simply unhelpful, and the courts of equity have long recognised that rectification rests upon a different rationale: unconscionable conduct.[99] Spry has written that "[t]he history and nature of the remedy of rectification are such that the validity of this suggested requirement [of objectivity] should not be accepted, since the concern of courts of equity has always been with the actual intention of those concerned. Rectification is an equitable remedy, not a legal remedy".[100]

Nevertheless, it has been said that Lord Hoffmann in *Chartbrook* simply "set out established principles rather than seeking to change them".[101] This does indeed appear to have been the view of Lord Hoffmann, but seems contrary to earlier orthodoxy.[102] The traditional, subjective approach has been maintained in Australia. For example, in *Codelfa*, Mason J. insisted that "[r]ectification ensures that the contract gives effect to the parties' actual intention".[103] This has been consistently supported by decisions of the lower courts. The most robust defence of the subjective approach is to be found in *Ryledar Pty Ltd. v Euphoric Pty Ltd.*[104] The New South Wales Court of Appeal was emphatic in favouring an approach based upon

[99] Bromley, "Rectification in Equity", p. 537.

[100] Spry, *Equitable Remedies*, p. 635. In a footnote to the text here quoted, the writer went on to snipe: "Lord Hoffmann is widely regarded as a distinguished commercial lawyer, but it may be thought that he has not demonstrated the same understanding of equity as have many other members of the House of Lords."

[101] *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [78], per Etherton L.J.

[102] It may be that, where the written document is simply meant to record a bargain which has already been agreed, but due to a mistake fails to do so, the parties' subjective intentions are not crucial because rectification in such circumstances is a form of specific performance of the concluded accord. This can explain the result in *George Cohen Sons & Co. Ltd. v Docks and Inland Waterways Executive* (1950) 84 Lloyd's Rep 97, which was relied upon by Lord Hoffmann in *Chartbrook Ltd.* [2009] UKHL 38; [2009] 1 A.C. 1101, at [62]: see *Britoil plc* [1994] C.L.C. 561, 571, per Hobhouse L.J.; J. Ruddell, "Common Intention and Rectification for Common Mistake" [2014] L.M.C.L.Q. 48, 57–60. But much more common is the situation such as that in *Chartbrook Ltd.* and *Daventry* where the document is the bargain, and all negotiations prior to signing the written document are understood to be "subject to a written contract".

[103] *Codelfa Construction Pty Ltd.* (1982) 149 C.L.R. 337, 346, per Mason J.

[104] *Ryledar Pty Ltd.* [2007] NSWCA 65; (2007) 69 N.S.W.L.R. 603.

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subjective intent since equity acts upon a defendant's conscience.[105] Any other approach was said to be contrary to "fundamental principle".[106] This view appears to have been met with the approval of the High Court of Australia: special leave to appeal in *Ryledar* was refused because there were insufficient prospects that Ryledar would succeed in overturning the findings made by the trial judge.[107]

The approach in *Ryledar* is inconsistent with that taken in *Chartbrook.* It will be interesting to see what effect, if any, the decision in *Chartbrook* will have in other jurisdictions.[108] It is suggested that rectification should be seen as a subjective "safety valve" from the objectivity of the common law rules of interpretation,[109] and that the approach in *Ryledar* should be preferred. Indeed, it is to be hoped that English courts will also move away from *Chartbrook*. Even after that decision of the House of Lords, the subjective approach to common mistake rectification has received support[110] and a number of judges have thought it sufficiently important to make extra-judicial comments in favour of a traditional approach.[111] In one such speech, Lord Toulson suggested that, since the Court of Appeal in *Daventry* made it clear that it was not deciding that *Chartbrook* should be followed as regards rectification, and that previous decisions of the Court of Appeal which favoured a subjective approach were not cited to the court in *Daventry*,[112] the rules of precedent may still require judges to follow earlier, binding decisions of the Court of Appeal, which require a subjective rather than objective test of common mistake.[113] Yet, despite "very real misgivings" about the approach taken in *Chartbrook* and *Daventry*, Leggatt J. in *Navona* said that "if I had concluded in this case that there

[105] See in particular [176]–[189], per Tobais J.A. and [267]–[316], per Campbell J.A. (Mason P. agreed with both judgments).

[106] *Ryledar Pty Ltd.* [2007] NSWCA 65; (2007) 69 N.S.W.L.R. 603, at [258]; see also *Masterton Homes Pty Ltd. v Palm Assets Pty Ltd.* [2009] NSWCA 234, at [107].

[107] [2007] HCA Trans 698, November 16, 2007.

[108] It has been followed in Hong Kong (by Lord Hoffmann N.P.J.): *Kowloon Development Finance Ltd.* [2013] HKCFA 35. However, the subjective approach still seems to be preferred in New Zealand: *Pernod Ricard New Zealand Ltd. v Lion-Beer, Spirits & Wine (NZ) Ltd.* [2012] NZHC 2801. The situation is unclear in Canada: *Performance Industries Ltd.* [2002] 1 S.C.R. 678, 692, demands sufficiently clear evidence such that the court is not left to speculate about the nature of the parties' unexpressed intentions.

[109] See e.g. J. Steyn, "Interpretation: Legal Texts and their Landscape", ch. 5, in B.S. Markesinis (ed.), *The Clifford Chance Millennium Lectures; The Coming Together of the Common Law and the Civil law* (Oxford 2000).

[110] *Crossco No.4 Unlimited* [2011] EWHC 803 (Ch), at [253] (Morgan J.); *Tartsinis* [2015] EWHC 57 (Comm), at [90]–[99], per Leggatt J. See also e.g. J. McGhee (ed.), *Snell's Equity*, 33rd ed. (London 2014), para. 16–015; J. Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, 3rd ed. (London 2012), 13–40; J. Beatson, A. Burrows, and J. Cartwright, *Anson's Law of Contract* (Oxford 2010), 263.

[111] Buxton, "'Construction' and Rectification after *Chartbrook*"; Lewison, "If It Ain't Broke, Don't Fix It", p. 127; Lord Toulson, "Does Rectification Require Rectifying?"; Patten, "Does the Law Need to Be Rectified?"; Morgan, "Rectification"; Legatt, "Making Sense of Contracts", p. 464. See also Nugee, "Rectification". Cf. Etherton, "Contract Formation".

[112] In particular *Britoil*, considered at text to notes 74–76 above.

[113] Lord Toulson, "Does Rectification Require Rectifying?". In *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [180], Toulson L.J. had said that "it would be a bold course" not to follow the "considered unanimous opinion of the House of Lords".

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is a disjunct between how the parties actually understood their pre-contractual discussions and what an objective observer would have thought their intention to be, I would have considered myself bound to follow the approach endorsed in *Chartbrook* and applied in *Daventry*".[114]

This is understandable as consistent with reasoning endorsed by the House of Lords, but unsatisfactory when considered against the fundamental principles at issue. Other jurisdictions which are not so influenced by *Chartbrook* and *Daventry* should maintain equitable orthodoxy. English courts should also soon cast off the shackles of those decisions.

IV. Rectification for Unilateral Mistake: Maintaining the Jurisdiction

An unhappy side effect of the objective approach to common mistake rectification is that it threatens to sideline rectification for unilateral mistake. Although "[t]hey sound like two varieties of mistake about the same thing, they are actually the expression of quite different principles".[115] It is suggested that where only one party is mistaken, then unilateral mistake rectification is the more appropriate doctrine to rely upon. *Chartbrook* and *Daventry* should therefore have been considered as potential cases for rectification on the basis of unilateral mistake, since in both cases the trial judge had found as a matter of fact that one party to the contract was not actually mistaken about the meaning of the contract at all. This was recognised by Toulson L.J.[116] and Lord Neuberger[117] in *Daventry*,[118] but the broad scope of rectification on the basis of an objectively ascertained common mistake engulfed the unilateral mistake analysis and proved sufficient in *Daventry* itself. Yet it is unsatisfactory to corrupt the language used in this area – where only one party and not both parties is mistaken, it is appropriate to use the language and principles of unilateral mistake rather than common mistake.[119]

Unilateral mistake rectification was not considered by the House of Lords in *Chartbrook*, so it seems unlikely that Lord Hoffmann's objective approach was intended to apply to cases of unilateral mistake as well. His Lordship has subsequently made this clear in *Kowloon Development Finance Ltd. v Pendex Industries Ltd.*,[120] a decision of the Hong Kong Court of Final Appeal. Lord Hoffmann N.P.J. insisted that rectification for unilateral mistake is distinct from rectification for common mistake, and that the former "is very much concerned with the subjective states of

[114] *Tartsinis* [2015] EWHC 57 (Comm), at [99].
[115] *Kowloon Development Finance Ltd.* [2013] HKCFA 35, at [19], per Lord Hoffmann N.P.J.
[116] *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [185].
[117] Ibid., at para. [225].
[118] See also e.g. *Tartsinis* [2015] EWHC 57 (Comm), at [97], per Leggatt J.
[119] Indeed, this might explain why the claim for rectification in Ryledar failed.
[120] *Kowloon Development Finance Ltd.* [2013] HKCFA 35.

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mind of the parties".[121] Such a subjective approach is consistent with equitable principles – especially the need for a defendant's conscience actually to be affected. However, it has been suggested that here too an objective approach would be preferable.[122] Such suggestions should be resisted.

Rectification on the basis of a unilateral mistake should not lightly be granted. After all, it "has the result of imposing on the defendant a contract which he did not, and did not intend to, make and relieving the claimant from a contract which he did, albeit did not intend to, make".[123] As such, it is a "drastic" remedy.[124] It is for this reason that the English Court of Appeal has consistently demanded that the defendant must actually know of the mistake, or at least recklessly turn a blind eye to the mistake, in order for his conscience to be affected and equitable relief justified.[125]

In *Daventry*, all comments about unilateral mistake rectification were *obiter*. Etherton L.J. considered "the critical broad distinction being between honesty and dishonesty",[126] which maps on well to earlier orthodoxy. However, Toulson L.J. expressed sympathy[127] for a different, broader approach put forward by Professor McLauchlan: unilateral mistake rectification should be awarded where the defendant ought to have been aware of the mistake, and the claimant was led reasonably to believe that the defendant was agreeing to the claimant's interpretation of the bargain.[128] This again places great emphasis on an objective prior accord which should be given effect. But it undermines the primacy of the final, written document, since a party can properly read and understand the terms of the document without making a mistake or acting dishonestly, and yet still be saddled with a contract to which he or she did not actually agree simply because that person ought to have known that the other party was making a mistake.[129]

[121] Ibid., at para. [20].
[122] See e.g. McLauchlan, "The 'Drastic' Remedy".
[123] *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77; [2005] BLR 135, at [75], per Blackburne J.
[124] *Agip SpA* [1984] 1 Lloyd's Rep 353, 365, per Slade L.J. *George Wimpey UK Ltd.* [2005] EWCA Civ 77; [2005] B.L.R. 135, at [75]. See also e.g. *A Roberts & Co. Ltd. v Leicestershire CC* [1961] Ch. 555; *Littman v Aspen Oil (Broking) Ltd.* [2005] EWCA Civ 1579; [2006] 2 P. & C.R. 2.
[125] *A Roberts & Co. Ltd.* [1961] Ch. 555; *Thomas Bates v Wyndham's* [1981] 1 All E.R. 1077; *Commission for New Towns v Cooper* [1995] Ch. 259.
[126] *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [97]. Etherton L.J. was prepared to accept, at [95], that the defendant's knowledge of the claimant's mistake must fall within one of the first three categories set out by Peter Gibson J. in *Baden v Societe Generale pour Favoriser le Developpement du Commerce et de l'Industrie en France SA (Note)* [1993] 1 W.L.R. 509: (1) actual knowledge; (2) wilfully shutting one's eyes to the obvious; and (3) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. However, Toulson L.J. was "not sure that the legal principle is or should be so rigid": *Daventry District Council* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333, at [184].
[127] Ibid., at paras. [173]–[178].
[128] D. McLauchlan, "Commonsense Principles of Interpretation and Rectification?" (2010) 126 L.Q.R. 8; See also McLauchlan, "The 'Drastic' Remedy".
[129] As Hodge has observed, the traditional, subjective approach ought to be maintained, since "[g]ood reason must be demonstrated before holding a contracting party to terms which differ, not only from those

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It is to be hoped that English courts will continue to maintain a subjective approach in this area.[130] In Canada, however, the situation is a little less clear. In the decision of the Supreme Court of Canada in *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club Ltd.*, Binnie J. held that "[e]quity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought reasonably to have known about at the time the document was signed".[131] The precise meaning of this test is a matter of some debate. McCamus has written that "[t]he content of the 'ought to have known' branch of this test is not entirely clear but it would appear to be slightly broader than the "sharp practice" test envisaged by English law".[132] If so, then that is unfortunate. It is only in very narrow circumstances that it may be appropriate to change a written document so that a person is subject to obligations to which he or she did not actually assent and about which he or she was not actually mistaken. There may be some scope for an "ought to have known" test in situations where a defendant has deliberately turned a "blind eye" to facts about which he or she was suspicious, but this is a narrow exception to a requirement of actual knowledge (or, to use the language of Etherton L.J. in *Daventry*, dishonesty). It should not be allowed to expand too far. The authorities in Canada do not speak entirely with one voice, but the decision of the British Columbia Court of Appeal in *Fraser v Houston* should be recommended:

> In any event, a person who merely ought to have known that another was making a mistake cannot, without more, be said to have committed an equitable fraud. His position is not comparable to that of a person who has actual knowledge of the mistake being made. At least as a general proposition, commercial certainty must favour holding a party to an agreement it saw fit to execute over imposing on another party obligations it did not intend to assume, or depriving it of rights it did not intend to lose, on the basis that it ought to have known a mistake was being made.[133]

V. Conclusion

A growing tide in favour of correcting mistakes through interpretation at common law poses a threat to the very existence of rectification.

which he subjectively intended, but also from those to which he objectively assented by his conduct in signing a document which records those terms": Hodge, *Rectification*, para. 4–22.

130 This appears to have been followed in Australia: See e.g. *Taylor v Johnson* (1983) 151 C.L.R. 422, 431; *Leibler v Air New Zealand Ltd.* [1999] 1 V.R. 1; *Sande v Medsara* [2004] NSWSC 147; *DSE (Holdings) Pty Ltd. v InterTAN Inc.* [2004] FCA 1159; and *International Advisor Systems Pty Ltd. v XYYX Pty Ltd.* [2008] NSWSC 2, cited by McLauchlan, "The 'Drastic' Remedy", p. 636.

131 *Performance Industries Ltd.* [2002] 1 SCR 678, 695. See also McLauchlan, "The 'Drastic' Remedy", p. 695.

132 McCamus, *The Law of Contracts*, p. 593.

133 *Fraser v Houston* (2006) 51 B.C.L.R. (4th) 82, at [42]. Cf. *Downtown King West Development Corp v Massey Ferguson Industries Ltd.* (1996) 28 O.R. (3d) 327; McLauchlan, "The 'Drastic' Remedy", pp. 637–39.

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However, the equitable jurisdiction is better placed to limit interference with formally agreed written documents – upon which commercial parties should rightly be encouraged to place great weight – and protect third-party interests. But rectification also faces questions about its very nature: is it to adopt an objective approach to the parties' intentions such that it is consistent with the common law, or favour a subjective approach in line with its traditional, equitable roots? The latter view should be preferred. The best objective evidence of the parties' intentions is the written document itself. It should only be rectified where it fails to accord with the parties' actual intentions, in the case of common mistake rectification, or where the non-mistaken party has unconscionably tried to take advantage of another party's mistake, in the case of unilateral mistake rectification.

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