Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 1. - Introduction to Mistake

Types of mistake

3-001

The doctrine of mistake in the law of contract deals with two rather different situations. In the first, there is some mistake or misunderstanding in the communications between the parties which prevents there being an effective agreement (for instance, if the parties misunderstand each other) or at least means that there is no agreement on the terms apparently stated (for instance, if one party in an offer states terms which the other party knows the first party does not intend, but nonetheless the other purports to accept). This first category of mistake, which can generally be referred to as "mistake as to the terms or identity", includes "mutual misunderstanding", where each is mistaken as to the terms intended by the other, [2] and "unilateral mistake", where only one of the parties is mistaken, over the terms of the contract [3] or the identity of the other party. [4] In the second situation, the parties are agreed on the terms of the contract but have entered it under a shared and fundamental misapprehension as to the facts or the law. [5] Cases in this category are now usually referred to as "common" mistake, [6] for normally the mistake is legally relevant only if both parties have contracted under the same misapprehension.

Mistakes as to terms and mistakes as to facts

3-002

In other words, the distinction between the two situations drawn in the previous paragraphs is one between mistakes as to the terms and mistakes as to the facts. It is common to categorise the situations in which the doctrine of mistake affects a contract [7] into cases of "common mistake", "unilateral mistake" or "mutual misunderstanding". [8] This is useful, but it highlights only one of the distinctions between the cases. For the purposes of the law, there is a second and vital distinction between common mistake on the one hand and on the other: namely, that unilateral mistakes or mutual misunderstandings are relevant only if the mistake is over the terms (or the identity of one party), while the doctrine of common mistake [9] concerns mistakes about the facts. Indeed, the law takes account of a mistake as to the factual circumstances [10] in which the contract is made only if the mistake was common, i.e. both parties made substantially the same mistake—for example, when an agreement was made to rent a room overlooking the route of a coronation procession, that both parties believed that the procession was scheduled to take place on the date concerned when in fact it had been cancelled. [11] Common mistake cases are ones in which:

> "… both parties make the same mistake of fact or law relating to the subject matter or the facts surrounding the formation of the contract." [12]

(As will be seen, the mistake must also be fundamental. [13]) In contrast, where only one of the parties

is mistaken as to the facts—a "unilateral" mistake as to the facts—there is no basis for relief under the doctrine of mistake. [14] A unilateral mistake or a mutual misunderstanding will only operate where the mistake or misunderstanding is about the terms of the contract—for example, the price or the contractual description of what is being sold. This category includes cases of mistaken identity, when one party thinks he is dealing with someone different to the person with whom he actually is dealing. Although mistaken identity cases do not involve a mistake over the terms of the contract, we shall see that they seem to depend on a parallel distinction between the terms of the offer or acceptance [15] and the surrounding facts. If the mistaken party's offer was, by its express or implied terms, not made to anyone other than the person with whom the mistaken party thought he was dealing, no other person can accept it and no contract will result from a purported acceptance by anyone else. If however the offer or acceptance was not so confined, it will result in a contract with the other person, whoever he is, and the first party's mistake is treated as merely being to the surrounding facts. [16]

Treatment of the two kinds of mistake

3-003

As the principles applicable to mistakes as to the terms or the identity of the other party seem largely to mirror the rules on agreement dealt with in Ch.2, they are dealt with in the current chapter. The mistakes as to the facts and the doctrine of "common mistake", involves different principles and is dealt with in Ch.6. This is a departure from previous editions of this work, in which the two situations were dealt with in a single chapter. It is hoped that the new treatment will make the underlying principles clearer.

Non est factum

3-004

There is a third type of mistake which may be seen as a variant of unilateral mistake, but which for convenience will be placed in a separate section within this chapter. It is peculiar to the law of written contracts, and it allows a party who has executed a document under a fundamental misapprehension as to its nature to plead that it is "not his deed". This is the defence of non est factum. [17]

Rectification of written documents

3-005

This chapter also deals separately with the remedy of rectification, which may be available when the parties have signed a written document that does not state accurately the terms that were agreed between them. [18]

Money paid under mistake of fact

3-006

Mistake may also entitle a party who has paid money under the mistake to recover it back on the basis of restitution (or unjust enrichment). The subject of the recovery of money paid under a mistake is principally dealt with in Ch.29 of this work. [19]

"Mistake" implies a positive belief

3-007

Further, it seems that relief will only be granted under the doctrine of mistake if one or both parties

entered the contract under a positive belief which was incorrect, rather than merely not having thought about a particular issue. [20] Thus in all the cases in which a contract has been held to be void [21] for common mistake, it seems that the parties had a positive belief that X was the case when it was not, rather than merely making no assumptions about whether X was so or not. Similarly, in the cases of unilateral mistake over the terms, one party has positively thought the terms he has offered, or has been offered, are Y when Y is not what in fact was said or written. It is very doubtful whether relief can be given on the ground of mistake when the party was simply unaware that the terms on offer included a particular clause, as opposed to positively believing that they were Y when they were not. [22] However, it seems that the positive belief may be that something is not the case, e.g. that the terms on offer do not include a particular clause or that the other party is not Z. [23]

Mistakes that are not legally relevant

3-008

It can be seen there are many situations that may loosely be called cases of "mistake" in which the contract will nonetheless be binding. One example is the case considered earlier, in which one party enters the contract under a mistake as to the facts which the other party does not share. [24] Suppose I buy a ring mistakenly thinking it is a gold ring. Nothing is said by the vendor as to what the ring is made of [25]; but he knows that it is not gold. Even if he knows that I think the ring to be made of gold, I cannot avoid the contract on the ground of mistake, though I would never have entered into it had I known the true position. The mistake does not relate to the terms of the contract, which are simply to sell and buy the specific ring, so neither mutual not unilateral mistake is relevant. Nor does the doctrine of common mistake apply: though the mistake may be fundamental, it is not shared. [26] A second example of a mistake that is not legally relevant is where the mistake is shared by both parties [27] but it is not sufficiently fundamental to render the contract void. [28]

Effects of mistake

3-009

The first type of mistake (termed above "mistake as to the terms or as to identity") is sometimes said to operate so as to negative consent, the second (termed above "common mistake") so as to nullify consent. [29] In other words, in the first case, the parties may not have in fact reached an agreement; in the second, the mistake renders the agreement ineffective as a contract. In either case, if the mistake is operative the contract is said to be void ab initio. This is correct in cases of common mistake; although until very recently there was authority for the proposition that some common mistakes that would not make the contract void would nonetheless give either party the right to avoid it, the Court of Appeal has now disapproved this line of cases. [30] The proposition that in cases of unilateral mistake and of mutual misunderstanding the contract is also void ab initio must be treated with more reservation. It is certainly correct in cases of mutual misunderstanding [31] and in some cases of unilateral mistake. Thus a unilateral mistake as to the identity of the other party may prevent the formation of a contract, so that if the subject matter of the contract consists of goods, no property in the goods will pass under the contract, and they may be recovered by the true owner even from a bona fide purchaser for value. [32] In other cases of unilateral mistake, however, it seems more accurate to say that there is no contract on the terms apparently agreed. [33] If one party made a mistake in his offer and the other knew what the offer was meant to be but purported to "snap up" the apparent offer, the result may be that there is a contract on the terms the first party intended. [34] If necessary the terms of any contractual document may then be "rectified" to correspond to this contract. [35]

Common law and equity

3-010

Until recently it could be argued that what has been said above about the circumstances in which the

law takes account of a mistake by one party, or both parties, to a contract represented the position at common law; and that the rules of equity "cut across this distinction". [36] This referred to the line of cases to the effect that in some circumstances a common mistake would give either party the right to avoid a contract that was not void for mistake at common law, [37] based on a rule of equity. Now that these cases have been disapproved, [38] and if the interpretation of certain cases of unilateral mistake that will be offered in this chapter [39] is accepted, it seems that there is no inconsistency between common law and equity. Equity will on occasion supplement the remedies available at common law: for example, a mistake may entitle a party to a contract that has been reduced to writing to have the document rectified if it is not expressed in accordance with the parties' true intentions, or does not reflect the terms that the claimant intended and the other party knew him to intend. [40]

3-011

The only apparent "divergence" between the treatment of mistake cases in common law and in equity is that the hardship that would be caused by granting specific performance of a contract made under either type of mistake may lead to the court refusing specific performance as a matter of discretion even though the mistake does not render the contract void or have any other effect at common law. [41] As this is merely the denial of a particular remedy, and the contract remains binding in other respects (e.g. the claimant would still be entitled to damages if the contract were not performed [42]) this is not a contradiction of the common law rules. [43] Thus in cases of contractual mistake, common law and equity are consistent and equity plays only a minor role. Thus in this edition of this work there is no separate treatment of "Mistake in Equity". [44]

Is there a separate doctrine of mistake?

3-012

Any "doctrine" of mistake in English contract law seems to have emerged only in the late nineteenth or even the twentieth century, [45] and from time to time commentators have argued that the doctrine is redundant or that the cases are better explained on some other basis. [46] Thus it has been said that cases of common mistake may be explained as resting on the construction of the contract, and in particular on an implied condition precedent [47]; while cases of unilateral and mutual mistake may be no more than an application of the rules of offer and acceptance. [48] From a conceptual point of view there is force in these arguments, and it is certainly hard to discern a single "doctrine" of mistake when the two categories of case described above are subject to quite different rules. However in this work it is assumed that there are distinct rules on mistake dealing with each category. This is partly because, in each situation, the courts have recognised distinct rules of mistake [49] and partly because the various kinds of mistake are what may be called "functional categories". In factual terms, a party may claim that he, or both he and the other party, made the contract under a misapprehension of some kind, whether it be as to some fact bearing on the contract, as to the terms he has included in his offer or as to the other party's intentions or identity, when the mistake was self induced. [50] We need to know what self-induced "mistakes" or (to use a word that does not have legal connotations) "misapprehensions" the law will take account of and what the parties' rights will be. Whether the rules that are applied are simply applications of more general rules, such as the doctrine of implied conditions or the rules of offer and acceptance, is from a functional viewpoint irrelevant; they are the rules that govern these types of mistake. On the other hand, when the relevant doctrine of mistake seems to be no more than an application of the principles used to decide whether the parties have reached an agreement, and if so on what terms, it seems helpful to maintain a close link between the two. This is why mistakes as to the terms and the identity of the other party are treated separately in this chapter. Mistakes as to the facts are covered in Ch.6.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

2. See below, para.3-019.

3. Below, paras 3-002 and 3-022 et seq.

4. Below, paras 3-036 et seq. The composite phrase "mistake as to terms or identity" is used as the "mistake of identity" cases do not involve a mistake over the terms of the contract; but as will be seen, theses cases depend on the terms of the offer or acceptance, so they are usefully considered in this chapter also.

5. On mistakes as to the law, see below, para.6-052.

6. The 29th and earlier editions of this work used the phrase "mutual mistake", following the terminology used by Lord Atkin in *Bell v Lever Bros [1932] A.C. 161*, and until recently some other works adhered to this usage: e.g. Beatson, *Anson's Law of Contract*, 28th edn (2002), Ch.8. It is now more common to refer to this type of mistake as "common mistake" (e.g. Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2015), Ch.8; Cheshire, Fifoot and Furmston, *Law of Contract*, 16th edn (2012), Ch.8). The courts have also referred to common mistake: e.g. *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*. One reason for using the phrase "common mistake" is to reduce the risk of confusion with what is termed here "mutual misunderstanding" (where the parties are at cross-purposes as to the terms of the contract): see below, para.3-019.

7. Compare those cases in which the mistake is not legally relevant, below, para.3-008.

8. Above, para.3-001.

9. Note however that it is also customary to refer to cases in which the written contract does not accurately record the parties' prior agreement and is therefore rectified as cases of "rectification for common mistake": see below, para.3-057. Rectification depends on quite different principles to those applicable when the parties make a common mistake as to the facts. On the latter, see Ch.6.

10. Or as to the law: see below, para.6-052.

11. *Griffith v Brymer (1903) 19 T.L.R. 434*.

12. Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2015), p.300.

13. Below, para.6-015.

14. *Smith v Hughes (1871) L.R. 6 Q.B. 597*; *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685*. See below, para.3-025.

15. See below, para.3-038.

16. See below, paras 3-036—3-039.

17. See below, paras 3-049—3-056.

18. See below, paras 3-057 et seq.

19. See below, paras 29-033 et seq.

20. cf. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.12–03. In *Pitt v Holt [2013] UKSC 26, [2013] 2 W.L.R. 1200*, a case of a mistake affecting a voluntary settlement, Lord Walker said (at [108]–[109]) that a mistake is different from ignorance, inadvertence and misprediction as to the future. A mistake encompasses two states of mind,

namely an incorrect conscious belief or an incorrect tacit assumption as to a present matter of fact or law, but does not encompass mere causative ignorance but for which the claimant would not have acted as he did. The nature of the mistake that must be shown for a settlor to obtain rectification of a voluntary settlement was discussed extensively: see below, para.29-052.

21. Or voidable in equity, under a line of cases no longer accepted as good law: see below, para.6-009.

22. See below, para.3-028.

23. See below, para.3-047.

24. See above, para.3-002.

25. Therefore there is no misrepresentation: compare below, para.6-013.

26. Compare Anson's famous "Dresden china" example: Anson's Law of Contract, 28th edn, p.324 (second scenario). The example is omitted from the 30th edition by Beatson, Burrows and Cartwright (eds) (2015) but it is explained that a unilateral mistake of fact or law does not render the contract void or give rise to an equitable jurisdiction to set aside the contract: pp.300. Friedmann (2003) 119 L.Q.R. 68, 79–81 argues that in such a case relief should be given, by analogy of cases of innocent misrepresentation.

27. Again it is assumed that neither party has stated what he believes to be the facts. If he had, the other might have a remedy for misrepresentation. See below, para.6-013.

28. See below, para.6-015. Note that the grounds on which a voluntary settlement may be set aside because of mistake on the part of the settlor are much wider: see *Pitt v Holt [2013] UKSC 26*; *Kennedy v Kennedy [2014] EWHC 4129 (Ch)* (rescission of self-contained and severable part of settlement).

29. *Bell v Lever Bros Ltd [1932] A.C. 161, 217*.

30. See below, paras 6-055 et seq.

31. Below, para.3-019.

32. *Hardman v Booth (1863) 1 H. & C. 803*; *Cundy v Lindsay (1878) 3 App. Cas. 459*; *Ingram v Little [1961] 1 Q.B. 31*. See below, paras 3-036 et seq.

33. See below, paras 3-029 et seq.

34. See below, paras 3-029 et seq.

35. See below, paras 3-069 et seq.

36. See the 28th edition of this work, para.5-001.

37. Above, para.3-008 at n.28.

38. See below, paras 6-055 et seq.

39. Below, paras 3-029—3-035. These paragraphs discuss the relationship between rectification and unilateral mistake as to the terms at common law. There was very little authority to suggest that unilateral mistake as to the facts was a ground for rescission in equity, and what there was has recently been rejected: see below, para.3-025.

40. See below, paras 3-057 et seq. Equity may also prevent a mistaken party from obtaining rectification to the "true" terms of a contract if a third party has relied on a document that stated the terms differently: see below, para.3-098.

41. See below, paras 3-026 and 6-061.

42. See, e.g. *Wood v Scarth (1855) 2 K. & J. 33 (equity); (1858) 1 F. & F. 293* (law).

43. cf. cases in which specific performance may be refused because of the hardship that would result because of a subsequent change of circumstances: see below, paras 3-026 and 6-061 and para.27-036.

44. cf. Chitty, 28th edn, paras 5–060 et seq.

45. See below, paras 6-017 et seq.

46. e.g. Slade (1954) 70 L.Q.R. 385.

47. Smith (1994) 110 L.Q.R. 400. See below, para.6-014.

48. e.g. Slade (1954) 70 L.Q.R. 385; Atiyah, *Essays in Contract* (1986), Ch.9.

49. This is clearly so in cases of common mistake, e.g. *Bell v Lever Bros [1932] A.C. 161*; *Associated Japanese Bank International Ltd v Crédit du Nord SA [1989] 1 W.L.R. 255*; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace) [2002] EWCA Civ 1407, [2003] Q.B. 679*. In the cases to be covered in this chapter, usage is less uniform.

50. Or when it resulted from a misrepresentation but the right to rescind for misrepresentation has been lost. See below, para.6-013.

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Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 2. - Mistakes as to terms or identity [51]

(a) - Underlying Principles

Underlying basis of law

3-013

It is arguable that the cases in which there is a mistake as to the terms of the contract, or as to the identity of one of the parties, that will have some legal effect are no more than an application of general rules of contract formation and interpretation. [52] They fall into three groups, each seeming to depend on a particular application of those rules.

Lack of agreement or agreement ambiguous

3-014

No contract can be formed if there is no correspondence between the offer and the acceptance, [53] or if the agreement is not sufficiently certain. [54] The starting point must be whether the parties have reached an agreement that there is a contract between them on the same terms, so that subjectively they are agreed on the same thing. If so there will be a contract on the agreed terms. [55] If, however, one party claims that he did not intend to contract at all, or did not intend to contract on the terms which the other party claims were agreed, then the question is whether there is a contract (or, as it is often put, whether or not the "contract is void"). The intention of the parties is, as a general rule, to be construed objectively: the language used by one party, whatever his real intention may be, is to be construed in the sense in which it was reasonably understood by the other. [56] Thus:

> "… if one party (O) so acts that his conduct, objectively considered, constitutes an offer, and the other party (A), believing that the conduct of O represents his actual intention, accepts O's offer, then a contract will come into existence, and on those facts it will make no difference if O did not in fact intend to make an offer, or if he misunderstood A's acceptance, so that O's state of mind is, in such circumstances, irrelevant." [57]

Nevertheless cases may occur in which the terms of the offer and acceptance do not match or suffer from such latent ambiguity that it is impossible reasonably to impute any agreement between the parties. For example, if it was reasonable for A to interpret the words of O's offer as meaning *x* when O in fact meant *y*, but it was equally reasonable for O to interpret A's reply as an acceptance of the offer as O intended it (i.e. as meaning *y*), there is no agreement even on an objective basis. [58] Thus "mutual misunderstanding" may prevent the formation of a contract, [59] and arguably this is no more than an application of the requirements of offer and acceptance and certainty.

Known mistake may prevent party holding other to words used

3-015

The “objective principle” just referred to means that normally a party is bound by what he said or wrote: he cannot escape by simply saying that he did not mean what the other reasonably understood, in the circumstances, by the words used. It may happen, however, that one party accepts a promise knowing that the terms stated by the other differed from what the other party intended. In such circumstances, the mistake may prevent the party’s acceptance being effective at face value: either the contract will be on the terms the other party actually intended or, possibly, the “mistake” will render the contract void. [60] This explains the cases on “unilateral mistake as to the terms of the contract”. [61]

Offer limited to particular person cannot be accepted by another

3-016

If an offer is by its express or implied terms open only to one person, or to a defined group of persons, no one else can accept the offer; and if they purport to do so, no contract will result. This underlies the cases of “mistaken identity”. [62]

Older “subjective” notions

3-017

The modern “objective principle” referred to in the previous paragraphs was not firmly established in the nineteenth century, and some cases seem to depend on an older theory, probably derived from continental thinking, that “subjective agreement” or consensus ad idem was necessary for a contract. [63] Some of the earlier authorities may thus require reinterpretation in the light of the modern principle. [64]

Test not wholly objective [65]

3-018

It has sometimes been suggested that in deciding whether the parties have reached an agreement, each party’s words are to be interpreted in a wholly objective fashion. [66] However, it is submitted that this is not consistent with the leading authorities. First, in *Smith v Hughes* [67] Blackburn J. said:

> “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.”

The italicised words show that if party O’s words reasonably appear to mean *x* when in fact O intended *y*, the other party (A) can only hold O to meaning *x* if A in fact believed this to be what O meant. This is why a party cannot snap up an offer which he knows contains a mistake. [68] Secondly, in *The Hannah Blumenthal*, [69] though there were differences between Lords Brandon, Diplock and Brightman in the way they explained the objective test, [70] all three spoke of the way in which the individual parties would reasonably understand the others’ conduct. [71] In other words, the test is not how an entirely detached observer might interpret what each party said or did, but how it would reasonably appear to the other party in the circumstances. This is why a mistake in the terms of the offer may be relevant even if the other party did not know of it but ought to have known of it. [72]

1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

51. On this phrase see above, para.3-001 n.4. On the kinds of mistake dealt with in this section, see Cheshire (1944) 60 L.Q.R. 175, 178, 180; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 386; Stoljar (1965) 28 M.L.R. 265, 266; M. Chen-Wishart, *Exploring Contract Law* (2009) 341; G. McMeel, "Interpretation and Mistake in Contract Law: 'The fox knows many things' " [2006] Lloyd's Maritime and Law Quarterly 49; R. Stevens, *Contract Terms* (2007) 101.

52. See above, para.3-012.

53. See above, para.2-031.

54. See above, para.2-147.

55. ! Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.13–10, citing Glanville Williams (1954) 17 M.L.R. 154–155; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968), p.11; Vorster (1987) 104 L.Q.R. 274, 286; Lord Macnaghten in *Falcke v Williams [1900] A.C. 176* at 178–179, PC; and Blackburn J. in *Smith v Hughes (1871) L.R. 6 Q.B. 597, 607*, who clearly assumes that the objective test need be used only if there was no subjective agreement. The author rightly points out that some decisions, such as *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 A.C. 854*, discuss the objective test without mentioning the subjective test. Each party must, of course, have signalled willingness to contract to the other, or there will be no agreement which a contract can be based (see above, para.2-001; and the need for some "outward accord" in rectification cases, below, para. 3-064). For an example in German law, see RG 8 Jun 1920 II (Ziv), RGZ 99, 147, in which both parties thought that the Norwegian word Haakjöringsköd meant whale meat when in fact it means shark meat. It was held that the contract was for whale meat. (The case is translated in Beale, Fauvarque-Cosson, Rutgers, Tallon and Vogenauer, *Ius Commune Casebooks for the Common Law of Europe: Cases, Materials and Text on Contract Law*, 2nd edn (2010), 445.) The importance of the parties' sharing subjective intentions will be when they both intend the contract to mean something other than its apparent meaning, when the communications are unclear, or where there is evidently an agreement but it is not clear what its terms are. For the possibility that a written agreement can be rectified to match what the parties were subjectively agreed on, see below, para.3-065.

56. *Cornish v Abington (1859) 4 H. & N. 549, 556*; *Fowkes v Manchester and London Assurance Association (1863) 3 B. & S. 917, 929*; *Smith v Hughes (1871) L.R. 6 Q.B. 597, 607*; *Woodhouse A.C. Israel Cocoa Ltd SA v Nigerian Products Marketing Co Ltd [1972] A.C. 741*; *McInerny v Lloyds Bank [1974] 1 Lloyd's Rep. 246*. Compare the effect of a mistake in a contractual notice. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749* (above, para.13-051) the House of Lords held that a contractual notice to determine a lease was effective although it did not comply exactly with the break clause in the contract, provided that the notice given would convey the lessee's intention to exercise its rights under the clause unambiguously to a reasonable recipient.

57. Goff L.J. in *Allied Marine Transport Ltd v Vale do Rio Navegacao SA, The Leonidas D [1985] 1 W.L.R. 925*, summarising the approach of Lord Brightman in *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal, The Hannah Blumenthal [1983] 1 A.C. 854, 924*. The Court of Appeal in *The Leonidas D* preferred Lord Brightman's formulation of the objective principle to those of Lords Brandon and Diplock (*[1985] 1 W.L.R. 925, 936*). See above, para.2-004.

58. ! Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.13–18.

59. See below, para.3-019.

60. See below, paras 3-029—3-033.

61. See below, paras 3-022 et seq.

62. See below, paras 3-036 et seq.

63. See Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2015), p.270.

64. For examples, see below, paras 3-019, 3-042.

65. The points in the paragraph are particularly well made in Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13–07—13–19. Cartwright's summary of the law was adopted in *DNA Production (Europe) Ltd v Manoukian [2008] EWHC 943 (Ch)* at [47], [50].

66. e.g. by Denning L.J. in *Frederick E. Rose (London) Ltd v William H. Pim Jnr & Co Ltd [1953] 2 Q.B. 450, 460* (" … 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. Once they had done that, nothing in their minds could make the contract a nullity from the beginning … ").

67. *(1871) L.R. 6 Q.B. 597*.

68. See below, para.3-022.

69. *Paal Wilson & Co A/S v Partenreederi Hannah Blumenthal (The Hannah Blumenthal) [1983] 1 A.C. 854*.

70. See above, para.2-004.

71. See *[1983] 1 A.C. 854* at 914, 915 and 924 respectively.

72. See below, para.3-023.

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(b) - Mutual Misunderstanding

Parties at cross-purposes

3-019

In most cases the application of the objective test will preclude a party who has entered into a contract under a mistake from setting up his mistake as a defence to an action against him for breach of contract. If a reasonable person in the defendant's position would have understood the contract in a certain sense but the defendant "mistakenly" understood it in another, then, despite his mistake, the court will hold that the defendant is bound by the meaning that the reasonable person would have understood. [73] But where parties are genuinely at cross-purposes as to the subject matter of the contract, the result may be that there is no offer and acceptance of the same terms because neither party can show that the other party should reasonably have understood his version. [74] Alternatively, the terms of the offer and acceptance may be so ambiguous that it is not possible to point to one or other of the interpretations as the more probable, and the court must necessarily hold that no contract exists. [75] The best-known example is of some antiquity. In *Raffles v Wichelhaus* [76] the defendants contracted to buy a cargo of cotton to arrive "*ex Peerless* from Bombay". There were two ships of that name and both sailed from Bombay, but one left in October and the other in December. The description of the goods pointed equally to either cargo. To an action for refusal to accept goods from the December shipment, the defendant pleaded that the agreement referred to the other one. The plaintiff demurred, but the court gave judgment for the defendants, apparently taking the view that it was open to the latter to adduce parol evidence as to which ship was meant. The judgment does not indicate what the position would be if the parol evidence failed to point to one cargo rather than the other, but the court did not express any disagreement with counsel's proposition that, if the defendant meant one *Peerless* and the plaintiff the other, there would be no contract. At that time it is likely that it was thought that there would be no contract without subjective agreement, consensus ad idem. In a modern case of a similar character it would have to be shown that each party's interpretation was as reasonable as the other's, [77] and it is unlikely that the facts proved would be so sparse as not to give some ground for adopting one interpretation of the contract rather than the other. [78]

Reasonable meaning of A's offer may depend on B's conduct

3-020

If one party has misled the other, even unintentionally, he may be precluded from relying on the normal interpretation of the other's words or conduct, with the result that even on an objective criterion no agreement results. In the case of *Scriven v Hindley*, [79] an auctioneer acting for the plaintiff put up for sale lots of hemp and tow from a single ship. It was very unusual for both hemp and tow to be shipped together. The auction catalogue did not indicate the difference in the contents of the lots. A lot of tow was put up, and the defendant bid for it thinking it was hemp. The bid was accepted. The jury found that the auctioneer intended to sell tow, while the defendant intended to bid for hemp, and that the former had merely thought that an overvalue had been placed by the defendant on the tow. It was held that, as the parties were never ad idem as to the subject matter of the contract, there was

no binding contract of sale. In the ordinary way an auctioneer is entitled to assume that a bidder knows what he is bidding for, and acceptance of a bid will create a binding contract; the decision in this case seems to have turned on the misleading nature of the catalogue. [80]

Parties aware of disagreement over meaning of clause

3-021

The case of mutual misunderstanding should be distinguished from the case in which the parties are aware that they disagree over the meaning of a term of the contract. It has been held that there may be a valid contract despite the fact that the parties know that they are not agreed as to the meaning of one of its terms. Provided there is evidence that the parties intended to make a binding agreement, the contract will be valid and the parties are treated as having left it to the court to determine its correct meaning. [81]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

51. On this phrase see above, para.3-001 n.4. On the kinds of mistake dealt with in this section, see Cheshire (1944) 60 L.Q.R. 175, 178, 180; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 386; Stoljar (1965) 28 M.L.R. 265, 266; M. Chen-Wishart, *Exploring Contract Law* (2009) 341; G. McMeel, "Interpretation and Mistake in Contract Law: 'The fox knows many things' " [2006] Lloyd's Maritime and Law Quarterly 49; R. Stevens, *Contract Terms* (2007) 101.

73. *Scott v Littledale (1858) 8 E. & B. 815*; *Wood v Scarth (1855) 1 F. & F. 293*; *Smith v Hughes (1871) L.R. 6 Q.B. 597*.

74. e.g. *South East Windscreens Ltd v Jamshidi [2005] EWHC 3322 (QB), [2005] All E.R. (D) 317 (Dec)* (parties put forward different versions of the agreement as to price); " … it is a question of trying to decide objectively what was agreed … neither party has discharged the burden of proving, on the balance of probabilities, that their version of the agreement is correct" (at [84]).

75. *Thornton v Kempster (1814) 5 Taunt. 786*; *Henkel v Pape (1870) L.R. 6 Ex. 7*; *Smidt v Tiden (1874) L.R. 9 Q.B. 446*; *Hickman v Berens [1895] 2 Ch. 638*; *Falck v Williams [1900] A.C. 176*; *Van Praagh v Everidge [1903] 1 Ch. 434*; cf. *Marwood v Charter Credit Corp (1971) 20 D.L.R. (3d) 563*. However, it seems possible that the mistake must relate to a point which is of some importance. If the misunderstanding is as to some unimportant point the court might simply disregard the relevant term and uphold the rest of the contract. cf. *Nicolene Ltd v Simmonds [1953] 1 Q.B. 543*.

76. *(1864) 2 H. & C. 906*. See further as to this case, Grant Gilmore, *The Death of Contract* (1974), pp.35–41; Simpson (1975) 91 L.Q.R. 247, 268.

77. Thus *Hickman v Berens [1895] Ch. 638* would not be followed today: a compromise agreement was set aside for want of consensus even though the document apparently expressed exactly what one of the parties meant.

78. This paragraph in the 29th edition was cited in *NBTY Europe Ltd (formerly Holland & Barrett Europe Ltd) v Nutricia International BV [2005] EWHC 734, [2005] 2 Lloyd's Rep. 350*, but it was held on the facts that there was no ambiguity in the agreement, nor indeed were the parties at cross-purposes.

79. *[1913] 3 K.B. 564*.

80. Although the jury found the parties were not ad idem, this does not mean that the court thought subjective agreement was necessary. Lawrence J. discussed whether the defendants were "estopped", which seems to be equivalent to asking whether they were bound by the normal meaning of their conduct in bidding, and held that, because of the auctioneer's behaviour, they were not. It is conceivable that, had the question arisen, the court might have held, not that there was no contract, but that the lot was sold as hemp. Compare below, paras 3-024 and 3-029.

81. *LCC v Henry Boot & Sons Ltd [1959] 1 W.L.R. 1069*.

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(c) - Unilateral Mistake as to Terms

(i) - When Mistake will Affect Contract

Mistake known to the other party

3-022

A mistake as to the terms of the contract, [82] *if known to the other party*, may affect the contract. In this case, the normal rule of objective interpretation is displaced in favour of admitting evidence of subjective intention. [83] In *Hartog v Colin and Shields* [84] the defendants offered for sale to the plaintiffs some Argentine hare skins, but by mistake offered them at so much per pound instead of so much per piece. The previous negotiations between the parties had proceeded on the basis that the price was to be assessed at so much per piece, as was usual in the trade. But the plaintiffs purported to accept the offer and sued for damages for non-delivery. The court held that the plaintiffs must have known that the offer did not express the true intention of the defendants and that the apparent contract [85] was therefore void. [86] On the same principle, it has been held in Canada [87] that an offer contained in a tender cannot be accepted when it is apparent that the tender had mistakenly omitted a price escalation clause. [88]

Mistakes which ought to have been apparent

3-023

It is not clear whether for the mistake to be operative it must actually be known to the other party, or whether it is enough that it ought to have been apparent to any reasonable person in the position of the other party. In Canada there are suggestions that the latter suffices, [89] but the Singapore Court of Appeal has held that the common law doctrine of mistake applies only when the non-mistaken party had actual knowledge of the other's mistake. [90] In England there is no clear authority, [91] but two cases suggest that if the other party ought to have known of the mistake, he will not be able to hold the mistaken party to the literal meaning of his offer. In *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [92] the Court of Appeal appeared to consider that the plaintiff might be able to negate any binding agreement by showing that the defendant ought to have known that the plaintiff's offer contained an error; and in *O.T. Africa Line Ltd v Vickers Plc* [93] Mance J. said that the objective principle would be displaced if a party knew or ought to have known of the mistake. The latter situation would include cases in which the party refrained from making enquiries or failed to make enquiries when these were reasonably called for, [94] but first there must be a real reason to suspect a mistake. In rectification cases, however, it has been said that a unilateral mistake made by one party is a ground for rectification only if the other party actually knew of it. [95] This may suggest that only actual knowledge of a mistake in an offer will prevent the other party from accepting it. Thus it is possible that the courts apply a different standard when the parties have signed a written document recording their agreement. However, it has been argued that rectification for unilateral mistake should

be granted when the mistake was not known but ought to have been known to the defendant. These points will be discussed when we consider rectification. [96]

Mistakes caused by the non-mistaken party

3-024

In *Deutsche Bank (Suisse) SA v Khan* [97] the defendants had argued that even if the mistake as to terms was neither known nor ought to have been known to the other party, it may still affect the contract if it has been induced by the other party. Hamblen J. founded it unnecessary to decide the point but doubted that there is any such principle. [98]

Mistake as to the terms of the contract

3-025

It is not sufficient that one party knows the other has entered the contract under a mistake of some kind. The mistake must relate to the terms of the contract. [99] If it relates, for example, to what is the subject matter that is being bought and sold (i.e. as to its contractual description), the mistake is to the terms and may prevent there being a contract; but if the mistake is merely to the quality or the substance of the thing contracted for, it will be a mistake as to the facts (or "an error in motive") and it is well established that an error in motive will not avoid a contract. [100] In *Smith v Hughes* [101] the defendant purchased from the plaintiff a quantity of oats in the belief that they were old oats, whereas in fact they were new oats and quite unsuitable for the purpose for which he wanted them. On discovering his mistake, he refused to accept them and was sued by the plaintiff for the price. The judge asked the jury whether the plaintiff believed the defendant to believe, or to be under the impression, that he was contracting for the purchase of old oats. If so, they were to return a verdict for the defendant. On a motion for a new trial, the Court of Queen's Bench considered that this direction would not sufficiently distinguish between a mistake on the part of the defendant that the oats were old oats, and a mistake that they were being offered to him as old oats. In the former case, the contract would be valid, as the error would be one of motive; in the latter, the mistake would be as to the terms of the contract, and, if known to the plaintiff, would provide a defence to the action. A new trial was ordered. It is not clear whether the defendant would, on the latter hypothesis, have been free from liability on the ground that the contract was void, or on the ground that the seller was in breach by delivering new oats. [102] As the buyer had been given a sample of the oats it is difficult to see how, on similar facts occurring today, any sort of a defence could be made out. In a recent case, the parties had reached a compromise over the amount of demurrage due. One party had made an offer, basing its calculations on a mistaken assumption as to the date the ship had completed its unloading. The mistaken party was not entitled to relief even though the other party was aware of the mistake when it accepted the offer and decided to say nothing. [103] It was not a term of the contract that discharge was completed on the date the claimant supposed. [104] There is no equitable jurisdiction to set the contract aside where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract. [105]

Refusal of specific performance for unilateral mistakes not known to the other party or not as to terms

3-026

Even though a mistake by one party has no effect at common law, for example because the other party neither knew nor had reason to know of it, [106] or because it is not a mistake as to the terms of the contract, [107] it may be a ground on which the court will refuse to order specific performance when it would otherwise have done so. In *Barrow v Scammell* [108] Bacon V.C. said:

> "It cannot be disputed that courts of equity have at all times relieved against honest mistakes in contracts, where the literal effect and the specific performance of them would

> be to impose a burden not contemplated, and which it would be against all reason and justice to fix, upon the person who, without the imputation of fraud, has inadvertently committed an accidental mistake; and also where not to correct the mistake would be to give an unconscionable advantage to the other party."

It has been held that specific performance may be refused if it would cause the defendant "a hardship amounting to injustice" [109] although he may still be liable to an action for damages at law. [110] It has also been held that mistake may also be a defence if the plaintiff has in some way contributed, even unwittingly, to the mistake. [111] But a mistake which is entirely the product of the defendant's own carelessness will afford no ground for relief [112] unless (perhaps) the case is one of considerable harshness or hardship. [113] Most of the cases are ones in which one party made a mistake about the terms and the other party did not know of the mistake, [114] but there is no reason in principle why the mistake might not have been one as to the surrounding facts rather than the terms of the contract and at least one case involved that. [115] However, most of the cases on refusal of specific performance are old. It is not clear whether the modern tendency to cut down defences of unilateral mistake as grounds for rectifying a contract, or refusing rescission as an alternative, [116] will extend also to cases where the defendant seeks to be excused from specific performance.

No equitable power to set aside contract

3-027

It appears that if one party enters a contract under a mistake as to the terms, and what was really intended is known to the other who nonetheless purports to agree, the contract will be on the terms actually intended by the first party, [117] and if necessary the document may be rectified to bring it into line with the contract. [118] In other cases (where the other party knows there has been a mistake but not what it is, or where he should know there is a mistake) the mistake seems to render the contract void, as some of the authorities suggest. [119] In neither situation is there a separate equitable jurisdiction to set aside the contract for unilateral mistake. [120]

Positive mistake necessary

3-028

It is submitted that there will not be an effective mistake as to the terms unless the "mistaken" party has a positive belief that the terms are X when the contract in fact says Y, or at least that the contract does not include term Y, and the other party knows or ought to know of the mistake. [121] It will not suffice that the "mistaken" party simply did not know that the contract contained a particular term, for example because he had not read it before signing it. [122]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

51. On this phrase see above, para.3-001 n.4. On the kinds of mistake dealt with in this section, see Cheshire (1944) 60 L.Q.R. 175, 178, 180; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 386; Stoljar (1965) 28 M.L.R. 265, 266; M. Chen-Wishart, *Exploring Contract Law* (2009) 341; G. McMeel, "Interpretation and Mistake in Contract Law: 'The fox knows many things' " [2006] Lloyd's Maritime and Law Quarterly 49; R. Stevens, *Contract Terms* (2007) 101.

82. On the application of this to cases of mistaken identity, see above, para.3-002 and below, paras 3-036 et seq.

83. The question is strictly speaking not one of whether either party was at fault, but of whether one knew (or possibly ought to have known; see next paragraph) of the other's intention: see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13–24—13–26. Contrast *LCC v Henry Boot & Sons Ltd [1959] 1 W.L.R. 1069*, criticised by Goodhart (1960) 76 L.Q.R. 32.

84. *[1939] 3 All E.R. 566*, followed in *McMaster University v Wilchar Construction Ltd (1971) 22 D.L.R. (3d) 9* and in *Ulster Bank Ltd v Lambe [2012] NIQB 31* (offer to settle claim for €155,000 when P meant €155,000 and D knew this; this paragraph of Chitty was applied (at [20])). See also *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685* (below, para.3-025) at [87].

85. The question whether there was no contract at all, or one on the terms in fact intended by the defendants, is discussed below at para.3-022. It will be submitted that the effects of the mistake may differ according to whether the party knew not only that the offer contained a mistake but what the mistake was, or merely knew or should have known that it contained a mistake.

86. See also *Watkin v Watson-Smith, The Times, July 3, 1986*. In *Taylor v Johnson (1983) 151 C.L.R. 422, 45 A.L.R. 265* the High Court held that where one party knew that the other was mistaken as to a term in a formal written contract, the contract was voidable rather than void; sed quaere. Part of the majority judgment of the High Court was adopted by the Court of Appeal in *Commission for New Towns v Cooper (Great Britain) Ltd [1995] 2 Ch. 259*, a case of rectification, without discussion of the majority's view on this point. See further, below, para.3-027 n.120. In *Deputy Commissioner of Taxation (N.S.W.) v Chamberlain (1990) 93 A.L.R. 729 (Federal Court General Division)* a taxpayer was not permitted to take advantage of a typing error he had noticed in a writ issued against him.

87. *McMaster University v Wilchar Construction Ltd (1971) 22 D.L.R. (3d) 9* (Ont.). Canadian cases have also given relief for mistakes in the calculations underlying a bid, which would almost certainly not be permitted in English law: see below, para.3-025 n.105.

88. See also *Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2, [2005] 1 S.L.R. 502* (buyers tried to take advantage of offer on Internet to sell goods at mistakenly low price). The case is noted by Yeo in (2005) 121 L.Q.R. 393.

89. See *McMaster University v Wilchar Construction Ltd (1971) 22 D.L.R. (3d) 9 (Ont.), 22*, per Thompson J. ("one is taken to have known what would have been obvious to a reasonable person in the light of the surrounding circumstances"). Some Canadian courts consider that there is a power to give equitable relief if it would be unconscientious to permit the defendant to obtain or retain a legal advantage resulting from a mistake, and that it would be unconscientious for the defendant to do so when he knew or ought to have known of the claimant's mistake: see *Craig Estate v Higgins [1994] 2 W.W.R. 595 (B.C.S.C.)* (contrast para.3-027 below). When a defendant ought to have known that a contract document did not reflect the claimant's intention, the Canadian courts have given the defendant an option between rescission and rectification, see below, para.3-075; see also Waddams, *Law of Contracts*, 6th edn (2010), para.343.

90. *Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2, [2005] 1 S.L.R. 502* at [53]. It appears that actual knowledge would include cases of "'Nelsonian knowledge', namely, wilful blindness or shutting one's eyes to the obvious" (at [42]). The court considered that there is also an equitable jurisdiction to set aside a contract for unilateral mistake in cases in which there is "sharp practice" or "unconscionable conduct" (at [76]–[77]) but this does not seem to represent English law: see Below, para.3-027.

91. In *Merrill Lynch International v Amorim Partners Ltd [2014] EWHC 74 (QB)* at [54] Hamblen J. said that a mistake will only give rise to relief if it was known to the other party, but the point does not appear to have been argued and the mistake was in any event not as to the terms of the contract: see below, para.3-025.

92. *[1983] Com. L.R. 158*. In this case it was said that if the other party did not know and had no

reason to know of the mistake, he is entitled to hold the mistaken party to the terms of the contract in their objective sense; it is immaterial that he has not changed his position or relied upon the contract. This appears to be consistent with the objective test of liability, see Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.13–22.

93. *[1996] 1 Lloyd's Rep. 700, 703*.

94. *[1996] 1 Lloyd's Rep. 700, 703* (i.e. where the party would not be treated as having actual knowledge: see below, para.3-070).

95. See below, para.3-070.

96. See below, paras 3-069 et seq. The question whether there was no contract at all, or one on the terms in fact intended by the defendants, is discussed below, para.3-029. It will be submitted that the effects of the mistake may differ according to whether the party knew not only that the offer contained a mistake but what the mistake was, or merely knew or should have known that it contained a mistake.

97. *[2013] EWHC 482 (Comm)*.

98. *[2013] EWHC 482 (Comm)* at [265]–[268]. cf. above, para.3-020.

99. Or, where the mistake is over one party's identity, must prevent effective offer and acceptance: above, para.3-002 and below, paras 3-036 et seq.

100. *Balfour v Sea Fire and Life Assurance Co (1857) 3 C.B.(N.S.) 300*; *Scrivener v Pask (1866)L.R. 1 C.P. 715*; *Pope v Buenos Ayres New Gas Co (1892) 8 T.L.R. 758*; cf. *Gill v M'Dowell [1903] 2 Ir.Rep. 463*. In *G & S Fashions v B&Q Plc [1995] 1 W.L.R. 1088* it was held that, if a landlord purports to forfeit a lease in the mistaken belief that the tenant is in breach of covenant, the fact that the tenant knows of the landlord's mistake does not prevent it accepting the forfeiture. See also *Bank of Credit and Commerce International SA (In Liquidation) v Ali [1999] 2 All E.R. 1005, 1019*. See further above, para.3-002. A contract will not be invalidated by a unilateral mistake over a separate document that was itself of no legal effect: *Donegal International Ltd v Zambia [2007] EWHC 197, [2007] 1 Lloyd's Rep. 397* at [471], referring to this paragraph.

101. *(1871) L.R. 6 Q.B. 597*.

102. cf. *Roberts & Co Ltd v Leicestershire CC [1961] Ch. 555* (rectification in case of unilateral mistake); see below, para.3-069.

103. *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685*.

104. *[2008] EWHC 2257 (Comm)* at [91]. See also *Merrill Lynch International v Amorim Partners Ltd [2014] EWHC 74 (QB)* at [55].

105. *[2008] EWHC 2257 (Comm)* at [105], refusing to follow in this respect suggestions made by the judge at first instance (and not discussed by the Court of Appeal, *[2003] EWCA Civ 1104*) in *Huyton SA v Distribuidora Internacional de Productos Agricolas SA [2002] EWHC 2088 (Comm)* at [455], both reported in *[2003] 2 Lloyd's Rep. 780*. In Canada relief has been given when the claimant has made a "calculation error" which has led to its bid being underpriced, even though the mistake was not in the terms of the offer itself: see McCamus (2008) 87 Can. B.R. 1, 6 (compare *The Harriette N*, where relief was refused because the mistake was not as to a term of the offer, see text at n. 104above).

106. See above, para.3-008.

107. See previous paragraph.

108. *(1881) 19 Ch. D. 175, 182*. See also *Preston v Luck (1884) 27 Ch. D. 497, 506*; *Stewart v*

Kennedy (1890) 15 App. Cas. 75, 105.

109. *Tamplin v James (1880) 15 Ch. D. 215, 221*.

110. *Webster v Cecil (1861) 30 Beav. 62, 64*.

111. *Baskomb v Beckwith (1869) L.R. 8 Eq. 100*; *Denny v Hancock (1870) L.R. 6 Ch. App. 1*; *Wilding v Sanderson [1897] 2 Ch. 534*.

112. *Tamplin v James (1880) 15 Ch. D. 215*.

113. *Manser v Back (1848) 6 Hare 443*; *Malins v Freeman (1837) 2 Keen 25*; *Van Praagh v Everidge [1903] 1 Ch. 434*.

114. If the other party did know of the mistake, it would have the effects described below: see para.3-029.

115. *Jones v Rimmer (1880) 14 Ch. D. 588* (though the omission of any mention of the ground rent in otherwise very detailed particulars makes the case very close to one of misrepresentation by a misleading half-truth: see below, para.7-020). See also *Heath v Heath [2009] EWHC 1908 (Ch), [2009] 2 P. & C.R. DG21* at [26] ("specific performance is a discretionary remedy and mistake may …still be a relevant factor in refusing equitable relief, at all events where the mistake has been induced by the words or conduct of the person seeking specific performance. In such a case … the mistake may also amount to, or be practically indistinguishable from, a misrepresentation").

116. See below, paras 3-073—3-075.

117. See below, para.3-029.

118. See below, para.3-069.

119. See below, paras 3-029—3-035.

120. An equitable remedy was applied by the court in *VP Plc v Thomas Megarry [2012] NIQB 22*. Compare the cases in Canada (above, para.3-023 n.89) and Singapore (n.90). In *Taylor v Johnson (1983) 151 C.L.R. 422, 45 A.L.R. 265* the Australian High Court held that where one party knew that the other was probably mistaken as to the terms of a formal written contract, and tried to prevent her discovering the mistake, the contract was voidable rather than void. Part of the majority judgment of the High Court was adopted by the Court of Appeal in *Commission for New Towns v Cooper (Great Britain) Ltd [1995] 2 Ch. 259*, a case of rectification, without discussion of the majority's view on this point. In *Deputy Commissioner of Taxation (NSW) v Chamberlain (1990) 93 A.L.R. 729 (Federal Court General Division)* a taxpayer was not permitted to take advantage of a typing error he had noticed in a writ issued against him. The dictum of Rimer J. in *Clarion Ltd v National Provident Institution [2000] 2 All E.R. 265, 276*, that there are "plenty of examples of equity permitting either rescission or rectification where one party has, to the knowledge of the other, made the contract under a mistake as to its subject matter or terms" must, with respect, be doubted as regards rescission. But cf. below, paras 3-073—3-076.

121. See above, para.3-007. This paragraph was cited with apparent approval in *Deutsche Bank (Suisse) SA v Khan [2013] EWHC 482 (Comm)* at [269].

122. Compare Spencer [1973] C.L.J 104, 114–116, cited in *Tilden Rent-a-Car Co v Clendenning (1978) 83 D.L.R. (3d) 400 CA Ont.* (signature does not show assent to provision which company "had no reason to believe were being assented to by the other contracting party").

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(ii) - Effect on Contract

Effect of mistake as to terms: mistaken party's intention known to other

3-029

In both *Hartog v Colin and Shields* [123] and *Smith v Hughes* [124] it was suggested that the effect of a mistake by one party as to the terms of the contract would, if it were known to the other party, make the contract void. However, in both cases the only question was whether the party who had made the mistake could be held to the objective meaning of his words. The *apparent* contract was void, but it was not decided that neither party had any contractual rights against the other. When the actual intentions of the mistaken party are known to the other, it is possible that the mistaken party can enforce the contract in those terms. Thus it may be that in *Hartog v Colin and Shields*the seller could have enforced the contract at so much per piece (the figure the seller actually intended) against the buyer. [125] The buyer, having accepted an offer which he knew was meant to read so much per piece, could be said to be bound by it. This was the result reached in a case in Northern Ireland in which the plaintiff had made an offer to settle a claim for €155,000 when they meant £155,000 and the defendant knew this [126]: Weatherup J. treated the offer as one for £155,000 "mistakenly expressed in euros" and enforced the settlement accordingly. [127] Further, although a contract entered under an operative mistake is often said to be void, it appears that this cannot be raised by the mistaken party against a third party who in good faith and without notice of the mistake has relied on the signed document. The signer is estopped and can only succeed against the third party if he can show non est factum. [128]

Rectification cases

3-030

The interpretation proposed in the previous paragraph is consistent with the cases granting rectification in cases of unilateral mistake. [129] There it is said that if the party against whom rectification is sought knew that the documents did not represent the true intention of the party seeking relief, the documents will be rectified to show what the party seeking relief actually intended. This presupposes the existence of a valid contract despite the mistake, on the terms actually intended by the mistaken party and known by the other to be so intended. [130]

Estoppel

3-031

To hold the party to the terms actually intended by the mistaken party is also consistent with cases

onestoppel. There it has been said that if one party knows the other has made a mistake and fails to point it out when the reasonable person would expect him to do so were he acting honestly and reasonably, an estoppel by silence or acquiescence may arise and result in liability where there would otherwise be none. [131]

Mistake should have been known to the other party; or true intention not known

3-032

It was submitted earlier that,at present, English law gives relief for a unilateral mistake if the mistake was known to the other party; but that there are suggestions in some of the cases that relief should also be given if the other party ought to have known of it. [132] If it were decided to give relief in these circumstances, what should the effect on the contract be? A similar question arises when the other party knows that the first party has made a mistake over the terms but(unlike in *Hartog v Colin and Shields*, [133] for example) does not know what the first party actually intended.

3-033

In these situations it might be argued that if the first party were to purport to accept the apparent offer, he would be estopped from denying that he had accepted whatever the offer or can prove he actually meant. But this would at the very least leave the first party in some uncertainty, and might involve holding him to a contract to which he would never have agreed. In a recent rectification case it was said that:

> "The effect of a successful rectification claim based on unilateral mistake is always that it imposes a contract upon the defendant which he did not intend to make. It is the unconscionable conduct involved in staying silent when aware of the claimant's mistake that makes it just to impose a different contract upon him from that by which he intended to be bound." [134]

When the first party's mistake was not actually known to the second party, or what the first party actually meant when that was unknown to the second party, it seems less appropriate to hold the second party to the terms intended by the first. It is more appropriate to hold that there is no contract. [135]

Oral and written contracts

3-034

It may be noted that there is at least one difference between the treatment of oral and written contracts which have been entered into as the result of a mistake as to the terms by one party which was known to the other. If the submissions above are correct, with an oral contract or one made by exchange of written communications, where the mistaken party's real intentions are known to the other, there will be a contract on those terms [136]; and for the most part the result when the contract has been reduced to writing is parallel. As was just mentioned, [137] a party who has signed a written agreement under a mistake may, if the mistake was known to the other party, claim to have the document rectified. The difference is that the right to rectification may be lost,and then, in the case of an agreement in writing, it is the ostensible agreement which will stand. [138]

3-035

It is possible that there is a second difference between the treatment of oral and written contracts, in the case where the mistaken party's intentions are not known to the other party, but either the other knows that there was a mistake but not what it is or he should have known that there was a mistake. In these cases it is suggested that if the contract was oral, or formed simply by an exchange of

correspondence, it is void. [139] What is not wholly clear is whether the same applies when the parties have reduced their agreement to writing. If oral and written contracts were to be treated identically, the contract should be void. As we will see below, in very limited circumstances a party who has signed a deed or other document under a misapprehension can claim that it is not binding on him under the doctrine of non est factum. The circumstances are very limited because a plea of non est factum can operate to prejudice third parties who have relied on the contract. It may be thought that this is the only ground on which the mistaken party can escape from a written contract, which would mean a second difference between oral and written contracts. But it has been pointed out that when the dispute is between the original parties, there is no need to rely on this defence: the contract may be void for mistake [140]; moreover, it is possible that in the case of a written contract which the defendant ought to know does not reflect the claimant's intention, the claimant may obtain rectification or possibly cancellation. [141]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

51. On this phrase see above, para.3-001 n.4. On the kinds of mistake dealt with in this section, see Cheshire (1944) 60 L.Q.R. 175, 178, 180; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 386; Stoljar (1965) 28 M.L.R. 265, 266; M. Chen-Wishart, *Exploring Contract Law* (2009) 341; G. McMeel, "Interpretation and Mistake in Contract Law: 'The fox knows many things' " [2006] Lloyd's Maritime and Law Quarterly 49; R. Stevens, *Contract Terms* (2007) 101.

123. *[1939] 3 All E.R. 566*; above, para.3-022. In *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N) [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep. 685* Aikens J. preferred to say that there is no contract at all (at [87]).

124. *(1871) L.R. 6 Q.B. 597, 606, 607, 609*;above, para.3-025.

125. See also Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2015), p.278;comparePeel, *Treitel on The Law of Contract*, 14th edn (2015), para.8–053(possibly seller could have held buyer to contract on the*stated* terms had he wished to do so).Contra,Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.13–28("there can be no contract-for the simple reason that though the defendant may have intended the contract to be on a different set of terms, there is no external evidence by which he can say that the claimant in fact agreed to it"). See also McLauchlan (2008) 124 L.Q.R.608, 613. However, if the claimant purported to accept the defendant's offer, there does seem to be such evidence,whether the contract was oral or written, unless it was no treasonable for the claimant to think that the defendant was accepting the claimant's offer as he intended it. For example, on facts like those in *Chwee Kin Keong v Digilandmall.com Pte Ltd [2005] SGCA 2, [2005] 1 S.L.R. 502*, in which buyers tried to take advantage of an offer on the internet to sell goods at a mistakenly low price and ordered large quantities of them, even if the buyers knew what the correct price should be, it would no treasonable for the seller to assume that a buyer was agreeing to buy large quantities of the goods at the correct price.

126. *Ulster Bank Ltd v Lambe [2012] NIQB 31*.

127. *[2012] NIQB 31* at [28]. The judge would have ordered rectification but thought it unnecessary to do so.

128. See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161*. Contrast the "mistaken identity" cases, Below, para.3-036,where the mistaken party is not estopped simply by entrusting possession of his property to the rogue who sells it to the third party. On non est factum see Below, para.3-049.

129. See Below, para.3-069.

130. In *Ulster Bank Ltd v Lambe [2012] NIQB 31* (above, para.3-029)the judge would have ordered rectification but thought it unnecessary to do so, as the issue could be dealt with as a matter of interpretation, cf. Below, para.3-060.

131. *Pacol Ltd v Trade Lines Ltd, The Henryk Sif [1982] 1 Lloyd's Rep. 456, 465*; *The Stolt Loyalty [1993]2 Lloyd's Rep. 281, 290*; *Republic of India v Indian Steamship Co, The Indian Grace (No.2) [1994] 2 Lloyd's Rep. 331, 344*. See above, para.2-071.

132. See above, para.3-023.

133. *[1939] 3 All E.R. 566*; above, para.3-022.

134. *Chartbrook Ltd v Persimmon Homes Ltd [2007] EWHC 409 (Ch), [2007] 2 P. & C.R. 9*at [137] (not referred to when the decision was reversed by the House of Lords, *[2009] UKHL 38*). See also *Daventry District Council v Daventry and District Housing Ltd [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333* at [177]. But see Below, para.3-076.

135. In Canada, in the analogous situation in which the mistaken party seeks rectification, the other party is given the option of submitting to rectification or to rescission, see Below, para.3-075. It does not seem easy to reach a parallel conclusion in the case of an oral agreement if it is the law that the effect of a mistake is to make the contract void rather than voidable.

136. See above, para.3-029.

137. See above, para.3-030.

138. See Below, para.3-095. In *Taylor v Johnson (1983) 151 C.L.R. 422, 45 A.L.R. 265* the Australian High Court held that where one party knew that the other was probably mistaken as to the terms of a formal written contract, and tried to prevent her discovering the mistake, the contract was voidable rather than void. This is an attractive solution but may go beyond English authority in allowing rescission for unilateral mistake: see above, para.3-027 and below, paras 3-074—3-075.

139. See above, para.3-034.

140. See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161*, discussed further below, para.3-050. It is suggested that that, if necessary, the court should cancel the document; but it is not clear that this remedy is available unless there was actual or constructive fraud: see Halsbury's Laws of England Vol. 47 (2014) Equitable Jurisdiction, para.84.

141. See below, paras 3-075—3-076.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 2. - Mistakes as to terms or identity [51]

(d) - Mistaken Identity

Mistaken identity

3-036

A number of cases have raised the question whether a mistake by one party as to the identity of the person with whom he appears to be contracting will render the contract void. The question arises in a recurrent situation typified by the facts of *Cundy v Lindsay*. [142] A fraudulent person named Blenkarn wrote to the plaintiffs offering to buy certain goods, and so contrived his signature to resemble that of Blenkiron & Co, a prosperous firm carrying on business in the same street and with whom the plaintiffs had previously dealt. The plaintiffs despatched the goods in the belief that they were dealing with Blenkiron & Co and the goods eventually came into the hands of an innocent purchaser, the defendant. If the contract between the plaintiffs and Blenkarn was void for mistake, no property in the goods had passed under the contract, and the plaintiffs were entitled to recover them. But otherwise the contract was merely voidable for fraud, and the defendant would have acquired a good title. [143]

Mistake as to the person. [144]

3-037

The identity of the person with whom one is contracting or proposing to contract is often immaterial. It is usually of no importance to a shopkeeper to whom he sells goods across the counter for cash [145]; and an auctioneer who accepts a bid at a public auction is not normally concerned with the identity of the person who makes the bid. [146] Sometimes, however, and for special reasons, the identity of the person is material. In such circumstances, if one party mistakenly believes that he is dealing with person A when he is in fact dealing with B, and he communicates to B an offer that is intended only for A, the mistake as to identity may prevent a contract coming into existence. The same may apply if the mistaken party purports to accept an offer that he believes to have been made by A but that was in fact made by B. [147]

Offer to B cannot be accepted by C

3-038

❗ Assuming the identity of the other party to be material to party A, we may start with the general proposition that, if A offers to make a contract with B, C cannot give himself any rights under the offer:

> “A person cannot constitute himself a contracting party with one whom he knows or ought to know has no intention of contracting with him. An offer can be accepted only by the

Equally, if a party makes an offer to another and the other addresses his acceptance to a third person with whom the other intends to deal, there will be no contract. [149] In *Boulton v Jones* [150] the defendant had been used to deal with one Brocklehurst, against whom he had a set-off. He sent Brocklehurst a written order for some goods. On the very day that the order was sent, Brocklehurst had transferred his business to his foreman, the plaintiff. The plaintiff thereupon dispatched the goods without informing the defendant of the change of ownership. The defendant refused to pay for the goods, and the court held that he was not liable to do so as the plaintiff could not accept an offer which was not addressed to him. Nevertheless the test is not entirely a subjective one. The question is not simply "with whom did the offeror intend to contract?" but "how would the offer have been understood by a reasonable man in the position of the offeree"? If A makes an offer to B in mistake for C, and B accepts the offer reasonably believing it to have been intended for him, A will be bound despite the mistake. [151] In *Boulton v Jones* the circumstances were such that a reasonable man would not have believed the offer to have been addressed to him. The business had only just changed hands, and the plaintiff either knew of [152] or could easily have discovered the existence of the set-off. But where such knowledge or means of knowledge is lacking, the offeror will be bound. Moreover, the growth of companies and the increasing depersonalisation of commerce may mean that nineteenth-century cases on questions of this kind are not very reliable as authorities. In 1857 a buyer of goods from a shop may well have regarded the identity of the seller as a matter of importance; in the day of the supermarket this is unlikely to be the case.

Offer may be accepted only by person to whom it was made

3-039

Thus the question is, to whom was the offer [153] made: to the actual recipient to whom it was addressed or sent, or to the person with whom the offeror thought he was dealing? There will be no contract if it is shown that:

> "… there was no objective agreement, e.g. that the offer was, objectively speaking, made to one person and (perhaps as the result of fraud) objectively speaking, accepted by another." [154]

In other words, the issue is parallel to the one raised when one party has made a mistake in the terms of his offer: whether or not the purported offer and acceptance result in a contract depends upon the terms of the offer or the acceptance.

> "Just as the parties must be shown to have agreed on the terms of the contract, so they must also be shown to have agreed the one with the other. If A makes an offer to B, but C purports to accept it, there will be no contract. Equally, if A makes an offer to B and B addresses his acceptance to C there will be no contract. Where there is an issue as to whether two persons have reached an agreement, the one with the other, the courts have tended to adopt the same approach to resolving that issue as they adopt when considering whether there has been agreement as to the terms of the contract. The court asks the question whether each *intended*, or must be deemed to have *intended*, to contract with the other." [155]

In the typical case [156] in which a rogue (R) has fraudulently induced the innocent party (S) to believe that R is in fact a third person (X), R is of course aware of S's mistake and it makes no sense to ask whether S intended to deal with R or X: to him they were the same person. [157] Nonetheless the questions are, first, to whom did S intend to make the offer—only to X or to whomever he was in fact dealing with [158]; and secondly, whether the offer must in the circumstances be interpreted as made to, or intended for, only X or as made to the person with whom S was actually dealing, whom he merely

thought to be X. In practice the answer to the second question will depend on whether the parties were dealing face-to-face or by correspondence.

Face-to-face dealings

3-040

When the parties are dealing with each other face-to-face [159] there is a strong presumption that the mistaken party "intends" to deal with the person physically present or, to put it in other words, there is a presumption that the offer is made to the person present. [160] Thus, in *Phillips v Brooks* [161] one North entered the plaintiff's shop and selected several pieces of jewellery. He then wrote out a cheque for the price, saying "I am Sir George Bullough"—a person known by reputation to the plaintiff. He took away some of the jewellery and pledged it with the defendant who received it in good faith. In an action by the plaintiff to recover the jewellery pledged, it was held that the plaintiff intended to contract with the person in the shop. There was therefore no operative mistake and the property in the jewellery passed.

The cases have not been wholly consistent in their outcomes. [162]

3-041

In *Ingram v Little* [163] the plaintiffs advertised their car for sale. A rogue who called himself Hutchinson offered to buy the car and to pay for it with a cheque. This offer was rejected. "Hutchinson" then gave his initials and address, describing himself as a respectable business man living in Caterham. The plaintiffs had never heard of this man but one of the plaintiffs ascertained from the telephone directory that such a person lived at that address. Relying on this information, they accepted the cheque, which was dishonoured on presentation. The rogue sold the car, which subsequently came into the hands of the defendant, a bona fide purchaser for value. In an action by the plaintiffs to recover the car, or its value, from the defendant, the Court of Appeal by a majority held that the contract between the plaintiffs and the rogue was void for mistake as to identity, and that they were entitled to judgment since the car was still their property. The circumstances (particularly the investigation of the telephone directory) indicated that it was with Hutchinson that the plaintiffs intended to deal and not with the rogue who was physically present before them. Devlin L.J. dissented: there was a presumption that the person intended to contract with the person to whom she was addressing her words and that the presumption had not been rebutted. It did not suffice to show that S would not have contracted with R unless she thought he was X. The decision in *Ingram v Little* was criticised and not followed in *Lewis v Averay* [164] where the facts were very similar but judgment was given for the bona fide purchaser. Phillimore L.J. emphasised that each of these cases must be decided on its own facts but that there is a strong presumption against holding a contract to be totally void where it is entered into inter praesentes. Megaw L.J. held that it had not been shown that the seller considered the identity of the buyer to be of vital importance. Denning L.J. expressed the view that a mistake of identity would never make a contract void. In the recent House of Lords case of *Shogun Finance Ltd v Hudson* [165] (a case of a contract in writing) it seems to have been accepted by all their lordships who discussed the point that, in face-to-face dealings, there is a strong presumption that the offer is made to the person physically present. [166] Indeed, two of their lordships doubted whether the presumption could be rebutted. [167] The tenor of their lordships' speeches was that the dissenting approach of Devlin L.J. in *Ingram v Little* [168] was to be preferred; Lord Walker said that the case was wrongly decided. [169]

Contracts in writing

3-042

Where the contract is in writing, in contrast, only the persons named in the writing can be parties to the contract, and it seems that the same applies when the negotiations for the contract were conducted in writing even if there was no formal written agreement. In *Cundy v Lindsay* [170] (the facts of which were given in para.3-036, above) it was held that the mistake was one as to the identity of the contracting party and the contract was void. Lord Cairns remarked:

> "… how is it possible to imagine that in the that state of things any contract could have arisen between the Respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested on him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever." [171]

This decision does not seem at the time to have rested on the distinction between face-to-face negotiations and a written contract; rather it seems to reflect the subjective approach to intention that was widely adopted in the nineteenth century. [172] However, the decision has been upheld on the basis that the negotiations were by correspondence and therefore the respondent's offer was made only to the person identified in the writing, i.e. the respectable firm of Blenkirons to whom the respondents dispatched the goods. This is the effect of the House of Lords decision in *Shogun Finance Ltd v Hudson*. [173]

3-043

In *Shogun Finance Ltd v Hudson* [174] a rogue wanted to acquire a vehicle displayed by a car dealer and showed the dealer a driving licence in the name of a Mr Patel. The dealer contacted the claimants and, after the claimants had checked Mr Patel's credit details, a financing agreement with the claimants was arranged in the name of Mr Patel. After the rogue had paid a deposit partly in cash and partly by cheque (which was later dishonoured), the dealer allowed the rogue to take the vehicle. The defendant bought the vehicle in good faith. The defendant claimed that he was protected by Hire Purchase Act 1964 s.27. This provides that when a motor vehicle has been bailed under a hire-purchase agreement or agreed to be sold under a conditional sale agreement, and before the property has vested in the debtor he disposes of it to a private purchaser who buys it in good faith, the purchaser will obtain good title. The Court of Appeal, [175] by a majority, held that the defendant had not acquired the vehicle from a "debtor" under a hire-purchase agreement as there was no valid agreement. Mr Patel was not bound by any agreement and there was no valid agreement with the rogue. By a majority this decision was affirmed in the House of Lords. A minority of their lordships argued powerfully that there was a contract between the finance company and the rogue; the effect of the fraudulently-induced belief by the company that it was dealing with Mr Patel merely rendered the contract voidable. [176] Lord Millett accepted that A cannot accept an offer that is made to B but argued that, whether the parties are dealing with each other face-to-face or in writing, there should be a presumption that the mistaken party intends to deal with the person with whom he is physically dealing—the person present or the writer of the letter. A contract should come into existence whenever there is sufficient correlation between the offer and the acceptance to make it possible to say that the imposter's offer has been accepted by the person to whom it was addressed. [177] Lord Millett said that *Cundy v Lindsay* was wrongly decided. [178] Lord Nicholls agreed that *Cundy v Lindsay* should not be followed. [179] A person should be presumed to intend to contract with the person with whom he is actually dealing, whatever the mode of communication. [180] But the majority held that when the dealings are carried out by correspondence in writing, and certainly when the contract is reduced to a writing, [181] the identification of the parties to the agreement is a question of the construction of the putative contract. If an individual is unequivocally identified by the description in the writing, that precludes any finding that the party to the agreement is anyone other than the person so described. [182] On the facts, the finance company was willing to do business only with the person who appeared to have identified himself in the written document, i.e. Mr Patel [183]; and where the party is specifically identified in the document, oral or other extrinsic evidence is not admissible to show that the party is someone else. [184] There was therefore no contract between the rogue and the finance company.

Non-existent person

3-044

It seems that if the rogue purports to be not another individual who exists but a non-existent person, then even when the contract is in writing it will normally be between the mistaken party and the rogue. In *King's Norton Metal Co v Edridge, Merrett & Co Ltd* [185] the plaintiffs had despatched goods to one Wallis, who had written to them posing as a member of a mythical firm named "Hallam & Co". Wallis

subsequently sold the goods so obtained to the defendants, who took in good faith and for value. The Court of Appeal held that the plaintiffs had intended to contract with the writer of the letter, although they had invested him with the attributes of solvency and respectability. A.L. Smith L.J. said [186] that if there had been a separate entity called Hallam & Co the case might have been within *Cundy v Lindsay*. [187] In the *Shogun* case, Lord Phillips said that in the *King's Norton* case:

> " … the plaintiffs intended to deal with whoever was using the name Hallam & Co. Extrinsic evidence was needed to identify who that was but, once identified as the user of that name, the party with whom the plaintiffs had contracted was established. They could not demonstrate that their acceptance of the offer was intended for anyone other than Wallis." [188]

The *King's Norton* decision does not completely preclude a finding that the mistaken party intended to contract only with a person who does not in fact exist [189] but, as Lord Hobhouse pointed out in the *Shogun* case, in a credit agreement it would be useless to use a pseudonym as there would be no actual person against whom a credit check could be run. [190]

Identity and attributes

3-045

It often used to be said that only a mistake as to the identity of the other party could ever prevent the formation of a contract; a mistake as to attributes could never do so. [191] While it is clear that a mistake as to an attribute of the other party such as whether he is credit-worthy will not prevent the formation of a contract, [192] the distinction has been criticised. [193] It is possible that in exceptional circumstances a mistake as to attribute may prevent a contract coming into existence, if a person is for the purpose identified by some attribute. An offer made only to members of the University of Warwick could not be accepted by someone who was not a member of the University. [194]

Mistake and third parties

3-046

It is not clear whether a person can intervene and allege that a contract is void for mistake as to the person when the contracting parties themselves are unwilling to assert its invalidity. In *Fawcett v Saint Merat (Star Car Sales Ltd, Claimant)* [195] Hardie Boys J. in the Supreme Court of New Zealand held that a third party (an execution creditor of the original owner of the goods) could not raise "in the name of one of the contracting parties" the question of mistake as to the person; but his view did not form part of the reasoning of the decision on appeal. [196] At first sight it might seem that a third party should be allowed to rely on the invalidity of the transaction for the contract is not voidable at the parties' option but void ab initio. But in practice some strange consequences would follow from permitting such intervention. If the buyer in *Boulton v Jones* [197] had waived his objections to the identity of the seller and paid for the goods could it really be contended by a third party that the property did not thereby pass to the buyer?

A believes B is not B

3-047

Suppose that A makes an offer to B merely in the belief that B is not B? The offer has been made to B even though A would never have made it had he known B's true identity. B can therefore accept the offer whether or not he knows of the mistake. The contract may be voidable for fraud, but it is not a nullity from the beginning. [198] It is only if a term can be implied into the offer that B is not B, and it is proved that this was known to the other party, that the contract will be void ab initio. [199] In such a case

the other party knows that the terms of the offer preclude him from accepting it, and, as we have seen, [200] this may invalidate the agreement.

Proposal for reform

3-048

In its Twelfth Report, [201] the Law Reform Committee recommended that, in the case of mistake as to the person, the distinction between void and voidable contracts should be abrogated so far as the acquisition of title by innocent parties is concerned. However, the Report was never implemented.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

51. On this phrase see above, para.3-001 n.4. On the kinds of mistake dealt with in this section, see Cheshire (1944) 60 L.Q.R. 175, 178, 180; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 386; Stoljar (1965) 28 M.L.R. 265, 266; M. Chen-Wishart, *Exploring Contract Law* (2009) 341; G. McMeel, "Interpretation and Mistake in Contract Law: 'The fox knows many things' " [2006] Lloyd's Maritime and Law Quarterly 49; R. Stevens, *Contract Terms* (2007) 101.

142. *(1878) 3 App. Cas. 459*; see further below, para.3-042.

143. The owner who has parted with possession of the goods to the rogue is not estopped from reclaiming them from the innocent third party to whom the rogue sells them; contrast the case where a party has mistakenly signed a document which is relied on by an innocent third party, below, para.3-049.

144. See Goodhart (1941) 57 L.Q.R. 228; Cheshire (1944) 60 L.Q.R. 175, 183; Williams (1945) 23 Can. Bar Rev. 271; Tylor (1948) 11 M.L.R. 257, 259; Slade (1954) 70 L.Q.R. 385, 390; Wilson (1954) 17 M.L.R. 515; Unger (1955) 18 M.L.R. 259; Hall [1961] Camb. L.J. 86; Stoljar (1965) 28 M.L.R. 265, 280; C. Hare, "Identity Mistakes: A Missed Opportunity?" (2004) 67 Modern Law Review 993; C. Macmillan, "Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law" [2005] Cambridge Law Journal 711; D. McLauchlan, "Mistake of Identity and Contract Formation" (2005) 21 Journal of Contract Law 1.

145. *Ingram v Little [1961] 1 Q.B. 31, 57*.

146. *Dennant v Skinner [1948] 2 K.B. 164*. See also *Smith v Wheatcroft (1878) 9 Ch. D. 223*. The seller will normally have lost the right to rescind for fraud: see below, para.7-138 (but nb. para.7-118).

147. See below, para.3-039. The same may occasionally apply when the mistake is one as attributes rather than identity: see below, para.3-045.

148. Beatson, Burrows and Cartwright, *Anson's Law of Contract*, 30th edn (2015), p.290; see *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [63], [125] and [184].

149. *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919*, per Lord Phillips at [125].

150. *(1857) 2 H. & N. 564, 6 L.R. 107*.

151. Goodhart (1941) 57 L.Q.R. 228, 241–244; Cheshire (1944) 60 L.Q.R. 175, 186–187. See also *Upton-on-Severn RDC v Powell [1942] 1 All E.R. 220*; *Shogun Finance Ltd v Hudson [2003]*

UKHL 62, [2004] 1 A.C. 919 at [65], [123] and [183].

152. See the report in (1857) 6 W.R. 107.

153. For convenience it is assumed that it is the offeror who is the mistaken party. The same principle will apply when the mistaken party purportedly accepts an offer that he believes came from A but was in fact made by C. See para.3-037 n.147, above.

154. Robert Goff L.J. in *Whittaker v Campbell [1984] Q.B. 318, 327*.

155. Lord Phillips in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [125].

156. See above, para.3-036.

157. See the judgment of Devlin L.J. in *Ingram v Little [1961] Q.B. 31, 65* and the speeches of Lords Millett, Phillips and Walker in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [64], [138], and [125], respectively.

158. See above, para.3-014. cf. *Midland Bank Plc v Brown Shipley & Co Ltd [1991] 1 Lloyd's Rep. 576* at 585 (mistake not of crucial importance).

159. Or probably where they negotiate over the telephone or by other means involving inter-personal contact other than in writing: *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [153].

160. See the speech of Lord Walker in *Shogun Finance Ltd v Hudson [2003] UKHL 62* at [184]–[185].

161. *[1919] 2 K.B. 243*, criticised by Goodhart (1941) 57 L.Q.R. 228 at 241, and by Gresson P. in *Fawcett v Star Car Sales [1960] N.Z.L.R. 406*. See also *Dennant v Skinner [1948] 2 K.B. 164*; *Barclays Bank Ltd v Okenarhe [1966] 2 Lloyd's Rep. 87*.

162. *Phillips v Brooks [1919] 2 K.B. 243* was distinguished by Viscount Haldane in *Lake v Simmons [1927] A.C. 487, 502*, who pointed out that the misrepresentation of his identity by North had not occurred until after the sale had been concluded and the property had passed. But in *Lake v Simmons* the question was whether the loss was covered by an insurance policy and Viscount Haldane's approach was not adopted by the other Lords: see Devlin L.J. in *Ingram v Little [1961] 1 Q.B. 31, 69–73* and Lord Phillips in *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [141].

163. *[1961] 1 Q.B. 31* (Devlin L.J. dissenting).

164. *[1972] 1 Q.B. 198*.

165. *[2003] UKHL 62, [2004] 1 A.C. 919*. See below, para.3-043.

166. *[2003] UKHL 62*. See the speeches of Lord Nicholls at [22] and [37], of Lord Millett at [69], of Lord Phillips at [170] and of Lord Walker at [187]. Lord Hobhouse did not address the question.

167. Lord Nicholls, *[2003] UKHL 62* at [37] and Lord Millett, who at [67] suggested that perhaps the presumption should be conclusive. Both were dissenting. Of the majority, Lord Walker said at [187] that exceptions to the presumption would be very rare but might occur in, e.g. cases of impersonation of someone actually known to a mistaken party whose senses are impaired.

168. *[1961] 1 Q.B. 31*.

169. *[2003] UKHL 62, [2004] 1 A.C. 919* at [185].

170. *(1878) 3 App. Cas. 459*.

171. *(1878) 3 App. Cas. 459* at 465. See also the speeches of Lord Hatherly at 469 and Lord Penzance at 471.

172. For a useful discussion see Simpson (1975) 91 L.Q.R. 247, 266 et seq. and Macmillan in Lewis and Lobban, *Law and History Current Legal Issues* (2004) Vol.6, pp.285–315.

173. *[2003] UKHL 62, [2004] 1 A.C. 919*.

174. *[2003] UKHL 62, [2004] 1 A.C. 919*. See C. Hare, "Identity Mistakes: A Missed Opportunity?" (2004) 67 Modern Law Review993; C. Macmillan, "Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law" [2005] Cambridge Law Journal 711; D. McLauchlan, "Mistake of Identity and Contract Formation" (2005) 21 Journal of Contract Law 1.

175. [2001] EWCA Civ 100, [2002] Q.B. 834.

176. The minority took a different approach to the policy of protecting good faith purchasers, see *[2003] UKHL 62* at [13] and [35] (Lord Nicholls) and [60] and [82] (Lord Millett): compare *[2003] UKHL 62* at [49] and [55] (Lord Hobhouse) and [181]–[182] (Lord Walker).

177. *[2003] UKHL 62* at [81].

178. *[2003] UKHL 62* at [93]. The minority were in part driven by the desire to protect innocent third parties who might purchase the property: see Lord Nichols at [35] and Lord Millett at [60] and [84].

179. *[2003] UKHL 62* at [34].

180. *[2003] UKHL 62* at [36].

181. Lord Hobhouse appears to state this as the rule when the contract is reduced to writing (at [46]) and then gives as a separate ground that the finance company only accepted the written offer apparently made on the form by Mr Patel. Lord Walker agreed with Lord Hobhouse and in his further remarks he appears to say that where there is an alleged contract reached by correspondence, again the identity of the parties will normally be determined by the writing; but he seemed to envisage that in such a case there might be room for argument, for example if in *Cundy v Lindsay* the respondents had never heard of Blenkiron & Co (at [188]). Lord Phillips does not seem to distinguish the two situations (see at [170] and [178]).

182. See the speeches of Lord Hobhouse, especially at [47]–[50]; Lord Phillips, especially at [154], [161] and [170]; and Lord Walker especially at [180] and [188]. The decision in *Hector v Lyons (1989) 58 P. & C.R. 156*, in which it was held that the mistaken identity cases have no application when the contract is wholly in writing (*(1989) 58 P. & C.R. 156,159*), was said to be correct in principle though the reason for the decision on the facts was not wholly clear: see *[2003] UKHL 62* at [49], [166] and [192].

183. See the speech of Lord Hobhouse at [48].

184. *[2003] UKHL 62* at [49]. It could of course be shown that the party named was acting as agent.

185. *(1897) 14 T.L.R. 98*.

186. *(1897) 14 T.L.R. 98, 99*.

187. *(1878) 3 App. Cas. 459*; above, paras 3-036 and 3-039.

188. *[2003] UKHL 62* at [135]. See also the speech of Lord Walker at [189].

189. *Lake v Simmons [1927] A.C. 487*; cf. *Newborne v Sensolid (Great Britain) Ltd [1954] 1 Q.B. 45*.

190. *[2003] UKHL 62, [2004] 1 A.C. 919* at [48].

191. e.g. in *Lewis v Averay [1972] 1 Q.B. 198, 215* Megaw L.J. decided the case on the ground that the mistake was merely as to attributes. See also *Whittaker v Campbell [1984] Q.B. 318, 324*. A mistake as to whether a person is contracting as agent for another or as principal may be relevant, as in *Hardman v Booth (1863) 1 H. & C. 803*; but not a mistake as to the identity of a mere messenger: *Midland Bank Plc v Brown Shipley & Co Ltd [1991] 1 Lloyd's Rep. 576*.

192. *Midland Bank Plc v Brown Shipley & Co Ltd [1991] 1 Lloyd's Rep. 576, 585*.

193. See *Shogun Finance Ltd v Hudson [2003] UKHL 62, [2004] 1 A.C. 919* at [5] (Lord Nicholls).

194. SeePeel, *Treitel on The Law of Contract*, 14th edn (2015), para.8–037.

195. *[1959] N.Z.L.R. 952*.

196. sub nom. *Fawcett v Star Car Sales [1960] N.Z.L.R. 406*. The majority of the court make no reference to this point, and Gresson P. (dissenting) expressly rejects it.

197. *(1857) 2 H. & N. 564*, above, para.3-038.

198. *Ingram v Little [1961] 1 Q.B. 31, 54*; Goodhart (1941) 57 L.Q.R. 228; Unger (1955) 18 M.L.R. 259. See also *Dyster v Randall & Sons [1926] Ch. 932*. Contrast *Gordon v Street [1899] 2 Q.B. 641*; *Sowler v Potter [1940] 1 K.B. 271*, which may perhaps now be taken to have been overruled, see *Solle v Butcher [1950] 1 K.B. 671, 691*; *Gallie v Lee [1969] 2 Ch. 17, 33, 41, 45*, affirmed sub nom. *Saunders v Anglia Building Society [1971] A.C. 1004*; *Lewis v Averay [1972] 1 Q.B. 198, 206*; and Wilson (1954) 17 M.L.R. 515.

199. *Said v Butt [1920] 3 K.B. 497* (a case of agency); see Vol.II, para.31-067.

200. See above, para.3-039.

201. Cmnd.2958 (1966), para.15.

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Volume I - General Principles

Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 3. - Non est Factum

Definition

3-049

This category of mistake is derived from a small group of cases most of them of modern times, although the doctrine existed at least as early as 1584. [202] The general rule is that a person is estopped by his or her deed, and although there is no such estoppel in the case of ordinary signed documents, a party of full age and understanding is normally bound by his signature to a document, whether he reads or understands it or not. If, however, a party has been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign, he can plead non est factum in an action against him. The deed or writing is completely void in whosesoever hands it may come. In most of the cases in which non est factum has been successfully pleaded, the mistake has been induced by fraud. But the presence of fraud is probably not a necessary factor. [203] As Byles J. said in *Foster v Mackinnon* [204]:

> "… it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."

However, a party is not permitted to escape the effect of a document that he has signed merely because he did not intend to sign a contract or a contract of the type he has in fact signed. As is explained below, the courts have placed strict limits on the doctrine of non est factum.

Importance of doctrine

3-050

The defence of non est factum is most obviously important in two situations. The first is where a party has signed the supposed contract as the result of the fraud of a third party and the other party to the contract has no actual knowledge or reason to know of, the fraud. [205] For example, in *United Dominions Trust Ltd v Western* [206] the defendant signed a blank hire-purchase proposal form and the dealer filled in incorrect figures before dispatching it to the finance company. The second is where the fraud has been committed by the other party to the alleged contract or deed and a third party has then relied on the document. In *Saunders v Anglia Building Society* [207] an elderly lady signed what she believed to be a deed of gift to her house to her nephew but which was in fact an assignment on sale to a third party who mortgaged the house to the defendants and kept the proceeds. If the case is one of fraud or misrepresentation by the other party to the contract, with no third party involved, the majority in the Court of Appeal in *Lloyds Bank Plc v Waterhouse* [208] said that the case should be dealt with as one of misrepresentation. [209] Alternatively, where the other party knew that the document did not represent the intention of the party signing it, the latter may have a remedy for unilateral mistake. [210]

Nature of mistake necessary to invalidate transaction

3-051

The plea of non est factum was formerly held to be available only if the mistake was as to the very nature of the transaction. In *Foster v Mackinnon* [211] the defendant was induced to indorse a bill of exchange on the false representation that it was a guarantee similar to one he had signed on a previous occasion. He was held not liable when sued by an innocent indorsee of the bill. In *Lewis v Clay* [212] the result was the same. The defendant was induced by a friend of long standing to sign a document, which was covered by a paper with four openings in it, under the representation that he was witnessing it. [213] The defendant had in fact signed two promissory notes and two letters authorising the plaintiff to pay the proceeds of the notes to the friend. The defendant was held not liable because his mind never went with the transaction. On the other hand, a mistake as to the contents of a deed or document was held not sufficient. An extreme case was that of *Howatson v Webb*, [214] where the defendant was fraudulently induced by one Hooper to execute a mortgage relating to certain property. The defendant executed the mortgage without reading the deed; he knew that it disposed in some way of the land in question, but was induced to believe that it was a conveyance rather than a mortgage. The plaintiff became transferee of the mortgage in good faith and sued the defendant on a covenant therein to repay £1,000. The defendant's plea of non est factum did not succeed as the deed in question was not of a wholly different class and character from that which the defendant believed it to be. It purported to be a transfer of property, and the defendant was merely mistaken as to its contents.

Distinction between nature and contents of document rejected

3-052

The law on this subject was completely reviewed and restated by the House of Lords in *Saunders v Anglia Building Society* [215] and the distinction between the character and nature of a document and the contents of the document was rejected as unsatisfactory. It was stressed that the defence of non est factum was not lightly to be allowed where a person of full age and capacity had signed a written document embodying contractual terms. But it was nevertheless held that in exceptional circumstances the plea was available so long as the person signing the document had made a fundamental mistake as to the character or effect of the document. Their Lordships appear to have concentrated on the disparity between the effect of the document actually signed, and the document as it was believed to be (rather than on the nature of the mistake) stressing that the disparity must be "radical", "essential", "fundamental", or "very substantial". [216] The plea may also be used when the mistake was as to the capacity in which the signor was acting, for example when he believed that he was merely witnessing the document. [217] In contrast, it may not be available when the party knew the nature of the document he was signing but thought that it would be used for a completely different purpose. [218]

Documents signed in blank

3-053

The plea of non est factum is likewise potentially applicable where one person signs a document in blank and hands it to another, leaving him to fill in the details and complete the transaction. [219] However, where erroneous details are inserted which are not in accord with the instructions of the person executing the document, he may yet be liable if the transaction which the document purports to effect is not essentially different in substance or in kind from the transaction intended. [220] Moreover, the onus is on the person signing the document to show that he has acted carefully, [221] and if he fails to discharge that onus he will be bound. [222]

Negligence

3-054

A person who signs a document may not be permitted to raise the defence of non est factum where he has been guilty of negligence in appending his signature. It was formerly held in a number of cases, of which the leading one was *Carlisle and Cumberland Banking Co v Bragg* [223] that negligence was only material where the document actually signed was a negotiable instrument, for there was not otherwise any duty of care owed by the person executing the document to an innocent third party who acted in reliance on it. But these cases were much criticised, both by the courts [224] and by writers, [225] and they were eventually reconsidered by the House of Lords in *Saunders v Anglia Building Society*, above. *Bragg's* case was overruled, and it was held that no matter what class of document was in question, negligence or carelessness on the part of the person signing the document would exclude the defence of non est factum. This does not depend on the principle of estoppel but on the principle that no man can take advantage of his own wrong. [226]

Disability or trickery

3-055

In *Saunders v Anglia Building Society* [227] Lord Reid said:

> "Originally this extension [of the plea] appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity."

To these cases, Lord Wilberforce added cases, of "persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended." [228] Non est factum was held to be available in a recent case in which a person was led to sign a guarantee thinking he was merely witnessing the document, of which he was shown only the last page. [229] But in each case the person claiming non est factum must have "taken all reasonable precautions available … before signing to ascertain the nature and purpose of the deed being signed". [230]

Onus of proof

3-056

There is "a heavy burden of proof on the person who seeks to invoke this remedy". [231] It will be a rare case in which a person who does not suffer from a disability will be able to plead non est factum when he has signed a document without checking to see what it is, or in what capacity he is signing it.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

202. *Thoroughgood's Case (1584) 2 Co. Rep. 9a*. The doctrine was probably much older than that case: see Holdsworth, *History of English Law*, Vol.8, p.50.

203. Contrast *Destine Estates Ltd v Muir [2014] EWHC 4191 (Ch)* at [83] ("Absent, however,

misrepresentation, there can be no sound foundation for the defence of non est factum").

204. *(1869) L.R. 4 C.P. 704, 711*. See also *Bank of Ireland v M'Manamy [1916] 2 I.R. 161*. cf. *Hasham v Zenab [1960] A.C. 316*; *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242, 268, 280* (misrepresentation).

205. On notice of fraud or misrepresentation by a third party, see below, paras 7-024—7-030.

206. *[1976] Q.B. 513*.

207. *[1971] A.C. 1004*.

208. *(1991) 10 Tr. L.R. 161*.

209. See also *Destine Estates Ltd v Muir [2014] EWHC 4191 (Ch)* at [83].

210. See the judgment of Sir Edward Eveleigh in *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161*. Although a contract entered under an operative mistake is often said to be void, above, para.3-029, it appears that this cannot be raised by the mistaken party against a third party who in good faith and without notice of the mistake has relied on the signed document. The signer is estopped and can only succeed against the third party if he can show non est factum: Contrast the "mistaken identity" cases, above, para.3-036, where the mistaken party is not estopped simply by entrusting possession of his property to the rogue who sells it to the third party.

211. *(1869) L.R. 4 C.P. 704*; cf. *National Provincial Bank of England v Jackson (1886) 33 Ch. D. 1*; *Carlisle and Cumberland Banking Co v Bragg [1911] 1 K.B. 489*; *Muskham Finance Ltd v Howard [1963] 1 Q.B. 904*. See also *Bagot v Chapman [1907] 2 Ch. 222*.

212. *(1898) 67 L.J.Q.B. 224*.

213. For a recent example with similar facts see *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)*.

214. *[1907] 1 Ch. 537, affirmed [1908] 1 Ch. 1*; cf. *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242*.

215. *[1971] A.C. 1004*; see Stone (1972) 88 L.Q.R. 190.

216. *[1971] A.C. 1004*, at 1017, 1022, 1026. In *Lloyds Bank Plc v Waterhouse (1991) 10 Tr. L.R. 161* it was held that an "all monies" guarantee was fundamentally different to one of liability under a particular transaction for the purchase of land. cf. *Hambros Bank Ltd v British Historic Buildings Trust and Din [1995] N.P.C. 179*.

217. As in *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)*.

218. *CF Asset Finance Ltd v Okonji [2014] EWCA Civ 870* at [27]–[32] per Patten L.J. (obiter). The defendant had signed in blank what she knew was a hire-purchase proposal; she thought it would be used by the salesman only to see whether she could obtain sufficient credit, but the salesman completed it and sent it to the finance company, which purported to accept it. Lord Dyson M.R. preferred to express no opinion, pointing out that: "there is some support in [*Saunders v Anglia BS*] for the view that such a mistake may enable her to invoke the remedy (subject to the question of negligence) … Lord Pearson (1031B–H) agreed with the reasoning of Russell L.J. and 'in particular with the principle that importance should be attached to the "object of the exercise" when dissimilar legal documents may have similar practical effects'."

219. *United Dominions Trust v Western [1976] Q.B. 513*. cf. *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242* at [279]–[280].

220. *United Dominions Trust Ltd v Western [1976] Q.B. 513* disapproving *Campbell Discount Ltd v*

Gall [1961] 1 Q.B. 431; see also Bills of Exchange Act 1882 s.20. cf. *Unity Finance Ltd v Hammond (1965) 109 S.J. 70*.

221. See below, para.3-054 (same principles applicable).

222. See also *British Ry Traffic and Electric Co Ltd v Roper (1939) 162 L.T. 217*; *Eastern Distributors Ltd v Goldring [1957] 2 Q.B. 600*.

223. *[1911] 1 K.B. 489*; *Campbell Discount Co Ltd v Gall [1961] 1 Q.B. 431*, *Wilson and Meeson v Pickering [1946] K.B. 422, 425*.

224. *Muskham Finance Ltd v Howard [1963] 1 Q.B. 904, 913*; *Mercantile Credit Co Ltd v Hamblin [1965] 2 Q.B. 242* at [278].

225. Anson (1912) 28 L.Q.R. 190; Guest (1963) 79 L.Q.R. 346.

226. *[1971] A.C 1004*, at 1019, 1038. In the Australian case of *Petelin v Cullen (1975) 132 C.L.R. 355* the High Court held that where no innocent third party is involved the question of negligence is not relevant. But in England it has been held that such a case should be dealt with as one of misrepresentation or unilateral mistake, not as non est factum, above, para.3-050. Negligence was one ground for failure of the plea in *Hambros Bank Ltd v British Historic Buildings Trust and Din [1995] N.P.C. 179*.

227. *[1971] A.C. 1004*, 1015–1016. See also the speech of Lord Pearce at 1034.

228. *[1971] A.C. 1004, 1025*. This is what occurred in *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)*.

229. *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)*.

230. *Beardsley Theobalds Retirement Benefit Scheme Trustees v Yardley [2011] EWHC 1380 (QB)* at [53].

231. Lord Reid in *Saunders v Anglia Building Society [1971] A.C. 1004, 1016*; see also at 1019 and 1027.

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Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 4. - Rectification of Written Agreements [232]

(a) - Introduction

Rectification of document to match agreement

3-057

Rectification only applies to contracts which have been reduced to writing. It is a process by which the document is made to conform to what was actually agreed between the parties, or what the law, applying the objective principle, treats as being their agreement.

> "… the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by mistake in verbal expression, does not accurately reflect their true agreement." [233]

It has become customary to divide rectification cases into two types. Most of the cases involve what has been agreed by the parties having been wrongly recorded in the document without either party being aware of the mistake. These cases involve what may be termed rectification to correct a common mistake; the document is rectified to bring it into line with the prior agreement. Rectification may also be available when, whether or not the parties had reached a prior agreement, one party signed a written document which did not record his intentions correctly, and the other party knew of the first party's intentions. [234] In this case the court may rectify the document so that it reflects the first party's intentions. This may be termed a case of rectification to correct a unilateral mistake. But in the case of *Chartbrook Ltd v Persimmon Homes Ltd* [235] the House of Lords said that rectification can also be ordered if the parties were not in actual agreement on the content or effect of their prior agreement but, under the objective approach, the prior agreement has a content or effect that differs from the content or effect of the document: again the document can be rectified to bring it into line with the prior agreement as objectively ascertained. This has proven to be controversial and it seems to cut across the distinction between "common mistake" and "unilateral mistake" rectification in such a way as to make that distinction of doubtful utility. In this section we will consider first "traditional" common mistake rectification, then unilateral mistake rectification and then the extended version before considering some general principles which apply in all situations. [236]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

232. Hodge, *Rectification* (2010); A Burrows, *Contract Terms* (2007), 77; Cartwrigh, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13-38—13-54;

McLauchlan (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, *Chancery Bar Association Annual Lecture* 2013, available at http://www.chba.org.uk/formembers/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited ; R. Toulson, *TECBar Lecture* 2013, available at https://www.supremecourt.uk/docs/speech-131031.pdf; T. Etherton, *Current Legal Problems Lecture* 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delive

233. *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba) [1984] 1 Lloyd's Rep. 353, 359*. For further discussion of what "the parties' agreement" is, see below, paras 3-082 et seq.

234. And possibly also if the other party should have known of the first party's intentions: see below, para.3-076.

235. *[2009] UKHL 38, [2009] 1 A.C. 1101*. See further below, para.3-077.

236. See below, paras 3-089 et seq.

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Section 4. - Rectification of Written Agreements [232]

(b) - Common Mistake

Common mistake

3-058

It has long been an established rule of equity that where a contract has by reason of a mistake common [237] to the contracting parties been drawn up so as to militate against the terms intended by both as revealed in their previous oral or written agreement, [238] the court will rectify the document so as to carry out such intentions. [239] So if the subsequent agreement was intended to reflect the terms of the earlier agreement but fails to do so, a party will be entitled to rectification unless it was shown that the parties intended to vary the terms of the earlier agreement. [240] Rectification will not be ordered, in contrast, if the terms of the subsequent written agreement were intended to supersede the terms of the earlier agreement, [241] if a written agreement fails to mention a matter because the parties simply overlooked it, having no intention on the point at all, [242] or if they decided deliberately to omit the issue. In such cases the written agreement must be construed as it stands.

Mistake in recording of terms or as to legal effect

3-059

Rectification may be ordered where the document did not record correctly what the parties had agreed, or where the legal effect of the words used was not what the parties had agreed on [243]: for example, if the document states that £x is to be paid "free of tax" when what was meant was that the payment would be of such sum that after deduction of tax would amount to £x. [244]

Issue may be solved by construction

3-060

Reference is made elsewhere to a series of cases in which the courts of common law have corrected clerical errors [245]; and also to cases in which parol evidence has been admitted to explain latent ambiguities. [246] Where a mistake is obvious, for example because the literal meaning of the words would be absurd, [247] and it is clear what is meant, rectification is not necessary; the matter will be dealt with as one of construction. As Brightman L.J. said in *East v Pantiles Plant Hire Ltd* [248]:

> "It is clear on the authorities that a mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to

> be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied, then either the Claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention."

In *Chartbrook Ltd v Persimmon Homes Ltd* [249] Lord Hoffmann accepted Brightman L.J.'s two conditions for the "correction of mistakes by construction" with two qualifications that had been explained in an earlier case by Carnwath L.J. [250]: first, that this is not a separate branch of the law but "simply aspects of the single task of interpreting the agreement in its context"; and that:

> "… in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

Lord Hoffmann's analysis was accepted by the other members of the Judicial Committee. In *State Street Bank & Trust Co v Sompo Japan Insurance Inc* [251] the Chancellor said:

> "… although the mistake must be clear it may emerge from a consideration of all the relevant documents, not only on the face of one of them; nor is there a limit to the correction which may be made provided that it is clear to the reasonable person having regard to all the relevant documents what the parties meant."

It is only where on an objective analysis it appears that each party must have had or must be taken to have had the same intention that the document will be interpreted in this way. In *Bashir v Ali* [252] a property was auctioned and, after the sale, the vendors claimed that they had not intended to include certain accommodation. Etherton L.J. said:

> "The present case is not one, like *Chartbrook*, in which what is being interpreted is an agreement between two negotiating parties. This case concerns a contract resulting from a bid at an auction. In that situation the terms are not negotiated. It is entirely up to the vendor to decide what to offer and on what terms. The bidder decides how much to bid in the light of what is offered and the terms dictated by the vendor. If, as in the present case, there has been a misdescription of the property and a low reserve leading the bidder to conclude that the vendor has or may have made a mistake in failing to take account of part of the accommodation, that does not mean that the contract must be construed so as to rectify the vendor's mistake. That is to confuse construction with the need for an action for rectification for (say) unilateral mistake. The vendor's mistake will only be corrected by construction if, objectively, it is clear what property and terms the vendor intended to offer and that the bidder understood them and intended to bid on that basis." [253]

However, it is not only in cases of common mistake that the question may be solved by construction. In *Ulster Bank Ltd v Lambe* the plaintiff had made an offer to settle a claim for €155,000 when they meant £155,000 and the defendant knew this. [254] Weatherup J. treated the offer as one for £155,000 mistakenly expressed in euros and enforced the settlement accordingly. [255]

Parol evidence

3-061

Where it is sought to construe a document, evidence of prior negotiations is not admissible. [256] But where it is sought to rectify a document, this rule does not apply. [257] In *Murray v Parker* [258] Lord Romilly, M.R. said:

> "In matters of mistake the court undoubtedly has jurisdiction, and though this jurisdiction is to be exercised with great caution and care, still it is to be exercised, in all cases, where a deed, as executed, is not according to the real agreement between the parties. In all cases the real agreement must be established by evidence, whether parol or written … If there be a previous agreement in writing which is unambiguous, the deed will be reformed accordingly: if ambiguous, parol evidence may be used to explain it, in the same manner as in other cases where parol evidence is admitted to explain ambiguities in a written instrument."

Even evidence of what a party believed had been agreed is admissible. In *Chartbrook Ltd v Persimmon Homes Ltd* [259] Lord Hoffmann said:

> "Unless itself a binding contract, the prior consensus is, by definition, not contained in a document which the parties have agreed is to be the sole memorial of their agreement. It may be oral or in writing and, even if the latter, subject to later variation. In such a case, if I may quote what I said in *Carmichael v National Power Plc* [260]:
>
> > 'The evidence of a party as to what terms he understood to have been agreed is some evidence tending to show that those terms, in an objective sense, were agreed. Of course the tribunal may reject such evidence and conclude that the party misunderstood the effect of what was being said and done.'
>
> In a case in which the prior consensus was based wholly or in part on oral exchanges or conduct, such evidence may be significant. A party may have had a clear understanding of what was agreed without necessarily being able to remember the precise conversation or action which gave rise to that belief. Evidence of subsequent conduct may also have some evidential value. On the other hand, where the prior consensus is expressed entirely in writing, (as in *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive 84 Ll. L. Rep. 97*) such evidence is likely to carry very little weight. But I do not think that it is inadmissible."

Even where the contract is one which is required to be in writing under s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 [261] or under s.4 of the Statute of Frauds 1677 [262] parol evidence is admissible, for the jurisdiction of the court to rectify is outside the prohibition of the statute. [263] However, it must be borne in mind that statements made in the course of negotiations are often no more than statements of a negotiating stance at that point in time. [264]

Conditions for rectification on the ground of common mistake

3-062

In *Chart-brook Ltd v Persimmon Homes Ltd* Lord Hoffmann said [265] that the requirements for rectification had been "succinctly summarised" by Peter Gibson L.J. in *Swainland Builders Ltd v Freehold Properties Ltd* [266]:

> "The party seeking rectification must show that: (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) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

The conditions for rectification on the ground of common mistake will be discussed more fully in the paragraphs that follow.

Concluded prior agreement not required

3-063

It was formerly thought that a plaintiff must show that there was an antecedent concluded contract, which was inaccurately represented by the instrument purporting to be made in pursuance of it:

> "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts." [267]

Where, therefore, a builder entered into a contract with an urban authority, the contract being sealed in accordance with s.174 of the Public Health Act 1875, it was held that it could not subsequently be rectified, for until the seal was affixed to the formal contract (i.e. the instrument sought to be rectified) there was no contract at all between the parties, and also because the effect of rectification, if allowed, would have been to bind the corporation to a contract which required a seal for its validity but which they had never sealed. [268] But although there was a strong body of judicial opinion in favour of this view, [269] Clauson J. in *Shipley UDC v Bradford Corp* [270] refused to accept that:

> "… the jurisdiction of the court cannot be exercised even in cases of clear mutual mistakes in the attempt to embody in the instrument the concurrent intentions of the parties existing at the moment of the execution of the instrument unless a previously existing contract can be proved."

This view was confirmed by a unanimous Court of Appeal in *Joscelyne v Nissen*. [271] The parties had negotiated an agreement but no concluded contract was made until execution of a formal legal document. It was held that the court had power to rectify the agreement so long as there was a continuing common intention in regard to a particular provision down to the execution of the written contract.

Outward expression of accord

3-064

❗ Although it is unnecessary to show that there was a binding agreement prior to the execution of the written document, in *Joscelyne v Nissen* it was said that there must have been an "outward expression of accord". [272] The Court of Appeal cited with approval its previous decision, *Lovell and Christmas Ltd v Wall* [273] and, in particular, the following passage from the judgment of Buckley L.J.:

> "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."

It is not necessary that the parties had formulated their intention into words at the time provided they had a common intention as to the substance, but there must have been some outward agreement. [274]

The requirement of an "outward expression of accord" is not an absolute one, but one of evidence that the parties shared a common intention even if they had not put it into words. The requirement of outward accord was first relaxed in a series of cases involving pension schemes [275] but in *Munt v Beasley*, which involved rectification of a lease, Mummery L.J., with whom the other members of the court agreed, said:

> "I would also accept … 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 … 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." [276]

Thus the accord may include understandings that the parties thought so obvious as to go without saying, or that were reached without being spelled out in so many words. [277]

Unexpressed but shared intentions

3-065

It is not clear whether rectification can be based on intentions that were never expressed to the other party in any form, even if the unexpressed intentions of each party happened to coincide. One argument is that unexpressed and unknown subjective intentions are irrelevant. [278] Rectification is to make the document conform to the agreement and in English law some outward manifestation is required for there to be an agreement. However, it has been argued that if the parties appear to have contracted, even if neither party has expressed his true intentions and neither party's intention coincides with the apparent agreement, if in fact their intentions coincide there may be a contract on the terms subjectively intended by both. If the apparent agreement is in writing, it would then be possible to rectify the written agreement to accord with the parties' subjective agreement. [279] If this were not the case, the parties would end up being bound by a written agreement that represented neither party's intentions.

Continuing intention

3-066

Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document. [280] If A prepares a draft of the written agreement, and the draft differs from the prior agreement, but B approves and signs the written agreement without noticing the change, can A resist rectification on the grounds that B knew or should have known that A had changed its mind? It cannot be that a difference between the prior agreement and the draft always prevents there being a continuing common intention or no rectification plea would ever succeed. [281] If B's intention is unchanged, and the difference between the prior agreement and the version that is signed is merely a slip, then there is a continuing intention and rectification can properly be granted. In *Daventry District Council v Daventry and District Housing Ltd* [282] there was a difference of opinion over the correct test to apply, and also on its application to the facts. [283] The case involved a prior, non-binding agreement which the parties had understood in different ways but which, as properly interpreted, placed an obligation on Daventry and District Housing (DDH) to pay a pension deficit. DDHmade a deliberate change in the draft contract, so that it no longer represented what had been the prior agreement (as

properly interpreted [284]): it contained a term requiring Daventry and District Council (DDC) to pay the deficit, so making explicit DDH 's understanding of the prior agreement. However, DDC did not appreciate the effect of the draft and continued to think that the agreement was in the terms of the prior agreement as DDC had (reasonably) understood it. (The same issue would arise when the draft prepared by A was different to the prior agreement because A had changed its mind.) Though the members of the Court of Appeal agreed that the question whether there was a continuing intention must be answered on an objective test, they took different approaches to what the test should be. Toulson L.J. asked "whether on a fair view there was a renegotiation of the prior agreement or a mistake" [285] and concluded that there was no attempt to renegotiate, as there was nothing to show that DDC had changed its mind. [286] For Etherton L.J. the test was "whether objectively, prior to the execution of the contract, DDH communicated to DCC that it intended to contract on a different basis" than the payment provided for in the prior agreement. [287] The Master of the Rolls pointed out that Toulson L.J.'s approach would require an assessment of DDC 's reaction to the draft, which he considered unnecessary: as the prior accord was not legally binding, "there was no need for DDC to agree to DDH 's resiling from the prior accord before that resiling could be effective". He therefore preferred Etherton L.J.'s approach. [288] However, Etherton L.J. and the Master of the Rolls reached different conclusions on the facts. The Master of the Rolls held that "the hypothetical observer would not have concluded thatDDH was signalling a departure from the prior accord: the observer would have believed that DDH was making a mistake" [289] and therefore there was a continuing intention. Etherton L.J., dissenting, held that the trial judge [290] had been right to find that DDH had objectively, prior to the execution of the contract, communicated to DDC that it intended to contract on a different basis, and therefore the appeal should be dismissed. [291] In a postscript to his judgment Etherton L.J. explained why he considers the Master of the Rolls' finding that the reasonable observer would have concluded that DDH was "making a mistake" to have been an incorrect application of the objective test, given that the wording inserted in the draft clearly placed the obligation to pay the deficit on DDC . [292]

3-067

In the light of these disagreements, it is difficult to extract a clear ratio from the *Daventry* case. [293] It is submitted that when A submits to B a draft which differs from the parties' earlier agreement, the correct approach in principle is to ask whether B realised or should reasonably have realised that the draft agreement was intended to differ from the prior agreement rather than to implement the prior accord. That B did not realise this is evidence of what it was reasonable for B to understand but no more. Though in the context of rectification the question is slightly different, this approach is consistent with the normal approach to the interpretation of contractual intention. In the case of a statement of intention such as an offer, the question is how should B as a reasonable person in the circumstances, have understood A's offer [294]; in the context of ascertaining whether or not there was a continuing common intention for the purposes of rectification, it is how B should reasonably have understood the draft, as merely to set down what was previously agreed, or as a new proposal (or perhaps a deliberate assertion that A did not accept the "objective" meaning of the prior agreement). [295]

More than one way of achieving intention

3-068

Rectification may be granted if the writing does not carry out the parties' objective intention even if there is more than one way by which the parties' intention can be achieved and the parties had not agreed on the precise mechanism. [296]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

232. Hodge, *Rectification* (2010); A Burrows, *Contract Terms* (2007), 77; Cartwrigh, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13-38—13-54; McLauchlan (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, *Chancery Bar Association Annual Lecture* 2013, available at http://www.chba.org.uk/formembers/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisite ; R. Toulson, *TECBar Lecture* 2013, available at https://www.supremecourt.uk/docs/speech-131031.pdf; T. Etherton, *Current Legal Problems Lecture* 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delive

237. *Murray v Parker (1854) 19 Beav. 305*.

238. On the meaning of this see below, paras 3-077 and 3-082 et seq.

239. *Burroughs v Abbott [1922] 1 Ch. 86*; *Constantinidi v Ralli [1935] Ch. 427*; *Jervis v Howle and Talke Colliery Co Ltd [1937] Ch. 67*. As regards past transactions, the court may give effect to a "defence" of rectification without actually ordering rectification: *The Nile Rhapsody [1992] 2 Lloyd's Rep. 399, 408*. A claimant may also invoke rectification on the same basis: *[1992] 2 Lloyd's Rep. 399, 409*.

240. *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor) [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246* at [58].

241. *[2008] EWHC 1330 (Comm)* at [60].

242. *Harlow Development Corp v Kingsgate (Clothing Productions) (1973) 226 E.G. 1960*; *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd (The Ypatia Halcoussi) [1985] 2 Lloyd's Rep. 364*; *OMV Supply and Trading AG v Kazmunaygaz Trading AG [2014] EWHC 1372 (Comm)* (neither party thought document contained the term that one claimed should be inserted). It is submitted that the apparent suggestion in that case (at [74]) that a contractual document cannot be rectified to include a term that has been omitted is not correct, provided the parties had a common intention that the term should form part of the agreement.

243. *Ahmad v Secret Garden (Cheshire) Ltd [2013] EWCA Civ 1005* at [27].

244. See *Burroughs v Abbott [1922] 1 Ch. 86*; *Jervis v Howle and Talke Colliery Co Ltd [1937] Ch. 67*. Rectification is not possible if the parties were merely mistaken over the consequences of their agreement for tax purposes: *Ashcroft v Barnsdale [2010] EWHC 1948 (Ch), [2010] S.T.C. 2544* at [17]; *Kennedy v Kennedy [2014] EWHC 4129 (Ch)* at [43] (voluntary settlement). See also Hodge, *Rectification* (2010), paras 3-100 and 3-169. Compare below, para. 3-090.

245. See below, paras 13-074—13-083.

246. See below, paras 13-120—13-129.

247. ⚠See para.13-056. Compare *LSREF III Wight Ltd v Millvalley Ltd [2016] EWHC 466 (Comm), 165 Con. L.R. 58* ("no ambiguity, no syntactical difficulty in construing the language used and the reference to the 1992 form of ISDA Agreement cannot be said to be such a commercial nonsense as to make it absurd for the parties to refer to it": at [62]).

248. *[1982] 2 E.G.L.R. 111, 112*, quoted in *Dalkia Utilities Services Plc v Celtech International Ltd [2006] EWHC 63, [2006] 1 Lloyd's Rep. 599*, at [109]. See below, para.13-077.

249. *[2009] UKHL 38, [2009] 1 A.C. 101* at [22]–[24]. For a critique, see Buxton (2010) 69 C.L.J. 253.

250. *KPMG LLP v Network Rail Infrastructure Ltd [2007] Bus. L.R. 1336* at [44]–[50].

251. *[2010] EWHC 1461 (Ch)* at [20].

252. *[2011] EWCA Civ 707, [2011] 2 P. & C.R.12*.

253. *[2011] EWCA Civ 707* at [42]. In *Scottish Widows Fund and Life Assurance Society v BGC International [2012] EWCA Civ 607* Arden L.J. said (at [20]) that (i) it must be clear from the document interpreted with the admissible background that the parties have made a mistake and what that mistake is; (ii) it must be clear, from the rest of the agreement interpreted with the admissible background, what the parties intended to agree; and (iii) the mistake must be one of language or syntax.

254. *Ulster Bank Ltd v Lambe [2012] NIQB 31*.

255. *[2012] NIQB 31* at [28]. The judge would have ordered rectification but thought it unnecessary to do so.

256. See below, paras 13-120 et seq.

257. *Lovell and Christmas Ltd v Wall (1911) 104 L.T. 85*; *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38* at [47]. In *J.J. Huber (Investments) Ltd v Private DIY Co Ltd [1995] N.P.C. 102 Ch D* it was held that the presence on an "entire agreement" clause in the contract does not prevent rectification. An entire agreement clause may tend to show that the parties have intended to be bound by the document in the material respects regardless of prior or other intentions (citing Spry on Equitable Remedies 5th edn (1997) at p.612): *Snamprogetti Ltd v Phillips Petroleum Co UK Ltd [2001] EWCA Civ 889, 79 Con. L.R. 80* at [32]. However, the clause may not be helpful if it was incorporated without any thought being given to its meaning: *Surgicraft Ltd v Paradigm Biodevices Inc [2010] EWHC 1291 (Ch)* at [75]. See also *Procter and Gamble Co v Svenska Cellulosa Aktiebolaget SCA [2012] EWHC 498 (Ch)* at [104]–[106]; *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA [2013] EWHC 3492 (Comm)* at [48]; *LSREF III Wight Ltd v Millvalley Ltd [2016] EWHC 466 (Comm), 165 Con. L.R. 58* at [121]–[123]; *Milton Keynes BC v Viridor (Community Recycling MK) Ltd [2017] EWHC 239 (TCC), [2017] B.L.R. 216* at [77].

258. *(1854) 19 Beav. 305, 308*.

259. *[2009] UKHL 38* at [64]–[67].

260. *[1999] 1 W.L.R. 2042, 2050–2051*. For an example of the parties' subjective intentions being evidence of the objective agreement, see *Equity Syndicate Management Ltd v Glaxosmithkline Plc [2015] EWHC 2163 (Comm)* at [35].

261. See below, paras 5-013 et seq.

262. See Vol.II, Ch.45 (contracts of suretyship).

263. *Cowen v Truefitt Ltd [1899] 2 Ch. 309*; *Johnson v Bragge [1901] 1 Ch. 28*; *Thompson v Hickman [1907] 1 Ch. 550*; *Craddock Bros v Hunt [1923] Ch. 136*; *USA v Motor Trucks Ltd [1924] A.C. 196*. cf. para.5-034.

264. *Scottish Widows Fund and Life Assurance Society v BGC International [2012] EWCA Civ 607* at [34].

265. *[2009] UKHL 38* at [48]. Lord Hoffmann's statements on rectification were obiter, as the case was decided on a question of construction (see para.3-060), but appear to have been supported by the other members of the Judicial Committee (see *[2009] UKHL 38* at [1], [71], [97] and [101]). See, however, below, para.3-081.

266. *[2002] 2 E.G.L.R. 71* at 74, para.33.

267. *Mackenzie v Coulson (1869) L.R. 8 Eq. 368, 375*.

268. *W. Higgins Ltd v Northampton Corp [1927] 1 Ch. 128*.

269. *Mackenzie v Coulson (1869) L.R. 8 Eq. 368*; *Faraday v Tamworth Union (1916) 86 L.J.Ch. 436,*

438; *W. Higgins Ltd v Northampton Corp [1927] 1 Ch. 128, 136*; *USA v Motor Trucks Ltd [1924] A.C. 196, 200*; *Lovell Christmas Ltd v Wall (1911) 104 L.T. 85*.

270. *[1936] Ch. 375*. See also *Frederick E. Rose (London) Ltd v William H. Pim Jnr. & Co Ltd [1953] 2 Q.B. 450, 461*; *Crane v Hegemann-Harris Co Inc [1939] 1 All E.R. 662, affirmed [1939] 4 All E.R. 68, [1971] 1 W.L.R. 1390n*; *Monaghan CC v Vaughan [1948] Ir.R. 306*; *Carlton Contractors v Bexley Corp (1962) 106 S.J. 391*; *Kent v Hartley (1966) 200 E.G. 1027*.

271. *[1970] 2 Q.B. 86*.

272. *[1970] 2 Q.B. 86, 98*. Use of this phrase is criticised by Bromley in (1971) 87 L.Q.R. 532; but compare Smith (2007) 123 L.Q.R. 116.

273. *(1911) 104 L.T. 85*.

274. ! *Grand Metropolitan Plc v William Hill Group Ltd [1997] 1 B.C.L.C. 390*. In *Mangistaumunaigaz Oil Production Association v United World Trading Inc [1995] 1 Lloyd's Rep. 617* no prior agreement was shown and rectification was refused. In *Mace v Rutland House Textiles Ltd (In Administrative Receivership), The Times, January 11, 2000* rectification was permitted when the text of the agreement had been prepared by a person instructed by both parties and did not represent their common intention although that had not been expressed in a settled form of words. In *Prowting 1968 Trustee One Ltd v Amos-Yeo [2015] EWHC 2480 (Ch), [2015] B.T.C. 33* rectification was ordered when an agreement did not reflect the parties' intention to transfer enough shares to entitle the claimants to tax relief, although the parties had left the number to be determined by a trustee, who had miscalculated the number (see at [37]–[38]).

275. In particular *AMP v Barker [2001] P.L.R. 77* and *Gallaher v Gallaher Pensions Ltd [2005] EWHC 42 (Ch), [2005] All E.R. (D) 177 (Jan)*.

276. *[2006] EWCA Civ 370, [2006] All E.R. (D) 29 (Apr)*, at [36].

277. Carnwath L.J. in *JIS (1974) Ltd v MCP Investment Nominees Ltd [2003] EWCA Civ 721* at [33]–[34]; see also *Cambridge Antibody Technology v Abbott Biotechnology Ltd [2004] EWHC 2974 (Pat), [2005] F.S.R. 27* at [105]–[112]. "Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained": *Co-operative Insurance Society Ltd v Centremoor Ltd [1983] 2 E.G.L.R. 52* at 54, cited in *Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560* at [34].

278. cf. Smith (2007) 123 L.Q.R. 116; *Tartsinis v Navona Management Co [2015] EWHC 57 (Comm)* at [88]–[89]. Similarly, it has been said that in establishing what the prior understanding was, "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 and did, and what that would convey to a reasonable person in their position—an objective question": *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (The Aktor) [2008] EWHC 1330 (Comm), [2008] 2 Lloyd's Rep. 246* at [38]. Christopher Clarke J. added that it was immaterial that both parties, although agreeing "X", thought that "X" meant something that, objectively, it does not mean. He added (at [41]) that "a continuing common intention is not sufficient unless it has found expression in outward agreement". See also *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 A.C. 1101* at [57]; and the lectures by Lord Justice Patten and Sir Terence Etherton, above, para.3-057 n.232. However, it is submitted that if each party understands "X" to mean "Y" and believes that the other has the same understanding, the actual agreement is on "Y" (see above, para.3-014). If this is correct, the written document can be rectified accordingly.

279. ! Cartwright 4th edn (2016), para.13-40. See also Hodge, *Rectification* (2010), paras 3-65—3-69.

280. ! *Fowler v Fowler (1859) 4 De G. & J. 250*; *Swainland Builders Ltd v Freehold Properties Ltd*

[2002] 2 E.G.L.R. 71 at 74, para.33, cited with approval in *Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38* at [48]; see above, para.3-062. It has been said that the word "continuing" in Peter Gibson L.J.'s first requirement in the *Swainland Builders* case seems to be superfluous: it is more accurate to say that there needs to be a common intention (requirement 1) which was continuing at the time that the contract was executed (requirement 3): *Milton Keynes BC v Viridor (Community Recycling MK) Ltd [2017] EWHC 239 (TCC), [2017] B.L.R. 216* at [48] (Coulson J.). If the parties have altered their agreement extensively before the document was executed, rectification will not be appropriate because their initial intention on the point at issue may well have changed also (as in *Pindos Shipping Corp v Raven ("The Mata Hari") [1983] 2 Lloyd's Rep. 449*), but the fact that there have been minor changes to other aspects of the agreement does not prevent rectification: *[2017] EWHC 239 (TCC)* at [62]–[63], citing *Dunlop Haywards Ltd v Erinaceous Insurance Services Ltd [2009] EWCA Civ 354* at [82].

281. *Daventry District Council v Daventry and District Housing Ltd [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333* at [59], per Toulson L.J., and at [211], per Lord Neuberger M.R. Compare below, para.3-094.

282. *[2011] EWCA Civ 1153, [2012] 1 W.L.R. 133*. See McLauchlan (2014) 131 L.Q.R. 83.

283. See the summary of the differences in the postscript to Etherton L.J.'s judgment at [104]–[105].

284. In other words, the case was one within the "extended" notion of common mistake: see below, para.3-077.

285. *[2011] EWCA Civ 1153* at [160].

286. *[2011] EWCA Civ 1153* at [170].

287. *[2011] EWCA Civ 1153* at [91].

288. *[2011] EWCA Civ 1153* at [207].

289. *[2011] EWCA Civ 1153* at [213].

290. *[2010] EWHC 1935 (Ch)*.

291. *[2011] EWCA Civ 1153* at [91]–[92].

292. *[2011] EWCA Civ 1153* at [106]–[115], especially at [110]–[112].

293. *Daventry District Council v Daventry and District Housing Ltd [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333*.

294. cf. above, para.3-022.

295. cf. below, para.3-071, text at n.317.

296. *Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 E.G.L.R. 71* at para.38; *Lloyds TSB Bank Ltd v Crowborough Properties Ltd [2013] EWCA Civ 107* at [57]–[70].

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 4. - Rectification of Written Agreements [232]

(c) - Unilateral Mistake [297]

Unilateral mistake

3-069

In this section we deal with cases in which one party makes a mistake over the terms of the contract and the other party does not intend to contract on the terms intended by the first party. If Lord Hoffmann's approach to rectification for common mistake in *Chartbrook Ltd v Persimmon Homes Ltd* [298] is followed, rectification for unilateral mistake will be less important than hitherto; but it will remain important in cases in which there was no agreement prior to the document being signed but the defendant knows that the document does not express the claimant's intention correctly. In this type of case rectification cannot be given on the ground of common mistake. [299] Where the mistake is unilateral, that is of one party only, it was formerly thought that rectification would not be granted unless a case of fraud or misrepresentation, [300] or unfair dealing, [301] or perhaps sharp practice, could be shown. In *Roberts & Co Ltd v Leicestershire CC* [302] it was said that the doctrine might be based on either fraud or estoppel, when:

> "… it is not an essential ingredient of the right of action to establish any particular degree of obliquity to be attributed to the defendants in such circumstances." [303]

But in *Thomas Bates Son v Wyndhams Ltd* the Court of Appeal rejected these limits on the availability of the remedy of rectification. [304] Where one party is mistaken as to the incorporation of the agreement in the document, and the other knows of the mistake, and does not draw it to the attention of the first party, it suffices that it would be inequitable to allow the second party to insist on the binding force of the document, either because this would benefit him or because it would be detrimental to the mistaken party. Buckley L.J. said:

> "For this doctrine—that's to say the doctrine of *A. Roberts & Co. Ltd. v. Leicestershire County Council*—to apply I think it must be shown: first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element [305] involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake." [306]

There are at least two issues which require discussion: the degree of knowledge required and the "fourth element", which Buckley L.J. put as whether, in addition to knowing of the mistake, the

defendant must be guilty of some inequity. [307]

Knowledge of the mistake

3-070

Even though sharp practice may not be required, unilateral mistake is not by itself a ground for rectifying a contract unless the other party knew of the mistake. [308] On current authority [309] it appears that the knowledge must be actual knowledge. [310] It is not enough that the party against whom rectification is sought may have suspected that a mistake had been made [311]; but if a party wilfully shuts its eyes to the obvious, or wilfully and recklessly fails to make such inquiries as an honest and reasonable man would make, that will count as actual knowledge. [312] The nature of the knowledge that A must be shown to have of B's mistake if rectification is to be granted was discussed in detail by the Court of Appeal in *George Wimpey UK Ltd v VI Construction Ltd*. [313] Using the analysis of the various forms of knowledge made by Peter Gibson J. in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA*, [314] it must be: (i) actual knowledge; (ii) wilfully shutting one's eyes to the obvious; or (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make. In *Agip (Africa) Ltd v Jackson* [315] Millett J. said that the true distinction is between honesty and dishonesty. In cases within (i)–(iii) A would not be acting honestly. The implication is that the same would not be true if A merely had (again using the categories of Peter Gibson J.); (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man, or (v) knowledge of circumstances which would put an honest and reasonable man on inquiry:

> "The remedy of rectification for unilateral mistake is a drastic remedy, for it has the result of imposing on the defendant to the claim a contract which he did not, and did not intend to, make. Accordingly the conditions for the grant of such relief must be strictly satisfied." [316]

Conduct contributing to the mistake

3-071

It seems that rectification will be granted even if the defendant did not have positive knowledge of the claimant's mistake if the defendant deliberately sought to prevent the claimant from discovering that what was written in the document did not accord with his intentions. Although it has been suggested that it is not sufficient that the defendant contributed to the mistake unless he did so knowingly, [317] if a party puts forward a draft document in such a way that he makes a presentation that it is in accordance with an earlier accord of the parties, and the other party foreseeably relies on this, an estoppel may arise. [318] Further, in *Commission for New Towns v Cooper* Stuart Smith L.J. said:

> "… 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. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient …" [319]

This type of conduct would clearly not be honest. In the Australian case of *Taylor v Johnson* [320] the High Court had held that this sort of unconscionable conduct on A's part would suffice for the contract to be rescinded on the ground of mistake. [321] The same principle does not necessarily apply to cases

of rectification, since the court is not simply undoing the bargain but also imposing a different bargain on A. However, it is not unjust to insist that the contract be performed according to B's understanding where that was the very meaning that A intended B to put on it, even if it is not shown that A had actual knowledge of B's mistake, and rectification may be granted. [322] If on the other hand it is reasonable to expect the other party to check the draft, and A does not know that B mistakenly thinks that it reflects what B hoped would be agreed, there will be no relief. [323] In cases of pure unilateral mistake that the other party did not know or have any reason to know of, [324] the remedy (if any, and there will often be none), is refusal of an order of specific performance [325] but not, it appears, rescission. [326]

Inequity

3-072

In *Riverlate Properties Ltd v Paul* [327] it was suggested that in a case of unilateral mistake the defendant must not only have known of the mistake but be guilty of sharp practice. In *Thomas Bates Son v Wyndhams Ltd* Buckley L.J. rejected this, [328] saying:

> "Undoubtedly I think in any such case 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. If this necessarily implies some measure of "sharp practice", so be it; but for my part I think that the doctrine is one which depends more upon the equity of the position. The graver the character of the conduct involved, no doubt the heavier the burden of proof may be; but, in my view, the conduct must be such as to affect the conscience of the party who has suppressed the fact that he has recognised the presence of a mistake."

He went on to say that for this requirement [329] to be satisfied, the mistake must be one "calculated to benefit B". In contrast, Eveleigh L.J. said that this was not necessary: it was enough that there would be a detriment to the claimant. [330] It is submitted that either should suffice. In practice, if the claimant's mistake was known to the defendant, or the defendant deliberately induced the mistake in the way described earlier, [331] and the terms of the written document are less favourable to the claimant than those the defendant knew that the claimant actually intended, it will be inequitable for the defendant to insist on the terms stated in the document and the grounds for rectification will be satisfied. [332] Even though it is still sometimes said that sharp practice is required, what amounts to sharp practice may depend on the comparative competence and resources of the parties. [333] A party with little experience or few bargaining resources who has noticed a possible mistake made by a much stronger party may be entitled to assume that the stronger party "knew what it was doing". [334] This may be explained in terms of whether the weaker party was acting unconscionably [335]; but it can equally be seen as a question of whether the weaker party had the requisite degree of knowledge—a party who did not actually know a mistake had been made but who shut his eyes to the obvious or failed to make enquiries is treated as "knowing of it" only if he acted dishonestly. [336]

Cancellation with option of rectification

3-073

In a small group of cases a middle course between refusing and granting rectification was adopted. These cases are *Garrard v Frankel*, [337] *Harris v Pepperell*, [338] *Bloomer v Spittle* [339] and *Paget v Marshall*. [340] The course adopted was to order cancellation with an option to the defendant to accept rectification instead. They are all cases of unilateral mistake. In *Garrard v Frankel* [341] the defendant agreed to take from the plaintiff a lease of a house at the rent of £230, and in the lease drawn up in pursuance of the agreement the rent was stated to be £130. Lord Romilly M.R. considered that the error was the plaintiff's but that the defendant must have perceived it, and held that though the

plaintiff was not entitled to have the lease rectified, the lessee ought to be put to his election whether to have the lease rectified or to reject it. In *Harris v Pepperell* [342] the vendor had executed a conveyance including a piece of land he had not intended to sell but which the defendant alleged he had intended to buy. Lord Romilly, following his previous decision in *Garrard v Frankel*, gave the defendant the option "of having the whole contract annulled or else of taking it in the form which the plaintiff intended". In *Bloomer v Spittle* [343] a conveyance of land reserved to the vendor the right to minerals. The purchaser alleged that the reservation had been inserted by mistake, but the vendor denied that this was so. The vendor died before he could be cross-examined on this point. In an action by the purchaser for rectification of the conveyance, it was held that this relief could not be granted after a long lapse of time and in the face of the vendor's denial. Nevertheless the personal representatives of the vendor were to choose whether to have the conveyance set aside or rectified. In *Paget v Marshall* [344] the plaintiff by mistake had offered and demised to the defendant four floors of three houses, whereas he had intended to reserve for his own use the first floor of one of the houses. Again the defendant had to elect whether to submit to rectification or have the lease cancelled.

3-074

This group of cases was critically re-examined by the Court of Appeal in *Riverlate Properties Ltd v Paul*. [345] The court expressed serious doubts about the authority of these cases and was especially critical of *Garrard v Frankel*. [346] Although they did not expressly overrule this case they left little doubt that in their view it was wrongly decided. They emphasised that if the defendant neither knows of, nor contributes to nor shares the mistake, but bona fide assumes that the written document correctly represents the common intention, there is no ground for rescission or rectification. If, on the other hand, the defendant does know of the claimant's mistake, and what his intention was, the claimant is today entitled to rectification, and there is no reason why the defendant should be offered the option of rescission. It seems that the cases referred to in para.3-073 must be explained on the ground that they were decided before it became clear that rectification could be ordered even for a unilateral mistake if known to (or, perhaps, if contributed to) by the defendant.

Rescission when known that claimant had made some mistake

3-075

There may be cases in which the claimant has made a mistake, and the defendant is aware of that but does not know what the claimant intended. It is submitted that in such a case the contract should not be rectified to accord with what the claimant shows his true intention to have been; that might force the defendant into a contract to which he had never agreed. [347] However, in such a case it seems appropriate to allow rescission. [348] This seems to have been recognised by Stuart Smith L.J. in *Commission for New Towns v Cooper*. [349] The passage quoted in para.3-071, above in fact ends: " … that is sufficient *for rescission*" (emphasis supplied). If necessary the document should be cancelled. [350]

Mistake that ought to have been known to the defendant

3-076

The requirement that the claimant's mistake must have been known to the defendant and that the defendant must have been guilty of sharp practice or that there would be inequity were rectification not to be granted, have been justified on the grounds that rectification for unilateral mistake is a drastic remedy because it results of imposing on the defendant to the claim a contract which he did not, and did not intend to, make. [351] It has been argued, [352] however, that rectification is not drastic: its purpose is simply to bring the written agreement into line with the agreement between the parties as determined by the ordinary principles of contract formation. Therefore rectification on the ground of a unilateral mistake should not be confined to the case in which the claimant's intention was known to the defendant, but should be extended to cases in which the defendant should have been aware of the claimant's intention and led the claimant reasonably to believe that the terms it intended were accepted. This would be consistent with the principle laid down by Blackburn J. in *Smith v Hughes* [353].

> "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."

Blackburn J.'s dictum is normally used to justify holding a party (A) to what he appeared to say, unless the other party (B) does not believe that this is what in fact A intended. However, the implication is that if in the circumstances it was not reasonable for B to believe that A intended what he said—in other words, if B should have realised that A had made a mistake—then B cannot rely on the apparent meaning of what A said. The argument is then made that if B, by his actions, appears to accept A's meaning, A is entitled to rely on this, provided his reliance is reasonable, with the result that the contract at common law will be in the terms in fact intended by A; and if the written agreement does not reflect what B should reasonably have understood to be A's intention, it should be rectified. In *Daventry District Council v Daventry and District Housing Ltd*, [354] Toulson L.J. expressed sympathy for this view. [355] It would seem odd not to grant rectification if the contract would be on the terms intended by A were the contract an oral one. However, the effect on an oral contract of a mistake by A which of which B did not know but should have known is not clearly established. It may be of no effect at all; or it may prevent an oral contract being formed; or it may result in the contract being on A's intended terms. [356] Earlier it was submitted that it should be treated as not giving rise to a contract. That would suggest that in case of the kind under discussion, the document should be treated as void. [357] But the rule stated in the current case law, that actual knowledge is required before a contract document can be rectified on the ground of a unilateral mistake and that anything less than actual knowledge is irrelevant, can be justified on the grounds of convenience and certainty; it is undesirable to allow A to go behind a document it has signed save in exceptional circumstances amounting to dishonesty, or something close to it, on B's part. The rule certainly seems to represent the authorities as they stand currently.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

232. Hodge, *Rectification* (2010); A Burrows, *Contract Terms* (2007), 77; Cartwrigh, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13-38—13-54; McLauchlan (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, *Chancery Bar Association Annual Lecture* 2013, available at http://www.chba.org.uk/formembers/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisite ; R. Toulson, *TECBar Lecture* 2013, available at https://www.supremecourt.uk/docs/speech-131031.pdf; T. Etherton, *Current Legal Problems Lecture* 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delive

297. Burrows in Burrows and Peel, *Contract Terms* (2010), p.77; McLauchlan (2008) 124 L.Q.R. 608.

298. *[2009] UKHL 38, [2009] 1 A.C. 1101*; see below, para.3-077.

299. cf. paras 3-058et seq.; but compare *Ulster Bank Ltd v Lambe [2012] NIQB 31*, cited in para.3-060, where it was held that D must have know of the mistake of euros for pounds in P's offer when accepting it and that the contract meant what P intended.

300. *Wood v Scarth (1855) 2 K. & J. 33, 41*; *May v Platt [1900] 1 Ch. 616*.

301. *McCausland v Young [1949] N.I. 49*.

302. *Roberts & Co Ltd v Leicestershire CC [1961] Ch. 555*.

303. Pennycuick J. at 570.

304. *Thomas Bates & Son v Wyndhams Ltd [1981] 1 W.L.R. 505*.

305. Differing views were expressed by the members of the Court of Appeal in *Thomas Bates & Son v Wyndhams Ltd [1981] 1 W.L.R. 505* on this fourth element. See below, para.3-072.

306. *[1981] 1 W.L.R. 505, 516*. In unilateral mistake cases, it may be said that rectification can be granted without there having been an antecedent agreement between the parties: *Littman v Aspen Oil (Broking) Ltd [2005] EWCA Civ 1579, [2006] 2 P. & C.R. 2*; but as Jacobs L.J. noted at [24], a party who accepts a clause knowing full well what the other party (mistakenly) thinks it means or says is in effect agreeing to the other party's version.

307. See below, para.3-072.

308. *Riverlate Properties Ltd v Paul [1975] Ch. 133*, below, para.3-074; *Kemp v Neptune Concrete (1989) 57 P. & C.R. 369*. In the latter case Purchas L.J. (at 377) said that it must have been unconscionable for the non-mistaken party to execute the deed or to stand by while the other does so; but it seems that the requirement of unconscionability will be satisfied if the non-mistaken party seeks to take advantage of the other's mistake: *Templiss Properties Ltd v Hyams [1999] E.G.C.S. 60*.

309. But see para.3-076, below.

310. *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba) [1984] 1 Lloyd's Rep. 353*; *Commission for New Towns v Cooper (Great Britain) [1995] Ch. 259*. cf. above, paras 3-022—3-023.

311. *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd (The Ypatia Halcoussi) [1985] 2 Lloyd's Rep. 364, 371*.

312. cf. *Commission for New Towns v Cooper (Great Britain) Ltd [1995] Ch. 259*, applying the analysis of various forms of knowledge made by Peter Gibson J. in *Baden v Société Générale pour Favouriser le Développement du Commerce et de l'Industrie en France SA [1993] 1 W.L.R. 509* and adopted by Millett J. in *Agip (Africa) Ltd v Jackson [1990] Ch. 265*, see further, Vol.II, paras 34-299 et seq.

313. *[2005] EWCA Civ 7, [2005] B.L.R. 135*.

314. *[1993] 1 W.L.R. 509*.

315. *[1990] Ch. 265* at 293.

316. See the judgment of Sedley L.J. in the *George Wimpey case[2005] EWCA Civ 77* at [65]. But see also below, para.3-076.

317. *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and the Nai Superba) [1983] 2 Lloyd's Rep. 333, 344*. The point was not discussed directly on appeal but appears to be consistent with the Court of Appeal's insistence on actual knowledge: *[1984] 1 Lloyd's Rep. 353*.

318. *[1984] 1 Lloyd's Rep. 353, 365*.

319. *[1995] Ch. 259* at 280.

320. *(1983) 151 C.L.R. 422, 45 A.L.R. 265*; see above, para.3-027 n.120.

321. See above, para.3-027.

322. *Commission for New Towns v Cooper (Great Britain) Ltd [1995] 2 Ch. 259*.

323. *Taylor Barnard v Tozer (1984) 269 E.G. 225*.

324. cf. below, paras 3-075—3-076.

325. See above, para.3-026.

326. See above, para.3-027. Nor will a document be interpreted in a way one party contends merely because the other party knew or suspected, at the time, that that was what the first party was hoping to achieve: *Zoan v Rouamba [2000] 2 All E.R. 620, 633*.

327. *[1955] Ch. 133, 140*.

328. *[1981] 1 W.L.R. 505* at 515; see similarly Brightman L.J. at 522.

329. The "fourth element": see para.3-069, above.

330. *[1981] 1 W.L.R. 505* at 521.

331. Above, para.3-071.

332. In *Littman v Aspen Oil (Broking) Ltd [2005] EWCA Civ 1579* at [23]–[24] Jacobs L.J. said that it would be sufficiently inequitable for one party to take deliberate advantage of a drafting error by the other.

333. *Rowallan Group Ltd v Edgehill Portfolio No.1 Ltd [2007] EWHC 32 (Ch), [2007] All E.R. (D) 106 (Jan)*, at [14].

334. See *George Wimpey UK Ltd v VI Construction Ltd [2005] EWCA Civ 77, [2005] B.L.R. 135* at [65]–[67] (Sedley L.J.).

335. *NHS Commissioning Board v Silovsky [2015] EWHC 3141 (Comm)* at [42]–[43].

336. As by the majority in *George Wimpey UK Ltd v VI Construction Ltd [2005] EWCA Civ 77, [2005] B.L.R. 135*, see at [47] and [79]; see Vol.I, para.3-070.

337. *(1862) 30 Beav. 445*.

338. *(1867) L.R. 5 Eq. 1*.

339. *(1872) L.R. 13 Eq. 427*.

340. *(1884) 28 Ch. D. 255*.

341. Above, n.333.

342. Above, n.334.

343. Above, n.335. This decision was said by Neville J. in *Beale v Kyte [1907] 1 Ch. 564, 565* to be "unintelligible as reported".

344. *(1884) 28 Ch. D. 255*.

345. *[1975] Ch. 133*.

346. *(1862) 30 Beav. 445*.

347. This passage in the 30th edition was referred to with apparent approval by Andrew Smith J. in *BP Oil International Ltd v Target Shipping Ltd [2012] EWHC 1590 (Comm)* at [199] ("I know of no precedent for rectifying a contract on the grounds of unilateral mistake so as to make for more favourable provision for the mistaken party than the other party realised he had in mind, and I should be reluctant so to expand the remedy"). The decision was reversed in part, *[2013] EWCA Civ 196, [2013] 1 Lloyd's Rep. 561*, without reference to this point.

348. In *Stepps Investments Ltd v Security Capital Corp Ltd (1976) 73 D.L.R. (3d) 351* the Ontario High Court held that an order for rectification or rescission at the defendant's option could be granted where the defendant did not actually know of the mistake but should have known of it. See also *Murphy's Ltd v Fabricville Co Inc (1980) 117 D.L.R. (3d) 668 (Supreme Ct of Nova Scotia)*; Waddams, *The Law of Contracts*, 6th edn (2010), §344; Hodge, *Rectification* (2010), paras 1-38—1-39.

349. *[1995] Ch. 259, 280*.

350. On cancellation of documents see Halsbury's Laws of England, Vol.47 (2014) Equitable Jurisdiction, para.84.

351. See above, para.3-070.

352. McLauchlan (2008) 124 L.Q.R. 608. McLauchlan argues (at 619) that the defendant should have led the claimant reasonably to believe that the terms it intended were accepted. He seems to envisage that B does more than merely agree to A's proposal, but what that should be is not wholly clear. cf. above, para.3-029 n.125.

353. *(1871) L.R. 6 Q.B. 597, 607*. See above, para.3-018.

354. *[2011] WCA Civ 1153, [2012] 1 W.L.R. 1333*. In contrast Davies (2012) 75 M.L.R. 412 argues that rectification should be confined to cases in which B had actual knowledge of A's mistake.

355. *[2011] EWCA Civ 1153* at [174].

356. See above, paras 3-029 et seq.

357. Compare above, para.3-033.

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Section 4. - Rectification of Written Agreements [232]

(d) - The Extended Notion of Common Mistake

Subjective agreement not required

3-077

It has been said in the House of Lords that it is not necessary for rectification on the basis of common mistake that the parties were subjectively agreed on the same terms; it suffices for there to be an outward expression of common intention that on an objective view the parties appeared to be in agreement. In *Chartbrook Ltd v Persimmon Homes Ltd* [358] Lord Hoffmann said that for rectification for common mistake, the document must differ from what the parties had agreed, objectively determined. He said: [359]

> "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 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. Perhaps the clearest statement is by Denning L.J. in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*: [360]
>
> > 'Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice."'

What one or other party believed they had agreed was not the issue. [361] Lord Hoffmann said that evidence of what a party believed should not be excluded, "but that is not inconsistent with an objective approach to what the terms of the prior consensus were". [362]

3-078

In the *Chartbrook* case, Chartbrook had always intended that Persimmon should pay "super overage",

[363] and thought that this was the prior agreement, but the reasonable person reading the prior documents would conclude that it was not to be payable. The final document might be understood to provide that it should be payable. The House of Lords held that as a matter of interpretation of the final document, super-overage was not payable [364]; but they also considered Persimmon's alternative claim for rectification, on the assumption that while according to the prior agreement, super overage was not payable, the final document did require it to be paid. Both parties thought that the final written agreement reflected their previous agreement; and as on this assumption it did not reflect the prior agreement, Lord Hoffmann reasoned, Persimmon would be entitled to rectification. [365]

The Daventry case

3-079

Similarly, in *Daventry District Council v Daventry and District Housing Ltd* [366] the objective meaning of the prior agreement was that the burden of paying a pension fund deficit was to be borne by the defendants, but the defendants were misled by one of their employees into thinking it was to be borne by the Council. The written contract, as the result of an insertion made at a late stage, placed the burden on the Council but the Council misunderstood the relevant clause and so were unaware of the change. It was held that on the *Chartbrook* principle, as both parties (though for different reasons) were mistaken in thinking that the final written agreement effected the prior agreement, rectification should be granted.

An extended notion of "common mistake"

3-080

Lord Hoffmann's reasoning in the *Chartbrook* case seems to stretch the notion of "common mistake", as though each party had made a mistake, it was not the same mistake: Chartbrook's mistake was as to the meaning of the prior agreement, Persimmons' as to whether the written document reflected the prior agreement. It may be more accurate to say that what is being done in both traditional cases of common mistake rectification and in cases like *Chartbrook* is that the written document is being brought into line with the prior agreement as properly interpreted.

Criticism of the Chartbrook decision

3-081

This extended notion of rectification for common mistake adopted by the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd* [367] has been criticised by both academic commentators and judges. Thus it has been said:

> "It is difficult to accept that Chartbrook was mistaken, at least in any usual sense of the word. The company intended the contract to provide the benefits that [on the assumption that the written agreement did provide for super overage] it did provide for." [368]

In the *Daventry* [369] case Toulson L.J. doubted the correctness of the *Chartbrook* principle but was prepared to apply it since its correctness had not been argued before the court and because it would cause no injustice, as it was arguable that because the defendant's employee knew of the Council's intention, the Council would be entitled to rectification on the basis of a unilateral mistake. [370] The Master of the Rolls also considered that the *Chartbrook* principle "may have to be reconsidered or at least refined" [371] but agreed with Toulson's L.J's approach. [372] Etherton L.J. did not share the doubt about the *Chartbrook* principle [373] but dissented for other reasons, discussed above. [374] In *Tartsinis v Navona Management Co* [375] Leggatt J. said that in *Britoil Plc v Hunt Overseas Oil Inc* [376] the Court of Appeal had held that rectification for common mistake is available only where it is proved

that both parties were in fact mistaken about the effect of the final document, and that was not the case in *Chartbrook*. [377] He also said that he found it

> "difficult to see the equity of imposing the view that a hypothetical reasonable observer would have formed of what had been agreed on a party who did not have that understanding of what had been agreed and whose understanding is reflected in the proper interpretation of the final document", [378]

unless the party against whom rectification is sought knew that the party seeking it was mistaken, so that the requirements of rectification for unilateral mistake were satisfied. [379]

Evaluation of the "extended approach"

3-082

It is submitted that Lord Hoffmann's approach is justified, but that much depends on the circumstances, in particular the degree of agreement at the "prior accord" stage and the purpose of the parties in drawing up a final document. Further, the "objective approach to what the terms of the prior consensus were" must be treated with care. Determining the agreement between the parties is more complex than applying a simple objective test, as will be explained in the paragraphs that follow.

Subjective accord not necessary

3-083

The first point is that to confine rectification to cases where either there was a genuine subjective agreement or a unilateral mistake known to the other party would in fact narrow the scope of the law very considerably. When in "common mistake" cases in the past the courts have determined the terms of the prior agreement, they have not always looked for actual subjective agreement. Typically in rectification cases the court looks at the outward expression to determine what the agreement was. Though evidence of what a party intended or thought the words meant is admissible and may be relevant, at least when the prior agreement is in writing the court determines its meaning in the usual way. Thus in *Britoil Plc v Hunt Overseas Oil Inc* [380] the court considered the meaning of the prior "heads of agreement" document without asking what each party actually meant. [381] Hobhouse L.J. referred [382] to an earlier summary of the law by Mustill J., where the latter said:

> "… 3. The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must be objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter." [383]

The reason that the Court of Appeal refused rectification in the *Britoil* case was that the "heads of agreement" did not constitute the final version: it was in some respects unclear and a witness conceded that part of the point of drawing up a final version was to eliminate any ambiguities. It is not surprising therefore that Hobhouse L.J said that to base rectification on going "back to successively less formal, less considered and less carefully drafted earlier documents …cannot be right". [384] But if the parties had thought that their prior agreement was complete, even if not binding on them, and had merely instructed lawyers to incorporate it into a final document that they both signed without careful study, it seems the court would have rectified any discrepancy between the prior agreement and the final document. Hoffmann L.J. dissented precisely because ""there was no further negotiation or discussion between the parties and that the common intention was that the definitive agreement should reflect the meaning of the heads of agreement, whatever that might be". [385]

3-084

This suggests that, at least where there is a concluded prior agreement, rectification should be given on the basis of a discrepancy between the "prior accord", objectively determined, [386] and the final document, unless there is evidence either that the parties intended to negotiate further or that one has given a reasonable indication that it has put something different into the draft—which raises the question of whether there was a continuing common intention, discussed earlier. It was there suggested that the question is whether the party claiming rectification to bring the terms into line with the previous agreement knew or should have known that the other party was seeking to renegotiate, or at least to assert that its own view as to their prior agreement differed from its objective meaning. [387]

Prior agreement incomplete

3-085

Some commentators accept that where the prior agreement was complete, even if not legally binding, and the final document does not match the objective meaning of the prior agreement, then rectification on the basis of a common mistake should be possible, but argue that this should not be possible where there was no concluded agreement. [388] In the latter case it should be available only on the basis of either a subjective common intention or unilateral mistake. It is argued that to allow it on the basis of the objective meaning of incomplete negotiations would favour, in the words of Hobhouse L.J. in *Britoil Plc v Hunt Overseas Oil Inc*, [389] "less formal, less considered and less carefully drafted earlier documents" over the carefully considered final version. It is submitted, however, that for this purpose no clear distinction can be drawn between concluded and partially negotiated agreements. While it may be the case that while negotiations on any aspect continue, the parties will regard the whole transaction as still open, this will not always be so. The parties may regard some issues as completely settled (not realising that their intentions on the point differ) and therefore not examine the relevant parts of the final document with care, so that they fail spot the difference between it and the final document. There seems no reason why this situation must necessarily be treated differently from that of the concluded prior agreement. It is a matter of degree, of the extent to which the parties regarded the matter as "settled" and of whether the party against who rectification is claimed had indicated that it was proposing a change or at least a clarification. [390]

"Objective" meaning known not to be party's intention

3-086

Lord Hoffmann's dictum in *Chartbrook Ltd v Persimmon Homes Ltd* [391] quoted earlier, [392] like the statement he quotes from Denning L.J., appears to look only at the evidence of prior agreement in a purely objective way, [393] from the view point of "the reasonable fly on the wall". [394] The test normally used in English contract law to determine the content or meaning of a contract is not wholly objective in this sense. [395] First, as submitted earlier, if the parties were in fact in subjective agreement as the meaning of their words, it is at least arguable that their subjective intentions should govern. [396] Secondly, if there is no subjective agreement, the question is how A understood B's words and whether A's interpretation was reasonable, and vice versa. [397] Normally it will be reasonable to understand the words of the prior agreement on their "purely objective" sense. However, if A knew B's intention to be different from the "purely objective" meaning of the words of the prior agreement, A cannot hold B to that meaning. [398] If the subsequent written agreement provides what B had intended, A should not be entitled to rectification, even if the result is that A is bound by a contract that he did not intend to make. If the written agreement were in the same terms as the prior agreement, but to A's knowledge B still intended it mean something different, B would be entitled to have it rectified on the basis of a unilateral mistake. [399] It is submitted that if it cannot be shown that A had actual knowledge that B was still mistaken at the stage of the final draft, B should still be entitled to have the final draft rectified to match the intention that A knew that B had at the earlier stage, unless again B should reasonably have understood the draft as not merely setting down what was previously agreed, but as a new proposal (or perhaps a deliberate assertion that A did not accept the objective" meaning of the prior agreement). [400] The aim of rectification should be "to ensure the written agreement reflects the true bargain between the parties as determined by ordinary principles of contract formation". [401]

A ought to have known of B's intention

3-087

It is arguable that in cases in which B's intention differed from the "purely objective", relief should be given even if A did not have actual knowledge of B's intention but A should have known that it was different to the objective meaning of the words used in the prior agreement. A's belief that B intended what he appeared to say is not a reasonable belief. In the case of an oral contract, although the authorities are not conclusive, the result at common law may be either that there is one on the terms which B intended and A should reasonably have understood to be intended, or that there is no contract. [402] It was submitted that the latter is the better solution, as to treat the contract as being on the terms that B intended would be to impose on A terms to which A never intended to agree. [403] If that is correct, it would be wrong to rectify the written agreement to bring it into line with the "purely objective" meaning of the prior agreement. Rather, the prior agreement should be treated as void and the final document cancelled. [404]

A "unilateral mistake" approach

3-088

The examples discussed in the two previous paragraphs raise the issue of whether in cases in which the parties were not in subjective agreement over the "prior accord", it is more appropriate to consider rectification for unilateral mistake than to use rectification for common mistake. [405] Unilateral mistake focuses on the intentions and understandings of the parties at the stage of signature of the document, rather than on the meaning of the prior agreement and whether there was a continuing common intention. On the authorities as they stand at present, rectification can be given on the ground of unilateral mistake only if the defendant knew that the document signed did not represent the claimant's intention, or deliberately caused the mistake. [406] It is submitted that this might leave some deserving claimants without a remedy. Suppose in the prior negotiations, A intends *x* and B intends *y*. The "objective meaning" of the agreement is *x*. That must be because this is what the words used would mean to the reasonable person in the circumstances (and that A did not know of B's actual intention). The parties then draft a document into which B, without any intent to deceive, has inserted a clause providing for *y*. A may reasonably assume that the document merely represents what was previously agreed and sign without noticing the slip. [407] It is submitted that A should be able to obtain rectification, provided that A reasonably understood the draft as merely setting down what was previously agreed, rather than as a new proposal (or perhaps a deliberate assertion that B did not accept the "objective" meaning of the prior agreement). But in this case rectification could not be given either on the basis of a subjective common intention or of unilateral mistake, as the law is currently understood, [408] as B did not know of A's mistake. If the doctrine of relief for unilateral mistake were to be extended in the fashion suggested in the preceding paragraph, it might deal adequately with cases like the one envisaged in this paragraph. It could be argued that B should have known, from the "purely objective" meaning of the final agreement and the fact that he has not flagged up a change, that the final document did not represent A's intentions. A could then at least seek to have the document cancelled. However, such an extension of relief has yet to be made and is likely to be controversial. Unless and until it is made, it is submitted that rectification to bring the agreement into line with the objective meaning of the prior agreement is a useful supplement to rectification when the final document is different to the subjective agreement of the parties and rectification for unilateral mistake is not available.

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

232. Hodge, *Rectification* (2010); A Burrows, *Contract Terms* (2007), 77; Cartwrigh,

Misrepresentation, Mistake and Non-disclosure, 4th edn (2016), paras 13-38—13-54; McLauchlan (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, *Chancery Bar Association Annual Lecture* 2013, available at http://www.chba.org.uk/formembers/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisite ; R. Toulson, *TECBar Lecture* 2013, available at https://www.supremecourt.uk/docs/speech-131031.pdf; T. Etherton, *Current Legal Problems Lecture* 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delive

358. *[2009] UKHL 38, [2009] 1 A.C. 1101*. The point on rectification did not have to be decided but it had been fully argued. The other members of the Judicial Committee agreed with Lord Hoffmann see above, para.3-062 n.265.

359. *[2009] UKHL 38* at [60].

360. *[1953] 2 Q.B. 450, 461*.

361. *[2009] UKHL 38* at [59].

362. *[2009] UKHL 38* at [64]–[65].

363. As the amount was called in the Court of Appeal: *[2008] EWCA Civ 183* at [13].

364. See above, para.3-060.

365. *[2009] UKHL 38* at [66].

366. *[2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333*.

367. *[2009] UKHL 38, [2009] 1 A.C. 1101*. The point on rectification did not have to be decided but it had been fully argued. The other members of the Judicial Committee agreed with Lord Hoffmann see above, para.3-062 n.265.

368. McLauchlan (2010) 126 L.Q.R. 8, 13.

369. *Daventry District Council v Daventry and District Housing Ltd [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333*. See McLauchlan (2014) 131 L.Q.R. 83. See also Lord Toulson's lecture, above, para.3-057 n.232.

370. *[2011] EWCA Civ 1153* at [178]–[185]. Etherton L.J (at [97]–[98]) held that rectification could not be granted on the basis of unilateral mistake as the trial judge held the Council had not proved that the Housing Association knew of the Council's mistake, and had found that the Housing Association's representative was not guilty of dishonesty. The Master of the Rolls found it unnecessary to decide whether rectification should be granted on the ground of unilateral mistake (at [226]).

371. *[2011] EWCA Civ 1153* at [19]. In *NHS Commissioning Board v Silovsky [2015] EWHC 3141 (Comm)*, Leggatt J. respectfully agreed with Lord Neuberger MR but held that he was bound to apply Lord Hoffmann's "strong" objective approach: at [31]. See also *Magellan Spirit ApS v Vitol SA (The Magellan Spirit) [2016] EWHC 454 (Comm), [2016] 2 Lloyd's Rep. 1* at [42].

372. *[2011] EWCA Civ 1153* at [196]–[202].

373. *[2011] EWCA Civ 1153* at [104].

374. See below, para.3-066.

375. *[2015] EWHC 57 (Comm)*.

376. *[1994] C.L.C. 561*.

377. *[2015] EWHC 57 (Comm)* at [91].

378. *[2015] EWHC 57 (Comm)* at [92].

379. *[2015] EWHC 57 (Comm)* at [93].

380. *[1994] C.L.C. 561*.

381. See also Ruddell [2014] L.M.C.L.Q. 48, 58.

382. *[1994] C.L.C. 561, 569*.

383. *Etablissements Levy v Adderley Navigation Co Panama SA (The Olympic Pride) [1980] 2 Lloyd's Rep 67, 72–73*.

384. *[1994] C.L.C. 561, 573*

385. *[1994] C.L.C. 561, 577*.

386. In the passage from the judgment of Mustill J. quoted earlier in the paragraph, the judge does not say how the meaning of a "concluded" prior agreement is to be judged, but it would certainly be in the objective manner by which contracts are normally interpreted.

387. See above, para.3-067.

388. Ruddell [2014] L.M.C.L.Q. 48; and see the lecture by Lord Justice Patten, above, para.3-057 n.232.

389. *[1994] C.L.C. 561*.

390. See above, para.3-067.

391. *[2009] UKHL 38, [2009] 1 A.C. 1101* at [60].

392. Above, para.3-077.

393. Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), para.13–40.

394. Spencer [1973] C.L.J. 104, 108.

395. See above, para.2-004.

396. See above, paras 3-014 n.55 and 3-065.

397. See above, para.3-014. In *Scottish Widows Fund and Life Assurance Society v BGC International [2012] EWCA Civ 607* Arden L.J. pointed out that Lord Hoffmann's test is not fully objective as the meaning of any words is taken to be that which the meaning would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which the parties were at the time of their agreement (at [46]).

398. No more than A can accept an apparent offer from B which A knows does not represent B's true intention: see *Hartog v Colin and Shields [1939] 3 All E.R. 566*, above, para.3-022.

399. *Daventry District Council v Daventry and District Housing Ltd [2011] EWCA Civ 1153* at [177], per Toulson L.J. at [178]. For rectification on the basis of unilateral mistake see above, paras 3-069 et seq.

400. See above, para.3-067.

401. McLauchlan (2008) 124 L.Q.R. 608, 640.

402. See above, paras 3-032—3-033.

403. Above, para.3-033.

404. cf. above, para.3-035.

405. McLauchlan (2010) 126 L.Q.R. 8, 13 argues that if Chartbrook knew of Persimmon's mistake, there would be a claim based on unilateral mistake, on which see above, para.3-069. As they did not know, the writer concludes that the only proper basis for rectification would be if Chartbrook ought to have known that Persimmon did not intend super overage to be payable, when there might also be a claim based on unilateral mistake or the contract might be void, see below, para.3-076.

406. See above, paras 3-070—3-071.

407. See above, para.3-066.

408. See above, para.3-076.

Chitty on Contracts 32nd Ed.

Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 2 - Formation of Contract

Chapter 3 - Mistakes as to the Terms or as to Identity [1]

Section 4. - Rectification of Written Agreements [232]

(e) - General Principles

Proof of mistake

3-089

The burden of proof is on the party seeking rectification. [409] He must produce "convincing proof" [410] not only that the document to be rectified was not in accordance with the parties' [411] true intentions at the time of its execution, but also that the document in its proposed form does accord with their intentions. [412] It is essential that the extent of the rectification should be clearly ascertained and defined by evidence contemporaneous with or anterior to the contract. [413] Although it has sometimes been suggested that the standard of proof is that required in criminal proceedings, [414] that was rejected by the Court of Appeal in *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova and The Nai Superba)*. [415] It is also now established that there is only one standard of proof in civil cases, namely the balance of probabilities. [416]

> "The explanation for the statements that 'convincing proof' is needed where rectification is claimed lies in the very nature of the allegation that the written instrument does not record the parties' common intention … The fact that the parties to a contract have approved particular language as the appropriate expression of their bargain is thus often itself cogent evidence that the document correctly records their common intention, so that convincing proof will be needed to displace that inference." [417]

The denial of one of the parties that the deed as it stands is contrary to his intention ought to have considerable weight. [418] Indeed, it has been said that it is not sufficient that the written contract does not represent the true intention of the parties; it must be shown that the written contract was actually contrary to the intention of the parties. [419] Where it is sought to rectify a document in accordance with a prior agreement between the parties, it must be shown that the intention of the parties continued unaltered up to the time of the execution of the document. [420]

Mistake as to terms

3-090

There must be a disparity between the terms of the prior agreement and those of the document which it is sought to rectify. In *Frederick E. Rose (London) Ltd v William H. Pim Junior & Co Ltd*, [421] Denning L.J. said:

> "Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly …"

In this case, the parties entered into an oral agreement for the purchase of horsebeans, in the belief that they were “feveroles”, and a subsequent written agreement embodied the same terms. The Court of Appeal refused rectification as both the oral and written contracts were for horse-beans; there was no disparity between them. In contrast, in *London Weekend Television v Paris and Griffith* [422] Megaw J. held that, where two persons expressly agree with one another what is the meaning of a particular phrase used in a written contract, the contract can be rectified to make it clear that the phrase bears the meaning agreed.

Live issue required

3-091

Rectification will only be ordered so long as there is an issue between the parties as to their legal rights inter se. If there is no such issue or if no substantive relief is sought and no practical purpose will be achieved rectification may be refused. [423]

Specific performance

3-092

Before the Judicature Act 1873, it was generally held that the court would not grant rectification of the contract to comply with its proper terms and then grant specific performance of the contract so rectified, at least in the same action. [424] But the Judicature Act 1925 s.43, requires the court to grant to the parties in one action all the relief to which they are entitled, and this has been held to confer upon the court the power to order rectification and specific performance in the same action, even though the mistake has been proved by parol evidence. [425]

A discretionary remedy

3-093

As with other equitable remedies, the court has a residual discretion to refuse to grant rectification. [426]

Effect of negligence

3-094

The fact that one party’s negligence has caused the mistake appears to be irrelevant where rectification is sought on the ground of a mistake common to both parties [427]:

> “If it were, many a claim to rectification for mutual mistake would fail since, ex hypothesi, the instrument as executed has failed accurately to express the parties’ common intention and this will very often have been as a result of carelessness for which, in part at least, the claimant for relief must share responsibility.” [428]

Equally in cases of unilateral mistake, provided the claimant’s mistake was known to the defendant or the defendant had deliberately sought to distract the claimant from discovering that the document did not reflect what he intended, [429] it seems to be irrelevant that the claimant might have discovered the mistake had he used more care.

Delay

3-095

A claimant who has discovered the mistake but delayed in seeking rectification may be denied it. Mere lapse of time is no bar if the mistake is clearly proved, [430] but as Blackburne J. has put it [431]:

> "… it is well established that the doctrine does not come into play before the person against whom it is raised as a defence has discovered the material facts, in this case the mistake. It must be shown that the subsequent delay in pursuing the claim renders it 'practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were otherwise to be asserted'. See *Lindsay Petroleum Company v Hurd (1873) 5 App Cas 221* at 239 (per Lord Selborne). As Lord Selborne went on (at 240) to observe:
>
> > 'Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking one course or the other, so far as relates to the remedy.'"

Parties must be restored to former position

3-096

Rectification will be refused if the parties cannot be restored to the same position which they occupied prior to the contract sought to be rectified; but this rule will not be applied so strictly as to require an exact restoration where such is difficult or impossible. [432]

Payment of money under judgment

3-097

After money had been paid under a judgment founded on the construction of an agreement, an action to rectify the agreement on the ground that this construction was contrary to the intention of all parties was refused by the Court of Appeal. There was no question of res judicata, but the agreement had been worked out and a fund distributed on that footing. [433]

Third parties

3-098

Rectification may be granted against third parties [434] but a conveyance will not be rectified as against a purchaser for value of a legal or equitable interest claiming under the deed in good faith and without notice of the mistake. [435] It may, however, be granted after the death of one of the parties. [436]

Procedure

3-099

Actions for rectification, setting aside or cancellation of deeds or other written instruments are by s.61 of and Sch.1 to the Senior Courts Act 1981 assigned to the Chancery Division of the High Court, but a counterclaim for rectification or cancellation is not infrequently entertained by the Queen's Bench Division. [437]

3-100

By ss.23 and 147(1) of the County Courts Act 1984, the county court may exercise all the powers of the High Court in proceedings for the rectification, delivery up or cancellation of any agreement for the sale, purchase or lease of any property where, in the case of a sale or purchase, the purchase money, or, in the case of a lease, the value of the property, does not exceed £350,000 [438] and also in proceedings for relief against fraud or mistake, where the damage sustained or the estate or fund in respect of which relief is sought does not exceed in amount or value £350,000. [439] The same limit applies to actions for the specific performance of such contracts. [440]

Other instances of rectification

3-101

The court has rectified a bill of exchange, [441] a marine insurance policy, [442] a transfer of shares wrongly numbered, [443] a bill of quantities, [444] and bought and sold notes by inserting therein a clause customary in a particular trade, [445] and very frequently conveyances of land. [446] A charge registered at the Land Registry pursuant to the Land Registration Act 2002 may be rectified. [447]

Marriage settlements

3-102

The court has used its jurisdiction in order to rectify marriage settlements. [448] If both the marriage articles and the settlement are executed before the marriage takes place, rectification will not be ordered so as to bring the settlement into line with the articles unless the settlement is expressly or impliedly executed in pursuance of the articles. But if the settlement is made after the marriage, it will be rectified so as to make it correspond with the articles. [449] It also seems that the court will readily admit evidence on behalf of the settlor alone that the settlement does not conform with his intention. [450]

Articles of association

3-103

The court has no jurisdiction to rectify the articles of association of a company on the ground that they do not accord with the proved intention of the signatories at the moment of signature. Any power of alteration in this respect is purely statutory and there is no hint in the Companies Act of any power in the court to rectify. [451]

Voluntary settlements

3-104

A voluntary deed cannot be rectified except with the consent of the donor, [452] and the court will hesitate to rectify such a deed at the suit of the settlor merely on his own evidence as to his intention unsupported by other evidence such as written instructions. [453] Nevertheless, the unilateral mistake of the settlor will suffice, in certain circumstances, to justify rectification [454] or rescission [455] of a settlement. If it is clearly shown that the settlement as executed does not express the true intentions of the settlor, and if the settlement was not executed by trustees or other parties as the result of a

contract or bargain, rectification can be ordered. If the trustees object, however, the court may, in its discretion, refuse an order for rectification. [456]

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1. See generally Cheshire (1944) 60 L.Q.R. 175; Tylor (1948) 11 M.L.R. 257; Slade (1954) 70 L.Q.R. 385; Stoljar (1965) 28 M.L.R. 265; Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (1968); Smith (1994) 110 L.Q.R. 400; Friedmann (2003) 19 L.Q.R. 68; Cartwright, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016); Macmillan, *Mistakes in Contract Law* (2010).

232. Hodge, *Rectification* (2010); A Burrows, *Contract Terms* (2007), 77; Cartwrigh, *Misrepresentation, Mistake and Non-disclosure*, 4th edn (2016), paras 13-38—13-54; McLauchlan (2008) 124 L.Q.R. 608, (2010) 126 L.Q.R. 8 and (2014) 130 L.Q.R. 83. N. Patten, *Chancery Bar Association Annual Lecture* 2013, available at http://www.chba.org.uk/formembers/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisite ; R. Toulson, *TECBar Lecture* 2013, available at https://www.supremecourt.uk/docs/speech-131031.pdf; T. Etherton, *Current Legal Problems Lecture* 2015, available at https://www.judiciary.gov.uk/wp-content/uploads/2015/04/contract-formation-and-the-fog-of-rectification-for-delive

409. *Tucker v Bennett (1887) 38 Ch. D. 1, 9*.

410. This was the expression preferred by the Court of Appeal in *Joscelyne v Nissen [1970] 2 Q.B. 86*. See also *Ernest Scragg & Sons Ltd v Perseverance Banking and Trust Co Ltd [1973] 2 Lloyd's Rep. 101*; *Thomas Bates & Son v Wyndhams Ltd [1981] 1 W.L.R. 505*.

411. When the contract is negotiated on behalf of a legal person, it is the intention of the decision maker who that is relevant, not that of a mere negotiator unless that person is also the decision-maker or shares in a relevant way those intentions with the person who is the decision maker: *Hawksford Trustees Jersey Ltd (Trustee of the Bald Eagle Trust) v Stella Global UK Ltd [2012] EWCA Civ 55* at [41].

412. *Fowler v Fowler (1859) 4 De G. & J. 250, 265*; *Constantinidi v Ralli [1935] Ch. 427*. But provided that the true agreement is clear, it is sufficient if it is merely doubtful whether the document accurately records this agreement: *Re Walton's Settlement [1922] 2 Ch. 509*.

413. *Earl of Bradford v Earl of Romney (1862) 30 Beav. 431*; *Harris v Pepperell (1867) L.R. 5 Eq. 1, 4*; *Stait v Fenner [1912] 2 Ch. 504*. Where lengthy negotiations have taken place between experienced negotiators, there must be a strong presumption that the parties intended to be bound by precisely the words they used, not some earlier understanding which might be derived from earlier, less carefully drafted documents: *Snamprogetti Ltd v Phillips Petroleum Co UK Ltd [2001] EWCA Civ 889* at [33].

414. *Atlantic Maritime Transport Corp v Coscol Petroleum Corp, The Pina [1991] 1 Lloyd's Rep. 246, 250* ("proof to the criminal standard").

415. *[1984] 1 Lloyd's Rep 353, 359*.

416. *In Re B (Care Proceedings) [2009] 1 A.C. 11*.

417. *Tartsinis v Navona Management Co [2015] EWHC 57 (Comm)* at [85]. The evidential weight to be given to the document will vary according to the circumstances, for example whether it was prepared after long negotiations with the help of legal advisers, how clearly the document is drafted and whether the drafters were working in their first language: *[2015] EWHC 57 (Comm)* at [86]).

418. *Fowler v Fowler (1859) 4 De G. & J. 250, 265*; *Wollaston v Tribe (1869) L.R. 9 Eq. 44*; *Cook v Fearn (1878) 48 L.J. Ch. 63*; *Hanley v Pearson (1879) 13 Ch. D. 545*. cf. *Tucker v Bennett (1887) 38 Ch. D. 1*; *Bonhote v Henderson [1895] 1 Ch. 742, affirmed [1895] 2 Ch. 202*; *Re*

Walton's Settlement [1922] 2 Ch. 509.

419. *Lloyd v Stanbury [1971] 1 W.L.R. 535*; *Pappadakis v Pappadakis, The Times, January 19, 2000* . It is not enough that there has been confusion between the parties as to what was being agreed: *Cambro Contractors Ltd v John Kennelly Sales Ltd, The Times, April 14, 1994*.

420. *Fowler v Fowler (1859) 4 De G. & J. 250*. See above, para.3-066.

421. *[1953] 2 Q.B. 450, 461*. Compare above, para.3-025.

422. *(1969) 113 S.J. 222*. Thus "rectification is 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 construction": *Re Butlin's Settlement Trusts [1976] Ch. 251, 260* (a case involving a voluntary settlement); applied to rectification of a contract in *Phillips Petroleum Co UK Ltd v Snamprogetti Ltd (2001) 79 Con. L.R. 80* at [39] (affirmed on other grounds *[2001] EWCA Civ 889*).

423. *Whiteside v Whiteside [1950] Ch. 65*; cf. *Re Colebrook's Conveyances [1972] 1 W.L.R. 1397*; *Etablissements Georges et Paul Levy v Adderley Navigation Co SA [1980] 2 Lloyd's Rep. 67*. Provided that there is an issue capable of being contested by the parties it is no bar to rectification that both sides wish the document to be rectified so as to reduce one party's tax liability: *Lake v Lake [1989] S.T.C. 865*; *Racal Group Services Ltd v Ashmore [1995] S.T.C. 1151*.

424. *Woollam v Hearn (1802) 7 Ves. 211*; *Martin v Pycroft (1852) 3 De G.M. & G. 785*; cf. *Thomas v Davis (1757) 1 Dick. 301*.

425. *Olley v Fisher (1886) 34 Ch. D. 367*; *Craddock Bros v Hunt [1923] 2 Ch. 136*; *USA v Motor Trucks Ltd [1924] A.C. 196*, not following *May v Platt [1900] 1 Ch. 616*. See now Senior Courts Act 1981 s.49.

426. *KPMG LLP v Network Rail Infrastructure Ltd [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan)* at [193] et seq. (party not disentitled by sending a clean copy of a draft rather than one showing the amendments which were proposed, and stating that none of the amendments were of any substance, even when it was known that some were. The other party in fact spotted the changes); reversed without reference to this point *[2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr)*. See also *Equity Syndicate Management Ltd v Glaxosmithkline Plc [2015] EWHC 2163 (Comm), [2016] Lloyd's Rep. I.R. 155* at [46]–[47] (on the facts it would have been inequitable to withhold the remedy).

427. *Kent v Hartley (1966) 200 E.G. 1027*; *Weeds v Blaney, The Times, March 18, 1976*.

428. Blackburne J. in *KPMG LLP v Network Rail Infrastructure Ltd [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan)* at [195]; reversed without reference to this point *[2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr)*.

429. See above, para.3-071.

430. *Millar v Craig (1843) 6 Beav. 433*; *Re Garnett (1885) 31 Ch. D. 1*; cf. *Beale v Kyte [1907] 1 Ch. 564* (laches).

431. *KPMG LLP v Network Rail Infrastructure Ltd [2006] EWHC 67 (Ch), [2006] All E.R. (D) 247 (Jan)*, reversed without reference to this point *[2007] EWCA Civ 363, [2007] All E.R. (D) 245 (Apr)*. In *Ahmad v Secret Garden (Cheshire) Ltd [2013] EWCA Civ 1005* at [56] Arden L.J. referred to "the inordinate delay that would be necessary to deprive a person of his right to apply for rectification".

432. *Earl of Beauchamp v Winn (1873) L.R. 6 H.L. 223*. cf. below, paras 7-123 et seq.

433. *Caird v Moss (1886) 33 Ch. D. 22*.

434. *Leuty v Hillas (1858) 2 De & G. J. 110*; *Craddock Bros v Hunt [1923] 2 Ch. 136*.

435. *Bell v Cundall (1750) Amb. 101*; *Smith v Jones [1954] 1 W.L.R. 1089*; *Lyme Valley Squash Club Ltd v Newcastle-under-Lyme BC [1985] 2 All E.R. 405, 413*. It is no bar to rectification that it would deprive a third party of an unintended windfall: *Equity Syndicate Management Ltd v Glaxosmithkline Plc [2015] EWHC 2163 (Comm)* at [47].

436. *Johnson v Bragge [1901] 1 Ch. 28*.

437. *Mostyn v West Mostyn Coal & Iron Co Ltd (1876) 1 C.P.D. 145*; *Storey v Waddle (1879) 4 Q.B.D. 289*; but see *Leslie v Clifford (1884) 50 L.T. 690* (partnership accounts transferred to Chancery Division).

438. See County Court Jurisdiction Order 2014 (SI 2014/503), revoking and replacing County Courts Jurisdiction Order 1981 (SI 1981/1123).

439. *R. v Judge Whitethorne [1904] 1 K.B. 827* and *Angel v Jay [1911] 1 K.B. 666*.

440. See below, Ch.27; but see also *Bourne v Macdonald [1950] 2 K.B. 422* and ss.21 and 38 of the Act.

441. *Druiff v Lord Parker (1868) L.R. 5 Eq. 131*.

442. *Spalding v Crocker (1897) 2 Com. Cas. 189*.

443. *Re International Contract Co (1872) L.R. 7 Ch. App. 485*.

444. *Neill v Midland Ry (1869) 17 W.R. 871*.

445. *Caraman Rowley & May v Aperghis (1923) 40 T.L.R. 124*.

446. *Beale v Kyte [1907] 1 Ch. 564*; *Craddock Bros v Hunt [1923] 2 Ch. 136*.

447. See *Cherry Tree Investments Ltd v Landmain Ltd [2012] EWCA Civ 736, [2013] Ch. 305*.

448. *Johnson v Bragge [1901] 1 Ch. 28*.

449. *Cogan v Duffield (1876) 2 Ch. D. 44*.

450. *Hanley v Pearson (1879) 13 Ch. D. 545*; cf. *Tucker v Bennett (1887) 38 Ch. D. 1*.

451. *Evans v Chapman (1902) 86 L.T. 381*; *Scott v Frank F. Scott (London) Ltd [1940] Ch. 217, affirmed [1940] Ch. 794*.

452. *Phillipson v Kerry (1863) 32 Beav. 628*.

453. *Bonhote v Henderson [1895] 1 Ch. 742, affirmed [1895] 2 Ch. 202*; *Van der Linde v Van der Linde [1947] Ch. 306, 311*.

454. *Re Butlin's Settlement Trusts [1976] Ch. 251*. It is the subjective intention of the settlor, rather than the intention of an agent of the settlor, which is relevant: see *Day v Day [2013] EWCA Civ 280, [2013] 2 P. & C.R. DG1*.

455. *Pitt v Holt [2013] UKSC 26* (see below, para.29-052); *Kennedy v Kennedy [2014] EWHC 4129 (Ch)* (rescission of self-contained and severable part of settlement). In *NRAM Plc v Evans [2015] EWHC 1543 (Ch)* the same principle was applied to a chargee's mistaken cancellation of a charge.

456. *Re Butlin's Settlement Trusts [1976] Ch. 251*.