

CHAPTER 6

RECTIFICATION

NATURE OF REMEDY

The rectification of documents is a remedy that has been granted by courts of equity for many centuries. Although it may be obtained in association with other remedies such as specific performance, it is an independent head of relief, and its basis is the protection of an applicant so that he is not put at risk or prejudiced by the existence of a document reliance on which would, without rectification, be unconscionable.

Recent general assertions by Lord Hoffmann in the *Chartbrook* case¹ have rendered the general law of rectification less certain. These assertions have been widely criticised, and unless they obtain general acceptance they should not be taken to represent equitable principle.

Rectification is, like other equitable remedies, discretionary. Hence relief may be refused if, for example, there has been acquiescence or laches. Further, the remedy of rectification becomes inappropriate to the extent that, after execution of the document, other persons have, for value and without notice, obtained legal rights that would be detracted from if rectification were ordered;² and it has been held that similar principles apply in favour of those who have taken

¹ *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] A.C. 1101. Lord Hoffman's analysis was criticised in (inter alia) *Daventry District Council v. Daventry & District Housing Ltd.* [2012] 1 W.L.R. 1333. Rectification has been drastically XXX in New Zealand: *Tri-Star Customs and Forwarding Ltd. v. Denning* [1999] 1 N.Z.L.R. 33.

² See *Garrard v. Frankel* (1862) 30 Beav. 445, 54 E.R. 961, *Smith v. Jones* [1954] 1 W.L.R. 1089 and *Thames Guaranty Ltd. v. Campbell* [1985] Q.B. 210. In some circumstances it may be possible to overcome this difficulty by merely partially rectifying the document.

It has been held that where a lessor assigns his interest in land that is subject to a lease of which he is entitled to rectification, his assignee is entitled to require the lease to be rectified, despite a lack of privity of contract: *Majestic Homes Pty. Ltd. v. Wise* [1978] Qd. R. 225.

equitable interests, as opposed to legal interests, for value and without notice.³

Rectification is the rectification of documents, not the reformulation of agreements that are expressed in documents. So James V.-C. once said, "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."⁴ Accordingly save where it arises through a breach of a trust or of a fiduciary duty or there is some other special basis of equitable intervention,⁵ rectification has been based on a mistake of one or more of the parties to a document.

It has been held that rectification may be obtained in three classes of cases. First, rectification may be granted where all parties to a document are under a concurrent mistake, that is, a common mistake at the time of its execution, as to the provisions that it contains.⁶

Secondly, it may be granted where, although one party is not under a mistake as to the provisions in fact contained in a document, he executes it in the knowledge that another party has executed it or will execute it under a mistake as to those provisions, or other circumstances render it unconscionable that those provisions should not be rectified.⁷

Thirdly, a court of equity may order rectification of documents where it is appropriate to do so pursuant to specific equitable doctrines, such as those that relate to trusts and to the enforcement of fiduciary duties. So, for example, a deed that has been executed under undue influence may be rectified by the striking out of an inappropriate power.⁸ Where, however, rectification is ordered in circumstances of this kind the basis of intervention is to be found in the doctrines and rules of the area of exclusive jurisdiction in question, such as those in regard to trusts or various fiduciary duties. It is not appropriate to consider the exclusive jurisdiction of the court at length here, and reference should be made to

³ See, for example, *Garrard v. Frankel* (1862) 30 Beav. 445, 54 E.R. 961, *Westminster Bank Ltd. v. Lee* [1956] Ch. 7, *National Provincial Bank Ltd. v. Ainsworth* [1965] A.C. 1175 and *Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265.

⁴ *Mackenzie v. Coulson* (1869) L.R. 8 Eq. 368 at p. 375. See also *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375, *Wellington City Council v. New Zealand Law Society* [1988] 2 N.Z.L.R. 614 and *Glenelg Homestead Ltd. v. Wile* (2005) 248 D.L.R. (4th) 427.

⁵ See note 8, *infra*.

⁶ See pp. 610-613, *infra*.

⁷ See pp. 613-614, *infra*. *Daventry District Council v. Daventry & District Housing Ltd.* [2012] 1 W.L.R. 1333.

⁸ See, for example, *Turner v. Collins* (1871) L.R. 7 Ch. 329.

works on trusts and other areas of equitable relief that may be relevant in the particular case in question.

It may be added generally of the remedy of rectification that in many contexts it has been shown to be salutary in preventing unconscionable reliance upon documents executed or continuing in existence in an objectionable form. In particular, especially since it often operates more moderately than rescission and like remedies, it should not be circumscribed by anomalous or artificial rules, but should be applied where appropriate in order to give better effect to equitable doctrines.⁹

CLASSES OF RECTIFIABLE DOCUMENTS

Rectification is most commonly sought in regard to agreements. It may also be obtained in regard to many other documents, and the general principle is that rectification may be sought of any document that is within the general principles that are set out here, save where a statutory provision expressly or impliedly provides to the contrary and save in certain exceptional cases that are discussed hereunder.

The width of the remedy may be seen from examples of some of the classes of documents in relation to which it has been regarded as appropriate. These include, as well as agreements, conveyances,¹ deeds poll,² settlements and wills,³ instruments of appointment,⁴ policies of life insurance,⁵ bills of exchange,⁶ leases,⁷ bought and sold notes,⁸ bonds⁹ and company registers.¹⁰

The doctrine of rectification is capable of applying to any part of a relevant document. So where appropriate an agreement may be

⁹ See *Joscelyne v. Nissen* [1970] 2 Q.B. 86 and *Ryledar Pty. Ltd. v. Euphoric Pty. Ltd.* (2007) 59 N.S.W.L.R. 603.

¹ *Beaumont v. Bramley* (1822) Turn. & R. 41, 37 E.R. 1009.

² *Wright v. Goff* (1856) 22 Beav. 207, 52 E.R. 1087. The setting aside of voluntary dispositions was considered in *In re Griffiths* [2009] 2 W.L.R. 394.

³ *Rooke v. Lord Kensington* (1856) 2 K. & J. 753, 69 E.R. 986; *Pengelly v. Pengelly* [2008] 3 W.L.R. 66. The rectification of pension fund deeds may also be appropriate: see *Smithson v. Hamilton* [2008] 1 W.L.R. 1453.

⁴ *Daniel v. Arkwright* (1864) 2 H. & M. 95, 71 E.R. 396.

⁵ *Collett v. Morrison* (1851) 9 Ha. 162, 68 E.R. 458; *Market Terminal Pty. Ltd. v. Dominion Insurance Co. of Australia* [1982] 1 N.S.W.L.R. 105.

⁶ *Druiff v. Lord Parker* (1868) L.R. 5 Eq. 131.

⁷ *Murray v. Parker* (1854) 19 Beav. 305, 52 E.R. 367.

⁸ *Caraman Rowley and May v. Aperghis* (1923) 40 T.L.R. 124.

⁹ *Hodgkinson v. Wyatt* (1864) 9 Beav. 566, 50 E.R. 462.

¹⁰ *Whitehorse v. Carlton Hotel Pty. Ltd.* [1983] Qd. R. 336.

rectified by adding, deleting or varying provisions set out therein, and even by substituting the name of an intended party for a name that has been wrongly inserted.¹¹ However where parties intend that only part of an agreement or transaction should be set out in the relevant document, the document can be rectified only in respect of that part.

Where statutory provisions require the registration of a document and accord it statutory force an intention may appear in the relevant legislation that rectification should no longer be open after the document has been registered, especially if a statutory procedure for modification may be availed of, such as a procedure for the variation of articles of association of a company.¹² Where rectification would otherwise be appropriate it is a matter of construction whether particular statutory provisions that, for example, provide a special procedure for variation or amendment are inconsistent with the jurisdiction of the court to grant rectification or are intended to displace it.¹³

It may be observed that special rules have been developed by courts of probate in regard to wills¹⁴ and that the equitable doctrine of rectification has sometimes been treated as inapplicable to them.¹⁵ This position has sometimes led to injustice, and, especially since it is established that a settlement may be rectified after the death of the settlor,¹⁶ the assertion of this jurisdiction in regard to wills would not appear to be contrary to equitable principle and often would prevent benefactions from being unconscionably withheld from those intended to take them.

¹¹ See *Elders Lensworth Finance Ltd. v. Australian Central Pacific Ltd.* [1986] 2 Qd. R. 364.

¹² *Scott v. Frank F. Scott (London) Ltd.* [1940] Ch. 794. Other difficulties in the obtaining of rectification of registered articles of association were adverted to by the Court of Appeal in this case.

Questions of this kind are important where, for example, the title to land depends on the statutory consequences of the registration of transfers or other instruments. In some instances it may be possible to order the rectification of the instrument itself: *Majestic Homes Pty. Ltd. v. Wise* [1978] Qd. R. 225; in other instances it may be necessary to require further instruments to be executed in order to give effect to the relevant intention.

¹³ Even if rectification remains open, the existence of other remedies is taken into account by the court in exercising its discretion.

¹⁴ See, for example, *Harter v. Harter* (1873) L.R. 3 P. & D. 11 and *Collins v. Elstone* [1893] P. 1. Compare now s. 20 of the Administration of Justice Act 1982.

¹⁵ *In re Bacharach's Will Trusts* [1959] Ch. 245 at p. 249. But see *Re Jensen* [1992] 2 N.Z.L.R. 506, where it was indicated that rectification was appropriate.

¹⁶ See pp. 614-615, *infra*.

COMMON MISTAKE

Where all parties who execute a document intend that the provisions of the document should accord with an agreement entered into by them, or with a common intention possessed by them, but due to a mistake shared by all of them it does not do so, rectification is ordered by the court, in the absence of special circumstances that render this course unjust.¹

It has from time to time been suggested that the agreement in question must have come into existence prior to the execution of the document. This view is contrary to principle, and the relevant enquiry should be, not as to the parties' intention at a prior time, but as to their intention at the time of execution of the document. So references may be found from early times to "the concurrent intention of all parties",² and more recently it has been affirmed that it is the concurrent intention of the parties at the time of execution, rather than their intention at a time of earlier agreement if any, that is material.³

It has also been suggested that it is not enough that there should have been a common concurrent intention of the parties, and that "some outward expression of accord is required".⁴ It does not, however, appear to be possible to find any basis in equitable principle for a requirement of this kind, and its inappropriateness has been commented on.⁵ The history and nature of the remedy of rectification

¹ See the various authorities that were discussed in *Joscelyne v. Nissen* [1970] 2 Q.B. 86, *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] A.C. 1101, *Daventry District Council v. Daventry & District Housing Ltd.* [2012] 1 W.L.R. 1333, and also *Franklins Pty. Ltd. v. Metcash Trading Ltd.* (2009) 76 N.S.W.L.R. 603, *Slee v. Warke* (1949) 86 C.L.R. 271 and *Brandwein v. Provident Mutual Life Ins. Co.* (1957) 3 N.Y. 2d 491, 146 N.E. 2d 693 (U.S.). Sometimes it is necessary on this basis to rectify both a prior written agreement and a document executed thereunder, although on other occasions it may be sufficient for all practical purposes that one only of the documents should be rectified: see generally *Craddock Brothers v. Hunt* [1923] 2 Ch. 136.

² *Marquis of Townshend v. Stangroom* (1801) 6 Ves. 328 at p. 334, 31 E.R. 1076 at p. 1079, per Lord Eldon. See also *Club Cape Schanck Resort Co. Ltd. v. Cape Country Club Pty. Ltd.* (2001) 3 V.R. 526.

³ *Shipley Urban District Council v. Bradford Corporation* [1936] Ch. 375; *Joscelyne v. Nissen* [1970] 2 Q.B. 86; *Daventry District Council v. Daventry & District Housing Ltd.* [2012] 1 W.L.R. 1333; *Slee v. Warke* (1949) 86 C.L.R. 271; *Commerce Consolidated Pty. Ltd. v. Johnstone* [1976] V.R. 724.

⁴ *Joscelyne v. Nissen* [1970] 2 Q.B. 86 at p. 98. This suggested requirement was accepted uncritically by Lord Hoffmann in *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] A.C. 1101. Lord Hoffmann did not refer to Mr. Bromley's Law Quarterly Review article cited at note 5, *infra*.

⁵ Bromley, *Rectification in Equity*, (1971) 87 L.Q.R. 532. See also *Pukallus v. Cameron* (1982) 56 A.L.J.R. 907, and compare *In re Streamline Fashions Pty. Ltd.* [1965] V.R. 418. Somewhat similar criticisms may be made of the formulation adopted in *Bishopsgate Insurance Australia Ltd. v. Commonwealth Engineering (N.S.W.) Pty. Ltd.* [1981] 1 N.S.W.L.R. 429.

are such that the validity of this suggested requirement should not be accepted, since the concern of courts of equity has always been with the actual intention of those concerned.⁶ Rectification is an equitable remedy, not a legal remedy.

The simplest cases in which a mistake arises are found where a provision that is intended to be included is inadvertently omitted or where there is an inadvertent inclusion of an unintended provision or where a provision is inadvertently mis-expressed. In all of these cases rectification may, where appropriate, be ordered.

A more difficult case arises where the parties are aware of the precise terms of the relevant part of the document but misapprehend their effect. Here it appears to be necessary to distinguish between two positions. The first position occurs where the concurrent intention, that is, the intention that the document is desired to effectuate, remains the dominant and governing intention. In this event it should not matter that the precise terms of the document have been seen by the parties, and rectification, where otherwise appropriate, should be ordered. So it has been said by Brightman J., "Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as a result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction."⁷ The second position arises where the parties, whatever their previous intention may have been, have ceased to retain that intention as their governing intention and have formed instead an intention to be bound by the precise terms of the document in question,

⁶ *N.S.W. Medical Defence Union Ltd. v. Transport Industries Insurance Co. Ltd.* (1986) 6 N.S.W.L.R. 740; *Westland Savings Bank v. Hancock* [1987] 2 N.Z.L.R. 21. Lord Hoffmann is widely regarded as a distinguished commercial lawyer, but it may be thought that he has not demonstrated the same understanding of equity as have many other members of the House of Lords. In *Chartbrook Ltd. v. Persimmon Homes Ltd.* [2009] 3 W.L.R. 267 at pp. 287-290 Lord Hoffmann treated rectification as depending on legal rules about the construction of contracts, where an objective test is applied. Normally an objective test leads in this context to the same result as a subjective test. But on some occasions the result may be different, and if so equitable principles require the adoption of the subjective test. Thus if in a particular case it appeared that both parties intended that a contract should make a particular provision, but it did not do so, on equitable principles rectification would be ordered, regardless of whether objective evidence existed to support this intention.

⁷ *In re Butlin's Settlement Trusts* [1976] Ch. 251 at p. 260. See also *In re Slocock's Will Trusts* [1979] 1 All E.R. 358, *Commissioner of Stamp Duties (N.S.W.) v. Carlenka Pty. Ltd.* (1995) 41 N.S.W.L.R. 329 and *Ryledar Pty. Ltd. v. Euphoric Pty. Ltd.* (2007) 69 N.S.W.L.R. 603.

regardless of possible discrepancies between its provisions and prior or other intentions on their part.⁸ In this event rectification is not appropriate.

Where a document contains a provision which states that the document sets out the entire agreement of the parties or which otherwise expressly negates the existence of terms not set out in it, that provision does not exclude rectification if rectification is appropriate under general equitable principles. However it may affect the actual operation of those principles because, for example, it may tend to show that in fact no inconsistent governing intention has subsisted, and that hence no basis for rectification has arisen, because the parties have intended to be bound by the document in the material respects regardless of prior or other intentions.

It should be borne in mind that different considerations apply where the relevant mistake does not arise through a lack of conformity between a document and the concurrent intention of the parties, but rather arises through an error underlying but not forming part of that intention itself. Where there is no lack of conformity between the document and the concurrent intention, the basis for rectification does not exist.⁹ So an error of law or other error may have related only to the expected consequences of an agreement and not to what the parties have actually agreed.¹⁰

If on the principles that have been set out here the basis for rectification is established, the better view is that it does not matter whether the lack of conformity between the document and the concurrent intention arises through an error of fact or an error of law such as an error of construction of the document.¹¹ However it is commonly found that where the parties have made an error of law, that error affects equally both the document and their concurrent intention, and in these circumstances rectification is not appropriate.

UNILATERAL MISTAKE

Where the relevant mistake is not shared by all the parties to the agreement for the expression of which a document is executed,

⁸ *Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd.* (1973) 128 C.L.R. 336; *Club Cape Schanck Resort Co. Ltd. v. Cape Country Club Pty. Ltd.* (2001) 3 V.R. 526.

⁹ *Baird v. B.C.E. Holdings Pty. Ltd.* (1996) 40 N.S.W.L.R. 374. The decision in *Frederick E. Rose (London) Ltd. v. William H. Pim Jnr. & Co. Ltd.* [1953] 2 Q.B. 450 may perhaps be justified on these principles.

¹⁰ Compare *Winks v. W.H. Heck & Sons Pty. Ltd.* [1986] 1 Qd. R. 226.

¹¹ See generally *In re Butlin's Settlement Trusts* [1976] Ch. 251.

ordinarily rectification is inappropriate.¹ In order that a court of equity should intervene there must be additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms. So Buckley L.J. has said, “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 degree 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.”²

The classic case where courts of equity intervene on this basis has arisen when the party not under a mistake has known, at the time of execution of the document, of the mistake of the other party and has stood by, without directing the other party’s attention to the mistake.³ The mistake must be of such a nature as to render it unconscionable for the party with knowledge to insist on performance without rectification, such as where the other party would be unjustly prejudiced.⁴ There has been speculation as to whether in circumstances of this kind the court acts on the basis of estoppel or of equitable fraud or on some other ground.⁵ It appears on principle to be preferable to conclude that this is merely an instance of cases in which it would be unconscionable that a party to an agreement should be able to insist that another party should be bound by its precise terms and should not be entitled to rectification in accordance with his actual intention in executing it. So, for example, misleading or unfair conduct⁶ or circumstances involving a breach of fiduciary duties may cause the court to hold that it would be unconscionable that a party to a document should be able to rely on it in an unrectified form.⁷ Further, where a trustee or a person in a similar

¹ *Riverlate Properties Ltd. v. Paul* [1975] Ch. 133; *Daventry District Council v. Daventry & District Housing Ltd.* [2012] 1 W.L.R. 1333; *Maralinga Pty. Ltd. v. Major Enterprises Pty. Ltd.* (1973) 128 C.L.R. 336 at p. 350.

² *Thomas Bates and Son Ltd. v. Wyndham’s (Lingerie) Ltd.* [1981] 1 W.L.R. 505 at p. 515. See also *Taylor v. Johnson* (1983) 151 C.L.R. 422 and *Brandwein v. Provident Mutual Life Ins. Co.* (1957) 3 N.Y. 2d 491, 146 N.E. 2d 693 (U.S.).

³ See, for example, *Riverlate Properties Ltd. v. Paul* [1975] Ch. 133, *Thomas Bates and Son Ltd. v. Wyndham’s (Lingerie) Ltd.* [1981] 1 W.L.R. 505; *Commission for the New Towns v. Cooper (Great Britain) Ltd.* [1995] Ch. 259 and *Commerce Consolidated Pty. Ltd. v. Johnstone* [1976] V.R. 724.

⁴ Compare the differing views expressed in *Thomas Bates and Son Ltd. v. Wyndham’s (Lingerie) Ltd.* [1981] 1 W.L.R. 505.

⁵ See, for example, *A. Roberts & Co. Ltd. v. Leicestershire County Council* [1961] Ch. 555, which was commented upon in (1961) 77 L.Q.R. 313.

⁶ *Commission for the New Towns v. Cooper (Great Britain) Ltd.* [1995] Ch. 259.

⁷ See generally *Clark v. Girdwood* (1877) 7 Ch. D. 9.

position is only a nominal or passive party to a document, it may be appropriate to grant rectification even although he has not been mistaken in the relevant respect.⁸

VOLUNTARY SETTLEMENTS

The rectification of voluntary settlements has received special attention by courts of equity. Where the circumstances are such that it is not sought to have the settlement set aside or rescinded,¹ rectification may be appropriate to the extent that that document is inconsistent with and does not put into effect the settlor's intention; and so it has been said that there is "no doubt that the court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain, such as an ante-nuptial marriage settlement."² Further, it has been laid down that where the trustees of the settlement have merely taken passively, and have not been parties to any active bargain, it is the intention only of the settlor that is material, and not that of the trustees, although whether the trustees agree to or are opposed to rectification may be relevant to the exercise of the court's discretion.³ However where the settlement has been made in order to effect an agreement by way of active bargain with the trustees or some other person, what is relevant is the intention that is inherent in the bargain.⁴

There has been a disinclination on the part of courts of equity to allow rectification of a voluntary settlement against the wishes of the settlor;⁵ but where the settlor has died, if it is proved that the contents of the settlement were inconsistent with his intention, rectification may in appropriate circumstances be ordered,⁶ even although the applicant is merely a volunteer.⁷

⁸ See, for example, pp. 614-615, *infra*, as to voluntary settlements.

¹ The setting aside of a settlement may be appropriate in circumstances where it fails in substance to carry out the relevant intention or where there is a breach of a fiduciary relationship, undue influence or misrepresentation or fraud: see generally *Phillipson v. Kerry* (1863) 32 Beav. 628, 55 E.R. 247 and *Turner v. Collins* (1871) L.R. 7 Ch. 329, and also Goff and Jones, *The Law of Restitution*, 4th edition, pp. 227-228.

² *In re Butlin's Settlement Trusts* [1976] Ch 251 at p. 260.

³ *In re Butlin's Settlement Trusts* [1976] Ch 251.

⁴ *In re Butlin's Settlement Trusts* [1976] Ch. 251 at pp. 261-262.

⁵ *Lister v. Hodgson* (1867) L.R. 4 Eq. 30 at p. 34.

⁶ *Lister v. Hodgson* (1867) L.R. 4 Eq. 30 at p. 34; *In re Slocock's Will Trusts* [1979] 1 All E.R. 358 at p. 361.

⁷ *Christie v. Public Trustee* (1921) 22 S.R. (N.S.W.) 148; *Kent v. Brown* (1942) 43 S.R. (N.S.W.) 124.

Matters of proof give rise to particular difficulties where what is in question is the intention of the settlor only. The ascertaining of his intention may be made easier when written drafts or instructions exist,⁸ and it may be necessary to receive verbal evidence with caution; but if the intention of the settlor is sufficiently clearly established, it should not matter what form the relevant evidence has taken.⁹

THE STATUTE OF FRAUDS

Where rectification is granted it relates back to the time of execution of the document, so that it is taken to have existed in its rectified form at all times.¹ The order of the court operates of its own force, and to the extent that as an order of a court with equitable jurisdiction it is required to be given effect for all purposes the execution by the parties of an amending document is ordinarily unnecessary.²

There was formerly controversy whether it was possible, in the same proceedings, to obtain both rectification of an agreement and the specific performance of that agreement. But it has been established that this course may be adopted, without any necessity for separate proceedings, and that, moreover, the plaintiff is not prevented from succeeding by the fact that the agreement is one that is, by a provision based on the Statute of Frauds, required to be in writing signed by the person to be charged.³ So it has been said in the Privy Council, "The statute, in fact, only provides that no agreement not in writing and not duly signed shall be sued on; but when the written instrument is rectified there is a writing which satisfies the statute, the jurisdiction of the court to rectify being outside the prohibition of the statute."⁴

⁸ See *Bonhote v. Henderson* [1895] 1 Ch. 742 at pp. 748-749.

⁹ See pp. 620-621, *infra*.

¹ *Earl of Malmesbury v. Countess of Malmesbury* (1862) 31 Beav. 407, 54 E.R. 1196.

² See, for example, *White v. White* (1872) L.R. 15 Eq. 247, where the order of the court was in the usual form whereby a copy of the order was required to be indorsed on the indenture in question, and *Beale v. Kyte* [1907] 1 Ch. 564. If necessary the court may, however, require conveyances or transfers or other instruments having legal effect to be executed so as to secure the rights of the applicant. As to the extent to which third persons are bound, see p. 607, *supra*.

³ *Craddock Brothers v. Hunt* [1923] 2 Ch. 136; *United States of America v. Motor Trucks Ltd.* [1924] A.C. 196; *Montgomery v. Beeby* (1930) 30 S.R. (N.S.W.) 394; *Whiting v. Diver Plumbing & Heating Ltd.* [1992] 1 N.Z.L.R. 560.

⁴ *United States of America v. Motor Trucks Ltd.* [1924] A.C. 196 at p. 201.

Where the rectification of a document is ordered, and it is sought to enforce the document as rectified, if the grant of specific performance or of an injunction is appropriate (or would be appropriate, apart from a discretionary consideration) it may be possible for the plaintiff to obtain equitable damages.⁵ Further, if in relation to the rectification proceedings there has not only been an order for rectification, but there has also been a consequential direction requiring the execution of an amending or new document, it may be possible for one or other of the parties to seek legal remedies, such as legal damages, by reference to that document. Indeed, it has been held that even where no new document has been executed consequentially upon an order of rectification, if, as is ordinarily the case, the circumstances are such that a court of equity would formerly have enjoined reliance in legal proceedings on the document to the extent that it was not in a rectified form, so as to ensure that legal remedies would be granted accordingly, since the enactment of Judicature Act provisions legal damages can be obtained directly.⁶

THE DISCRETION OF THE COURT

Rectification is an equitable remedy that may be withheld at the discretion of the court according to general equitable principles.¹ The discretion of the court commonly involves, however, different considerations from those that arise in cases of specific performance, where ordinarily the plaintiff is entitled to alternative relief in damages. If rectification is refused, and the document remains in existence in an uncorrected form, generally the plaintiff is not entitled to alternative relief and may suffer greater hardship or prejudice accordingly than in cases where a plaintiff seeking specific performance is confined to damages instead.

Therefore when the basis of a right to rectification is made out relief is only in exceptional cases refused on discretionary grounds. It is generally not enough that, for example, the deficiency of the

⁵ See the discussion of equitable damages in Chapter 7, *infra*.

⁶ *Bosaid v. Andry* [1963] V.R. 465 at p. 468. See generally *Earl of Malmesbury v. Countess of Malmesbury* (1862) 31 Beav. 407, 54 E.R. 1196.

¹ See, for example, *In re Butlin's Settlement Trusts* [1976] Ch. 251. A claim for rectification ought to be pleaded expressly, although it has been held that under Judicature Act provisions the court has a discretion to order rectification even if it has not been sought by a counterclaim: see *Butler v. Mountview Estates Ltd.* [1951] 2 K.B. 563 and *In re Butlin's Settlement Trusts* [1976] Ch. 251 at p. 255.

document has been caused by the fault of the plaintiff himself.² Nor is it generally enough that an order for rectification will cause hardship or prejudice to the defendant merely because performance on his part under the rectified document is more difficult than under its original form. Matters of hardship or prejudice may, however, be found to be of importance in regard to laches or acquiescence.³ Further, such considerations as an absence of clean hands may cause rectification to be refused,⁴ and in exceptional cases other circumstances may arise that render the grant of rectification unjust. So, for example, if acts of performance have already taken place that cannot, even by the imposition of terms or conditions, be adequately dealt with by an order for rectification, it may be proper that an order be refused.⁵ Further, rectification may be refused if the person who is entitled to rectification is also entitled to rescission and prefers the latter remedy or if the other party has a right to rescind or if on any other basis an alternative remedy is more appropriate.⁶

In particular, the court may decline to intervene if its order would have no practical advantages or benefits to the plaintiff,⁷ such as where there has already been complete performance of an agreement in accordance with the common intention of the parties, despite the existence of an unrectified document, and the defect will no longer be material in any respect. Further, it may appear that rectification is unnecessary in a particular case because despite a defect or error in a document, the document can be given its intended effect through the application of the ordinary rules of construction; in this event no order need be made, although if there are sufficient doubts the court may consider it appropriate to intervene so as to order rectification, especially where the interests of persons who are not parties to the proceedings require protection.⁸

² The court may, however, decline to award him costs: *Murray v. Parker* (1854) 19 Beav. 305, 52 E.R. 367.

³ See pp. 225-244, *supra*, and pp. 618-619, *infra*.

⁴ See pp. 245-248 and 409-414, *supra*.

⁵ This may be so especially where the positions of third persons have been prejudiced: see generally *Taylor v. Johnson* (1983) 151 C.L.R. 422.

⁶ See generally *Taylor v. Johnson* (1983) 151 C.L.R. 422.

⁷ Pace *Whiteside v. Whiteside* [1950] Ch. 65, it does not appear that rectification is inappropriate merely because any prejudice that the plaintiff would otherwise suffer would arise as against third persons, and not as against the other party or parties to the document: see *In re Slocock's Will Trusts* [1979] 1 All E.R. 358.

⁸ See, for example, *Standard Portland Cement Co. Pty. Ltd. v. Good* (1982) 57 A.L.J.R. 151.

LACHES AND ACQUIESCENCE

As in relation to other equitable remedies, so also in relation to rectification it was formerly suggested that delay on the part of the plaintiff, without anything more, may debar him from relief. The better view, however, now is that delay itself is not a bar and that in order to prevent the grant of relief delay must be associated with other circumstances that give rise to a recognised equitable consideration, such as laches or acquiescence.¹

In order that laches may be established it must appear, first, that the plaintiff has been guilty of unreasonable delay.² What is reasonable is a question of fact in all the circumstances, and the time from which delay is regarded as relevant is ordinarily the time at which he had sufficient knowledge or suspicion of the facts that gave rise to a right to equitable relief.³ Secondly, it must appear that the unreasonable delay of the plaintiff has rendered unjust the grant of the relief that is sought; and as to the matters that are relevant here, such as any alteration of the position of the defendant so that rectification would operate substantially more harshly on him than if there had not been unreasonable delay, similar general principles apply *mutatis mutandis* to those that have been set out here in regard to injunctions.⁴ However it should be noted that rectification is a remedy in the exclusive jurisdiction of courts of equity so that if the plaintiff is denied equitable assistance he may be without any remedy at all. This consideration must be taken into account by the court in relation to such matters as laches, as affecting the balance of justice or injustice in granting or withholding relief. Hence especially if the plaintiff will suffer substantial hardship if relief is refused the court will, where it is appropriate to do so, impose conditions or otherwise mould its order so as to prevent prejudice to the defendant that would otherwise, through laches, have rendered the grant of rectification unjust.⁵

A right to rectification may be lost, not only by laches, but by acquiescence. If the plaintiff has sufficient knowledge or suspicion of

¹ Compare, for example, delay in relation to specific performance and injunctions: see pp. 225-237 and 431-438, *supra*. After long delay prejudice may be presumed.

² See the general exposition of the doctrine of laches in *Lindsay Petroleum Co. v. Hurd* (1874) L.R. 5 P.C. 221 and *Fisher v. Brooker* [2009] 1 W.L.R. 1764.

³ *Beale v. Kyte* [1907] 1 Ch. 564, *Australasian Performing Rights Association Ltd. v. Austarama Television Pty. Ltd.* [1972] 2 N.S.W.L.R. 467; and see generally pp. 226-230, *supra*.

⁴ See pp. 230-237, *supra*, and *Issa v. Berisha* [1981] 1 N.S.W.L.R. 261. Thus delay may prejudice the defendant through the loss of evidence of substantial importance.

⁵ See p. 232, *supra*.

the facts that give rise to a right to rectification,⁶ and thereafter represents expressly or impliedly that he will not assert or rely on that right, and as a consequence of the representation it becomes unjust that rectification should be ordered, either because the position of the defendant has been prejudiced through reliance on it or on any other basis, his right is lost and the document will not be rectified at his instance,⁷ unless, for example, the acquiescence should be disregarded in view of undue influence between the parties or injustice can be avoided by specially limiting the order of the court or by imposing conditions.

Even where delay does not involve laches or acquiescence it may be of importance in other respects in proceedings for rectification. Especially where the deficiency of the document is not supported by written material, or where persons who might have given evidence have died, the court may conclude as a matter of evidence that recollections of events that took place a long time previously are insufficiently distinct to be acted on with confidence.⁸ Findings of this kind as to matters of evidence should not be extended into rules of law; if evidence is sufficiently cogent, it does not matter that it relates to events that took place many years previously, unless laches or acquiescence or some other basis for the refusal of relief has arisen.⁹

ILLEGALITY

Rectification of a document in accordance with a governing concurrent intention at the time of its execution may be inappropriate where that intention involves an illegality.¹ The principles that are applicable here do not appear to be fully established, but probably a distinction must be drawn between cases where through illegality a contract is wholly void or unenforceable and cases where illegal terms are severable. So, for example, the better view is that where illegality is limited to a particular provision of the agreement of the parties, and the agreement is not void or unenforceable in toto, rectification may be ordered, to the extent that it does not involve the addition or amendment by the court of that provision.² On this basis it

⁶ As to the nature of appropriate knowledge or suspicion, see pp. 226-227, *supra*.

⁷ As to abandonment and acquiescence, see pp. 237-244, *supra*, and also *Caird v. Moss* (1886) 33 Ch. D. 22.

⁸ See *Fredenszen v. Rothschild* [1941] 1 All E.R. 430.

⁹ As to the nature of the evidence that is required in rectification proceedings, see pp. 620-621, *infra*.

¹ See generally *D.J.E. Constructions Pty. Ltd. v. Maddocks* [1982] 1 N.S.W.L.R. 5.

² As to illegality in regard to contracts, see pp. 145-148, *supra*.

may, for example, be appropriate that rectification be ordered without reference to the illegal provision, provided that this is the most just course in all the circumstances.

STANDARD OF PROOF

In early cases, when the doctrine of rectification had not been fully developed, the strength of the evidence that was required before the terms of a document would be rectified was much emphasised. More recently, when the application of the doctrine has become more clear, it has been established that the ordinary rules in regard to the standard of proof apply, although those rules may require that, according to the precise circumstances, particular evidence should be received with caution. So it has been held by the Court of Appeal in regard to the nature of the evidence that is appropriate “that it is in our view better to use only the phrase ‘convincing proof’ without echoing an old-fashioned word such as ‘irrefragable’ and without importing from the criminal law the phrase ‘beyond all reasonable doubt’”.¹

When it is sought to establish a matter, the requisite degree of cogency of proof may vary with the nature of the facts to be established and the circumstances of the case: “In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others.”² On this basis it may be said that the more serious the allegation, the clearer the evidence that may be required, but this is not to say that the ordinary rules as to the standard of proof do not apply as much in rectification proceedings as in other kinds of civil proceedings.³ As was observed on one occasion by Brightman L.J., “It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties’ intention because it is a document signed by the parties.”⁴

It may be noted that the doctrine of rectification has sometimes been so expressed as to suggest that, for example, it is not enough to establish a relevant concurrent mistake, but that as an additional

¹ *Joscelyne v. Nissen* [1970] 2 Q.B. 86 at p. 98.

² *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 W.L.R. 505 at p. 514, per Buckley L.J.

³ *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 W.L.R. 505 at p. 514. So even the uncorroborated evidence of an interested party may be sufficient in all the circumstances: *Lovesy v. Smith* (1880) 15 Ch. D. 655 at p. 664.

⁴ *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 W.L.R. 505 at p. 521.

requirement there must be shown exactly and precisely the form to which the material document should be brought.⁵ On principle, however, it appears to be preferable not to regard this latter consideration as an additional requirement but rather to treat the precise terms by which the document is to be made to conform to the relevant concurrent intention as merely an aspect of that concurrent intention itself, to be established by ascertaining that concurrent intention and then modifying the document in accordance with the principles that have here been set out here.⁶

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⁵ See, for example, *Fowler v. Fowler* (1859) 4 De G. & J. 250 at p. 265, 45 E.R. 97 at p. 103 and *Pukallus v. Cameron* (1982) 56 A.L.J.R. 907.

⁶ See generally *Thomas Bates and Son Ltd. v. Wyndam's (Lingerie) Ltd.* [1981] 1 W.L.R. 505.