

procedures before assigning it, it is a question of construction whether they operate as conditions to the validity of the assignment.²⁶⁹

If despite the prohibition, the creditor purports to assign the contract, then the assignment may be valid between himself and the assignee. But it cannot make the debtor liable to the assignee.²⁷⁰ Moreover, prohibition on direct assignment does not necessarily prevent the creditor from declaring a trust of his rights for a third party.²⁷¹ Thus the trustees under a marriage settlement were entitled to the benefit of certain insurance policies which were expressed to be unassignable and which the settlor had covenanted to convey to them.²⁷²

The construction of the transaction as a declaration of trust would only be excluded if it was inconsistent with the wording or purpose of the contract. It is possible even where the contract is for personal services, provided that it would not require the beneficiary of the trust to interfere in the day-to-day performance of the contract.²⁷³ In general, only the trustee would have the right to sue the debtor or obligor, though he would have to account to the beneficiary for the proceeds of the claim.²⁷⁴ If the trustee refused to sue, then the beneficiary would sue the debtor or obligor, and join the trustee as a second defendant.²⁷⁵

Helstan Securities Ltd v Hertfordshire CC [1978] 3 All E.R. 262.
²⁶⁹ *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495.
²⁷⁰ *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1994] 1 A.C. 85 at 108 per Lord Browne-Wilkinson interpreting *Shaw and Co v Moss Empires Ltd* (1908) 25 T.L.R. 190.
²⁷¹ *Re Turcan* (1888) 40 Ch.D. 5; *Don King Productions Inc v Warren* [2000] Ch. 291 at 319–320, 335–336; cf. *R. v Chester and North Wales Legal Aid Office Ex p. Floods of Queensferry Ltd* [1998] 1 W.L.R. 1496 (CA).
²⁷² *Re Turcan* (1888) 40 Ch.D. 5.
²⁷³ *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* [1993] R.P.C. 493 at 503; *Don King Productions Inc v Warren* [1998] 2 All E.R. 608 at 632; affirmed [2000] Ch. 291; [1999] 2 All E.R. 218.
²⁷⁴ *Re Turcan* (1888) 40 Ch.D. 5 at 10–11.
²⁷⁵ *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] A.C. 70; *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148; [2007] 1 Lloyd's Rep. 495 at [44]–[47], [98]–[119].

CHAPTER 4

PRIORITIES

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Many different questions of priorities may arise. There may be, for example, rival conveyances of property, or competing assignments of beneficial interests in trust funds, or multiple mortgages of property whose value is enough to satisfy one charge but not both.

The rules of priority applied to resolve such conflicts depend on a combination of the general law and statutory provisions. First, there is the basic rule that competing interests rank according to the order of their creation. This basic rule may sometimes be modified by refinements relating to:

- (i) registration; and
- (ii) overreaching.

It will be noted that even these modifications preserve in large measure the basic rule of first in time priority. In relation to equitable interests in some kinds of property, the basic rule may be modified by:

- (iii) purchase for value without notice of the legal interest in the property;
- (iv) the conduct of the parties; and

- (v) the rule in *Dearle v Hall*¹ under which the priority of certain dealings in property is determined by the order in which notice of the dealings has been received.

1.— THE BASIC RULE: ORDER OF CREATION

1. The Rule

4-002

At law, as in equity, the basic rule is that estates and interests primarily rank in the order in which they are created.² The precise explanation of this result differs between the two systems. At law, the result is generally expressed in terms of the disponor's capacity to confer a good title on the donee of an estate or interest. The maxim is *nemo dat quod non habet*: no person can confer a better title than he himself has. The donee therefore takes subject to prior interests affecting the estate or interest. Thus, the purchaser of stolen goods generally takes subject to the surviving legal ownership of the victim of the theft provided that it has not been extinguished by the running of the limitation period.³ In equity, the result is expressed more directly in terms of temporal priority. The maxim is *qui prior est tempore potior est jure*⁴: he who is earlier in time is stronger in law. Accordingly, where there are two competing equitable interests, the general rule of equity is that the person whose equity attached to the property first is entitled to priority over the other. Where the equities are equal and neither claimant has the legal estate, the first in time prevails, since:

"every conveyance of an equitable interest is an innocent conveyance, that is to say, the grant of a person entitled merely in equity passes only that which he is justly entitled to and no more."⁵

The rule applies to two deeds executed on the same day subject to any contrary intention shown in the deeds.⁶ The rule is preserved in the basic scheme of priorities applying to registered land. The Land Registration Act 2002 provides that the disposition of a registered estate or charge does not affect the priority of an interest affecting it.⁷ The Act draws no specific distinction for the purposes of priority between legal and equitable interests.

2. Operation of the Rule

4-003

The rule may be illustrated by a case where a company hired machinery from A under a hire-purchase agreement whereby the property in the machinery was not to pass to the company until all instalments had been paid, and a right was given to A to remove the machinery on the company's failure to pay an instalment. The machinery was fixed on the business premises of which the company was the legal owner, and so the legal interest in the machinery vested in the company. Afterwards, the company created an equitable mortgage of the premises in favour of B who had no notice of the hire-purchase agreement. It was held that A's right

¹ *Dearle v Hall* (1828) 3 Russ. 1.

² *Macmillan Inc v Bishopsgate Investment Trust (No.3)* [1995] 1 W.L.R. 978 at 999–1000.

³ Limitation Act 1980 ss.2, 3(2).

⁴ *Brace v Duchess of Marlborough* (1728) 2 P. Wms 490 at 495; *Wilmot v Pike* (1845) 5 Hare 14 at 22; *Barclays Bank Ltd v Bird* [1954] Ch. 274 at 280; *Assaf v Fuwa* [1955] A.C. 215 at 230; *Macmillan Inc v Bishopsgate Investment Trust (No.3)* [1995] 1 W.L.R. 978 at 1000.

⁵ *Phillips v Phillips* (1861) 4 De G.F. & J. 208 at 215, per Lord Westbury L.C.

⁶ *Gartside v Silkstone and Dodworth Coal and Iron Co* (1882) 21 Ch D. 762.

⁷ Land Registration Act 2002 s.28(1).

to remove the fixtures was an equitable interest in the land, and that as it had attached before B's equitable mortgage was created, it had priority over B's rights.⁸

2.— REGISTRATION⁹

4-004

There are three principal systems of registration for determining the priority of interests in property. The first is under the Land Registration Act 2002 and determines title to and the priority of interests in registered land. The second, which is diminishing in importance, is the system for registration of charges under the Land Charges Act 1972 which applies to unregistered land. Thirdly, is the system of company charges under the Companies Act 2006 which determines the priority of company charges and their validity against a liquidator, administrator or creditor. Also considered in this section is the system for registration of local land charges under the Local Land Charges Act 1975. In different degrees, these registration systems modify the basic rule of first in time priority.

1. Priority of Interests Affecting Registered Land

4-005

(a) **The basic rule: order of creation.** The Land Registration Act 2002 provides two statutory rules to determine the priority of interests affecting registered land. The first, which is the basic rule, provides that the disposition of a registered estate or charge does not alter the priority of an interest affecting it.¹⁰ In substance, this statutory rule applies to registered land the basic rule applying to most kinds of property that the priority of interests is determined by the order in which they were created.

It makes no difference for the purposes of this rule whether the interest is legal or equitable, or whether the disposition of the registered estate or charge takes effect at law or in equity. For example, if a registered freehold estate in land were subject to an equitable lease, and the reversion were assigned at law as a gift, then the new registered proprietor of the freehold would take it subject to the lease. Similarly, if the registered proprietor holding the freehold subject to an equitable lease were to charge the freehold with an equitable mortgage, then the starting point would be that the mortgage would take effect subject to the lease.

The precise ambit of this basic rule must be clearly understood. It only applies to the priority of interests where there has been a disposition of a registered estate or charge. It does not apply where there has been a disposition of an unregistered interest affecting the registered estate or charge. In these situations, the resulting priority of interests is determined by the rules applying to unregistered land. For example, if the beneficiary of a trust of registered estate in land makes competing dispositions of his beneficial interest, then the rule in *Dearle v Hall* governs their priority.¹¹

(b) **Exceptional cases where priority must be protected.** The Act also

4-006

⁸ *Re Samuel Allen & Sons Ltd* [1907] 1 Ch. 575, followed in *Re Morrison, Jones and Taylor Ltd* [1914] 1 Ch. 50 (CA); and see *Hawks v McArthur* [1951] 1 All E.R. 22. See generally *H.A. Holland* (1928) 3 C.L.J. 173; *A.G. Guest and J. Lever* (1963) 27 Conv. (NS) 30.

⁹ This section gives only an outline, and is intended to show the relationship of registration to notice. For a full treatment of land charges, reference should be made to books on land law, e.g. Megarry and Wade, *Law of Real Property*, edited by C. Harpum, S. Bridge, M. Dixon, 8th edn (London: Sweet & Maxwell, 2012), Ch.8; for charges on registered land see, e.g. *Ruoff & Roper: Registered Conveyancing* (London: Sweet & Maxwell), Ch.27; for company charges see, e.g. W.J. Gough, *Company Charges*, 2nd edn (London: Butterworths, 1996); for local land charges see, e.g. J.E. Boothroyd, *Garner's Local Land Charges*, 12th edn (Kent: Shaw & Sons Ltd, 1998).

¹⁰ LRA 2002 s.28.

¹¹ See para.4–052.

provides a large exception to this basic rule. It applies to registered dispositions of a registered estate which are made for valuable consideration. Here the priority of an interest affecting the registered land is postponed unless it has been protected in one of the ways specified in the Act.¹² The main forms of protection would be to register the interest with a title of its own, or to make it the subject of a notice in the register.¹³ So, for example, the purchaser of a registered estate in land will take it subject to a registered legal mortgage which is not discharged before the transfer to the purchaser takes effect. He would also take subject to the burden of a restrictive covenant or easement, the priority of which was protected by entry of a notice on the register.¹⁴

Priority is also given if it, the interest, is one on a specified list of interests which override registered dispositions. Their priority is protected although they may not be registered with their own title or protected by entry of a notice.¹⁵ These include, for example, a legal lease for a term not exceeding seven years, the interest of a person in actual occupation and certain categories of unregistered legal easements. A local land charge also overrides a registered disposition for value of the registered estate. This will be the case regardless of whether it has been properly registered in the appropriate register of local land charges.¹⁶

The priority of an interest under a trust of land may not be protected by a notice.¹⁷ This reflects the aim of the system of land registration that beneficial entitlements behind the legal estate should be kept off the register to facilitate dealings with the estate. Consequently, the priority of a beneficial interest under a trust may only be protected by the beneficiary's being in actual occupation at the time of the relevant registrable disposition for value.

4-007 (c) **Priority of equitable interests in registered land.** In relation to registered land, the distinction between legal and equitable interests has a limited relevance. While it determines which interests may be registered with a title of their own,¹⁸ it has no direct relevance in the resolution of priority disputes between interests affecting registered land. The result of the basic statutory rule of priority is that the ranking of equitable interests in registered land is governed solely by the order in which they were created. Unlike other kinds of property, the fault of the proprietor of a prior equitable interest does not cause it to be postponed to a later equitable interest.¹⁹

In registered land there is no difference in the priority rules applying to equitable interests and mere equities. The Act provides that mere equities are to have effect as interests capable of binding successors in title. Their priority in relation to other interests affecting the registered estate is therefore determined by the general rules of priority in the Act.²⁰ This excludes the effect of the rule in *Phillips v Phillips*.²¹

4-008 (d) **The doctrine of notice in registered land.** The statutory rules of priority generally exclude the operation of the doctrine of notice from the resolution of priority disputes in registered land. To this there are two exceptions. The priority of petitions in bankruptcy and bankruptcy orders affecting registered land is

¹² LRA 2002 s.29(1).

¹³ LRA 2002 s.29(2)(a)(i).

¹⁴ For notices see LRA 2002 s.32.

¹⁵ LRA 2002 s.29(2)(a)(ii); Sch.3.

¹⁶ cf. para.4-011.

¹⁷ LRA 2002 s.33(a).

¹⁸ The definition of "qualifying estate" which may be first registered or the subject of a registrable disposition does not include equitable interests: LRA 2002 ss.4(2), 27(2), 132(1).

¹⁹ cf. para.4-047.

²⁰ LRA 2002 s.115.

²¹ *Phillips v Phillips* (1861) 4 De G.F. & J. 208. cf. para.4-023.

determined by the general rules of bankruptcy applying to other kinds of property.²² Although the Act provides that the registrar may enter a notice of the bankruptcy petition against the registered estate affected, the effect is not automatically to preserve the priority of the petition over a registered disposition for value. Rather, it fixes the disponee with notice of the petition so that he takes subject to it. Similarly, the effect of a disposition of registered land subject to a charge for unpaid inheritance tax depends on whether the disponee takes the registered estate or charge in good faith and for value.²³

The priority of an interest of a person in actual occupation may depend on whether his occupation would have been obvious on a reasonably careful inspection of the land.²⁴ The question in such cases is whether the occupation of the person claiming the interest would have been reasonably obvious. It is not a question whether the interest would have been discoverable by making reasonable inquiries. Accordingly, the effect of the rule is not to introduce the doctrine of constructive notice into dealings with registered land.²⁵

In exceptional cases, a constructive trust may be imposed on a person taking a registered disposition of land for value which may appear to give effect to an unregistered interest whose priority has not been properly protected.²⁶ This may happen where the disponee expressly agreed to take the land subject to the claimant's interest and where it was in all the circumstances unconscionable for him to rely on the statutory priority rules in the Act to deny the enforceability of the interest. Strictly, these cases illustrate the creation of a fresh trust interest in the claimant to reverse the consequences of the disponee's unconscionable conduct. They are not truly instances where the priority of the claimant's interest is preserved despite the operation of the statutory rules on priority which would have postponed it.

2. Priority of Charges Affecting Unregistered Land

4-009 Entirely distinct from the statutory rules governing the priority of interests in registered estates and charges is the system of land charges registration applying to unregistered land. The Land Charges Act 1972²⁷ provides for the registration of many instruments or matters affecting unregistered land. The Local Land Charges Act 1975 provides for the registration by local authorities of a number of restrictions and prohibitions on the use of land such as the listing of buildings, or tree preservation orders or those made under the Town and Country Planning Act 1990.

Registration of any instrument or matter required or authorised to be registered under either Act constitutes actual notice of such instrument or matter.²⁸ The precise effect of a failure to register differs under the two Acts. Failure to register a registrable charge under the Land Charges Act 1972 may cause it to lose its priority against certain categories of purchaser of the land. To this extent the registration system is an exception to the basic rule of priority. A failure to register under the Local Land Charges Act 1975 does not affect the priority of the charge but may entitle the purchaser of the land to compensation.

²² LRA 2002 s.86(1). See *Ruoff and Roper: Registered Conveyancing*, Ch.34.

²³ LRA 2002 s.31.

²⁴ LRA 2002 Sch.3 para.2. A similar rule determines the priority of unregistered legal easements, such as those arising by prescription, over a registered disposition for value: Sch.3 para.3.

²⁵ See para.4-029.

²⁶ See para.26-009.

²⁷ The Land Charges Act 1972 (Commencement Order) (SI 1972/2058) brought into force January 29, 1973. It replaced the Land Charges Act 1925.

²⁸ Law of Property Act 1925 s.198 as amended by Local Land Charges Act 1975 s.17(2), Sch.1.

4-010 (a) Land Charges Act 1972. As a matter of form, the priority of interests registrable under the Land Charges Act 1972 against a purchaser for value depends on whether he has notice of it. The effect of registering the interest is to fix the purchaser with notice. Consequently, the purchaser takes subject to the interest, irrespective of whether he actually knew of it or would have had notice of it according to the equitable doctrine of notice.²⁹ In substance, it is the fact of registration which ensures the priority of the charge against a purchaser of the legal estate for money or money's worth.

Failure to register some classes of these instruments or matters renders them void against purchasers of a legal estate for money or money's worth; failure to register other classes renders them void against purchasers who for any valuable consideration (whether money, money's worth or marriage) take any interest, legal or equitable, in the land. It is further provided that a purchaser is not prejudicially affected by actual or constructive notice of an unregistered instrument or matter which under the Land Charges Act 1972 is void for want of registration.³⁰

Set out below are the main interests that are void only as against a purchaser of a legal estate for money or money's worth if not registered before completion of the purchase.³¹ There is no requirement that the consideration be adequate and it may even be nominal.³²

- (1) An estate contract;
- (2) a restrictive covenant entered (other than one made between a lessor and lessee) entered into after 1925;
- (3) an equitable easement, right or privilege over or affecting land created or arising after 1925³³;
- (4) petitions in bankruptcy and bankruptcy orders.

The following are the principal matters which are void against a purchaser for value of any interest in the land³⁴ if not registered before completion of the purchase. In the case of pending actions there is an additional requirement that the purchaser does not have express notice of the interest claimed.

- (1) A legal mortgage other than one protected by a deposit of documents relating to the legal estate affected;
- (2) a general equitable charge;
- (3) a charge under Pt IV of the Family Law Act 1996 protecting a spouse's or civil partner's right to occupy a matrimonial home;
- (4) pending actions, writs and orders.

4-011 (b) Local Land Charges Act 1975. Registration of a local land charge in the appropriate register constitutes actual notice of the charge and its contents to all

²⁹ *Coventry Permanent Economic Building Society v Jones* [1951] 1 All E.R. 901 at 904; *Hollington v Rhodes* [1951] 2 All E.R. 578; *Buckley v SRL Investments* (1971) 22 P. & C.R. 756 at 764, 768; *Midland Bank Trust Co Ltd v Green* [1981] A.C. 513 (HL); *Markfaith Investment v Chiap Hua Flashlights* [1991] 2 A.C. 43 at 60.

³⁰ See LPA 1925 s.199(1)(i).

³¹ LCA 1972 ss.2, 4(6) 5(8), 6(5)(6).

³² *Midland Bank Trust Co Ltd v Green* [1981] A.C. 513 (sale of farm worth £40,000 for £500).

³³ "Right or privilege" have been restrictively construed and do not include a right to take possession after requisitioning (*Lewisham BC v Maloney* [1948] 1 K.B. 50); the right of a lessee to remove a building or other fixture (*Poster v Slough Estates Ltd* [1969] 1 Ch. 495); an equitable right of entry attached to an assignment of a lease (*Shiloh Spinners Ltd v Harding* [1973] A.C. 691); or an equity in the nature of an easement created by estoppel (*ER Ives Investments Ltd v High* [1967] 2 Q.B. 379). The binding nature of all these interests depends on the general law doctrines of notice.

³⁴ LCA 1972 ss.2, 4(5) 5, 6.

persons. To this extent, the system of local land charges registration is consistent with that under the Land Charges Act 1972. However, the failure to register the notice does not affect its enforceability against any purchaser of the land.³⁵ The charge will take priority over the interest which he acquires. The purchaser instead becomes entitled to compensation for any loss suffered by him in consequence of the failure to register the charge. This result illustrates how the priority of a land charge depends on the basic rule of first in time priority, rather than on any system based on notice.

3. Charges by Companies

Some classes of charges by companies registered under the Companies Act 2006 are void against the liquidator, administrator or any creditor of the company to the extent of any security on the company's property, though not as to the debt, unless the charge is registered with the Registrar of Companies.³⁶ The classes include charges on land, charges on book debts and floating charges.³⁷

Thus if a mortgage by a company is not registered it is void against a subsequent registered mortgagee even if he had express notice of it when he took his own security.³⁸ Conversely, if the mortgage is registered it ordinarily takes priority over a subsequent registered mortgage even if the first mortgage is equitable and the second legal because registration constitutes constructive notice of the first charge.³⁹

Apart from floating charges over unregistered land,⁴⁰ any charge which is registrable as a charge on registered land under the Land Registration Act 2002, or as a land charge under the Land Charges Act 1972, or must also be registered under those Acts.

3.— OVERREACHING⁴¹

1. Meaning of Overreaching

Overreaching is an incident of a trustee's equitable authority to make dispositions of the trust property. Its primary effect is to subordinate the interest of the beneficiary under the trust to the interest acquired by the donee from the trustee. The donee therefore takes his interest in the property entirely free of, or in priority to, the beneficiary's interest. A secondary effect of overreaching is that the beneficiary of the trust may take an interest in any proceeds arising from the disposition of the original property. In substance, therefore, it may seem that the overreaching has the effect of transposing the beneficiary's equitable interest in the original asset to any proceeds of it. Overreaching promotes the free alienability of property by allowing the trustee to dispose of property clear of the trust or to use the trust property as effective security.⁴²

³⁵ Local Land Charges Act 1975 s.10(1).

³⁶ Companies Act 2006 s.889.

³⁷ See Companies Act 2006 s.878 for the full list.

³⁸ *Re Monolithic Building Co* [1915] 1 Ch. 643.

³⁹ *Wilson v Kelland* [1910] 2 Ch. 306.

⁴⁰ See LCA 1972 s.3(7). Before 1970 no land charge for securing money created by a company over unregistered land was required to be registered in the land charges register.

⁴¹ For a full treatment see C. Harpum, "Overreaching Trustees' Powers and the reform of the 1925 Legislation" [1990] C.L.J. 277; P. Birks and A. Pretto, *Breach of Trust*, (Oxford: Hart Publishing, 2002), Ch.4; R.C. Nolan, "Property in a Fund" (2004) 120 L.Q.R. 108, 113.

⁴² See *City of London Building Society v Flegg* [1988] A.C. 54 at 73, 74.

The effect of overreaching may be illustrated by a case where a trust corporation transfers land held on trust to a purchaser. The beneficiary's equitable title to the land is subordinated to the legal title of the purchaser and effectively extinguished against him and all successors in title. The purchaser takes the land clear of the trust and the trustee holds the sale proceeds on trust for the beneficiary. Similar principles apply in a case where the trust corporation grants a legal mortgage charge over the land. The priority of the trust is postponed to the charge. The beneficiary would take an equitable interest in any proceeds of the mortgage advance. If the chargee were to exercise its power of sale over the property, it would recover the amount of its security in priority to the beneficiary's equitable claim to the sale proceeds.⁴³ If the conveyance is effective to overreach the beneficiary's interest, it is unnecessary to consider whether in the case of registered land the disponee is in actual occupation of the land, or, in the case of unregistered land, whether the disponee takes with notice of the beneficiary's interest. The general law rules of priority presuppose the capacity of a trustee to enter into effective overreaching conveyances.

A trustee may overreach interests in all kinds of property, though special limitations apply to the overreaching of interests in real property. Properly understood, overreaching is consistent with the general rule that the priority of interests depends on the order in which they are created. The beneficiary's interest under the trust is limited from the outset by the trustee's power to overreach. Accordingly, nothing in a trustee's power to overreach conflicts with the principle *nemo dat quod non habet*.⁴⁴

Similar powers to overreach interests and powers in land vest in the tenant for life under the Settled Land Act 1925, a mortgagee or personal representative in the exercise of his paramount powers, or take effect when a conveyance of land is made under an order of the court.

2. Overreaching Conveyances of Land⁴⁵

4-014 The overreaching effect of conveyances of land is dealt with in the Law of Property Act 1925.⁴⁶ A conveyance to a purchaser of a legal estate for money or money's worth will overreach certain legal estates, and any equitable interest or power affecting the estate if the conveyance is made:

- (i) under the Settled Land Act 1925; or
- (ii) by trustees of land; or
- (iii) by a mortgagee⁴⁷ or personal representative⁴⁸ in the exercise of his paramount powers; or
- (iv) under an order of the court

provided that the legal estate or equitable interest or power is one of those which are capable of being overreached by the conveyance, and that any capital money arising from the transaction is paid:

- (a) in cases (i) and (ii) to the trustees, who must be at least two in number, or a trust corporation; and
- (b) in case (iii) to the mortgagee or personal representative; and

⁴³ *City of London Building Society v Flegg* [1988] A.C. 54.

⁴⁴ See R.C. Nolan, "Property in a Fund" (2004) 120 L.Q.R. 108 at 113.

⁴⁵ For a full treatment of the limitations on overreaching of interests in land, see Megarry and Wade, *Law of Real Property*, edited by C. Harpum, S. Bridge, M. Dixon, 8th edn (2012), paras 6-047-6-056.

⁴⁶ LPA 1925 s.2 as amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch.3.

⁴⁷ See para.39-034.

⁴⁸ See para.33-013.

(c) in case (iv) into, or in accordance with the order of, the court.

(a) **Settled land and trusts of land.** A conveyance by a tenant for life under the Settled Land Act 1925 will pass the land to the purchaser free from the equitable interests of persons entitled under the settlement.⁴⁹ A conveyance by trustees of land will pass the land to the purchaser free from the equitable interests of the persons entitled under the trust instrument⁵⁰ whether the purchaser knows of them or not. In addition, it is further provided⁵¹ that, if the trustees of land are either two or more individuals approved or appointed by the court or their successors in office, or a trust corporation, a conveyance by the trustees will overreach even equitable interests which have priority to the trust of land, i.e. equitable interests which were in existence when the trust of land was created. However, there are so many equitable interests which are excepted from this provision⁵² (e.g. restrictive covenants and most interests protected by registration under the Land Charges Act 1972) that this overreaching power and the corresponding provision for settled land⁵³ are of little practical importance.

(b) **Mortgages.** Special provisions in the Law of Property Act 1925 apply to overreaching by mortgagees. A mortgagee exercising his paramount powers of sale may overreach the interest of the mortgagor to that of the purchaser.⁵⁴ This ensures that the purchaser from the mortgagee takes free of any surviving interest of the mortgagor. It may also happen that the mortgage is held on trust. In this case, a person dealing in good faith with a mortgagee (or with the mortgagor if the mortgage has been discharged, released or postponed as to the whole or any part of the mortgaged property) is not concerned with any trust at any time affecting the mortgage money, whether or not he has notice of it.⁵⁵ This provision does not affect the liability to give effect to the trust of any person in whom the mortgage debt is vested. Its object is merely to prevent purchasers of property from being affected by notice of equitable interests relating to money lent on mortgage of the property; it does not affect the priority of such equitable interests *inter se*.⁵⁶

4. — THE BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE

An important qualification to the basic rule of first in time priority of interests is the doctrine of the bona fide purchaser without notice, which demonstrates a fundamental distinction between legal and equitable interests in some kinds of property.⁵⁷

1. The Doctrine

(a) **General.** The doctrine is most easily understood by an example taken from a disposition of unregistered land. A legal estate or interest was generally enforceable against any person who took the property, whether or not he had notice of it. This followed from the basic rule of priority that interests in property rank in the order in which they were created. If V sold to P land over which W

⁴⁹ Settled Land Act 1925 s.72.

⁵⁰ LPA 1925 s.27, as amended by TLATA 1996 Sch.3.

⁵¹ LPA 1925 s.2(2).

⁵² LPA 1925 s.2(3).

⁵³ SLA 1925 s.21.

⁵⁴ LPA 1925 s.2(1)(iii).

⁵⁵ LPA 1925 s.113.

⁵⁶ *Beddoes v Shaw* [1937] Ch. 81.

⁵⁷ *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1995] 1 W.L.R. 978 at 1001.

had a legal right of way, P took the land subject to W's right even if he was ignorant of it. But, historically, it was different for equitable rights: a bona fide purchaser for valuable consideration who obtained a legal estate at the time of his purchase without notice of a prior equitable right was entitled to priority in equity as well as at law.⁵⁸ He took free of the equitable interest. In such a case equity followed the law; the purchaser's conscience was in no way affected by the equitable right so there was no justification for invoking the jurisdiction of equity against him. Where there was equal equity the law prevailed.⁵⁹

The onus lay on the purchaser to prove that he was a bona fide purchaser for value and also that he took without notice of the equitable interest.⁶⁰

4-019 (b) **Its scope.** The scope of application of the doctrine is now much reduced in relation to dealings with land. With two exceptions, it has no place in determining the priority of interests in registered land.⁶¹ Even in relation to unregistered land, the effect of the doctrine has been curtailed by the system of land charges registration.⁶² The result has been to replace the general law doctrine of notice by a system of statutory notice by registration.

The doctrine retains its main importance in determining the priority of equitable interests affecting a right of legal ownership in personal property, such as money, shares and chattels. The reader should bear this point in mind in considering the material in this section. Many of the authorities on the doctrine concern dealings in land. They are now mainly relevant as analogies illustrating the application of the doctrine to dealings in other kinds of property. For a complete account of the doctrine as it applied to dealings in land the reader should refer to an earlier edition of this work.⁶³

4-020 (c) **Illustrations.** Suppose that T, a trustee, wrongfully transfers shares to a person P, who is not entitled to receive them. Since the disposition is unauthorised by the terms of the instrument, the equitable interest of B, the beneficiary under the trust, will not be overreached. Prima facie, it will bind P since B's interest arose before the legal title in the shares was transferred to P. But if P has acquired the legal title bona fide for value without notice, he has an equity to retain the legal interest in the shares equal to B's right to enforce his equitable claim to it, and therefore the court will refuse to give B any relief as against P.

⁵⁸ *Pilcher v Rawlins* (1871-72) L.R. 7 Ch. App. 259; *Macmillan Inc v Bishopsgate Investment Trust Plc (No.3)* [1995] 1 W.L.R. 978 at 1000.

⁵⁹ F.W. Maitland, *Equity* (Cambridge: Cambridge University Press, 1909), pp.117-119; *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 (HL) at 705.

⁶⁰ *Attorney General v Biphosphated Guano Co* (1879) 11 Ch.D. 327 at 337; *Re Nisbet and Potts' Contract* [1905] 1 Ch. 391 at 402; on appeal [1906] 1 Ch. 386 at 404, 409, 410; *Wilkes v Spooner* [1911] 2 K.B. 473 at 486; *GL Baker Ltd v Medway Building and Supplies Ltd* [1958] 1 W.L.R. 1216; petition to HL dismissed [1959] 1 W.L.R. 492; *Heneghan v Davitt* [1933] I.R. 375 at 377, 379; *Northern Bank Ltd v Henry* [1981] I.R. 1 at 19; but see *Re Hardy Ex p. Hardy* (1832) 2 Deac. & Ch. 393; *Corser v Cartwright* (1874-75) L.R. 7 H.L. 731 at 739, 741, 743; *Burkinshaw v Nicolls* (1878) 3 App. Cas. 1004; *Union Bank of Australia Ltd v Murray-Aynsley* [1898] A.C. 693 and *Shears v Wells* [1936] 1 All E.R. 832.

⁶¹ See para.4-008.

⁶² See para.4-010.

⁶³ See the 30th edition of this work paras 4.13-4.26.

In the application of the doctrine of the bona fide purchaser without notice, the following points must be considered.

2. Bona Fides

The formulation of the rule suggests that there is a distinct requirement that the purchaser is in good faith. Indeed it has been said that it is still necessary to show good faith even if the absence of notice is proved.⁶⁴ However, in view of the development of the doctrine of notice it is difficult to imagine a case in which the purchaser does not have notice and yet is not acting in good faith.

4-021

3. Purchaser for Value

A purchaser is a person who acquires an interest in property by grant rather than operation of law.⁶⁵ Thus it does not include a squatter,⁶⁶ a trustee in bankruptcy⁶⁷ or an execution creditor.⁶⁸

4-022

The purchaser must have given some value in the form of executed consideration. A promise to perform will only count as value to the extent that the purchaser has actually acted on his promise.⁶⁹ A volunteer does not become a purchaser for value merely because he undertakes to use the property which has been given to him in a particular way.⁷⁰ Although it need not be shown that the consideration was adequate,⁷¹ it seems that a nominal consideration is not sufficient.⁷² The satisfaction of an existing debt is sufficient value to support the defence⁷³ as is the promise of marriage.⁷⁴

4. Legal Interest

(a) **The rule.** The purchaser must generally have obtained the legal interest in the property. In the case of chattels this would be the right of legal ownership,⁷⁵ and in case of choses in action the right to sue at law on the claim.⁷⁶ The purchaser

4-023

⁶⁴ *Midland Bank Trust Co Ltd v Green* [1981] A.C. 513 at 528 per Lord Wilberforce; and see *Pilcher v Rawlins* (1871-72) 7 L.R. Ch. App. 259 at 269; *Oliver v Hinton* [1899] 2 Ch. 264; *Taylor v London and County Banking Co* [1901] 2 Ch. 231 at 256. cf. *Le Neve v Le Neve* (1747) Amb. 436 at 445 where Lord Hardwicke appears to treat bona fides and lack of notice as the same.

⁶⁵ *Inland Revenue Commissioners v Gribble* [1913] 3 K.B. 212 (CA) at 218; *H L Bolton (Engineering) Co Ltd v T J Graham & Sons Ltd* [1957] 1 Q.B. 159 at 170; *Nurdin & Peacock v DB Ramsden* [1999] 1 E.G.L.R. 119 at 122.

⁶⁶ *Re Nisbet and Potts' Contract* [1906] 1 Ch. 386.

⁶⁷ *Madell v Thomas & Co* [1891] 1 Q.B. 230 at 238.

⁶⁸ *Beavan v Earl of Oxford* (1856) 6 De G. M. & G. 507 at 517.

⁶⁹ *Tourville v Naish* (1734) 3 P. Wms. 307; *Hardingham v Nicholls* (1745) 3 Atk. 304, recently applied in *Taylor Barnard Ltd v Tozer* [1984] 1 E.G.L.R. 21.

⁷⁰ *Re Diplock's Estate* [1947] Ch. 716 at 781-785; [1948] Ch. 465 at 545.

⁷¹ *Bassett v Nosworthy* (1673) Rep. t. Finch 102.

⁷² *Nurdin & Peacock v D B Ramsden* [1999] 1 E.G.L.R. 119; but cf. *Midland Bank Trust Co Ltd v Green* [1981] A.C. 513 at 531-532 (meaning of valuable consideration in Land Charges Act 1925).

⁷³ *Thorndike v Hunt* (1859) 3 De G. & J. 563; *Taylor v Blakelock* (1886) 32 Ch.D. 560 at 568, 570.

⁷⁴ *Salih v Atchi* [1961] A.C. 778 at 793.

⁷⁵ Query whether a bailee taking the legal possession of chattels as a bona fide purchaser without notice took his possession free of the equitable interest.

⁷⁶ With real property, the rule applied to the acquisition of a legal estate, whether a freehold or legal term of years (e.g. *Goodright on the demise of Humphreys v Moses* (1775) 2 Wm. Bl. 1019), and to other legal interests such as legal mortgage (e.g. *Kingsnorth Finance Co Ltd v Tizard* [1986] 1

CHAPTER 15

RESCISSION

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1.— NATURE

Rescission properly so-called involves the extinction of a contract and the restoration of the parties to their original positions.¹ The basis for the remedy is the election of a party whose consent to the formation of the contract was vitiated in one way or another, for example by a misrepresentation.² Similar but distinct remedies developed at law and in equity. Owing to its greater flexibility, the equitable remedy is now predominant except in relation to executory contracts, insurance and the sale of goods. 15-001

¹ See generally O'Sullivan, Elliott, Zakrzewski, *The Law of Rescission*, 2nd edn (OUP, 2014).

² Like principles apply to other types of transaction such as gifts.

2.— RELATION TO OTHER DOCTRINES

1. Termination for Breach

15-002 Rescission must be distinguished from termination for breach, which is sometimes but improperly also called rescission.³ Rescission responds to defects in the formation of contracts whereas termination responds to defects in performance. In the case of rescission all unperformed obligations are extinguished, as are secondary obligations to pay damages for intervening breaches of contract. Termination for breach, on the other hand, results in the extinction of contractual obligations which have not yet accrued, but obligations which have already accrued unconditionally remain enforceable,⁴ including secondary obligations to pay damages for breach.⁵ Further, title to property transferred under the contract will not usually revert upon termination and money already paid unconditionally will only exceptionally be recoverable, for example where the consideration for the payment has totally failed. The recovery of title and the repayment of money are, by contrast, routine consequences of rescission.

2. Void and Ineffective Contracts

15-003 A contract liable to be rescinded is voidable not void, and the right to rescind is the only qualification to its enforceability. Such a contract is effective to confer rights and obligations and to pass title to property. By contrast an apparent contract that is void never has any validity or effect. This may be, for example, because of a sufficiently fundamental common mistake,⁶ or because of a successful plea of non est factum,⁷ or because of statutory prohibition. No rights and obligations arise and title to property cannot pass by force of the terms of a void contract. Different rules govern the restitution of assets and other benefits transferred pursuant to an avoided contract and those transferred in purported conformity with a void contract.

Voidable contracts must also be distinguished from contracts which are ineffective in equity, for example a contract made by an agent whose lack of authority was known to the counterparty. In the case of a voidable contract, rights and obligations are effective unless and until the contract is avoided, whereas an ineffective contract creates no rights and obligations unless and until the contract is ratified. Similarly, a voidable contract is effective to pass title to property although that title may be recovered by rescinding the contract. By contrast, where a contract is ineffective in equity, beneficial title to assets transferred under it remains with the transferor, although the transferor may subsequently choose to vest beneficial title in the transferee by ratifying the transaction.

³ *Johnson v Agnew* [1980] A.C. 367, at 397; *Hurst v Bryk* [2002] 1 A.C. 185, at 193–94; *Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea)* [2003] 1 A.C. 469, at 494; *Howard-Jones v Tate* [2012] All E.R. 369 (CA).

⁴ *Lep Air Services Ltd v Rolloswin Investments Ltd* [1973] A.C. 331, at 354–55; *Johnson v Agnew* [1980] A.C. 367, at 397; *Photo Productions Ltd v Securicor Transport Ltd* [1980] A.C. 827, at 844, 849.

⁵ *Hurst v Bryk* [1999] Ch. 1 (CA) at 21–22; [2002] 2 A.C. 185, at 193–94, 199.

⁶ *Bell v Lever Bros Ltd* [1932] A.C. 161; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] Q.B. 679 (CA).

⁷ *Saunders v Anglia Building Society* [1971] A.C. 1004.

3.— GROUNDS

1. Misrepresentation

15-004 Rescission has long been available for fraudulent misrepresentation both at law and in equity.⁸ The common law has never, however, recognised non-fraudulent misrepresentation as giving a right to rescind except in the special case of insurance. The courts of equity granted relief in a wider class of cases before the Judicature reforms, and it was finally settled in *Redgrave v Hurd* that rescission lies in equity in cases of purely innocent misrepresentation.⁹

Rescission may therefore be available where (a) there was a relevant representation, (b) it was made by the other party or with their knowledge, (c) the representation was false, and (d) the representation was relied upon by the rescinding party in deciding to transact. A presumption of reliance arises where the representation was material such that the onus falls on the representor to disprove reliance by the representee.¹⁰ A representation is material if it would influence the judgment of a reasonable person.¹¹ In cases of fraud materiality is not necessary provided reliance can be positively proved,¹² but it is open to debate whether there are circumstances in which reliance on an immaterial innocent misrepresentation will support a claim to rescind.¹³

Contracts induced by fraudulent misrepresentation are especially vulnerable to rescission. For instance:

- 1) misrepresentations of opinion, intention and law may suffice where they would not in a case of innocent misrepresentation¹⁴;
- 2) the misrepresentation need not be material and there is a more generous test of reliance and causation¹⁵;
- 3) in cases of fraud it may be possible to rescind without the need to apply to the court¹⁶;
- 4) the bars to rescission, particularly the restitutio in integrum impossible bar, are applied more liberally; and

⁸ The elements of fraudulent misrepresentation are set out in Ch.8 above.

⁹ *Redgrave v Hurd* (1881) 20 Ch.D. 1 (CA).

¹⁰ *Mathias v Yetts* (1882) 46 L.T. 497 (CA), at 502; *Smith v Land and House Property Corp* (1884) 28 Ch.D. 7 (CA), at 16; *Smith v Chadwick* (1884) 9 App.Cas. 187, at 196; *Barton v County NatWest Ltd* [1999] Lloyd's Rep. Bank 408 (CA); *Dadourian v Simms* [2009] 1 Lloyd's Rep. 601 (CA), at [99]–[101].

¹¹ *Smith v Chadwick* (1882) 20 Ch.D. 27 (CA), at 44, on appeal (1884) 9 App.Cas. 187, at 196; *Lonrho Plc v Fayed (No.2)* [1992] 1 W.L.R. 1 (CA), at 6; *Downs v Chappell* [1996] 3 All E.R. 344, at 351.

¹² *Smith v Kay* (1859) 7 H.L.C. 750; *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 501, at 533.

¹³ See the discussion in O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 2nd edn (2014) [4.65]ff. It is clear that reliance on an immaterial innocent misrepresentation will not support rescission of an insurance policy: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 A.C. 187.

¹⁴ For example *West London Commercial Bank v Kitson* (1884) 13 Q.B.D. 360 (CA), at 363; *Edgington v Fitzmaurice* (1885) 29 Ch.D. 459 (CA), at 483; *Angus v Clifford* [1891] 2 Ch. 449 (CA), at 470.

¹⁵ *Edgington v Fitzmaurice* (1885) 29 Ch.D. 459 (CA), at 481, 483; *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and Sibotre)* [1976] 1 Lloyd's Rep. 293, at 324; *Downs v Chappell* [1997] 1 W.L.R. 426 (CA), at 433; *UCB Corporate Services Ltd v Williams* [2002] 3 F.C.R. 448 (CA), at [86], [89]; *Standard Chartered Bank v Pakistan National Shipping Corp (No.2)* [2003] 1 A.C. 959, at 967; *Raiffeisen Zentralbank Osterreich AG v The Royal Bank of Scotland Plc* [2011] 1 Lloyd's Rep 123, at 143–200 (a damages case).

¹⁶ See para.15-011 below.

- 5) the statutory discretion afforded by s.2(2) of the Misrepresentation Act 1967 to award damages in lieu of rescission does not apply in cases of fraud.

2. Non-Disclosure

15-005 There is normally no duty to volunteer information during the negotiations leading to the conclusion of a contract,¹⁷ and where that is so the failure to disclose material facts will not give a right to rescind.¹⁸ It sometimes happens that the course of pre-contractual negotiation is such that one party's silence may be said to amount to a misrepresentation, for example where a medical practitioner's representation about the vitality of their practice became false when the practice diminished in the months preceding its sale.¹⁹ It is a fine point, but in such cases the ground for rescission is misrepresentation notwithstanding that disclosure would have cured it.

Exceptionally, non-disclosure is a ground for rescission in relation to contracts of insurance of all types, and also in relation to surety contracts and family arrangements.²⁰ Contracts of insurance are said to be contracts *uberrimae fide* and rescission will lie if either party fails to disclose facts material to the decision to place or accept the risk or the insurer's assessment of the premium.²¹ Thus, if a proposing assured fails to disclose that there are rumours circulating about its financial probity, that will entitle the other party to rescind even where it becomes known that those rumours are unfounded.²² The rescission of insurance policies is something of a special case and, before Judicature, the common law courts and Chancery exercised a coordinate jurisdiction.²³ Recent decisions have established that the court has no discretionary equitable jurisdiction to control the exercise of a right to rescind insurance policies.²⁴ As to surety contracts, there is no general duty to disclose material facts to the intending surety but the creditor does owe a limited duty to disclose unusual features of the contract between the creditor and the debtor or between the creditor and other creditors of the debtor.²⁵ The category of family arrangements is in practice now virtually obsolete.²⁶

¹⁷ *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1990] 1 Q.B. 665 (CA), at 798.

¹⁸ *Bell v Lever Bros Ltd* [1932] A.C. 161, at 227.

¹⁹ *With v O'Flanagan* [1936] Ch. 575 (CA).

²⁰ In fiduciary cases governed by the fair dealing rule, non-disclosure is not the ground for rescission, although full disclosure may save the transaction.

²¹ As to the duty of proposing assureds, see Marine Insurance Act 1906 s.18(2), stating a test which has been held to apply to all forms of insurance; *Locker and Woolfe Ltd v Western Australian Insurance Co Ltd* [1936] 1 K.B. 408 (CA), at 415. Exceptions to the disclosure obligation of a proposing assured are enumerated in s.18(3) of the Marine Insurance Act 1906. As to the duty of proposing insurers, see *Banque Keyser Ullmann SA v Skandia (UK) Insurance Co Ltd* [1991] 2 A.C. 249, at 268.

²² *Brotherton v Asegurada Colseguros SA (No.2)* [2003] 2 All E.R. (Comm) 298 (CA).

²³ *Hoare v Bembridge* (1872) 8 Ch.App. 22.

²⁴ *Brotherton v Asegurada Colseguros SA (No.2)* [2003] 2 All E.R. (Comm) 298 (CA); *Drake Insurance Plc v Provident Insurance Plc* [2004] Q.B. 601 (CA).

²⁵ *Hamilton v Watson* (1845) 12 Cl. & F. 109 (HL(Sc)) at 119; *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 A.C. 773, at 812, 848; *North Shore Ventures Ltd v Anstead Holdings Inc* [2012] Ch. 31 (CA), at [14].

²⁶ Although there are a few modern cases: see *Wales v Wadham* [1977] 1 W.L.R. 199; *Crowden v Aldridge* [1993] 1 W.L.R. 433, at 443; and *Bank of Credit and Commerce International SA v Ali* [1999] 1 R.C. 1068, at 1077-78.

3. Mistake

Common mistake is no longer thought to be a ground for rescission; if it operates at all, it is to make the contract void not voidable.²⁷ Where only one party is mistaken and that is known to the other, the result may be that the parties are so much at cross purposes that they fail to conclude an effective contract notwithstanding that they might appear objectively to have agreed terms, for example where the mistake relates to the terms of the contract or the identity of the counterparty.²⁸ But if the parties succeed in contracting, there is no jurisdiction to rescind the contract for unilateral mistake. Rescission was, for example, unavailable where one party to an agreement settling an amount of demurrage due knew that the other had based its calculations on a mistaken assumption as to the date on which the ship had finished unloading and decided to say nothing.²⁹

Gifts, gratuitous settlements and other gratuitous dispositions are more vulnerable to rescission and can be rescinded where there was a causative unilateral mistake which was so grave that it would be unconscionable to refuse relief.³⁰ This test will normally only be satisfied where there was a mistake either as to the legal character or nature of the transaction or as to some matter of fact or law which was basic to the transaction. A mistake as to the tax consequences of a transaction may, in an appropriate case, be sufficiently grave to warrant rescission.

4. Fiduciary Misdealing and Bribery

15-007 Where a fiduciary contracts with their principal, the transaction is liable to be rescinded unless the fiduciary can positively prove that the principal consented to the adverse interest and that disclosure was made of all facts material to the principal's decision.³¹ Absent a clear limitation on the fiduciary's retainer,³² the same standard applies where a fiduciary is doubly employed by two principals who contract with each other.

Allied to this, contracts procured by bribery may be rescinded,³³ and special presumptions assist claimants in such cases.³⁴ However, if a suborned agent purports to conclude a contract on behalf of their principal (as opposed to the

²⁷ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2003] Q.B. 679 (CA), departing from *Solle v Butcher* [1950] 1 K.B. 671 (CA).

²⁸ Mistake as to terms: *Woodhouse AC Israel Cocoa Ltd v Nigerian Produce Marketing Co* [1972] A.C. 741, at 768; *Hartog v Colin & Shields* [1939] 3 All E.R. 566; *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] 2 Lloyd's Rep. 685, at [87]-[88], [96]. Mistake as to identity: *Cundy v Lindsay* (1878) 3 App.Cas. 459.

²⁹ *Statoil ASA v Louis Dreyfus Energy Services LP (The Harriette N)* [2008] 2 Lloyd's Rep. 685, at [98]-[105], declining to follow obiter dicta in *Huyton SA v Distribuidora Internacional de Productos Agrícolas SA de CV* [2003] 2 Lloyd's Rep. 780, at [455].

³⁰ *Ogilvie v Littleboy* (1897) 13 T.L.R. 399 (CA) at 400, affirmed *Ogilvie v Allen* (1899) 15 T.L.R. 294 (HL); *Pitt v Holt* [2013] 2 A.C. 108.

³¹ See Ch.7 above.

³² As to which compare *Kelly v Cooper* [1993] A.C. 205 (PC) with *Hilton v Barker Booth and Eastwood* [2005] 1 All E.R. 651 (HL), and see also *Rosetti Marketing Ltd v Diamond Sofa Co Ltd* [2013] Bus. L.R. (CA), at [27], which is not a double employment case.

³³ *Panama and South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) L.R. 10 Ch.App. 515; *Logicrose Ltd v Southend United Football Club* [1988] 1 W.L.R. 1256; and see *Hurstanger Ltd v Wilson* [2008] Bus. L.R. 216 (CA), where bribery is distinguished from lesser breaches of fiduciary duty by reason of the secrecy it involves. The elements of bribery were authoritatively enumerated in *Industries and General Mortgage Co Ltd v Lewis* [1949] 2 All E.R. 573, at 575.

³⁴ For example an irrebuttable presumption that the agent was influenced by the bribe: *Hovenden & Sons v Millhof* (1900) 83 L.T. 41 (CA), at 43.

principal contracting at the agent's instance) then they will do so without authority and it appears that the contract is of no effect unless the principal chooses to ratify it,³⁵ so that there is no need to rescind.

5. Undue Influence, Duress and Unconscionability

15-008 Rescission is available in equity in cases of undue influence and at common law in cases of duress. Undue influence may be shown to have been actually applied, or else the claimant may succeed by proving a relationship of influence, in which case a presumption of undue influence arises which it is for the defendant to rebut.³⁶ Duress depends on proof (a) of illegitimate pressure arising from a threat coupled with a demand, (b) that the effect of the pressure was to cause coercion in the sense of an absence of practical choice, and (c) that the pressure was a sufficient cause of the victim's entry into the transaction.³⁷ Unconscionable bargains may also be rescinded,³⁸ as may contracts concluded by a party suffering from impaired capacity provided only that the other party knew of the impairment.³⁹

6. Third Party Wrongdoing

15-009 Where a third party, C, wrongfully causes A to contract with B, the contract will only be liable to be set aside (a) if C was B's agent acting within the scope of B's actual or apparent authority,⁴⁰ or else (b) if B actually knew of the factual circumstances that are treated by the court as vitiating A's consent, such as a material misrepresentation or a relationship between A and C sufficient to raise a presumption of undue influence.⁴¹ Gifts and other gratuitous dispositions procured by third party wrongdoing may, however, be set aside without proof of knowledge on the part of the donee.⁴²

A special principle recently fashioned by the House of Lords applies to surety transactions where the creditor knew that the relationship between the surety and the debtor was non-commercial and the transaction was not on its face financially

³⁵ *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep. Bank 511 (CA), at 521, and see 533; see also O'Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 2nd edn (2014) [1.85]ff.

³⁶ See Ch.8 above.

³⁷ *DSND Subsea Ltd v Petroleum Geoservices ASA* [2000] B.L.R. 530, at 545; *Carillion Construction Ltd v Felix (UK) Ltd* [2001] B.L.R. 1. The identification of elements in these cases has been followed in numerous subsequent cases.

³⁸ See Ch.8 above. Trial judges have disagreed about whether the same is true of unconscionable gifts: compare *Langton v Langton* [1995] 2 F.L.R. 890 with *Evans v Lloyd* [2013] W.T.L.R. 1137.

³⁹ *Hart v O'Connor* [1985] A.C. 1000 (PC); *Barclays Bank Plc v Schwartz*, *The Times*, August 2, 1995 (CA).

⁴⁰ *Lynde v Anglo-Italian Hemp Spinning Co* [1896] 1 Ch. 178, at 182-83; *Goldrei, Foucard & Son v Sinclair* [1918] 1 K.B. 180 (CA); *Anglo-Scottish Sugar Beet Corp Ltd v Spalding UDC* [1937] 2 K.B. 607; *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep. 1, at 18-19; *Gordon v Selico Co Ltd* [1986] 1 E.G.L.R. 71 (CA), at 75; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep. 194 (CA), at 204; *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, at [57]. As to the test for determining whether a fraud was committed within the scope of an agent's authority, see *Dubai Aluminium v Salaam* [2003] 2 A.C. 366, at [23], [122] and [129].

⁴¹ *Bainbrigge v Browne* (1881) 18 Ch. 188, at 197; *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180, at 197; *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All E.R. 144 (CA), at 152; *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 A.C. 774, at [40], [144].

⁴² *Bridgeman v Green* (1755) 4 De. G. & J. 429, at 433-34; *Barron v Willis* [1900] 2 Ch. 121 (CA), at 133; *Bullock v Lloyds Bank Ltd* [1955] Ch. 317.

advantageous to the surety.⁴³ In these circumstances, the creditor will only avoid being fixed with constructive knowledge of any impropriety, and so avoid losing their security, by insisting that the vulnerable surety obtains independent legal advice subject to certain safeguards.⁴⁴

4.— SELF-HELP RESCISSION AND JUDICIAL RESCISSION

15-010 Before the Judicature reforms rescission operated differently depending whether it was asserted in the common law courts or in Chancery. The equitable variant now predominates owing to its greater flexibility, but the distinction persists. At law rescission operates as a self-help remedy such that the innocent party may rescind by communicating their election to do so, whereas a claimant whose rights are equitable must obtain the assistance of the court.

1. Self-help Rescission

15-011 The common law recognises rights to rescind in a limited class of cases including most saliently fraudulent misrepresentation, bribery, duress and non-disclosure in relation to insurance policies. Where the ground for rescission sounds at law, provided rescission has not become barred, the claimant has a power to bring the contract to an end by announcing their election to rescind. The bars to rescission, particularly the restitutio in integrum impossible bar, are applied quite strictly at law, so that self-help rescission is only available exceptionally outside of executory contracts and the insurance and sale of goods contexts.

Where a party with a legal power to rescind announces their election to do so, the consequences take effect automatically. The role of the court in such cases is to pronounce upon the efficacy of that election and give effect to its consequences by awarding judgment on claims and cross-claims for restitution of benefits that have previously passed under the contract. There is no scope for the exercise of judicial discretion in deciding whether to rescind or what the consequences should be.

The innocent party's election to rescind must usually be communicated to the other party by unequivocal words or conduct. An exception to the communication requirement was created in *Caldwell's* case which may be limited to cases where a fraudulent buyer of goods has made it impossible or impracticable for the defrauded seller to communicate with him.⁴⁵

2. Judicial Rescission

15-012 Equity recognises as grounds for rescission all or almost all of the grounds recognised at law as well as a number of others such as fiduciary misdealing, undue influence and innocent misrepresentation. The mechanism of rescission applied by equity differs markedly from the self-help mechanism developed by the common law courts. In equity, a contract or other transaction is only rescinded in accordance with the terms of a court order. The innocent party's equity to rescind is an entitlement to apply to the court for such an order. The contract remains in force until the order takes effect.

⁴³ *Barclays Bank Plc v O'Brien* [1994] 1 A.C. 180; *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] A.C. 773, at [41], [43]-[49], [87]. See Ch.8 above and Ch.36 below.

⁴⁴ *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] A.C. 773, at [56], [78]-[79], [171], [172]-[175], [189]. The creditor proceeds at their own risk, however, if they know that the solicitor has not duly advised the surety or knows facts from which they ought to realise that the surety has not received appropriate advice: [57].

⁴⁵ *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525 (CA); and see *Spriggs v Wessington Court Schools Ltd* [2005] 1 Lloyd's Rep. IR 474, at 483.

Notwithstanding a number of decisions which indicate that rescission always occurs by the act of the innocent party,⁴⁶ the foundational authorities presuppose the parallel operation of different mechanisms at law and in equity,⁴⁷ and recent authorities make clear that the judicial mechanism developed in Chancery continues to exist today.⁴⁸

When exercising the equitable jurisdiction, the court enjoys a discretion in deciding whether a contract should be rescinded. This discretion is guided by settled principles articulated over the years in the cases defining the various bars to rescission. If rescission has become barred, then the court will exercise its discretion to refuse relief; but if restitutio in integrum is possible, and rescission is not otherwise barred, then the claimant is entitled to rescission as a matter of right.⁴⁹

5. — EXCLUSION OF RESCISSION

1. Affirmation

15-013 Where a right of rescission exists, it will be lost if the person entitled to rescind elects to waive that right and affirm the contract after the material facts conferring the right have come to their notice or they are otherwise freed from the factor which vitiated their consent. Examples are where, with full knowledge of a fraud upon him, a person nevertheless takes a benefit under a contract or claims damages for its breach.⁵⁰ Both the facts which give rise to the right of rescission and the existence of that right must be fully known to the entitled party before they can be considered to have waived the right.⁵¹ Affirmation requires express words or unequivocal conduct,⁵² but an intention to affirm is not required.⁵³

2. Impossibility of Restitutio In Integrum

15-014 Rescission will be barred where restitutio in integrum is impossible.⁵⁴ Restitutio in integrum will only be possible where the party seeking rescission "is able to put those against whom it is asked in the same situation in which they stood when the

⁴⁶ *Reese River Silver Mining Co Ltd v Smith* (1869) L.R. 4 H.L. 64; *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] A.C. 773; *Horsler v Zorro* [1975] 1 Ch. 302, at 310; and more recently *Drake Insurance Plc v Provident Insurance Plc* [2003] Lloyd's Rep. IR 78, at [31]–[32]; *Brotherton Aseguradora Colseguros SA* [2003] 2 All E.R. (Comm) 298 (CA), at [27], [45]–[48]. See however *O'Sullivan* [2000] C.L.J. 509, arguing that self-help rescission should be abolished.

⁴⁷ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, at [1278]; *Spence v Crawford* [1939] 3 All E.R. 271 (HL(Sc)) at 290; *Alati v Kruger* (1955) 94 C.L.R. 216, at 223–24; *O'Sullivan v Management Agency and Music Ltd* [1985] Q.B. 428 (CA), at [45]; cf. *Halpern v Halpern* [2008] Q.B. 195 (CA).

⁴⁸ *Goldsworthy v Bricknell* [1987] Ch. 378 (CA) at 409–10; *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep. PN 309 (CA), at [32], [56]–[57], [78]–[79]; *Hurstanger Ltd v Wilson* [2008] Bus L.R. 216 (CA), at [48]–[51].

⁴⁹ *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 (CA), at 456; *Spence v Crawford* [1939] 3 All E.R. 271 (HL(Sc)) at 280.

⁵⁰ *Insurance Corp of the Channel Islands Ltd v The Royal Hotel Ltd* [1998] Lloyd's Rep. IR 151, at 161, 174.

⁵¹ *Peyman v Lanjani* [1985] Ch. 457 (CA). Where the claimant's ignorance is sufficient to defeat a defence of waiver, a defence based on acquiescence (or estoppel) may still succeed: *Habib Bank Ltd v Tufail* [2006] EWCA Civ 374, at [20].

⁵² *Clough v London and North Western Railway Co* (1871) L.R. 7 Ex. 26, at 34; *Abram Steamship Co Ltd v Westville Shipping Co Ltd* [1923] A.C. 773, at 779, 789; *Peyman v Lanjani* [1985] Ch. 457 (CA), at 501.

⁵³ *Scarfe v Jardine* (1882) 7 App.Cas. 345, at 361; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] A.C. 850, at 883.

⁵⁴ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278.

contract was entered into".⁵⁵ The concern of the bar is to protect the defendant from unjustified prejudice; that circumstances have changed such that it is no longer possible fully to restore the claimant will not preclude rescission.⁵⁶ In making their election, it is for the claimant to decide whether they are content to get back less than they gave. The bar is usually applied in cases where the party seeking rescission is unable to make satisfactory counter-restitution of what they have received, but it may also apply where the circumstances have changed in some other way such that the defendant would be unjustifiably prejudiced were the contract now set aside, particularly where the defendant has not been guilty of conscious wrongdoing.⁵⁷

The bar applies in relation to all of the grounds for rescission and whether rescission is sought at law or in equity.⁵⁸ However, the bar is applied more strictly at law than it is in equity.⁵⁹ As rescission at law occurs automatically upon the innocent party's communication of their election, rescission will only be possible where the circumstances are such that the other party is immediately and fully restored to their original position. There is no difficulty in the case of a purely executory contract, for the obligations are simply extinguished. Where instead the innocent party has received a benefit under the contract, rescission will only be possible either where the benefit is an asset that can be specifically returned and title to which can re-vest automatically,⁶⁰ or where the common law affords the defendant a claim to recover the benefit. For example, the mere fact money has been paid is not a bar because, upon rescission, whichever party has paid will acquire a claim against the other for restitution on the ground of total failure of consideration.⁶¹ If the claimant has enjoyed a benefit under the contract which cannot be returned, such as the intermediate possession of land,⁶² rescission will be barred at law.

Where rescission is barred at law, it may nonetheless be possible in equity owing to the greater flexibility the court enjoys in adjusting the positions of the parties. Restitutio in integrum will be possible in equity provided the court can achieve the practically just result of placing the defendant in as good a position as before, which is known as substantial restitutio in integrum.⁶³ Restitutio in integrum is achieved by putting the party seeking rescission on terms as a condi-

⁵⁵ *The Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. App. 145, at 164–65.

⁵⁶ *Spence v Crawford* [1939] 3 All E.R. 271 (HL(Sc)) at 279.

⁵⁷ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278–79; *Spence v Crawford* [1939] 3 All E.R. 271 (HL(Sc)) at 281–82.

⁵⁸ For example the bar has recently been held to apply in cases of duress: *Halpern v Halpern* [2008] Q.B. 195 (CA), at [72].

⁵⁹ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278.

⁶⁰ Completed contracts for the transfer of estates in land are not capable of rescission at law: *Feret v Hill* (1854) 15 C.B. 206, at 223–37; *Canham v Barry* (1855) 15 C.B. 597, at 611–12; *R. v Saddlers' Co* (1863) 10 H.L.C. 303, at 422; *Taylor v Chester* (1869) L.R. 4 Q.B. 309, at 311–12. Those cases all concerned unregistered land but the same rule applies by analogy to registered land, where rectification of the register is required or else the execution and deliverance of a registrable transfer. Similarly, rescission at law cannot re-vest shares other than bearer shares, for here again a register is determinative of legal title: *Civil Service Co-operative Society v Blyth* (1914) 17 C.L.R. 601, at 613; *Sons of Gwalia Ltd v Margaretic* (2007) 232 A.L.R. 232 (HCA), at [55].

⁶¹ For example *Clough v London and North Western Railway* (1871) L.R. 7 Ex. 26, at 37. However rescission will be barred where the claimant is insolvent such that all the other party would acquire is a claim in the insolvency: *Greater Pacific Investments Pty Ltd v Australian National Industries* (1996) 39 N.S.W.L.R. 143 (CA), at 151–52.

⁶² *Hunt v Silk* (1804) 5 East 449; *Blackburn v Smith* (1848) 2 Ex. 783; and see *Clark v Dickson* (1858) El. Bl. & Bl. 148.

⁶³ *Erlanger v The New Sombrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278; *Compagnie Franais des Chemins de Fer Paris-Orleans v Leeston Shipping Co* [1919] 1 Lloyd's Rep. 235, at

tion of the remedy,⁶⁴ for instance terms requiring the return of assets or payment of compensation for valuable improvements. In crafting such terms the court enjoys a discretion, although that discretion is confined to making adjustments designed to restore the parties to their original positions in light of event occurring after the contract came into force.⁶⁵

To illustrate, while it appears that any non-trivial alteration of goods will make restitutio in integrum impossible at law,⁶⁶ mere deterioration will not bar rescission in equity where a compensating allowance can be made.⁶⁷ However, rescission may be barred even in equity if the asset deteriorates after the claimant sufficiently learns of their rights but before they exercise them,⁶⁸ or where the asset has changed its very nature,⁶⁹ for example where a business has changed from an operator of licensed premises to substantially a property holding company.⁷⁰

Some benefits do not need to be restored upon rescission, for example:

- benefits which the rescinding claimant is unable to return because of the defendant's wrongdoing⁷¹;
- benefits the defendant was bound to confer in any event⁷²;
- assets that were always worthless⁷³; and
- premiums paid under a contract of marine insurance procured by fraud.⁷⁴

There is an as-yet ill defined class of circumstances in which a party wishing to rescind but who no longer has the asset in question can nonetheless make satisfactory counter-restitution by paying an equivalent sum of money.⁷⁵ To the extent this is so, the restitutio in integrum bar has no application at all.

3. Intervention of Third Party Rights

15-015 Rescission is barred where it would defeat rights which third parties have acquired without notice of the circumstances entitling the claimant to rescind.⁷⁶ Accordingly, while there is no special difficulty in rescinding a multipartite

⁶⁴ 238; *O'Sullivan v Management Agency and Music Ltd* [1985] 1 Q.B. 428 (CA), at 458, 456; *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA), at 136.

⁶⁵ *Sturgis v Champneys* (1839) 5 My. & Cr. 97, at 102; *Hanson v Keating* (1844) 4 Hare 1, at 4-5.

⁶⁶ *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA), at 137; *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (CA), at 434; *De Molestina v Ponton* [2002] 1 Lloyd's Rep. 271, at 287. Cf. *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 C.L.R. 102.

⁶⁷ *Udell v Atherton* (1861) 7 H.&N. 172.

⁶⁸ *Armstrong v Jackson* [1917] 2 K.B. 822, at 829.

⁶⁹ *Vigers v Pike* (1842) 8 Cl. & Fin. 562, at 650; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 (CA), at 433-34.

⁷⁰ *Clark v Dickson* (1858) El. Bl. & El. 148; *The Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. App. 145.

⁷¹ *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, at 587.

⁷² *Rees v De Bernardy* [1896] 2 Ch. 437, 446. Similarly, rescission will not be barred by the claimant's inability to restore the defendant to an advantageous position which they obtained through illegitimate means: *Borelli v Ting* [2010] UKPC 21, at 39.

⁷³ *Hulton v Hulton* [1917] 1 K.B. 813 (CA).

⁷⁴ *Phosphate Sewage Co v Hartmont* (1875) 5 Ch.D. 394 (CA) at 454-55; *Halpern v Halpern* [2008] Q.B. 195 (CA).

⁷⁵ Marine Insurance Act 1906 ss.84(1) and 84(3)(a), and see the Consumer Insurance (Disclosure and Representations) Act 2012. It has not been decided whether the same rule applies in relation to insurance policies of other types.

⁷⁶ This appears to be possible at least in relation to shares (and probably other fungibles) and services: *Smith New Court Securities Ltd v Citibank* [1997] A.C. 254, at 262 (shares); *O'Sullivan v Management Agency and Music Ltd* [1985] 1 Q.B. 428 (CA) (services). See Ch.18 below.

⁷⁷ *Tennent v The City of Glasgow Bank and Liquidators* (1879) 4 App.Cas. 615 (HL(Sc)), at 620-21. A classical application of this, although one that is no longer of great practical importance, is the

contract where all of the other parties are implicated in the wrongdoing,⁷⁷ there can be no rescission where only one of the parties whose rights would be destroyed is innocent.⁷⁸ For instance, a surety under a tripartite loan agreement cannot avoid their obligation by reference to the debtor's fraud if the creditor did not have constructive notice of it.⁷⁹ The bar does not apply in favour of volunteers.⁸⁰

The bar is not activated where the only effect of rescission would be to make a third party's rights less valuable, as by shrinking the wrongdoer's resources or increasing the claims on them. Thus the claimant in *Scholefield v Templer* avoided a release of the defendant's obligations as surety notwithstanding that the claimant had known that third parties would advance the defendant money on the faith of the release and had even written to the third parties assuring them that the defendant had been released.⁸¹ The third parties' rights against the defendant debtor remained intact although they were less valuable because rescission created a competing claim on their assets. It appears that the bar will only be activated where the consequence of rescission is to destroy or necessarily frustrate the third party's rights.

It is long established both at law and in equity that if A transfers an asset to B under a voidable contract, and, before the contract is avoided, B sells the asset to C who does not have notice of the circumstances that make the contract voidable, C will take the asset free from any claim by A to recover it.⁸² The fact that the third party, C, has securely acquired an asset from the wrongdoer, B, has never, however, been treated in equity as barring rescission of the contract between A and B. Following rescission the claimant A may be entitled either to trace into the proceeds of the sale if they remain identifiable in the B's hands,⁸³ or else to claim a financial accounting of those proceeds.⁸⁴

Well-known obiter dicta suggest that a different rule applies at law, such that where C securely acquires from B rights in an asset B had acquired from A under a voidable contract, not only is C's title protected but the contract between A and B is no longer capable of being rescinded.⁸⁵ However, all of the cases involve contests between parties in the positions of A and C, and there are no cases where this supposed rule has been applied in favour of a wrongdoer in the position of B.⁸⁶ The status of the bar in cases of this type has been strongly criticised and must be considered to be doubtful.⁸⁷

rule that a shareholder cannot avoid their statutory contract with the company once it has gone into liquidation or is on the verge of doing so: *Oakes v Turquand* (1867) L.R. 2 H.L. 325.

⁷⁷ *Savery v King* (1856) 5 H.L.C. 627 (CA); *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876.

⁷⁸ *Re Metal Constituents, Ltd (Lord Lurgan's Case)* [1902] 1 Ch. 707, at 710; *Senanayake v Cheng* [1966] A.C. 63 (PC) at 80; *Society of Lloyds v Leighs* [1997] 6 Re. L.R. 289 (CA).

⁷⁹ *Moody v Condor Insurance Ltd* [2006] 1 W.L.R. 1847.

⁸⁰ *Hunter BNZ Finance Ltd v CG Maloney Pty Ltd* (1988) 18 N.S.W.L.R. 420, at 433-34, 438.

⁸¹ *Scholefield v Templer* (1859) 4 De. G. & J. 429.

⁸² At law: *White v Garden* (1851) 10 C.B. 919; *Cundy v Lindsay* (1878) 3 App.Cas. 459, at 463-64; in equity: *Hawes v Wyatt* (1790) 2 Cox 263.

⁸³ For example *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717, at 735; *Twinsectra Ltd v Yardley* [1999] Lloyd's Rep. Bank 438 (CA), at 461-62; *Shalson v Russo* [2005] Ch. 281, at 320-22.

⁸⁴ For example *New Sombbrero Phosphate Co v Erlanger* (1877) 5 Ch.D. 73 (CA) at 125; *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 (CA), at 434.

⁸⁵ *Clough v The London and North Western Railway Co* (1871) L.R. 7 Ex. 26, at 35; *Re LG Clarke* [1967] Ch. 1121 (CA) at 1135-36. *White v Garden* (1851) 10 C.B. 919 is often cited but the proposition was only asserted by counsel in argument (at 920) and Creswell J. said (at 926) that the fraudster "could not have enforced the contract".

⁸⁶ *Huyton SA v Distribuidora Internacional de Productos Agricolas SA de CV* [2003] 2 Lloyd's Rep. 780 (CA), at 845-46 was a case of innocent misrepresentation and therefore not a common law case. The passage suggesting that rescission was impossible by reason of the resale of the seeds

The third party rights bar is not engaged where the third party acquires rights, not from the wrongdoer B, but instead from the innocent claimant A. If the claimant has parted with an asset that had been acquired from the wrongdoer, or has given a third party a security interest over it, the difficulty will instead be one of making sufficient counter-restitution.⁸⁸

4. Disproportionate Effect

15-016 Section 2(2) of the Misrepresentation Act 1967 confers on judges and arbitrators a discretionary power, where rescission is claimed for non-fraudulent misrepresentation, to “declare the contract subsisting and award damages in lieu of rescission”. The power was intended to be used where the consequences for the defendant of rescission would be disproportionately hard compared with the consequences for the claimant of the contract remaining on foot, particularly where the misrepresentation relates to a fact of minor importance.⁸⁹ The power only exists where rescission would otherwise be available.⁹⁰ In effect s.2(2) creates a discretionary bar to rescission in those circumstances, coupled with a power and duty to award damages where the bar is applied.

5. No Partial Rescission

15-017 Rescission is an all or nothing process.⁹¹ A contractual bargain cannot be rescinded in part unless that part is properly severable.⁹²

6. Abolition of Special Bars Relating to Non-Fraudulent Misrepresentation

15-018 Section 1 of the Misrepresentation Act 1967 abolished bars that had been developed by the courts in cases of non-fraudulent misrepresentation (a) on completion of a contract for the transfer of an estate in land,⁹³ (b) on completion of a contract for the transfer of personal property,⁹⁴ and (c) where the representation has been incorporated as a contractual term.⁹⁵

was arguably obiter dicta and is inconsistent with the authorities in equity.

⁸⁷ O’Sullivan, Elliott and Zakrzewski, *The Law of Rescission*, 2nd edn (2014) [20.18]ff; Häcker, “Rescission and Third Party Rights” [2006] R.L.R. 1.

⁸⁸ *Dunbar Bank Plc v Nadeem* [1998] 3 All E.R. 876 (CA) at 887. The third party rights bar is sometimes erroneously confused with the restitutio in integrum impossible bar, which is concerned to protect the position of defendants rather than third parties: e.g. *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, at 588.

⁸⁹ Law Reform Commission, “Innocent Misrepresentation” (Cmd. 1782, 1962) paras [11] and [12].

⁹⁰ *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 W.L.R. 233, differing from *Thomas Witter Ltd v TBP Industries Ltd* [1996] 2 All E.R. 573, at 589.

⁹¹ *TSB Bank Plc v Camfield* [1995] 1 W.L.R. 430 (CA), at 436.

⁹² *Myddleton v Lord Kenyon* (1794) 2 Ves. 391, at 408; *Rawlins v Wickham* (1858) 3 De. G.&J. 304, at 321–22; *The Sheffield Nickel and Silver Plating Co Ltd v Unwin* (1877) 2 Q.B.D. 214 (CA), at 223. Similarly, there can be no partial affirmation: *Potter v Dyer* [2011] EWCA Civ 1417, at [58].

⁹³ *Legge v Croker* (1811) 1 Ball & Beatty 506, at 514–15 and later cases.

⁹⁴ *Seddon v The North Eastern Salt Co Ltd* [1905] 1 Ch. 326.

⁹⁵ *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All E.R. 1167.

6.— EFFECT OF RESCISSION

1. Extinction of the Contract

The irrevocable extinction of the contract is a cardinal consequence of rescission, “the contract is treated in law as never having come into existence”.⁹⁶ Arbitration clauses usually survive,⁹⁷ and there is authority that exclusive jurisdiction agreements survive as well, at least in the context of insurance.⁹⁸ If a variation to a contract is rescinded, the original contract revives.⁹⁹ **15-019**

2. Restoration of Property Rights

A voidable transaction is capable of passing title subject only to the innocent party’s entitlement to set the transaction aside. Until they do so, the other party enjoys absolute title to the asset without distinction between legal and beneficial title.¹⁰⁰ Where the innocent party is entitled to and elects to rescind at law, the effect will be to automatically re-vest in him full title to the asset,¹⁰¹ except where it has in the interim come into the hands of a bona fide purchaser.¹⁰² Where a transaction is rescinded in equity, by its order the court will provide for the re-vesting or restoration of title and for delivery up of possession, directing that the defendant do whatever is necessary for these purposes,¹⁰³ again provided the asset has not come into the hands of a bona fide purchaser. It has been said that where a transaction is set aside in equity, equitable title re-vests retrospectively for the purposes of tracing into the hands of third parties, although the party against whom the contract is rescinded is not retrospectively liable for breach of trust in transferring the asset.¹⁰⁴ **15-020**

⁹⁶ *Johnson v Agnew* [1980] A.C. 367, at 393. See also *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch. 91 (CA), at [113].

⁹⁷ Arbitration Act 1996 s.7, following *Harbour Assurance Co (UK) Ltd v Kansa Ltd* [1993] Q.B. 701.

⁹⁸ *Mackender v Feldia AG* [1967] 2 Q.B. 590 (CA); *Brit Syndicates Ltd v Grant Thornton* [2006] EWHC 341 (Comm), at [22]; and see *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association Ltd* [1998] Lloyd’s Rep. I.R. 24.

⁹⁹ *North Ocean Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] Q.B. 705.

¹⁰⁰ *Twinsectra Ltd v Yardley* [1999] Lloyd’s Rep. Bank 438 (CA), at 463.

¹⁰¹ *Load v Green* (1846) 15 M.&W. 216, at 221; *Clough v London and North Western Railway Co* (1871) L.R.7 Ex. 26, at 32; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 Q.B. 525 (CA).

¹⁰² For example *White v Garden* (1851) 10 C.B. 919; *Stevenson v Newnham* (1853) 13 C.B. 285. Where either party had received an asset under the contract which was, unknown to them, subject to the beneficial interest of a third party, rescission will deprive that party of the defence of bona fide purchase they enjoyed while the contract subsisted: *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch. 91 (CA).

¹⁰³ Such as executing an appropriate transfer instrument or conveyance in the case of shares or land: e.g. *Transvaal Lands Co v New Belgium (Transvaal) Land and Development Co* [1914] 2 Ch. 488 (CA) at 505 (shares); *Clark v Malpas* (1862) 4 De. G.F. & J. 401 (unregistered land); *Norwich Peterborough Building Society v Steed* [1993] Ch. 116 (CA), at 132–33 (registered land, rectification of register).

¹⁰⁴ *Lonrho Plc v Fayed (No.2)* [1992] 1 W.L.R. 1, at 11–12; *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717, at 735; *Bristol and West Building Society v Mothew* [1998] Ch. 1 (CA), at 23; *Twinsectra Ltd v Yardley* [1999] Lloyd’s Rep. Bank 438 (CA), at 461–62; *Shalson v Russo* [2005] Ch. 281, at 320–22; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch. 91 (CA), at [53], [67].

3. Consequential Claims and Adjustments

15-021 Following rescission relief may be given with the object of restoring the parties to their original positions or, where rescission occurs in equity, as near to those positions as may be.¹⁰⁵

In addition to the return of assets transferred under the avoided contract, restoring the parties to their original positions may require financial claims, allowances and adjustments. Where rescission occurs at law, the scope for financial claims is limited, although money payments may be recovered by a claim for restitution, and if assets are withheld there may be claims in conversion. When exercising its equitable jurisdiction, the court enjoys a wider array of powers to adjust the positions of the parties,¹⁰⁶ such as by ordering an accounting of benefits derived from the use of assets,¹⁰⁷ by awarding indemnities in respect of detriments incurred pursuant to the contract,¹⁰⁸ or by ordering that compensation be paid in appropriate cases in respect of improvements, repairs, deterioration or depreciation.¹⁰⁹

Restoring the parties to their original positions does not entail restoring them in all respects, but only "as regards the rights and obligations which have been created by the contract".¹¹⁰ Thus the parties may be indemnified for detriments incurred pursuant to the contract, but they are not compensated as part of the process of rescission for costs incurred in preparing to perform a contract or for extraneous losses they suffer in consequence of it.¹¹¹ These are matters in respect of which the claimant can only recover if they also have a claim sounding in damages or its equitable counterpart. Although the financial adjustments made upon rescission are sometimes labelled "compensation" or "equitable compensation", their function is restitutionary not reparative. In principle a right to rescind is independent of, and cumulative with, any right the claimant may also have to damages in tort.¹¹² This is so even where both rights arise out of the same factual circumstance. Where this is so, for example in a case of deceit, the claimant may claim rescission or damages or both.¹¹³ A claimant may sue for damages even if they affirm the contract or if rescission is otherwise barred.

¹⁰⁵ *The Western Bank of Scotland v Addie* (1867) L.R. 1 Sc. App. 145, at 165; *Erlanger v The New Sombbrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278; *Cheese v Thomas* [1994] 1 W.L.R. 129 (CA), at 137; *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2013] Ch. 91 (CA), at [115]. See further Ch.20 below.

¹⁰⁶ *Erlanger v The New Sombbrero Phosphate Co* (1878) 3 App.Cas. 1218, at 1278.

¹⁰⁷ For example *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 (CA), at 461; *Armstrong v Jackson* [1917] 2 K.B. 822; *Spence v Crawford* [1939] 3 All E.R. 271 (HL(Sc)) at 284.

¹⁰⁸ *Adam v Newbigging* (1886) 34 Ch.D. 682 (CA); *Whittington v Seal-Hayne* (1900) 82 L.T. 49.

¹⁰⁹ *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch. 392 (CA), at 456;

¹¹⁰ *Adam v Newbigging* (1886) 34 Ch.D. 582 (CA), at 592-94; *Smith v Cooper* [2010] 2 F.L.R. 1521 (CA), at [101].

¹¹¹ *Redgrave v Hurd* (1881) 20 Ch.D. 1; *Aldrich v Norwich Union Life Ins Co Ltd* [2000] Lloyd's Rep. IR 1, at 7-8.

¹¹² *Goldrei, Foucard & Son v Sinclair* [1918] 1 K.B. 180 (CA).

¹¹³ *Adam v Newbigging* (1886) 34 Ch.D. 682 (CA).

RECTIFICATION

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1.— NATURE OF RECTIFICATION

1. The Remedy of Rectification

(a) **The Role of Rectification.** Where the terms of a written instrument do not accord with the true agreement between the parties,¹ equity has the power to reform, or rectify, that instrument so as to make it accord with the true agreement.² What is rectified is not a mistake in the transaction itself, but a mistake in the way in which that transaction has been expressed in writing.³

"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

It was at one time thought that rectification could only be ordered if there was a concluded antecedent contract with which the instrument did not conform and that rectification "may be regarded as a branch of the doctrine of specific

¹ Rectification of unilateral transactions is also available; see further para.16-021.

² See *M'Cormack v M'Cormack* (1877) 1 L.R.Ir. 119; *Frederick E Rose (London) Ltd v William H. Pim Jnr & Co Ltd* [1953] 2 Q.B. 450. For a more detailed study of this area, see D. Hodge QC, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (London: Sweet & Maxwell, 2010).

³ See *Racal Group Services v Ashmore* [1995] S.T.C. 1151 at 1154; *Allmutt v Wilding* [2007] EWCA Civ 412; [2007] W.T.L.R. 941.

⁴ *Mackenzie v Coulson* (1869) L.R. 8 Eq. 368 at 375, per James V.C. See also *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 Q.B. 450 where rectification was refused since, "There was no doubt an erroneous assumption underlying the contract—an assumption for which it might have been set aside on the grounds of misrepresentation or mistake—but that is very different from an erroneous expression of the contract, such as to give rise to rectification".

performance".⁵ But subsequently it has been recognised⁶ that the court can order rectification of a document where the parties' underlying agreement did not have contractual force,⁷ so rectification is clearly distinct from specific performance.

Traditionally, rectification was available where the parties had reached agreement, but by a common mistake its terms were incorrectly recorded in the final written document. However, rectification may also be available where only one party is mistaken as to the terms of the written document and the other is seeking to take advantage of this fact; in other words, rectification for unilateral mistake. Rectification is a potent remedy because it allows the courts to rewrite the contract. This is uncontroversial in the case of common mistake, because both parties intended the terms of the contract to be different to those set out in the written document, so rectification is necessary to give effect to the parties' intentions. However, this reasoning cannot be used to justify rectification for unilateral mistake, where the written document in its original form does accord with the intention of one party, and so rectification does not give effect to this party's intentions. Therefore, rectification for unilateral mistake is different from the doctrine of rectification for common mistake and inherently more controversial,⁸ despite similarities in the principles in operation.⁹

16-002 (b) Discretion. Rectification is a discretionary remedy, "which must be cautiously watched and jealously guarded".¹⁰ But unlike remedies such as specific performance, which are based on the inadequacy of the remedy at law, rectification "gives relief from the inflexibility of the common law, and from the nature of the case involves a contravention of its rules".¹¹ Rectification may be ordered by consent, but remains at the court's discretion.¹² Rectification will not be decreed if the desired result can conveniently be achieved by other means: by reliance upon common law rights, or by agreement between the parties.

16-003 (c) Jurisdiction. Claims for rectification are expressly assigned to the Chancery Division.¹³ But the other Divisions may grant any remedy or relief connected with matters before them,¹⁴ and, further, any Division may give effect to a defence of rectification as regards past transactions without actually rectifying the instrument.¹⁵ Normally claims for rectification must be pleaded,¹⁶ but in a clear case a court has rectified a document even without the claim having been pleaded.¹⁷

⁵ Sir Herbert Cozens-Hardy M.R. in *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85, cited by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 110.

⁶ *Joscelyne v Nissen* [1970] 2 Q.B. 86.

⁷ See para. 16-015. It follows that rectification may be available in respect of a contract to which s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 applies, even though (i) the written contract (prior to rectification) does not contain the true terms of the agreement, and (ii) the accord which supports the claim to rectification is not a contract. A similar result will be achieved if (by parity of reasoning with the position under LPA 1925 s.40) mistake is an exception to the statute in equity: see *Craddock Bros v Hunt* [1922] 2 Ch. 809 at 822.

⁸ Lightman J. in *Rowallan Group Ltd v Edgehill Portfolio No.1 Ltd* [2007] EWHC 32 (Ch) explained that, "the remedy of rectification for unilateral mistake is a drastic remedy, for it has the result of imposing on the defendant [...] a contract that he did not, and did not intend, to make".

⁹ This paragraph was cited with approval by Henderson J. in *Patrick Francis v F. Berndes Ltd* [2011] EWHC 3377 (Ch) at [39].

¹⁰ *Whiteside v Whiteside* [1950] Ch. 65 at 71, per Evershed M.R.; *Racal Group Services v Ashmore* [1995] S.T.C. 1151 at 1154; *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108.

¹¹ *Thompson v Hickman* [1907] 1 Ch. 550 at 562, per Neville J.

¹² *Burford (Fareham) Ltd v Christian Vision* [2005] EWHC 2533 (Ch).

¹³ See para. 1-036.

¹⁴ See para. 1-036.

¹⁵ JA 1925 s.40, replacing JA 1873 s.24(2), on equities "appearing incidentally" in the course of

2. Documents that will be Rectified

(a) Contracts and Other Documents Inter Partes. The jurisdiction to rectify is quite general, and may be exercised in respect of a wide range of contracts and documents inter partes. These include mercantile documents such as a policy of marine insurance,¹⁸ a bill of exchange,¹⁹ a transfer of shares,²⁰ and a bill of quantities²¹; conveyancing documents such as a conveyance²² and a lease²³; and a consent order, which for this purpose stands on the same footing as an agreement inter partes,²⁴ even though the mistake on which it is founded is as to the effect of a particular instrument.²⁵ But the articles of a company will not be rectified²⁶; for not only would rectification be inconsistent with the provisions of the Companies Acts, but also the articles are (inter alia) a contract between the company and its members,²⁷ and ex hypothesi the company cannot have had a different intention before incorporation.

(b) Voluntary Settlements. Marriage settlements were early instances of voluntary instruments that could be rectified²⁸; the same principles apply to rectification of a trust deed²⁹ and voluntary dispositions by trustees, for example.³⁰ Although a donor who makes a voluntary settlement would not be compelled to alter his own grant,³¹ he may himself obtain rectification by proving that the settlement does not represent his true intention: it is unnecessary for him to prove that it does not represent the true intention of the trustees, if there was no actual bargain between him and them.³²

proceedings: s.40 was repealed by SCA 1981 s.151(4) and Sch.7 but was not replaced by that Act. See further *Breslauer v Barwick* (1876) 36 L.T. 52; and see *Mostyn v West Mostyn Coal & Iron Co Ltd* (1876) 1 C.P.D. 145.

¹⁶ *Blay v Pollard* [1930] 1 K.B. 628 at 634, 637.

¹⁷ *Butler v Mountview Estates Ltd* [1951] 2 K.B. 563, where *Blay v Pollard* [1930] 1 K.B. 628 does not appear to have been cited.

¹⁸ *Spalding v Crocker* (1897) 2 Com.Cas. 189 at 193.

¹⁹ *Druiff v Lord Parker* (1868) L.R. 5 Eq. 131.

²⁰ See *Re International Contract Co* (1872) 7 Ch.App. 485 (shares wrongly numbered in transfer).

²¹ *Neill v Midland Railway* (1869) 17 W.R. 871.

²² *Beale v Kyte* [1907] 1 Ch. 564; *Wilson v Wilson* [1969] 1 W.L.R. 1470; *Re Colebrook's Conveyances* [1972] 1 W.L.R. 1397. Rectification of the Land Register itself does not concern the rectification of a document and raises different considerations: see Land Registration Act 2002 s.65 and Sch.4; see the discussion in *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch. 305.

²³ *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 (rent review clause).

²⁴ *Huddersfield Banking Co v Henry Lister & Son Ltd* [1895] 2 Ch. 273; and see *Mullins v Howell* (1879) 11 Ch.D. 763 (consent order rectified for unilateral mistake: but the order was made on an interlocutory application, where the rules are not so strict: see *Ainsworth v Wilding* [1896] 1 Ch. 673 at 675, 679).

²⁵ *Allcard v Walker* [1896] 2 Ch. 369 at 381.

²⁶ *Scott v Frank F Scott (London) Ltd* [1940] Ch. 794; *Willow International Investments Ltd v Smiths of Smithfield Ltd* [2003] EWHC 568 (Ch); [2003] B.C.C. 769.

²⁷ Companies Act 2006 s.33. See too *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 W.L.R. 1988.

²⁸ See, e.g. *Thin v Thin* (1650) 1 Rep.Ch. 162.

²⁹ *Lawie v Lawie* [2012] EWHC 2940 (Ch); [2013] W.T.L.R. 85.

³⁰ *Day v Day* [2013] EWCA Civ 280; [2014] Ch. 114; *Merchant Navy Officers Pension Fund Trustees v Watkins* [2013] EWHC 4741 (Ch).

³¹ On the evidence required where the settlement was preceded by marriage articles, see *Legg v Goldwire* (1736) Cas.t.Talb. 20; *Bold v Hutchinson* (1856) 5 De G.M. & G. 558; *Cogan v Duffield* (1876) 2 Ch.D. 44.

³² *Re Butlin's Settlement Trusts* [1976] Ch. 251; *AMP (UK) Plc v Barker* [2001] Pens.L.R. 77.

16-006 (c) **Wills.** Formerly, short of fraud, there was no power to rectify a will³³; the furthest the court could go was to omit spurious words.³⁴ Now, however, by statute, if a court is satisfied that a will is so expressed that it fails to carry out the intentions of the testator in consequence of a clerical error³⁵ or failure to understand his instructions, the court may order that the will be rectified.³⁶ The action for rectification cannot, without the permission of the court, be commenced later than six months after the grant of probate.³⁷

The Supreme Court in *Marley v Rawlings*³⁸ considered in detail the scope of the statutory jurisdiction to rectify a will. Here, a husband and wife intended to execute matching wills, under which each spouse left his or her estate to the other, and the survivor left his or her entire estate to the appellant. By mistake, their solicitor gave each spouse the other's will to execute. The mistake went undetected when the wife died and her estate passed to her husband, but it came to light when he died. The respondents (who would inherit on his intestacy) challenged the admission of his will to probate. At first instance and in the Court of Appeal, their challenge was successful, on the basis that the purported will was invalid, and only a valid will could be rectified under the statutory jurisdiction. The Supreme Court allowed the appellant's appeal and ordered rectification.

Lord Neuberger explained that the approach to interpretation of a will was the same as the modern contextual approach to interpretation of contracts³⁹ and suggested that it might have been possible to construe the will as the testator had intended. But his Lordship preferred to decide the case on the basis of rectification, stating:

"I can see no reason in principle why a wholesale correction should be ruled out as a permissible exercise of the court's power to rectify, as a matter of principle. On the contrary: to impose such a restriction on the power of rectification would be unprincipled—and it would also lead to uncertainty."⁴⁰

He concluded first that statutory rectification was available even if the document, un-rectified, did not fulfil the requirements of a valid will:

"it does not appear to me that a document has to satisfy the formal requirements of s.9, or of having the testator's knowledge and approval, before it can be treated as a "will" which is capable of being rectified pursuant to s.20."⁴¹

Moreover, the statutory requirement of a "clerical error" should be given a wide meaning, for reasons of statutory interpretation, the purpose of the legislation (to make the law more flexible so as to "save" more wills), a desire for coherence and consistency within the law, and because:

"the term 'clerical error' can, as a matter of ordinary language, quite properly encompass the error

³³ *Harter v Harter* (1872–75) L.R. 3 P. & D. 11; *Collins v Elstone* [1893] P. 1.

³⁴ *In the Goods of Schott* [1901] P. 190; *Vaughan v Clerk* (1902) 87 L.T. 144.

³⁵ See *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch. 412; *Re Segelman (Deceased)* [1996] Ch. 171; *Bell v Georgiou* [2002] W.T.L.R. 1105; *Brown v Bimson* [2010] All E.R. (D) 325 (Jul). Rectification was refused in *Boswell v Lawson* [2011] EWCA Civ 452, because the Court of Appeal held that the will as drafted did in fact represent the testator's intentions. See now the detailed discussion in *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213, which has been applied in *Burnard v Burnard* [2014] EWHC 340 (Ch) and *Brooke v Purton* [2014] EWHC 547 (Ch).

³⁶ Administration of Justice Act 1982 s.20(1), applying where the testator has died after 1982 (see ss.73(1), 76(1)).

³⁷ Administration of Justice Act 1982 s.20(2). For the principles to be applied by the court in extending time, see *Re Chittock (Deceased)* [2000] W.T.L.R. 643.

³⁸ *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213.

³⁹ See further para. 16–008.

⁴⁰ *Marley v Rawlings* [2014] UKSC 2 at [53].

⁴¹ *Marley v Rawlings* [2014] UKSC 2 at [60].

involved in this case. There was an error, and it can be fairly characterised as clerical, because it arose in connection with office work of a routine nature. Accordingly, given that the present type of case can, as a matter of ordinary language, be said to involve a clerical error, it seems to me to follow that it is susceptible to rectification."⁴²

2.— SCOPE OF RECTIFICATION

16-007 Although it has been suggested that it is "more logical" to consider rectification before interpretation, on the basis that if rectification is ordered, the instrument as rectified would then need to be construed,⁴³ the more common approach is to consider the common law first. This is sensible: if the instrument can be interpreted such that any mistake can be corrected, there will be no room for rectification.⁴⁴

16-008 (a) **Interpretation.**⁴⁵ Where a written instrument purports to set out the terms of a transaction then, at common law, the terms of that transaction are to be identified by interpreting the instrument. Terms of a document are interpreted objectively. Previously, where there was an objectively unambiguous clause, then the plain meaning of that clause was given effect.⁴⁶ Such a "literal" approach to interpretation restricted the ability of the courts to depart from the natural meaning of written words. As a result, claimants were obliged to seek rectification of the instrument in order to avoid being bound by a document which, mistakenly, failed accurately to record the parties' intentions.

However, a more flexible, contextual approach to interpretation has since been adopted by the courts.⁴⁷ Thus the meaning which the document would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, is that which will be given effect by the court. Nevertheless, the starting point of the interpretative exercise remains the words used in the document,⁴⁸ and it must be apparent that something has gone wrong in reducing the parties' agreement to writing for the court to depart from any "plain meaning" of the instrument. Although it has been said that the court will not readily accept that linguistic mistakes have been made in formal documents,⁴⁹ there are many reasons why a court may find that there has been such a problem.⁵⁰ For example, the court may find that a mistake has been made due to the language not making grammati-

⁴² *Marley v Rawlings* [2014] UKSC 2 at [82].

⁴³ *KPMG v Network Rail Structure Ltd* [2007] EWCA Civ 363; [2008] 1 P. & C.R. 11 at 16, per Carnwath L.J.

⁴⁴ See e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101.

⁴⁵ See K. Lewison, *The Interpretation of Contracts*, 5th edn (London: Sweet & Maxwell, 2011); G. McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (Oxford: Oxford University Press, 2007). On the "uneasy parallel" between construction and rectification see R. Buxton, "Construction and Rectification after Chartbrook" (2010) 69 C.L.J. 253.

⁴⁶ e.g. *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85; *In the Goods of Peel* (1870) L.R. 2 P. & D. 46.

⁴⁷ See notably *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912–913, per Lord Hoffmann.

⁴⁸ See e.g. *Bank of Credit and Commerce International v Ali* [2001] UKHL 8; [2002] 1 A.C. 251 at [8] (Lord Bingham) and at [37]–[39] (Lord Hoffmann); *JIS (1974) Ltd v MCP Investment Nominees Ltd* [2003] EWCA Civ 721 at [10] (Carnwath L.J.).

⁴⁹ *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912–913; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [14]–[15].

⁵⁰ Although Lord Hoffmann has accepted that it is "not unusual" for judges to differ in their interpretations, particularly concerning whether a mistake has been made: see e.g. *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [15].

cal sense,⁵¹ being ambiguous,⁵² using a technical term without definition,⁵³ or quite simply because it would be obvious to a reasonable person with the relevant background knowledge that there was a mistake in the language of the instrument⁵⁴ or that the terms of an instrument appear to be contrary to “business commonsense”.⁵⁵

Thus the context and “factual matrix”⁵⁶ within which the instrument was written down are crucial to the interpretative exercise. This broader approach enables the court to alter mistakes through interpretation, without having to resort to rectification. It has even been said that “there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed”⁵⁷ in interpreting contracts such that mistakes be eradicated. Indeed, the process has sometimes been called “common law rectification”.⁵⁸ However, this is a misnomer: the court merely engages in the interpretative process.⁵⁹ Interpretation will only be able to correct a mistake if it is clear what correction ought to be made in order to cure the mistake.⁶⁰ In considering whether it is clear how the error should be corrected, the court is entitled to have regard both to the language of the instrument and the surrounding circumstances. Where the term itself is unambiguous, its plain meaning should be respected.⁶¹

That an instrument can be interpreted broadly to correct a mistake clearly restricts the range of circumstances in which rectification will be necessary. However, in some situations the parties will still need to seek rectification rather than interpretation. For example, the parol evidence rule traditionally restricts what evidence can be used to interpret terms,⁶² but there is no such limit in

⁵¹ *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12; [2004] 1 A.C. 715 at [23] (Lord Bingham)

⁵² *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235.

⁵³ See *Proforce Recruit Ltd v Rugby Group Ltd* [2006] EWCA Civ 69; and see subsequently [2007] EWHC 1621 (QB); [2008] 1 All E.R. (Comm) 569 (meaning of expression “preferred supplier status”). Although the term in question must be used in a technical or unconventional manner: *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [43]–[47]; cf *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd* [1976] 2 Lloyd’s Rep. 708.

⁵⁴ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 (HL) at 912–913 (Lord Hoffmann’s third principle); also *East v Pantiles Plant Hire Ltd* [1982] 2 E.G.L.R. 111 (CA) at 112 (Brightman L.J.); *Holdings & Barnes Plc v Hill House Hammond Ltd* [2001] EWCA Civ 1334; [2002] 2 P. & C.R. 11 at 21 (Clarke L.J.).

⁵⁵ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 (HL) at 912–913 (Lord Hoffmann’s fifth principle), citing *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] A.C. 191 at 201 (Lord Diplock). Similarly, in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 both Lord Hoffmann (at [16]) and Lord Walker (at [93]) emphasised the importance of “commercial sense”.

⁵⁶ *Prenn v Simmonds* [1971] 1 W.L.R. 1381 (Lord Wilberforce); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 at 912–913 (Lord Hoffmann).

⁵⁷ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [25].

⁵⁸ *Westway Homes Ltd v Moore* (1992) 63 P. & C.R. 480 at 489.

⁵⁹ *Holdings & Barnes Plc v Hill House Hammond Ltd* [2001] EWCA Civ 1334; [2002] 2 P. & C.R. 11 at 47; *KPMG v Network Rail Structure Ltd* [2007] EWCA Civ 363; [2008] 1 P. & C.R. 11 at [48]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [22]–[24].

⁶⁰ *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12; [2004] 1 A.C. 715; [2004] 1 A.C. 715 at [23] (Lord Bingham) and [192] (Lord Millett); *East v Pantiles Plant Hire Ltd* [1982] 2 E.G.L.R. 111 (CA) at [112] (Brightman L.J.).

⁶¹ *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 W.L.R. 2900.

⁶² See e.g. *Mercantile Bank of Sydney v Taylor* [1893] A.C. 317; *Bank of Australia v Palmer* [1897] A.C. 540. However, there are now so many exceptions to the parol evidence rule that it rarely applies: *Prince Jefri Bolkiah v State of Brunei Darussalam* [2007] UKPC 63. cf *Shogun Finance Ltd v Hudson* [2003] UKHL 62; [2004] 1 A.C. 919.

rectification.⁶³ Since neither prior negotiations⁶⁴ nor subsequent conduct⁶⁵ are admissible as a guide to interpretation, it would be necessary to seek rectification if reliance needs to be placed on such evidence.⁶⁶ Similarly, if a term has been mistakenly inserted into a written document, but the mistake is not obvious, interpretation may fail to correct the error whereas rectification could. Further, if reliance is placed upon the subjective intentions of the parties,⁶⁷ rectification would be a more appropriate remedy than interpretation.⁶⁸

(b) **Implication.** Terms may be implied in fact into a particular instrument when it is necessary to do so.⁶⁹ It has been suggested that this is simply an aspect of construction of the written document.⁷⁰ Thus obvious terms which have been mistakenly excluded may be implied into the written instrument, without need for rectification.⁷¹ However, where a term has been mistakenly omitted, and is not obvious or necessary, implication may be unavailable and the court can rectify the instrument.⁷² 16-009

(c) **Collateral Agreement.** If the material which it is sought (by rectification) to be inserted in the written instrument is already enforceable as a collateral contract, then a court may not need to rectify the instrument.⁷³ However, it may be suggested that the court should be prepared to rectify the agreement if this would be important to third parties who were not party to the original agreement. 16-010

(d) **Effects.** Rectification is of a different nature to interpretation. Thus although both may be able to correct an error made in the written instrument, only 16-011

⁶³ “There is no conceptual limit as to the sort of material which may be relevant”: *Dunlop Haywards (DHL) Ltd v Barbon Insurance Group Ltd* [2009] EWHC 2900; [2010] Lloyd’s Rep. I.R. 149 at 195. This is unaffected by an entire agreement clause: *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch); *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm). However, in *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch) at [101]–[109] Hildyard J. held that where there is an entire agreement clause, even though rectification might be granted to correct an errant provision, it should not be allowed to insert a term which is not present in the document at all (this issue was not considered on appeal: [2012] EWCA Civ 1413).

⁶⁴ *Inglis v John Buttery & Co* (1878) 3 App.Cas. 552; *Prenn v Simmonds* [1971] 1 W.L.R. 1381; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101. Although, despite *Chartbrook*, it may still be possible to find some room for prior negotiations if this can help to establish an objectively known fact: *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] UKSC 44.

⁶⁵ *James Miller Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] A.C. 583; *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] A.C. 235. By contrast, such evidence is admissible in New Zealand: *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37.

⁶⁶ See *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 W.L.R. 896 (HL) at 912 (Lord Hoffmann’s third principle).

⁶⁷ For discussion about whether rectification relies upon a subjective or objective test of intention, see para.16-015.

⁶⁸ For further discussion of the suitability of interpretation or rectification, see *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213 at [36]–[42] (Lord Neuberger); *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736; [2013] Ch. 305 at [122] (Lewison L.J.).

⁶⁹ Traditional formulations of the test include the “business efficacy test” (*The Moorcock* (1889) 14 P.D. 64) and the “officious bystander test” (*Shirlaw v Southern Foundaries (1926) Ltd* [1939] 2 K.B. 206).

⁷⁰ *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 2 All E.R. (Comm) 1. The touchstone for implication is still that of necessity: *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The Reborn)* [2009] EWCA Civ 531.

⁷¹ *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12; [2004] 1 A.C. 715.

⁷² *Caraman v Aperghis* (1923) 40 T.L.R. 124.

⁷³ See *Walker Property Investments (Brighton) Ltd v Walker* (1947) 177 L.T. 204.

rectification will actually change the terms of the written agreement. This may be advantageous if third parties later rely upon the written agreement.⁷⁴ As Lord Neuberger made clear in *Marley v Rawlings*⁷⁵:

"If it is a question of interpretation, then the document in question has, and has always had, the meaning and effect as determined by the court, and that is the end of the matter. On the other hand, if it is a question of rectification, then the document, as rectified, has a different meaning from that which it appears to have on its face, and the court would have jurisdiction to refuse rectification or to grant it on terms (eg if there had been delay, change of position, or third party reliance)."

Further, although the applicable principles underpinning rectification are a question of law, whether or not a particular instrument should be rectified is a question of fact. By contrast, the correct construction of a particular written contract is a question of law.⁷⁶ Thus appeals concerning interpretation are much more common than appeals on the issue of rectification.

3.— MISTAKE

16-012 There are two distinct types of mistake which may lead to rectification. In some cases, both parties will have entered into an instrument under a common mistake that it truly recorded the terms which had been agreed. In other cases, the mistake will be unilateral, so only one of the parties will have entered into the instrument labouring under a mistake. These two situations require separate consideration.

1. Common Mistake

16-013 The general rule is that rectification will not be granted unless there has been a mistake in expression which is common to all parties.⁷⁷ In general, a claim will succeed only if it is established, first, that there was some prior agreement between the parties; secondly, that this was still effective when the instrument was executed; thirdly, that by mistake the instrument fails to carry out that agreement; and fourthly, that if rectified as claimed, the instrument would carry out the agreement.⁷⁸ These points will be taken in turn.⁷⁹

16-014 (a) Prior Agreement. The prior agreement between the parties on which a claim for rectification is based need not amount to an enforceable contract; it suffices if there is a common intention in regard to the particular provisions of the agreement in question⁸⁰ continuing up to the date of the written instrument,⁸¹

⁷⁴ In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [40], Lord Hoffmann recognised that the law of interpretation sometimes had to choose between protecting the contracting parties and third parties, although he considered it "hard to say" how much of a practical problem this was.

⁷⁵ *Marley v Rawlings* [2014] UKSC 2; [2014] 2 W.L.R. 213 at [40]. See further para.16-006.

⁷⁶ See e.g. *Carmichael v National Power Plc* [1999] 1 W.L.R. 2042 at 2048–2049.

⁷⁷ *Murray v Parker* (1854) 19 Beav. 305; *Vaudeville Electric Cinema Ltd v Muriset* [1923] 2 Ch. 74; *W Higgins Ltd v Northampton Corp* [1927] 1 Ch. 128.

⁷⁸ See generally *Fowler v Fowler* (1859) 4 De G. & J. 250 at 264, 265.

⁷⁹ This approach in the previous edition of this work was adopted in *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch).

⁸⁰ *Joscelyne v Nissen* [1970] 2 Q.B. 86, applying *Crane v Hegeman-Harris Co Inc* [1939] 1 All E.R. 662; [1971] 3 All E.R. 245n.; [1971] 1 W.L.R. 1390n. (affirmed [1939] 4 All E.R. 68), and not following dicta in *Lovell and Christmas Ltd v Wall* (1911) 104 L.T. 85 and *Frederick E Rose (London) Ltd v William H. Pim Jnr & Co Ltd* [1953] 2 Q.B. 450. See also *Monaghan CC v Vaughan* [1948] I.R. 306; *Slee v Warke* (1952) 86 C.L.R. 271 at 280, 281.

⁸¹ *Crane v Hegeman Harris Co Inc* [1939] 1 All E.R. 662.

together with some outward expression of accord.⁸² Thus a contract sealed by a corporation may be rectified even if the contract is one that the corporation can validly make only by deed, so that no antecedent enforceable contract was possible.⁸³ If in fact there is an antecedent enforceable agreement, extrinsic evidence is admissible in a proper case to rectify both the agreement and the deed.⁸⁴

(b) Continuing Intention. A difference between the instrument and terms previously agreed may be capable of two explanations: there may have been a mistake, or the parties may have decided to depart from the terms previously agreed. A claim for rectification can only succeed if the first explanation is correct, and it follows that a person seeking rectification must satisfy the court that the parties intended the instrument merely to carry out those terms and not to vary them.⁸⁵ If one of the parties denies that the instrument was contrary to his intention this accordingly has considerable weight⁸⁶; but like other evidence in cases of rectification, this evidence must be directed to the intention existing when the instrument was executed, or earlier, and not at some later time.⁸⁷

What is relevant is:

"the intention of the parties at the time when the deed was executed, and not what would have been their intent if, when they executed it, the result of what they did had been present to their minds."⁸⁸

There can thus be no rectification if the omission of a term was deliberate,⁸⁹ even if this was due to an erroneous belief that the term was unnecessary⁹⁰ or that it was sufficiently dealt with in the antecedent oral agreement,⁹¹ or that the term was illegal,⁹² or a breach of covenant,⁹³ and similarly if the instrument intentionally contains a provision which in fact means something different from what the parties thought it meant.⁹⁴ Rectification ensures that the instrument contains the

⁸² *Joscelyne v Nissen* [1970] Q.B. 86 at 98, criticised by L. Bromley, "Rectification in Equity" (1971) 87 L.Q.R. 532. For an illustration of the importance of the requirement of an outward expression of accord, see *Lansing Linde Ltd v Alber* [2000] Pens.L.R. 15, although it has been suggested that this only serves an evidentiary function: *Munt v Beasley* [2006] EWCA Civ 370 at [36], per Mummery L.J. No outward manifestation of an accord is required in cases where the instrument is not intended to set out an accord between two or more parties (i.e., if the underlying transaction is unilateral); nor where a unilateral transaction requires the consent of another: *AMP (UK) Plc v Barker* [2001] Pens.L.R. 77; followed in *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); [2005] Pens.L.R. 103.

⁸³ *Shipley Urban DC v Bradford Corp* [1936] Ch. 375. See now Corporate Bodies' Contracts Act 1960 and Companies Act 2006 Pt 4.

⁸⁴ *Craddock Bros v Hunt* [1923] 2 Ch. 136.

⁸⁵ *The Marquess of Breadalbane v The Marquess of Chandos* (1837) 2 My. & Cr. 711 at 740; *George Cohen, Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll.L.Rep. 97 (see esp. at 113).

⁸⁶ *Fowler v Fowler* (1859) 4 De G. & J. 250 at 273. Indeed, it is now possible to argue that such cases should fall within unilateral mistake: see further para.16-018.

⁸⁷ *Bradford v Romney* (1862) 30 Beav. 431; and see *Stait v Fenner* [1912] 2 Ch. 504 at 519.

⁸⁸ *Tucker v Bennett* (1887) 35 Ch.D. 1 at 16, per Lopes L.J.

⁸⁹ See *Whiteside v Whiteside* [1950] Ch. 65 (correct phrase struck out of draft).

⁹⁰ *Worrall v Jacob* (1817) 3 Mer. 256 at 271.

⁹¹ *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 C.L.R. 336.

⁹² *Irnham v Child* (1781) 1 Bro.C.C. 92.

⁹³ *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch. 129; and see *Hazell, Watson & Viney Ltd v Malvermi* [1953] 2 All E.R. 58 (omitted from [1953] 1 W.L.R. 782).

⁹⁴ *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 Q.B. 450.

provisions which the parties actually intended it to contain, and not those which it would have contained had they been better informed.⁹⁵

Traditionally, the parties' actual intentions had to be determined; the court could only rectify a written instrument if it failed to reflect the actual intentions of the parties.⁹⁶ This seems preferable to an objective test of intention; after all, the best evidence of what the parties objectively agreed is to be found in the written document itself. It is difficult to explain why any prior objective agreement should override a later, formal instrument, unless the prior agreement reflects the parties' actual agreement, and continued to do so at the time the instrument was executed. However, this approach has recently been doubted. In *Chartbrook Ltd v Persimmon Homes Ltd*,⁹⁷ Lord Hoffmann suggested, obiter, that an objective approach to ascertaining the common intention of the parties is more appropriate, since this is consistent with the approach adopted in interpretation.⁹⁸ This view has been accepted by the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*.⁹⁹ Yet the Court had serious reservations surrounding the test for common mistake,¹⁰⁰ and all three judges differed in their interpretation of what the test required.¹⁰¹ Significantly, in *Daventry*, it was accepted by the parties that Lord Hoffmann's approach in *Chartbrook* should be applied,¹⁰² and the decision of the Court of Appeal in *Britoil Plc v Hunt Overseas Oil Inc*,¹⁰³ where the majority demanded a subjective test of intention,¹⁰⁴ was not cited to the court. It may therefore be possible for courts to follow the majority decision in *Britoil*¹⁰⁵ rather than the obiter view of Lord Hoffmann in *Chartbrook*, although the latter has also been applied in subsequent cases.¹⁰⁶

16-016 (c) Failure to Represent Agreement. There must be clear and unambiguous evidence that the instrument either does not accurately represent the true agreement of the parties at the time when it was executed,¹⁰⁷ or at least that it is doubt-

⁹⁵ See *Townshend v Stangroom* (1801) 6 Ves. 328 at 322.
⁹⁶ See J. Bromley "Rectification in Equity" (1971) 87 L.Q.R. 532 and the cases cited therein. See more recently e.g. *Britoil Plc v Hunt Overseas Oil Inc* [1994] C.L.C. 561 (Hobhouse and Glidewell L.J.J., Hoffmann L.J. dissenting); *Munt v Beasley* [2006] EWCA Civ 370.
⁹⁷ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [60].
⁹⁸ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 A.C. 1101 at [60]. See M. Smith "Rectification of Contracts for Common Mistake, Joscelyne v Nissen and Subjective States of Mind" (2007) 123 L.Q.R. 116.
⁹⁹ *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333.
¹⁰⁰ See, e.g. Toulson L.J. at [173]–[177] and Lord Neuberger M.R. at [195].
¹⁰¹ For critical discussion, see P.S. Davies, "Rectifying the course of rectification" (2012) 75 M.L.R. 387.
¹⁰² See, e.g. Lord Neuberger M.R. at [196], Toulson L.J. at [181].
¹⁰³ *Britoil Plc v Hunt Overseas Oil Inc* [1994] C.L.C. 561.
¹⁰⁴ Hobhouse and Glidewell L.J.J.; Hoffmann L.J. dissenting.
¹⁰⁵ See Lord Toulson, "Does Rectification Require Rectifying?" (TECBA Annual Lecture, 21 October 31, 2013): available at <http://www.supremecourt.uk/docs/speech-131031.pdf>.
¹⁰⁶ See, e.g. *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607; *K/S Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWHC 3179 (Ch); *20:20 London Ltd v Riley* [2012] EWHC 1912 (Ch); *Re IBM Pension Plan; Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005; [2013] 3 E.G.L.R. 42; *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm); *St Maximus Shipping Co Ltd v AP Moller-Maersk A/S* [2014] EWHC 1643 (Comm). However, it has now been made clear that an uncommunicated subjective intention remains sufficient in the case of a voluntary disposition: *Day v Day* [2013] EWCA Civ 280; [2013] 3 All E.R. 661 at [22] (Etherton C.) and [48] (Lewison L.J.); see para.16-021.
¹⁰⁷ *Fowler v Fowler* (1859) 4 De G. & J. 250 at 265; *Constantinidi v Ralli* [1935] Ch. 427.

ful whether it does.¹⁰⁸ Rectification is available where the "wording does not reflect what the parties agreed not merely what they or one of them thought it meant".¹⁰⁹ What is required is a literal disparity between the language of the agreement and that of the instrument, and not merely a misunderstanding of the meaning of that language; if the oral agreement is for "horsebeans" and the written contract is for "horsebeans", there can be no rectification merely because the parties mistakenly believed that horsebeans were the same as feveroles.¹¹⁰ But rectification may be ordered where the words which the parties chose to use did not give effect to their intention.¹¹¹ Also the omission of a term not in the parties' minds may be cured by rectification if the term is one that is always taken for granted, e.g. a force majeure clause in a shipping contract.¹¹² It is not necessary that the parties should at the material time have formulated the words which it is sought to insert by rectification so long as they had the necessary common intention as to the substance of what would be achieved by the rectification sought.¹¹³

Usually the mistake is one of fact, but rectification may also be granted where the mistake is as to the legal effect of the language used.¹¹⁴ Thus it could be decreed where a covenant to pay an annuity¹¹⁵ or royalties¹¹⁶ of £x used the formerly¹¹⁷ ineffective phrase "free of tax" instead of the efficacious expression requiring payment of such a sum as after deduction of tax would leave £x.¹¹⁸ So also rectification of a settlement was granted where the settlor had intended that a majority of trustees should have a general power to bind a minority,¹¹⁹ but by an error in drafting the settlement gave a majority such a power only in specified circumstances.¹²⁰ The extent to which equity will relieve against mistakes of law in general is far from clear¹²¹; but it is no ground for rectification that subsequent legislation has frustrated the intention of the parties.¹²²

(d) Accurate if rectified. It must appear that if rectified as claimed the instrument would accurately represent the true agreement of the parties at the time

16-017

¹⁰⁸ *Walker v Armstrong* (1856) 8 De G.M. & G. 531 (a happy example of judicial scorn appears at [538]); and see *Re Walton's Settlement* [1922] 2 Ch. 509.
¹⁰⁹ *Ted Baker Plc v Axa Insurance Plc* [2012] EWHC 1406 (Comm), per Eder J.
¹¹⁰ *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 Q.B. 450.
¹¹¹ *Grand Metropolitan Plc v The William Hill Group* [1997] 1 B.C.L.C. 390 at 394.
¹¹² *Caraman v Aperghis* (1923) 40 T.L.R. 124.
¹¹³ *Grand Metropolitan Plc v The William Hill Group* [1997] 1 B.C.L.C. 390 at 395; see also *Swainland Builders v Freehold Properties Ltd* [2002] EWCA Civ 560; [2002] E.G.L.R. 71; *Lloyds TSB Bank Ltd v Crowborough Properties Ltd* [2013] EWCA Civ 107.
¹¹⁴ *Whiteside v Whiteside* [1950] Ch. 65 at [74] and *AMP (UK) Plc v Barker* [2001] Pens.L.R. 77; contrast *Napier v Williams* [1911] 1 Ch. 361 at 367 and *Rabin v Gerson Berger Association Ltd* [1986] 1 W.L.R. 526.
¹¹⁵ *Burroughes v Abbott* [1922] 1 Ch. 86.
¹¹⁶ *Jervis v Howle* [1937] Ch. 67.
¹¹⁷ *Until Ferguson v Inland Revenue Commissioners* [1970] A.C. 442.
¹¹⁸ Consider also *Cooper v Phibbs* (1867) L.R. 2 H.L. 149; *Beauchamp v Winn* (1873) L.R. 6 H.L. 223, but contrast *Jackson v Stopford* [1923] 2 I.R. 1.
¹¹⁹ See para.10-015.
¹²⁰ *Re Butlin's Settlement Trusts* [1976] Ch. 251; para.16-025.
¹²¹ Contrast, e.g. *Rogers v Ingham* (1876) 3 Ch.D. 351 at 357 and *Watson v Marston* (1853) 4 De G.M. & G. 230 at 236 (as reported 1 W.R. 362) with *Midland Great Western Railway of Ireland v Johnson* (1858) 6 H.L.C. 798 at 811 and *Jackson v Stopford* [1923] 2 I.R. 1. See also *Kleinwort Benson v Lincoln City Council* [1999] 2 A.C. 349 which abolished the rule that there could not be recovery of money paid under a mistake of law. See generally P. Birks "Mistakes of Law" (2000) 53 C.L.P.
¹²² *Pyke v Peters* [1943] K.B. 242. This paragraph was cited with approval by Henderson J. in *Patrick Francis v F. Berndes Ltd* [2011] EWHC 3377 (Ch) at [39].

when it was executed.¹²³ If there is doubt as to this, then rectification should be withheld.¹²⁴

2. Unilateral mistake

16-018 (a) Contracts and other bilateral transactions. Traditionally, there could be no rectification for a unilateral mistake,¹²⁵ as where one party genuinely believes the document reflects the underlying agreement but the other party does not, the former can rely on the objective principle and enforce the contract as drafted, and this remains the general rule. For example, where a lease of a maisonette provided that the landlord should bear the cost of structural repairs and this was the tenant's understanding of the position, but the landlord had intended to make the tenant responsible for half the cost of structural repairs and applied for rectification of the lease to this effect, the Court of Appeal refused, holding that there is nothing in either principle or authority:

"which requires a person who has acquired a leasehold interest on terms on which he intended to obtain it, and who thought when he obtained it that the lessor intended him to obtain it on those terms, either to lose the leasehold interest, or, if he wish to keep it, to submit."¹²⁶

But today a document may exceptionally be rectified for unilateral mistake where one party knows of the other's mistake and acts unconscionably in seeking to take advantage of it.

Historically, rectification for unilateral mistake was permitted only in cases where fraud could be established; in other words, where, although only one party was mistaken, the other was fraudulent.¹²⁷ Constructive fraud¹²⁸ sufficed, and so rectification was decreed where a father failed in his duty of explaining to his son a provision for the father's benefit¹²⁹ or to the son's disadvantage¹³⁰ in a resettlement by the son, or where a retired solicitor failed to explain to his fiancée provisions to his advantage in a marriage settlement drafted by him and made by her.¹³¹ More recently, the basis on which rectification will be ordered for unilateral mistake has widened beyond cases of fraud.

16-019 (b) Rectification in cases where unconscionable advantage taken. It is now established that if one party to a transaction knows that the instrument contains a mistake in his favour, but does nothing to correct it and seeks to take advantage of the other's mistake, he (and those claiming under him) may be precluded from resisting rectification on the ground that the mistake is unilateral and not common.¹³² This has been described as a species of equitable estoppel.¹³³

¹²³ *Fowler v Fowler* (1859) 4 De G. & J. 250 at 265.

¹²⁴ *Allnut v Wilding* [2007] EWCA Civ 412; [2007] W.T.L.R. 941.

¹²⁵ *Sells v Sells* (1860) 1 Dr. & Sm. 42; *Mortimer v Shortall* (1852) 2 Dr. & War. 363 at 372.

¹²⁶ *Riverlate Properties Ltd v Paul* [1975] Ch. 133.

¹²⁷ See *Ball v Storie* (1823) 1 Sim. & St. 210 at 219.

¹²⁸ See para.8-001.

¹²⁹ *Hoblyn v Hoblyn* (1889) 41 Ch.D. 200.

¹³⁰ *McCausland v Young* [1949] N.I. 49.

¹³¹ *Lovesy v Smith* (1880) 15 Ch.D. 655; and see *Clark v Girdwood* (1877) 7 Ch.D. 9.

¹³² *Whiteley v Delaney* [1914] A.C. 132; *Monaghan CC v Vaughan* [1948] I.R. 306; *George Cohen, Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll.L.Rep. 97 at [111]; *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch. 555; *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 at 515, 516, and see (1961) 77 L.Q.R. 313. See also *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579.

¹³³ See para.12-016. The description of this principle as a species of equitable estoppel was cited by Pennycuik J. in *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch. 555, and see more recently

Under this head, the evidence of the knowledge and intention of the defendant must be such as to involve him in a degree of sharp practice,¹³⁴ or at least:

"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."¹³⁵

So rectification was denied where the claimant failed to provide convincing evidence that the other party:

"shut its eyes to the obvious or wilfully and recklessly failed to do what an honest and reasonable person would have done in the circumstances."¹³⁶

Actual knowledge by the defendant of the mistake is not necessarily required. It is sufficient that he wilfully and recklessly shut his eyes to the obvious¹³⁷ or intended the other party to labour under a mistake and suspected, though did not actually know, that the other party was mistaken.¹³⁸ On the other hand, mere non-disclosure of a matter which might have affected the mind of the other party but which there was no obligation to disclose, such as recent information as to market prices, will not suffice.¹³⁹ It seems that mere negligence in not spotting the other party's erroneous understanding of the terms of the contract is similarly insufficient.¹⁴⁰

(c) Rectification and rescission. There is a further line of cases in which there has been mere unilateral mistake by the claimant and yet the court has put the defendant to his election of either accepting a variation of the contract which will end the claimant's mistake (i.e. rectification) or submitting to rescission of 16-020

Traditional Structures Ltd v H W Construction Ltd [2010] EWHC 1530 (TCC).

¹³⁴ *Riverlate Properties Ltd v Paul* [1975] Ch. 133 at [140].

¹³⁵ *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 at 515, per Buckley L.J.; and see 515–516, setting out the conditions which must be satisfied to obtain rectification on this basis. Buckley L.J.'s formulation of those conditions has been accepted as being authoritative: see *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77 at [38], [52] and [68]. For a slightly different formulation, however, see *Hurst Stores and Interiors Ltd v ML Europe Property Ltd* [2004] EWCA Civ 490 at [20]. See also *QR Sciences Ltd v BTG International Ltd* [2005] EWHC 670, [2005] F.S.R. 43, where a test of unconscionability was applied and rectification ordered.

¹³⁶ *George Wimpey (UK) Ltd v VI Components Ltd* [2004] EWHC 1374 (Ch). See further *Traditional Structures Ltd v H W Construction Ltd* [2010] EWHC 1530 (TCC).

¹³⁷ *Hurst Stores & Interiors Ltd v ML Europe Property Ltd* [2004] EWCA Civ 490; [2004] B.L.R. 249.

¹³⁸ *Commission for the New Towns v Cooper* [1995] Ch. 259; and *Templiss Properties v Hyams* [1999] E.G.C.S. 60. See also *Hurst Stores and Interiors Ltd v ML Europe Property Ltd* [2004] EWCA Civ 490 at [19]–[20]. See too *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333 at [95]–[100]; *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC).

¹³⁹ *Commission for the New Towns v Cooper* [1995] Ch. 259, per Evans L.J., citing *Agip SpA v Navigazione Alta Italia SpA, The Nai Genova* [1984] 1 Lloyd's Rep. 353 and *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd, The Ypatia Halcoussi* [1985] 2 Lloyd's Rep. 364.

¹⁴⁰ It has been controversially argued that the basis for unilateral mistake rectification should be "whether in all the circumstances that conduct led the Claimant reasonably to believe that the terms he or she intended had been accepted by the Defendant" (D.W. McLauchlan "The Drastic Remedy of Rectification for Unilateral Mistake" (2008) 124 L.Q.R. 608, 624) but this is contrary to previous decisions of the Court of Appeal (see e.g. fn.114 above) and has not been accepted: *Traditional Structures Ltd v HW Construction Ltd* [2010] EWHC 1530 (TCC). However, in *Daventry, Toulson L.J.*, obiter, cited McLauchlan's argument with apparent approval: [2011] EWCA Civ 1153; [2012] 1 W.L.R. 1333 at [173]–[178]. For criticism, see P.S. Davies, "Rectifying the course of rectification" (2012) 75 M.L.R. 387 at 423–425.

the contract.¹⁴¹ Even prior to the decision of the Court of Appeal in *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd*¹⁴² these cases were of very doubtful authority.¹⁴³ For the most part they can be explained as having been decided when the fact that the defendant knew of the claimant's unilateral mistake was not recognised (as it is now) as a ground for rectification, but only for rescission: the court, by putting the defendant to his election, gave him the opportunity of preserving the transaction, but only upon terms that he did not take advantage of the claimant's mistake.¹⁴⁴ But now, if the defendant was ignorant of that mistake when the contract was made, he will not be compelled afterwards to choose between altering or abandoning his bargain. "If conscience is clear at the time of the transaction, why should equity disrupt the transaction?"¹⁴⁵ The effect of the *Great Peace* case is that a contract cannot be rescinded in equity on the grounds of mistake, and today there will seldom¹⁴⁶ be circumstances in which this line of authority will be relevant.

16-021 (d) Unilateral transactions. Where the transaction is unilateral, unilateral mistake suffices for rectification.¹⁴⁷ Thus a deed poll may be rectified on sufficient proof of a mistake¹⁴⁸ in carrying out the intention of the grantor,¹⁴⁹ and so may provisions in deeds of settlement.¹⁵⁰ Nor is there anything to prevent a volunteer claiming rectification,¹⁵¹ at any rate after the settlor's death.¹⁵² And there is now a statutory jurisdiction to rectify wills.¹⁵³ It has recently been suggested that the unilateral mistake required for rectification of a voluntary disposition should be of similar gravity as that required for rescission under *Ogilvie v Littleboy*.¹⁵⁴

¹⁴¹ *Garrard v Frankel* (1862) 30 Beav. 445; *Harris v Pepperell* (1867-68) L.R. 5 Eq. 1; *Bloomer v Spittle* (1871-72) L.R. 13 Eq. 427; *Paget v Marshall* (1884) 28 Ch.D. 255; and see *Gun v M'Carthy* (1884) 13 L.R.Ir. 304; *Solle v Butcher* [1950] 1 K.B. 671.

¹⁴² *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2003] Q.B. 679; [2002] EWCA Civ 1407.

¹⁴³ See *Riverlate Properties Ltd v Paul* [1975] Ch. 133; also (1974) 90 L.Q.R. 439; (1975) 53 Can.Bar.Rev. 339 (S. M. Waddams).

¹⁴⁴ *Bloomer v Spittle* (1871-72) L.R.B Eq. 427 and *Solle v Butcher* [1950] 1 K.B. 671 were explained in *Riverlate Properties Ltd v Paul* [1975] Ch. 133 at 143, 144, as cases of common mistake.

¹⁴⁵ *Riverlate Properties Ltd v Paul* [1975] Ch. 133 at 141, per Russell L.J.

¹⁴⁶ The *Great Peace* case ([2003] Q.B. 679; [2002] EWCA Civ 1407) concerned the rescission of a contract on the grounds of mistake, and it is perhaps possible that the decision is confined to cases which concern the rescission of contracts as opposed to other transactions: if so, there may be some cases where rescission remains available in equity. However, in *Heath v Heath* [2009] EWHC 1908 (Ch); [2010] 1 F.L.R. 610 at [26] it was said that "mistake as a vitiating element has been eliminated as a separate equitable doctrine by *Great Peace*".

¹⁴⁷ See *Wright v Goff* (1856) 22 Beav. 207 at 214.

¹⁴⁸ *Bonhote v Henderson* [1895] 1 Ch. 742; [1895] 2 Ch. 202.

¹⁴⁹ *Wright v Goff* (1856) 22 Beav. 207; *Killick v Gray* (1882) 46 L.T. 583; but see *Phillipson v Kerry* (1863) 32 Beav. 628, although this can hardly be read as a decision by Romilly M.R. denying the jurisdiction to rectify a deed poll that he had exercised in *Wright v Goff*. If the deed is wholly misconceived, it may be cancelled or rescinded.

¹⁵⁰ See, e.g. *Maunsell v Maunsell* (1877) 1 L.R.Ir. 529 (see at 539, 540); *Van der Linde v Van der Linde* [1947] Ch. 306 (deed of covenant); *Lackersteen v Lackersteen* (1860) 30 L.J. Ch. 5. See para.16-005.

¹⁵¹ *Thompson v Whitmore* (1860) 1 J. & H. 268 at 273; *Weir v Van Tromp* (1900) 16 T.L.R. 531.

¹⁵² *Lister v Hodgson* (1867) L.R. 4 Eq. 30 at 34; *M'Mechan v Warburton* [1896] 1 I.R. 435 at 439.

¹⁵³ See para.16-006.

¹⁵⁴ *Day v Day* [2013] EWCA Civ 280; [2013] 3 All E.R. 661 at [39]-[45], per Lewison L.J., relying upon the judgment of Lloyd L.J. in the Court of Appeal decision in *Pitt v Holt* [2011] EWCA Civ 197; [2012] Ch. 132; the Supreme Court in *Pitt v Holt* [2013] UKSC 26; [2013] 2 A.C. 108 has also subsequently approved the test in *Ogilvie v Littleboy* (1897) 13 T.L.R. 399 at 400 (affirmed by the House of Lords: *Ogilvie v Allen* (1899) 15 T.L.R. 294). For further discussion of this type of

3. The standard of proof

The standard of proof remains the civil standard of the balance of probabilities. However, since the alleged intention contradicts the written instrument, "convincing proof"¹⁵⁵ is required to contradict the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by them.¹⁵⁶ Equally, "certainty and ready enforceability would be hindered by constant attempts to cloud the issue by reference to pre-contractual negotiations".¹⁵⁷ It is for these reasons that a person seeking rectification must be able to rely upon "strong irrefragable evidence".¹⁵⁸ The burden of proof is on the party seeking rectification, and this burden is particularly "formidable" if the formal written instrument is detailed and recorded with the benefit of expert legal advice.¹⁵⁹

(a) Evidence of a settlor's evidence. If it is explicit enough and is uncontradicted, the evidence of a settlor may suffice for the rectification of a settlement¹⁶⁰; and even a mere perusal of the document itself may satisfy the court.¹⁶¹ Nevertheless, in the case of a voluntary settlement the court is especially cautious in granting rectification merely on the settlor's evidence if it is unsupported by other evidence such as his contemporaneous written instructions. This is so even if on rectification the settlement would more nearly accord with recognised precedents and the probable intention,¹⁶² and be more beneficial to the settlor.¹⁶³

(b) Evidence of intention in other cases. Subject to any written evidence,¹⁶⁴ the true intention of the parties¹⁶⁵ may be established both by evidence of their acts, as where for a long time they have observed the true agreement and not the words of the instrument,¹⁶⁶ and also by oral evidence of their intentions and states

"sufficiently serious" mistake, see para.15-006.

¹⁵⁵ *Joscelyne v Nissen* [1970] 2 Q.B. 86; see further *Citifinancial Europe Plc v Davidson* [2014] EWHC 1802 (Ch).

¹⁵⁶ *Thomas Bates and Son v Wyndham's (Lingerie) Ltd* [1981] 1 W.L.R. 505 at 521; *Racal Group Services v Ashmore* [1995] S.T.C. 1151 at 1155. See also *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] A.C. 563 at 586-587; *Grupo Torras v Al Sabah* (1999) C.L.C. 1469 (reversed on a different point [2001] C.L.C. 221) (civil fraud). cf. *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep.Bank 511.

¹⁵⁷ *The Olympic Pride* [1980] 2 Lloyds Rep. 67 at 73, per Mustill J.

¹⁵⁸ *Shelburne v Inchiquin* (1784) 1 Bro.C.C. 338 at [341], per Lord Thurlow L.C.; and see *Townshend v Stangroom* (1801) 6 Ves. 328 at 334; *Lake v Lake* [1989] S.T.C. 865 at 869, per Mervyn Davies J.

¹⁵⁹ See e.g. *James Hay Pension Trustees Ltd v Hird* [2005] EWHC 1093 (Ch) at [81]. This paragraph was cited and has been approved by Arden L.J. in *Scottish Widows Fund and Life Assurance Society v BGC International* [2012] EWCA Civ 607 at [44]; see too *Ashwood Enterprises Ltd v Bank of Ireland* [2014] EWHC 2624 (Ch) at [214].

¹⁶⁰ *Hanley v Pearson* (1870) 13 Ch.D. 545; but see *Tucker v Bennett* (1887) 38 Ch.D. 1.

¹⁶¹ *Banks v Ripley* [1940] Ch. 719.

¹⁶² *Bonhote v Henderson* [1895] 1 Ch. 742; affirmed [1895] 2 Ch. 202.

¹⁶³ *Van der Linde v Van der Linde* [1947] Ch. 306; and see *Whiteside v Whiteside* [1950] Ch. 65.

¹⁶⁴ *Lackersteen v Lackersteen* (1860) 30 L.J.Ch. 5.

¹⁶⁵ Where a contracting party is a legal person, the relevant intention will generally be that of the decision-maker who has the authority to bind the company, and not that of a mere negotiator unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company: *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 55; [2012] 2 All E.R. (Comm) 748 at [41].

¹⁶⁶ *M'Cormack v M'Cormack* (1877) 1 L.R.Ir. 119; and see *Dormer v Sherman* (1966) 110 S.J. 171.

of mind.¹⁶⁷ Evidence of the parties' pre-contractual negotiations is admissible in an action for rectification, though not as an aid to construction¹⁶⁸; likewise it is permissible in claims for rectification to have regard to events after the transaction as evidence of the parties' intentions at the time of the transaction.¹⁶⁹ Oral evidence is admissible even if the instrument carries out a transaction which by statute must be made or evidenced by deed or in writing; for all that equity does is to make the writing record the true agreement instead of the untrue.¹⁷⁰ Thus a lease granted in pursuance of an oral agreement may be rectified so as to accord with that agreement.¹⁷¹ It was at one time thought that where the claimant relied solely on parol evidence without any documentary corroboration, and that evidence was denied by the defendant, the claimant would be without a remedy.¹⁷² Nowadays, in a proper case, the court may accept the evidence of the claimant in preference to that of the defendant. Similarly, extrinsic evidence may be used to support a rectification claim, even when the contract contains an entire agreement clause.¹⁷³

4. — DEFENCES

1. Valid defences

16-025 Even if the foregoing requirements are satisfied, the court may still refuse to order rectification; for the remedy is equitable and discretionary. Thus, it will not be granted to the prejudice of a bona fide purchaser for value without notice who takes an interest conferred by the instrument¹⁷⁴; and laches or acquiescence will bar the claim.¹⁷⁵ Where rectification is sought of a voluntary settlement and one of the trustees objects, the court may in its discretion refuse rectification.¹⁷⁶ Further, it is too late to claim rectification of a contract if it is no longer capable of performance,¹⁷⁷ or if, after being construed by the court, it has been wholly performed under the judgment of the court.¹⁷⁸ Impossibility of restoring the parties to the pre-contract position may also bar rectification, although not if:

"it would not be difficult to adjust so as to place the parties in a position in which they would receive little or no prejudice from what had been done after the exchange."¹⁷⁹

¹⁶⁷ *Murray v Parker* (1854) 19 Beav. 305 at 308.

¹⁶⁸ *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 A.C. 1101 and see further para.16-008.

¹⁶⁹ *Gallaher Ltd v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch); [2005] O.P.L.R. 57; *Industrial Acoustics Company Ltd v Crowhurst* [2012] EWHC 1614 (Ch); [2012] Pens.L.R. 371.

¹⁷⁰ *Re Boulter Ex p. National Provincial Bank of England* (1876) 4 Ch.D. 241; *Johnson v Bragge* [1901] 1 Ch. 28; *Craddock Bros v Hunt* [1923] 2 Ch. 136 (for earlier conflicting authorities see at [151]); *United States v Motor Trucks Ltd* [1924] A.C. 196.

¹⁷¹ *Cowen v Truefitt Ltd* [1899] 2 Ch. 309.

¹⁷² *Mortimer v Shortall* (1842) 2 Dr. & War. 363 at 374.

¹⁷³ *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch); *DS-Rendite-Fonds Nr.106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm).

¹⁷⁴ *Bell v Cundall* (1750) Amb. 101; *Garrard v Frankel* (1862) 30 Beav. 445; *Coates v Kenna* (1873) 7 I.R.Eq 113; and see *Smith v Jones* [1954] 1 W.L.R. 1089; *Thames Guaranty Ltd v Campbell* [1985] Q.B. 210 at 240, citing this passage.

¹⁷⁵ *Beale v Kyte* [1907] 1 Ch. 564 (holding that time runs from discovery of the mistake); *McCausland v Young* [1949] N.I. 49; cf. *Dormer v Sherman* (1966) 110 S.J. 171 at 172.

¹⁷⁶ *Re Butlin's Settlement Trusts* [1976] Ch. 251 at 262 (rectification granted).

¹⁷⁷ *Borrowman v Rossell* (1864) 16 C.B.(N.S.) 58.

¹⁷⁸ *Caird v Moss* (1886) 33 Ch.D. 22.

¹⁷⁹ *Beauchamp v Winn* (1873) L.R. 6 H.L. 223 at 232 (Lord Chelmsford).

Performance of the contract will not always amount to a defence, however, at least where the performance was monetary and it is arguable that it (or part of it) is repayable on restitutionary grounds.¹⁸⁰ An order for rectification will also be refused where the parties have already varied their agreement so as to correct the error, so that the only consequence of the court's order would be to secure a fiscal benefit.¹⁸¹ In other words, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal advantage.¹⁸²

2. Bad defences

16-026 It is no defence that the claimant¹⁸³ or his solicitor¹⁸⁴ was careless, or that the claimant, being a solicitor, drafted the instrument himself.¹⁸⁵ Similarly, the death of a party is no defence,¹⁸⁶ nor is the absence of any privity of contract between the parties¹⁸⁷ so that rectification may in appropriate cases be granted to¹⁸⁸ or ordered against¹⁸⁹ successors in title; nor is it a defence that a party to the transaction who will not be affected by the order is not before the court.¹⁹⁰ Provided that the court is otherwise satisfied that rectification should be granted (i.e., it is satisfied that a document does not give effect to the true agreement or arrangement between the parties, or to the true intention of a grantor or covenantor; and if satisfied that there is an issue, capable of being contested between the parties or between a covenantor or a grantor and the person he intended to benefit), it is irrelevant first that the rectification of the document is sought or consented to by all of the parties, and second that rectification is desired because it has beneficial fiscal consequences.¹⁹¹ Further, the rule that equity will not grant relief against the non-execution of a power of appointment (as distinct from defective execution¹⁹²) does not preclude rectification of a settlement so as to make it carry out an intended exercise of a power¹⁹³; for rectification is an independent remedy.

¹⁸⁰ *The Toronto Dominion Bank v Oberoi* [2002] EWHC 3216.

¹⁸¹ See *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151. However, it may be argued that this affords insufficient protection to third parties: see para.16-010.

¹⁸² See *Whiteside v Whiteside* [1950] Ch. 65 (CA), where the parties had already entered into a supplementary deed rectifying the error before the matter came to court. See also *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151 at 1158, per Peter Gibson L.J. However in *Giles v Royal National Institute for the Blind* [2014] EWHC 1373 (Ch) it was no bar to rectification (of a deed of variation of a will) that in executing the deed it was the claimant's objective to relieve the beneficiaries of the indirect burden of inheritance tax.

¹⁸³ *Monaghan CC v Vaughan* [1948] I.R. 306.

¹⁸⁴ *Weeds v Blaney* (1977) 247 E.G. 211, where at 213 this sentence is cited with approval.

¹⁸⁵ *Ball v Storie* (1823) 1 Sim. & St. 210.

¹⁸⁶ See *Johnson v Bragge* [1901] 1 Ch. 28.

¹⁸⁷ *Shepherd v Graham* [1947] N.Z.L.R. 654; and see *Van der Linde v Van der Linde* [1947] Ch. 306 at 311.

¹⁸⁸ See *Boots the Chemist Ltd v Street* (1983) 268 E.G. 817.

¹⁸⁹ See *Equity & Law Life Assurance Society Ltd v Coltness Group Ltd* (1983) 267 E.G. 949.

¹⁹⁰ *Wilson v Wilson* [1969] 1 W.L.R. 1470 (declaration of trust by purchasers in transfer rectified in absence of vendor).

¹⁹¹ See *Racal Group Services Ltd v Ashmore* [1995] S.T.C. 1151 (CA) at [1157] (Peter Gibson L.J.), approving a passage from the judgment of Vinelott J. at first instance [1995] S.T.C. 416 at 425. See also *Re Colebrook's Conveyances* [1972] 1 W.L.R. 1397; *Re Slocock's Will Trusts* [1979] 1 All E.R. 358, and *Lake v Lake* [1989] S.T.C. 865.

¹⁹² See Ch.11.

¹⁹³ *Johnson v Bragge* [1902] 1 Ch. 28.