Contracts in Writing: Issues in Rectification for Mistake and Rescission for Misrepresentation

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ABSTRACT

This thesis examines issues concerning the rectification of contractual documents for mistake and the rescission of contracts for misrepresentation. The principles underlying these two remedies are unclear. It has been suggested that: rectification is an instance of subjectivity trumping objectivity; rectification is a by-product of 'partial rescission'; and a claimant may rescind a contract for misrepresentations even without believing in them.

This thesis demonstrates that: contract law's 'objective principle' underlies not just contractual interpretation and formation but also rectification and rescission; rectification is not a by-product of 'partial rescission'; and a claimant must believe in the misrepresentations in order to rescind. This thesis also justifies the rule that unilateral mistake rectification ensues only if the defendant *knew* of the claimant's mistake.

Since misrepresentations are mistakes induced by mis-statements, examining rectification and rescission together will usefully demonstrate how courts should respond holistically where these concepts overlap. Where claimants contract with defendants because the defendants misrepresented that their contractual document contains C terms when in fact it contains D terms, and the defendants know of the claimants' mistake, the claimants should have a choice. The claimants may uphold the contract on D terms; rescind the contract on D terms and walk away; or uphold the contract on C terms (and may get the document rectified to reflect C terms). Given their importance as remedies, this thesis also examines whether rescission and rectification may be precluded by a contractual clause in the very contract or document which is being rescinded or rectified.

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CHAPTER 1: INTRODUCTION

> 'The object of the court is to do justice between the parties, and the court … will not be deterred by mere difficulties of interpretation.'–*Wells*.[1]

1. Scope

This doctoral thesis examines some controversial issues concerning the rectification of contractual documents for mistake and rescission of contracts for misrepresentation.

Its subject-matter has been a topical, fruitful field of study. Important cases, decided during the course of writing this thesis, fundamentally affect the way English contract lawyers look at rectification for mistake[2] and rescission for misrepresentation.[3] They enriched the discussion in, but also necessitated revision of, the thesis up to 31 July 2020.

Ultimately, this thesis is concerned with finding a principled, just and pragmatic way to explain when rectification or rescission is available where a party (claimant) has entered into a contract by executing a contractual document under the erroneous assumption that the document is consistent with what he thought he was contracting for. It focuses on three situations, namely, where the claimant's mistaken assumption was:

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1 *Wells v Devani* [2019] UKSC 4, [18] (Lord Kitchin) (citing *G Scammel & Nephew Ltd v HC and JG Ouston* [1941] AC 251, 268 (Lord Wright)). R Stevens, 'Contract Interpretation: What It Says on the Tin' (Inner Temple Lecture Series, 6 October 2014), 3: 'Certainty alone is never very persuasive as a justification for a rule departing from what justice would otherwise require. A rule stipulating for the slaughter of all first born children may be very certain, but that isn't much to its credit'.

2 Eg, *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361.

3 Eg, *Zurich Insurance Company Ltd v Hayward* [2016] UKSC 48, [2017] AC 142.

(A) shared with the other party (defendant);

(B) known to the defendant; or

(C) induced by the defendant's pre-contractual misrepresentations.

Situations (A), (B) and (C) are traditionally categorised as cases of common mistake, unilateral mistake and misrepresentation; each with different consequences. Part of the aim of this thesis is to examine whether the English approach of analysing mistake and misrepresentation separately obscures their underlying similarities. This thesis will, instead, examine mistake and misrepresentation side by side. Recognising operative misrepresentations as induced mistaken beliefs could yield valuable insights (but one must remain vigilant against overstating or understating their differences and similarities).

Furthermore, if facts permit claimants to characterise their case in terms of misrepresentation or mistake, the law must decide whether they should have a choice between treating the apparent contract as void, voidable or subject to rectification.

In all three situations (A), (B) and (C), the starting point is that parties are bound by the terms of the contractual document because they appear objectively to have agreed thereto. According to current discourse, although the principle that the formation and interpretation of contracts are assessed objectively promotes certainty, justice sometimes requires subjective factors to be taken into account to allow a claimant to escape from the objective appearance of agreement as reflected in the contractual document. Since English contract law treats the 'objective principle' as fundamental doctrine, it is essential to examine what the principle actually entails and how it is said to be qualified subjectively.

Thus, this thesis examines when subjective factors (such as the parties' relative fault and the defendant's knowledge or inducement of the claimant's mistake) qualify contract law's commitment to objectivity. This insight helps to explain when rescission and rectification are available in situations (A), (B) and (C).

To the extent that rectification for mistake and rescission for misrepresentation exhibit a tension between upholding the objective manifestation of agreement and allowing an 'escape' therefrom, that tension is magnified where it is argued that the parties have *expressly* contracted out of any potential escape. This gives rise to difficult questions about whether parties may contract out of the consequences of misrepresentation or mistake (addressed in Chapters 7 and 8).

This thesis will, in the course of contributing towards the doctrinal coherence of the principles of rectification of contractual documents for mistake and rescission of contracts for misrepresentation, address various important conceptual and practical issues, according to the following structure.

2. Method and Structure

This thesis adopts a classic doctrinal method of case-based research, focusing on judicial precedents and scholarly literature.

Chapter 2: The Objective Principle

Chapter 2 sets out the orthodox view of what contract law's 'objective principle' comprises, and will also touch on some of the so-called subjective qualifications to contract law's general objective approach. However, given that the objective principle is in fact contextualised, takes into account business common sense, and is 'addressee-centric', it

therefore comprises a complex amalgam of *objective and subjective elements*. Since some 'subjective' elements are already intrinsic to the objective principle, not much room is left for any *additional* subjective qualifications.

Chapter 3: Rectification for Common Mistake

Chapter 3 deals with the doctrinal basis of the rectification of contractual documents on the ground of 'common mistake'.

The starting point is that the contractual document prevails as the objective manifestation of the parties' agreement. This may be displaced by the parties' prior consensus or common continuing intention if it differs from the objective interpretation of the contractual document. The key questions are why, and the level of objectivity or subjectivity deployed in determining that consensus or intention.

Chapter 4: Rectification for Unilateral Mistake

Chapter 4 deals with the doctrinal basis of the rectification of contractual documents for 'unilateral mistake' which, under current orthodoxy, is triggered by unconscionability or bad faith. If the claimant mistakenly assumes that the ultimate contractual document contains a particular term when it in fact contains some other term, but the defendant does *not* share that mistake, when and why should the claimant's assumption trump the documented, objective, appearance of agreement?

Rectification for unilateral mistake is available only if the defendant *knew* of the claimant's mistake as to terms. Why does rectification not ensue where the defendant *ought reasonably to have known* thereof?

Chapter 5: Misrepresentation–Establishing Right to Rescind

Chapter 5 sets out the main elements required for establishing a right to rescind a contract on the ground that the claimant was induced to enter into it by a misrepresentation. The claimant must establish the falsity of, and reliance upon, a representation. The same objective principle applied by the courts in the formation and interpretation of contracts is used when interpreting (mis)representations.

Can the claimant escape the objective appearance of agreement in the contractual document, if he knew of the falsity of the defendant's misrepresentation? Can a statement of fact in the contract amount to a contractual term and, concurrently, an operative misrepresentation?

Chapter 6: Misrepresentation and Mistake–Interpretation, Rescission and Rectification

Chapter 6, as the culmination of the preceding Chapters, explores the intersection amongst misrepresentation, mistake, rescission and rectification. To navigate the complexities of this intersection, one must first have a clear understanding of what the law is trying to achieve when it allows rescission for misrepresentation or rectification for mistake (discussed in the preceding Chapters).

Here, we examine when rectification and rescission are available in the three scenarios listed (as situations (A), (B) and (C)) above. Where the defendant's misrepresentation as to terms induces the claimant to enter into a contract with the defendant (so that the defendant *knows* that the claimant mistakenly assumed that the contractual document contains terms which are consistent with the defendant's (mis)representations), does the claimant have a *choice* of remedies?

The defendant's knowledge may imply fraud. If fraud unravels all, why does fraudulent misrepresentation render a contract voidable rather than void? The claimant was *also* acting under a unilateral mistake: is the contract void? Can the claimant choose to elevate prior (mis)representations into contractual obligations; and can this be done by rectification?

Chapter 7: Misrepresentation–Bootstraps, Contractual Estoppel and Contracting Out of Rescission

'No representation', 'no rescission', 'no cancellation' or 'non-reliance' clauses, if efficacious, purport to preclude the right to rescind for (non-fraudulent) misrepresentation. In particular, 'non-reliance' and 'no representation' clauses raise a so-called 'contractual estoppel' which precludes the claimant from asserting a representation or reliance, thereby precluding a claimant from proving misrepresentation at all.

In Chapter 7 it will be argued that, contrary to current orthodoxy, clauses purporting to preclude rescission (for non-fraudulent misrepresentation) are ineffective if the contract in which they are found is being rescinded, since they cannot pull themselves up by their own bootstraps. Even if such clauses may prima facie preclude rescission effectively at common law, must they be subject to the statutory 'reasonableness' requirement, as imposed by section 3 of the Misrepresentation Act 1967?

Chapter 8: Mistake–Contracting Out of Rectification

Chapter 8 deals with the question whether clauses (such as entire agreement clauses) purporting to preclude a claimant's right to assert rectification for mistake are effective if they are contained in the contractual document being rectified.

Chapter 9: Conclusion

Chapter 9 sums up the conclusions in the preceding Chapters.

CHAPTER 2: THE OBJECTIVE PRINCIPLE

> 'Thus the task of ascertaining whether the parties have reached agreement as to the terms of a contract can involve quite a complex amalgam of the objective and the subjective and involve the application of a principle that bears close comparison with the doctrine of estoppel. … The task of ascertaining whether the parties have reached agreement as to the terms of the contract overlaps with the task of ascertaining what it is that the parties have agreed. The approach is the same. It requires the construction of the words used by the parties … whether the contract is oral or in writing. … The court asks the question whether each party intended, or must be deemed to have intended, to contract with the other.' – *Shogun Finance*.[1]

1. Introduction

This chapter examines certain less-traversed aspects of the 'objective principle', better described as the principle of 'addressee-centric objectivity', in English contract law. As the foregoing quotation clarifies, the so-called objective principle actually comprises a 'complex amalgam' of both subjective and objective elements. Hence, one must heed the salutary warning in *Meagher, Gummow & Lehane's Equity Doctrines & Remedies*:[2]

> 'The process by which a court decides whether the parties reached an agreement amounting to a common intention cannot be described straightforwardly as "subjective" or "objective". Care is needed when approaching analyses and critiques which rely heavily on the use of such terms in their treatment of the current law. English lawyers at present can

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1 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123], [124], [125] (Lord Philips of Worth Matravers).

2 JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th edn, 2015), 934 ([27-070]).

only be too painfully aware of the inevitable confusion that otherwise results.'

It is unnecessary to add to the already ample discourse on the relevance of business common sense and contextualisation of the reasonable person's perspective in the objective interpretative process.[3] Nonetheless, this chapter must unavoidably set out some tenets of the objective principle, since much of contract doctrine is grounded upon it.

The objective principle is not just used by the courts in interpreting offers and acceptances during contract *formation.*[4] It applies to *contractual interpretation*,[5] regardless of whether the contract is wholly reduced to writing.[6] The principle also applies so that communications are interpreted to bear the same meaning at law and in equity.[7]

Similarly, the courts apply the objective principle in relation to both the identification and interpretation of representations and agreements for the purposes of

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3 *Sutton Housing Partnership Ltd v Rydon Maintenance Ltd* [2017] EWCA Civ 359, [46] (Jackson LJ).

4 *Smith v Hughes* (1870-1871) LR 6 QB 597 (Blackburn J); *Hartog v Colin and Shields* [1939] 3 All ER 566 (Singleton J); *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333, [174] (Toulson LJ), [194] (Lord Neuberger of Abbotsbury MR); *Paal Wilson & Co v Partenreederei Hannah Blumental (The 'Hannah Blumenthal')* [1983] AC 854, 916-917 (Lord Diplock), 924 (Lord Brightman).

5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann); *Prenn v Simmonds* [1971] 1 WLR 1381, 1384 (Lord Wilberforce); *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (Lord Clarke); *Arnold v Britton* [2015] 2 WLR 1593, [15], [21] (Lord Neuberger); *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095, [9]-[15] (Lord Hodge); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); *BCCI v Ali* [2002] 1 AC 251, [8], [19] (Lord Bingham of Cornhill).

6 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [22], [23] (Lord Hoffmann NPJ); *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123], [124], [125] (Lord Philips of Worth Matravers).

7 *BCCI v Ali* [2002] 2 AC 251 (Lord Nicholls of Birkenhead); *Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132, [42] (Lewison LJ).

establishing the right to rescind a contract for misrepresentation[8] and to rectify a contractual document for common mistake where the parties' continuing common intention amounts to a prior *binding* contract.[9] It will be argued in the later chapters (on rectification for common mistake and unilateral mistake) that the same objective principle ought to apply in the rectification of contractual documents for unilateral mistake and (despite the Court of Appeal's recent decision in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd*[10]) for common mistake where the continuing common intention does *not* amount to a prior *binding* contract.

Although the objective principle is applicable across different aspects of contract law, it is ultimately an interpretative approach. It prescribes how communications, such as unilateral notices, contractual documents or (mis)representations, are interpreted. Nonetheless, it finds expression chiefly in cases concerning contractual interpretation, and that is reflected in this chapter.

2. Communicating: 'Complex Amalgam' of Objectivity and Subjectivity

The 'objective principle' is borne of practical commercial sense.

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8 *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, [30] (Mance LJ); *Kyle Bay Ltd v Underwriters Subscribing under Policy No 019057/08/01* [2007] 1 CLC 164, [31] (Neuberger LJ).

9 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [60] (Lord Hoffmann); *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [141]-[146], [176] (Leggatt LJ).

10 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [141]-[146], [176] (Leggatt LJ).

It might seem that if a contract is the product of the contracting parties' mutual agreement, the contract's existence and meaning should comport with their subjective intentions. That is not current law.

If communications between contracting parties were interpreted entirely subjectively, it would be insidious for an offeree to guess at what he is accepting or rejecting and for the offeror to guess at the meaning of an apparent acceptance or a counter-offer. It would similarly be difficult to settle on the meaning of the parties' agreement, even assuming that the putative contract exists. If its meaning were based on the subjective intention of one party, when should one prevail over the other? Or must we conclude that there is no contract unless the subjective, even undisclosed, intentions of *both* parties coincide? Purporting to prescribe that a contract exists only if the intentions of both parties comported with each other would result in many apparent contracts being void for lack of subjective agreement. That is not in itself objectionable, but would radically contradict the longstanding judicial commitment to uphold apparent contracts. The courts would 'incur the reproach of being the destroyer of bargains',[11] not for striking down putative contracts for uncertainty and incompleteness but for unrealistically insisting upon subjective consensus.[12]

A contract law which founds the formation and interpretation of binding agreements entirely on subjective intentions would be an invitation to perjure.[13] The existence and meaning of putative contracts would be held to ransom by self-serving

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11 *Cf WN Hilas & Co Ltd v Arcos Ltd* [1932] UKHL 2, (1932) 147 LT 503 (Lord Tomlin).

12 *Summit Investment Inc v British Steel Corp* [1987] 1 Lloyds Rep 230, 233 (Sir John Donaldson MR).

13 *Spencer v Secretary of State for Defence* [2012] EWHC 120 (Ch), [62] (Vos J).

disputants on the strength of their *ipse dixit*, leaving no commercially acceptable way to protect the reasonable expectations of parties who act on what appears to be a contract. Similar objections apply if the rectification of contractual documents was founded entirely on subjective intentions. It is incorrect to suggest that equity is concerned exclusively with conscience and subjective intentions and knowledge, and the common law with objectivity.[14] Centuries ago, in a different context, equity accepted the necessity of imposing some objectivity to prevent easy evasion of principles formulated in purely subjective terms. As Prof Maitland noted, after equity extended beneficiaries' interests in trust assets to bind purchasers with *actual knowledge* of the trust, it became 'inevitable' to go further and impose 'an objective standard'; otherwise, 'purchasers will take care not to know of the trust'. Hence, the trust was further extended to bind even purchasers with merely *constructive notice*, who 'would have known of the trust had they behaved as prudent purchasers behave'.[15]

On the other hand, if communications were assessed wholly objectively, entirely detached from the perspective of the contracting parties, then the courts, being the ultimate reasonable person, would need to interpret contracts to conform to what the courts regard as reasonable bargains in the light of the parties' words and conduct. An apparent objection to detached objectivity is that, whilst the enforcement of contractual terms subjectively intended by *one party* but not the other might be justified in some cases, it would be absurd, and too artificial, to enforce contractual terms which *neither* party intended.[16] Yet, this

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14 *Cf* PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 192.

15 AH Chaytor & WJ Whittaker (ed), *FW Maitland: Equity also the Forms of Action at Common Law* (CUP, 1929), 118-119.

16 *Cf* D McLauchlan, 'The Contract that Neither Party Intends' (2012) 29 JCL 26, 30-31.

supposed absurdity would be a potential consequence of detached objectivity. The force in this objection must not be overstated. After all, the imposition of rights and obligations[17] independently of the parties' actual subjective intentions is common in English private law. It is true that, unlike other private law obligations, contractual obligations are supposedly founded on the parties' agreement. However, once we accept that private law obligations can be imposed regardless of the parties' actual subjective intentions in general, there is no logical impediment to imposing private law obligations regardless of parties' actual subjective intentions specifically in a contractual context. The law merely has to provide some principled manner for ascertaining what it regards as the parties' 'agreement' in the contractual context.

In fact, under current orthodoxy, the 'objective principle' applicable in English contract law is not entirely objective despite its nomenclature, because it is not wholly detached from the contracting parties and contains some subjective elements. The objective principle prescribes that communications between contracting parties should be interpreted objectively from the perspective of a reasonable person in the position of the *addressees* of those communications (namely, the contracting parties), taking into account their known characteristics, business common sense and context.

According to Profs Endicott, Chen-Wishart, Coote and Stevens,[18] contracting is objective because making a contract involves the communication of the contracting parties'

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17 Eg, imposing duties of care in tort (*Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465) and fiduciary duties or equitable duties to act with care and diligence (*Bristol and West Building Society v Mothew* [1996] EWCA Civ 533, [1998] Ch 1).

18 TAO Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' (Ch 8 in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, 2000)), 151, 155; M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 346-

choice (via offers, acceptances or documents memorialising an agreement); and, to be meaningful, communication must be objective in the sense that the content and meaning of what has been communicated by the speaker or writer to the listener or reader must take into account the addressees' perspective.[19] Prof Endicott said:[20]

> '…questions of the existence and content of an agreement are objective questions … A court adjudicating a contract dispute, therefore, faces a central task of answering this objective question: "what commitments did each party give the other reason to think that they were assenting to"? …
>
> Agreements are objective in this way for the same reason that promises are. Both agreements and promises are objective because communication is. Speaking is (among other things) a way of communicating intentions, but the meaning of an utterance is not determined by the speaker's intentions. It is not simply determined by the meaning of the words a speaker uses, either. It is determined by the reasons that a speaker gives (by using the words that he or she uses) for another person to believe that the speaker has one intention or other. The House of Lords[21] has made this point in *Mannai Investment*…'

A contract speaks to both contracting parties, not some wholly detached observer standing apart from the parties.[22] Thus, in the interpretative exercise, the courts only take

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347; B Coote, 'Reflections on Intention in the Law of Contract' (Ch 2 in JW Carter (ed), *Brian Coote: Contract as Assumption II* (Hart Publishing, 2016)), 16; R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch. 9 in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016)), 170; R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 601, 608.

19 L Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553, 558-560.

20 TAO Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' (Ch 8 in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, 2000)), 151, 155.

21 *Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd* [1997] 3 All ER 352, 376.

22 *Homburg Houtimport BV v Agrosin Private Ltd ('The Starsin')* [2004] 1 AC 715, [73] (Lord Hoffmann).

into account the facts which were known to the contracting parties[23] or reasonably available to a reasonable person in the position of the contracting parties during contract formation.[24]

It has been argued that a contract cannot mean different things to a court and to counsel; and that the proper addressees of a contract are not in fact the contracting parties but the lawyers asked to advise on its meaning and who have limited knowledge of context extrinsic to the contractual document.[25] This is a difficult argument. Some contracting parties seek legal advice without resorting to litigation, some go through trial and appeal, and some assign their contractual rights to third parties. Nonetheless, the vast majority of contracts are created, performed and discharged by the original contracting parties without any formal legal advice, litigation or assignment. There is no warrant generally to prefer the perspective of an advising solicitor–or some third party assignee or other detached third party–over (the court's objective interpretation from) the perspective of the original contracting parties.

The simple justification for adopting addressee-centric objectivity is that it is better than its alternatives. Even if one accepts that giving effect to an agreement which comports with the subjective intentions of both contracting parties might seem ideal, it is impracticable. Addressee-centric objectivity provides additional security of transaction which a purely subjective approach cannot.

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23 C Mitchell, *Interpretation of Contracts* (2nd edn, 2018), 37; *cf* R Calnan, *Principles of Contractual Interpretation* (2nd edn, 2017), 63 ([4.68]).

24 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [21] (Lord Neuberger of Abbotsbury); *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, [10] (Lord Hodge JSC); *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 997 (Lord Wilberforce); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912, 913 (Lord Hoffmann); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock).

25 A Berg, 'Thrashing through the Undergrowth' (2006) 122 LQR 354, 358, 359, 362.

Prof Chen-Wishart rightly said that addressee-centric objectivity–not subjectivity or detached objectivity–'has the weight of authority and ticks all the justifications for objectivity', including: [26]

> (1) The addressees' perspective is entitled to respect because, being the contracting parties, they provided consideration and 'paid for the promised performance';
>
> (2) Addressee-centric objectivity is consistent with 'the nature of communication as conveying meaning' to the addressees; and
>
> (3) Addressee-centric objectivity protects the addressees' 'reasonable expectations and reliance' as contracting parties.

Unlike a wholly detached form of objectivity, an addressee-centric perspective takes into account the parties' knowledge, thus reducing the possibility of a contract being enforced in accordance with the subjective intention of *neither* contracting party. As such, it becomes likelier that addressee-centric objectivity would give effect to agreements which are comparatively less artificial than detached objectivity. Addressee-centric objectivity will, in many cases, result in contracts being enforced in accordance with the subjective intentions of one or both parties (unless they were both unreasonable).[27]

Despite this unsurprising overlap in terms of results arising from addressee-centric objectivity and subjectivity, clearly, uncommunicated subjective intentions do not count. A contract is typically formed by the parties' agreement,[28] and generally constituted by an

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[26] M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 350. Just as much was said in PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 18.

[27] *Cf* B Coote, 'Reflections on Intention in the Law of Contract' (Ch. 2 in JW Carter (ed), *Brian Coote: Contract as Assumption II* (Hart Publishing, 2016)), 26, 29; *cf FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [128] (Leggatt LJ).

[28] *Gibson v Manchester City Council* [1979] 1 WLR 294, 297 (Lord Diplock).

unconditional acceptance of all the terms[29] of an antecedent offer. The parties' act of 'contracting' or 'agreeing' is an act of communication between them because the offer must be communicated to the offeree, and the acceptance must respond to the antecedent offer and must be communicated to the offeror. As such, neither identical cross-offers[30] nor purported acceptances of unknown offers[31] will constitute binding agreements because *no antecedent offer was communicated* to the offeree *before* the purported acceptance, and there is therefore no 'acceptance' *which responds to* (or results from)[32] an antecedent offer. Similarly, a purported acceptance is not effective to constitute an agreement unless it is brought to the offeror's notice.[33]

It follows that the parties' uncommunicated intentions cannot form the basis of a contract even if their actual, subjective, intentions coincide.

If uncommunicated but coincidental intentions cannot found an agreement which constitutes a contract then, *a fortiori*, they cannot justify rectification[34] of a contractual document to make it comport with the parties' true agreement. This is clear from *FSHC*.[35]

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29 *Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd* [1979] 1 WLR 401.

30 *Tinn v Hoffman & Co* (1873) 29 LT 271, 279.

31 *R v Clarke* (1927) 40 CLR 227.

32 J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 52 ([3-05], fn 14): 'An "agreement" is not just a coincidence of ideas, but requires a sharing of those ideas and an appreciation by each party that they understand each other'.

33 *Entores Ltd v Miles Far East Corp* [1955] 2 QB 327 (Denning, Birkett and Parker LJJ).

34 *Cf* D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 616 (argument in relation to rectification for common mistake).

35 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77] (Leggatt LJ).

Notwithstanding the foregoing distinction between subjectivity and addressee-centric objectivity, significant overlaps remain. After all, the objective principle, being addressee-centric, comprises 'a complex amalgam of the objective and the subjective'.[36]

One must heed *Meagher, Gummow & Lehane's* warning, quoted at the beginning of this chapter, that since the objective principle 'cannot be described straightforwardly as "subjective" or "objective"', an unthinking fixation on the 'subjective' or 'objective' labels will lead to 'inevitable confusion'.[37] Thus, whereas English lawyers regard Blackburn J's pronouncement in *Smith*[38] (quoted in the following paragraph) as the classic statement of the objective principle, the High Court of Australia in *Taylor*[39] regarded it as an illustration of 'the "subjective theory" of the nature of assent necessary to constitute a valid contract' in English law. With this important caveat in mind, we can now examine some basic tenets of the objective principle.

3. Some Basic Tenets of the 'Objective Principle'

The starting point is Blackburn J's statement of the objective principle in *Smith v Hughes*:[40]

> 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the

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36 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123] (Lord Philips of Worth Matravers). This view resonates with Blackburn J's classic statement of the objective principle (*Smith v Hughes* (1870-1871) LR 6 QB 597, 607); and echoes *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); and *Paal Wilson & Co v Partenreederei Hannah Blumental (The 'Hannah Blumenthal')* [1983] AC 854, 915-916 (Lord Diplock), 924 (Lord Brightman)).

37 JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 934 ([27-070]).

38 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J).

39 *Taylor v Johnson* (1983) 151 CLR 422, 428-429 (Mason ACJ, Murphy and Deane JJ); JW Carter, *The Construction of Commercial Contracts* (Oxford: Hart Publishing, 2013), 58 ([2-22]).

40 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J).

> contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'.

Although Blackburn J's formulation was directed at the interpretation of offers and acceptances during contractual *formation*, it has been accepted as the classic statement of the objective principle underlying the *interpretation of contracts* (whether or not reduced to writing).[41] Significantly, Blackburn J's pronouncement is reflected in Lord Diplock's judgment in *Ashington Piggeries Ltd v Christopher Hill Ltd*[42] and in the first of Lord Hoffmann's restatement of the five principles of the *interpretation* of contracts in *Investors Compensation Scheme Ltd v West Bromwich Building Society* ('*ICS*').[43] In *Sans Souci Ltd v VRL Services Ltd*,[44] Lord Sumption assimilated how utterances, regardless of whether they are court orders or contracts reduced to documentary form, are interpreted. Likewise, Lord Hoffmann's *ICS* restatement assimilated the way judges interpret contracts, particularly those reduced to written documents, with the 'common sense principles by which any serious utterance would be interpreted in ordinary life'.

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41 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123], [124], [125] (Lord Philips of Worth Matravers); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [22], [23] (Lord Hoffmann NPJ); PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 18.

42 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock): 'What [the seller] promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. The test is impersonal. It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the seller would have led a reasonable man in the position of the buyer to a different belief as to the promise; nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer. The result of the application of this test to the words themselves used in the contract is "the construction of the contract".'

43 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann).

44 *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, [13]-[15] (Lord Sumption).

The five *ICS* principles are summarised here. First, a contractual document is interpreted by ascertaining the meaning which it would 'convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were in at the time of the contract'. Secondly, so long as it should have been reasonably available to the parties, the background knowledge 'includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'. Thirdly, for 'reasons of practical policy', evidence of the parties' prior negotiations and subjective intention is excluded from the admissible background for the purpose of interpretation, but such evidence is admissible for rectification (and other purposes, such as establishing a right to rescind for misrepresentation). It is 'only' in respect of this policy-driven evidential exclusion that 'legal interpretation differs from the way we would interpret utterances in ordinary life'. Fourthly, the background does not merely enable the court to 'choose between the possible meanings of words which are ambiguous but even … to conclude that the parties must, for whatever reason, have used the wrong words or syntax', even though 'we do not easily accept that people have made linguistic mistakes, particularly in formal documents'. This resonates with Lord Sumption's view in *Sans Souci* that evidence (including background, underlying reasons, and other relevant surrounding circumstances) extrinsic to a formal document (embodying, for example, a court order) is *always* admissible when interpreting the document even without first establishing a linguistic ambiguity.[45] Fifthly, Lord Hoffmann endorsed Lord Diplock's observation in *The*

[45] *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, [13]-[15] (Lord Sumption).

Antaios[46] that, 'if detailed sematic and syntactical analysis of words in a commercial document is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'; thus declaring that if we 'conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had'.

Although Blackburn J's pronouncement is consistent with the *ICS* restatement (particularly the first of the five *ICS* principles), and is still regarded as the classic statement of the objective principle, it became eclipsed by the latter.

This is because, apart from difficult cases, the *ICS* restatement is sufficiently comprehensive for resolving most interpretative disputes. *ICS* not only authoritatively summarised the law 'in a nutshell', but also 'became the starting point for disputes about contractual interpretation'.[47] Other than confirming that the objective principle is fundamentally concerned with interpreting communications objectively from the perspective of a reasonable person in the position of the addressees, which is the focus of Blackburn J's pronouncement, *ICS* also usefully clarified the principles regarding admissibility of evidence extrinsic to a contractual document and reliance on business common sense to deviate from the document's literal meaning.

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46 *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, 201 (Lord Diplock).

47 Sir K Lewison, *The Interpretation of Contracts* (6th edn, 2015), 1, 3 ([1.01]).

In truth, the *ICS* principles were not novel.[48] They were foreshadowed by House of Lords decisions[49] the significance of which was not 'always sufficiently appreciated'.[50] The characteristic lucidity with which Lord Hoffmann helpfully synthesised those principles into a coherent restatement in *ICS* left little doubt that the days of literal, non-contextual, interpretation were over. It was this realisation, then, that reignited interest in old controversies.[51] Hence, judges and commentators who preferred the comfort of the old ways have been exercised continually post-*ICS* over the (il)legitimacy of relying on business common sense, context and other extrinsic evidence to deviate from what might appear as the literal meaning of a contractual document. Those old controversies[52] continue to generate intellectual discourse.

Two points can be repeated here. First of all, the first of the five principles of the *ICS* restatement, consistently with the objective principle pronounced by Blackburn J in *Smith*, prescribes that a contracting party's communication is interpreted from the perspective of a reasonable person in the position of the addressees of that communication. This is why the 'objective principle' is 'addressee-centric' and comprises a 'complex amalgam' of objective and subjective elements. Secondly, although the objective principle

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48 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [37] (Lord Hoffmann).

49 *Prenn v Simmons* [1971] 1 WLR 1381; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989; *Mannai Investment Co Ltd v Eaglestar Life Assurance Co Ltd* [1997] 749.

50 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann).

51 C Mitchell, *Interpretation of Contracts* (2nd edn, 2018), 1.

52 Eg, PS Davies, 'The Meaning of Commercial Contracts' (Ch 12 in PS Davies & J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing, 2015)), 216-217; Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2016-2017) 8 *UK Supreme Court Yearbook* 74; Harris Society Annual Lecture (Keble College, Oxford) (8 May 2017), 9; N Andrews, 'Interpretation of Contracts and "Commercial Common Sense": Do Not Overplay this Useful Criterion' (2017) 76 CLJ 36; L Hoffmann, 'Language and Lawyers' (2018)134 LQR 553.

has been explicitly applied by the courts towards the interpretation of offers and acceptances in contract *formation* and the *interpretation of contracts* (whether or not they were reduced to writing), some commentators nonetheless suggest that a *more detached* form of objectivity applies to the *interpretation* of a contract reduced to a single document. The suggestion seems to be that this more 'detached' form of objectivity is supposedly unlike the more 'party-oriented perspective' which applies in the interpretation of separate communications (alleged to constitute offer and acceptance) during contract formation.

For instance, Prof McLauchlan observed that whereas the law relating to rectification of contractual documents for common mistake should reflect the courts' approach towards contract formation, it would be 'somewhat more problematic'[53] for it to also reflect the approach towards interpretation. Prof Cartwright has also suggested that 'once the agreement is contained in a single, agreed document, it is less obvious that the perspective of one or other party should be used in the interpretation of the words used in that document': so, 'in general the courts adopt the position that the test for interpretation of a written document is wholly objective, in the sense that the understanding of both parties as to the meaning of the words is regarded as irrelevant, and the question is how a reasonable person–having the background knowledge (the "context") which would reasonably have been available to the parties at the time of the contract–would interpret it'.[54]

If this is a suggestion that a contract wholly reduced to a written document should be interpreted from the perspective of a reasonable third party whose perspective is *entirely*

53 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86.

54 J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 51-55 ([3-08]).

detached from that of the parties, different from the perspective from which other forms of contracts are interpreted, then it is submitted that the suggestion is flawed for at least seven reasons.

First, the contracting parties' perspectives are entitled to respect in contractual interpretation precisely because it is *their* contract. They are its proper addressees. It exists because they provided consideration.

Secondly, contractual formation and interpretation are inextricably tied up. The courts have explicitly accepted that the objective principle, whether pronounced in *Smith* or *ICS*, underlies the interpretation of contracts regardless of whether they have been reduced to writing.[55] A contract is normally formed by an unqualified acceptance of all the terms of an offer, thus requiring an acceptance to 'mirror' exactly the terms of an offer.[56] The law would be schizophrenic if it purported to interpret the terms of an offer and acceptance one way and the terms of the resulting contract another way. As Sir Terence Etherton MR observed, the ultimate question for judges is 'whether there has in fact been agreement on the same terms in relation to the same subject matter' and, so, 'the question of formation overlaps or merges with that of interpretation'.[57]

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55 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123], [124], [125] (Lord Philips of Worth Matravers); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [22], [23] (Lord Hoffmann NPJ).

56 *Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd* [1979] 1 WLR 401 (purported acceptance ineffective, because at variance with offer).

57 Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 382; H Collins, 'Objectivity and Committed Contextualism in Interpretation' (Ch 8 in S Worthington (ed), *Commercial Law and Commercial Practice* (Hart Publishing, 2004)), 189-190 (emphasising that the *Smith* principle of objectivity in contract formation applies equally to interpretation).

Thirdly, the modern rules on contractual interpretation, which were restated in *ICS* for contracts reduced to writing, are consistent with a contextualised principle of addressee-centric objectivity; not detached objectivity. There is no special 'carve out' for a contract memorialised in a single document. For example, Lord Steyn said that a contract reduced to documentary form is interpreted from the perspective of 'a reasonable person, circumstanced as the actual parties were'.[58] According to Lord Hoffmann, such a 'reasonable person' should have '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'. [59] As Lord Hoffmann clarified (in *Chartbrook*, *Mannai Investment* and *ICS*),[60] the *ICS* principles are of *general* application: they apply to any 'contract' and 'any other instrument or utterance'. In effect, *ICS* contradicts suggestions that a more detached form of objectivity applies to the interpretation of a contract reduced to a single document.

Fourthly, it cannot be suggested that a different, more detached, objective principle which ignores the parties' *actual knowledge* applies to contractual interpretation, whereas such actual knowledge is relevant to contract formation. The objective approach applicable towards contractual interpretation imbues the reasonable addressee with the actual knowledge of the contracting parties and imputes to him such knowledge as would have

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58 *Sirius International Insurance Co v FAI General Insurance Ltd* [2004] UKHL 54, [18]-[19] (Lord Steyn).

59 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann).

60 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [14]; *Mannai Investment Co Ltd v Eaglestar Life Assurance Co Ltd* [1997] 749, 774; *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913.

been available to a reasonable person in their position. This is well-established.[61] For instance, Lord Neuberger said in *Arnold v Britton*:[62]

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean," to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. … That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, … *(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed,* and …
>
> When interpreting a contractual provision, one can only take into account *facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties.* Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties' [emphasis added].

The italicised words demonstrate that the parties' actual knowledge is relevant in contractual interpretation, contrary to commentary suggesting otherwise.[63] This was the law before, and is the law after, *Arnold*. In *Wood v Capita Insurance Services Ltd*,[64] the Supreme Court clarified that *Arnold* did not represent a break from the tenets of

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61 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, [14] and [21] (Lord Clarke); *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [10], (Lord Hodge); *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753, [45] (Lord Clarke); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann); *Prenn v Simmonds* [1971] 1 WLR 1381, 1383-1385 (Lord Wilberforce); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); *BCCI v Ali (No 1)* [2001] UKHL 8, [2002] 1 AC 251, [8] (Lord Bigham of Cornhill).

62 *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593, [15], [21] (Lord Neuberger) (emphasis added); see also *Marley v Rawlings* [2014] UKSC 2, [2014] 2 WLR 213, [19] (Lord Neuberger).

63 *Cf* R Calnan, *Principles of Contractual Interpretation* (2nd edn, 2017), 63 [4.68].

64 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [9]-[15] (Lord Hodge).

interpretation expounded earlier by Lord Hoffmann in *ICS* and *Chartbrook* or Lord Clarke in *Rainy Sky SA v Kookmin Bank*.[65]

Fifthly, given the following two factors, the law would be incoherent–because internally contradictory–if the objective principle applicable to *rectification and interpretation* were to be different from the objective principle applicable to *rectification and contract formation*. First, the courts now apply the same objective principle to interpret contracts and to ascertain the parties' true agreement for purposes of rectifying a contractual document for common mistake[66] so that it would comport with their true agreement (at least where that agreement amounts to a prior 'legally binding contract').[67] Secondly, there is some consensus that the approach applicable to contract *formation* ought similarly to apply to *rectification*.[68] Fragmentation along the lines of formation, rectification and interpretation makes no sense. The Supreme Court in *Oceanbulk*[69] agreed with Sir Richard Buxton's observation[70] that the principles of contractual interpretation expounded in *ICS* 'point to the close relationship between interpretation and rectification',

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65 *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 (Lord Clarke); see also *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56 (Lord Clarke).

66 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [60] (Lord Hoffmann); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19], [23] (Lord Hoffmann NPJ); *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [194] (Lord Neuberger MR).

67 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [141]-[146], [176] (Leggatt LJ).

68 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86; Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 378.

69 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662, [44]-[45] (Lord Clarke), [48] (Lord Phillips).

70 Sir R Buxton, '"Construction" and Rectification after *Chartbrook'* (2010) 69 CLJ 253.

and that 'the problems with which both the principles of rectification and the principles of construction (as explained in recent cases) grapple are closely related'.

Sixthly, the courts explicitly adopted the *ICS* principles of contractual interpretation when interpreting misrepresentations.[71] Since there is no doubt that the objective principle operates from an addressee-centric perspective which takes into account the parties' knowledge in misrepresentation cases, again, it is difficult to see how the objective principle can be said to be 'detached' from the parties. In any event, applying the objective principle of contractual interpretation to representations seems unobjectionable, not only because it was applied by Lord Steyn and Lord Hoffmann in *Mannai Investments*[72] to unilateral notices, but also because it was expressed by Lord Hoffmann in *ICS*[73] to be applicable to 'any serious utterance'.

Seventhly, and crucially, if there is any difference in the way that contracts wholly reduced to writing, as compared to other utterances, are interpreted, this does *not* mean that the objective principle applicable to the interpretation of such contracts is different from the objective principle applicable to contractual formation, the interpretation of contracts not wholly reduced to writing or to rectification or misrepresentations. Any difference between them is instead attributable to technical, policy-driven, exclusionary rules of evidence; not to any difference in applicable 'objective principle(s)': Lord Neuberger and

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71 *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] CLC 518, 531 (Mance J); *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, [30] (Mance LJ); *Kyle Bay Ltd v Underwriters Subscribing under Policy No 019057/08/01* [2007] EWCA Civ 57, [2007] 1 CLC 164, [31] (Neuberger LJ).

72 *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] AC 749; *Stobart Group Ltd v Stobart* [2019] EWCA Civ 1376, [25]-[38] (Simon LJ).

73 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann).

Prof McLauchlan acknowledged this point.[74] Although the use of evidence of prior negotiations and declarations of the contracting parties' subjective intentions may be consistent with interpretation in accordance with the objective principle, such evidence is not admissible for the interpretation of contracts wholly reduced to writing. The technical, policy-motivated rules, which are *separate from* the objective principle and which exclude such evidence, comprise the only difference between the interpretation of contracts reduced wholly to writing and the interpretation of all other utterances.[75]

Ultimately, under current orthodoxy, contracts reduced wholly to writing are interpreted in accordance with the same addressee-centric objective principle–not some entirely detached form of objectivity–which governs the interpretation of serious utterances generally. The question whether the policy underlying the technical exclusionary evidential rules is sound is considered later in this chapter.

4. 'Addressee-Centric Objectivity', Common Sense and Context

As emphasised earlier in this chapter, the objective principle applicable in contract law is generally 'addressee-centric'.[76] Although sometimes referred to as 'promisee',[77] 'offeree'[78]

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74 *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [197]-[198] (Lord Neuberger of Abbotsbury MR); D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86.

75 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 913 (Lord Hoffmann); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [33]-[35] (Lord Hoffmann).

76 L Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553, 558-560.

77 W Howarth, 'The Meaning of Objectivity in Contract Law' (1984) 100 LQR 265.

78 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 199-200 ([2-004]).

or 'observer'[79] objectivity, the neutral term 'addressee-centric objectivity' is preferable. This is because a contract's addressees, namely the contracting parties,[80] might be the offeree or offeror, or both promisee and promisor:

> 'In relation to the promise, the meaning of which is disputed, the law starts from the position of the reasonable person in the position of the promisee but it does not stop there. It then goes on to examine the transaction from the perspective of the reasonable person in the position of the other party to the contract'.[81]

If we minimise the risk of confusion by remembering what the 'objective principle' entails in substance, relabelling it as the 'principle of addressee-centric objectivity' would be unnecessary. Unfortunately, there are tendencies either to emphasise labels without remembering their underlying substance or to fight over labels even where the fight makes little difference in substance. Leggatt LJ in *FSHC* purported to abandon the objective *Chartbrook*[82] approach (in favour of a supposedly subjective approach) towards the rectification of contractual documents for common mistake where the parties' continuing common intention does *not* amount to a binding contract. Yet, Leggatt LJ's judgment appears, in substance if not in name, to endorse addressee-centric objectivity:[83]

> 'As has often been observed, the power of the court to rectify a contractual document is not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed. …

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79 M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 350.

80 *Arnold v Britton* [2015] UKSC 36, [2015] 2 WLR 1593, [15], [21] (Lord Neuberger).

81 E McKendrick, *Contract Law: Text, Cases and Materials* (9th edn, 2020), 25; J Vorster, 'A Comment on the Meaning of Objectivity in Contract' (1987) 103 LQR 274, 276-278.

82 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [60] (Lord Hoffmann); *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [141]-[146], [176] (Leggatt LJ).

83 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77] (Leggatt LJ) (emphasis added).

> Leaving aside for the time being cases of rectification for unilateral mistake, establishing new contractual rights and obligations in this way is only justified if they are founded on mutual agreement. *Whether the test applied is subjective or objective, it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other* and not on uncommunicated intentions which happen, without the parties knowing it, to coincide'.

There are of course differences in how objectivity is formulated, specifically for rectification, in *Chartbrook* and *FSHC*. Since the objective principle is (metaphorically) a 'complex amalgam' of objective and subjective elements, the difference between formulations is essentially their different emphasis of each element; just as how (metallurgically) different amalgams are formulated to comprise different metals in different proportions. However, the differences between the *Chartbrook* and *FSHC* formulations need not detain us here. *FSHC* will be addressed in the next chapter (on rectification for common mistake).

A contract is formed by communications (including offers, acceptances or documents memorialising an agreement reduced to writing) between the contracting parties. According to the objective principle, whether a contract has been formed and what it means is determined by how the overall *words and conduct* of the contracting parties[84] would be understood by a *reasonable person* with business common sense, standing *in the position of its addressees* (the contracting parties), given that he is imbued not only with the addressees' knowledge and known characteristics[85] but also imputed with knowledge

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84 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); *Wells v Devani* [2019] UKSC 4, [20] (Lord Kitchin), [59] (Lord Briggs); *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753, [45] (Lord Clarke) ('communicated between them by words or conduct'); D Friedmann, 'The Objective Principle and Mistake and involuntariness in Contract and Restitution' (2003) 119 LQR 68, 68-75.

85 *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, [30] (Mance LJ) (assimilating the objective principles of contractual

which would reasonably have been available to a reasonable person[86] in that position. Current law is committed beyond peradventure to this form of objectivity–addressee-centric, common-sensical and contextualised.[87]

It is sometimes suggested that, when interpreting 'written contracts' or contracts which have been wholly reduced to writing, context and business common sense should be irrelevant unless the express terms of the document are ambiguous.[88] Whilst some commentators might claim that all communications entail ambiguities that must be resolved by extrinsic criteria such as context and commercial sense,[89] others might assert that words normally convey an unambiguous meaning which we ought to respect.[90] In any event, Lord Sumption said in *Sans Souci*:[91]

> 'The construction of a judicial order, like that of any other instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these

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interpretation (under *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896) with the interpretation of misrepresentations).

86 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock).

87 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [10], (Lord Hodge); *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [15] (Lord Neuberger of Abbotsbury PSC); *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, [14] and [21] (Lord Clarke); *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14; [2010] 1 WLR 753, [45] (Lord Clarke); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [14] (Lord Hoffmann); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann); *Prenn v Simmonds* [1971] 1 WLR 1381, 1383-1385 (Lord Wilberforce).

88 *Cf* PS Davies, 'The Meaning of Commercial Contracts' (Ch 12 in PS Davies & J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing, 2015)), 231; N Andrews, 'Interpretation of Contracts and "Commercial Common Sense": Do Not Overplay this Useful Criterion' (2017) 76 CLJ 36, 49.

89 *Cf* L Hoffmann, 'Language and Lawyers' (2018) 134 LQR 553; C Mitchell, *Interpretation of Contracts* (2nd edn, 2018), 45.

90 *Cf* Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2016-2017) 8 *UK Supreme Court Yearbook* 74; Harris Society Annual Lecture (Keble College, Oxford) (8 May 2017), 9; which, remarkably, appears contradicted by his Lordship himself in *Sans Souci*.

91 *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, [13]-[15] (Lord Sumption).

> circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. … It is generally unhelpful to look for an "ambiguity", if by that is meant an expression capable of more than one meaning simply as a matter of language. True linguistic ambiguities are comparatively rare. The real issue is whether the meaning of the language is open to question. There are many reasons why it may be open to question, which are not limited to cases of ambiguity. … As with any judicial order which seeks to encapsulate in the terse language of a forensic draftsman the outcome of what may be a complex discussion, the meaning of the order of the Court of Appeal in this case is open to question if one does not know the background. The … reference in the order to "the issue of damages", although necessary, begged the question "Which issue of damages?" The order does not answer itself. Only extrinsic evidence can do that'.

Lord Sumption in *Sans Souci*, like Lord Hoffmann in *ICS*, assimilated how documented utterances such as court orders and contracts, are interpreted. Significantly, Lord Sumption held that evidence extrinsic to the document (including the background, underlying reasons, and other relevant surrounding circumstances) is always admissible without first establishing a linguistic ambiguity. Even a court's judicious expression in a solemn instrument ('judicial order') with expert input from counsel ('forensic draftsman'), which encapsulates the 'outcome of … a complex discussion', is susceptible to such interpretative treatment; it is unjustifiable to treat ordinary contracts differently.

It is authoritatively settled that judges *never* interpret a contract without regard to business common sense, context and its commercial purpose[92] or the parties' reasonable expectations,[93] regardless of whether a contractual document is ambiguous; however, the literal non-contextual meaning of the express words of the contractual document may carry

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92 *Arbuthnott v Fagan* [1995] CLC 1396, 1400 (Sir Thomas Bingham MR), 1402 (Steyn LJ).

93 *Homburg Houtimport BV v Agrosin Pte Ltd ('The Starsin')* [2004] 1 AC 715, [45] (Lord Steyn).

more or less weight depending on the circumstances.[94] This position is also impelled by the conception that objectivity is viewed from the perspective of a reasonable person in the position of the contracting parties. After all, a reasonable person in the position of the contracting parties ought reasonably to possess business common sense and know of matters of which the parties were aware or ought reasonably to have been aware. Yet, some commentators object to the use of context and business common sense to displace what they regard as the literal, non-contextual, meaning of contracts reduced to writing. Some have even suggested that the law had swung in *Arnold*[95] against Lord Hoffmann's *ICS*[96] approach, towards a *relatively more* detached, literalist, non-contextual objectivity.[97]

However, post-*Arnold* decisions demonstrate that courts have neither become literalist, detached and non-contextual, nor lost touch with commercial common sense. Briggs LJ in *Nobahar-Cookson* affirmed that 'the court must still use all of its tools of linguistic, contextual, purposive and common-sense analysis to discern what the clause really means'.[98] Prof McMeel observed[99] that Lord Neuberger in *BNY Mellon*[100] had not merely 'rejected the bondholders' explicitly literal argument', but had 'set out in considerable detail the legal, regulatory, and factual matrix, before even quoting the

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94 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [11]-[13] (Lord Hodge).

95 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [15] (Lord Neuberger of Abbotsbury PSC).

96 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann).

97 *Cf* C Mitchell, *Interpretation of Contracts* (2nd edn, 2018), 2.

98 *Nobahar-Cookson v The Hut Group Ltd* [2016] EWCA Civ 128 (Briggs LJ).

99 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 105-107 ([1.184]-[1.186]).

100 *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 Plc* [2016] UKSC 29 (Lord Neuberger).

disputed clauses' of the contractual documents; and that his Lordship 'invoked the commercial purpose of the bonds and the relevant clause' and relied upon 'common sense' in order to conclude that 'something had gone wrong with the language' in the documentation. Furthermore, the Supreme Court in *Wells v Devani*[101] saved an estate agent's contract with a property vendor from being void for incompleteness, even though there was *no express provision* for an essential term to identify the event that would trigger the vendor's obligation to pay the agent's commission. Their Lordships did so by *interpreting* the contract to require 'commission to be payable on completion and from the proceeds of sale'. Some might prefer it if *Wells* had turned on implying the requisite payment term; nonetheless, their Lordships decided the case primarily on *interpretation* whilst accepting *implication* as an alternative ground. Significantly, Lord Briggs clarified that, although 'lawyers frequently speak of the interpretation of contracts … as if it is concerned exclusively with the words used expressly, either orally or in writing, by the parties', often 'the context in which the words are used, and the conduct of the parties at the time when the contract is made' may tell us 'as much, or even more, about the essential terms of the bargain than do the words themselves'.

Obviously, the argument–that contractual interpretation has oscillated towards a more literalist, non-contextual and detached form of objectivity–is unrealistic and was rejected in *Wood*.[102] Instead of regarding *Arnold* as signalling a radical retreat towards literalism or textualism, Gross LJ in *Silovsky* 'welcomed' *Wood* for 'emphasising

101 *Wells v Devani* [2019] UKSC 4, [26]-[27] (Lord Kitchin), [59] (Lord Briggs).

102 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [9]-[14], [15] (Lord Hodge).

continuity in the law's approach', thus ensuring that 'contractual background or commercial common sense' continue to shape the interpretative process.[103]

Even if we assume that the courts seem, now, to accord *relatively more weight* to the literal, non-contextual, meaning of the words in a contractual document as compared to when Lord Hoffmann was on the bench,[104] that is only an adjustment in judicial emphasis[105] – an immeasurable matter of *mere weight and degree*. Put simply, *Wood* and subsequent appellate decisions confirm that the *ICS* approach remains applicable and that *Arnold* did not cause any change in *principle*. The governing approach of the objective principle remains addressee-centric, continues to take into account the addressees' knowledge and known characteristics, as well as the knowledge and business common sense which would have been imputed to a reasonable person in the addressees' position.

Since the chosen words, context, and business common sense, etc, will all influence the interpretative process according to the objective principle, there will always be inevitable tension between different judges and commentators as to the appropriate weight to allocate between these factors.[106] The interpretative process is a balancing exercise turning on the relative emphasis on each factor in particular cases,[107] hence, excessive

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103 *National Health Service Commissioning Board v Silovsky* [2017] EWCA Civ 1389, [39], [40], [45] (Gross LJ). See also *Grimes v The Trustees of the Essex Farmers and Union Hunt* [2017] EWCA Civ 361, [26], [28], [34] (Henderson LJ).

104 Eg, PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 174-175; PS Davies, 'Agency and Rectification' (2020) 136 LQR 77, 84.

105 Eg, *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 (Beatson LJ).

106 Sir George Leggatt's 'Foreword' in G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), v-vi.

107 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [11], [13] (Lord Hodge).

elaboration of the principles of interpretation will neither resolve the tension nor bring about more predictable outcomes.[108]

Rather, the courts' commitment to the addressee-centric, contextual, and common-sensical form of objectivity means that they can deal flexibly, in a nuanced manner, with interpretative problems in different contexts. For example, more weight or emphasis can be accorded to the literal meaning of words expressed in a contractual document (than other extrinsic factors) when interpreting charterparties,[109] pension schemes[110] or documentary credits.[111] These are not instances of a regression to literalism; rather, they signify that the particular 'context may be significant in suggesting that a fairly literal approach to a text should be adopted'.[112]

There may be pragmatic policy concerns, warranted or otherwise, that recourse to contextual or other extrinsic evidence would be excessively costly.[113] Such policy concerns do not absolutely bar the use of such evidence, but should be addressed as a *nuanced* matter of flexible, practical, procedural justice, through the courts' 'case management powers' to keep 'the admission and extent of evidence as to the external context'[114] 'within proper

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108 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [15] (Lord Hoffmann); *Globe Motors, Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [56] (Beatson LJ); *Pratt v Aigaion Insurance Company SA* [2008] EWCA Civ 1314, [2009] 1 Lloyds Rep 225, [9] (Sir Anthony Clarke MR).

109 *Eleni Shipping Ltd v Transgrain Shipping BV* [2019] EWHC 910 (Comm), [11] (Popplewell J).

110 *Barnardo's v Buckinghamshire* [2018] UKSC 55, [13]-[18] (Lord Hodge).

111 J Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (Ch 5 in S Worthington (ed), *Commercial Law and Commercial Practice* (Hart, 2003)), 125-126.

112 H Collins, 'Objectivity and Committed Contextualism in Interpretation' (Ch 8 in S Worthington (ed), *Commercial Law and Commercial Practice* (Hart, 2003)), 192.

113 *Wire TV Ltd v Cable Tel (UK) Ltd* [1998] CLC 244, 257 (Lightman J); *cf Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [38] (Lord Hoffmann).

114 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 201 ([5.49]).

bounds'.[115] This policy consideration has been internalised by the courts' procedural rules (in commercial and admiralty matters) requiring pleadings to specify the relevant extrinsic evidence alleged to affect the interpretation of a document:[116] any discourse which ignores this reality would radically and unnecessarily disrupt the coherence of current law.

5. One Ultimate Binding Interpretation

An inevitable difficulty flows from any interpretative approach that is objective in any degree: many contracts are normally susceptible to more than one interpretation which appears objectively plausible to different reasonable persons.[117]

As the objective principle and the interpretative exercise are open-textured, context- and fact-sensitive, different judges can arrive at different but reasonable interpretations. As Lord Neuberger observed,[118] even in relation to an 'issue on contractual interpretation' on which 'there was no disagreement as to the appropriate principles which applied' in the *BNY Mellon* litigation,[119] the UK Supreme Court was split: three of their Lordships agreed with the Court of Appeal and two with the first instance judge; thus demonstrating that 'it is unrealistic to believe that the outcome of every dispute could and should be confidently predicted'.

115 *Arnold v Britton* [2015] UKSC 36, [74] (Lord Hodge).

116 HM Courts & Tribunals Service, *Admiralty and Commercial Courts Guide* (2014; updated March 2016), para C1.2(h).

117 *Cf Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [15] (Lord Hoffmann); *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13, [20]-[29] (Lord Hodge).

118 Lord Neuberger, 'Express and Implied Terms in Contracts' (School of Law, Singapore Management University) (19 August 2016), [5], [6], [8].

119 *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 Plc* [2016] UKSC 29.

However, it is trite that only *one* ultimate binding interpretation can be attributed to a contract.[120] Its ultimate interpretation under the objective principle is not *any interpretation* amongst the many potential interpretations derived by *any reasonable person*. Instead, the particular court rendering final judgment is the only relevant reasonable person, and it derives the one ultimate interpretation by a unitary, iterative, exercise to choose the most appropriate meaning amongst potential interpretations.[121] All other potential interpretations, however reasonably plausible, must yield. And the one ultimate binding interpretation may turn out to be an interpretation which only one (or neither) contracting party had subjectively intended,[122] perhaps, because one (or both) of them never thought or communicated about that interpretation, or they raised but failed to agree thereon.

This trite conclusion is not merely driven by the policy underlying *res judicata*, but also impelled by principle and pragmatism. Courts strive to uphold apparent contracts rather than nullify them for 'uncertainty', 'incompleteness' or 'ambiguity' unless it is impracticable to ascribe a meaning to them.[123] It follows that a contract can have only one ultimate binding interpretation; that is, unless the courts' attitude has changed and they are now more inclined to strike down putative contracts as void.

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120 *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437, [34] (Beatson LJ).

121 *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] 2 WLR 1095, [11]-[12] (Lord Hodge); *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, [21] (Lord Clarke).

122 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [149] (Leggatt LJ).

123 *Wells v Devani* [2019] [2019] UKSC 4, [18] (Lord Kitchin); *Blue v Ashley* [2017] EWHC 1928 (Comm), [61]-[64] (Leggatt J); *Carlyle v Royal Bank of Scotland Plc* [2015] UKSC 13, [29] (Lord Hodge).

6. Misconceptions about 'Written Contracts'

It is now firmly established that applying the objective principle to ascertain the contents of a contract requires the reasonable person to interpret the overall words and conduct of the contracting parties, taking into account context, business common sense and other forms of extrinsic evidence (except where technical rules exclude evidence of prior negotiations or declarations of subjective intentions when interpreting contracts reduced wholly to writing). Yet, opposition against deviating from the explicit words and literal meaning of a contractual document remains. That opposition may be partly based upon the misconceived sanctification of written documents or belief that non-contextual literalism engenders greater certainty.

Here, it is imperative to dispel the misconception that, when a contract appears to have been reduced to writing, the document is the contract itself. This insidious myth is so ephemeral that it could take on different shades,[124] and can generally be distilled into three allied misconceptions:[125]

(a) the document embodying the 'written contract' is the contract itself;

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124 *Cf* JW Carter, *The Construction of Commercial Contracts* (Oxford: Hart Publishing, 2013), 319 ([10-05]): 'In any use of the word "contract" there is an inherent ambiguity in cases where a document exists. Does the word refer to the bargain or to the document which sets out its terms? Lawyers drafting documents intended to be executed as written contracts not unnaturally tend to see the one as synonymous with the other. But the general commercial perspective is the same if the parties adopt a document as evidence of the bargain'.

125 *Cf* J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 465-466 ([13-33]-[13-34]): 'But any indication will suffice if it negatives the intention to create legal relations until the moment when the written document is executed. At that moment, however, the contract is concluded, and it is the written document, rather than the oral or (informal) written agreement which preceded it, that is the contract. … The starting-point is inevitably the written contract itself. … The starting point for contracts in writing is that the written document contains the agreed terms. The document becomes the exclusive record of the contract, and therefore the only evidence that can be used to prove the existence of the contract and its terms is the document itself'.

(b) the document is exclusive evidence of the contract; or

(c) the document is conclusive evidence that the clauses expressed in the document state exhaustively the terms of the contract.

Left unchecked, this myth may lead to excessive sanctification of contractual documents reflected in vague references to the 'primacy of' or 'loyalty to' the written text;[126] which may, in turn, stultify recourse to relevant matters extrinsic to contractual documents when ascertaining the contents of contracts.[127]

To dispel this myth, we must consider the rectification of documents which reflect or implement a contract. Concerning such documents, Prof Burrows observed that both rectification and interpretation perform the same function of giving effect to what the law regards as the contracting parties' true agreement, although interpretation does so by telling us what the words of the document mean whereas rectification does so by changing those words.[128] The existence of the equitable jurisdiction to rectify contractual documents to make them accord with what the law regards as the parties' true agreement, coupled with the principle that courts do not rectify contracts[129] but merely rectify documents so that they conform to the parties' contract,[130] compels us to face the following two axioms.

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126 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 49 ([1.82]).

127 For example: Lord Sumption, 'A Question of Taste: The Supreme Court and the Interpretation of Contracts' (2016-2017) 8 *UK Supreme Court Yearbook* 74; Harris Society Annual Lecture (Keble College, Oxford) (8 May 2017), 9.

128 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77.

129 *Cf* R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch 9 of S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016), 181.

130 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [141] (Leggatt LJ); *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353 *(The Nai Genova)*, 359 (Slade LJ); *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, [27] (Lord Neuberger).

First, it is wrong to treat a 'contract reduced to writing', 'contract in writing' or 'written contract' as if that document is itself the contract. As Bramwell B stated in *Wake v Harrop*,[131] 'a written contract … is not the contract itself, but only evidence–the record of the contract'. This fundamental tenet, whilst no longer commonly addressed in modern treatises,[132] should not be forgotten.

Secondly, the ideas–that the document is 'exclusive evidence of the contract' or 'conclusive evidence that the clauses expressed in the document state exhaustively the terms of the contract'–are also misconceptions. Otherwise, how could the courts rectify a contractual document by referring to evidence extrinsic to the document, so as to make the document conform to the parties' true contract? This much remains clear from *FSHC*.[133]

The two axioms make sense. Contracts comprise intangible *in personam* rights and obligations, not tangible pieces of paper. If we bargain face to face and seal the deal by shaking hands, or reach agreement during a telephone conversation or by exchanging two letters posted through the mail, nobody suggests that the handshake, telephone discussion or two letters are 'the contracts'. Otherwise, when the handshake or telephone conversation ended, the contracts would literally dissipate into thin air. Likewise, it would be absurd to suggest that there is 'no contract' or 'the contract cannot be proved', just because one or other of the two letters was lost or destroyed. The telephone negotiation, hand shake and letter writing were merely the occasion for the agreement being made and the audible,

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131 *Wake v Harrop* (1861) 30 LJ Ex 273, 158 ER 317, 320 (Bramwell B); *Gordon v Macgregor* (1909) 8 CLR 316, 323 (Isaacs J).

132 *Cf* JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2012), 320 ([10-07]).

133 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [141]-[145] (Leggatt LJ).

visible or tangible means by which the intangible contractual undertakings were expressed outwardly. Once (what the law regards as) 'agreement' is reached (and buttressed by consideration and the intention to create legal relations), a 'contract' with an independent legal existence arises in the intangible form of *in personam* rights and obligations, separate from *how* the contract came about.

When we say that 'parties have entered into a written contract'; that a 'contract was entered into in writing'; or that it has been 'reduced to writing', we are stating *how* the contractual agreement was initially made or subsequently recorded. We merely mean that the parties had used tangible writing to outwardly express or record their intangible agreement, but are *not* necessarily asserting that their agreement has been *reified* into a physical chattel. Thus, although s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 prescribes that a 'contract for the sale or other disposition of an interest in land can only be made in writing and by incorporating all the terms which the parties have expressly agreed in one document' which 'must be signed by or on behalf of each party', Prof Cartwright concluded:[134]

> 'The question is whether the contract was made in writing in conformity with the statute, not whether the original document can be produced– although if the document is lost, and its existence or its compliance with the statute is disputed, the court must be satisfied on the evidence that it was properly entered into. … In a case, for example, where the written document does not incorporate all the terms which the parties expressly agreed, a court

[134] J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 157 ([5-18], fn 108), 167 ([5-25], fn 172).

may order its rectification to include all the agreed terms and thereby to comply with section 2.'

Courts may, now, change the law radically by reifying and fusing intangible contracts into tangible sheets, so that the former would have no existence apart from the latter. Historically, the right to sue on a covenant came close to being reified into a deed, but that is no longer the law.[135] The law evolves; hopefully, it evolves coherently.

Now, before modern courts attempt to reify contracts, one should be alive to the practical inconvenience consequent thereto. Happily, such a misconceived enterprise has not taken place. Otherwise, insurance documents perishing in a fire would mean an insured house-owner's contractual protection is lost at the moment of his need; and loan contracts will no longer exist if banker-creditors cannot produce original documentation.

Rather, under current law, secondary and parol evidence is admissible to prove documents,[136] including bills of exchange,[137] deeds[138] and other contractual documents,[139] which were lost or destroyed. Admitting such evidence gives the game away. The document and contract are *two separate things*: the document is merely a record of the underlying contract. If the 'written contract' had been fused into tangible paper before the

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135 HG Beale (ed), *Chitty on Contracts – Volume 1* (33rd ed, 2018), 1785 ([25-028]-[25-029]): 'In early law, the accidental destruction or cancellation of a deed or of its seal prevented it being sued upon. Now only the intentional cancellation by the promisee of a bond or bill or promissory note is sufficient. … The loss of a deed or other instrument does not destroy the obligation, but only affects the question of proving the instrument'.

136 HM Malek (ed), *Phipson on Evidence* (19th ed, 2018), [41-04] *et seq*.

137 SJ Gleeson, *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (18th edn, 2017), 580-583 ([10-005]-[10-009]).

138 HG Beale (ed), *Chitty on Contracts – Volume 1* (33rd ed, 2018), 1785 ([25-028]-[25-029]).

139 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 808 ([28.24]), 810-812 ([28.29]-[28.33]); *Masquerade Music Ltd v Springsteen* [2001] EWCA Civ 513, [85] (Jonathan Parker LJ).

sheets were destroyed, then it would have been pointless admitting secondary or parol evidence of the contractual documents, since such evidence cannot resurrect that which no longer exists.

Even the closest statutory attempt to reify contracts, in the form of bills of exchange, is carried out half-heartedly. A claimant's cause of action as 'holder of a bill' is normally premised on his possession of and ability to produce the bill in court; yet, he will not necessarily fail just because it was lost. Secondary and parol evidence can be admitted to prove his right of action, provided that he undertakes to indemnify other parties against potential liability if the (presumably lost) bill resurfaces.[140]

It is wrong to assume generally that big business concerns (such as banks) would prefer the ultimate certainty of not looking beyond a specific document when proving contracts or contractual terms.

Certainty is prized, first by judges if it secures the ends of justice[141] and, secondly, by businesses or litigants only if it secures their advantage in a specific bargain[142] or dispute.[143] Banks may be in the privileged position to dictate their standard terms, but it is

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140 Bills of Exchange Act 1882, s 70; SJ Gleeson, *Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes* (18th edn, 2017), 580-582 ([10-005]-[10-009]).

141 *G Scammel & Nephew Ltd v HC & JG Ouston* [1941] AC 251, 268 (Lord Wright); *Maredelanto Compania Naviera SA v Bergbau-Handel GmbH (The Mihalis Angelos)* [1971] 1 QB 164 (Megaw LJ) ('Where justice does not require greater flexibility, there is everything to be said for, and nothing against, a degree of rigidity in legal principle').

142 Lord Neuberger, 'Express and Implied Terms in Contracts' (School of Law, Singapore Management University) (19 August 2016), [8]: 'Both sides to a negotiation may be content to include an ambiguous provision in it, on the basis that, if they try to spell it out more clearly the deal may fall apart…'.

143 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 59 ([1.100], fn 305): 'However, many will sympathise with Cooke P's observation that "Businessmen and lawyers are often loud in their stress on the need for certainty in commercial law. When it seems expedient, however, many are ready to destroy certainty by contending that an apparently complete bargain was not what it seemed".'

common for banks suing on a loan contract to fail to produce the original instrument documenting the contract. Fortunately, for the banks at least, the original document is not a *sine qua non* for proving the contract. The English High Court in *Carey v HSBC Bank Plc*[144] accepted that a bank-lender may re-construct contractual loan documents from available information and records, even if the original documents cannot be produced. In South Africa, Rogers J rejected a borrower's argument that a bank-lender's action to enforce a loan contract must fail because the loan documents (destroyed in a fire) were not produced in court.[145]

Clearly, principle and pragmatism dictate that so-called 'written contracts' or documents which appear to record or evince contracts are not contracts, but are merely evidence or records thereof.

Neither should those documents, for similar reasons, be regarded as the *exclusive* record or evidence of the contracts.

It is, however, a separate question whether a document is 'conclusive evidence that the clauses expressed in that document state exhaustively all the agreed terms of the contract'.

In this regard, the parol evidence rule has been analogised functionally as an implicit 'entire agreement' clause. An explicit 'entire agreement' clause and its implicit counterpart generally preclude the admission of extrinsic evidence to vary the terms of a

144 *Carey v HSBC Bank Plc* [2009] EWHC 3417 (QB) (Judge Waksman QC); Consumer Credit Act 1974, s 78; Financial Conduct Authority (FCA), 'Guidance on the Duty to Give Information under Sections 77, 78 and 79 of the Consumer Credit Act 1974' (Ch 13 of the *Consumer Credit Sourcebook*), CONC 13, Release 15 (April 2017), [13.1.4].

145 *ABSA Bank Ltd v Zalvest Twenty (Pty) Ltd* (Case Number 4620/13, 6 November 2013) (Western Cape High Court, South Africa), [9], [24] (Rogers J).

contract reduced wholly to writing because (a) *if* the parties have agreed (explicitly or implicitly) that the terms of their contract are expressed exclusively in the document; (b) then, there are no other terms to vary or contradict them.[146]

The parol evidence rule was described as a tautology or circularity[147] precisely because the premise (a) necessarily results in the conclusion (b); however, everything turns on whether the premise is even established on the facts of each case. Whether the explicit clauses in a document are the exclusive terms of their contract is a question of fact turning on the court's holistic and contextual assessment of the parties' overall words and conduct.[148] Even if the document looks like a contract reduced wholly to writing or if it contains an 'entire agreement' clause, these are just weighty, but inconclusive, reasons for saying that the clauses are the exclusive terms of their contract.

This must be correct because, crucially, entire agreement clauses do not prevent rectification of contractual documents;[149] and yet, rectification merely reforms a document to make it comport with the parties' true agreement. Furthermore, the effect of an explicit entire agreement clause must not be overstated, since such a clause in a contractual document does not necessarily preclude the courts from finding a contract or contractual

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146 R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch 9 of S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Lawbook Co, 2016), 180-181.

147 Law Com No 154, *The Parol Evidence Rule* (1986), [2.7], [2.17].

148 D McLauchlan, 'The Entire Agreement Clause: Conclusive or a Question of Weight' (2012) 128 LQR 521, 531; *Reeds Solicitors (a firm) v Norwich Union Insurance Ltd* [2005] EWCA Civ 323, [11] (Longmore LJ); *Carmichael v National Power Plc* [1999] 1 WLR 2042; G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 737 ([26.14]), 773-774 ([26.96]-[26.98]); Law Com No 154, *The Parol Evidence Rule* (1986), [2.15], [2.22].

149 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 420-426 ([4-137]-[4-144]); *DS-Rendite Fonds NR 106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm), [48] (Hamblen J); *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch) (Judge Christopher Pymont).

terms extrinsic or collateral to the document;[150] from implying terms;[151] or from giving effect to an estoppel which contradicts what appears to be a literal interpretation of the document.[152] Additionally, it has been held that an explicit entire agreement clause will not preclude the court from having regard to evidence of facts extrinsic to a contractual document in order to interpret it contextually.[153] Its implicit counterpart, the parol evidence rule, warrants no greater effect.

Strictly speaking, since the parol evidence rule merely prevents extrinsic terms from *varying* the clauses in a contractual document, it should not affect the admissibility of evidence for *interpretation* purposes.[154] Therefore, the exclusion of evidence of prior negotiations or declarations of subjective intentions for the purpose of interpreting a contract reduced wholly to writing must be based on a policy-driven exclusionary rule,[155] separate from the parol evidence rule. Nonetheless, in practice, the parol evidence rule is commonly assumed to restrict admissibility of evidence during interpretation.[156]

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150 *Ryanair Ltd v SR Technics Ireland Ltd* [2007] EWHC 3089 (QB), [137]-[143] (Gray J); *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2005] EWHC 2431 (Ch), [102]-[104] (Judge Nicholas Davidson QC)); [2007] EWHC 3130 (Ch), [101]-[104] (Sir Donald Rattee); Sir K Lewison, *The Interpretation of Contracts* (6th edn, 2015), 155 ([3.16]).

151 *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 CLC 312, [41] (Stanley Burnton LJ); *Barden v Commodities Research Unit* [2013] EWHC 1633 (Ch), [47] (Vos J); *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [51] (Lewison LJ).

152 *Barclays Bank Plc v Unicredit Bank AG* [2012] EWHC 3655 (Comm), [89], [90] (Popplewell J); *Cheverny Consulting Ltd v Whitehead Mann Ltd* [2006] EWCA Civ 1303, [55]-[56] (Carnwath LJ).

153 *John v Price Waterhouse* [2002] EWCA Civ 899, [67] (Robert Walker LJ); *Proforce Recruit Ltd v The Rugby Group Ltd* [2006] EWCA Civ 69, [41] (Mummer LJ), [59] (Arden LJ), [60] (Richards LJ).

154 R Stevens, 'Contract Interpretation: What It Says on the Tin' (Inner Temple Lecture Series, 6 October 2014), 18-19.

155 Recently affirmed in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101.

156 Sir K Lewison, *The Interpretation of Contracts* (6th edn, 2015), 131 ([3.11]); *Shore v Wilson* (1842) 9 Cl & F 355 (Tindal CJ). *Cf* E Peel, *Treitel: The Law of Contract* (15th edn, 2020), [6-029] ('Rather than regarding extrinsic evidence as generally inadmissible, subject to exceptions under which it is admissible, the present approach appears to be to regard it as generally admissible, subject only to

In any event, excluding evidence of prior negotiations or declarations of subjective intentions when interpreting a contract reduced wholly to writing is based ostensibly on the pragmatic policy that such evidence may be useful in some cases, but will mostly be a distracting waste of resources in many others; and that excluding such evidence will engender certainty and savings of resources. That policy has considerable theoretical force but faces serious limitations in reality.

This is because the exclusionary rule is easily circumvented by pleading rectification, misrepresentation or estoppel concurrently with a claim founded on contractual interpretation.[157] The concurrent claims mean that the same quantum of evidence is adduced before the same courts by the same parties to the same contractual dispute. In reality, any abstract certainty and theoretical savings is obviated, unless litigants fail to make the concurrent claims because of ignorance or refusal to pay for the full deployment of the complete array of legal arguments. Instead, courts need to confront the complexity and prolixity of concurrent claims, and separately address them at length in the same judgment,[158] and contend with futile distractions over whether rectification should precede interpretation[159] or vice versa.[160] It is irrational to exclude evidence of prior negotiations when interpreting a contract reduced wholly to writing, since it is admissible

exceptions under which it is inadmissible'), citing *Cherry Tree Investments Ltd v Landmain Ltd* [2012] EWCA Civ 736, [37] (Arden LJ).

157 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [34]-[35] (Lord Hoffmann); *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch), [41]-[42] (Chief Master Marsh).

158 Eg *Mihail Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm) (Leggatt J).

159 *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] Bus LR 1336, [16] (Carnwath LJ).

160 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 84-86 ([2-03]-[2-05]); *Pathway Finance SARL v The Defendants set out in Annex 1 to the Claim* [2020] EWHC 1191 (Ch), [17] (Simon Salzedo QC).

for rectification, and yet rectification merely makes the document conform with what the law regards as the parties' true agreement. These propositions remain unchallenged despite *FSHC*,[161] at least in relation to the rectification of contractual documents which fail to reflect the parties' prior binding contract. Thus, the schism between interpretation and rectification, over the admissibility of evidence, cannot be justified in principle or on pragmatic grounds.

Significantly, contracting parties may create as many original sets of documents as they execute. In practice, each contracting party usually keeps an original set of the executed contractual documents, even though 'the importance of the original is diminished, save where there are doubts about the authenticity of the document or any signatures'.[162]

Consider the situation where two contracting parties execute two sets of original contractual documents. If one set has been altered by an unauthorised third party, how can the court tell which is the unaltered document? If different unauthorised alterations were made to each of the two sets, how can the court tell what the true contract is; or must the court say that there are two separate contracts or none at all?

Or consider, more simply, a situation where two contracting parties negotiate via email, through 5 different drafts of the proposed contract, before finally agreeing to sign two copies of the fifth version. If they inadvertently print and sign a copy each of version 3 and version 4, is there one contract, or two or three contracts, or none?

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161 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [140]-[153], [176] (Leggatt LJ).

162 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 803 ([28.06]).

Business common sense and evidence extrinsic to the signed documents provide the *only* commercially sensible answer to the foregoing questions, without abandoning the courts' commitment,[163] first, to do justice between the contracting parties; secondly, to uphold what appears to be the parties' contract unless too uncertain; and thirdly, to attribute to their contract one ultimate binding meaning. The law cannot paint itself into a corner by insisting that each of those documents which looks like a 'written contract' is 'the contract', or 'exclusive evidence of the contract', or 'conclusive evidence that the clauses expressed in that document state exhaustively all the agreed terms of the contract'.

This conclusion may cause discomfort to those who think that it offends the sanctity of written words in contractual documents. However, contractual documents are not divine commandments writ in stone: its clauses are displaceable and replaceable.

7. Conclusion

This chapter clarifies some aspects of the objective principle. The label 'objective principle' can be misleading because English contract law's objective approach is in fact addressee-centric and comprises a complex amalgam of objective and subjective elements.

The objective principle underlies the courts' fundamental approach towards assessing the content of contracting parties' communications. It entails interpreting the overall words and conduct of the parties (subject to restrictive evidential rules in relation to contracts reduced wholly to writing) from their perspective, taking in account context, business common sense, matters they knew and ought reasonably to have known. It is used to derive the ultimate binding meaning of their communications, whether for the purpose

163 *Wells v Devani* [2019] UKSC 4, [18] (Lord Kitchin).

of interpreting contracts in order to give effect to what the law regards as the parties' true agreement, rectifying contractual documents to make them comport with their true agreement, or determining the true meaning of pre-contractual (mis)representations. These matters will be explored in the following chapters, beginning with the rectification of contractual documents for common mistake.

CHAPTER 3: RECTIFICATION FOR COMMON MISTAKE

> '...the power of the court to rectify a contractual document is not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed. … Whether the test applied is subjective or objective, it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide.'–*FSHC*.[1]

> '…the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract. … Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not.'–*Chartbrook*.[2]

1. Introduction

Rectification of contractual documents has become topical for two reasons. First, there is an 'explosion in the number of rectification claims' because the 'increased volume, size, and complexity of legal documents' has 'compounded the inherent risk of error'; and secondly, evidence supporting rectification claims is now readily accessible via computer 'records of pre-contractual and drafting negotiations'.[3]

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1 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77] (Leggatt LJ).

2 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [59]-[60] (Lord Hoffmann).

3 Lord Neuberger MR, 'Foreword to the First Edition' (in D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016)), ix.

Some now regard this area of law as 'extraordinarily, and needlessly, complex'.[4] In *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd*, Leggatt LJ stated that what appeared previously to be the 'settled state of the law was thrown into doubt by Lord Hoffmann's *dicta* in *Chartbrook Ltd v Persimmon Homes Ltd* which 'have proved controversial and have been criticised by both academic commentators and judges'. Thus, Leggatt LJ's voice joined the 'unprecedented' 'chorus' blaming *Chartbrook* for the 'uncertainty and dissatisfaction about the present state of the law'.[5]

In redressing that perceived dissatisfaction, Leggatt LJ said that Lord Hoffmann was wrong in assimilating the common law's objective principle in contractual interpretation with the test for the equitable rectification of contractual documents in all cases of common mistake.

Instead, Leggatt LJ cleaved common mistake rectification into two separate sub-categories:[6] (a) where a document failed to accurately reflect the parties' common continuing intention which amounted to a *prior binding contract*, and (b) where it failed to accurately reflect their common continuing intention when it did *not* amount to a prior binding contract, ie where the parties did not intend to be bound until execution of the written instrument. Leggatt LJ held that Lord Hoffmann was right to apply the objective principle to rectification in sub-category (a); but wrong to apply it to sub-category (b)

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4 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 83; Sir P Morgan, 'Rectification: Is it Broken? Common Mistake after *Daventry*' [2013] 21 RLR 1, 2.

5 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [9]-[10], [107], [129]-[132] (Leggatt LJ).

6 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [140]-[146], [176] (Leggatt LJ); J Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] LMCLQ 48.

which required instead a subjective approach. Some suggest that 'the so-called *Chartbrook* problem' was 'solved … in *FSHC*';[7] however, others simply refer to *FSHC* without fanfare.[8]

There are serious difficulties within *FSHC* itself, some of which will be examined in this chapter. Moreover, although much criticised, Lord Hoffmann's objective approach towards common mistake rectification in fact contributed greatly to the coherent development of the law.

The rectification of documents which record or implement contracts comprises two separate categories under current English law, namely, rectification for common mistake and for unilateral mistake. This chapter aims to inject some simplicity and coherence into the law, by clarifying certain aspects of rectification of contractual documents for common mistake. The next chapter will deal with unilateral mistake.

Typically, the issue with which this chapter is concerned arises where the claimant and defendant had reached a prior agreement or consensus (whether or not amounting to a binding contract) before they adopt the ultimate contractual document (usually by signing it). The starting point is that the contractual document presumptively prevails as the objective manifestation of the parties' agreement.[9] If, through rectification, the prior

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7 *Armstrong v Armstrong* [2019] EWHC 2259 (Ch), [34] (HHJ Paul Matthews); PS Davies, 'Agency and Rectification' (2020) 136 LQR 77, 87.

8 *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch), [29] (Chief Master Marsh); *Gwynt Y Mor Ofto Plc v Gwynt Y Mor Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm), [81], [120] (Phillips LJ).

9 *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [85]-[86] (Leggatt J).

consensus or agreement displaces the ultimate contractual document which recorded that consensus or agreement inaccurately, the question is why.

This chapter proposes a principled response to that question. The *key* is to remember that, according to pre-*FSHC* orthodoxy, rectification in such cases of common mistake ensues only if the parties' prior consensus or agreement amounts to a 'common continuing intention': *their consensus, agreement or common intention must have continued and remained current up to* – and has not become expired or superseded by – *the time the document was executed*.

As foreshadowed in Chapter 2 (The Objective Principle), the two main theses in this chapter are: first, that rectification of a contractual document for common mistake merely makes the document conform to what the law regards as the contracting parties' true agreement which that document was meant to reflect or implement; and secondly, contrary to *FSHC* but consistently with *Chartbrook*, that the same objective approach towards the formation and interpretation of contracts is applicable to common mistake rectification. Although these two theses might seem self-evident to some, the argument in their favour must be made here for two reasons.

First, although the view that rectification 'is designed to bring the written document into conformity with the parties' agreement'[10] is not new, doubts were cast thereon by critics of *Chartbrook*. For these critics, the availability of rectification turns on the *type* and *subjectivity* of 'mistake'.[11] Likewise, it has been suggested that, because of its equitable

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10 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 472 ([13-38]).

11 See eg, Lord Roger Toulson, 'Does Rectification Require Rectifying?' (TECBAR Lecture, 31 October 2013), 7, 12, 15.

roots, common mistake rectification should function as a 'subjective safety valve' to the common law's objective approach towards contract formation and interpretation:[12] so, instead of replicating the common law's objective approach, a contractual document should be rectified in equity only if both parties were subjectively mistaken as to its contents.[13] It has even been argued,[14] radically, that rectification reforms the parties' contractual bargain by setting aside a contractual term (either an explicit entire agreement clause or its implicit counterpart, the parol evidence rule) which provides that the contractual document, and the 'document alone, contains the parties' agreement'. According to that argument, once that term is set aside, 'what we are left with is the agreement that the parties have entered into absent their reduction' thereof into a single document.[15] Furthermore, it has been said that the true purpose of common mistake rectification is the same as that for unilateral mistake rectification, namely, the 'correction of unconscionable behaviour', rather than to give effect to the parties' agreement.[16]

Secondly, although it has been said that the same objective approach towards contract formation ought to be applicable to rectification, it has been disputed whether that

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12 PS Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 63.

13 PS Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 420-421.

14 R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch 9 in S Degeling, J Edelman and J Goudkamp (ed), *Contract in Commercial Law* (Lawbook Company, 2016)), 181, 182; R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 602.

15 However, this radical argument need not detain us here. It is contradicted by two well-established principles: (a) courts rectify documents rather than the parties' contractual bargain (*Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ)); and (b) a contractual bargain is set aside in its entirety if at all, so partial rescission is not allowed (*Holliday v Lockwood* [1917] 2 Ch 47).

16 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistakes* (2nd ed, 2016), 282 ([3-94]) and 293 ([3-104]).

same principle ought to apply to contractual interpretation.[17] Thus, it has been suggested that the standard of objectivity differs between rectification or formation ('promisee objectivity' or 'not exclusively objective') and interpretation ('detached objectivity').[18] This fragmentation unnecessarily complicates the law.

The two aforementioned theses will also lead to some significant practical consequences concerning, *inter alia*, the type of 'mistake' which qualifies for 'common mistake' rectification and the difference between the admissibility of evidence for rectification and for contractual interpretation.

2. Current Orthodoxy, *Chartbrook* and *FSHC*

We start by laying out the current orthodoxy in its typical context. Two corporate executives negotiate at length and finally shake hands to seal the deal. The major commercial terms, or their 'points of agreement', are written on a sheet of notepaper. The executives hand over copies of the notepaper to their respective lawyers and instruct them to draft a formal contractual document for signing. The fundamental question is, what if the signed contractual document failed to accurately reflect the 'points of agreement'? This turns on whether the document was meant to *change* or *reflect* their 'points of agreement'. The peripheral question is, why should it matter (and *FSHC* seems to say it does) whether there was already a *binding* contract when negotiations closed, prior to executing the document?

17 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86.

18 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 137 ([3.02], [3.04]), 150 ([3.38]), 151 ([3.39]), 161 ([3.70]).

Alternatively, consider a case where two parties negotiate a contract by email correspondence, going through five drafts, before finally agreeing to settle on the fifth version. It is common practice to execute as many sets of 'original' contractual documents as there are contracting parties, so they agree to execute two copies of version 5. What if, instead of version 5, they printed and signed one copy of version 3 and one copy of version 4? Is there one contract or none; or are there two contracts or three? Again, fundamentally, were the formal documents (version 3 and version 4) meant to *change* or *reflect* their negotiated agreement (version 5)? Why should it matter whether their agreement (version 5) amounted to a *binding* contract, *before* they signed the documents (versions 3 and 4)?

Emphasising 'respect' for, or loyalty to, the 'primacy of the final, agreed, written terms of a contract'[19] is commonplace. Clearly, a single-minded insistence on loyalty to the written text *cannot* provide a solution to any questions in the two foregoing hypothetical examples which delivers practical justice, commercial pragmatism and security of transaction in one balanced package. The modern law, painstakingly developed by the courts, *can*; and it does so with a combination of interpretation (or implication) and rectification, and through a balanced amalgam of respect for the document, business common sense and other relevant realities extrinsic to the document. For instance, in *Wells v Devani*[20] an estate agent's contract with a property vendor had *no express provision for an essential term* identifying the event that would trigger the vendor's obligation to pay the agent's commission. The Supreme Court saved it from being void for incompleteness and uncertainty. This was done *by interpreting* (and alternatively *by implying* a term into) the

19 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [144], [173] (Leggatt LJ).

20 *Wells v Devani* [2019] UKSC 4, [5], [7]-[8], [17], [26]-[27] (Lord Kitchin), [59] (Lord Briggs).

contract to require 'commission to be payable on completion', after context and common sense were taken into account together with the parties' overall words and conduct.

The law could insist that everyone must stand by the document, regardless of whether anyone has made a mistake: 'If the parties do not take the final language chosen seriously, then they should be encouraged to do so'.[21] Happily, that is not current law. Judges take in a healthy dose of pragmatism and are not bent on inflicting punishments for linguistic infractions.

Modern courts accept that, in reality, 'there are bound to be ambiguities, infelicities and inconsistencies' in 'complex documents'.[22] In *FSHC*, the 'common mistake' triggering rectification arose because the effect of the contractual document was misunderstood by the claimant's solicitors (Allen & Overy LLP), the defendant (Barclays Bank Plc) and its solicitors (Lathams & Watkins LLP). Even professional consultants cannot avoid making mistakes about the contents of complex modern transactional documents, thus necessitating judicial intervention.[23]

In reality, in the two hypothetical examples considered above, the parties struck a deal but it was not well-implemented because inaccurately documented. In such cases, English courts strive to give effect to the parties' true agreement. Often, the appropriate remedy may be to make the documents reflect their agreement: documents which appear inconsistent with the parties' agreement should be made to comport with the real deal as

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21 PS Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 70.

22 *LBG Capital No. 1 plc v BNY Mellon Corporate Trustee Services Ltd* [2015] EWCA Civ 1257, [88] (Gloster LJ) (correction by interpretation).

23 *Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [67]-[69] (Coulson J) ([70]-[75]: rectification for common *and* unilateral mistake).

recorded on the notepaper or in email correspondence, either by interpretation or rectification where appropriate.[24] This *is* current (pre-*FSHC*, at any rate) orthodoxy.

As discussed in Chapter 2 (The Objective Principle), it might sometimes be difficult to tell when interpretation shades into rectification. However, as Prof Burrows observed, both are different paths towards the same end, namely, ensuring that the contractual documents give effect to what the law regards as the parties' true agreement.[25] The quotations (from *FSHC* and *Chartbrook*) at the very beginning of this chapter are consistent with this view of common mistake rectification.

From a normative perspective, there is nothing wrong with current orthodoxy. Let us return to the hypothetical example where two corporate executives reached a prior agreement which was subsequently inaccurately reflected in the final contractual document which they signed. By upholding their negotiated 'points of agreement' (and tampering with the effect of the literal words of the formal signed document), it is true that the courts may be preferring a less literal interpretation or departing from the actual words of the signed document through rectification, but that is neither here nor there.

First, the law is not descending into intolerable uncertainty. The courts are not arbitrarily inventing contractual terms out of thin air but are merely holding the parties to what the law regards as their agreement.

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24 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [25] (Lord Hoffmann); Sir R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253, 253.

25 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77.

Secondly, the law is not preferring an expired, superseded, non-binding, consensus over a new, binding, consensus:[26] the parties are held to their prior consensus or prior agreement as the real deal *only if* it is the *current* deal. The parties' prior consensus or agreement must have persisted up to the time of execution of the ultimate documents; and the documents must have been intended to implement or reflect that consensus.[27] That is why the Court of Appeal in *Agip*, *Swainland* and *FSHC* referred to this consensus or agreement as the parties' 'common continuing intention'.[28] The terms 'prior agreement' or 'prior consensus' indicate that parties arrived at that consensus prior to executing the document, not that the consensus has expired.

When parties have reached prior consensus and subsequently reduced their contract to writing, they presumably intend that document to be treated as *the* record of their bargain. However, that itself has never prevented courts from ordering rectification of the document if it failed to reflect what the law regarded as the parties' true agreement. This is because the parties presumably *also* intend that the document would *correctly reflect* their prior consensus or common continuing intention. Rectification reconciles and effectuates *both* intentions in such cases. Likewise, entire agreement clauses will not in general prevent an inaccurate contractual document from being rectified: after all, when contracting parties insert an entire agreement clause in a contractual document executed after they had reached

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26 *Cf* Lord Justice N Patten, 'Does the Law need to be Rectified? *Chartbrook* Revisited' (The Chancery Bar Association Annual Lecture, April 2013), [36].

27 *Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [56], [62], [63], [66] (Coulson J).

28 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ); *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, [33] (Peter Gibson LJ); *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [99]-[100], [177], [183], [193] (Leggatt LJ).

prior consensus, they commonly intend that the document be treated as reflecting their final agreement, and *also* that the document should *correctly* reflect their prior consensus if it persisted to the time they executed the document.[29]

Thirdly, no injustice is caused: the parties' intentions and the sanctity and freedom of contract are respected. The law is not imposing an unwanted contract. The law is merely giving effect to the parties' real bargain but, of course, the law must have *rules as to how* we ascertain their deal.

At this point, we can refocus on the current rules governing common mistake rectification.

Common mistake rectification is available in two situations: first, where parties had reached a prior binding contractual agreement; and, secondly, where they had reached a prior, non-binding, agreement.[30] Modern cases treat both situations as comprising one single category of common mistake rectification: the parties' contractual document may be rectified to conform to their prior agreement on the ground of 'common mistake', if their 'common intention' underlying that prior agreement persisted or continued up to the time of execution of the contractual document intended to implement or reflect that agreement; and the contractual document fails to reflect their prior agreement accurately.[31] Peter Gibson LJ's following statement of the requirements of common mistake rectification in

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29 *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), (2016) 165 Con LR 58, [122]-[123] (Cooke J); *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [76]-[78] (Coulson J).

30 *Joscelyne v Nissen* [1970] 2 QB 86, 98 (Russell LJ).

31 *Ahmad v Secret Garden (Cheshire) Ltd* [2013] EWCA Civ 1005, [25]-[26], [30], [34] (Arden LJ).

Swainland, emphasising the parties' 'common continuing intention', was endorsed in *FSHC*[32] and *Chartbrook*:[33]

> 'The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; and (4) by mistake, the instrument did not reflect that common intention'.[34]

Despite the apparent clarity of Gibson LJ's statement, some issues remain unresolved particularly in relation to the nature of the 'mistake' which triggers rectification, the level of objectivity or subjectivity when ascertaining the prior agreement, and the interrelationship between contractual formation, interpretation and rectification. The key to answering these questions lies in identifying the doctrinal basis of common mistake rectification, which, as Sir Terence Etherton recognised, is inextricably tied up with the formation of contracts and the ascertainment of their content and meaning.[35]

Contrary to the current orthodoxy which treats the two situations as comprising a single category, Leggatt LJ in *FSHC* cleaved common mistake rectification into two separate sub-categories: (a) where the contracting parties' common continuing intention up to the time of execution of the contractual document in question amounted to a binding contract prior to execution; and (b) where the common continuing intention did *not* so amount. Leggatt LJ observed that the Court of Appeal in *FSHC* was entitled to depart from

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32 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [99]-[100] (Leggatt LJ).

33 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [48] (Lord Hoffmann).

34 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA CIV 560, [2002] 2 EGLR 71, [33] (Peter Gibson LJ).

35 Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 378.

Chartbrook since it was decided on the basis of contractual interpretation, and whatever the House of Lords said about rectification was mere *dicta*; and since the Court of Appeal in *Daventry*[36] merely assumed that *Chartbrook* was correct. In relation to (a), Leggatt LJ accepted that *Chartbrook* was correct in applying the usual objective principle in contractual interpretation. In relation to (b), Leggatt LJ asserted that *Chartbrook* was wrong to apply the objective principle, but should have applied a 'subjective' approach:[37]

> 'The principle that a contractual document should be reformed so as to enforce what the parties have (objectively) agreed has no validity where the prior 'agreement' is not a legally binding contract but a non-binding expression of intent. …
>
> The justification for rectifying a contractual document to conform to a "continuing common intention" … rests on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed. This basis for rectification is entirely concerned with the parties' subjective states of mind. …
>
> We … hold that, before a written contract may be rectified on the basis of common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result

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36 *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333.

37 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [141]-[147], [153], [176]-[177] (Leggatt LJ).

> of communication between them, the parties understood each other to share that intention'.

In *Chartbrook*, Lord Hoffmann treated evidence of the contracting parties' subjective intentions as relevant (for rectification), but unnecessary and inconclusive,[38] in ascertaining the parties' true agreement objectively in the eyes of a reasonable person circumstanced as the parties were. This is consistent with Lord Diplock's formulation of the objective principle (for interpretation) in *Ashington Piggeries*.[39] For rectification in sub-category (b) under *FSHC*, the contracting parties' subjective intentions are necessary ingredients, but they must also have been outwardly communicated. This is because, as demonstrated in the quotation from Leggatt LJ's judgment in *FSHC* (at the very beginning of this chapter), rectification is not about judges inventing agreements for contracting parties but is merely concerned with *correcting the record* of the parties' contractual agreement, insofar as that agreement is 'based on mutual assent which the parties have manifested to each other'. In this light, Leggatt LJ's so-called 'subjective' approach looks very much like some form of addressee-centric objectivity, and it comes very close to Lord Hoffmann's objective approach towards rectification in *Chartbrook*.

The only distinction is that the so-called 'subjective' approach in *FSHC* requires both objective agreement (outward expression) and coincidence of subjective intentions, whereas *Chartbrook* regards subjective intention merely as an element which might assist in ascertaining objective agreement. Yet, as Leggatt LJ observed, this distinction often makes no difference because:

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38 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [64]-[66] (Lord Hoffmann).

39 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock).

> 'The general approach adopted by judges … has been the prudent course … of making findings about the subjective intentions and the "objective" intention of the parties which, in all the cases cited to us, happily produced the same result'.[40]

Furthermore, once the Court of Appeal in *FSHC* accepted that the law prescribes that a contract may be given effect through an (objective) *interpretation* which *neither party subjectively intended*,[41] it should similarly be acceptable that a contractual document may be *rectified* (objectively) to give effect to contractual terms which neither party subjectively intended. After all, in both instances, the law is merely giving effect to what it regards–for whatever reason or rationale and according to whatever degree of objectivity or subjectivity–as their contract. Once a contractual document has been rectified–regardless of whether the rationale justifying rectification is to give effect to the parties' true agreement ascertained objectively or to redress unconscionability or inequity arising from the parties' subjective mistake or subjective intentions–the rectified document will, *in effect*, reflect what the court ultimately regards as the enforceable contract between the parties. It is entirely true that, potentially, the law could *rectify contractual documents* to make them comport with what both parties *subjectively* intended; but such a development makes sense only if the law *also changes* fundamentally, so that *contracts are likewise* enforceable in accordance with their *subjective* intentions.

The point is a simple one: a subjective version of rectification which yields a result that is inconsistent with contract law's objective approach would render the law incoherent.

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40 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [128], [176] (Leggatt LJ); *Gwynt Y Mor Ofto Plc v Gwynt Y Mor Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm), [81], [120] (Phillips LJ). However, the distinction would have made a difference on the availability of rectification in *Chartbrook*.

41 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [149]-[150], *cf* [151]-[153] (Leggatt LJ).

A subjective approach towards rectification would contradict the established objective approach towards ascertaining the existence and meaning of contracts. We could illustrate this point by revisiting *Wells v Devani*.[42]

In *Wells*, an estate agent's contract (founded upon an oral agreement which was subsequently reduced to writing) with a property vendor had *no express provision for an essential term* identifying the event that would trigger the vendor's obligation to pay the agent's commission. The Supreme Court saved it from being void for incompleteness at common law *by interpreting* (and alternatively *by implying* a term into) the contract to require 'commission to be payable on completion', after context and common sense were taken into account together with the parties' overall words and conduct, according to contract law's objective principle. None of their Lordships treated *Wells* as a case of 'rectification' for 'common mistake' or 'unilateral mistake'; and no one made any subjective mistaken assumption about the contract terms concerning when commission would be payable. Nonetheless, in effect, their Lordships did *read into* the contract an omitted, essential, term by interpretation, thus demonstrating two points. First, whatever abstract distinction may exist theoretically between interpretation and rectification, the former shades into the latter in reality: words *were* read in. That distinction is, in effect, a difference of mere degree. Secondly, *Wells* thoroughly exploded any myths that explicit contractual terms are ironclad or that imperfect documents should only be remedied in response to specific forms of 'mistake'. *Wells* certainly causes one to seriously doubt any suggestion that equity should order rectification only if a subjective mistake is proven. Supposing rectification was litigated in *Wells*, would their Lordships have refused

42 *Wells v Devani* [2019] UKSC 4.

rectification, just because neither party assumed 'mistakenly' that their contractual document contained a term requiring 'commission to be payable on completion'? Ultimately, their Lordships assessed the parties' overall words and conduct to conclude that, at common law, their contract included a term requiring 'commission to be payable upon completion'; yet, the same objective principle applies so that their contract has the same meaning in equity.[43] So, their *contract* includes that term at law and in equity, although the *document* does not. There is no reason for equity to refuse to correct (ie, rectify) the *document* to make it accord with what *law and equity* regard as their *contract* (and true agreement). Afterall, rectification is a 'salutary' remedy to prevent misleading documents 'continuing in existence in an objectionable form'.[44] Nothing in the forgoing analysis turns on the question whether the parties' oral agreement amounted to a binding contract before being reduced to writing: that is an irrelevant distraction because the content of their contract is derived by holistically assessing their overall words and conduct. Rather, the key question, as identified at the beginning of this chapter, is whether the parties' agreement or consensus *continued and remained current up to* – and has not become expired or superseded by – *the time it was reduced to documentary form*.

In any event, the facts of *FSHC* can be put simply. The claimant or 'Parent' (FSHC Group Holdings Ltd) was the holding company of the Four Seasons Health Care Group which was involved in a corporate acquisition and restructuring transaction in 2012. This required complex, multi-party, multi-document, large-scale financing, so Barclays Bank Plc (the defendant) was appointed as Security Agent for the financiers. After Carr J

43 *BCCI v Ali* [2002] 2 AC 251 (Lord Nicholls).

44 ICF Spry, *The Principles of Equitable Remedies* (9th ed, 2014), 632, 641.

delivered judgment at first instance (and before the defendant appealed to the Court of Appeal), Barclays Bank Plc was replaced by GLAS Trust Corporation Ltd as Security Agent (and defendant).[45] In Carr J's words:

> 'The terms of a private equity financing transaction completed in 2012 required the Parent [ie the claimant] to provide security over a shareholder loan which was part of the overall funding. Having belatedly spotted, in 2016, that the relevant security documentation had either never been provided or could not now be located, an attempt was made by the Parent to provide that security by way of the 2016 Accession Deeds. By a mistake, far more onerous obligations were undertaken by the Parent than were required ("the Additional Obligations"). There was no intention on either side for the Parent to provide the Additional Obligations; the intention was only to make good the missing security over the shareholder loan; as the Parent put it to "*fill the gap*". In light of the Additional Obligations themselves, and also in the context of the parties' commercial relationship, it made no sense for the Parent to undertake them. By this rectification claim, the Parent seeks to delete the Additional Obligations'.[46]

Specifically, clause 10.6(b) of the Intercreditor Agreement executed in 2012 'imposed' on the claimant 'an obligation to ensure that the benefit of' certain loans was pledged as security to the defendant as Security Agent; and this 'required' the claimant to assign its interests in those loans to the defendant.[47] Under the Term Loan Facility Agreement executed in 2012, it was 'an event of default if any failure' by the claimant 'to comply with the provisions of the Intercreditor Agreement was not remedied within 30 business days of … becoming aware of the non-compliance'. By an oversight, nobody realised that the claimant did not execute the assignment as required by clause 10.6(b); and

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45 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2] (Leggatt LJ).

46 *FSHC Group Holdings Ltd v Barclays Bank plc* [2018] EWHC 1558 (Ch), [1]-[3], [5] (Henry Carr J).

47 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [14], [18], [22], [187] (Leggatt LJ).

this omission was only discovered when the claimant's solicitors reviewed the transaction documents in 2016. The claimant's solicitors thought 'the simplest way of providing the required security' under clause 10.6(b) was for both the claimant and the defendant to execute the 'Accession Deeds' in 2016, and this was communicated to the defendant and its solicitors.

The problem which emerged was that, contrary to the parties' assumption, the Accession Deeds executed in 2016 were expressed in 'short, simple and unambiguous' terms which explicitly imposed on the claimant many more obligations ('Additional Obligations') towards the defendant than required under clause 10.6(b). So, the claimant applied to court for rectification in order 'to delete the Additional Obligations' from the Accession Deeds of 2016. According to the trial judge's *unchallenged* findings of *fact*, the claimant and defendant thought and intended, *both objectively and subjectively*, that in executing the Accession Deeds, they did 'no more and no less than putting in place documents to fill the gap in the missing security' required under clause 10.6(b). These findings were affirmed by the Court of Appeal.[48] The claimant thus succeeded in obtaining rectification at first instance *regardless of whether the proper test for rectification was objective or subjective*; and the defendant's appeal was dismissed.

There are three difficulties with *FSHC*.

First, Leggatt LJ accepted that the defendant's appeal turned on whether *Chartbrook*'s 'objective' approach towards common mistake rectification was correct.[49] In

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48 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [42]-[44], [177], [183], [193] (Leggatt LJ).

49 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [48]-[50], [5] (Leggatt LJ).

fact, the defendant's appeal in *FSHC* turned on whether the defendant could successfully challenge the trial judge's findings of fact.[50] Since the defendant did not even challenge the trial judge's findings which justified rectification on *either an objective or subjective basis*, the defendant's appeal should have failed *in limine* for that reason alone. It was plainly unnecessary to question the objective *Chartbrook* approach.

The second flaw is that *FSHC* unjustifiably cleaved common mistake rectification into two separate sub-categories, namely, (a) where the contracting parties' 'common continuing intention' amounted to a *prior binding contract*, and (b) where their 'common continuing intention' did *not* so amount. Why should the objective *Chartbrook* approach (based on the objective principle usually applicable to contractual interpretation) apply to (a), but a subjective approach apply to (b), as Leggatt LJ insisted in *FSHC*?[51] The quotation (at the very beginning of this chapter) from Lord Hoffmann's judgment in *Chartbrook* clarifies that his Lordship started from the case where the parties' prior consensus or common continuing intention amounted to a binding contract. In such a case, since their prior consensus or common continuing intention amounted to a contract, its contents must be ascertained in the usual objective way by which contracts are interpreted. Executing the document is an implementation of their prior consensus; and that consensus amounts to their true agreement or contract, which underlies the document. If the document is rectified to give effect to their true agreement or contract, this means that the document is being reformed to accord with their agreement, contract, consensus or common intention as

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50 *Cf Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255, [17]-[18], [83] (Mummery LJ) ('the trial judge was better placed than' the Court of Appeal 'to find the facts').

51 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [140]-[146], [176] (Leggatt LJ).

interpreted in the usual objective way. With respect, Lord Hoffmann was right when he assimilated (a) and (b) by applying the same objective approach to both: 'it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not'. [52]

The Court of Appeal in *FSHC* went wrong by attaching undue, decisive, significance to the words of the contractual document, where the parties' common continuing intention did not amount to a binding contract before execution of the document. As demonstrated in Chapter 2 (The Objective Principle), the *tangible contractual document* merely reflects or implements the *intangible contract* which underlies the document, and the document is not: the contract itself, exclusive evidence of the contract, nor conclusive evidence that the clauses expressed in the document state exhaustively the terms of the contract. The Court of Appeal asserted wrongly that the objective meaning of the words of the document should *inevitably* trump the parties' objective common continuing intention if such common intention did not comprise a binding contract prior to the execution of the document, because the document *inevitably* supersedes that common intention:

> 'There is no principle which requires or justifies a court in holding the parties to the terms of an objective consensus reached during negotiations but never intended to be binding: it is in the very nature of such a consensus … that it should not have any legal effect and represents only a stage in negotiations from which either party is free to walk away. … It is in the very nature of a formal written contract that it is objectively intended to have priority over any earlier informal non-binding record of the parties'

[52] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, [60] (Lord Hoffmann). *Cf* E Peel, 'Rectification Revisited' (2020) 136 LQR 205, agreeing that it would be anomalous to adopt an objective test for sub-category (a) and a subjective test for sub-category (b); but suggesting, instead, that both sub-categories should be governed by subjectivity.

> intention, as objectively assessed. In so far as there is a difference between them, it is therefore the contractual document which must prevail'.[53]

The words of contractual documents cannot *always* trump the parties' objective prior consensus. Otherwise, the documents would *always* supersede the earlier binding contract: this would effectively mean that no rectification could ensue at all in relation to any common continuing intention, even where it amounted to a prior *binding* contract. Regardless of whether the parties' common continuing intention amounted to a binding contract prior to execution of the contractual document, in all cases where their common intention has continued up to (and was not superseded by) the time of execution, the parties intend both that the document would represent *the* deal and, concurrently, that the document should correctly reflect their common *continuing* intention. The pivotal questions, always, are whether that common intention has persisted up to the time of execution; and how to reconcile the document with that intention.

Moreover, the words of contractual documents cannot *always* trump the parties' prior consensus even if the consensus did *not* amount to a prior binding contract. The Court of Appeal in *FSHC* gave the game away after it held that rectification ensued on their new-found subjective test formulated for a consensus which did not amount to a prior binding contract; but went ahead, anyway, to accept that the trial 'judge was also right to conclude' that the claimant had also succeeded in 'establishing the existence of an "objective" common intention, based on what a hypothetical observer would have thought the

[53] *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [143]-[144] (Leggatt LJ); Lord Briggs of Westbourne, 'Equity in Business' (2019) 135 LQR 567, 582.

intentions of the parties to be when they executed' the document.[54] Leggatt LJ gave the game away by accepting that:

> 'Undoubtedly the plain terms of the documents create a strong presumption that, in executing them, the parties meant what they said. But in considering whether that presumption was rebutted, the judge was in our opinion right to attach decisive weight to three factors. The first was the contractual background to the accession deeds and the communications which preceded their execution. … A second cogent consideration is the commercial absurdity of the Parent agreeing … to undertake through the accession deeds additional onerous contractual obligations which did not form part of the bargain struck in 2012. The third compelling factor is the absence of any discussion of such a fundamental change to the structure of the transaction. … it was the complete absence of any reference to the Additional Obligations in any of the relevant communications which, in this particular context, spoke louder than words'.[55]

In other words, the Court of Appeal in *FSHC* accepted that whilst the words of the ultimate contractual document rightly carry much weight, they *cannot be decisive* in determining the content of the parties' contract (to the exclusion of business common sense, context, pre-contractual negotiations, and evidence of other factors extrinsic to the document). The court ascertains the parties' intentions by a holistic assessment of their overall words and conduct (including the contractual document)[56] in the usual way according to the objective principle, in order to derive the content of their contract. On this view, consistently with *Chartbrook*, contract law's usual objective approach applies to both

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54 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [183] (Leggatt LJ).

55 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [186]-[193] (Leggatt LJ).

56 *Cf Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [214] (Trower J): 'I also share the view expressed by Henry Carr J at first instance in *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2018] EWHC 1588 (Ch) at [47] that: "the authorities illustrate the proposition that, where an important change is made to an existing arrangement between the parties, the absence of any discussion of that change may itself be evidence that the parties did not intend it. Whether that is true in any case depends on all the circumstances".'

interpretation and common mistake rectification (however, some difference in result might arise because technical restrictions exclude evidence of negotiations and declarations of subjective intentions when interpreting contracts reduced wholly to writing, but these restrictions are inapplicable to rectification).

Once the content of their contract has been ascertained objectively, that is what their contract says and means, regardless of the literal acontextual meaning of the words printed on the document. The document is not the contract; the document is merely supposed to reflect or implement the contract. Rectification ensues to reform the document, so that it does not give a misleading impression of the content of the parties' contract. In Prof Cartwright's words:[57]

> Rectification for common mistake is designed to bring the written document into conformity with the parties' agreement. … It has already been noticed that there are two stages in the formation of a written contract: the creation of the parties' agreement; and then the creation of the contract itself by the execution of a written document which is designed to reflect the agreement. Where, however, it can be shown that the written document failed to contain the terms of the agreement which both parties at the moment of its execution intended–that is, they made a common mistake about the document–rectification may be ordered.'

It is crucial to understand the distinction and relationship between the parties' 'common intention' or 'agreement' (on which their 'contract' is built) and the 'document' which is meant to reflect or implement their common intention, agreement or contract. Rectification makes the document comport with their contract; their contract reflects or implements their common intention and agreement. Since the courts decidedly ascertain the content of their contract in accordance with the objective principle, the same objectivity

[57] J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 472 ([13-38]); 466 ([13-33]).

should apply to the ascertainment of the content of: (i) their common intention or agreement on which the contract is based; and (ii) their document which is designed to reflect or implement their agreement, common intention or contract. As indicated earlier, the key is to recognise that:

(a) the parties' common intention triggers rectification only if it (objectively) continues to persist up to (and has not been superseded by) the time of execution of the document;[58]

(b) if the common intention so persists, this means that the parties intend (objectively) both that the document would represent *the* deal and, concurrently, that the document should correctly reflect their common *continuing* intention; and

(c) the law *reconciles both (objective) intentions* by rectifying the document to make it comport with their common continuing intention, so that the rectified document now *correctly* represents *the* deal.

The third, fatal, flaw is that *FSHC* was really a case of rectification of a document which failed to comport with the parties' prior *binding* contract (sub-category (a)), rather than rectification of a document to make it comport with parties' common continuing intention which did *not* amount to a binding contract (sub-category (b)).

In essence, *FSHC* supposedly decided that (a) *Chartbrook* was correct to apply an objective approach towards the rectification of a contractual document to make it comport with the parties' common continuing intention where it amounted to a prior binding

[58] See *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [214] (Trower J).

contract, but that (b) *Chartbrook* was wrong to apply that objective approach where it did *not* so amount, and that a subjective test should instead apply in this latter sub-category. It was held that *FSHC* was a case falling within sub-category (b) and, so, the documents – the Accession Deeds of 2016 – should be rectified according to the subjective approach.

Of course, one may assert that the Court of Appeal correctly classified *FSHC* as a case concerning sub-category (b), by arguing that the Intercreditor Agreement is not a relevant 'binding contract' which would bring the case within sub-category (a). However, that is a difficult argument. The Accession Deeds were in fact executed by the contracting parties in 2016 only because clause 10.6(b) of the Intercreditor Agreement executed in 2012 'imposed' on the claimant 'an obligation to ensure that the benefit of' certain loans was pledged as security to the defendant; and according to the Term Loan Facility Agreement executed in 2012, it was 'an event of default if any failure' by the claimant 'to comply with the provisions of the Intercreditor Agreement was not remedied within 30 business days of … becoming aware of the non-compliance'. The claimant sought to rectify the Accession Deeds because the Accession Deeds went far beyond what was required by clause 10.6(b).

In short, *FSHC* was a classic case of sub-category (a), concerning the rectification of a contractual document executed pursuant to a *prior binding contract*. The Court of Appeal mis-characterised *FSHC* as a case of sub-category (b). Consequently, *FSHC* was only concerned with *sub-category (a)*; so the Court of Appeal overreached itself by deprecating *Chartbrook* in respect of *sub-category (b)*; and the 'subjective' test which the Court of Appeal purported to formulate for sub-category (b) was mis-applied to facts falling within sub-category (a).

This saga exposes the fundamental weakness in the Court of Appeal's analysis in *FSHC* when it cleaved common mistake rectification into two distinct sub-categories: the analysis is over-sophisticated. As the aforementioned 'second flaw' demonstrates, the distinction between sub-categories (a) and (b) is difficult to justify; and, as the 'third, fatal, flaw' illustrates, that distinction may be difficult to identify and apply. Both sets of counsel, and the three Lords Justices, did not notice that *FSHC* was mis-characterised and that the analysis was mis-applied.

It follows that, notwithstanding *FSHC*, the objective *Chartbrook* approach (quoted at the beginning of this chapter) remains current orthodoxy, unless *Chartbrook* is subsequently overturned by the Supreme Court.

3. Doctrinal Basis: Giving Effect to the Parties' True Agreement

Reverting to Lord Hoffmann's judgment in *Chartbrook*,[59] rectification of a contractual document to make it conform to the contracting parties' prior *binding* contract is simply a way of giving effect to the prior binding contract. If some other *wider* explanatory basis is found for cases where the prior agreement does *not* amount to a binding contract, it will be able to justify rectifying a contractual document to make it comport with a prior agreement, *regardless* of whether the prior agreement amounts to a binding contract.

The natural choice for this wider doctrinal basis is that common mistake rectification gives effect to the contracting parties' true agreement, which in turn gives effect to their (objectively ascertained) current intention, ie, their common continuing

[59] *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [59] (Lord Hoffmann).

intention. Giving effect to the parties' true agreement is the natural doctrinal justification for common mistake rectification for several reasons.

As a matter of authority, the 'true agreement' thesis is not merely consonant with the current judicial motivation underlying common mistake rectification of contractual documents to comport with a prior *binding* contract, but was also the explicit objective of Russell LJ in *Joscelyne v Nissen*[60] in extending common mistake rectification to cases where the prior agreement did *not* amount to a binding contract. Russell LJ identified the court's task as the ascertainment of the parties' *prior agreement or accord* (whether amounting to a binding contract or not) so as to *give effect to it* (by ordering rectification).

It is therefore unsurprising that this 'true agreement' thesis is regarded by numerous judges[61] and commentators[62] as the principle justifying common mistake rectification of contractual documents. In Prof Cartwright's words:[63] 'Rectification for common mistake is designed to bring the written document into conformity with the parties' agreement'. To like effect, Lord Diplock said:[64]

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60 *Joscelyne v Nissen* [1970] 2 QB 86, 95 and 98 (Russell LJ). See also *Shipley Urban District Council v Bradford Corpn* [1936] 1 Ch 375 (Clauson J); *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 (Simonds J); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19] (Lord Hoffmann NPJ).

61 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ); *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] BLR 1336, [16] (Carnwath LJ); *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, [251].

62 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 1 ([1-02]) ('the true accord between the parties'; 'their common agreement or understanding'); J McGhee (ed), *Snell's Equity* (34th edn, 2020), 465 ([16-001]); C MacMillan, *Mistakes in Contract Law* (Hart Publishing, 2011), 46, 55; JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 927 ([27-010]).

63 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 472 [13-38]); A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77.

64 *American Airlines Inc v Hope* [1974] 2 Lloyd's Rep 301, 307 (Lord Diplock).

> ‘Rectification is a remedy which is available where parties to a contract, intending to reproduce in a more formal document the terms of an agreement upon which they are already *ad idem*, use in that document words which are inapt to record the true agreement reached between them. The formal document may then be rectified so as to conform with the true agreement which it was intended to reproduce, and enforced in its rectified form’.

FSHC suggests that older authorities referring to the parties’ agreement or consensus were in fact referring to their *subjective* intentions because equity traditionally remedied unconscionability or bad faith;[65] nonetheless, the editors of *Chitty on Contracts* rightly point out that:[66]

> ‘When in “common mistake” cases in the past the courts have determined the terms of the prior agreement, they have not always looked for actual subjective agreement. Typically in rectification cases the court looks at the outward expression to determine what the agreement was. Though evidence of what a party intended or thought the words meant is admissible and may be relevant, at least when the prior agreement is in writing the court determines its meaning in the usual way’.

Furthermore, the ‘true agreement’ thesis is consistent with the well-established prescription that common mistake rectification reforms contractual documents to make them comport with the *current (not superseded) terms*[67] of the true agreement *reached by the parties (not invented by the courts),*[68] in so far as those terms can be *ascertained*.[69]

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65 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [102], [52], [55] (Leggatt LJ).

66 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 392 ([3-083]).

67 *PT Berlian Laju Tanker TBK v Nuse Shipping Ltd (‘The Aktor’)* [2008] EWHC 1330 (Comm), [2008] 2 Lloyd’s Rep 246, [58], [60] (Christopher Clarke J).

68 *Agip SpA v Navigazione Alta Italia SpA (The ‘Nai Genova’)* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ); *MacKenzie v Coulson* (1869) LR 8 Eq 368, 375 (Sir WM James VC).

69 *Etablissements Georges et Paul Levy v Adderley Navigation Co (The ‘Olympic Pride’)* [1980] 2 Lloyd’s Rep 67, 72-73 (Mustill J); *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2020] EWHC 337 (Ch), [32]-[34] (Chief Master Marsh).

The ‘true agreement’ thesis is not merely backed by authority; but is also sound in principle.

It is axiomatic that, as far as possible and subject to constraints of legal principle and policy, the courts give effect to binding agreements entered into by contracting parties.[70] So, if an agreement embodying the contracting parties’ common intention, and buttressed by consideration and the intention to create legal relations, are all that the law requires to give effect to the parties’ agreement as an enforceable contract, it is difficult to see *what other additional elements* should be necessary before the law will give effect to the parties’ true agreement just because it is recorded in or implemented by a document. Fundamentally, if giving effect to the agreement or common intention of the contracting parties is the justification for enforcing contracts (ie, agreements buttressed by consideration and the intention to create legal relations), there is no reason why it cannot also justify the rectification of contractual documents which are meant to implement or record (rather than supersede) the parties’ agreement.

The key questions are how to ascertain and give effect to their true agreement. In practical terms, these are questions as to what the law regards as their ‘true agreement’, what material will evidence their agreement, and whether rectification is an appropriate remedy in particular cases.

Concentrating on the remedial aspect, in some cases, judges have concluded that a contract means the same thing when properly interpreted or when rectified;[71] or that

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70 Eg *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] AC 436, [46]-[48] (Lord Toulson).

71 Eg, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [58], [66] (Lord Hoffmann) (common mistake); *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (unilateral mistake).

rectification should anyway be ordered *ex abundanti cautela* if it would avoid doubt and confusion (even if the dispute could have been resolved by interpretation).[72] Obviously, courts may in general grant relief by way of interpretation or rectification in the alternative. However, of course, there may be specific cases where an error of expression can be put right by rectification but not interpretation[73] because (*inter alia*) the latter attracts different evidential rules[74] (but this calls into question why the evidential rules are different). Clearly, rectification 'should not be circumscribed by anomalous or artificial rules' just because it is an equitable remedy; after all, rectification can be a 'salutary' remedy for preventing misleading documents 'continuing in existence in an objectionable form'.[75]

The foregoing conclusions should not be surprising since Prof Burrows observed that the 'common thread' between interpretation and common mistake rectification is that they serve the similar function of giving effect to the parties' true agreement – ensuring that 'the contract, as enforced, reflects the intentions of the parties'.[76]

It is important to remember the distinction between agreements, contracts and documents. An *agreement* must at least be buttressed by consideration and the intention to

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72 *Standard Portland Cement Co Pty Ltd v Good* [1982] 2 NSWLR 668, (1982) 47 ALR 107, 112 (Lord Templeman); *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, [538] (Campbell JA) ('Even though one can arrive by a process of construction at a meaning for clause 4.4(a), I would still make an order rectifying clause 4.4(a) to make that meaning clear on the face of the document. Even if a mistake in the expression of a document is able to be read in the correct (ie, the intended) sense as a matter of construction, nevertheless rectification can be granted *ex abundanti cautela*').

73 *JIS (1974) Ltd v MCP Investments Nominees I Ltd* [2003] EWCA Civ 721 (Carnwath LJ); *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [13], [81], [143]-[146], [158], [159] (Leggatt J). Or *vice versa*: *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [2007] BLR 1336 (Carnwath LJ) (error of expression can be put right by interpretation but not by rectification).

74 Eg, *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), [45] (Cooke J).

75 ICF Spry, *The Principles of Equitable Remedies* (9th ed, 2014), 632, 641.

76 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77.

create legal relations before it amounts to a *contract*. And, rectification merely reforms *documents* without mending the *agreements* or *contracts* which underlie the documents: this is a natural consequence of two contract law axioms. First, as Bramwell B stated long ago, a so-called 'written contract' is 'not the contract itself, but only evidence – the record of the contract'.[77] Secondly, although the courts give effect to binding agreements amounting to contracts, they will neither rewrite the parties' agreement nor invent a contract where parties have not in fact reached agreement on terms. We have no principled basis for saying how a contractual document should be rectified to make it reflect their true agreement or contract, unless we know that the true agreement (underlying the document) exists and what its terms are. Of course, the law must have rules determining what constitutes, in the eyes of the law, 'agreements', 'contracts', the 'terms' thereof and the 'relevant and admissible evidence' for establishing these.

Unless you have done something which amounts in law to entering into a contract with X on terms ABC, there is no principled basis for saying that you have contracted with X or anyone else, on terms ABC or any particular terms. There is an indeterminate number of persons with whom you might reasonably contract on an uncertain combination of terms, or you might not even enter into any contract. The courts' fundamental refusal to invent contracts or rewrite terms of agreement is impelled not by arid dogma, but by the judicious pragmatism to promote certainty and avoid arbitrary indeterminacy.

Hence, in point of principle and policy, the 'true agreement' thesis holds its ground. Compelling concerns about arbitrary indeterminacy and certainty mean that, generally,

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77 *Wake v Harrop* (1861) 30 LJ Ex 273, 158 ER 317, 320 (Bramwell B).

courts can give effect to the parties' contract through rectification, only if the true agreement (underlying the document) exists and if its terms can be ascertained. Furthermore, the courts' policy is to give effect to the true agreement entered into by contracting parties (buttressed by consideration and the intention to create legal obligations), by enforcing the agreement as a binding contract. Thus it is difficult to deny that 'giving effect to their true agreement' would justify the enforcement of contracts and *also* the rectification of contractual documents (meant to reflect their agreement).

Nonetheless, it has been suggested that the doctrinal basis of common mistake rectification is to 'correct unconscionable behaviour'.[78] However attractive this 'unconscionability' suggestion might seem, an outright rejection of the 'true agreement' thesis is untenable.

If the suggestion is to *deny* rectification on the ground that there was no unconscionable conduct, even where parties had reached a prior consensus amounting to a binding agreement which is inaccurately reflected in the ultimate contractual document, it seems the unconscionability requirement is an unfounded, superadded, obstacle. The courts have never prescribed such an additional unconscionability requirement where the prior consensus amounts to a *binding* agreement.[79]

If rectification is *allowed* on the basis of unconscionability, then the 'unconscionability' suggestion is entirely consistent with the 'true agreement' thesis in this

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78 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistakes* (2nd ed, 2016), 282 ([3-94]) and 293 ([3-104]).

79 *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88 (Cozens-Hardy MR); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19] (Lord Hoffmann NPJ); *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [141]-[146] (Leggatt LJ).

chapter (which reflects current orthodoxy). If the defendant's conduct is indeed so unconscionable that it justifies rectification, then the defendant's unconscionable conduct will likewise justify the court treating the defendant as if he had reached agreement with the claimant on the terms as rectified. Ultimately, in cases where rectification *is available*, the result should be the same whether we say that the parties' contractual document should be rectified because of a party's 'unconscionable' (or inequitable) conduct or because rectification would make it comport with the parties' 'true agreement' according to the objective principle.

It is easier to illustrate this point by reference to cases of unilateral mistake, where the language of 'unconscionability' is frequently invoked to justify rectification.[80] In *Littman*,[81] the tenant knew that the landlord had made a drafting error in a lease but chose not to mention it because the error was in the tenant's favour. The Court of Appeal held that the tenant's knowledge and silence made it unconscionable or inequitable to resist the claimant's claim for rectification. Jacob LJ accepted that the rectified terms 'put the parties in a contractual position which they had never agreed'; yet, in the same breadth, Jacob LJ also stated that 'in reality', the tenant's words and conduct 'amounted to an agreement – by accepting the clause knowing what the other side thought it meant, he was accepting just that and equity should not allow him to resile'. Likewise, May LJ concluded that the tenant's knowledge of the landlord's mistake and his failure to point it out meant that 'on one view, he agreed to' what he understood the landlord had 'intended to say'; yet, his

80 Eg, *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 516 (Buckley LJ).

81 *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P&CR 2, [21], [24] and [26] (Jacob LJ), [33] (May LJ).

Lordship also accepted that on another view unilateral mistake rectification was justified even though the parties had *not* in fact reached an 'antecedent agreement'.

The *Littman* decision helpfully demonstrates that where it would be unconscionable for a defendant to deny rectification on the ground of (the claimant's unilateral) mistake, the law would likewise regard the defendant as having contracted in reality with the claimant on the terms *as rectified*. It follows that, even if we accept that rectification of a contractual document for (unilateral or common) mistake is an equitable remedy against unconscionability, this does not detract from saying that rectification merely gives effect to (what the law regards as) the parties' true agreement.

According to Prof McLauchlan[82] and the learned editors of *Chitty on Contracts*,[83] the same analysis could apply if facts similar to *Hartog*[84] were to arise now. (Rectification was not in fact considered, and it was unclear anyway whether any document existed which might have been susceptible to rectification, in *Hartog*). The seller negotiated and intended to sell hare skins at a (higher) price per piece but mistakenly offered to sell at a (lower) price per pound, and the buyer knew (from their negotiations) of the seller's mistake yet he purported to snap up the offer. Since the buyer knew of the seller's mistake, the buyer would be acting unconscionably or in bad faith if he insisted on purchasing on a per pound basis,[85] so the apparent contract on a per pound basis was held to have been void or invalid in *Hartog*. Clearly, however, the parties' 'true agreement' *could have been* seen as a

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82 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 614, 640.

83 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 359 ([3-030]).

84 *Hartog v Colin & Shields* [1939] 3 All ER 566.

85 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [20] (Lord Hoffmann NPJ).

contract on a per piece basis under the addressee-centric objective approach towards the formation of contracts.[86] A reasonable person in the seller's position might have thought, just as the (mistaken but presumably reasonable) seller did, that he was offering to sell and the buyer was accepting at a price per piece. A reasonable person in the buyer's position might have thought, just as the buyer knew, that the seller (mistakenly) understood that they were dealing at a price per piece. If so, then, if any written instrument documenting the contract on a per pound basis existed, such document could have been rectified to give effect to the per piece contract because: first, their 'true agreement' would have been for a contract at the price per piece; and secondly, it would *also* have been unconscionable for the buyer to deny this.

4. Objective Principle, Interpretation and Formation of Contracts

It must be emphasised that the existence and content of any agreement, or the 'true agreement' (such as in *Littman* and *Hartog*), are ascertained according to contract law's 'objective principle' which is addressee-centric. The objective principle was covered in Chapter 2, so only some salient points will be repeated here.

Some regard the relationship between common mistake rectification, contract formation and interpretation as controversial. Thus, it has been suggested that the principles for interpreting a contract are distinct from those relating to the question whether a contract has been formed;[87] and that whereas the law relating to rectification should reflect the

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86 According to Blackburn J's classic exposition in *Smith v Hughes* (1870-1871) LR 6 QB 597, 607.

87 *Crest Nicholson (Londinium) Ltd v Akaria Investments Ltd* [2010] EWCA Civ 1331, [25] (Sir John Chadwick); *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [160] (Andrew Smith J). *Cf Bexbes LLP v Beer* [2008] EWHC 2559 (Ch), [18] (Arnold J) (affirmed in *Beer v Bexbes LLP* [2009] EWCA Civ 628, [23] (Mummery LJ)).

courts' approach towards contract formation, it would be 'problematic'[88] for it to also reflect the approach towards contractual interpretation. Similarly, some have said that a more 'detached' form of objectivity may be deployed in the interpretation of a single contractual document, unlike the more 'party-oriented perspective' which applies in the interpretation of separate communications (constituting offer and acceptance) between contracting parties during contractual formation.[89] It has even been suggested that, instead of replicating the common law's objective approach to contract formation and interpretation, rectification – being an equitable remedy – ought to be a subjective exercise, and so a contractual document should be rectified only if both parties were subjectively mistaken as to its contents.[90]

Nonetheless, as a matter of authority and principle, such fragmentation between formation, interpretation and rectification cannot be right: the same principle of objectivity ought to apply across all three.

The authorities are clear that the same objective principle applies to the *interpretation* of contracts[91] and of offers and acceptances during contractual *formation*.[92] There is some scholarly consensus that the objective approach applicable to *formation*

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88 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86.

89 J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 51-55.

90 PS Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 420-422; *cf FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [176], [77] (Leggatt LJ).

91 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913 (Lord Hoffmann); *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 (Lord Clarke); *Arnold v Britton* [2015] 2 WLR 1593, [15], [21] (Lord Neuberger); *Wood v Capita Insurance Services Ltd* [2017] 2 WLR 1095, [9]-[15] (Lord Hodge); *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); *BCCI v Ali* [2002] 1 AC 251, [8], [19] (Lord Bingham).

92 *Smith v Hughes* (1870-1871) LR 6 QB 597 (Blackburn J); *Hartog v Colin and Shields* [1939] 3 All ER 566 (Singleton J); *Paal Wilson & Co v Partenreederei Hannah Blumental (The 'Hannah Blumenthal')* [1983] AC 854, 916-917 (Lord Diplock), 924 (Lord Brightman).

ought to govern common mistake *rectification*.[93] The Supreme Court in *Oceanbulk*[94] agreed with Sir Richard Buxton's observation:[95] that the *ICS* principles of contractual interpretation point to the 'close relationship between *interpretation* and *rectification*', and that 'the problems with which both the principles of rectification and the principles of construction … grapple are closely related'. Furthermore, *Chartbrook* and *Daventry* established that the approach towards *contractual interpretation*, particularly the objective principle, applies to common mistake *rectification*.[96] Consistently with the thesis that common mistake rectification, like interpretation, gives effect to the parties' true agreement, the court must interpret the parties' continuing common intention and the ultimate contractual document using the same objective principle to ensure that the latter accurately reflects the former.[97]

Furthermore, the same objective principle applies so that a communication has the same interpretation at law and in equity,[98] so the so-called legal/equitable divide cannot justify any purported difference in the level of objectivity/subjectivity between interpretation and rectification. Thus, equity applies the same objective principle (as the common law's objective principle in formation and interpretation) when ascertaining the

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93 D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86; Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 378.

94 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662, [48] (Lord Phillips), [44]-[45] (Lord Clarke) (emphasis added).

95 Sir R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253.

96 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [60] (Lord Hoffmann); *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [194] (Lord Neuberger MR).

97 *Cf Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19], [23] (Lord Hoffmann NPJ).

98 *BCCI v Ali* [2002] 2 AC 251 (Lord Nicholls).

true meaning of an alleged misrepresentation[99] or the true agreement of contracting parties (where rectification for mistake is sought) to reform the contractual documents to make them conform to their true agreement.[100] As Lord Neuberger put it in *Daventry*:[101]

> 'Rectification is an equitable remedy, which means that its origins lie in conscience and fair dealing, but those origins cannot be invoked to justify an unprincipled approach: far from it. Particularly as rectification is normally invoked in a contractual context, it seems to me that its principles should reflect the approach of the law to contracts, in particular to the formation and interpretation of contracts'.

However, it is currently true that, when interpreting contracts reduced wholly to writing, evidence of prior negotiations and declarations of subjective intentions are excluded by technical policy-driven rules.[102] Still, this does *not* mean that the objective principle applicable to the interpretation of contracts reduced wholly to writing is different from the objective principle applicable in all other contexts (such as rectification, interpretation of representations or interpretation of contracts not reduced wholly to writing); but simply that additional exclusionary evidential rules are imposed for policy reasons in that one single context.[103] This does mean, also, that one must question whether

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99 *Bankers Trust International Plc v PT Dharmala Sakti Sejahtera* [1996] CLC 518, 531 (Mance J).

100 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2011] 1 AC 662, [44]-[45] (Lord Clarke); *Daventry District Council v Daventry & District Housing Ltd* [2012] 1 WLR 1333, [194] (Lord Neuberger); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [20], [22] (Lord Hoffmann NPJ); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 (Lord Hoffmann) (common mistake); *Littman v Aspen Oil (Broking) Ltd* [2006] 2 P&CR 2, [21], [24] and [26] (Jacob LJ), [33] (May LJ) (unilateral mistake); D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608.

101 *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [194] (Lord Neuberger of Abbotsbury MR); Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 378 ('rectification is intimately bound up with the rules of contract formation and interpretation').

102 Lord Neuberger, 'The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation' (Banking Services and Finance Law Association Conference, Queenstown) (11 August 2014), [9], [11].

103 The point seems to be accepted in D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83, 86.

it is appropriate to maintain different evidential rules for interpreting contracts reduced wholly to writing (considered later in this chapter).

Furthermore, since the objective principle is not completely detached from the contracting parties (who are the proper addressees of the contract), but is addressee-centric, it therefore comprises a 'complex amalgam' of both objective and subjective elements. Thus, the judges ascertained the substance of the agreement in *Littman* by an objective interpretation of the lease from the perspective of both landlord and tenant; and the (non-)formation of the sale agreement in *Hartog* was derived from the perspective of both buyer and seller, taking into account the contracting parties' knowledge and mistake. As Lord Philips put it:[104] the 'task of ascertaining whether the parties have reached agreement as to the terms of a contract can involve quite a complex amalgam of the objective and the subjective and involve the application of a principle that bears close comparison with the doctrine of estoppel', and the 'task of ascertaining whether the parties have reached agreement as to the terms of the contract overlaps with the task of ascertaining what it is that the parties have agreed.'

From the foregoing, it seems clear that as a matter of authority, the same objective principle applies to contractual interpretation, formation and (common mistake) rectification. The same point can be made from first principles.

To begin with, the ascertainment and interpretation of contract terms are bundled up with the principles of contract formation in one package. A contract normally results

104 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123], [124], [125] (Lord Philips of Worth Matravers).

from an unqualified acceptance[105] which mirrors the terms of the offer.[106] The law would be schizophrenic if it purported to apply one form of objectivity to derive one meaning of the terms of an offer and acceptance during formation and, immediately thereafter, interpret the resulting agreement using another form of objectivity to derive another meaning. After all, a contract has *only one meaning* properly interpreted,[107] at law or in equity;[108] and its proper *interpretation* is derived based on circumstances *at the time of formation*[109] so it cannot mean one thing during formation and something else immediately after.

Therefore, to the extent that the objective principle governs the ascertainment and interpretation of the terms of an offer and its acceptance during contractual formation, the same approach should govern the ascertainment and interpretation of the terms of the parties' contract.

If the interpretation of a contract is in dispute, the question is what the contract terms mean; whereas, if the contract's formation and existence are in dispute, the questions are whether there was an offer and whether it was accepted. In that sense, the questions involved, in interpretation and formation disputes, seem quite different. [110] However, that is only because the question of the precise meaning of the parties' expressions was not asked, even though it must be asked if we are to ascertain the substance of their relationship.

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105 *Gibson v Manchester City Council* [1979] 1 WLR 294, 297 (Lord Diplock).

106 *Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd* [1979] 1 WLR 401: purported acceptance ineffective because at variance with the offer.

107 *Trust Risk Group SpA v AmTrust Europe Ltd* [2015] EWCA Civ 437, [34] (Beatson LJ); *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), [42] (Cooke J).

108 *BCCI v Ali* [2002] 2 AC 251 (Lord Nicholls of Birkenhead).

109 *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619, [21] (Lord Neuberger).

110 *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [160] (Andrew Smith J).

Let us take the case where an offeror says in March 2011 that he is 'willing to contract with the offeree for "Blackacre" on "usual market conditions".' The offeree reverts in May 2011 that he 'would be happy to contract for the "Smith family estate" on "The Law Society's Standard Conditions of Sale, 4th ed".' Putting aside any issue about statutory formality requirements,[111] the question whether the offeror and offeree have formed a contract turns on whether, despite their precatory language, a definite offer was made and whether it was accepted; and that depends on the interpretation of the terms of the offer and the terms of the acceptance. In particular, the 'mirror' approach towards offer and acceptance require the offer and acceptance to be interpreted to determine whether 'Blackacre' is the same subject-matter as the 'Smith family estate', and whether 'The Law Society's Standard Conditions of Sale, 4th ed' and 'usual market conditions' are the same terms. In this interpretative exercise, it is crucial to know whether there is any admissible evidence of relevant context or other extrinsic matter to help identify the subject-matter and whether it is relevant that The Law Society published a 5th edition in April 2011.

The foregoing example demonstrates that what the terms of the offer and acceptance are interpreted to mean will determine both the existence of the contract as well as its meaning. Some offerors and offerees, in some cases, may fortuitously expressly refer to the same words, without specifically considering what each word means. However, as Sir Terence Etherton concluded, the ultimate question is 'whether there has in fact been agreement on the same terms in relation to the same subject matter'; and therefore, 'the question of formation overlaps or merges with that of interpretation'.[112]

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111 Under Law of Property (Miscellaneous Provisions) Act 1989, s2.

112 Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 382.

Since (a) the ascertainment of the content and interpretation of the parties' agreement are inextricably connected with the way contracts are formed; and since (b) (common mistake) rectification gives effect to the parties' true agreement; therefore, it follows that (c) the same objective principle applicable to contractual formation should also apply to contractual interpretation and (common mistake) rectification.

5. Some Practical Consequences

Establishing the two theses in this chapter leads to significant practical consequences, which include impacting on the type of 'mistake' which must be established for 'common mistake' rectification, as well as the differences between evidential rules applicable to the interpretation and rectification of contractual documents.

First, the acceptance in *Chartbrook* that rectification of a contractual document could be ordered on the ground of *common mistake* where the document failed to record the *objective prior agreement* of the parties, but *only one* party was *subjectively mistaken* as to the contents of the document, remains controversial. It has been suggested, for example, that *Chartbrook* should not have qualified as a case of common mistake and should have been subject to the different rules of *unilateral* mistake rectification.[113]

However, if giving effect to what the law regards as the parties' true agreement is the justification for the displacement of the express words of the contractual document by the prior agreement in common mistake rectification, it follows that (contrary to Hobhouse LJ's view)[114] the only so-called 'common mistake' that must be proven to justify

113 *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [93] (Leggatt J).

114 *Britoil plc v Hunt Overseas Oil Inc* [1994] CLC 561 (Hobhouse LJ); Lord R Toulson, 'Does Rectification Require Rectifying?' (TECBAR Lecture, 31 October 2013), 7, 12, 15.

rectification is simply that objectively the document does not reflect the parties' true agreement.[115] How that 'mistake' came about is 'generally irrelevant to the availability of the remedy of rectification'.[116] The crucial task of identifying the parties' true agreement will entail discovering the parties' current agreement or 'common continuing intention' according to contract law's objective approach towards contract formation and interpretation. As Sir Terence Etherton said, searching for what counts as a 'common mistake' for rectification is merely an 'unprofitable' distraction.[117]

Secondly, by treating rectification as an alternative to the remedial interpretation of the document so as to make the document conform to the prior agreement in *Chartbrook*, questions arise whether common mistake rectification has been rendered largely redundant by liberal rules of interpretation.[118] The short answer, apparent from the proliferation of modern rectification claims, is 'no'. In any event, by applying an objective approach in determining the existence and content of the prior agreement (with which the rectified contractual document must comport), it is sometimes suggested that *Chartbrook* controversially departed from the earlier assumption that contractual documents are rectified so as to make them conform to the parties' actual, *subjective*, agreement.[119]

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115 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [59] (Lord Hoffmann); *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19], [23] (Lord Hoffmann NPJ).

116 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 5 ([1-07]); *MV Promotions Ltd v Telegraph Media Group Ltd* [2020] EWHC 1357 (Ch), [53] (HHJ Hodge QC).

117 Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 381.

118 PS Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 424, 426.

119 PS Davies, 'The Meaning of Commercial Contracts' (Ch 12 in PS Davies & J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing, 2015)), 236.

However, if, in accordance with the theses in this chapter, the same general objective approach of contract law is applied to interpretation, formation and rectification, the law is not merely simplified because unified across all three processes. It also becomes more coherent. There are difficulties with saying that the equitable remedy of rectification gives effect to the party's subjective intentions whereas the common law enforces a contract according to a generally objective view of its terms. The point was touched upon when *Wells v Devani* was discussed earlier in this chapter. English courts have worn both legal and equitable hats since the Judicature Acts of 1873 and 1875,[120] and they interpret contracts the same way at law and in equity (now or even earlier).[121] What is important to modern lawyers and litigants is not the historical difference between law and equity or between objectivity and subjectivity, but the ultimate solutions which the courts must deliver when actual facts pose real questions.[122] Only one question really matters: is the courts' role in enforcing a contract to give effect to the parties' agreement according to a subjective view or an objective view? If the courts' role is to rectify contractual documents according to the parties' subjective intentions then, surely, the subjective intentions must prevail over the objective perspective (because the rectified document is ultimately the

120 The Supreme Court of Judicature (and, later, the Supreme Court of England and Wales) has been administering equity and law concurrently since as long ago as the Supreme Court of Judicature Acts of 1873 and 1875. This practice has been continued by the Senior Courts of England and Wales under the Senior Courts Act 1981: each Division of the High Court has the remedial jurisdiction of the entire High Court (s 5(5)) and every judge of each Division has concurrent jurisdiction at law and in equity (s 49).

121 *Scott v Liverpool Corp* (1858) 3 De G & J 334 (Lord Chelmsford LC); *Hotham v East India Co* (1779) 1 Doug 272 (Lord Mansfield); *BCCI v Ali* [2002] 2 AC 251 (Lord Nicholls of Birkenhead).

122 S Worthington, 'Integrating Equity and the Common Law' (2002) 55 CLP 223, 224: '… a potential litigant … could be told that at common law she has no remedy for an unwanted disclosure, but that equity's rules will assist her. These statements articulate the modern law by describing its history. The important conclusion for the potential litigant, surely, is simply the contemporary status of her legal claim'.

version which is enforced as their contract); and, if so, those same subjective intentions should govern the interpretation of contracts to begin with. Conversely, if the courts' role is to give effect to the parties' contract according to an objective interpretation, then that should leave little room for rectification on a subjective basis.

It is circuitous for judges to give effect to a contract according to an objective view of its terms (interpretation) and, yet, insist on giving effect to it according to a subjective view of its terms (rectification). In Prof Douglas' words, it would seem 'odd for the court to give primacy to the objective approach except for when litigants tag a "rectification" claim on to their pleadings'; and 'what point is there in conducting an objective inquiry in the first place?'.[123] The point can be made even more starkly, as Prof Stevens did (when criticising *FSHC*):

> 'If rectification really did permit the court to give effect to the parties' subjective intentions, it is unclear why it is (or should be) a doctrine concerning *documents* at all. Why not *always* enforce such subjective intentions, amending objective agreements where they do not conform to them?'.[124]

The current, generally objective, orthodoxy laid down in *Chartbrook* is commendable precisely because it promotes a coherent alignment between the courts' approach towards formation, interpretation and rectification.

Most importantly, the orthodox, objective, approach towards common mistake rectification (supported by the thesis in this chapter) also reflects the fundamental reason why contract law's approach towards formation and interpretation is generally objective.

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123 S Douglas, 'Trusts, Objectivity and Rectification' (Ch 8 in PS Davies and J Penner (ed), *Equity, Trusts and Commerce* (Hart Publishing, 2017)), 193.

124 R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 603.

This is that 'both agreements and promises are objective because communication is'; and that the meaning of an utterance … is determined by the reasons that a speaker gives (by using the words that he or she uses) for another person to believe that the speaker has one intention or another'.[125] Contracts, and contractual documents (whether rectified or not), are means of communication:

> 'Finally, objectivity is intrinsic to contracting. Making a contract is essentially an exercise in the *communication* of choice, and communication is impossible without objectivity. … The existence and extent of contractual obligations are determined by the signs made – the moves in the language game being played. Any legal concern with undisclosed intention is senseless: it contradicts the very idea of contract as an agreement between parties who convey and receive meaning'.[126]

Thirdly, emphasising the close similarities between the three processes of formation, interpretation and rectification will exert pressures, particularly on the latter two. It becomes more pressing to clarify, first, the standard of objectivity which ought to apply across the board;[127] and, secondly, how to justify having different rules governing admissibility of evidence for contractual interpretation and rectification.

It is well-established that under English law, a contractual document may be *treated as if* it conformed to the parties' true agreement through the process of interpretation,[128] if it is clear from reading the document (and having regard to business common sense,

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125 TAO Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' (Ch 8 in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, 2000)), 155; *Paal Wilson & Co v Partenreederei Hannah Blumental (The 'Hannah Blumenthal')* [1983] AC 854, 915-916 (Lord Diplock) and 924 (Lord Brightman). See also R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 601, 608.

126 M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 346-347.

127 The (addressee-centric) nature of the law's objective approach has been explored in Chapter 2.

128 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 472 ([13-37]).

relevant background and context) that something has gone wrong with its expression and it is clear what corrections would make it right.[129] A less literal interpretation may be preferred;[130] infelicitous wording may be rephrased or substituted;[131] omitted words may be inserted;[132] wrongly included words may be disregarded:[133] multiple instances of such cases are helpfully documented by Prof McMeel.[134]

Similar results can also be achieved, alternatively, by rectification. It may well be that there must come a point where the judicial departure from the literal non-contextual meaning of the parties' contractual language is so extensive that the exercise can be considered as an interpretative endeavour only with some difficulty.[135] Interpretation, in reality, shades into rectification. There may be theoretical difficulties concerning how to tell *precisely* where interpretation ends and rectification begins; but, in practical terms, that is entirely beside the point unless counsel inexplicably fails to rely on *both*. As Sir Richard

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129 *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, 112 (Brightman LJ); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [22]-[25] (Lord Hoffmann).

130 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 ('actually paid' was read to mean 'actually payable').

131 *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 ('actually paid' was read to mean 'actually payable'); *Re Howgate and Osborn's Contract* [1902] 1 Ch 451 ('William' was read to mean 'Edward Thomas'); *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 ('this bill of lading' was read to mean 'this charterparty'). See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896: 'any claim (whether sounding in rescission for undue influence or otherwise)' was read to mean 'any claim sounding in rescission (whether for undue influence or otherwise)'.

132 *Mourmand v Le Clair* [1903] 2 KB 216 (inserting the word 'pounds' in a bill of sale); *Hombourg Houtimport BV v Agrosin Private Ltd ('The Starsin')* [2003] UKHL 12, [2004] 1 AC 715, [192] (Lord Millett) (despite inserting 17 additional words into a bill of lading, this 'process was one of construction, not rectification').

133 *Stewart v Merchants' Marine Insurance Co* (1885) 16 QBD 619 (judicial decision to 'strike out all the immaterial stipulations which cannot possibly apply to an assurance of the ship').

134 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 521 ([17.03]-[17.04]).

135 *Cf* M Bridge, 'The Future of English Private Transactional Law' (2002) 55 CLP 191, 213; and Staughton LJ's dissenting judgment in the Court of Appeal in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 ('There must come a time when efforts to bend meaning … have to stop').

Buxton put it '…all but the most negligent of counsel will have pleaded rectification of the writing as well as the construction of the writing that best suits his clients' interests'.[136]

In effect, rectification and interpretation are both 'concerned to ensure that the contract, as enforced, reflects the intentions of the parties'.[137] In fact, *Chartbrook*[138] is a case where the same result would have been arrived at via rectification if not by interpretation. Thus, rectification and interpretation 'serve the same forensic purpose' as the 'two weapons available to the courts to deal with written agreements that do not reflect the contract that the parties intended to make'.[139] The subject-matter (the contractual document and its underlying contract), juristic purpose (giving effect to the parties' true agreement) and forum (the court exercising both its legal and equitable jurisdiction) are the same; and the applicable general approach (objective principle) is similar. Only the adjectival rules (admissibility of evidence) seem to be divergent.

The 'obvious differentiating' feature between interpretation and rectification is that more restrictive evidential rules are applied in the interpretation of contracts for pragmatic policy reasons: [140] evidence of prior negotiations and declarations of subjective intention is

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136 Sir R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253, 253; Lord Donald Nicholls of Birkenhead, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 578.

137 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77-78.

138 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101; which was referred to as an authority for 'correction by way of interpretation' in *Hopkinson v Towergate Financial (Group) Ltd* [2018] EWCA Civ 2744, [44] (Richards LJ).

139 Sir R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253.

140 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 93 and 81.

admissible for rectification but not interpretation (of a contract reduced wholly to writing).[141] But the difference must not be overstated.

Although drafts which do not reflect the parties' final consensus are inadmissible in evidence during contractual *interpretation*, the court may in fact look at a draft which *does* represent their final consensus:[142] yet this comes very close to rectifying a contractual document to comport with a prior consensus which continued up to the time the document was executed. All this is compounded by the fact that although evidence of prior negotiations is admissible for rectification but not *generally* for interpretation, such evidence is *exceptionally admissible* during *interpretation*[143] to prove background facts known to the parties (even if the prior negotiations were conducted on a 'without prejudice' basis)[144] or establishes the contract's commercial object,[145] or if it establishes an estoppel by convention.[146] How are policy objectives like certainty, reduction of litigation cost or conservation of judicial resources achieved, if the same evidence is excluded generally for interpretation purposes, but admissible for *rectification* and also for *interpretation* purposes if it establishes background circumstances, contractual objectives or conventional understandings of the terms arising by estoppel? Would not the proliferation of exceptions

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141 *Prenn v Simmonds* [1971] 1 WLR 1381, 1383 (Lord Wilberforce); *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [12]-[13] (Leggatt J).

142 *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363, [36]-[43] (Carnwath LJ); Sir K Lewison, *The Interpretation of Contracts* (6th edn, 2015), 103 ([3.07]).

143 Sir K Lewison, *The Interpretation of Contracts* (6th edn, 2015), 105 ([3.09]).

144 *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662, [40] (Lord Clarke) and [48] (Lord Philips); D McLauchlan, 'Common Intention and Contract Interpretation' [2011] LMCLQ 30 (arguing that the general rule excluding admissibility of prior negotiations has little substance left because of this exception).

145 *Investec Bank (Channel Islands) Ltd v The Retail Group plc* [2009] EWHC 476 (Ch) (Sales J); *Barclays Bank plc v Landgraf* [2014] EWHC 503 (Comm) (Popplewell J).

146 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [42] (Lord Hoffmann);

to an embattled general exclusionary rule merely *fuel* litigation as to whether a particular case falls within any applicable exception?

It might be suggested that the courts insist on a distinction between interpretation and common mistake rectification because a higher threshold for establishing rectification would conserve legal resources and promote certainty. But this justification has its limits. No higher standard of proof is required for rectification: although counsel must know the inherent evidential difficulty in convincing judges that a signed contractual document does not represent the parties' agreement, the 'normal civil standard' of 'balance of probability' applies .[147] If litigants *have* evidence in favour of their asserted case, they will make the allegation accordingly; and they will do so by way of interpretation *and concurrently* by rectification. If the current distinction in admissibility of evidence (for rectification and interpretation) is upheld only because of pragmatic policy objectives,[148] it is difficult to see how those objectives are achieved. How is the certainty of preferring a (relatively more) literalist interpretation of a written document preserved in litigation if, although a more literal interpretation has been preferred, the document is ultimately rectified anyway?[149] How does excluding some evidence for interpretation, but ultimately admitting it for rectification, reduce litigation cost and conserve judicial resources?[150] *All that evidence* has

147 *Cf Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 521 (Brightman LJ), 514 (Buckley LJ).

148 Policies identified in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [35]-[37] (Lord Hoffmann); Lord Neuberger, 'The Impact of Pre- and Post-Contractual Conduct on Contractual Interpretation' (Banking Services and Finance Law Association Conference, Queenstown) (11 August 2014), [11].

149 See eg *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), [62], [63], [73], [75], [112], [115] (Cooke J).

150 *Cf Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [35] (Lord Hoffmann).

been admitted and must be considered by the same judge in the same proceedings anyway, if both rectification and interpretation are pleaded. In fact, the judgments in *Tartsinis* and *LSREF* were substantially *lengthened* because they had to deal with rectification and interpretation *separately*.[151]

If interpretation and rectification are both:

(a) ultimately concerned with giving effect to the parties' true agreement;

(b) governed by the objective principle; and

(c) asserted in the same proceedings,

it becomes difficult to insist that different evidential rules ought to apply to the interpretation and rectification portions of the parties' proceedings.[152]

The relatively restrictive evidential rules for interpretation cannot be justified by saying that common law interpretation needs to be constrained because it fails to protect third party interests against unfair prejudice, whereas 'the equitable nature of rectification means that this can be done'.[153] That overstates the difference between interpretation and rectification and between law and equity.

Exceptionally, the approach towards *interpretation, at law,* does in fact take into account the potential of prejudicing third parties but this is done only in limited

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151 See *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm) (Leggatt J); *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), [73], [75] (Cooke J)

152 Lord Donald Nicholls of Birkenhead, 'My Kingdom for a Horse: The Meaning of Words' (2005) 121 LQR 577, 578; Sir R Buxton, '"Construction" and Rectification after *Chartbrook*' (2010) 69 CLJ 253, 253, 260.

153 *Cf* Lord R Toulson, 'Does Rectification Require Rectifying?' (TECBAR Lecture, 31 October 2013), 25.

circumstances such as the interpretation of public documents or instruments which are negotiable. Instances include the interpretation of a company's memorandum and articles of association,[154] legal charges on the Land Register[155] and negotiable bills of lading.[156] Nonetheless, it remains the general rule that since a contract is interpreted by treating it as being addressed only to the contracting parties, any third party assignee 'must either inquire as to any relevant background or take his chance on how that might affect the meaning a court will give to the document'.[157]

The approach towards *rectification*, *in equity*, is not all that different. A contracting party's right to seek rectification, like the right to rescind, is a 'mere equity' falling short of an equitable proprietary interest. That right binds third parties except the bona fide purchaser for value of a legal or equitable proprietary interest without notice.[158] However, apart from this exception, it is trite that the assignee of a mere chose in action takes the assignment 'subject to equities'[159] (regardless of whether the assignment is equitable or statutory[160]). Since assignors cannot give assignees a greater right than the assignors have,[161] the rule in equity is that, generally, third party assignees of contractual choses in

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154 *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988.

155 *Cherry Tree Ltd v Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305, [124]-[125] (Lewison LJ).

156 *Hombourg Houtimport BV v Agrosin Private Ltd ('The Starsin')* [2003] UKHL 12, [2004] 1 AC 715.

157 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [40] (Lord Hoffmann).

158 *Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2016] EWHC 2764 (TCC), [13]-[17] (Coulson J).

159 *Roxburghe v Cox* (1881) 17 Ch D 520, 526 (James LJ); E Peel, *Treitel: The Law of Contract* (15th ed, 2020), 817 ([15-037]).

160 The Law of Property Act 1925, s 136(1); *E Pfeiffer Weinkellerei-Weinenkauf GmbH v Arbuthnot Factors Ltd* [1988] 1 WLR 150.

161 *Mangles v Dixon* (1852) 3 HLC 702, 10 ER 278; M Bridge, L Gullifer, KFK Low & G McMeel, *The Law of Personal Property* (2nd edn, 2018), 599 ([22-001]) and 609 ([22-016]).

action take the assignment subject to the original contracting parties' right to seek rectification. Hence, it is well-established that an original contracting party's right to rectify may be exercised against third parties,[162] and this result comes very close to the general rule at law in respect of interpretation.

6. Conclusion

The main theses in this chapter are that the rectification of contractual documents on the so-called ground of 'common mistake' merely makes the documents conform to what the law regards as the contracting parties' 'true agreement' which the documents were meant to reflect; and that the same (addressee-centric) objective principle applies to contractual formation, interpretation and (common mistake) rectification.

However, different policy-driven evidential rules apply to the interpretation of contracts reduced wholly to writing on the one hand and to (the interpretation of contracts not wholly reduced to writing,) rectification and contract formation. By conflating the answers to these issues in all three contexts, the theses in this chapter will inject a large dose of coherence and simplicity into the law by effectively merging their conceptual underpinnings.

[162] *Craddock Bros v Hunt* [1923] 2 Ch 136; HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 400 ([3-098]).

CHAPTER 4: RECTIFICATION FOR UNILATERAL MISTAKE

> 'He [Mr Levan, the tenant's solicitor] decided to accept the clause as it stood, not only knowing that Miss Gowan [the landlord's solicitor] had made a mistake but also what she had really meant. … The judge thought, as I do, that there was no reason to refuse rectification. … I can see no legitimate reason not to regard this attempt to take advantage of an obvious drafting error as inequitable. … Besides in reality Mr Levan's conduct amounted to an agreement–by accepting the clause knowing what the other side thought it meant, he was accepting just that and equity should not allow him to resile'.–*Littman*.[1]

> 'What [the seller] promised is determined by ascertaining what his words and conduct would have led the buyer reasonably to believe that he was promising. That is what is meant in the English law of contract by the common intention of the parties. The test is impersonal. It does not depend upon what the seller himself thought he was promising, if the words and conduct by which he communicated his intention to the seller would have led a reasonable man in the position of the buyer to a different belief as to the promise; nor does it depend upon the actual belief of the buyer himself as to what the seller's promise was, unless that belief would have been shared by a reasonable man in the position of the buyer.'–*Ashington Piggeries*.[2]

1. Introduction

The law concerning the rectification of documents which were meant to reflect or implement a contract has been described as unsatisfactory and unnecessarily complex.[3]

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1 *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P&CR 2, [19], [23]-[24] (Jacob LJ); [33] (May LJ) ('the equity would arise, I think, from Mr Levan's calculated silence, whereby, on one view, he agreed to a proposed clause in the draft lease understanding what it intended to say').

2 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock) (objective principle applying in contractual interpretation).

3 Sir T Etherton, 'Contract Formation and the Fog of Rectification' (2015) 68 CLP 367, 368; D McLauchlan, 'Refining Rectification' (2014) 130 LQR 83.

That was partly addressed in Chapter 3 in relation to *common* mistake rectification, leaving *unilateral* mistake to be dealt with in this chapter.

As appears from the foregoing quotations, this chapter has two main theses. First, like common mistake rectification, rectification for unilateral mistake merely gives effect to what the law regards, consistently with the objective principle, as the contracting parties' true agreement. Secondly, whatever inequity or unconscionability that is said to be required for unilateral mistake rectification merely reflects the same route by which contract law deems parties to have reached agreement.

2. Current Orthodoxy

The received view is that,[4] although equity at first only allowed rectification of contractual documents for common mistake, the remedy was subsequently extended to unilateral mistake in *Roberts*.[5] Under current orthodoxy, a claimant may seek rectification of a contractual document for unilateral mistake if:[6]

(i) the claimant had made a mistake about its terms;

(ii) the defendant knew of the claimant's mistake; and

(iii) the defendant failed to draw that mistake to the claimant's notice; and

(iv) the mistake was calculated to benefit the defendant.

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4 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (OUP, 2007, 2007)), 85; Lord Roger Toulson, 'Does Rectification Require Rectifying?' (TECBAR Lecture, 31 October 2013), 22.

5 *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555 (Pennycuick J).

6 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 516 (Buckley LJ).

However, doubts linger over the level of knowledge required, and whether it suffices that the mistake would be detrimental to the claimant or whether the mistake must be calculated to benefit the defendant.[7] Furthermore, although it is sometimes said that the claimant must also show that the defendant was guilty of 'sharp practice'[8] or that it would otherwise be 'inequitable' for the defendant to resist rectification,[9] these requirements may turn out to be superfluous. Not only has 'sharp practice' been doubted as a separate requirement,[10] it has also been treated as a corollary of the defendant's knowledge (of the claimant's mistake).[11]

As held in *Littman*,[12] a defendant purporting to accept a claimant's offer when the defendant knows of the claimant's mistake can, in and of itself, give rise to sufficient inequity to justify rectification. Lord Hoffmann said as much in *Kowloon Development* and in his TECBAR Lecture;[13] as did the Court of Appeal in *FSHC*, when Leggatt LJ identified the core of the remedy as the *defendant's knowledge* of the *claimant's mistake* as to terms:[14]

> 'The development of the modern doctrine stems from the approval in *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 55 of the

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7 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515 (Buckley LJ), 521 (Eveleigh LJ).

8 *Riverlate Properties Ltd v Paul* [1975] Ch 133, 140.

9 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515 (Buckley LJ).

10 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515 (Buckley LJ), 520 (Eveleigh LJ).

11 G McMeel, *McMeel on The Construction of Contacts: Interpretation, Implication and Rectification* (3rd edn, 2017), 552 ([17.82]-[17.83]), 553 ([17.85]-[17.87]); citing *Riverlate Properties Ltd v Paul* [1975] Ch 133, 140 (Russell LJ).

12 *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P&CR 2, [23]-[24] (Jacob LJ), [33] (May LJ).

13 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [20] (Lord Hoffmann NPJ); Lord Hoffmann, 'Rectifying Rectification' (TECBAR Lecture (21 November 2018)).

14 *FSHC v Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [103]-[106], [140]-[141], [146]-[147] (Leggatt LJ).

> following statement of principle in *Snell's Equity* (25th edn, 1960) at 570: "a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included". … As described in [Lord Hoffmann's] recent TECBAR Lecture: "…A party who subjectively knows that the other party is mistaken about the terms of the contract … cannot enforce those terms and the mistaken party may be entitled to rectification. … The underlying moral is that persons negotiating a contract have to observe certain standards of good faith". … We find this analysis illuminating.
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> …. It is not, however, a new principle as suggested by Lord Hoffmann … Nor is it limited, as also there suggested, to cases of unilateral mistake. … Moreover, it is just as contrary to good faith–if not more obviously so–for a party to take advantage of a mistake about the content or effect of a written contract in a case where both parties were mistaken in believing when the contract was executed that it faithfully recorded their common intention than it is to do so in a case where only one party made such a mistake (to the other's knowledge)'.

Whilst Pennycuick J in *Roberts*[15] established the jurisdiction to rectify contractual documents for unilateral mistake, his Lordship acknowledged that 'the exact basis of the principle' underlying the jurisdiction 'appears to be in some doubt'.

3. True Agreement and Objectivity

There is substantial support for the 'preferable view'[16] that the courts' role in rectifying contractual documents for unilateral mistake is to remedy the inequity or unconscionability arising from the defendant's knowledge or conduct in the light of the claimant's mistake.[17] Unlike common mistake rectification which emphasises bringing a contractual document

15 *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555, 570 (Pennycuick J).

16 E Peel, *Treitel: The Law of Contract* (15h ed, 2020), 402 ([8-076]).

17 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 515-516 (Buckley LJ).

into conformity with the parties' prior agreement or 'common continuing intention',[18] unilateral mistake rectification is said to be concerned with correcting the 'inequity' and 'unconscionability' arising from the parties' subjective states of mind, namely one party's knowledge of another party's mistake as to the terms contained in the document.[19] One commentator has gone so far as to urge that the 'correction of unconscionable behaviour' should be the 'underlying rationale' of rectification for not just unilateral mistake, but *also* of common mistake.[20]

Despite the widespread acceptance of this inequity or unconscionability view, it is submitted that, like common mistake, rectification of contractual documents for unilateral mistake merely gives effect to what the law regards as the parties' true agreement. There are two main reasons for this.

First, case[21] focusing on the defendant's knowledge, inequity or unconscionability are in fact consistent with the thesis that unilateral mistake rectification brings contractual documents into conformity with *what the law regards as the parties' true agreement*. (Of course, it then becomes crucial to identify how contract law identifies the parties' true agreement, a matter which was addressed in Chapter 2 on 'The Objective Principle' and will be revisited later in this chapter). Although Lord Hoffmann in *Kowloon Development*

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18 *cf FSHC v Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361 (Leggatt LJ).

19 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (OUP, 2007)), 90.

20 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 444 ([5-02]).

21 Such as in *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555; *Riverlate Properties Ltd v Paul* [1975] Ch 133; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505; *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353; *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135.

emphasised that bad faith (or inequity or unconscionability) and subjective states of mind were important considerations in the rectification of contractual documents for unilateral mistake, nonetheless his Lordship's reference to *Hartog* highlighted the affinity between unilateral mistake rectification and contract law's objective principle:

> 'Rectification for unilateral mistake, on the other hand, is very much concerned with the subjective states of mind of the parties. If the contract contains a provision which one party knows that the other party thinks is not there, or knows that the other party is mistaken about its meaning, the court may, as a matter of discretion, either refuse to allow him to enforce the contract as it would ordinarily be construed (*Hartog v Colin and Shields* [1939] 3 All ER 566) or go further and rectify the written agreement to give effect to what the mistaken party thought had been agreed (*A Roberts & Co Ltd and Another v Leicestershire County Council* [1961] Ch 555). … To claim to enforce a contract in terms to which you know the other party never meant to agree is a breach of good faith.'[22]

Whilst Lord Hoffmann did not specifically address the point, the question is why rectification was not ordered in *Hartog*. The simple explanation may be that it is unclear whether there was any contractual document (susceptible to rectification), or that the seller neither asserted that the buyer was contractually bound to buy on a price per piece basis nor pleaded rectification. However, it is useful to examine the point from first principles.

In *Hartog*, buyer and seller negotiated for the sale and purchase of hare skins at a (higher) price per piece but, subsequently, the seller offered to sell at a (lower) price per pound. The buyer purported to snap up the seller's mistaken offer to sell at a (lower) price per pound, even though the buyer knew (from their negotiations) of the seller's mistake and that the seller meant to offer to sell at a (higher) price per piece. Eventually, the buyer sued the seller for breach of the purported contract when the seller refused to deliver.

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[22] *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [20] (Lord Hoffmann NPJ).

Singleton J held that the seller was not bound to deliver and not liable to pay damages. Since the buyer knew of the seller's mistake, the buyer would be acting unconscionably or in bad faith if he insisted on purchasing on a per pound basis, so the apparent contract per pound was invalid.

Clearly, however, the parties' 'true agreement' in *Hartog might* have been seen by a reasonable person – having regard to context and *both parties'* overall words and conduct especially their negotiations on a per piece basis – as a contract on a per piece basis under the addressee-centric objective approach.[23] The law does not prescribe that an agreement may be enforced only in a literal explicit sense; indeed, rectification of a contractual document may be founded upon a 'tacit' agreement.[24] The courts have long since accepted that it is common for reasonable persons, even sophisticated commercial parties and their professional consultants,[25] to be mistaken about the wording or meaning of contractual documents. A reasonable person in the seller's position *might* have thought, just as the (mistaken but presumably reasonable) seller did, from their negotiations that the seller was offering to sell and the buyer was accepting at a price per piece. A reasonable person in the buyer's position *might* have thought, just as the buyer knew, that the seller (mistakenly) understood that they were dealing at a price per piece. If so, then, if any written instrument documenting the contract on a per pound basis existed, such document could have been

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23 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 614, 640; HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 359 ([3-030]).

24 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [81]-[84] (Leggatt LJ) (common mistake); E Peel, *Treitel: The Law of Contract* (5th edn, 2020), 399 ([8-073]).

25 Eg, *Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [67]-[75] (Coulson J) (rectification for common *and* unilateral mistake).

rectified to give effect to the per piece contract. As emphasised in Chapter 2, since the objective interpretative exercise is open-textured, context- and fact-sensitive, many contracts are generally susceptible to more than one interpretation which might appear objectively plausible to different reasonable persons. A reasonable judge *might* conclude that there is a contract on a per piece basis according to the addressee-centric objective principle and that rectification ought to ensue, but not every judge would necessarily come to the same conclusion. The decisive factor is that the buyer *knew* that the seller mistakenly thought he was selling per piece (but the buyer acted unconscionably or inequitably) when purporting to enforce the apparent per pound contract. That factor makes the seller's per piece interpretation a *reasonable interpretation* from the perspective of a reasonable person in the buyer's (and seller's) position – and also gives the seller the choice to treat it as the *ultimate binding interpretation*.

As Lord Hoffmann put it in *Kowloon Development*, the fact that the defendant knew of the claimant's mistake as to terms gives rise to a choice of 'remedies', a view supported in authoritative treatises.[26] One could say (as Singleton J held in *Hartog*) that the defendant may not enforce the apparent contract, so there is effectively no enforceable contract or that any apparent contract is 'void'. Indeed, *Hartog* (like *Tamplin*[27] and *Smith*[28]) has been treated as a classic case on the operation of the objective principle of contractual (non-

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26 J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 24 ([2-17], fn 93). Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 274: In *Hartog v Colin and Shields* [1939] 3 All ER 566, Singleton J 'held that H did in fact know that C&S were under a mistake. The apparent agreement (i.e. so much per pound) was therefore void. However, the Judge did not consider whether C&S could enforce the intended contract (i.e. so much per piece) but both principle and the analogy of rectification in cases of unilateral mistake suggest that they might have been able to do so'.

27 *Tamplin v James* (1880) 15 ChD 215, affirmed 15 ChD 219.

28 *Smith v Hughes* (1870-1871) LR 6 QB 597.

)formation which turns on one party's knowledge of the other party's mistake as to terms.[29] Alternatively, one could say that there is a contract but that it comports with the claimant's mistake of which the defendant knew; indeed, if there was a contractual document then it might additionally be rectified to make it comport with the claimant's mistake of which the defendant knew (as in *Roberts*). Put simply, the application of the objective principle applicable in contractual formation (which is the same objective principle that applies in contractual interpretation and common mistake rectification) generates *both* remedial responses: either 'no enforceable contract' or 'enforceable contract comporting with the claimant's mistake known to the defendant', and the latter may lead further to 'unilateral mistake rectification' if a relevant contractual document exists.[30]

There is another simple, but significant, point. If the courts say that the defendant's behaviour in the light of his knowledge of the claimant's mistake makes it inequitable or unconscionable for the defendant to resist rectification of their contractual document then, in effect, the law is treating the contractual document in *its rectified form* as correctly reflecting the parties' true agreement. Furthermore, if the circumstances generate sufficient inequity or unconscionability to trigger rectification, surely those circumstances must also generate sufficient inequity or unconscionability to justify the law treating the parties as having contracted on those terms *as rectified*. Provided that the courts clarify what circumstances render it so inequitable that unilateral mistake rectification ensues, there is

29 Eg PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 13-14; E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 386-388 ([8-055]-[8-057]).

30 Or indeed a potential third response of *estopping* the defendant from denying the existence of a contract comporting with the claimant's mistake of which the defendant knew: HG Beale (ed), HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 358-359 ([3-029]-[3-031], fn 131).

nothing wrong with saying that unilateral mistake rectification is a judicial remedy to redress unconscionability.

The advantage of expressly recognising that unilateral mistake rectification merely reflects what the law regards as the parties' true agreement–even if that is, concurrently, the result of the defendant's inequitable or unconscionable conduct–is that it makes explicit that which is known but usually not expressed. It reminds us that the courts *regularly* treat parties as having entered into a contract if it would be unjust–or inequitable–in the circumstances for the defendant to deny that he has accepted what appeared to be the defendant's offer. This is how the objective principle of contractual formation operates according to Blackburn J's classic exposition in *Smith*:[31]

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

Blackburn J's statement is consistent with Lord Diplock's pronouncement in *Ashington Piggeries* (quoted at the beginning of this chapter). Put simply: 'questions of the existence and content of an agreement are objective questions' which turn on 'what commitments did each party give the other reason to think that they were assenting to?'.[32]

Similarly, Prof McLauchlan has also argued that rectification for common and unilateral mistake should be regarded as a 'routine result of applying the objective

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31 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J); *Paal Wilson & Co v Partenreederei Hannah Blumental (The 'Hannah Blumenthal')* [1983] AC 854, 916-917 (Lord Diplock), 924 (Lord Brightman).

32 TAO Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' (Ch 8 in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, 2000)), 155.

principle'; and that a 'party who is mistaken as to the terms expressed in a written contract ought to be granted rectification *whenever he or she has been led reasonably to believe* that the document does in fact contain the terms intended'.[33] His argument resonates, even if it may not be on all fours, with the courts' approach to the formation of contracts through an agent's apparent (or ostensible) authority, which is formulated in similar terms.

Apparent authority requires 'a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority': when the representation is 'acted upon by the contractor by entering into a contract with the agent', it 'operates as an estoppel, preventing the principal from asserting that he is not bound by the contract'.[34] The courts conclude that a principal should be treated as having entered into a contract with a third party contractor through an agent if the circumstances make it unjust for the principal to deny that the agent was authorised to contract on his behalf, even if the agent had no authority in reality.

Secondly, adopting a wider and more objective perspective allows us to recognise that unilateral mistake rectification merely gives effect to what the law regards as the true agreement between the parties; thus, painting a more coherent picture of contract law's objective principle and of the relationship between contractual formation, interpretation and rectification. On the other hand, a narrower and more subjective view of rectification requires us to say that unilateral mistake rectification is an equitable imposition on the

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33 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 639-640 (emphasis added).

34 *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (Diplock LJ).

parties which is not founded on their agreement. Although it is sometimes suggested that unilateral mistake rectification may have the effect of imposing on a defendant a contract which he did not intend to make[35] – for example, it has been said that *Roberts*,[36] *Cooper*[37] and *Littman*[38] are cases of unilateral mistake rectification where the parties had 'no common intention'[39] – that is correct only if we confine ourselves to assessing the defendant's intention subjectively or according to a completely detached form of objectivity.

On the other hand, matters take on a different complexion once we adopt a wider objective perspective which is addressee-centric as advocated in Chapter 2 (on 'The Objective Principle'). Legally, the courts conclude from the circumstances that the defendant must be *treated as if he had agreed* to contract with the claimant on the rectified terms. Factually, the circumstances are such that the defendant must have *appeared objectively* to a reasonable person in the parties' position (who possessed the relevant information known to or available to the parties) to have agreed to contract with the claimant on the rectified terms. This is illustrated in the discussion above on *Hartog*: the reasonable person in the buyer's position knew of the seller's mistake as to terms, and he would be taken to understand the offer to be on terms comporting with the seller's mistake (terms as rectified). Conversely, the reasonable person in the seller's position would, like

35 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 360 and 365 (Slade LJ); *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135, [75] (Blackburne J).

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

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

38 *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P&CR 2.

39 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (OUP, 2007, 2007)), 88-89 (fn 44).

the (mistaken but presumably reasonable) seller, be taken to understand the buyer's acceptance to be on the terms comporting with the seller's mistake (terms as rectified), and that is because those terms (as rectified) were the terms on which buyer and seller dealt during the entire course of their negotiation.

Littman[40] (quoted at the very beginning of this chapter) is another instructive case. The tenant knew that the landlord had made a drafting error in a lease document but chose not to mention it because the error was favourable to the tenant. The landlord's claim succeeded on the basis of interpretation and, alternatively, unilateral mistake rectification. The Court of Appeal held that the tenant's knowledge and silence made it inequitable for the tenant to resist the claimant's claim for rectification. Jacob LJ accepted that the rectified terms 'put the parties in a contractual position which they had never agreed'; however, Jacob LJ also observed that 'in reality', the tenant's 'conduct amounted to an agreement – by accepting the clause knowing what the other side thought it meant, he was accepting just that and equity should not allow him to resile'. Likewise, May LJ accepted that the tenant's knowledge of the landlord's drafting mistake and his failure to point it out meant that 'on one view, he agreed to' what he understood the landlord had 'intended to say'; but May LJ also observed that on another view unilateral mistake rectification was justified in the circumstances even though the parties had *not* in fact reached an 'antecedent agreement'. *Littman* clearly demonstrates that whether one discovers an antecedent agreement between the parties (on which to found unilateral mistake rectification) turns on the level of objectivity or subjectivity of one's perspective. The tenant subjectively

[40] *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [2006] 2 P&CR 2, [21], [24] and [26] (Jacob LJ), [33] (May LJ).

intended to contract on the unrectified terms; however, because the tenant knew of the landlord's mistake, the objective reasonable person in the tenant's position would have understood the landlord as dealing on the rectified terms. The objective reasonable person in the landlord's position, being mistaken (but presumably reasonable) just like the landlord, would think that the landlord was dealing on and that the tenant was agreeing to the rectified terms. But, of course, since the objective interpretative exercise is open-textured, context- and fact-sensitive, the foregoing interpretation of what the parties' agreement means might appear self-evident to some reasonable persons such as their Lordships in *Littman*, but other reasonable persons might not necessarily come to the same conclusion.[41]

Authoritative treatises start the discourse on rectification with statements of general principle, presumably applicable to both common and unilateral mistake, that equity 'mends no man's bargain, though it sometimes mends his assurance';[42] that rectification 'is available where there has been a mistake, not in the making, but in the recording, of a contract';[43] or that rectification 'is the process by which the document is made to conform to what was actually agreed between the parties, or what the law, applying the objective principle, treats as being their agreement'.[44] These general statements give the impression

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41 *Cf* D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 634.

42 JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 926; citing *Maynard v Moseley* (1676) 3 Swans 651, 36 ER 1009, 1011 (Lord Nottingham LC). See also J McGhee (ed), *Snell's Equity* (34th edn, 2020), 465 ([16-001]); and G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 529 ([17.28]); both citing *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (James VC).

43 E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 391 ([8-063]); citing *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (James VC).

44 HG Beale (ed), HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 373 ([3-057]); citing *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's

that the courts rectify contractual documents, whether for common or unilateral mistake, so as to make them comport with what the courts regard as the contracting parties' true agreement.

However, the apparent incoherence in the current discourse of this area of law surfaces once each of those treatises move on, from the general statement of principle, to discuss the specific requirements for unilateral mistake rectification, thus emphasising elements such as the defendant's knowledge of the claimant's mistake and the requirement that it must be inequitable or unconscionable for the defendant to resist rectification. A common refrain is that unilateral mistake rectification is a 'drastic' judicial remedy[45] which imposes on the defendant 'a contract which he did not, and did not intend to, make'.[46] Unfortunately, this has the propensity to suggest that 'rectification for unilateral mistake serves a different purpose than rectification for common mistake'[47] and that, unlike common mistake rectification which merely gives effect to the parties' true agreement, unilateral mistake rectification is a remedy against the defendant's 'bad faith or … unconscionability'.[48]

Rep 353, 359 (Slade LJ). See also JW Carter, *The Construction of Commercial Contracts* (Hart Publishing, 2013), 304 [9-43]; citing *Etablissements Georges et Paul Levy v Adderley Navigation Co Panama SA (The 'Olympic Pride')* [1980] 2 Lloyd's Rep 67, 72 (Mustill J).

45 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 360 and 365 (Slade LJ).

46 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135, [75] (Blackburne J).

47 *Cf* D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 609.

48 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (OUP, 2007, 2007)), 88.

The truth is far simpler and more coherent than we are commonly led to believe. If we accept that unilateral mistake rectification, like its counterpart for common mistake, brings a contractual document into conformity with what the law regards as the parties' true agreement, the principles of contractual formation, interpretation and rectification are aligned. By conflating their doctrinal basis, the law becomes simpler and more coherent.

However, this simplicity and coherence comes at a price. It forces us to confront difficult questions as to how exactly contracts are formed, and what exactly is meant by the 'objective principle' in the context of contractual formation and interpretation. This is explicitly recognised in *Chitty on Contracts* and by Prof McMeel and Prof McLauchlan, and will be revisited in the following parts of this chapter.

Thus, the learned editors of *Chitty on Contracts* accept that 'the principles applicable to mistakes as to the terms … seem largely to mirror the rules on agreement'; and that rectification is the judicial remedy which makes a contractual document 'conform to what was actually agreed … or what the law, applying the objective principle, treats as being their agreement'.[49] Nonetheless, they regard as controversial the question whether, according to the formation rules and objective principle laid down in *Smith,*[50] there is simply no contract if the defendant *ought to have known* but did not know of the claimant's mistake; and they argue that rectification should only ensue if the defendant *knew* of the claimant's mistake.[51] Similarly, although Prof McMeel argues that 'at bottom both

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49 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 345 ([3-003]), 373 ([3-057]).

50 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J).

51 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 360 ([3-033]), 389 ([3-076]).

construction and rectification are concerned with the task of ascertaining what the parties' agreement was', he accepts that this 'does raise the question of what "agreement" means as a matter of law (or equity)'.[52] Likewise, whilst Prof McLauchlan argues that regardless of whether it is 'given for common or unilateral mistake, rectification serves, and can only legitimately serve, the purpose of ensuring that the written record of a contract corresponds with the true agreement made by the parties, as determined by applying ordinary principles of contract formation', he also accepts that it remains 'necessary to start with an examination of what is meant by the objective approach to contract formation'.[53]

4. Contextualised 'Addressee-Centric Objectivity'

The objective approach of contract law (including its contextual and addressee-centric nature) was discussed at length in Chapter 2 (on 'The Objective Principle'). Inevitably, some pertinent features must be reiterated here.

Although the *same* objective principle ought to apply to contractual formation, interpretation and rectification because all three processes are ultimately concerned with identifying and giving effect to what the law regards as the parties' true agreement, *some differences in result* remain. Such differences arise because there are policy-driven restrictions barring certain types of evidence for the purpose of interpreting a contract

52 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 529 ([17.28]).

53 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 609-610.

reduced wholly to writing.[54] It remains the law[55] that evidence of prior negotiations and declarations of subjective intentions is admissible for rectification but not for the interpretation of contracts reduced wholly to writing.

It is important to view contracting in its usual context. A contract is typically formed by the contracting parties' agreement (if intended to create legal obligations and supported by consideration), and that agreement is generally constituted by an unconditional acceptance of all the terms[56] of an antecedent offer. The parties' act of 'contracting' or 'agreeing' is an act of communication between them because the antecedent offer must be communicated to the offeree, and the acceptance must respond to the antecedent offer and must be communicated to the offeror. Neither identical cross-offers[57] nor purported acceptances of unknown offers[58] will constitute binding agreements because *no antecedent offer was communicated* to the offeree *before* the purported acceptance, and there was therefore no 'acceptance' *which responds to* (or results from)[59] an antecedent offer. Furthermore, a purported acceptance is not effective to constitute an agreement unless it is communicated to or brought to the offeror's notice.[60] As such, the uncommunicated intentions of the parties cannot form the basis of a contract even if the

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54 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77, 93, 94.

55 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [41], [64], [65] (Lord Hoffmann); *Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [12] (Leggatt J).

56 *Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd* [1979] 1 WLR 401.

57 *Tinn v Hoffman & Co* (1873) 29 LT 271, 279.

58 *R v Clarke* (1927) 40 CLR 227.

59 J Cartwright, *Formation and Variation of Contracts* (2nd edn, 2018), 52 ([3-05], fn 14).

60 *Felthouse v Bindley* (1862) 11 CB (NS) 869; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34.

actual, subjective, intentions of the parties happen to coincide.[61] If uncommunicated but coincidental intentions cannot found an agreement on which to form a contract then, *a fortiori*, they cannot justify common mistake rectification (of a contractual document to make it comport with the parties' agreement).[62]

Since, as argued earlier in this chapter, unilateral mistake rectification (like common mistake rectification) also serves to make contractual documents conform with the parties' true agreement as ascertained by the objective principle, the same conclusion should apply to preclude 'unilateral mistake' rectification based entirely on uncommunicated subjective intentions.

In any event, it is implausible in practice for unilateral mistake rectification to be founded on purely *uncommunicated* subjective intentions (ie, the claimant's subjective mistake unbeknownst to the defendant); after all, current orthodoxy prescribes that a defendant must *know* of the claimant's mistake to trigger unilateral mistake rectification.

According to Prof Chen-Wishart, contracting is 'a communication of choice, and communication is impossible without objectivity'.[63] As Prof Endicott puts it, objectivity in this context prescribes that the meaning of what has been communicated by the speaker or writer to the listener or reader must take into account the listener's or reader's perspective:[64]

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61 *Cf* J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 448 ([13-10]).

62 *FSHC v Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77], [176] (Leggatt LJ) (common mistake rectification); *cf* D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 616, 619 (argument in relation to common, rather than unilateral, mistake rectification).

63 M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 346-347.

64 TAO Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' (Ch 8 in J Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (OUP, 2000)), 151, 155.

> '…questions of the existence and content of an agreement are objective questions … A court adjudicating a contract dispute, therefore, faces a central task of answering this objective question: "what commitments did each party give the other reason to think that they were assenting to"? … the meaning of an utterance … is determined by the reasons that a speaker gives (by using the words that he or she uses) for another person to believe that the speaker has one intention or other.'

The lynchpin of Lord Hoffmann's justification for an objective approach towards *common mistake rectification* in *Chartbrook* was that it ought to be consonant with the objective approach towards contractual interpretation. Lord Hoffmann emphasised that the terms of the prior informal agreement, to which the formal contractual document must be made to comport by rectification, 'must be objectively determined in the same way as any other contract'.[65] It follows that the objective approach towards common mistake rectification advocated in *Chartbrook* is not a detached form of objectivity but is in fact the same contextualised addressee-centric objectivity applied in contractual interpretation. The substance of the parties' prior informal agreement and the formal contractual document have to be determined objectively from the perspective of a reasonable person having all the relevant contextual knowledge possessed by the parties or which they ought reasonably to have had. It is determined neither purely subjectively on the basis of 'what one or other of the parties believed those terms to have been' nor in a purely, detached, objective basis which ignores the parties' knowledge.

Since the contract speaks to both contracting parties at the time of its formation, both of them are the relevant 'addressees'.[66] However, this does require some elaboration

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65 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101, [59]-[60], (Lord Hoffmann).

66 *Homburg Houtimport BV v Agrosin Private Ltd ('The Starsin')* [2004] 1 AC 715, [73] (Lord Hoffmann).

because the *subjective knowledge of one party can* be relevant in some cases to *subjectively qualify the way* in which the *objective approach operates*. Or, to make the same point using different words, taking one party's subjective knowledge into account is in fact *part of how the objective principle operates* in some cases, particularly cases of *unilateral* mistake rectification.

5. Subjective Qualifications, Inequity and Unconscionability

At this point, it is necessary to revert to the first basic thesis of this chapter, namely, that rectification for unilateral mistake (and common mistake) merely gives effect to the parties' true agreement consistently with ordinary contract law principles, and that this means that the same principles of objectivity apply in the context of formation, interpretation and rectification. That might *appear* to be inconsistent with the central idea in this part of the chapter which deals with how the defendant's knowledge of the claimant's unilateral mistake justifies rectification, and how the courts regard this as a *subjective departure* from contract law's general objective approach.

Any such apparent inconsistency is purely cosmetic; and turns entirely on how broadly or narrowly one perceives the objective approach.

This is because 'objectivity' and 'subjectivity' are malleable labels liable to cause confusion, thus calling to mind *Meagher, Gummow and Lehane's* caution against excessive reliance on such terms.[67] The objective principle in English law is addressee-centric and involves a 'complex amalgam' of subjective and objective elements.[68] As such, it is

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67 JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 934 ([27-070]).

68 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [123]-[125] (Lord Philips).

unsurprising that whilst English lawyers hold up Blackburn J's judgment in *Smith*[69] as the classic exposition of the objective principle, the High Court of Australia in *Taylor*[70] regard *Smith* as exemplifying 'the "subjective theory" of the nature of assent necessary to constitute a valid contract' in English law.

Clearly, a broad contextualised version of addressee-centric objectivity, which *already* incorporates some subjective elements, leaves very little room for any *further* 'subjective qualification' to apply, even though current discourse describes unilateral mistake rectification and unilateral mistake in formation cases as subjective qualifications to contract law's objective approach.

For example, one could say that where a claimant's subjective unilateral mistake is subjectively known by the defendant, the contractual document reflecting their objective agreement should be rectified because this is an instance of subjectivity trumping the objective approach; but this is only because one assumes that the document reflects their objective agreement (on a detached objective basis), and that the parties' mistake and knowledge are subjective considerations which are normally irrelevant to this narrow detached form of objectivity.

On the other hand, the exact same phenomenon and result can be described more accurately, and without any change in substance, as a simple application of contextualised addressee-centric objectivity,[71] rather than a subjective qualification of detached

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69 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J).

70 *Taylor v Johnson* (1983) 151 CLR 422, 428-429 (Mason ACJ, Murphy and Deane JJ).

71 *Cf* M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 355: 'The crucial distinction is *not* between subjectivity and objectivity, since subjectivity is simply irrelevant; but rather between detached-formal objectivity on the one hand,

objectivity.[72] In this light, a contractual document is rectified for *unilateral* mistake to make it comport with the parties' true agreement in accordance with a straightforward application of addressee-centric objectivity. This harks back to the earlier discussion of *Hartog*. Where parties negotiate a contract and informally settle on C terms, but the ultimate contractual document they sign is on D terms, it is crucial that the defendant knew that the claimant mistakenly thought that their document contained C terms. The defendant's knowledge and the claimant's mistake are both relevant in the application of this broader addressee-centric form of objectivity, so there is no need to resort to any 'subjective qualifications'. The courts accept that reasonable persons are often mistaken about the wording or meaning of contractual documents and that the claimant's carelessness in itself will not bar rectification.[73] A reasonable person in the position of a defendant, who knew of the claimant's mistake, would have understood the claimant as offering C terms (despite the unrectified document stating D terms). A reasonable person in the claimant's position, like the (mistaken but presumably reasonable) claimant, would have perceived the claimant and defendant as negotiating and dealing on C terms and would have understood the defendant as accepting C terms (despite the unrectified document stating D terms). Thus, in the context of contract formation, Prof Chen-Wishart said:

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and observer-contextual objectivity on the other. The former might necessitate resort to the notion of exceptional "subjectivity" to explain the outcome of cases where contracts are voided for "mistakes of terms", but this is unnecessary on the more expansive observer-contextual objectivity'.

72 *Cf* E McKendrick, *Contract Law: Text, Cases, and Materials* (9th ed, 2020), 32.

73 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 415-418 ([4-130]-[4-133]), 548-550 ([6-03]-[6-05]).

> '… where D knows of C's *objective* meaning and leads C to believe that D is consenting to it, there is a contract on C's meaning although this deviates from the literal or ordinary meaning of C's conduct'.[74]

The ingenuity of the above statement is that it does not matter at all whether the italicised label 'objective' is changed to 'subjective' or simply deleted, because it is clear from the context that what is relevant is the meaning in C's mind, of which D knows. Although we can say that this meaning merely represents C's subjective intention, it is also objective because it is known to both D and C (and to reasonable persons in C's and D's positions) who are the two proper addressees of the contract. It is difficult to dispute Prof Chen-Wishart's argument that:[75]

> 'We should reject the interpretation of both *Hartog v Colin and Shields*[76] and *Smith v Hughes*[77] as instances of a category of operative mistake (as to terms known to the other party) where subjectivity trumps objectivity. … *Hartog* is entirely explicable in terms of the contextual objective approach to intentions; there were sufficient reasons for an honest and reasonable buyer to treat the seller's meaning as "per piece". … Indeed one could go

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74 M Chen-Wishart, 'Contractual Mistake, Intention in Formation and Vitiation: The Oxymoron of *Smith v Hughes*' (Ch 14 in J Neyers, R Bronaugh & S Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009)), 360-362 (emphasis added); citing *Hartog v Colin & Shields* [1939] 3 All ER 566; *Scriven v Hindley* [1913] 3 KB 564; and *Denny v Hancock* (1870) LR 6 Ch App 1.

75 M Chen-Wishart, *Contract Law* (6th ed, 2018), 52 ([2.1.3.1]).

76 *Hartog v Colin & Shields* [1939] 3 All ER 566.

77 *Smith v Hughes* (1870-1871) LR 6 QB 597.

> further and conclude that an honest and reasonable buyer knew that the seller meant to offer "per piece", which he accepted.
>
> … In *Smith v Hughes*, the objective agreement was for "new oats" because this is what the buyer inspected and gave the seller reason to believe he was agreeing to.'

It is more accurate to describe, as Prof Chen-Wishart did, formation cases of 'unilateral mistake' as straightforward applications of contextualised addressee-centric objectivity.

Nonetheless, much of the current cases and literature in relation to unilateral mistakes in contractual formation and rectification, including *Kowloon Development,*[78] describe them as instances of subjective qualifications of the objective principle and, as such, the continued use of such terminology is inevitable in the near future. It is probably harmless to stick to this terminology of 'subjective qualification of the objective principle', but only if it is borne in mind that this is merely shorthand for the straightforward application of the orthodox principle of contextualised addressee-centric objectivity. It neither implicates any 'drastic' departure from contract law's usual objective approach nor allows subjectivity to 'trump' objectivity in any 'exceptional' way.[79] Therefore, one should not feel unduly reluctant to allow a claimant to seek rectification on the ground of unilateral mistake, since this is simply a straightforward application of contract law's usual objective approach.

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78 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [19]-[20] (Lord Hoffmann NPJ) (in the context of unilateral mistake rectification).

79 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 609.

Thus, reverting to the current terminology adopted in current orthodoxy, one party's subjective knowledge of the other's mistake may be sufficient to trigger a departure from the general objective approach of contract law. Hence, Prof Davies and Prof McMeel suggested that rectification in general should function as a 'subjective "safety valve" from the objectivity of the common law rules of interpretation';[80]and that unilateral mistake rectification is an example of the 'subjective theory trumping the objective approach'.[81]

Returning to Lord Hoffmann's exposition on unilateral mistake rectification in *Kowloon Development*, under current orthodoxy, the defendant will be acting in bad faith if he knows of the claimant's subjective mistake (about the content or meaning of the contract), and this knowledge or bad faith makes it inequitable or unconscionable for the defendant to resist rectification.

Furthermore, English law currently requires[82] a high knowledge threshold: the defendant must have actual knowledge of the claimant's mistake to trigger rectification[83] or some notion akin to actual knowledge (for example, that he wilfully shut his eyes to the obvious or that he wilfully and recklessly failed to make such inquiries as an honest and reasonable man would);[84] so it is not enough that he merely suspects or ought to have

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80 PS Davies, 'Rectifying the Course of Rectification' (2012) 75 MLR 412, 421.

81 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 557 ([17.96]).

82 PS Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 83-84.

83 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353; *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259.

84 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135; *Commission for New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [97] (Etherton LJ); M Chen-Wishart, *Contract Law* (6th edn, 2018), 256 ([6.1.2.3]).

known of the mistake. The editors of *Chitty on Contracts*[85] suggest that where the defendant does not know of the claimant's mistake, but ought to have known of it, it might be 'more appropriate to hold that there is no contract' rather than to allow rectification.

On the other hand, Prof McLauchlan does not think that the touchstone for unilateral mistake rectification is any particular degree of knowledge on the part of the defendant or his bad behaviour; instead: [86]

> 'A party who is mistaken as to the terms expressed in a written contract ought to be granted rectification whenever he or she has been led reasonably to believe that the document does in fact contain the terms intended, regardless of whether the other party shares the mistake, knows of it, or behaved badly in some way. '

This argument is founded on Blackburn J's classic exposition of the objective principle of contract formation in *Smith*:[87]

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

Prof McLauchlan's argument seems compelling because it is derived directly from Blackburn J's celebrated pronouncement. The result flowing from his argument is that knowledge may not be enough in some cases, and knowledge may not be necessary in other cases, to trigger rectification. In the light of the current authorities which treat the

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85 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 360 ([3-032]-[3-033]).

86 D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 640.

87 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607.

defendant's knowledge as the touchstone for unilateral rectification, it is difficult for Prof McLauchlan's view, which sidelines the defendant's knowledge, to prevail.

Prof McLauchlan's argument applies Blackburn J's principle from one perspective (the claimant's); yet it must be applied also from a different perspective (the defendant's).[88] After all, contracts are addressed to *both* contracting parties, not just one of them.

Consider the case where the defendant and claimant give each other the impression that they are willing to contract on the claimant's terms (C Terms). This might happen because they have been negotiating at length and settled informally on C Terms. However, the claimant mistakenly signs the ultimate contractual document which provides for D Terms instead. It might be true that, *from the claimant's perspective*, the defendant (through their negotiations grounded entirely on C Terms) might have led the claimant to think that they are contracting on C Terms.

However, it is essential to remember that the claimant signed the contractual document on D Terms, and there is no indication whether the defendant knew of the claimant's mistake. It is therefore possible that, *from the defendant's perspective*, the claimant (through proffering the document on D terms) might have led the defendant to think that they were contracting on D Terms.

An even-handed, and bifocal, application of Blackburn J's principle of addressee-centric objectivity from *both* the claimant's and defendant's perspectives, leads us potentially to recognise and enforce two different sets of contract terms: which should

[88] *Cf* E McKendrick, *Contract Law: Text, Cases, and Materials* (9th ed, 2020), 25.

prevail–C or D Terms? It is submitted that this is where the current authorities' focus on the *defendant's knowledge,* in unilateral mistake rectification, becomes crucial.

If the *defendant knew* of the claimant's mistake then, *from the defendant's perspective,* it would be clear that the claimant intended to contract on C Terms and not D Terms. As such, a reasonable person in the defendant's position (with the defendant's knowledge of the claimant's mistake) would not be led to think that they were contracting on D Terms. The additional fact of the *defendant's knowledge* makes all the difference: the claimant's terms, C Terms, ought to prevail.

Finally, having explained the relevance of the defendant's knowledge in unilateral mistake rectification, the inquiry naturally turns to the level of knowledge. Is the current law justifiable in insisting on a high level of knowledge for triggering unilateral mistake rectification? Why not allow rectification where the defendant suspected or ought to have known of the claimant's mistake?

The high knowledge threshold is usually justified by arguing that a lower threshold might unduly undermine the primacy of the contractual document; or that a lower threshold is undesirable because[89] unilateral mistake rectification is a 'drastic' remedy which imposes 'on the defendant a contract which he did not, and did not intend to, make'.[90] *If* valid (and their validity was questioned earlier in this chapter), these *might* be weighty reasons for requiring a *relatively higher* level of knowledge. However, different levels of knowledge shade into one another in nuanced degrees. However weighty they might be,

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89 PS Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 83.

90 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135, [75] (Blackburne J).

these reasons cannot justify *drawing a line* in the sand and prescribing a *particular level* of knowledge.

It is submitted that the justification for drawing a line in the sand and saying that unilateral mistake rectification will not ensue merely because the defendant suspected or ought to have known of the claimant's mistake is that these standards, being nothing more than standards pegged at carelessness, are too low and will cause incoherence in the law.

Consider the case where the defendant carelessly failed to realise that the claimant mistakenly intended to contract on C Terms, whereas the signed document is expressed in D Terms. Yet, the claimant was also careless in failing to realise that the document was expressed in D Terms (rather than C Terms). Which set of terms should prevail since both were equally careless?

How else to justify preferring the claimant's C Terms, apart from demonstrating that the defendant was *more* blameworthy than the careless claimant? The law needs to be even-handed and coherent. In principle, rectification, whether for unilateral or common mistake, is *not* barred by a *claimant's carelessness* in failing to discover his own mistake about the content and meaning of the contractual document.[91] Since the claimant's carelessness will not bar rectification, it is submitted that the defendant's mere carelessness in failing to discover the (claimant's) same mistake cannot be sufficient to trigger

[91] D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd ed, 2016), 415-418 ([4-130]-[4-133]), 548-550 ([6-03]-[6-05]); *Univar UK Ltd v Smith* [2020] EWHC 1596 (Ch), [215] (Trower J): '…it is no bar to rectification that a mistake in respect of which rectification is sought occurred as a result of the negligence on the part of the claimant or its legal advisors. As Lawrence Collins J said in [*AMP (UK) Plc v Barker* [2001] Pens LR 77] at [71], negligence "not only does not prevent rectification, but is a ground for it".'

rectification. This amply justifies setting the defendant's knowledge threshold above mere carelessness.

6. Conclusion

This chapter demonstrates that, like common mistake rectification, unilateral mistake rectification is based on, and serves to give effect to, the contracting parties' true agreement. Their true agreement is ascertained in accordance with contract law's objective principle which is addressee-centric. Despite its name, the objective principle actually comprises a complex amalgamation of both objective and subjective elements.

Recognising that the contracting parties' true agreement underlies rectification of contractual documents imparts simplicity and coherence to the law. The law is further stabilised by rationalising why unilateral mistake rectification ensues only if the defendant knew of the claimant's mistake.

CHAPTER 5: MISREPRESENTATION – ESTABLISHING RIGHT TO RESCIND

> 'The law relating to the effect of representations upon a contract proceeds on the basis that a representation made in the course of pre-contractual discussions may produce a misapprehension in the mind of the other party which continues so as to have a causative effect at the time when the contract is concluded. It is on that basis that a misrepresentation may lead to the setting aside of the contract as being vitiated by error or fraud. … Where a misrepresentation does not have a continuing effect, for example because it is withdrawn or lapses, or because the other party discovers the true state of affairs before the contract is concluded, it cannot induce the other party to enter into the contract and therefore cannot affect its validity or give rise to a remedy in damages for any loss resulting from its conclusion. As Lord Brougham observed in *Irvine v Kirkpatrick* (1850) 7 Bell App (HL) 186, 237-238, in order that the misrepresentation may be of any avail whatever, it must inure to the date of the contract. If the other party discovers the truth before he signs the contract, "the misrepresentation and the concealment go for just absolutely nothing".' –*Cramaso*.[1]

1. Introduction

This chapter briefly sets out the basic requirements for establishing a claimant's *prima facie* right to rescind an impugned contract he entered into with the defendant because of the latter's pre-contractual misrepresentation.

In the process of doing so, some fundamental misconceptions will be clarified. As pointed out in Chapter 2 ('The Objective Principle'), English courts apply a contextualised,

[1] *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, [2014] 1 AC 1093, [16], [20] (Lord Reed).

addressee-centric, objective principle in contractual formation and interpretation, and also in identifying and interpreting (mis)representations.[2]

The objective principle therefore sheds light on questions such as whether a defendant has made a representation to the claimant; the meaning of the representation; whether it amounts to a false representation at the time the claimant acts on it (by entering into the impugned contract); whether the representation amounts to a contractual term; and whether a contractual term also amounts to a representation concurrently. Furthermore, this chapter examines how an operative misrepresentation's fundamental nature – as an induced mistake – affects how claimants establish their right to rescind for misrepresentation.

2. Right to Rescind: Three Basic Requirements

Under current orthodoxy, a claimant asserting a *prima facie* right to elect to rescind a contract for pre-contractual misrepresentations must establish, at minimum, the following three requirements:[3]

(1) There must be a representation that is made by the defendant (or of which the defendant had notice or was put on inquiry).[4]

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2 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 28 ([3-06]); E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 412 ([9-007]), 415 ([9-012]).

3 Eg, E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 412.

4 *Barclays Bank Plc v O'Brien* [1994] 1 AC 180; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44, [2002] 2 AC 773; HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 665-668 ([7-025]-[7-029]).

(2) The representation must be substantially false; in other words, the representation must amount to a *mis*representation in a way which appears material to a reasonable person in the claimant's position.[5]

(3) The claimant must have been induced by the misrepresentation to enter into the impugned contract, thus demonstrating a causal link between the misrepresentation and the contract.[6]

Fourthly, *Zurich Insurance*[7] starkly raises the question whether, in addition to the foregoing, the claimant must have believed in the defendant's misrepresentation. Such an additional requirement, whether as a fourth separate requirement or as a part of the third requirement of 'inducement', appears to be ruled out by *dicta* in *Zurich Insurance*. As the quotation (at the beginning of this chapter) from *Cramaso*[8] shows, an operative misrepresentation vitiates the impugned contract because the defendant's misstatement induced a mistake or misapprehension in the claimant's mind at the moment when he entered into the contract. If he was not in fact misled by the defendant because he knew the truth or because he did not believe the defendant, there is no operative misrepresentation because he was not acting under a mistake or misapprehension. Fundamentally, an

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5 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [149] (Christopher Clarke J); *Jennifer Ann Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589 (Ch), [120], [121] (Asplin J); KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 40-41 ([4.04]-[4.05]).

6 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [18], [23], [25], [32], [44] (Lord Clarke of Stone-cum-Ebony JSC) and [67], [71] (Lord Toulson JSC); *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 3 WLR 1113, [32], [41], [43] (Longmore LJ).

7 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [18], [23], [25], [32], [44] (Lord Clarke of Stone-cum-Ebony JSC) and [67], [71] (Lord Toulson JSC); KCF Loi, 'Pre-Contractual Misrepresentations: Mistaken Belief Induced by Mis-statements' [2017] JBL 598.

8 *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, [2014] 1 AC 1093, [16], [20] (Lord Reed).

operative misrepresentation is an 'induced mistake'.[9] This point, which contradicts *Zurich*, will require elaboration later in this chapter.

Fifthly, but this is not a requirement *stricto sensu*, wholly innocent misrepresentations are sufficient to generate the right to rescind. Whilst the right of rescission was limited at common law to cases of fraudulent misrepresentation, it is clear that even wholly innocent misrepresentations generated such right in equity.[10]

However, the fact remains that, properly pleaded and proven, fraud entails distinctive advantages for a claimant. Two examples suffice. First, it is said that clauses excluding rescission of a contract might be effective[11] in cases of non-fraudulent misrepresentations, but it is clear that they are ineffective against fraud.[12] Thirdly, the courts' statutory discretion to award damages *in lieu* of rescission (of a contract induced by non-fraudulent misrepresentation) does not prevent a claimant from rescinding for fraud.[13]

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9 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 2 ([1-03]).

10 *Redgrave v Hurd* 51 LJ Ch 118, (1881-82) LR 20 Ch D 1, 12-13 (Sir George Jessel MR); *Duranty's Case* (1858) 26 Beav 268, 53 ER 901, 902 (Lord Romilly).

11 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 532 ([26.02]); *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyds Rep 496, 502. This is challenged as wrong (being a vitiated contract trying to pull itself up by its own 'bootstraps'), where the clause purporting to exclude rescission is part of the impugned contract: KCF Loi, 'Misrepresentation and Rescission' (Ch 14 in Nolan, Tang and Low (eds), *Trusts and Modern Wealth Management* (CUP, 2018)), 425-457.

12 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [16] (Lord Bingham); *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm), [112]-[113] (Cockerill J).

13 Misrepresentation Act 1967, s 2(2).

3. False Representations: Interpretation and Objectivity

3.1 The Objective Principle

As explained in Chapters 2 ('The Objective Principle'), 3 ('Rectification for Common Mistake') and 4 ('Rectification for Unilateral Mistake'), the general approach of the courts is to apply the objective principle, which is contextualised and addressee-centric, towards contractual formation, interpretation and rectification. There are some who suggest that an operative misrepresentation arises only if the misrepresentation is 'unambiguous'[14] or that it would be 'inapposite' to apply the same objective approach towards contractual interpretation in the interpretation of representations.[15] Nonetheless, despite those suggestions, it is now established beyond peradventure that the same objective principle is equally applicable towards the interpretation of representations.[16]

Although the objective principle is no panacea, it can shed light on questions such as whether the defendant has made a representation to the claimant; what the representation means; whether it amounts to a false representation when the claimant acts on it; how to

14 DK Allen, *Misrepresentation* (Sweet & Maxwell, 1988), 20.

15 *Cf* A Trukhtanov, *Contractual Estoppel* (1st edn, 2017), 42 ([2.32]), 171 ([7.14], fn 70) (in the context of representations which raise a reliance-based estoppel, rather than giving rise to rescission for misrepresentation).

16 *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] CLC 518, 531 (Mance J); *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, [30] (Mance LJ); *Kyle Bay Ltd v Underwriters Subscribing under Policy No 019057/08/01* [2007] EWCA Civ 57, [2007] 1 CLC 164, [31] (Neuberger LJ); *British Nuclear Group Sellafield Ltd v Gemeinschaftskernkraftwerk Grohnde GmbH* [2007] EWHC 2245 (Ch), [313] (Briggs J); *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2007] 1 Lloyds Rep 264, [50] (Toulson J); *Hans Henning Reinhard v Ondra LLP* [2015] EWHC 1869 (Ch), [102]-[103] (Warren J).

differentiate between a representation and a contractual term; and whether a contractual term amounts to a representation concurrently.

According to the objective principle, whether representations (by words or conduct) have been made and how they are interpreted is assessed from the perspective of a reasonable person in the position of the addressees, taking into account the knowledge and other known characteristics of the parties and all relevant surrounding context.[17] These important propositions were clearly enunciated by prominent judges. For example, Toulson J and Mance LJ said in *IFE Fund* and *MCI WorldCom*:

> 'In determining whether there has been an express representation, and to what effect, the court has to consider what a reasonable person would have understood from the words used in the context in which they were used. In determining what, if any, implied representation was made, the court has to perform a similar task, except that it has to consider what a reasonable person would have inferred was being implicitly represented by the representor's words and conduct in their context'.[18]

> '… whether there is a representation and what its nature is must be judged objectively according to the impact that whatever is said may be expected to have on a reasonable representee in the position and with the known characteristics of the actual representee' (just as contractual interpretation depends on ascertaining "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

17 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 28-30 ([3-06]-[3-07]); D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 82-83 ([4.39]-[4.42]).

18 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm), [2006] 2 CLC 1043, [50] (Toulson J); *Cassa di Risparmio della Repubblica di San Marino SpA v Barclays Bank Ltd* [2011] EWHC 484 (Comm), [2011] 1 CLC 701, [215] (Hamblen J).

were at the time of the contract": *Investors Compensation Scheme Ltd v West Bromwich B S* [1998] 1 WLR 896, 912 per Lord Hoffmann)'.[19]

Their Lordships' application of the same objective approach towards contractual interpretation and the interpretation of representations seems unobjectionable, not merely because the principles of contractual interpretation were applied in *Mannai Investments*[20] to unilateral notices, but also because they were expressed to be applicable to 'any serious utterance' in *ICS*[21] and 'all legal texts' in *Westminster City Council*.[22]

The fact-sensitive and context-specific nature of this interpretative process cannot be overstated. Neither should it be overlooked that in this exercise of interpreting misrepresentations, the representor's and representee's circumstances, perspectives and their known characteristics are important considerations. Since the questions whether any representation has been made, and what it means, turns on a holistic interpretation of all the relevant facts and surrounding circumstances,[23] such a fact- and context-dependent process of interpretation must entail a significant level of curial latitude. It will be difficult to predict outcomes with absolute certainty since different judges can come to different, but reasonable, conclusions about what a defendant's words and conduct mean.[24]

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19 *MCI WorldCom International Inc v Primus Telecommunications Inc* [2004] EWCA Civ 957, [2004] 2 All ER (Comm) 833, [30] (Mance LJ).

20 *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] AC 749.

21 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912 (Lord Hoffmann).

22 *Westminster City Council v National Asylum Support Services* [2002] UKHL 38, [2002] 1 WLR 2956, [5] (Lord Steyn).

23 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 82 ([4.39]) - 83 ([4.42]).

24 Eg, *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [23] (Patten LJ) (in the context of promissory estoppel).

Furthermore, 'a cocktail of truth, falsity and evasion is a more powerful instrument of deception than undiluted falsehood' and 'is also difficult to detect'.[25] As such, courts do not insist that 'any particular form of words is necessary to convey a false impression'.[26] Rather than focus unduly on specific words, the court has to look at all that was said and done 'in its entire context'[27] – including 'ambiguous language' – so as to conclude whether the defendant gave an overall 'false impression'.[28]

As such, it is clearly unhelpful to suggest that a claimant is entitled to rely on a representation only if it is 'unambiguous'.[29] The supposed requirement is harmless if it merely means that 'where the representation is reasonably capable of more than one meaning, the representee must prove how he understood it and that, so understood, it was false'.[30] In other words, the supposed unambiguity requirement merely emphasises that the claimant must satisfy the court that his understanding (or interpretation) of the defendant's representation in a particular sense was justified,[31] and that he was induced to act by the defendant's misrepresentation in that particular sense.[32] Nonetheless, it is better not to insist on 'unambiguity' as a separate requirement of an operative misrepresentation, since it might be misunderstood as suggesting that the courts insist upon greater

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25 *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] UKHL 3, [1997] AC 254, 274 (Lord Steyn).

26 *Aaron's Reefs Ltd v Twiss* [1896] AC 273, 281 (Lord Halsbury LC).

27 PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 579.

28 *Aaron's Reefs Ltd v Twiss* [1896] AC 273, 281 (Lord Halsbury LC).

29 DK Allen, *Misrepresentation* (Sweet & Maxwell, 1988), 20; M Chen-Wishart, *Contract Law* (6th ed, 2018), 207 ([5.1]).

30 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 45 ([4.14]); *Bonham-Carter v SITU Ventures Ltd* [2012] EWHC 3589 (Ch), [119] (Asplin J).

31 *Smith v Chadwick* (1884) 9 App Cas 187, 190; *EA Grimstead & Son Ltd v Francis Patrick McGarrigan* [1998-99] Info TLR 384, [1999] All ER(D) 1163.

32 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 100 ([4.103]).

unambiguity in the interpretation of representations than in the interpretation of contract terms. Even in the context of raising estoppels where the 'unambiguous representation' requirement is said to be well-established, the requirement merely excludes 'far-fetched or strained, but still possible, interpretations': so, a representation can raise an estoppel even if it is 'open to different constructions', but 'it must be such as will be reasonably understood in a particular sense by the person to whom it was addressed'.[33] Thus, even though it has been suggested that 'a representation can only support an estoppel if it is unambiguous', imposing 'such a requirement for misrepresentation would be a rogue's charter'.[34] After all:

> 'Few, if any, statements are not capable of being interpreted in more than one way. The Court's usual role in construing, for example, a contract is to arrive at the legally correct meaning of the words … and the Court's function is to resolve any ambiguities in reaching its conclusion'.[35]

Of course, if the representation is too vague for a claimant to claim to have relied on any particular meaning, no misrepresentation can be made out.[36] However, that is no different from the inability to establish a contract, and a breach thereof, if the terms are insolubly vague for the ascertainment of what the parties have agreed upon.[37] There should not be a different, and more stringent, requirement of unambiguity for pre-contractual

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33 A Trukhtanov, *Contractual Estoppel* (1st edn, 2017), 171 ([7.14], fn 70).

34 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 46 ([4.14], fn 1).

35 *Kim v Chasewood Park Residents Ltd* [2013] EWCA Civ 239, [23] (Patten LJ).

36 PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 579 ([7.3.1]); J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 37 ([3-15]).

37 *Raffles v Wichelhaus* (1864) 2 H&C 906, 159 ER 375 (sale of cotton ex *Peerless*, but there were two shipments (in October and December) and two ships of the same name).

misrepresentations: such representations are interpreted according to the same objective principle applicable to contractual interpretation.

3.2 False Representation of (Law or) Fact

The first crucial question, in determining whether a claimant has a *prima facie* right to rescind his contract for pre-contractual misrepresentation, is whether the defendant had made a representation at or before the time of contracting, which turns out to be false at the time the claimant acts upon it by entering into the impugned contract. Apart from fraudulent representations or misrepresentations of law,[38] an operative misrepresentation must normally be a misstatement of past or existing fact. This insistence upon a misstatement of past or existing fact, requires some explanation.

Dishonest explicit statements of future states of affairs may amount to misrepresentations because they may be interpreted as implicit false statements of past or existing fact relating to the defendant's current belief or current intention as to the future.[39]

Honest statements of future fact or intention will not usually amount to actionable misrepresentations. The ostensible reasons are that a statement 'as to a future state of affairs can in itself neither be true or false at the time it is made, since the future cannot be foretold',[40] or that courts are 'wary of imposing liability for statements about the future' because 'no one can foretell the future'.[41] However, the unpredictability of the future has

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38 *Pankhania v London Borough of Hackney* [2002] EWHC 2441 (Ch); *Brennan v Bolt Burden* [2004] EWCA Civ 1017, [2005] QB 303.

39 *Edgington v Fitzmaurice* (1885) 29 Ch D 459, 483 (Bowen LJ).

40 *Cf Bank Leumi Le Israel BM v British National Insurance Co Ltd* [1988] 1 Lloyds Rep 71 (Saville J).

41 *Cf Foodco UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), [193] (Lewison J).

not stopped the law imposing contractual liability for subsequent failure to perform as promised. These ostensible reasons are also contradicted by the well-established principle that a statement of fact which was currently true when spoken, but subsequently became untrue when the claimant acted upon it, can be treated as a misrepresentation.[42] It is likely that the true reason is simply the overweening legal policy historically to promote the primacy of the doctrine of consideration in contract and to prevent other rules from any perceived potential competition with it.[43] That also seems capable of explaining why unfulfilled predictions and promises are usually to be remedied, [44] if at all, by an action for breach of contract.[45] That same policy reason led to the decline of the old equitable jurisdiction requiring defendants to 'make representations good',[46] and the ascendency of the prescription that promises *in futuro* are not enforceable unless supported by consideration.[47] The old equitable jurisdiction, which required a defendant to 'make good'

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42 *With v O'Flanagan* [1936] Ch 575.

43 *Cf Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 525-528 (Lord Devlin); DK Allen, *Misrepresentation* (London: Sweet & Maxwell, 1988), 7: 'By the end of the nineteenth century, therefore, misrepresentations might, depending upon the circumstances give rise to a remedy … The main gap, which, as we shall see, took until the 1960s to fill, was the absence of a remedy in damages for a careless misrepresentation, explicable, at least in part, by a concern that to allow such a claim would be to breach the doctrine of consideration'.

44 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 62 ([3-44]): 'The mechanism provided by the law for remedying such mispredictions or promises is the contract itself'. See also DK Allen, *Misrepresentation* (London: Sweet & Maxwell, 1988), 12.

45 See also *Foodco UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), [193]-[194] (Lewison J); *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, 67 (Browne-Wilkinson VC): "A representation as to future conduct has no effect unless it constitutes a contract".'

46 See generally: DK Allen, *Misrepresentation* (London: Sweet & Maxwell, 1988), 4-7; PD Finn, 'Equitable Estoppel' (Ch 4 in PD Finn (ed), *Essays in Equity* (Sydney: The Law Book Co Ltd, 1985)), 62-71; P Finn, 'Equity as Tort?' (Ch 6 in K Barker, R Grantham & W Swain (ed), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015)), 139-144; JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 528.

47 *Jorden v Money* (1854) 5 HLC 185, 10 ER 868 (HL); *Beattie v Lord Ebury* (1871-72) LR 7 Ch App 777, 804 (Mellish LJ); *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, 67 (Browne-

or ‘give effect to’ his representations which induced a claimant to contract with him even if the defendant himself had believed in their veracity,[48] withered away as newer limitations were chiselled into it in the latter half of the nineteenth century: pre-contractual misstatements became actionable in deceit to ground an award of damages only if made dishonestly;[49] they became capable of justifying rescission[50] or ground an evidential estoppel (not amounting to a cause of action) only if they were statements of past or present fact but not promises *in futuro*;[51] and they became actionable as breaches of contract only if they were supported by consideration and buttressed by an intention to warrant their accuracy.[52]

In some circumstances, statements of fact – ‘sales talk’ or mere ‘puffs’ – might be so obviously laudatory of the defendant’s products or services that the courts might refuse to treat them as operative misrepresentations. It is customary to contrast sales puffs which do not amount to misrepresentation with untrue statements of fact which do, but this portrayal must not be misunderstood. Of course, it is possible for some puffs to be ‘so

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Wilkinson VC); *cf* JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 533 ([17-185]).

48 *Pulsford v Richards* (1853) 17 Beav 87, 51 ER 965, 968 (Sir John Romilly MR), approving *Burrowes v Lock* (1805) 10 Ves 470, 32 ER 927, 929. See also *Slim v Croucher* (1860) 1 De G F & J 518, 45 ER 462, 465.

49 *Derry v Peek* [1889] 14 App Cas 337; *Low v Bouverie* [1891] 3 Ch 82. Damages for non-fraudulent misrepresentations were not generally available until the tort of negligence was extended to misstatements (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465) and the imposition of statutory damages for misrepresentations inducing a contract in cases where the defendant did not believe or did not have reasonable grounds for his belief in the veracity of his representations (Misrepresentation Act 1967, s 2(1)).

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

51 *Low v Bouverie* [1891] 3 Ch 82; *Jorden v Money* (1854) 5 HLC 185, 10 ER 868 (HL).

52 *Beattie v Lord Ebury* (1871-72) LR 7 Ch App 777, 804 (Mellish LJ); *Jorden v Money* (1854) 5 HLC 185, 10 ER 868 (HL); *Heilbut, Symons & Co v Buckleton* [1913] AC 30, 44 (Lord Moulton); *Pasley v Freeman* (1789) 3 TR 51, 100 ER 450 (Buller J).

vague and indefinite' that they cannot be true or false.[53] However, it is equally possible that defendants may make laudatory statements which are false at the time the claimant acts upon them; yet, even in such cases, the laudatory statements cannot amount to misrepresentations if the courts classify them as mere sales puffs. The question is whether a claimant is entitled to take that laudatory statement seriously, and that depends on a holistic interpretation of the parties' words and conduct in the given context, to assess what the laudatory statement means and whether the parties objectively intended that it should be relied upon.[54] This question is consonant with the law's objective approach towards contractual formation and interpretation. And, in this light, the true reason why mere puffs will not amount to operative misrepresentations is not that they are not falsifiable representations or statements of fact,[55] but because they are classified as statements which are not to be taken seriously since they are unbelievable exaggerations that will not mislead or induce reasonable persons to act.[56] Another reason why mere puffs are not normally actionable misrepresentations is that the laudatory statements might be interpreted as no more than *true* statements of the defendant's opinion or belief, unless the defendant did not in fact believe therein.

Honest statements of opinion or belief will not normally amount to actionable misrepresentations because they usually do not involve any explicit misstatement at all, if

53 *Trower v Newcome* (1813) 3 Mer 704, 36 ER 270.

54 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5h edn, 2019), 34-39 ([3-13]-[3-17]).

55 *Cf* KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 22 ([2.34]-[2.35]).

56 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 85 ([4.47]); *Shaftsbury House (Developments) Ltd v Lee* [2010] EWHC 1484 (Ch), [35] (Proudman J).

the defendant subjectively holds the stated belief or opinion.[57] A dishonest statement of opinion or belief may be a misstatement because untrue, if the defendant did not in fact hold the professed opinion or belief.[58] If, however, the defendant's honest explicit statement of belief or opinion is accompanied by an implicit statement that he knows of facts or has reasonable grounds supporting his belief or opinion,[59] that could amount to an implicit misrepresentation of fact if untrue (because he knew no such facts or had no such grounds). Again, whether an explicit statement of opinion or belief is accompanied by an implicit representation of fact that the defendant had reasonable grounds for his opinion or belief will depend on the judge's overall assessment and interpretation of all that was said and done, taking into account all the relevant context including the parties' knowledge, so the implication may be made in one case but not another. Hence, even language that is couched in conditional, futuristic, terms of 'hope and expectation' may be interpreted, in light of all relevant context, as amounting to a 'representation as to existing facts' which conveys an overall false impression.[60]

It is clear that the defendant's representation may be made expressly, implicitly, by words or by conduct. Even though mere silence and inaction will not normally amount to a representation unless there is a pre-existing duty of disclosure,[61] the courts may go very

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57 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 12 ([2.18]).

58 *Brown v Raphael* [1958] Ch 636, 641.

59 *Bisset v Wilkinson* [1927] AC 177, 182.

60 *Aaron's Reefs Ltd v Twiss* [1896] AC 273, 281 (Lord Halsbury LC).

61 *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205, 211 (Viscount Maugham).

far to interpret the defendant's overall words and conduct as comprising an implicit misrepresentation. Even 'a nod or a wink, or a shake of the head, or a smile' could suffice.[62]

For example, in *Spice Girls*,[63] the overall conduct of the Spice Girls group of performers was taken to implicitly represent to a sponsor that all members of the group were committed to the sponsorship contract and had no existing intention to leave the group. Likewise, purchasers ordering goods from vendors or patrons ordering meals in a restaurant implicitly represent that they intend to pay for their orders and have the means to do so.[64] Furthermore, where a vendor takes steps to conceal defects from a purchaser, the courts may infer a false representation that there is no such defect, and that such representation was made by the vendor with the knowledge that it was false.[65] Although sales puffs and statements of opinion or belief (such as claims that a piece of property is an 'uncommonly rich water meadow'[66] or that its farming capacity suffices for two thousand sheep[67] or statements as to financial default risks[68]) are not usually treated as operative misrepresentations; nonetheless, even laudatory claims that a business is 'a gold mine'[69] or that a car is 'absolutely mint'[70] have been treated as misrepresentations. Furthermore, in

62 *Walters v Morgan* (1861) 3 De GF&J 718, 45 ER 1056, 1059 (Lord Campbell LC).

63 *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002] EMLR 27 (Morritt VC).

64 *Re Shackleton, ex parte Whittaker* (1875) LR 10 Ch App 446, 449 (Mellish LJ); *DPP v Ray* [1974] AC 370.

65 *Schneider v Heath* (1813) 3 Camp 506; *Gordon v Selico* [1985] 2 EGLR 79, 83 (Goulding J), [1986] 1 EGLR 71, 77 (Slade LJ).

66 *Scott v Hanson* (1829) 1 Russ & M 128, 39 ER 49.

67 *Bisset v Wilkinson* [1927] AC 177, 183-184.

68 *Cassa di Risparmio della Republlica di San Marino SpA v Barclays Bank Ltd* [2011] 1 CLC 701, [267].

69 *Senanayake v Cheng* [1966] AC 63.

70 *Fordy v Harwood* [1999] EWCA Civ 1134.

some cases, defendants who have better access to information and proffer an opinion have been treated as implicitly representing the fact that they had reasonable grounds for their opinion.[71]

3.3 Different but Reasonable Interpretations of Words and Conduct

It is simply impossible to reconcile all the instances where the words and conduct of a defendant justify the inference that a misrepresentation was made and where they did not. Why should claimants be entitled to rely on laudatory descriptions such as 'a gold mine' or 'absolutely mint' as representations of fact, but not on 'uncommonly rich water meadow'? The suggestion, that it is the defendant's expertise or superior access to information (relative to the claimant) which justifies the judicial implication of the representation of fact that the defendant has reasonable grounds for his opinion, is not satisfactory. That comes close to a finding that the defendant has implicitly agreed to undertake reasonable care in proffering his opinion, but why should the undertaking be implied where the defendant has better access to information but not implied otherwise? Where in-house legal counsel of a multi-national corporation outsources advisory work to external counsel, no one suggests that the question whether external counsel must undertake reasonable care (in contract or tort) in proffering his opinion would depend on which among them has superior access to information or financial resources. Regardless of whether a defendant's pre-contractual misstatement is an explicit statement of opinion or of fact, the claimant will have either an equal or a different level of expertise or access to information, relative to the defendant. Since a claimant's ability to uncover the truth

[71] *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] PNLR 35, [131]-[134] (Newey J).

would not disentitle him from relying on a defendant's pre-contractual misstatement of fact,[72] why should it make a decisive difference when a defendant proffers an opinion? Furthermore, why should a seller's act of cleaning up and concealment, so that defects are not visible to a potential purchaser, amount to a false representation of fact that the vessel or property being sold has no defects; rather than a true representation that there are presently no *visible* defects?

The impossibility of reconciling many such instances, where pre-contractual statements are said to amount to operative misrepresentations of fact and where they are not, is simply the result of applying the objective principle to the interpretation of a defendant's words and conduct to ascertain whether he made a relevant representation and what it meant. As this interpretative process is objective but fact-sensitive and contextualised, different judges can arrive at different but reasonable conclusions, and their conclusions cannot be predicted with certainty. Indeed, it has been said that 'it is of limited use to rely on decided cases: the cases only demonstrate the general approach and cannot be taken as precedents for future decisions'.[73]

One further example may be given. Where the defendant obtains information or statements of fact from third parties and sends them on to the claimant, it is a difficult question of interpretation as to how a reasonable person in the claimant's position would understand the defendant's communication. Different judges may arrive at different but reasonable conclusions. Is the defendant: merely passing on the third parties' statements; contractually warranting the accuracy of the third parties' statements; adopting the third

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72 *Redgrave v Hurd* 51 LJ Ch 118, (1881-82) LR 20 Ch D 1.

73 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 36 ([3-15]).

parties' statements as the defendant's own representations; or implicitly representing that the defendant has reasonable grounds for believing the third parties' statements? And these do not even exhaust the possible interpretations. The difficulty of the interpretative task arises because, where a defendant-middleman provides goods or services to the claimant and says to the claimant, 'this is the manufacturers' brochure of the medicine I am providing you' or 'here is the financiers' description of the financial product I am selling you', all the relevant context and the parties' circumstances including their knowledge and market expertise must be taken into account in addition to the parties' words and conduct.

All relevant factors carry some weight but no single factor is decisive. Even if one were initially minded to conclude from those words alone that the defendant was adopting the third parties' statements as his own representations or that he was doing no more than merely passing on information, surely, the context would make a difference. For instance, if the claimant had in fact disclosed his requirements and asked the defendant for his recommendation or if the defendant had disclosed that he has not had the opportunity to independently verify the accuracy of the third parties' information or if the defendant was in the business of providing specialised advice in the relevant field.

3.4 Continuing Representations

If the claimant is to rescind for pre-contractual misrepresentation, the defendant's representation must be untrue at the time the claimant acts on it by entering into the impugned contract. The temporal gap between the pre-contractual negotiations during which a misrepresentation might have been made and the time the contract was entered into might present a potential problem, if the statement was true when uttered but becomes untrue when the claimant enters into the contract in reliance thereon.

The material time for establishing falsehood is the time when the claimant acts on the misrepresentation by entering into the impugned contract,[74] but it is commonly asserted that an operative misrepresentation must be grounded in a statement of past or existing facts. Paradoxically, a pre-contractual statement of past or existing facts speaks *explicitly* only of *prior facts* and cannot be falsified by subsequent events. Where claimants have succeeded in establishing misrepresentation on account of an initially true utterance which subsequently became false at the time of entering into the contract, the ostensible reason for the claimant's success is said to rest on the defendant's earlier representation being a 'continuing representation'; in effect, meaning that the defendant's earlier representation is deemed to be repeated every moment until the claimant acts on it by entering into the impugned contract or that the defendant comes under a duty to inform the claimant if the defendant knows that his earlier representation has been falsified by a subsequent event prior to the claimant acting on it.[75] However, even where the prior explicit representation is classified as a continuing representation, no convincing principle explains how a prior explicit representation is deemed to be repeated from moment to moment, and no legitimate doctrine has been ascribed to the defendant's duty to inform the claimant of any known changes. It is probably better to simply say that, on an objective interpretation from the claimant's perspective in the relevant context, the defendant's overall words and conduct,

74 *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577, [63] (Clarke LJ).

75 *With v O'Flanagan* [1936] Ch 575; *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Ltd* [2010] EWHC 358 (Ch), [208]-[212].

up to the time when the claimant acted by entering into the impugned contract,[76] amounted to a representation at that time, and that representation was false at that time.

But, again, it is not always easily predictable whether a court will interpret a representation as continuing or implicit at the time the claimant enters into the contract because interpretation is context-specific and, as Lord Reed reminded us in *Cramaso*, fact-sensitive.

4. Warranties and Representations

Since a claimant's archetypal complaint is that he wishes to rescind the impugned contract because he was induced to enter into it by the defendant's pre-contractual misrepresentation, the relevant representation will normally *precede* the impugned contract. However, there is no principle against the misrepresentation being concurrently a term in the contract;[77] so, how do we differentiate between a contractual term and a mere misrepresentation?

If a representation is just 'a statement, or assertion, made by one party to the other, before or at the time of the contract, of some matter or circumstance relating to it',[78] it would seem difficult to deny that a statement of fact found in a contractual document

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76 *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, [2014] 1 AC 1093, [22], [25], [31], [19] (Lord Reed); citing *Jones v Dumbrell* [1981] VR 199, 203 (Smith J) ('When a man makes a representation with the object of inducing another to enter into a contract with him, that other will ordinarily understand the representor, by his conduct in continuing the negotiations and concluding the contract, to be asserting, throughout, that the facts remain as they were originally represented to be. And the representor will ordinarily be well aware that his representation is still operating in this way, or at least will continue to desire that it shall do so. Commonly therefore, an inducing representation is a continuing representation in reality and not merely by construction of law.)'.

77 Misrepresentation Act 1967, s 1(a); *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [20], [23], [24] (Rix LJ); *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), [68] (Newey J).

78 *Behn v Burness* (1863) 3 B&S 751, 98 ER 1361, 1362 (Williams J).

amounts to a relevant representation, since it would have been a statement at the time of entering into the contract, even if not earlier. If so, the real issue should be whether the claimant read and relied upon the statement before finally committing to the agreement, such that he can be said to have been induced by the statement to enter into the contract.

Distinguishing between mere misrepresentations and contractual terms entails practical consequences.[79] A false representation which has induced the claimant to enter into the impugned contract will justify the claimant seeking rescission and an indemnity, and may also in some cases allow him to claim damages on a tortious measure. A contractual term that has been breached will justify a claim in damages on a contractual measure, and may in some cases allow the claimant to terminate the contract forthwith.

Under current orthodoxy, whether representations have become terms of the contract depends on the parties' intentions, whether they intend that those representations should form part of their contract, by incorporating the representations into their main contract or by treating the representations as a separate contract collateral to their main contract.[80] The question is whether, on the totality of the evidence, the parties intended that the defendant who has made a representation 'undertakes or guarantees that it is true' or that he undertakes 'contractual liability for the accuracy of the statement'.[81]

Say, for instance, that the defendant makes an explicit statement in the course of discussions with the claimant that 'this car has done no more than 10,000 miles', and they

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79 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 13-17 ([2-04]-[2-10]), 86-87 ([4-17]).

80 *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30; *Hanoman v Southwark LBC (No 2)* [2008] EWCA Civ 624, [2009] 1 WLR 374, [56] (Arden LJ).

81 Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 316-317, 140-141.

finally reach agreement and enter into a contract for the claimant's purchase of the defendant's car. It is a question of objectively interpreting the overall words and conduct of the parties in their contextual circumstances from the perspective of a reasonable person in their respective positions taking into account their characteristics and knowledge, whether:

(a) the claimant is entitled to rely on the explicit words literally as a representation of fact regarding the car's mileage, so he is entitled to rescind if the stated mileage is inaccurate;

(b) it is a statement of the defendant's opinion that he thinks the car has such mileage and that the defendant has reasonable grounds for his opinion, so the claimant is entitled to rescind if the defendant had no reasonable grounds for his opinion or in fact held no such opinion;

(c) it is merely a statement of the defendant's opinion that he thinks the car has such mileage, so the claimant is entitled to rescind if the defendant in fact held no such opinion; or

(d) it is merely a laudatory puff not to be taken seriously and has no legal significance, because no reasonable person in the claimant's position would rely on it.

To the above list which relates purely to identifying actionable misrepresentations, we now have to add the following for identifying contractual terms:

(e) it is a statement that the defendant undertakes or guarantees that the stated mileage is correct, in which case the representation becomes a contractual term but still retains its potency as a misrepresentation concurrently; or

(f) it is a statement that the defendant undertakes or guarantees that the stated mileage is correct, but he does not assert that mileage as a fact, in which case the statement becomes a contractual term but loses its potency as a misrepresentation.

To simplify matters, we could perhaps concentrate on options (a), (e) and (f) in the present context of distinguishing between a contractual term and a representation. Even with this artificial simplification, the problem is as Prof Sealy identified long ago in relation to the courts' insistence[82] that 'the distinction between a warranty and "mere" representation be preserved':[83]

> 'But while the courts now accept (as they must) this difference ... they have generally resisted all attempts to pinpoint the distinction in objective terms, to the vexation of litigants and students alike. … The sole criterion is said to be the "intention" of the parties – whether the parties "intended" the accuracy of the statement to be backed by a liability in damages. Since, however, it will only be in those cases where the parties have manifested *no* intention on the point that recourse will have to be had to the courts, a test based on "intention" simply begs the question at issue. In the absence of evidence of the parties' actual intention, and lacking any guidance in the form of legal rules or presumptions, the discovery of this "intention" would seem to demand of the judiciary some supernatural powers not vouchsafed to ordinary men; in reality (although it may be heresy to say so) the very vagueness of the canon of "intention" and the lack of binding rules leave the judges free to reach their decisions in accordance with what they feel to be the merits of the case. … Of course, there are advantages in having a flexible approach, but this must be at the cost of certainty. … Any writer who attempts to find principles hidden behind the cloak of "intention" in the decided cases must tread warily.'

Although a typical representation is merely a statement of past or present fact which would turn out to be true or false at the time the claimant acts on it by entering into the

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82 In *Chandelor v Lopus* (1603) Cro Jac 4, 79 ER 3; *Hopkins v Tanqueray* (1854) 15 CB 180, 139 ER 369; and *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30.

83 LS Sealy, 'Representations, Warranties and the Reasonable Man' (1965) 23 CLJ 178, 179.

impugned contract, such statements can also be interpreted to amount to a contractual term. Even a statement of past or present fact can be a contractual undertaking if the maker of the statement guarantees its accuracy or undertakes to be liable for its accuracy; indeed, this is the classic example of what is called a seller's contractual undertaking (sometimes dubbed 'warranties', but technically classified as 'conditions' in the Sale of Goods Act 1979) that his goods are: of satisfactory quality or correspond to their description.[84] Furthermore, section 1(a) of the Misrepresentation Act 1967 patently mandates that a statement can be both a representation and contractual term concurrently.

Thus, such a statement may be either a representation or contractual term or both, but there is no way to distinguish between them except by reference to the parties' intention to be gleaned from an interpretation of all that has been said and done in the relevant context, in accordance with the objective principle. Courts have to make difficult judgment calls in their metaphysical attempt to grasp the parties' ephemeral 'intention'. But once we accept that reasonable persons can come to different but reasonable conclusions on matters of interpretation, it is clear that one should not expect predictability in all cases.

Nonetheless, the interpretative difficulty confronts the judge from different angles depending on the scenarios in which the questions arise.

In the first scenario, where the pre-contractual representations are statements which do not find explicit expression in the ultimate contractual document, the questions are what the prior statements mean, and whether they become incorporated into the contract (evinced by the document) or constitute a separate, collateral, contract. In the exercise of

[84] The Sale of Goods Act 1979, s 14(2), s 13(1).

interpreting the parties' words and conduct to identify the parties' intentions to answer these questions, the courts take into account significant (but inconclusive) factors such as:[85] the time difference between the representations being made and the entering into of the contract;[86] whether the parties have reduced their ultimate contract into a written form;[87] whether the representations concerned a matter of importance to the subject-matter of the contract or to the parties;[88] and the relative disparity of knowledge or expertise between the parties.[89] This first scenario is the one that receives the most attention in contract law treatises; and the aforementioned factors are relevant only in this scenario.

In the second scenario, where statements of fact are actually found in the ultimate contractual document, a different set of questions arise: whether they amount to contractual undertakings like the other contractual terms in the document or are mere representations (which might raise an estoppel);[90] and, whether they are both representations and contractual undertakings concurrently.[91]

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85 E McKendrick, *Contract Law: Text, Cases and Materials* (9th edn, 2020), 286, 297; E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 441-445 ([9-056]-[9-064]).

86 *Routledge v McKay* [1954] 1 WLR 615; *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574.

87 *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30.

88 *Bannerman v White* (1861) 10 CBNS 444, 142 ER 685; *Oscar Chess Ltd v Williams* [1957] 1 WLR 370.

89 *Schawel v Reade* [1913] 2 Ir R 64; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623.

90 *Peekay Intermark Ltd v Australian New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyds Rep 511; *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221 [2010] 2 CLC 705. *Cf Lowe v Lombank Ltd* [1960] 1 WLR 196.

91 *Idemitsu Kosan Co Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm); *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch); *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), [68] (Newey J); *cf Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch).

Whether a statement of fact found in a contractual document amounts to a contractual undertaking or is a mere representation is an issue which turns on interpretation. If it is interpreted as a contractual undertaking, then it would be treated no differently from any other contractual term, and it would be a 'misnomer' to describe it as raising a 'contractual estoppel'.[92]

Whether statements of fact found in a contractual document amount to contractual undertakings and misrepresentations *concurrently* also turns on their interpretation.

Since the statements are *already within* the four corners of the document which evinces the contract, the courts have to make their difficult judgment call by direct recourse to the parties' intentions as interpreted objectively from the facts; and the difficulty is exacerbated because the courts cannot resort to the aforementioned factors which were formulated to *incorporate* representations into the contract. One key factor emerging from the cases is whether the contracting parties have chosen to label or phrase the form of the statements as 'warranties' or 'representations',[93] or both.[94] Although labels and form are not in principle decisive, they will in practice prove significant in interpreting the parties' words and conduct in the process of objectively deciphering their intentions, particularly

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92 *Chen v Ng* [2017] UKPC 27, [30] (Lord Neuberger and Lord Mance); KCF Loi, 'Contractual Estoppel and Non-Reliance Clauses' [2015] LMCLQ 346, 352, 358, 363, 366. See also *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [32], [46], [47] (Lord Toulson); *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [309], [310] (Andrew Smith J); *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [94], [95] (Leggatt LJ).

93 *Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [16]- [20] (Mr Andrew Baker QC); *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), [203(i)-(iii)] (Mann J).

94 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [22], [23] (Rix LJ); *cf Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), [68] (Newey J).

where little other evidence is available. It is sometimes suggested that an express contractual warranty does not amount concurrently to a representation because it was *presumably* intended that the claimant should only have the right to damages for breach of contractual warranty (which may be subject to explicit contractual limitations), without also having the option of rescinding the impugned contract and recovering damages in tort (or under the Misrepresentation Act 1967) which may be more substantial.[95]

One is on firmer ground when, without making inappropriate *presumptions*, one correctly applies the objective principle *in the usual way to interpret* the parties' words and conduct, according due weight to the language used – including labels like 'warranties' or 'representations' – and other relevant circumstances.[96]

Although a contractual term labelled as a 'warranty' in a contractual document may concurrently amount to a representation as well as a contractual undertaking,[97] it is a question of interpretation whether it does so. The question is whether a seller saying that he 'warrants that the car has done 10,000 miles' can be interpreted as also saying that 'the car has done 10,000 miles'.[98] This is the same exercise in converse when interpreting a statement of fact ('the car has done 10,000 miles') to determine whether it also comprises a contractual warranty ('warrants that the car has done 10,000 miles'). As such, it would

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95 *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), [203(v)] (Mann J); *cf Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [14] (Mr Andrew Baker QC).

96 *Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), [203(i)-(iii)], [210] (Mann J); *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [22], [23] (Rix LJ).

97 *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch), [363] (Arnold J).

98 *Cf Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [17] (Mr Andrew Baker QC). Or that the seller 'has reasonable grounds for saying that the car has done 10,000 miles' (see *Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] PNLR 35, [133] (Newey J)).

be incorrect to make a blanket assertion that a contractual warranty does not also amount to a representation, or to simply assume that it does.[99]

Thus, the assertion that, when a defendant 'warrants' something about the goods he is selling, he is making nothing more and nothing less than a contractual promise,[100] must be qualified. It is true that when a seller 'warrants that the car has done 10,000 miles', that *prima facie* amounts to an explicit, literal, contractual warranty, but it is incorrect to say that as a matter of law no representation is made at all, since the issue falls to be decided as a question of interpretation.[101] When a seller says that 'the car has done 10,000 miles', it is a question of interpretation whether it is a statement of fact that this is its mileage or whether it also amounts to a warranty of its mileage. There is no reason why, when a seller says that 'you have my word on it: the car has done 10,000 miles', the question should be any different. Likewise, when a seller says that he 'guarantees' (or 'warrants') that 'the car has done 10,000 miles', it is again a question of interpretation whether he is asserting a statement of fact that this is the mileage or whether it also amounts to a warranty of its mileage.

The Court of Appeal's decision is *Eurovideo*[102] is instructive. In that case, the impugned contract provided that the defendant granted the claimant the 'exclusive right for the first exploitation' of some video programmes. Furthermore, Clause 8C of the ultimate

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99 *Cf Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [14], [16], [19], [20] (Mr Andrew Baker QC).

100 E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 415 ([9-011]); *Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [14], [16] (Mr Andrew Baker QC).

101 *Cf Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [17] (Mr Andrew Baker QC).

102 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235.

contractual document, entitled 'Representations and Warranties', provided that 'Licensor [the defendant] represents and warrants to Licensee [the claimant] as follows: … That the Licensor has not entered into any agreement which conflicts with the rights granted herein to the Licensee. Licensee has the exclusive first exploitation right in the licensed territory'. In correspondence prior to the parties settling on the aforementioned ultimate contractual document, an earlier draft was sent by the defendant to the claimant which contained the aforementioned provisions. The defendant breached the contract because those rights had already been licensed to other parties in the past. However, damages for breach of contract would have been nominal since the claimant could not prove that the licensed rights were any less valuable in the light of the earlier licence to other parties. The claimant therefore sought rescission of the contract for misrepresentation and recovery of the sums paid to the defendant for the licence.

Rix LJ accepted that the draft contained explicit misrepresentations of fact which induced the claimant to enter into the contract.[103] Not only was Clause 8C an explicit statement of fact, but it was also expressed to function as both a contractual warranty and a representation.[104] Additionally, it was inherently implicit in the grant of an exclusive right of first exploitation that the defendant implicitly represented the (untrue) fact that no previous first exploitation right had been granted to other parties. Their lordships interpreted the terms (in light of all relevant circumstances) as constituting a representation

103 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [20], [22], [23], [24] (Rix LJ).

104 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [22] (Rix LJ).

(explicit or implicit), and then concluded that the representation was a reason why (or the basis on which) the impugned contract was entered into:[105]

> 'In my judgment, however, there was also a misrepresentation of fact involved inherently in the language of "first exploitation". … If a contractor promises a right of exclusive exploitation he is of course, whatever else he is doing, promising for the future that he will not grant a right of exploitation to others which impinges on that promise of exclusivity. … If then the licensor grants a conflicting licence in the future that is simply a question of a breach of warranty; no question of misrepresentation occurs. If however he has already granted a conflicting right of exploitation which is still subsisting at the date of the contract, then, as of that very moment, the moment both before the contract is made and the moment as of making that contract, that promise of exclusivity contains within it a false representation that there is no existing grant of the relevant exploitation rights to others which would prevent the contractual grant being exclusive. That is an example of how … contractual language can exist both as a term and as a representation. … If that promise is going to turn out to be disappointing at all, it is because something has happened in the past to prejudice that expectation and promise. Thus a promise of first exploitation necessarily, in my judgment, contains within it a representation of fact that the relevant exploitation rights have not previously been granted. That was a representation of fact which was implicit in the language of the contract. It is not surprising therefore that the clause is headed "Representations and Warranties". It is accurately so called, even though … the label by itself cannot be conclusive or determinate.
>
> The question then arises whether that representation of fact was a pre-contractual representation on the basis of which the contract was entered into. It seems to me to be perfectly plain that it was. It is a representation of fact which was bargained for in the letters to which I have referred [the correspondence prior to the contract].'

The decision in *Eurovideo* seems, with respect, correct: there is nothing 'artificial' or 'implausible'[106] in interpreting the terms in an earlier draft contractual document and prior correspondence as containing misrepresentations which induced the claimant to enter

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105 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [23], [24] (Rix LJ).

106 *Cf The Hut Group Ltd v Nobahar-Cookson* [2014] EWHC 3842 (QB), [291] (Blair J).

into the ultimate impugned contract evinced by a document that contains the same terms as in the draft. But, clearly, the reasoning in *Eurovideo* extends beyond just prior correspondence and earlier *preliminary* drafts of the contract. The quotation from Rix LJ's judgment in *Eurovideo* also suggests that, where the defendant delivers a *finalised* copy of the contractual document for the claimant to sign it, any *explicit* 'representations and warranties' contained therein and any 'representation of fact which was *implicit*' therein could also amount to pre-contractual representations.[107] But, of course, those explicit or implicit statements would be operative misrepresentations only if they caused, or induced, the claimant to sign the ultimate contractual document.[108] As such, it cannot be right to state categorically that, unless it is in some prior correspondence, a statement in the ultimate contractual document cannot amount to a misrepresentation which induced the claimant to enter into the impugned contract evinced in that document.[109]

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107 Eg, *Avrora Fine Arts Investment Ltd v Christie, Manson &Woods Ltd* [2012] EWHC 2198 (Ch), [132]-[134] (Newey J); *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), [68], [38] (Newey J).

108 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 77-78 ([4.23]-[4.24]): 'The preferable view is that a pre-contractual representation does not cease to be a representation because it is also made in the contract. … Moreover, if a representation was not made in oral negotiations but first appeared in the document signed by the parties, it is a still a representation that potentially confers a right to rescind. … If the representee read the document before signing, the statement will be a pre-contractual representation made to him. If he did not read it, then no right to rescind arises because there was no reliance on the representation, not because no representation was made'. See also *Idemitsu Kosan Co, Ltd v Sumitomo Corporation* [2016] EWHC 1909 (Comm), [11], [24] (Mr Andrew Baker QC) (on 'execution copy representations').

109 *Cf Sycamore Bidco Ltd v Breslin* [2012] EWHC 3443 (Ch), [203(iv)] (Mann J).

5. Misrepresentation Leading to a Mistaken Belief

5.1 Mistake and Misrepresentation

As the foregoing illustrates, determining whether a misrepresentation has been made can be an involved process, which may distract from other considerations.

Yet, a failure to appreciate the fundamental nature of an operative misrepresentation as an 'induced mistake', coupled with a mechanical application of the three basic requirements (representation, falsity and inducement) listed at the beginning of this chapter for establishing a right to rescind, is liable to lead to confusion. This part of the Chapter concentrates on addressing the nature of an operative misrepresentation as a mistaken belief induced by a misstatement. Other important issues, such as how different categories of mistake give rise to different effects in English contract law (for example, why a mistake induced by a fraudulent misrepresentation generally leads to a contract being voidable but causes the apparent contract to be void where the mistake relates to identity specifically) will be addressed in Chapter 6 (Misrepresentation and Mistake–Interpretation, Rescission and Rectification).

The sharp distinction in English law between the effects of an operative misrepresentation and a spontaneous mistake on the validity and enforceability of contracts tends to obscure the close relationship between mistake and misrepresentation, namely, that an operative misrepresentation is an 'induced mistake'. As Prof Cartwright puts it, in order to preserve the security of contracts, courts are slow to allow a claimant to escape from what appears objectively to be a contract merely because subjectively he has made a spontaneous mistake; however, where a defendant has made (or has notice of) a

misrepresentation which induced a claimant to enter into a contract with the defendant, the claimant may elect to rescind the voidable contract.[110]

This is because courts regard the claimant's intention or consent to be contractually bound as 'defective' or 'impaired' since he had been 'misled' or 'deceived' (fraudulently or otherwise) by a false representation made by the defendant (or of which the defendant had notice): how the claimant's mistaken belief came about 'makes the critical difference'.[111] As Lord Nicholls (dissenting) said in respect of fraudulent misrepresentations:[112]

> 'The existence of a fraudulent misrepresentation means that a person's intention is formed on a false basis – a basis, moreover, known by the other party to be false.
>
> … But the effect of the misrepresentation is that the buyer, believing the proffered goods to be as represented, agrees to buy the proffered goods. He enters into a contract on the basis of what he believes is the position. … His belief means there was a contract, but the fraudulent inducement of his belief means the contract is voidable.'

In other words, the claimant may rescind the contract because he entered into it under a mistake or misapprehension which was induced by a misstatement or false representation made by the defendant (or of which the defendant had notice): that much is clear from the quotation from *Cramaso* at the very beginning of this chapter. Hence, it is

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110 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 2 ([1-03]).

111 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 71-72 ([4.01]-[4.02]).

112 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [6], [8], [10], [11] (Lord Nicholls of Birkenhead), [56]-[59] (Lord Millett).

fundamental that an 'operative misrepresentation' is simply an 'induced mistake' which gives rise to the right to rescind a contract.[113]

It follows that there can be no operative misrepresentation if the claimant was not misled into making a mistake,[114] for instance, because he knew the truth[115] or he did not believe in the misstatement.[116]

5.2 Pressure and Duress

All this is not new, but it is at risk of being overlooked; so, it is now necessary to remind ourselves of what Prof Stoljar said long ago:[117]

> '… a misrepresentation causes or induces a mistake, for unless the representee is in error he does not even have a *misrepresentation* to complain about. … Hence it is important to repeat that fraud and duress … differ precisely in this: that while the former depends on the existence of a mistake, the latter does not. More particularly, in duress it is precisely because the relevant facts are known by both sides that coercion has to be

113 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 2 ([1-03]); JD Heydon, MJ Leeming & PG Turner, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (5th ed, 2015), 455 ([13-030]) ('The misrepresentation must have produced a misunderstanding on the part of the representee and this must have been one of the reasons which induced the contract').

114 *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, 209 (Lord Browne-Wilkinson): 'The effect of the wrongdoer's [misrepresentor's] conduct is to prevent the wronged party from bringing a free will and properly informed mind to bear on the proposed transaction which accordingly must be set aside in equity as a matter of justice'.

115 *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, [2014] 1 AC 1093, [20] (Lord Reed).

116 *Sprecher Grier Halberstam LLP v Walsh* [2008] EWCA Civ 1324 , [2009] CP Rep 16, [17] (Ward LJ); *Vigers v Pike* (1842) 8 Cl & F 562, 8 ER 220, 253 (Lord Cottenham) ('In a case depending upon alleged misrepresentation as to the nature and value of the thing purchased, the defendant cannot adduce more conclusive evidence, or raise a more effectual bar to the plaintiff's case, than by showing that the plaintiff was from the beginning cognisant of all the matters complained of, or, after full information concerning them, continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines').

117 SJ Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (Sweet & Maxwell, 1968), 83-84; PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 20, 25, 26, 569.

> used, while in fraud exactly the opposite occurs: the defrauded party only enters the contract because he is mistaken'.

Prof Stoljar's distinguishing between duress and misrepresentation is instructive. It emphasises the obvious, but underappreciated, axiom that unjustifiably induced pressure is the hallmark of duress whereas unjustifiably induced mistake is the hallmark of misrepresentation. A mechanical application of the aforementioned three basic requirements (representation, falsity and inducement) for establishing an operative misrepresentation, without regard to the nature of an operative misrepresentation as an induced mistake or erroneous belief, is liable to cause confusion. Thus, it has been wrongly asserted that since the 'inducement' requirement merely requires a factual causal link between the defendant's pre-contractual misrepresentation and the claimant's entering into the impugned contract, neither the claimant's 'disbelief in the misrepresentation or knowledge of its falsity would automatically negate inducement as a matter of law'.[118]

5.3 Fraudulent Misrepresentation in *Zurich Insurance*

That assertion was made on the strength of *dicta* in *Zurich Insurance*.[119] The claimants were insurers of the defendant's employers. The claimants entered into a settlement agreement with the defendant, even though they suspected that the defendant had dishonestly made exaggerations about the extent of the injury he suffered in the course of employment and the duration of his inability to work. The claimants settled at a much more generous sum than they would otherwise have done because they thought they would not have been able to prove their suspicion of fraud in court, and that a trial judge would have

118 R Lee, 'Proof of Inducement in the Law on Misrepresentation' [2017] LMCLQ 150, 158.

119 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637.

believed the defendant and awarded a larger sum as damages for the defendant's injuries. After the settlement agreement was entered into, the defendant's neighbour provided the claimants with evidence proving that the defendant had made fraudulent representations prior to the settlement agreement and that the defendant had recovered from his injuries earlier than he asserted. Therefore, the claimant commenced proceedings against the defendant for damages in the tort of deceit and for rescission of the settlement agreement (and repayment of disbursed settlement sums) on the ground that it had been induced by the defendant's fraudulent misrepresentation. The claimants succeeded in the Supreme Court. Lord Clarke held that the defendant had dishonestly made material false representations which induced the claimants to enter into the generous settlement agreement. Whether the claimants were induced by the defendant's fraudulent misrepresentation to enter into the settlement agreement was a question of fact which goes to establish a causal link between the misrepresentation and the impugned contract.[120]

Lord Clarke emphasised that although the claimants suspected that the defendant had exaggerated the extent of his injuries and had conducted their own investigations prior to the settlement, 'this is not a case in which Zurich [the claimants] or the employer knew that Mr Hayward [the defendant] was deliberately exaggerating the seriousness and long term effects of his injuries', because 'the fact is that Zurich [the claimants] did not know the extent of Mr Hayward's [the defendant's] misrepresentations', so 'no very clear

120 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [29] (Lord Clarke of Stone-cum-Ebony JSC), [63] Lord Toulson JSC.

allegations were, or could be made' against the defendant for fraudulent exaggerations at the time of entering into the settlement agreement.[121]

It follows that Lord Clarke's opinion[122] on the following two issues were clearly *obiter dicta*. First, that 'there may be circumstances in which a representee may *know* that the representation is false but nevertheless may be held to rely upon the misrepresentation' because 'questions of inducement and causation are questions of fact'. As Lord Clarke explained, since 'it cannot fairly be said that Zurich [the claimants] had full knowledge of the facts here', it was 'not necessary to express a final view on the question whether it always follows from the fact that the representee *knows* that the representation is false that he cannot succeed.' Secondly, that 'it is difficult to envisage any circumstances in which mere *suspicion* that a claim was fraudulent would preclude unravelling a settlement when fraud is subsequently established'. This is also *obiter* because his Lordship considered that the answer to this second issue 'seems to … follow from the answer to the first'.

It should also be clear that since the claimants pleaded and established that the defendant made dishonest exaggerations in order to obtain a better settlement agreement, the Supreme Court was concerned exclusively with fraudulent misrepresentations and the tort of deceit, effectively eliding the right to rescind a contract for fraudulent misrepresentation with the commission of the tort of deceit.[123] Furthermore, their Lordships' decision turned on the defendant's dishonesty, thus, the facts (a) that the

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121 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [20], [22], [45] (Lord Clarke of Stone-cum-Ebony JSC).

122 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [44], [48] (Lord Clarke of Stone-cum-Ebony JSC) (emphasis added).

123 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [18], [23] (Lord Clarke of Stone-cum-Ebony), [58], [67] (Lord Toulson JSC).

claimants already suspected that the defendant was making fraudulent exaggerations before entering onto the settlement agreement; (b) that the claimants consciously took the risk that they were settling with the defendant on an ill-founded claim; and (c) that there is a public policy in favour of encouraging the compromise of litigation by upholding settlement agreements, were all considered 'not sufficient to allow' the defendant to retain the benefit of the settlement agreement 'which he only obtained by fraud'. To hold otherwise would be putting 'the position too high in favour of fraudsters'.[124] After all, 'fraud' is seen as 'a thing apart': it 'unravels all'; and 'vitiates judgments, contracts and all transactions'.[125]

5.4 Inducement

In the context of fraud in *Zurich Insurance*, the legal threshold for establishing inducement or a factual causal connection between the misrepresentation and the impugned contract is not high. Since 'materiality is evidence of inducement because what is material tends to induce', it follows that a material misrepresentation will raise a 'presumption of inducement' through 'an inference of fact'; and, furthermore, the factual presumption of inducement is 'very difficult to rebut' because a 'party who has practised deception with a view to a particular end, which has been attained by it, cannot be allowed to deny its materiality or that it actually played a causative part'.[126] Moreover, it is 'sound policy' that where 'a fraudulent representation is relied upon', it is 'sufficient for the misrepresentation

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124 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [20]-[22], [44] (Lord Clarke of Stone-cum-Ebony JSC) and [53], [55], [56] (Lord Toulson JSC)

125 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [53] (Lord Toulson JSC).

126 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [29], [34], [37] (Lord Clarke of Stone-cum-Ebony JSC).

to be an inducing cause and that it is not necessary for it to be the sole cause'.[127] All these foregoing propositions have been accepted in *Rembrandt*.[128] However, the idea that a misrepresentation need not be the 'sole' inducement is not limited to fraud. Even in relation to a non-fraudulent misrepresentation, 'it is sufficient if it can be shown to have been one of the inducing causes' if the claimant 'would not entered the contract but for the misrepresentation'.[129]

The 'normal rule' prescribes that[130] 'where a party has entered a contract after a misrepresentation has been made to him, he will not have a remedy unless he would not have entered the contract (or at least not on the same terms) but for the misrepresentation';[131] however, this 'but for' causative requirement does not seem to apply where fraud is made out prior to *Rembrandt*. Now, however, it is unclear whether Longmore LJ in *Rembrandt* regards the 'but for' test as being applicable to fraudulent misrepresentation.[132] All that is required is that the fraudulent misrepresentation was one

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127 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [33] (Lord Clarke of Stone-cum-Ebony JSC); *Barton v Armstrong* [1976] AC 104, 118 (Lord Cross of Chelsea).

128 *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 3 WLR 1113, [32], [41], [43] (Longmore LJ).

129 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 674 ([7-038]); *Taberna Europe CDO II Plc v Selskabet AF1.September 2008 in Bankruptcy (formerly known as Roskilde Bank A/S)* [2015] EWHC 871 (Comm), [153] (Eder J).

130 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 675 ([7-039]); *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2002] EWCA Civ 1642, [2003] 1 WLR 577, [59] (Clarke LJ), [187] (Sir Christopher Staughton); *Taberna Europe CDO II Plc v Selskabet AF1.September 2008 in Bankruptcy (formerly known as Roskilde Bank A/S)* [2015] EWHC 871 (Comm), [153] (Eder J)..

131 It seems the 'but for' test of inducement for non-fraudulent misrepresentations is 'whether the misrepresentee would have entered into the contract had the representation not been made, rather than what he would have done had he known the truth': HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 675 ([7-039], fn 214), citing *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [174]-[191] (Christopher Clarke J).

132 *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 3 WLR 1113, [32], [33] (Longmore LJ).

of the reasons for the claimant's decision, or that it had 'an impact' or 'an influence' on the claimants' mind or judgment, such that inducement is negated only if the misrepresentation 'did not influence' or 'had no effect' on the claimant's mind or decision.[133] It is probably clearer to put matters in negative form:

> 'The [tests for causation] … excludes only those misrepresentations which were forgotten or ignored as irrelevant or immaterial and those where the truth was known. All others will in some degree have been causative.'[134]

A fraudulent defendant cannot avoid a claimant's election to rescind merely by attempting to show that the claimant might have entered into the same contract if the misrepresentation had not been made;[135] indeed, the presumption that the claimant was induced by a fraudulent misrepresentation is a strong one which is 'very difficult to rebut'.[136]

Clearly, there is a strong judicial policy to formulate rules 'intended to deter fraud'.[137] It is tempting to read Lord Clarke's *dicta* in *Zurich Insurance* to mean that where a defendant had made fraudulent misrepresentations which had some effect on the claimant's decision to enter into the impugned contract, the policy to deter fraud means that the claimant may rescind even if he *did not believe* in the defendant's representations.

However, one should resist that temptation. If their Lordships had intended to overturn the fundamental principle that an operative misrepresentation is an induced

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133 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [29] (Lord Clarke of Stone-cum-Ebony JSC).

134 KR Handley, 'Causation in Misrepresentation' (2015) 131 LQR 275, 285.

135 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 675 ([7-040]).

136 *BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc* [2019] EWCA Civ 596, [2019] 3 WLR 1113, [43], [44] (Longmore LJ).

137 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 676 ([7-040]).

mistake (so that disbelief in the representation and prior knowledge of the truth precludes misrepresentation because they preclude mistake), whether in the context of fraudulent misrepresentation or otherwise, they would have said so.

Instead, Lord Clarke simply noted that the parties 'accepted' that 'where the representee knows that the representation is false, he cannot succeed' and that 'there is some support in the authorities for this view'; and concluded that since 'it cannot fairly be said that' the claimant 'had full knowledge of the facts here', it followed that it was 'not necessary to express a final view on the question whether it always follows from the fact that the representee knows that the representation is false that he cannot succeed'.[138] Secondly, the reason why Lord Clarke thought there might be circumstances in which a claimant should be held to have been induced to enter into an impugned contract and thus have the right to rescind, even though he knew the defendant's representations were false, is that the claimant might have had no real practical choice given the defendant's assertion of illegitimate pressure through fraudulent misrepresentations and giving false evidence. Thus, both Lord Clarke and Lord Toulson emphasised that although a claimant might suspect or even know that the defendant was fraudulently making exaggerated claims, the claimant might be influenced to reach a settlement agreement on terms favourable to the defendant because the claimant thinks that the defendant's fraudulent statements might be believed by a judge at trial. It is in this sense that the defendant's fraudulent statements

138 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [43], [44] (Lord Clarke of Stone-cum-Ebony JSC).

have 'caused' or 'induced' the impugned settlement agreement.[139] The two examples relied upon by their Lordships are cases of this nature.[140]

5.5 Duress in *Borrelli* and *Zurich Insurance*

In their Lordships' first example, a wife who entered into a property settlement agreement with her former husband during divorce proceedings may be entitled to set aside the settlement even though prior to the settlement she suspected that he had dishonestly undervalued his assets. In the second example, claimants entered into a settlement agreement with a defendant even though they knew that the defendant had fraudulently 'staged' a traffic accident, because the claimants could not 'choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial'; and 'this situation is quite different from a proposed purchase, where if in doubt one can simply walk away'. Both settlement agreements are said to be causally linked to, and hence induced by, the defendant's prior fraud; and both are said to be susceptible to rescission if the claimants are subsequently able to obtain evidence to prove fraud. However, these examples are cases where the claimants entered into an impugned contract under threat of proceedings perverted by false evidence, and they turn on whether the claimants lack pragmatic or realistic choice arising from the illegitimate assertion of pressure. The claimants cannot 'simply walk away' or ignore the defendant even if the claimants disbelieved the defendant, and insisting on a trial would likely be futile – that is why courts *might* regard them as

139 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [15], [19], [32], [45] (Lord Clarke of Stone-cum-Ebony JSC) and [52], [67], [71] (Lord Toulson JSC)

140 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [29], [43], [45] (Lord Clarke of Stone-cum-Ebony JSC) and [69] (Lord Toulson JSC), citing the trial judge (Judge Moloney QC) and *Gipps v Gipps* [1978] 1 NSWLR 454, 460 (Hutley JA).

lacking a *real practical choice*.[141] Properly regarded, these two examples should have been dealt with as potential cases of duress, not misrepresentation.

They call to mind Prof Stoljar's reminder to distinguish between (a) contracts induced by pressure and voidable under the doctrine of duress and (b) contracts induced by a *mistaken belief* in *misstated matters* and voidable under the doctrine of misrepresentation.

The Privy Council decision in *Borrelli*[142] is the clearest modern example of a voidable settlement agreement being set aside for duress because (a) it was induced by the defendant's 'illegitimate economic or similar pressure' leaving the claimant 'with no reasonable or practical alternative'; (b) the illegitimate pressure arose from, *inter alia,* the defendant's use of 'forgery and false evidence' to unjustifiably oppose the claimant's proposed corporate scheme of arrangement of an insolvent company in the company's scheme meeting and in court proceedings for sanctioning the proposed scheme; and (c) the claimant knew (or 'did believe (correctly)') that the defendant resorted to forgery and false evidence. It is true that the doctrine of duress would always be constrained at its fringes by doubts about *how far* it should be allowed to undermine the security of contracts and the liberty of contracting parties to exploit commercial pressures to obtain the best deals. Nonetheless, these are merely nuanced questions of degree,[143] to be managed on a case by case basis concerning the degree: of pressure, of lack of practical choice, and of

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141 *Cf* E Bant, 'Unravelling Fraud in the Wake of Hayward v Zurich Insurance' [2019] LMCLQ 91, 99; PS Davies & W Day, 'A Mistaken Turn in the Law of Misrepresentation' [2019] LMCLQ 390, 403.

142 *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718, [29], [31], [34], [35] (Lord Saville of Newdigate).

143 Such difficult questions of degree are inevitable because the courts reject any bright line rule equating (un)lawfulness of defendant's conduct with (il)legitimacy of pressure to constitute duress: *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm), [36], [43] (Cooke J); *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828, [38], [105] (Richards LJ); E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 509 ([10-010]).

reprehensibility of the defendant's conduct, which might potentially vitiate a contract for duress.

It is necessary here to clarify the impact of *Zurich* because it might, if misunderstood, disrupt the internal coherence of the law of misrepresentation. For instance, the learned editors of *Chitty on Contracts* seem to have accepted, in the 33rd edition published in 2018, that the *dicta* in *Zurich* had likely changed the law fundamentally:[144]

> 'In some cases the requirement of inducement may not be satisfied because the misrepresentee knew that the statement made was false, but it is not necessary that the misrepresentee believed that the claim made was true. … The Supreme Court [in *Zurich*] did not accept that knowledge of the falsity was always a defence: its decision shows that the question is whether the claimant's decision was induced by the misrepresentation, not necessarily whether the claimant suspected or possibly even knew the statement to be untrue.'

Nonetheless, the *Zurich dicta* remain disconcerting because, without explicitly abrogating it, *Zurich* casts doubt upon the longstanding idea that an operative misrepresentation is an induced mistaken belief. Post-*Zurich*, authoritative treatises continue to accept three fundamental propositions. First, that voidable contracts resulting from operative misrepresentations are contracts founded upon a mistaken belief induced by misstatements.[145] Secondly, and consistently with the first proposition, those treatises continue to accept the well-established rule that a claimant cannot rescind for misrepresentation if he has not been misled or mistaken because he knew the truth or did

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144 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 673-674 ([7-036]-[7-037]).

145 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 2 ([1-03]); PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 569, 645 ('representee being misled'); HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (32nd edn, 2015), (incorporating the First Supplement, 2016), 667 ([7-036]) ('if established, knowledge on the part of the representee is of course a complete defence, because he is then unable to show that he was misled by the misrepresentation').

not believe the defendant's misstatements.[146] Thirdly, however, those same treatises go on to cite *Zurich* for the proposition that a claimant's knowledge of the truth or disbelief in the defendant's misstatements would not, as a matter of law, prevent him from rescinding.[147] These treatises are merely taking their cue from Lord Clarke. His Lordship refused to take a final stand and elected instead to sit on the fence between the second and third propositions, essentially by supporting the third proposition with strongly worded *dicta*, whilst refusing to decisively abrogate the second.[148] However, one cannot sit on the fence on matters as fundamental as this, particularly since the first and second propositions are conceptually bundled together,[149] and they are simply irreconcilable with the third. It is telling that in the 2016 supplement to the 32nd edition (which was published after, and took into account, *Zurich*), the learned editors of *Chitty on Contracts* stood by all three of these propositions,[150] but the foregoing quotation from the 33rd edition in 2018 suggests

146 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2020), 67 ([3-51], fn 241); PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 668-671 ([7.7.5]); HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (32nd edn, 2015), (incorporating the First Supplement, 2016), 667 ([7-035]) ('if the misrepresentation did not affect the representee's mind, because he was unaware that it had been made, or because he was not influenced by it, or because he knew it was false, he has no remedy.').

147 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2020), 67 ([3-51], fn 242); PM Eggers, *Vitiation of Contractual Consent* (1st edn, 2017), 670-671 ([7.7.5]); HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (32nd edn, 2015), (incorporating the First Supplement, 2016), 667 ([7-035], fn 186) ('In *Hayward v Zurich Insurance Co Plc* [2016] UKSC 48 the Supreme Court … held that a settlement of an insurance claim could be avoided by the insurer when it discovered that the amount of loss had been exaggerated fraudulently, even though at the time the insurer had doubts over the extent of the claim. … It is not necessary that the insurer believed that the claim made was true.').

148 *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [43]-[44] (Lord Clarke of Stone-cum-Ebony JSC).

149 See, for instance, the quotation at the very beginning of this chapter from *Cramaso LLP v Ogilvie-Grant, Earl of Seafield* [2014] UKSC 9, [2014] 1 AC 1093, [16], [20].

150 HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (32nd edn, 2015), (incorporating the First Supplement, 2016), 667 ([7-035]-[7-036]).

that they now consider that the first and second propositions have been overtaken by the third, post-*Zurich*.

Until the matter is decisively settled by the Supreme Court, the *Zurich* dicta will engender unnecessary uncertainty. As Nugee J demonstrated in *Holyoake,*[151] litigants and judges post-*Zurich* must continue to assume that ordinarily, 'where A lies to B in the hope of inducing B to do something B will in fact usually only be induced to do so if he believes A's lie', unless the case exceptionally possesses the two special characteristics of *Zurich.*[152] First, (however much the claimant in *Zurich* might have suspected the defendant's statements) the claimant *did not know* they were lies; and secondly, (although the defendant in *Zurich* lied to the claimant) the claimant was induced to act because the defendant might tell the same lies to a third party (the courts) and the *third party might believe* those lies, so the 'inducement' in such a case is not necessarily the claimant's belief in the lies.

Of course, one can easily understand their Lordships' desire not to allow the fraudulent defendant in *Zurich* to retain the benefit of the settlement agreement which he obtained dishonestly by false evidence. However, as *Borrelli* demonstrated, it is preferable to deploy the law of duress to deliver potentially the same result in *Zurich*, without disrupting the existing principles of misrepresentation. The point here is *not* that the claimant *would have succeeded* on duress in *Zurich,* since establishing duress can be unpredictable because it turns on nuanced questions of *degrees* of. The point is that *Zurich* should have been dealt with as a case of duress, not misrepresentation.

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151 *Holyoake v Candy* [2017] EWHC 3397 (Ch), [388]-[393] (Nugee J).

152 *Cf* E Bant, 'Unravelling Fraud in the Wake of Hayward v Zurich Insurance' [2019] LMCLQ 91, 98; PS Davies & W Day, 'A Mistaken Turn in the Law of Misrepresentation' [2019] LMCLQ 390, 405.

6. Conclusion

To rescind a contract for misrepresentation, a claimant must at least show that he was induced to enter into the impugned contract by a statement that was false. The meaning of any such pre-contractual statement, and hence its falsity or truthfulness, is determined by its interpretation in accordance with contract law's objective principle.

Recent suggestions, that a claimant should be entitled to rescind a contract for misrepresentation despite not believing in the misrepresentation, should not be accepted. They contradict the very nature of operative misrepresentations as mistaken beliefs induced by mis-statements.

A term in a contract can, in principle, operate as a contractual promise potentially giving rise to remedies for breach of contract and, concurrently, as a representation potentially giving rise to remedies for misrepresentation. This seems clear from the cases and s 1(a) of the Misrepresentation Act 1967. However, whether such a term is to be treated as giving rise to a contractual promise or (mis)representation, or both, will turn on the parties' intentions which are also determined by interpreting their overall words and conduct according to the objective principle.

CHAPTER 6: MISREPRESENTATION AND MISTAKE – INTERPRETATION, RESCISSION AND RECTIFICATION

> 'If the representee sought to rely on the misrepresentation to obtain not rescission of the contract but rectification of a written contract to reflect the terms as misrepresented or (in the case of a contract not reduced to writing) to assert that the contract stood but on the basis of terms as misrepresented, he may be entitled to do so.'–*Misrepresentation, Mistake and Non-Disclosure*.[1]

> '… the plaintiff, who has available to him concurrent remedies in contract and tort, may choose that remedy which appears to him to be the most advantageous.'–*Henderson*.[2]

1. Introduction

Three themes feature prominently in the earlier chapters. First, the existence and meaning of a contract under English law are determined by the objective principle (which is contextualised and addressee-centric): contractual formation and interpretation are determined by what the contracting parties' words and conduct would mean to a reasonable person in the position of the parties and having their characteristics (including their knowledge). Secondly, a close relationship exists between mistakes and misrepresentations: an operative misrepresentation which generates a right to rescind a

[1] J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 85 ([4-13]). *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [20] (Lord Hoffmann NPJ): 'If the contract contains a provision which one party knows that the other party thinks is not there, or knows that the other party is mistaken about its meaning, the court may, as a matter of discretion, either refuse to allow him to enforce the contract as it would ordinarily be construed … or go further and rectify the written agreement to give effect to what the mistaken party thought had been agreed'.

[2] *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, [1995] 2 AC 145 (Lord Goff of Chieveley).

contract is a mistaken belief induced by a misstatement. Thirdly, the same objective principle applies to the identification and interpretation of 'representations' and the terms of the parties' true agreement for establishing the right to rescind a contract induced by misrepresentation and for establishing the right to rectify a contractual document (for mistake).

One might expect a close relationship in the remedial consequences of mistakes and misrepresentations, given that the latter is a species of the former. It has also been suggested that rectification is merely the result of the 'partial rescission' of a contract,[3] thus effectively treating rectification as a by-product of rescission.

This doctoral thesis is concerned with the rectification of contractual documents for mistake and the rescission of contracts for misrepresentation. As such, it is now apposite to focus on some aspects of the relationship between rectification and rescission and between misrepresentation and mistake. In this chapter, we consider the complex situation where a defendant's (fraudulent) misrepresentation as to terms induced the claimant to enter into a contract which is reduced to a written document; the contractual document does not accurately reflect what the claimant mistakenly thought were its terms (because misrepresented by the defendant); and the defendant knew of the claimant's mistake as to terms. (The defendant's knowledge connotes fraud, and *vice versa*.)

In this situation, does the *claimant* have a choice of remedies? The claimant was acting under a unilateral mistake as to terms and the defendant knew of this: does the

[3] R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch 9 in S Degeling, J Edelman and J Goudkamp (ed), *Contract in Commercial Law* (Lawbook Company, 2016)), 181-182; R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 602.

claimant's mistake necessarily mean that there is no contract or that the apparent contract is 'void'? Can the claimant rescind for misrepresentation instead? If fraud unravels everything, why does the defendant's fraudulent misrepresentation render the apparent contract voidable rather than void? Can the claimant elevate prior misrepresentations (as to terms) into contractual obligations; and can this lead to rectification?

More controversially, can the *defendant* assert that his own misrepresentations have become terms of an enforceable contract, thereby preventing the claimant from electing rescission (for fraudulent misrepresentation)?

These are questions of great practical significance. Consider the not uncommon modern phenomenon concerning litigation between banks and their customers such as in *Peekay*.[4] If a bank misrepresents the nature of the financial product (product X) which it proposes to sell but, subsequently, the customer signs a contractual document which 'accurately' describes the product (product Y), what legal consequences ought to follow?

One cannot assume that a contractual *document's* existence necessarily precludes arguing that:

(a) the *contract* does not exist;

(b) the putative contract can be rescinded; or

(c) the contract does not mean what the document says literally (without regard to context, including what was previously communicated between the parties).

[4] *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582.

As demonstrated in Chapter 2 and Chapter 3, the document is not the contract; it merely purports to be a tangible reflection or implementation of the intangible contract. Even if one accepts that the parol evidence rule or the rule barring evidence of prior negotiations prevent the use of prior communications for varying or interpreting the contract, no rule precludes evidence of prior communications for establishing a mistake which renders the putative contract void. Even if there is a contract, no rule precludes evidence of prior communications in order to rectify the document to make it comport with the parties' true agreement (according to what Lord Hoffmann described in *Kowloon Development* as 'the classic statement of the principle of objective interpretation'[5] expounded by Blackburn J in *Smith*[6]); or for establishing a misrepresentation in order to rescind the contract.[7]

The claim in *Peekay* concerned only damages;[8] but one can see immediately the difficult issues if questions of 'void or no contract', rescission or rectification had been raised. If the contract as evidenced in the written document is more favourable to the bank than the customer, the bank would want to uphold the contract 'as is', whereas the customer would prefer to say 'no contract' or to rescind for misrepresentation or even to seek rectification so that the document reflects what had previously been (mis)represented. Can

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5 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [22]-[23] (Lord Hoffmann NPJ).

6 *Smith v Hughes* (1870-1871) LR 6 QB 597, 607 (Blackburn J): 'If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms'.

7 See generally, F Dawson, 'Parol Evidence, Misrepresentation and Collateral Contracts' (1982) 27 McGill LJ 403.

8 *Cf* KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 164 ([13.10]), 221 ([17.07]).

the customer choose or elect between (a) asserting that there is no contract; (b) rescinding and walking away from the deal; (c) seeking rectification of the document to make it comport with the prior representation and enforce the contract as rectified; or (d) merely acceding to the bank's request by sticking to the deal as reflected in the current unrectified document? If the market has completely collapsed so that the customer simply wants to rescind or assert that the 'contract' was void, can the bank stop the customer from simply walking away? So, for example, can the bank insist on enforcing the 'true agreement' between them in accordance with what the bank had previously represented, as if the contractual document has been rectified (according to (c) above)?

These are important questions. Addressing them will require us to delve into what contract lawyers mean when they refer to mistakes.

2. Mistakes and Contracts

2.1 Categories of Mistakes

No attempt will be made here to construct a definitive statement of what a mistake is in English private law. That multi-faceted concept varies according to context. Without courting unnecessary controversy, the following is a modest working description of seven categories of mistake and their impact on contracts according to current orthodoxy.

2.1.1 Spontaneous Mistake Simpliciter

First, a claimant cannot generally avoid a contract merely because he entered into it under a spontaneous (un-induced) mistake extrinsic to the contract (not relating to its terms). Lord Atkin provided an illustration in *Bell*:[9]

> 'A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound, and cannot recover back the price …'

This remains so even if the defendant knew of the claimant's mistake, but the result may be different if the claimant made a mistake as to the *terms* of the contract and the defendant knew of, or caused, the mistake.[10]

In deference to legitimate commercial expectations and transactional security, once the prerequisites for the formation of a contract have been satisfied–that is, once parties have reached agreement as to terms according to the objective principle and that agreement is supported by consideration and bolstered by the intention to create legal relations–the vitiating effect of spontaneous mistakes *simpliciter* is judiciously constrained. As demonstrated in the following categories, *something more* is required for a contract to be avoided for mistake, usually concerning the type or seriousness of the claimant's mistake and the defendant's knowledge or inducement of the mistake.

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9 *Bell v Lever Brothers Ltd* [1932] AC 161 (Lord Atkin).

10 *Smith v Hughes* (1870-1871) LR 6 QB 597; *Statoil ASA v Louis Dreyfus Energy Services LP ('The Harriette N')* [2008] EWHC 2257 (Comm), [2008] 2 Lloyds Rep 685, [87]-[88] (Aikens J).

2.1.2 Non Est Factum – 'This is Not My Deed'

Secondly, a claimant who signed a contractual document under a mistake as to its nature or effect may assert that the putative contract memorialised therein is void, provided that the claimant was disabled from understanding what he was signing without any negligence and his mistake was so serious as to render what he signed fundamentally different from what he thought he was signing.[11] Crucially, although the plea is commonly raised by a claimant who was induced by fraud to sign the impugned document, the claimant can succeed even where the defendant committed no fraud and where the defendant neither knew of nor caused the claimant's mistake.[12]

This is the one true instance where the law vitiates a putative contract purely for the protection of a claimant who suffered from a spontaneous mistake *simpliciter*; but it is clearly an outlier. The courts confine the plea of *non est factum* narrowly so as to avoid undermining the rule that a person is normally bound by a contractual document he signed[13] and the policy deference to legitimate commercial expectations and transactional security.

2.1.3 Unilateral Mistake as to Identity

Thirdly, a defendant 'cannot constitute himself a contracting party' with a claimant 'whom he knows' has 'no intention of contracting' with the defendant.[14] If a fraudster pretended to be someone else (say, a celebrity) and purported to contract with the claimant, the

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11 *Saunders v Anglia Building Society* [1971] AC 1004, 1026 (Lord Wilberforce).

12 *Foster v Mackinnon* (1869) LR 4 CP 704, 711 (Byles J); J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 486 ([13-56]), 490 ([13-60]).

13 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

14 Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 286. R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (Ch 6 in A Burrows and E Peel (ed), *Contract Terms* (OUP, 2007)), 101, 110; *Cunday v Lindsay* (1878) 3 App Cas 459.

claimant might contract under an induced mistaken belief as to the fraudster's identity. The claimant might have intended subjectively to contract with the celebrity, but directed the offer to the fraudster; and the fraudster might have purported to accept the offer (knowing that it was meant for the celebrity).

If the objective interpretation of the parties' communications shows that the claimant's offer was meant for the fraudster, then the fraudster's acceptance was effective,[15] even if the resultant contract may be rescinded for fraudulent misrepresentation.[16]

If the claimant's offer is objectively interpreted as being meant for the celebrity, then the fraudster's purported acceptance was ineffective.[17] There is no contract between the claimant *and the celebrity*, because the celebrity did not accept. Furthermore, no valid contract was formed between the claimant *and the fraudster* because the fraudster, knowing that he was not the intended offeree, could not accept the claimant's offer.[18] Alternatively, one could say that any purported contract between the claimant and the fraudster was void because the fraudster knew of the claimant's mistake as to identity.

It may be argued, paradoxically, that in *all* such cases, the claimant *always* makes a mistake of identity; and the fraudster *always knows* that the claimant's offer was meant

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15 *Phillips v Brooks Ltd* [1919] 2 KB 243; *Lewis v Averay* [1972] 1 QB 198.

16 Here, for simplicity of exposition, we concentrate on interpreting the claimant's offer (purportedly being accepted by the fraudster in the celebrity's name). The same reasoning applies to interpreting the claimant's purported acceptance (of the fraudster's offer in the celebrity's name).

17 Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 287; *Ingram v Little* [1961] 1 QB 31; *Boulton v Jones* (1857) 2 H&N 564; *Cunday v Lindsay* (1878) 3 App Cas 459; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919.

18 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 497 ([14-06]), 504 ([14-17]), 508 ([14-22]).

for someone else 'identified' using the misstated name (or address, status, creditworthiness, or other stated attributes[19]). Following this argument, the fraudster is never entitled to accept the claimant's offer and, inevitably, any putative contract between the claimant and the fraudster will *always be void*; however, such a result would be unacceptably disruptive towards transactional security. This potential paradox is sidestepped where the court objectively interprets the claimant's offer as being meant for the fraudster, and hence open to the fraudster's acceptance, on two (seemingly weak) interconnected bases.

First, the court may find that it was unimportant to the claimant whether he was contracting with any particular person. Secondly, it may be held that the claimant's mistake was not a relevant 'mistake of identity' (a 'mistake about who his counter-party was'), since the claimant (un-mistakenly) intended to contract with the person (fraudster) with whom he was communicating, regardless of the claimant's mistake as to the fraudster's name, address, creditworthiness, or other attributes. In sum, a claimant *never* makes a relevant 'mistake of identity' or 'mistake about who his counter-party was' which voids the putative contract, unless the court determines on a holistic interpretation in all the circumstances that the counterparty's identity was essential and the claimant did not intend to contract with the person with whom he was in fact dealing.[20] However, this approach is largely dependent on certain presumptions.

This approach results from a policy imperative. It prevents the potential paradox from unacceptably destabilising transactional security, by *always* classifying the claimant's

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19 *cf Shogun Finance Ltd v Hudson* [2004] 1 AC 919, [73]-[75] (Lord Millett, dissenting).

20 M Chen-Wishart, *Contract Law* (6th edn, 2018), 261 ([6.2.3]); *cf Shogun Finance Ltd v Hudson* [2004] 1 AC 919, [48]-[49] (Lord Hobhouse), [124]-[125], [135] (Lord Philips).

mistake as a relevant 'mistake of identity' which voids any contract *whenever* the claimant is mistaken about the name (or other attributes) of his counterparty.

Thus, if the claimant fails to void the putative contract for mistake of identity, the courts say that this is because the other party's identity did not matter to the claimant so that the claimant intended to 'contract with the person present' before him;[21] or the claimant was merely mistaken about the other contracting party's 'attributes' but not his 'identity'.[22] In contrast, if the claimant succeeds in voiding the putative contract for a relevant 'mistake of identity', the courts say that the 'identity' of the other contracting party was 'of importance' to the claimant, or that the claimant intended to contract with 'only' some specific person, but not with just anyone.[23] Thus, a seller's mistake as to the purchaser's 'identity' will not *necessarily* void a sale unless his identity was essential.[24]

The vitiating effect of this form of unilateral mistake as to identity is grounded in the objective interpretation of communications between the claimant and fraudster during contractual formation. Being an interpretative exercise, one cannot predict with certainty if the courts will say whether a particular claimant objectively intended to contract with the fraudster in any specific case.

In this interpretative exercise, the courts rely heavily on certain factors and presumptions. First, if the claimant mistook the fraudster for some non-existent entity,[25] it will be easier to establish that identity was unimportant to the claimant; that he intended to

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21 *Phillips v Brooks Ltd* [1919] 2 KB 243.

22 *Lewis v Averay* [1972] 1 QB 198.

23 *Cunday v Lindsay* (1878) 3 App Cas 459; *Boulton v Jones* (1857) 2 H&N 564, 566.

24 *cf Said v Butt* [1920] 3 KB 497 (McCardie J).

25 *King's Norton Metal Co (Ltd) v Edridge, Merrett and Co (Ltd)* (1897) 14 TLR 98.

contract with the fraudster with whom he was communicating, so the claimant's mistake does not qualify to void the putative contract. Secondly, the claimant's failure to check the fraudster's identity may evince that the counterparty's identity was unimportant to him. However, actually checking will not necessarily render the putative contract void: the claimant may succeed[26] or still fail[27] to establish a qualifying mistake of identity. Thirdly, English cases place great weight on whether the claimant dealt with the fraudster (a) face-to-face (*inter praesentes*) or (b) in writing, say via correspondence over some distance (*non inter praesentes*). Where the claimant deals face-to-face with the fraudster, there is a strong presumption that the claimant intended to deal with the fraudster, so there may be no qualifying mistake.[28] On the other hand, where the claimant deals with the fraudster in writing or via correspondence, the claimant is presumed to intend to deal with the person *named in the writing or correspondence*, so it will be easier for the claimant to establish a qualifying mistake of identity.[29] Although relying on these presumptions is not easy to defend intellectually, it does impart some predictability of result.

2.1.4 Rectification for Common Mistake

Fourthly, where the parties made a common mistake by erroneously assuming that the contractual document which was meant to implement or record their prior agreement

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26 *Ingram v Little* [1961] 1 QB 31.

27 *Lewis v Averay* [1972] 1 QB 198.

28 *Phillips v Brooks Ltd* [1919] 2 KB 243 (Horridge J) (*inter praesentes*); *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 (*non inter praesentes*), [170] (Lord Phillips), [188] (Lord Walker).

29 *Cunday v Lindsay* (1878) 3 App Cas 459 (*non inter praesentes*); *Shogun Finance Ltd v Hudson* [2004] 1 AC 919 (*non inter praesentes*).

(founded upon their common intention) had done so accurately,[30] that document can be rectified to make it comport with their prior agreement. For purposes of rectification, the parties' common intention must have continued up to the time the document was executed; and the common intention is ascertained objectively, in the same way that contracts are interpreted. However, rules that bar the admissibility of evidence of subjective intentions and prior negotiations from contractual interpretation do not apply to rectification.

Concentrating on voiding a putative contract for (common or unilateral) mistake without regard to rectification would paint an incomplete picture. Where both parties mistakenly assume that the contractual document says C terms, whereas it explicitly says D terms, *either party* may seek rectification. By giving effect to the contract according to the rectified terms (C) as the true agreement between the parties, the underlying assumption is that the contract is void for mistake in its unrectified form (D). There is no contract on D terms.

A contracting party may assert that the putative contract on D terms is void, without necessarily being entitled to rectification. The contract on D terms can be void for mistake because the parties have not reached agreement on the objective principle if, say, both parties made the same mistake as to the contract's terms or the claimant's unilateral mistake as to terms was known to the defendant. However, rectification of the contractual document

30 Parties may be mistaken about (a) the *form of words* used or (b) the *meaning* of words used in the document (*Re Butlin's Settlement Trusts* [1976] Ch 251, 260 (trust deed); *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch) [16]-[17] (settlement deed)).

cannot be ordered unless the court can *also* identify the true agreement which the document should be rectified to reflect.[31] Courts do not invent agreements out of thin air.

The current controversy amongst English lawyers is whether rectification of contractual documents should be grounded in the objective principle, or whether rectification should be an equitable subjective escape valve to objectivity.[32] The objective approach towards common mistake rectification was established in *Chartbrook*;[33] and, as argued in Chapter 3 (Rectification for Common Mistake), the attempt in *FSHC*[34] to change it is misguided. Surely, the law would seem incoherent if it purported to apply the objective principle to contractual interpretation but a subjective approach to the rectification of contractual documents which are meant to implement or reflect that contract? After all, (a) rectification 'is designed to bring the written document into conformity with the parties' agreement'[35] and (b) courts do not rectify the parties' contractual bargains, but only rectify documents to make them comport with their contract.[36]

2.1.5 Rectification for Unilateral Mistake

Fifthly, where the claimant mistakenly assumed that the terms of a contractual document say one thing whereas they say something else,[37] and the defendant knew of the claimant's

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31 *Etablissements Georges et Paul Levy v Adderley Navigation Co ('The Olympic Pride')* [1980] 2 Lloyds Rep 67 (Mustill J).

32 PS Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 63.

33 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101.

34 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [176] (Leggatt LJ).

35 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 472 ([13-38]).

36 *Agip SpA v Navigazione Alta Italia SpA* [1984] 1 Lloyd's Rep 353, 359.

37 The claimant's mistake may concern the form of words or their meaning.

mistake,[38] the claimant may seek rectification of the contractual document to make it comport with the claimant's assumption.[39]

Again, by giving effect to the contract according to the rectified terms (C) as the true agreement between the parties, the underlying assumption is that the contract in its unrectified form (D) is void for mistake at law. There is no contract in D terms, since the only effective contract is in C terms (as rectified). The contract in C terms is the parties' true agreement according to the objective principle, which is addressee-centric and takes into account the claimant's (knowledge or) mistake and the defendant's knowledge thereof.[40] A reasonable person in the parties' position, and imputed with their mistake and knowledge, may regard them as having agreed to contract on C terms.

A claimant asserting unilateral mistake as to terms is normally accorded the privilege to choose between remedies, because he is in a more deserving or less blameworthy position than the defendant. For instance, when the defendant asserts a contract on D terms, (1) the claimant may simply accede. But, of course, (2) the claimant may say that the putative contract on D terms is void, and walk away on the basis that there is simply no contract between the parties.[41] Alternatively, (3) the claimant may assert that the parties' true agreement, and hence their contract, should be based on C terms instead;

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38 *Centrovincial Estates Plc v Merchant Investors Assurance Co Ltd* [1983] Com LR 158.

39 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505, 516 (Buckley LJ); *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579.

40 *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579, [21]-[26] (Jacob LJ), [33] (May LJ).

41 *Hartog v Colin and Shields* [1939] 3 All ER 566 (Singleton J).

and, furthermore, the claimant may ask the court to rectify the contractual document so that it accurately reflects C terms.[42]

2.1.6 Common Fundamental Mistake

Sixthly, if at the time of contracting, the claimant and defendant made a spontaneous fundamental common mistake (say, about the surrounding circumstances or the subject-matter of the contract) extrinsic to the contract (hence, not amounting to a mistake as to terms), the purported contract is void for common fundamental mistake at common law; provided the true state of affairs would render performance of the contract impossible or radically different from what was originally contemplated by both parties.[43] As illustrated by Lord Atkin's examples in *Bell*, the threshold of fundamentality is extremely high:[44]

> 'A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of a representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty.'

Thus, neither a mistake, shared by both buyer and seller, as to whether a house is habitable nor a mistake as to the provenance and value of a painting would be sufficiently fundamental to constitute a fundamental common mistake to void the contract at common law.

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42 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] HKCFA 35, [2013] 6 HKC 443, [20] (Lord Hoffmann NPJ).

43 *Bell v Lever Brothers Ltd* [1932] AC 161; *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679.

44 *Bell v Lever Brothers Ltd* [1932] AC 161 (Lord Atkin).

The doctrine of common fundamental mistake only vitiates the purported contract where neither party was at fault and there was no contractual allocation between them of the risk of the mistake. It may be said that the doctrine of mistake 'fills the gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality'.[45] However, it is ultimately a question of interpretation, according to the objective principle, whether there is any such allocation, and whether the true state of affairs renders performance of the putative contract impossible or so fundamentally different from what was originally contemplated that the putative contract is inapplicable in the true circumstances.[46] The interpretative question in all cases of common fundamental mistake is: 'Although the contract states that "C must do this" and "D must do that" in explicitly unqualified terms, now that we know of the pre-existing mistake, must they still do this and that, according to the true interpretation of the contract?'. Ultimately, the answer is either 'yes, they must' or 'no, they need not',[47] leaving some theoretical space but very little real room for 'neither "yes" nor "no".'[48]

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45 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, [80] (Lord Phillips MR).

46 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, [82] (Lord Phillips MR); *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255, 268 (Steyn J). *Cf E Peel, Treitel: The Law of Contract* (15th edn, 2020), 353-356 ([8-002]-[8-006]).

47 R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' (Ch 6 in A Burrows and E Peel (ed), *Contract Terms* (OUP, 2007)), 105 (both *common fundamental mistake* and *frustration* turn on 'the court's interpretation of the parties' contract and ascertaining the limits on what has been promised'); E McKendrick, *Contract Law: Text, Cases and Materials* (9th edn, 2020), 533-534, 730-731; *W Nagel v Pluczenik Diamond Company NV* [2018] EWCA Civ 2640, [30]-[34] (Leggatt LJ) (whether a contract is *frustrated* by unforeseen events turns on contractual interpretation; and the courts' contextualised objective approach towards interpretation means that a contract can be interpreted to remain binding and applicable even if new circumstances arise which were unforeseeable during contractual formation). *Cf E Peel, Treitel: The Law of Contract* (15th edn, 2020), 1106 ([19-132]).

48 *Cf* Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 299-300: 'As a general rule, one or other of them will be considered to have assumed the risk of the ordinary

Establishing a common fundamental mistake means that the contract is void at common law. English courts have renounced any wider equitable doctrine[49] of common fundamental mistake which might render a contract voidable (and hence liable to be rescinded or set aside on terms as may be just).

2.1.7 Mutual Mistake and Irresolvable Ambiguity

Seventhly, where both the claimant and defendant were mutually mistaken as to the terms proposed by each of them, such that each thought that he was contracting on his own terms, and it is also impossible to determine whether they have reached agreement on the claimant's terms or the defendant's terms according to the objective principle, there is no contract between them. Their putative contract is void for irresolvable uncertainty; or it could be said that no valid contract is formed because there is no coincidence between offer and acceptance.

For example, if the claimant and the defendant expressly agreed to contract for the sale and purchase of cotton *ex Peerless*, but there were two ships named *Peerless* with two different shipments (October and December respectively), and there is no way for a judge to say whether the contract referred to one or the other, then there is simply no contract or their putative contract is void.[50]

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uncertainties … However, it is not sufficient to say that the doctrine of common mistake rests on the construction of the contract. If the contract expressly or by implication allocates the risk of the unknown fact to one or other of the parties, then there is no mistake: the contract provides for the situation. But a test is needed for those cases where the unknown fact is not dealt with expressly or impliedly in the contract itself, to determine whether the mistake is sufficient to render the contract void'.

49 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679.

50 *Raffles v Wichelhaus* (1864) 2 H&C 906, 159 ER 375 ('Peerless'); *Falck v Williams* [1900] AC 176 (contract of carriage by coded telegrams, whether for copra from Fiji to UK/Europe or for shale from Sydney to Barcelona).

2.2 The Core Case

It is clear from the foregoing survey of the seven common categories that what effects flow from a mistake in the contracting process will depend on a complex interplay of multitudinous factors. Furthermore, there is no unitary basis for the vitiating effect of mistake across all categories.

As the core of this thesis is the rescission of contracts and rectification of contractual documents for misrepresentation and mistake, we concentrate on the fifth aforementioned category, namely, the central case of the claimant's unilateral mistake as to terms which is known to the defendant. We focus on the more complex case where, unlike the aforementioned seven categories of spontaneous mistakes, the claimant's mistake was induced by the defendant's fraudulent mis-statements, such that the defendant knew of and caused the claimant's mistake, and examine how the superimposition of a misrepresentation, over and above the claimant's mistaken belief, impacts the claimant's choice of remedies. Reference, however, may be made to the other aforementioned categories of mistake in the course of analysis.

3. Mistakes, Misrepresentations, Rectification and Rescission

It is apposite at this stage, having examined the seven common categories of mistake, to clarify some aspects of the relationship between rectification and rescission and between misrepresentation and mistake which may potentially cause confusion for the unwary.

3.1 Mistakes and Misrepresentations

It is true that an operative misrepresentation is an induced mistake; and it is a common refrain that fraud unravels everything.[51] Yet, it would be wrong to suggest that since mistakes render contracts void, all fraudulent misrepresentations ought to render any putative contract void. Likewise, it would also be wrong to suggest that if fraudulent misrepresentations merely render a contract voidable, mistakes should not lead to putative contracts being declared void.

Regardless of mistake, a contract might be void for illegality if giving effect thereto is contrary to public policy. However, for a putative contract to be void for *mistake*, apart from the outlier category of *non est factum*, we must find that as a combined result of the mistake and the objective principle: (a) the parties in fact had not reached agreement as to terms; or (b) if they did, then, the putative contract must have been interpreted not to apply in the true circumstances now uncovered. That much should be plain from the seven categories of mistake, particularly the third to seventh, examined above.

Although operative misrepresentations are mistaken beliefs induced by mis-statements, not all mistakes render a contract void, and not all operative misrepresentations comprise mistakes which do. Since only certain specific types of mistakes would render a contract void, a misrepresentation should render a contract void only if it induced a mistake which is one of those specific types. In other words, a misrepresentation should render a putative contract void for mistake only if, as a result of a mistaken belief induced by a mis-statement, and in accordance with the objective principle: (a) the parties in fact had not

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[51] *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [15]-[16] (Lord Bingham of Cornhill).

reached agreement as to terms; or (b) if they did, then, the putative contract must have been interpreted not to apply in the true circumstances now uncovered. This flows from the analysis in the immediately preceding paragraph.

This conclusion makes sense. For an impugned contract to be voidable, there must have been sufficient consensus to establish that the parties had reached agreement as to terms, but their agreement would have been based on consent that was initially defective in the eyes of the law at the time of contract formation. Where a claimant entered into a contract because of the defendant's duress, exploitation of unconscionable bargain, undue influence or misrepresentation, the contract can validly subsist if the claimant and defendant had in fact *reached agreement on terms according to the objective principle*: however, the contract may be voidable because the *quality* of the claimant's consent at the time of contract formation was sufficiently *defective* in the eyes of the law *and* that defect was caused or unconscientiously exploited by the defendant, so as to give the claimant the right to elect to affirm or rescind the contract.[52]

There is nothing wrong with saying that, in general, there is a valid (but voidable) subsisting contract between a claimant and a defendant, even where the claimant's consent had been induced by the defendant's fraudulent misrepresentation,[53] so long as they had reached agreement as to terms and the contract is interpreted to be applicable in the circumstances. On the other hand, where the misrepresentation gave rise to a mistake which prevented the parties from reaching agreement at the time of formation or the putative

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52 *Cf* N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (3rd edn, 2019), 11 ([2-004]), 470 ([28-001]).

53 *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 AC 919, [6], [8], [10], [11] (Lord Nicholls of Birkenhead, dissenting) (fraudulent misrepresentation generally renders a *valid* contract *voidable*).

contract is interpreted to be inapplicable in the circumstances, there is no contract or the putative contract is void.

We can illustrate this by reference to the third of the aforementioned seven categories of mistakes, namely unilateral mistake as to identity, where the fraudster pretended to be a celebrity and purported to enter into a contract with the claimant. The claimant could be regarded as acting under a mistaken belief induced by the fraudster's misrepresentation of identity. The claimant intended to contract with the celebrity but directed his offer to the fraudster; and the fraudster purported to accept the offer, even though the fraudster knew that the offer was meant for the celebrity.

If the claimant's offer is interpreted according to the objective principle as being meant for the celebrity only, then the fraudster's purported acceptance was ineffective: (a) there was no contract between the claimant and the celebrity because the celebrity has not accepted the claimant's offer; and (b) no valid contract was formed between the claimant and the fraudster because the fraudster, not being the offeree, could not accept the claimant's offer, or we might say that any such purported contract with the fraudster would have been void because of the claimant's mistake as to identity.

However, if the true interpretation of the parties' communications according to the objective principle shows that the claimant's offer was meant for the fraudster, then the fraudster's acceptance was effective and there was a valid contract between the claimant and the fraudster, even though such a contract could be rescinded at the claimant's election because of fraudulent misrepresentation. In such a case, there is a valid contract between the fraudster and the claimant, albeit one that is voidable for misrepresentation, because the claimant and defendant had *reached agreement with each other on terms* according to

the objective principle. Unless we say that some additional legal ingredient–apart from the agreement which satisfies the traditional doctrinal requirements for the formation of a contract (such as consideration and the intention to create legal obligations)–is necessary for the formation of contracts, there is no principled way to conclude that there is no valid contract regardless of fraud.

It is difficult to detract from the foregoing conclusion. But should it matter that fraud is often described as a thing apart, and that it is said to unravel everything?[54] It is clear that where a claimant entered into a contract with a defendant because the defendant exerted extreme duress on the claimant, say at gunpoint, or because the claimant was misled by the defendant's innocent misrepresentation, the contract is voidable at the claimant's election. The outmoded notion that extreme pressure meant that there was no real consent, and hence no valid contract, was exposed as a misconception many years ago;[55] and it has been superseded by the modern orthodoxy that there is a valid contract, albeit one that is voidable because it was founded on real but defective consent under illegitimate pressure. Fraudulent misrepresentation falls somewhere in-between innocent misrepresentation and duress at gunpoint, both in terms of the defendant's reprehensibility and its effect on the claimant's mind. If duress at gunpoint and innocent misrepresentation both render a contract voidable, fraudulent misrepresentation should not be any different.

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54 *Cf Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2016] 3 WLR 637, [53] (Lord Toulson JSC).

55 *Universe Tankships of Monrovia v International Transport Workers Federation ('The Universe Sentinel')* [1983] 1 AC 366 (Lord Diplock) (Lord Scarman (dissent)); *Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck')* [1992] 2 AC 152 (Lord Goff of Chieveley).

It is liable to cause confusion by asking whether all mistakes induced by fraudulent misrepresentations ought to render contracts void. The proper questions, regardless of whether the claimant's mistake was induced by a fraudulent misrepresentation, are: (a) whether the parties reached agreement on terms according to the objective principle; or (b) if they reached agreement, then, whether the agreement is interpreted to be inapplicable in true circumstances now uncovered.

3.2 Rectification and Rescission

The radical argument by Prof Stevens, that *'rectification' for mistake* is merely a consequence of the 'partial rescission' of a contract, would reduce rectification to a by-product of *rescission for mistake*. According to Prof Stevens:[56]

(a) mistakes justify rescission but cannot be the basis of a contract;

(b) the existence and meaning of a contract is grounded in an objectively ascertained agreement;

(c) an explicit entire agreement clause in a contractual document demonstrates that the parties' agreement is contained in that document and that document alone;

(d) the parol evidence rule is the implicit equivalent of an explicit entire agreement clause;

(e) the reduction of an agreement into writing *prima facie* attracts the parol evidence rule and so, even without an explicit entire agreement clause, the parties' agreement is assumed to be contained in that document alone;

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[56] R Stevens, 'The Meaning of Words and the Intentions of Persons' (Ch 9 in S Degeling, J Edelman and J Goudkamp (ed), *Contract in Commercial Law* (Lawbook Company, 2016)), 181-182. See also R Stevens, 'What is an Agreement?' (2020) 136 LQR 599, 602.

(f) rectification would be pointless if it only reformed pieces of paper;

(g) instead, rectification is the process by which a court reforms the parties' contractual bargain and not just a piece of paper;

(h) the rectification of a contract for mistake flows from the partial rescission of the contract for mistake;

(i) so, by rescinding a specific contractual term (either an explicit entire agreement clause or its implicit counterpart, the parol evidence rule) whilst keeping the rest of the contract alive, 'what we are left with is the agreement that the parties have entered into absent their reduction' thereof into a single document; and

(j) thus, the result is that the parties' contract is no longer reflected exclusively in the original contractual document, but is instead evidenced by a holistic assessment of the parties' overall words and conduct, and the document has to be reformed (rectified) in order to make it consistent with that holistic assessment of the parties' agreement.

However, Prof Stevens' radical argument runs against the grain of current orthodoxy on multiple fronts. First, a spontaneous[57] or unilateral[58] mistake is either sufficiently fundamental to 'void' a putative contract at law or not at all: the mistake will not render the contract voidable or susceptible to rescission in equity. Yet, for his argument to succeed, he would need to identify some doctrine which validates the contract said to be infected by mistake but also allows a mistaken party to rescind that part of the contract

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57 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd ('The Great Peace')* [2002] EWCA Civ 1407, [2003] QB 679.

58 *Statoil ASA v Louis Dreyfus Energy Services LP ('The Harriette N')* [2008] EWHC 2257 (Comm), [2008] 2 Lloyds Rep 685, [105] (Aikens J).

which comprises the explicit entire agreement clause (or its implicit counterpart) on the ground of his own mistake. Secondly, insofar as his argument relies on the principle that contracts are based on objectively ascertained agreements rather than mistakes, it paints a misleading picture. It must be clarified that the objective principle, by which the existence and meaning of contracts are ascertained, is contextual and addressee-centric, and will therefore take into account the parties' knowledge including one party's knowledge of the other party's mistake. Thirdly, to the extent that his argument is based on the idea that rectification is a process of reforming contractual bargains, it is flatly contradicted by the well-established principle that the courts do not rectify contractual bargains although they do rectify documents which purport to reflect or implement their contracts.[59] Fourthly, his suggestion that rectification is the result of the partial rescission of a contract, namely rescinding an explicit entire agreement clause (or its implicit counterpart), flies in the face of current orthodoxy: the courts do not allow partial rescission. A voidable contractual transaction has to be set aside in its entirety or not at all.[60]

Finally, Prof Stevens' argument seems unnecessarily elaborate. If a holistic assessment of the parties' words and conduct in the circumstances (including context and their knowledge of mistaken beliefs) shows that a contractual document (regardless of the presence or absence of any entire agreement clause) does not accurately reflect the parties' true agreement, then that itself is sufficient reason not to treat the document as such. There is therefore no further need or justification to partially rescind anything.

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59 *Agip SpA v Navigazione Alta Italia SpA (The 'Nai Genova')* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ).

60 *Holliday v Lockwood* [1917] 2 Ch 47; *TSB Bank Plc v Camfield* [1995] 1 WLR 430; D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd ed, 2014), 399 ([19.05]).

This is reflected in how courts traditionally interpret contracts which have been reduced to a written document but the document contains terms which appear literally to contradict one another. The courts interpret the contractual document holistically. The courts will try to reconcile apparently contradictory terms whenever possible;[61] but, where necessary, will make one term yield to the overall contractual objective if the former is truly irreconcilable with the latter.[62] In this interpretative exercise, there is no need to partially rescind anything: all the work is done by interpretation and, where required, by reading down an explicit written term.[63] It should make no difference when we interpret the parties' overall words and conduct holistically rather than just a single document: any explicit term is reconciled with or read down, if it is inconsistent with the parties' true agreement ascertained holistically from the parties' overall words and conduct according to the objective principle. This sort of reconciliation is a commonplace phenomenon and involves no sophistry. An entire agreement clause will not, in principle, prevent an *inaccurate* contractual document from being rectified.[64] Regardless of whether they resort to an entire agreement clause, when contracting parties execute a contractual document after they had reached prior consensus, they generally intend that the document should *accurately* reflect their prior consensus, and also that the document be treated as reflecting their final agreement. In *general*, rectification will give effect to, and reconcile, *both* these intentions; and this is because the rectified document will contain the final terms of their

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61 *Societe Generale, London Branch v Geys* [2012] UKSC 63, [2013] 1 AC 523, [24] (Lord Hope).

62 *Homburg Houtimport BV v Agrosin Pte Ltd ('The Starsin')* [2003] UKHL 12, [2004] 1 AC 715, [183]-[187] (Lord Millett).

63 *Yien Yieh Commercial Bank Ltd v Kwai Chung Cold Storage Co Ltd* [1989] UKPC 28, [1989] 2 HKLR 639 (Lord Goff of Chieveley).

64 *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [76]-[78] (Coulson J).

contract and will also reflect accurately their prior consensus. In the *specific instance* where the parties' common intention and prior consensus did not persist up to the time when the document was executed, this means: that their true agreement has changed, that the terms of the document supersede their prior consensus, that rectification would not give effect to their current true agreement, and so rectification should not ensue.

As demonstrated in Chapter 2 and Chapter 3 on the rectification of a contractual document for common mistake and unilateral mistake, rectification merely makes the literal, non-contextual, wording of the document comport with the party's true agreement which is ascertained by an interpretative process in accordance with the objective principle. Rectification also serves the useful purpose of minimising the risk of the document continuing to exist in a (literally and non-contextually) misleading form. Rectification is not a by-product of rescission.

4. Choice of Remedies

Having clarified some potential misconceptions about the relationship between rectification and rescission and between mistakes and misrepresentations, we can now consider the question of the claimant's choice of remedies if he entered into a contract as a result of a mistaken belief induced by the defendant's fraudulent mis-statement.

Some explanation is required for recognising a claimant's right to elect to rectify a contractual document, affirm or rescind a voidable contract, or to treat a putative contract as void.

4.1 Choice within Legal Limits

A right, even a qualified right, entails some choice. A party with a right to pursue a certain cause of action is entitled, within limits imposed by legal principle and policy, to choose whether and when to do so.

Fundamentally, where a claimant can establish facts which might give rise to different rights or causes of action, it is axiomatic that the English courts normally accord to him the liberty to exercise consistent rights alternatively or concurrently or to elect between inconsistent rights, unless there is some overriding principle or policy which mandates that one right should prevail over others.

Various instances can be given to illustrate this liberal axiom and the constraints imposed thereon by principle or policy, but they are necessarily just examples.

For instance, the courts do not force parties to go to court to assert their respective contradictory interpretations of contracts, their allegations of breaches of contract or pre-contractual misrepresentations, and courts do not at their own instance compel parties to assert that a putative contract is void for common fundamental mistake or *non est factum*. The decision whether to do so is a matter of party autonomy and choice. Likewise, a claimant may assert a contractual claim on the basis of his interpretation of the contract and he may also claim alternatively that the contractual document ought to be rectified to reflect his assumption of what it said. Furthermore, although a court might be circumspect about a claimant's allegation that a defendant had voluntarily assumed a tortious duty of care which appears inconsistent with the contractual rights and obligations undertaken

between them,[65] there is no rule preventing a claimant from asserting concurrent rights of action in tort or in contract against a defendant.[66]

However, where a contract is said to be illegal because its invalidity is impelled by an inflexible rule of policy or mandatory positive law, the courts are entitled to treat the contract as void regardless of the contracting parties' wishes. Furthermore, if the contract for the sale of the claimant's chattel to the defendant is voidable because of the defendant's misrepresentation, but a *bona fide* third party purchaser for value (euphemistically described as 'equity's darling') has acquired a legal proprietary interest in the chattel from the defendant without notice of the defendant's prior defect in title, the courts will not allow any subsequent election by the claimant to prejudice the third party's legal proprietary interest. Here, the legal policy to protect a vested legal proprietary interest which superseded a mere equity to rescind which had not been exercised prior to vesting of the legal interest, impels the subordination of the claimant's choice and extinguishes his right to elect rescission.

Similarly, a clause in a contractual document may reflect simultaneously a misrepresentation (which induced the claimant to enter into the contract if he had read the clause prior to execution of the document) as well as a contractual term (the contravention of which amounts to a breach of contract).[67] Nonetheless, the claimant has to elect between claiming rescission for misrepresentation (plus tortious damages) and breach of contract

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65 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1985] UKPC 22, [1986] AC 80 (Lord Scarman).

66 *Henderson v Merrett Syndicates Ltd* [1994] UKHL 5, [1995] 2 AC 145 (Lord Goff of Chieveley).

67 *Eurovideo Bildprogramm GmbH v Pulse Entertainment Ltd* [2002] EWCA Civ 1235, [22]-[24] (Rix LJ); *Greenridge Luton One Ltd v Kempton Investments Ltd* [2016] EWHC 91 (Ch), [68] (Newey J).

(allowing for contractual damages). He may not claim rescission and breach of contract cumulatively because these are mutually inconsistent in principle: rescission entails treating the impugned contract as if it was not entered into, whereas breach of contract entails treating the contract as subsisting (until discharged).

4.2 Choice and Parties' Relative Positions

The foregoing examples illustrate the great latitude normally accorded to a claimant in *his choice* of remedies in the contractual context.[68]

However, if a contract is a bilateral construct which gives rise to mutually enforceable rights and obligations between the contracting parties then, *prima facie*, *either party* should be just as entitled to assert the true legal position, whether by asserting the non-existence of a putative contract or the validity of a contract which effectuates their true agreement and by seeking enforcement thereof. This view is certainly correct in cases where the relative positions of the parties are equal: if neither of the parties should be regarded as more deserving or blameworthy than the other, then, any one of them should be able to assert the parties' true agreement or assert that their apparent contract is in truth invalid, and neither of them should be allowed to prevent the other from asserting the true legal position.

An example is the case of a common fundamental mistake under the sixth of the seven categories of mistakes examined earlier in this chapter. Thus, where the claimant and defendant made a spontaneous fundamental common mistake about the surrounding circumstances or the subject-matter of the contract at the time they entered into a putative

[68] *Karim v Wemyss* [2016] EWCA Civ 27, [40], [23], [26] (Lewison LJ).

contract (not amounting to a mistake as to terms), the impugned contract is void if, through no fault of either party, the true state of affairs would render performance of the contract impossible or radically different from what they originally contemplated. In such a case, the putative contract is interpreted to mean that it is inapplicable in the true circumstances. Since the relative positions of both contracting parties are equal because both are equally innocent, there is no reason to prefer one party over the other and no need to confer upon one party the prerogative of election to choose whether the impugned contract should be regarded as effective or ineffective: either party can assert that the purported contract is void for common fundamental mistake, and neither party can prevent the other from making such assertion of the true legal position.

The same principle applies in relation to cases of *non est factum* in the second category of mistakes, where a putative contract is vitiated because of the claimant's spontaneous, non-negligent, unilateral and fundamental mistake about the nature or effect of the contractual document he signed, but there was no fault on the defendant's part. Can it be suggested that, since the policy of the doctrine of *non est factum* is to protect the mistaken claimant, it should be left to the claimant alone to choose whether he wants to treat the contract as ineffective? However, the courts have held that the putative contract in such cases is simply void; and since *non est factum* vitiates the putative contract even where the defendant was neither responsible for nor aware of the claimant's mistake,[69] it is difficult to see why the claimant should have the right to impose his choice upon the defendant whether the putative contract subsists. It is true that the court will vitiate a

[69] J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 486 ([13-56]), 490 ([13-60]-[13-61]).

contract for *non est factum* only if a contracting party brings the matter to court in the first place but, once the matter is in court, there is no reason why the mistaken claimant's choice should be preferred over the defendant's. The argument here is not about whether the putative contract ought to be 'void' rather than 'voidable' at the claimant's instance under the doctrine; and the question whether the courts ought to say that *non est factum* renders a putative contract 'void' when the defendant neither caused nor knew of the claimant's mistake need not detain us here. The argument here is far simpler: if the defendant was neither responsible for nor aware of the claimant's mistake,[70] *either* party may assert *non est factum*, so neither party may prevent the other from asserting the true legal position, namely, that the putative contract is void.

The position is likewise in relation to rectification for common mistake under the fourth category of mistakes. Where both contracting parties mistakenly assume that their contractual document correctly records the terms of their prior agreement which the document was intended to reflect or implement, either of them is entitled to seek rectification to make the document comport with their true agreement, in effect treating the contractual document as if it were ineffective in its unrectified form (in D terms) and as if it were always effective in its rectified form (in C terms). If their relative positions are the same and neither was at fault for causing the common mistake, there is no reason why one of them should have the right to prevent the other from seeking rectification in order to effectuate their true agreement. Either of the parties should be able to disregard the contract

[70] Of course, if the defendant 'committed a wrong in procuring the mistaken [claimant's] signature', the defendant should 'for that reason not be able to rely on the mistake he caused … in order to escape the contract': J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 490 ([13-60]).

in unrectified form (in D terms) and seek rectification in order to give effect to their true agreement (in C terms) and, furthermore, neither party should be able to prevent the other from asserting that true legal position.

The same principle applies to mutual mistakes resulting in irresolvable ambiguity under the seventh category of mistakes. Where both parties to a putative contract think that they are contracting on their respective terms and there is no principled way to prefer one party's terms over the other party's terms, there is no contract because it is impossible to settle on the true terms of their apparent agreement. Here again, where their relative positions are similar and neither was at fault in causing the mistake, neither of them should be preferred. Either of them should be able to assert that the putative contract was in truth invalid, and neither should be able to prevent the other from asserting such true legal position.

5. Misrepresentation and Unilateral Mistake as to Terms

As foreshadowed, the legal complexion changes drastically when the parties' relative positions are not the same and one party is regarded as being more deserving or blameworthy than the other. As between the two contracting parties, this would usually arise because one party (the defendant) caused or knew of the other party's (the claimant's) mistake at the time of formation of the putative contract. In such cases, the more deserving party (the claimant) usually has the right to choose his remedy against the more blameworthy party (the defendant).

This is where we turn to concentrate on the fifth of the seven categories of mistakes, where the claimant made a mistake as to terms and the defendant knew of his mistake;

however, we vary the scenario to create a concurrent claim in fraudulent misrepresentation so that we have a complex situation where 'misrepresentation' overlaps with 'mistake' and where 'void or no contract' overlaps with 'voidable contract' and 'rectified contract'. The defendant's knowledge connotes fraud in this context: the defendant knew that the claimant thought he was contracting on C terms, because the defendant fraudulently misrepresented to the claimant that the document memorialising or implementing their agreement states C terms, but the document states D terms. Here, four principles are engaged.

First of all, it is clear from *Smith*[71] and *Hartog*[72] that where a claimant is mistaken about the terms of a contract and the defendant is aware of that mistake, the claimant may choose to assert that the purported contract between them is void for mistake. In light of the defendant's knowledge of the claimant's mistake (caused by the defendant's misrepresentation), the claimant is entitled to say that, in truth, there is no contract on D terms according to the objective principle.

Secondly (and consistently with the fourth principle), the claimant may choose to assert the existence of a contract on C terms in accordance with the objective principle. A contract on C terms is essentially what the contractual document would say if it was rectified. Furthermore, the claimant's right to seek rectification arises not only in cases where the claimant's mistake was merely known to the defendant but also where his mistake was caused by the defendant's misrepresentation;[73] and indeed, the claimant's right to seek rectification on the ground of the defendant's misrepresentation as to terms

71 *Smith v Hughes* (1870-1871) LR 6 QB 597.

72 *Hartog v Colin and Shields* [1939] 3 All ER 566.

73 *Commissioner for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch. 259, 280 (Stuart-Smith LJ).

has been described as a right to elect rectification as an 'alternative to rescission'.[74] This recognition, that a misrepresentation (as to the terms of the contract) may give rise to concurrent rights to rescind or treat the misrepresentation as a contractual term, is consonant with the statutory acceptance of the claimant's right to rescind for misrepresentation even if the 'misrepresentation has become a term of the contract'.[75] Additionally, stating that there is no contract on D terms is entirely consistent with the enforcement of a contract on C terms: indeed, the latter implies the former.

Thirdly, the defendant cannot force the claimant to assert the existence or non-existence of a contract on D terms or on C terms. That is a matter of choice for the claimant (and not the defendant), because the claimant's mistake was known to the defendant and caused by the defendant's fraudulent misrepresentation. The defendant has no equal claim to the claimant's right to choose because the parties' positions are not similar: the defendant is more blameworthy. The law is emphatic that where the defendant's misrepresentation induced the claimant to enter into a contract with the defendant, the right to elect to uphold or set aside the impugned contract belongs not to the defendant but to the claimant, because the claimant is more deserving and the defendant is more blameworthy.[76] Furthermore, the claimant's right to choose whether to uphold or rescind his contract with the defendant is not restricted to misrepresentations made by the defendant: the claimant may rescind if the

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74 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 194 ([16.03]).

75 The Misrepresentation Act 1967, s 1(a).

76 *Bristol and West Building Society v Mothew* [1998] Ch 1, 22 (Millett LJ): 'Misrepresentation makes a transaction voidable not void. It gives the representee the right to elect whether to rescind or affirm the transaction. The representor cannot anticipate his decision. Unless and until the representee elects to rescind the representor remains fully bound'.

defendant knew of (and, where the doctrine of notice applies, was 'put on inquiry' regarding or 'had notice' of) some third party's misrepresentation to the claimant.

Fourthly (and consistently with the second principle), where the claimant mistakenly assumes that an exculpatory clause is narrower than it was in fact expressed, and the claimant's mistake was induced by the defendant's misrepresentation, the defendant is not allowed to enforce the clause in its wider form.[77] Although it is notionally consistent with the rectification of contractual documents, this is not a rule limited to exculpatory clauses or restricted to contracts reduced wholly to writing, but is instead a wider principle applicable to contracts in general.[78] In other words, where a claimant's mistake *as to the terms* of the contract with the defendant was caused by the defendant's misrepresentation, the defendant is not allowed to enforce the contract without giving effect to the misrepresentation. In the result, the claimant is entitled to enforce the contract as if it had been varied by the defendant's misrepresentation as to terms or as if the contractual document reflecting the parties' contract was 'notionally rectified' to give effect to the misrepresentation.[79] All that is needed is that the misrepresentation was 'sufficiently unambiguous' 'to count as an estoppel' or 'create a term'.[80] It is as if the contract had been reformed to give effect to the parties' true agreement as evidenced by the defendant's

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77 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] EWCA CIV 133, [2011] 1 CLC 312, [104] (Rix LJ).

78 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582, [44] (Moore-Bick LJ).

79 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 233 ([18.11]).

80 *AXA Sun Life Services plc v Campbell Martin Ltd* [2011] EWCA Civ 133, [2011] 1 CLC 312, [104] (Rix LJ).

misrepresentation, even though there may not have been any document to rectify or, even if there was a document but no rectification was claimed in court.

According to the objective principle, there is in truth no valid contract on D terms but their true agreement is a contract in C terms. However, reconciling the four principles in the preceding paragraphs, the claimant has a right to choose his remedies. This is because the relative positions of the claimant and defendant are not similar. The claimant is more deserving whereas the defendant is more blameworthy, since the defendant knew of the claimant's mistake as to terms because the claimant's mistake was induced by the defendant's fraudulent misrepresentation. In summary, in this complex situation:

(a) The claimant is entitled to say that there is no effective contract or that any putative contract is void; or the claimant may simply rescind any contract on the ground of fraudulent misrepresentation.

(b) Alternatively, the claimant may choose instead to affirm the contract on either terms D or on terms C (but not both, since these two are mutually inconsistent).

(c) If the claimant chooses to assert a contract on C terms, he may also seek rectification in order to make any relevant contractual documents comport with the parties' true agreement on C terms, in accordance with the objective principle.

6. Conclusion

This chapter is essentially the culmination of the various ideas in the preceding chapters concerning the relationship between the objective principle (better described as the

principle of addressee-centric objectivity), the rescission of contracts for misrepresentations and the rectification of contractual documents for mistake.

It has already been established in earlier chapters that: (a) the same objective principle is used to interpret representations and contracts; (b) rectification is the reformation of contractual documents to give effect to the parties' true agreement ascertained according to the objective principle; (c) mis-statements can constitute either misrepresentations or contractual terms or both concurrently; and (d) operative misrepresentations are mistaken beliefs induced by mis-statements.

Once we accept these doctrinal tenets, as we must, it is easy to get confused by the close relationship: between misrepresentation, mistake and the objective principle; and between rescission, rectification and interpretation.

The confusion is aggravated by the notions that: some mistakes render contracts void or lead to rectification of contractual documents; operative misrepresentations render contracts voidable; but operative misrepresentations are just mistakes induced by mis-statements.

The confusion can also arise because, logically, there can only be one true legal position whether a contract does not exist or it does; and a contract can have only one binding meaning if it exists.

And so, the difficult question arises whether both contracting parties should be equally entitled to assert the non-existence or the existence (and meaning) of their contract.

Serious confusion may potentially arise where these foregoing multitudinous concepts overlap, particularly in the scenario where a claimant's unilateral mistake as to

terms was induced by a defendant's fraudulent misrepresentation. This chapter provides some clarification on three points.

First of all, although operative misrepresentations are mistaken beliefs induced by mis-statements, not all misrepresentations render contracts void; and this is because not all mistakes render contracts void. If a certain type of mistake renders a putative contract void, that same type of mistake should likewise render the putative contract void even if that mistake was induced by a misrepresentation. If, on the other hand, the misrepresentation does not lead to a mistake which renders a putative contract void, there is no reason in principle for insisting that the contract ought to be void for misrepresentation. Whether the misrepresentation was made fraudulently makes no difference: after all, if duress at gunpoint and innocent misrepresentation both render a contract voidable in general, there is no reason for fraudulent misrepresentation, which falls between these two vitiating factors, to produce any different result.

Secondly, Prof Stevens' recent argument, that rectification is a by-product of the (partial) rescission of a contract, is explored. It is rejected as being contradictory to well-established principles.

Thirdly, and finally, we address directly the difficult question of a claimant's choice of remedies when his unilateral mistake as to contract terms was known to, and caused by the fraudulent misrepresentation of, the defendant. The claimant's choice of remedies is justified because of the difference in the parties' relative positions, as follows.

The existence and meaning of a contract are ascertained by the objective principle at the time of formation. Its existence and meaning at the point of formation is a legal constant, ie the true legal position, which either party to the contract should be able to assert

in the usual course, if their relative positions are equal and neither party is more blameworthy or deserving than the other. Either party may assert the non-existence or existence of a putative contract and its true meaning; and one may not prevent the other from asserting that true legal position. Thus, where both parties were equally innocent, either of them may assert that the putative contract between them is void for common fundamental mistake (not amounting to a mistake as to terms), and neither may prevent the other from asserting this true legal position. Likewise, where both parties were equally blameless, either of them may seek rectification of a contractual document for common mistake as to terms, so as to make the document comport with their true agreement according to the objective principle; and neither may prevent the other from asserting this true legal position.

Yet, in some other situations, the legal complexion changes drastically and a right to choose is given to one party and not the other. The explanation for this is simply that the contracting parties' relative positions are not equal because one is more deserving or blameworthy than the other. The law allows a claimant who entered into a contract due to a defendant's misrepresentation to elect whether to rescind or affirm that contract, without according the same right of choice to the defendant. The right to elect is given to the more deserving claimant even though it will prevent the more blameworthy defendant from asserting the true legal position: where a defendant knew that a claimant had mistakenly assumed that a contractual document stated C terms when it was expressed in D terms, the claimant is entitled to get the document rectified to comport with their true agreement in C terms according to the objective principle. However, it has never been suggested that the defendant may force rectification upon the claimant in such a situation.

In summary, where a defendant's fraudulent misrepresentation induced the claimant to assume mistakenly that the contractual document stated C terms when it was expressed in D terms, the claimant has a choice of remedies. First, the claimant may choose to assert that there is no valid contract on D terms or on C terms, or he may rescind any contract for fraudulent misrepresentation. Secondly, the claimant may choose to assert that there is a contract on D terms or on C terms (but not both, since the two are mutually inconsistent). Thirdly, if the claimant elects to assert a contract on C terms, he may also seek rectification of the relevant contractual document to make it comport with C terms, because the true agreement between the claimant and the defendant is a contract on C terms according to the objective principle.

In this complex situation, the law accords the claimant with a choice of remedies since he is more deserving than the more blameworthy defendant. This is because the defendant knew of the claimant's mistake and that mistake was induced by the defendant's misrepresentation. In other words, the claimant is at liberty whether to assert the true legal position at his election, whereas the defendant's ability to assert that the true agreement between the parties is on C terms is constrained by the claimant's election.

CHAPTER 7: MISREPRESENTATION – BOOTSTRAPS, CONTRACTUAL ESTOPPEL AND CONTRACTING OUT OF RESCISSION

> 'Prima facie art XV is part of the 1982 treaty. If it is discharged by avoidance for material non-disclosure the whole contract including art XV ceases to exist. In other words, it can be said that the non-disclosure also impeaches art XV.'–*Pan Atlantic*.[1]

> 'Even if, by giving the language of section 3 of the [Misrepresentation Act 1967] a strained interpretation, a distinction could be drawn between a contract term which would exclude liability and a term which would prevent liability from arising, there is no reason to draw such a formalistic distinction and good reason not to interpret section 3 in a way which omits the latter type of term from its scope. .... No rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term.'–*First Tower*.[2]

1. Introduction, Current Orthodoxy and Bootstraps

The preceding chapters illustrate the central role of contract law's objective principle (which is addressee-centric, contextual and takes into account business common sense and the contracting parties' known characteristics) in establishing, first, the existence and

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1 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502-503 (Steyn LJ). VK Rajah & Sundaresh Menon, 'Choice of Law Clauses and the Limits on Party Autonomy' in Teo KS (ed), *Current Legal Issues in International Commercial Litigation* (NUS, 1997), 171-172: 'There is no intellectually defensible basis for allowing parts of a challenged contract to stand as if impervious to the challenge, and to apply those parts to determine whether the rest of the contract has fallen'.

2 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [96] (Leggatt LJ).

meaning of contracts; secondly, the right to seek rectification of contractual documents; and thirdly, the right to rescind contracts induced by pre-contractual misrepresentations.

Any discourse concerning the legal principles which give a contracting party the right to rescind for misrepresentation would become nothing more than a moot indulgence if those principles could easily be displaced by the stroke of a pen. That is why it is essential to examine, here, whether that right to rescind and those principles can be sidestepped simply by evasive draftsmanship of exculpatory contractual clauses.

Consistently with the fundamental idea that contracts are interpreted in accordance with the objective principle, exculpatory clauses in those contracts should generally be interpreted likewise;[3] however, exculpatory clauses may be interpreted restrictively or *contra proferentem* for policy reasons in some circumstances. The policy-motivated, restrictive, interpretative technique deployed by the courts when construing exculpatory clauses need not detain us.[4] Rather, this chapter focuses on substantive controls, such as the statutory reasonableness requirement imposed under s 3 of the MA and the 'bootstraps' argument (described below), which regulate those clauses.

The first issue addressed in this chapter is whether a contractual clause purporting to preclude rescission–and contained in a tainted contract induced by non-fraudulent misrepresentation–can pull itself up by its own bootstraps by precluding rescission of the impugned contract. The main thesis in this chapter is that the impugned contract, including any such clause (which may take the form of *inter alia* a no rescission, non-reliance, no

3 *BCCI SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, [57]-[62] (Lord Hoffmann); PS Davies, *JC Smith's The Law of Contract* (2nd edn, 2018), 204-205.

4 See the discussion in J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 366 ([9-10]).

representation or no cancellation clause) in the contract, may *not* pull itself up by its own bootstraps. In principle, but contrary to what is assumed to be current orthodoxy, such a clause should not be able to prevent the impugned contract from being rescinded (if rescission is not otherwise barred).

If the main thesis in this chapter is not accepted, then the only viable substantive constraint left to regulate such clauses found in the tainted contract purporting to preclude rescission would be the statutory reasonableness requirement imposed by s 3 of the Misrepresentation Act ('MA')[5] read with s 11(1) of the Unfair Contract Terms Act ('UCTA').[6] Unfortunately, it has become fashionable to argue that since s 3 of the MA (exemption for pre-contractual misrepresentation),[7] as well as s 2 (exemption for negligence) or s 3 (exemption for breach of contract) of UCTA,[8] subject only exemption clauses to the reasonableness requirement, therefore, exculpatory clauses could be drafted as 'basis', 'definition' or 'duty-defining' clauses instead, so as to evade being regulated as a relevant exemption clause. To keep this chapter within reasonable bounds, the regulation of consumer contracts will not be considered here.[9]

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5 Misrepresentation Act 1967 ('MA').

6 Unfair Contract Terms Act 1977 ('UCTA').

7 See HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 735-738 ([7-151]-[7-153]); *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637.

8 See HG Beale (ed), *Chitty on Contracts Volume I: General Principles* (33rd edn, 2018), 1186-1188 ([15-070]-[15-071]); *Smith v Eric S Bush* [1990] 1 AC 831, 857.

9 See Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 351-353; and J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 307 ([7-74]), 391 ([9-39]), concerning Part 2 of the Consumer Rights Act 2015 and Part 4A of the Consumer Protection from Unfair Trading Regulations 2008).

Thus, the second issue examined in this chapter is whether the statutory reasonableness requirement may be sidestepped by evasive drafting of an exculpatory clause as a 'basis', 'definition' or 'duty-defining' clause, rather than phrasing it as an outright exemption clause. As this thesis concerns the rescission of contracts for misrepresentation, that issue is refined more specifically, as follows. Since only exemption clauses which purport to exclude a 'liability' or 'remedy' for misrepresentation will be ineffective under s 3 of the MA unless they satisfy the statutory reasonableness test, the specific issue here is: are clauses such as 'non-reliance' or 'no representation' clauses, which purport to prevent an operative misrepresentation from arising at all (rather than exclude liabilities or remedies flowing from an operative misrepresentation), effective (to preclude rescission) without being subject to the s 3 reasonableness requirement? Relying on *First Tower*,[10] the later part of this chapter concludes that the policy objectives underlying the statutory reasonableness requirement of s 3 of the MA cannot be easily circumvented by evasive draftsmanship, and that s 3 focuses on the substance and effect of a clause rather than its label or form.

1.1 Misrepresentation and Rescission

If a defendant makes a misrepresentation which induces the claimant to enter into a contract with the former, a variety of legal consequences may follow.

[10] *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637.

First, if the representation amounts to an effective contractual undertaking which is breached by the defendant,[11] the claimant is entitled to damages on a contractual measure. If the breach of contractual undertaking amounts to a sufficiently serious breach of an innominate or intermediate term which deprives the claimant of substantially the entire benefit intended for him under the contract or if it is a breach of condition, the claimant may also elect to terminate the contract.

Secondly, the claimant may elect to retroactively rescind the impugned contract which he was induced to enter into by an operative misrepresentation. Rescission results in the contract being set aside ab initio and the claimant is also entitled to (an indemnity plus) damages on a tortious measure.[12] Where the misrepresentation was not fraudulent, the court also has a statutory discretion under section 2(2) of the MA to award 'damages in lieu of rescission' if it is equitable to do so, particularly where the misrepresentation was relatively unimportant and the consequences of rescission would be disproportionately harsh.[13]

When a claimant seeks damages and asserts a right to rescind because of the defendant's pre-contractual misrepresentation, a dilemma arises if, apart from a clause restricting its liability for damages, the defendant also points to a separate term in the tainted contract purporting to preclude rescission (say, a 'non-reliance' or 'no representation', a 'no cancellation' or 'no rescission' clause). The defendant might argue

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11 It is clear from s 1(a) of the MA that an operative misrepresentation can also amount to a contractual term concurrently.

12 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 88 ([4-18), 243 ([6-52]), 275 ([7-32]).

13 *William Sindall plc v Cambridgeshire County Council* [1994] 1WLR 1016, 1036.

that the claimant cannot rescind because he contracted to give up the right to rescind; and that the defendant's liability for damages is restricted by a separate exemption or limitation clause. 'No representation' or 'non-reliance' clauses are all the more insidious: the defendant's argument might be that the claimant can neither rescind nor claim damages because he cannot establish any operative misrepresentation at all (since he contracted not to assert any representation or reliance).

Contractual terms purporting to restrict liability for misrepresentation are generally valid; however, their effectiveness may be constrained by: interpreting them *contra proferentem*, rules precluding the exculpation of liability for fraud[14] or breach of fiduciary duties,[15] and by statutory prescriptions that certain exculpatory clauses may be valid only if reasonable.[16] This seems correct in general if the exculpatory clause forms part of a *valid* contract.

It is commonly assumed that a clause precluding rescission of a contract for non-fraudulent misrepresentation might be effective in English law, even where the clause is part of the impugned contract itself. This chapter challenges this assumption as being wrong in principle:[17] after all, if a contract is voidable for, say duress or misrepresentation, then a term therein should not be able to prevent rescission because the contract (including

14 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349.

15 *Gluckstein v Barnes* [1900] AC 240; *Armitage v Nurse* [1998] Ch 241.

16 Eg, MA, s3; UCTA, s11(1).

17 See generally KCF Loi, 'Banks, Agency and Misrepresentation' [2012] SJLS 441; KCF Loi, 'Misrepresentation and Rescission' (Ch 14 in Nolan, Tang and Low (eds), *Trusts and Modern Wealth Management* (CUP, 2018), 425-457).

any of its terms) cannot pull itself up by its own bootstraps. This should be as true for misrepresentation as it (undoubtedly) is for duress.[18]

1.2 The Current Orthodoxy

In essence, this chapter reopens an old controversy. Current orthodoxy appears to assume that 'the right to rescind for non-fraudulent misrepresentation can be limited or excluded by an express provision of the agreement', and that one cannot sidestep the clause by purporting to rescind the contract in which the clause is contained.[19]

Nonetheless, this old controversy must be examined afresh because the supposed orthodoxy seems patently circular and cannot be defended in a principled manner.[20]

2. Vitiating Factors, Defective Consent and Rescission

We start by examining duress, unconscionable bargain and undue influence as vitiating factors which trigger the right to rescind. According to Prof Enonchong: [21]

> 'Where a complainant has entered into a contract as a result of the other party's duress, undue influence or unconscionable dealing, the complainant is entitled to certain remedies. The main remedy is rescission. … Rescission is the remedy by which a subsisting transaction is avoided or set aside on

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18 *Borrelli v Ting* [2010] UKPC 21, [40] (Lord Saville).

19 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.02]); *E Macdonald, Exemption Clauses and Unfair Terms* (2nd edn, 2006), 301 (fn 2). However, stopping short of recognising the efficacy of a clause precluding the right to rescind, J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 88 ([4-17] and fn 77) observed: 'So it has been held that that an exclusive jurisdiction clause in a contract can be given effect notwithstanding the avoidance of the contract for misrepresentation. Similarly, a clause requiring disputes to be submitted to arbitration can survive the avoidance. And clauses in the contract which make other provision for the consequences of rescission ought also to have effect – such as limitation and exclusion clauses. … eg a clause excluding remedies in damages for the misrepresentation (but not excluding rescission of the contract).'

20 *Cf* A Trukhtanov, *Contractual Estoppel* (1st edn, 2018), 129 ([5.28]), 136 ([5.38]).

21 N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (3rd edn, 2019), 470-471 ([28-001]-[28-003]).

> the ground of a vitiating factor such as duress, undue influence or unconscionable dealing. … First, it cancels all future contractual obligations. … Secondly, the effect of rescission is also retrospective. It nullifies the contract *ab initio*. In other words, the contract is treated in law as never having come into existence. Rescission for duress, undue influence or unconscionable dealing is therefore a remedy that not only looks forward to put an end to future obligations but also looks backwards to undo, as far as possible, the effects which the transaction has already produced. Rescission seeks to put the complainant in the position in which he would have been if he had not entered into the impugned contract. In this sense, a right to rescission is a right to "unwind" the contract…'.

The law in relation to misrepresentations, according to Prof Cartwright, is identical;[22] and it is not difficult to see why. Generally, all these aforementioned vitiating factors lead similarly to a right to rescind because of the combination of two requirements (although unconscionable bargains must, additionally, be substantively unfair[23]). First, the *quality of the initial consent or agreement of one contracting party must have been defective or impaired* in the eyes of the law *at the time of contract formation*. The initial consent must have been defective because of misapprehension (misrepresentation), illegitimate pressure or lack of practical choice (duress), bargaining vulnerability or impairment (unconscionable bargain), and misplaced confidence, trust or reliance (undue influence). Secondly, this defect or impairment must have been unconscientiously taken advantage of, or induced, by the other party. Where the doctrine of notice applies, a person may not in good conscience take advantage of a contract entered into as a result of impaired or defective consent induced by *someone else*: thus, a wife may rescind a contract of guarantee or charge with a bank if the bank had notice or was put on inquiry that the

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22 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 77- 78 ([4-03], [4-06], fn 16, fn18).

23 *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94-95 ('oppressive' or 'overreaching' bargain).

contract resulted from her husband's misrepresentation or undue influence,[24] or even duress[25] and unconscionable bargain.[26]

Therefore, regardless of whether a contract was tainted by misrepresentation, unconscionable bargain, duress or undue influence, it seems tolerably clear that: rescission vindicates the legal and factual phenomenon (that the defendant had unconscientiously induced or taken advantage of the initial defect of consent at the time of contract formation), by retroactively treating the tainted contract as if it was not made:[27]

> 'At the moment of rescission of the contract, the contract becomes avoided *ab initio*: it is to be as if there had been no contract. This retrospective aspect of the remedy is natural in the context of the English law of contract: the circumstances in which a contract is void or voidable are generally only where there was a defect in its formation ... In the case of misrepresentation, there was a sufficient agreement between the parties to form a contract (and so the contract was not void *ab initio*), but on the representee's side it was based on a false assumption which was created or perpetuated by the representor's statement. The remedy therefore operates back to the time at which the defect arose: the moment of formation'.

Given the fundamental similarities between the various vitiating factors and their common rationale for grounding a retroactive right to rescind, what is assumed to be current orthodoxy seems incoherent. The law should not be different for a claimant who purports to rescind a contract containing a no rescission, non-reliance clause or any other

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24 *Barclays Bank plc v O'Brien* [1993] UKHL 6, [1994] 1 AC 180; *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 AC 773.

25 Especially given the close relationship between duress and actual undue influence (see E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 515 ([10-019])) and the 'obvious analogy' between rescission for fraudulent misrepresentation, undue influence and duress (see *Barton v Armstrong* [1976] AC 104 (Lord Cross of Chelsea)).

26 *Credit Lyonnais Bank Nederland NV v Burch* [1997] 4 All ER 144, 152-153 (Millett LJ).

27 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 78 ([4-06], fn 18).

clause precluding rescission, regardless of whether his ground for rescission is misrepresentation, undue influence, unconscionable bargain or duress.

The law would be defective if its protection against duress, unconscionable bargains, undue influence – or misrepresentation – can be easily sidestepped by the mere inclusion of a no rescission or other boilerplate clause, where the clause is held up by nothing other than the claimant's initial defective consent. This is not mere rhetoric.

It is particularly difficult to reconcile current orthodoxy – that a no rescission clause effectively precludes the right to rescind for non-fraudulent misrepresentation even where a claimant purports to rescind the very contract in which the clause is found[28] – with the principle in *Borrelli*[29] that it is 'not possible to contract out of the right to rescind for duress.'[30] Likewise, it is inconceivable that a no rescission clause in a contract induced by undue influence or caused by an unconscionable bargain could preclude rescission. Indeed, O'Sullivan, Elliott and Zakrzewski's authoritative treatise deals exhaustively with the various vitiating factors triggering the right to rescind, but their chapter dealing with 'contracting out' of rescission merely singles out non-fraudulent misrepresentation. It does not deal with undue influence or unconscionable bargains; and apart from saying that *Borrelli* prohibits the contracting out of the right to set aside a contract for duress, their chapter on 'contracting out' is devoted *entirely* to the 'the freedom parties have to contract out of rescission' for non-fraudulent misrepresentation.[31]

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28 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.02]).

29 *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718, [39]-[40] (Lord Saville of Newdigate).

30 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.01]).

31 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.01]).

The exceptional treatment of non-fraudulent misrepresentation is difficult to justify. It might be objected that duress at gunpoint is radically more blameworthy compared to non-fraudulent misrepresentation; that non-fraudulent misrepresentation is less culpable than undue influence, duress or unconscionable bargains; and that these differences justify upholding clauses precluding rescission for non-fraudulent misrepresentation but not for the other vitiating factors. It might even be objected that the clause should be effective because of freedom of contract: the parties agreed via that clause to preclude rescission.

However, these objections miss the point. The second objection, based on freedom of contract, holds no water for duress, undue influence or unconscionable bargains; and, by parity of reasoning, it should not work for non-fraudulent misrepresentation too. The first objection, that non-fraudulent misrepresentation is not as strong a vitiating factor as the others, fares no better. Whereas unconscionable bargains, duress[32] and undue influence[33] do not necessarily constitute actionable wrongs in themselves, all pre-contractual misrepresentations are presumptively actionable wrongs sounding in damages (until it is proven that the defendant believed in his representations and had reasonable grounds therefor[34]). And, crucially, the duress in *Borrelli*[35] came nowhere near the threat of violence; indeed, the claimant-liquidator was not even under any personal economic pressure. The defendant's obstruction of the liquidator's proposed scheme of arrangement

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32 *The Universe Sentinel* [1983] 1 AC 366, 385 (Lord Diplock); *The Evia Luck (No. 2)* [1992] 2 AC 152, 166-167.

33 Damages are not awarded for undue influence *per se*, but the court may make a monetary award in some cases where rescission is no longer possible: *Mahoney v Purnell* [1996] 3 All ER 61; E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 525 ([10-038]).

34 MA, s2(1).

35 *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718, [39]-[40] (Lord Saville of Newdigate).

might have prejudiced the company's creditors but that was no skin off the liquidator's back. If indeed there is no authority in support of a no cancellation clause precluding the right to rescind for duress, undue influence or unconscionable bargain (where the contract in which the clause is found is itself vitiated), then clearly the exceptional treatment for non-fraudulent misrepresentation is unjustifiable. This makes sense.

An agreement supported by consideration binds the contracting parties because it embodies the parties' consensual bargain. If the law regards one party's initial consent or agreement during contract formation as sufficiently defective (because of any vitiating factor), this gives him the right to rescind because the initial impairment is treated as sufficient to vitiate his initial consent. Consequently, the contract is also vitiated because it is founded upon his vitiated consent, so rescission winds the parties back to the position as if the contract as a whole never came about. The vitiating factor generally vitiates the entire consensual bargain, not just particular bits of the contract. The same vitiating factor taints and vitiates that entire contract and *all* its clauses, including those which purport to exclude rescission.

We can demonstrate the point with an illustration. If the defendant's threat of bodily harm induces the claimant to enter into a contract with the defendant by signing a document, that contract may be rescinded for duress.[36] This is an atypical threat *in extremis* but *Borrelli* shows that the same right to rescind flows from any type of duress, even duress of goods and economic duress. What if the defendant, having read textbook accounts of 'contracting out' of the right to rescind, inserts a no rescission clause in the document on

[36] *Barton v Armstrong* [1976] AC 104.

the next occasion when he forces another person to sign another contractual document? What if the defendant forces the claimant to sign that document as well as a 'separate' document evincing a separate no rescission contract at the same time? It should make no difference whether a no rescission clause in the main contract or a separate no rescission contract is involved unless, of course, the separate no rescission contract was entered into after the claimant was fully liberated from the pressure constituting duress.

It matters not whether the defendant forces the claimant to sign one contractual document or two, whether a contractual document contains two simple clauses or is a complex document spanning hundreds of pages, and whether the signed contractual document contains this kind of term or that type of clause: the same consequence applies. This is because whatever they contain, each document was signed under duress for the same threat. That means the initial consent to each contract and contractual document *as a whole* was defective at the moment of contracting and each contract and all its clauses are susceptible to rescission. That is why it makes no difference whether the signed document contains a no rescission clause or non-reliance or any other type of clause at all, or whether a 'separate' no rescission contractual document is signed.

The point is a simple, but fundamental, one. Thus, in *Borrelli*,[37] the liquidator entered into a settlement agreement to cease investigations against the former chairman of the insolvent company in exchange for his cooperation to not obstruct the liquidator's proposal to set in place a scheme of arrangement. When the liquidator purported to rescind the settlement agreement on the ground that it was entered into as a result of the former

[37] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.

chairman's duress (threat to obstruct the liquidator's scheme), the former chairman countered that the settlement agreement was drafted very widely so as to preclude the liquidator's right to withdraw therefrom. In other words, the former chairman argued that the very settlement agreement itself was worded to preclude its own rescission, even if it was procured by illegitimate pressure. Unsurprisingly, the Privy Council held that the former chairman's argument – that 'it is possible, by the use of illegitimate means, to obtain a binding agreement from which the party subject to the duress cannot withdraw' – was an 'unacceptable proposition'.[38] Thus, if one party causes the other party to sign a contractual document under duress, it is difficult to see how any clauses therein purporting to preclude rescission could save the contract from being set aside. The victim of duress can set aside the contract in its entirety, precisely because it was induced by duress, so any clauses therein are vitiated to the same extent. To uphold a contract entered into by duress, based on nothing more than a clause in that contract which purports to preclude rescission, is unacceptably circular: the clause draws its legal force, if any, from the fact that it is part of a binding contract, but the validity of the contract itself is vitiated by duress.

For exactly the same rationale, where a defendant made a material misrepresentation which induced the claimant to enter into a contract, the claimant may rescind a contract induced by a defendant's misrepresentation. In principle, the claimant's right to rescind should not be precluded just by inserting a no rescission clause in the tainted contract or if the claimant also entered into a separate no rescission contract, unless the misrepresentation was no longer operative when he entered into the latter.

[38] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718, [40] (Lord Saville of Newdigate).

This conclusion is consonant with the judicial approach towards the correction of defective consent and affirmation, which focuses on the *quality* of the claimant's consent.

3. Affirmation and Correcting Defective Consent

Rescission *ab initio*, or the unwinding of the tainted contract, is how the law corrects the unwanted legal effect of the vitiating factors, by returning the parties to the position as if the contract was not entered into.[39]

However, if circumstances permit it, the law also allows for the correction or repair of what might possibly become a party's initial defective consent. Thus, a statement, which might otherwise have amounted to a pre-contractual misrepresentation giving rise to a right to rescind, will not amount to misrepresentation if its initial falsity was corrected in a timely fashion before it was acted upon by entering into the tainted contract.[40] In effect, the original statement no longer amounts to a misrepresentation because the representee's consent is 'cured' of its prima facie defect. It is also well-established that a representee is entitled to rescind a contract entered into in reliance on a pre-contractual misrepresentation even if he could have discovered the falsity if he had exercised reasonable diligence.[41]

Clearly, the burden falls upon the representor to *correct any initial misapprehension* in the representee's mind which was induced by his misrepresentation before the representee acts on it by entering into the contract.[42] The law is evidently

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39 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 77 ([4-09]).

40 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 33 ([3-12]).

41 *Redgrave v Hurd* (1881) 20 Ch D 1, 14 (Jessel MR), 23 (Baggallay LJ).

42 *C.f.* J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 34 ([3-12], fn 45): 'Where, however, the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation will have been "corrected" as long as the claimant is bound by those terms'. One

concerned with the *quality* of the misrepresentee's consent *at the time the contract is entered into*, rather than whether he had exercised due care.

There are two practical reasons why a contract, even one containing a no rescission clause, which was itself the subject of defective consent will usually not 'correct' the misrepresentation which induced the contract (bearing in mind that generally only bringing the truth to the timely attention of the representee can cure the initial defective consent by 'correcting' the misrepresentation). First, representations of matters *extrinsic* to the contract (*not* amounting to a misrepresentation of *terms*) will usually not be corrected by the terms of the contract because it is unusual for terms to address *extraneous* matter. The purchaser in *Redgrave*[43] was induced to buy the seller's house and practice by misrepresentations about the value of the seller's practice and the purchaser in *Smith*[44] was induced to buy the seller's hotel by a misrepresentation that the hotel was let to a 'most desirable tenant', and the purchasers in both cases were entitled to rescind. The misrepresentations in both cases concerned facts extraneous to the contract: the misrepresentations did not relate to the existence or scope of any term of the contract. It is, of course, possible for the terms of the contract to purport to address pre-contractual misrepresentations which are *intrinsic* to the contract, particularly misrepresentations relating to the terms of the contract; for example, the terms might provide that an investment services contract is an 'execution-only' contract even though it was previously

must, however, note Prof Cartwright's requirement that a 'correction' by the terms of the tainted contract would be effective only if those terms are binding in the first place. This does not contradict the central thesis in this chapter (that the tainted contract cannot pull itself up by its own bootstraps if rescinded), since there is no assumption that a term in a vitiated contact is binding.

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

44 *Smith v Land and House Property Corporation* (1884) 28 Ch D 7.

represented that the defendant undertakes advisory duties in addition to executing the claimant's investment decisions, or the terms might clarify the nature of the investment product which was previously misdescribed in pre-contractual representations.[45] Nonetheless, the point remains that it is unusual for terms of a contract to address misrepresentations of fact (or other relevant matters) which are *extraneous* to the contract. Secondly, exculpatory clauses such as exclusion or limitation of damages clauses, no rescission clauses or non-reliance clauses will normally not correct pre-contractual misrepresentations, again because they will usually not touch upon the facts (or other relevant matters) which had been falsely represented. It is of course possible for exculpatory clauses to address prior misrepresentations, for example, by correcting any prior misrepresentations of fact; however, it remains true that exculpatory clauses will normally not do so, since they are typically drafted to address the prospective *legal consequences* of misrepresentation rather than the *facts which were previously misrepresented*.

The law's approach towards affirmation, which is the *subsequent* election to give up one's right to rescind, mirrors (at the subsequent time of affirmation) the requirement that the representee's initial defective consent can only be corrected by free and informed consent (at the time of contract formation). Thus, affirmation is only effective *if the original vitiating factor* which caused the initial agreement or consent to be defective or impaired has been corrected and, furthermore, the affirmation must be free of any other

[45] See eg, *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582; *Deutsche Bank AG v Chang Tse Wen* [2013] SGCA 49.

'fresh' vitiating factor.[46] An 'election' to affirm 'has to be an informed choice, made with knowledge of the facts giving rise to the rights'.[47] Affirmation arises from the claimant-victim's unilateral election, so no agreement or contract with the defendant-perpetrator is necessary; [48] but, of course, affirmation *can* arise through an agreement subsequent to the main impugned contract.

In the 'context of rescission for misrepresentation, the representee cannot be held to have affirmed … if he did not have at least knowledge of the falsity of the statement which gives rise to the right to rescind'.[49] Likewise, Prof Enonchong has helpfully provided examples to show that:[50] if a transaction is voidable because of undue influence,[51] duress[52] or it comprised an unconscionable bargain,[53] a 'subsequent agreement which purports to affirm' it so as to preclude the right to rescission will 'similarly be ineffective if it was induced by a similar wrong' or if the original vitiating factor has not 'ceased to operate' on the victim's mind when the subsequent affirming agreement was formed.

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46 N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (4th edn, 2019), 537 ([29-007]).

47 *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 399.

48 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 107 ([4-42]); *The Kanchenjunga* [1990] 1 Lloyd's Rep 391, 398.

49 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 108 ([4-44]): the separate controversy, whether a representee cannot be held to have affirmed unless he *also* knew that he had the *right* to rescind (*Peyman v Lanjani* [1985] Ch 457, 494 (May LJ)), need not detain us.

50 N Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (4th edn, 2019), 537 ([29-006]).

51 *Moxon v Payne* (1872) 8 LR Ch App 881, 885 (Sir WM James LJ).

52 *Universe Tankships of Monrovia Inc v ITF* [1983] AC 366, 384.

53 *Crowe v Ballard* (1790) 1 Ves Jun 215, 220 (Lord Thurlow LC).

So, the foregoing examples on (subsequent) affirmation and (initial) correction demonstrate two important principles. First, the subsequent – separate – affirmation agreement is not effective (to prevent the initial impugned contract from being rescinded) unless no vitiating factor was operative when the affirmation agreement was entered into. The second principle mirrors the first: if a party is entitled to rescind an impugned contract because his initial consent was defective because of a vitiating factor operating on his mind, a no rescission clause in the initial impugned contract cannot effectively preclude his right to rescind. The contract and all its clauses are liable to be set aside for precisely the same reason, namely, that his initial consent was impaired. The contract, and its clauses, will be effective only if the vitiating factors were no longer operating to impair his consent at the time of formation of the contract.

Critically, it follows, from these two principles, that treating the no rescission clause as if it were notionally an agreement 'separate' from the initial impugned contract, cannot make the clause effective either, unless no vitiating factor was operative at the time of formation of both the initial impugned contract and the 'separate' no rescission agreement. Absence of an operative vitiating factor is essential for the efficacy of the no rescission clause, regardless of whether it is part of the initial impugned contract or in a separate agreement.

It is crucial to bear this in mind when we see later in this chapter, that current orthodoxy is premised on the doctrine of 'separability', so the no rescission clause (by analogy with an arbitration clause) is treated as a notionally separate agreement from the impugned contract. This is the fatal flaw of the current orthodoxy in resting the presumed effectiveness of no rescission clauses on the 'separability' doctrine.

The logic is compelling: if free and informed consent is required before one is said to have entered into an *effective agreement to voluntarily give up his right to rescind* in all cases (including correcting the initial defective consent or subsequent affirmation), there is no reason why the rule should be any different for *no rescission clauses* in relation to misrepresentation.

4. The House of Lords Landmarks in *O'Brien* and *Etridge*

Apart from logic, the main thesis in this chapter is also supported implicitly by House of Lords landmark cases on misrepresentation and undue influence. The two leading cases, *O'Brien*[54] and *Etridge*,[55] which are cited in textbook accounts of when banks are 'put on inquiry' and infected by 'notice' that a wife's contract of guarantee or charge in favour of the bank had been procured by her husband's 'misconduct', are in fact concerned with both the husband's undue influence and *misrepresentation*. This much is clear from Lord Nicholls' discussion (of *O'Brien*) in *Etridge*[56] and Lord Browne-Wilkinson's opening paragraph in *O'Brien*.[57] Lord Browne-Wilkinson held that a wife could rescind a guarantee or charge in favour of a bank if it was procured by the husband's misrepresentation or undue influence and the bank had notice thereof; and that the bank could enforce the guarantee or charge *only if* the bank had taken 'reasonable steps' to satisfy itself that the transaction was freely entered into with knowledge of the true facts. Lord Browne-

54 *Barclays Bank plc v O'Brien* [1993] UKHL 6; [1994] 1 AC 180.

55 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [42] (Lord Nicholls of Birkenhead).

56 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [42] and [54] (Lord Nicholls of Birkenhead).

57 *Barclays Bank plc v O'Brien* [1993] UKHL 6; [1994] 1 AC 180 (Lord Browne-Wilkinson).

Wilkinson's prescription was that, for *future cases*, such 'reasonable steps' would normally consist of advising the wife at a private meeting with the bank's representative (in the husband's absence) to take independent legal advice and warning her of the potential risks.

Lord Nicholls acknowledged that,[58] despite Lord Browne-Wilkinson's prescription in *O'Brien*, banks have been understandably reluctant to send *its own representatives* to a private meeting so as to avoid allegations that the bank's representatives made unfulfilled assurances at such meetings: as such, the question as to the 'steps a bank should take when it has been put on inquiry' and whether the task of attending a private meeting with the wife could be delegated by the bank to *an independent solicitor* became the 'principal area of controversy' in such cases. Lord Nicholls considered that a bank should 'take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction'; and that this will 'mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned'.[59] Lord Nicholls devoted 31 paragraphs of his judgment in *Etridge*[60] to prescribe in detail, *for the future*, the nature of those 'reasonable steps' a bank ought to take when it is put on inquiry. These include the bank's need to obtain a solicitor's confirmation that he had brought home to the wife the risks being assumed under the guarantee or charge, the bank's disclosure to the wife of information relating to the husband's indebtedness, the nature of the solicitor's advice to the wife, how that advice ought to take place at a face-

58 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [3] (Lord Bingham of Cornhill), [50]-[55] (Lord Nicholls of Birkenhead).

59 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [54] (Lord Nicholls of Birkenhead).

60 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [50]-[81] (Lord Nicholls of Birkenhead).

to-face meeting with the wife in the husband's absence, whether the solicitor should be regarded as the bank's agent in this context, and whether the solicitor must act for the wife alone in order to avoid conflicts of interests.[61]

All banking lawyers are familiar with the steps set out by Lord Browne-Wilkinson and Lord Nicholls for future use. Indeed, Lord Nicholls' prescription must have become standard operational procedure because they were obviously designed by Lord Nicholls as a pragmatic device, with banking practice and banking needs firmly and clearly in mind: *in order to assist banks to secure the validity of their guarantees and charges* in a straightforward and practical way (while avoiding the risks associated with sending the bank's own representative to advise a wife in a private meeting).[62]

One might ask, rhetorically and perhaps unfairly, whether any banking lawyer would be willing to advise his banker-client to forgo the standard operational procedure prescribed in *O'Brien* and *Etridge* and, instead, rely solely on a no rescission clause to prop up the enforceability of its contracts of guarantee and charge. Put another way, is it realistic to suppose that the current Supreme Court would allow a simple boilerplate provision such as a no rescission clause to erase what little equitable protection a guarantor or chargor has? It is obviously difficult to make a conclusive argument on the basis of *O'Brien* or *Etridge* since their Lordships did not explicitly say that no rescission clauses would be ineffective to prevent rescission. Nonetheless, if indeed such a simple boilerplate clause in a contract of guarantee or charge would have worked to preclude a wife from rescinding

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61 Similarly, Lord Scott dedicated 28 paragraphs of his judgment to a discussion of these matters: *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [163]-[191] (Lord Scott of Foscote).

62 *Royal Bank of Scotland plc v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 AC 773, [54]-[56] (Lord Nicholls of Birkenhead).

the contract on the ground that the bank had notice that it was entered into as a result of the husband's misrepresentation or undue influence, surely one of the ten law lords in *O'Brien* or *Etridge* would have mentioned it over the course of a decade? Surely, if that was indeed an option, the mere adoption of a boilerplate clause would have been the most pragmatic solution for the banks' adoption for future use in securing the validity of their charges and guarantees in a practical fashion? It would take very much to persuade one that their Lordships, in two leading House of Lords decisions spanning a decade, have been wasting everyone's time on a moot point that could have been solved by adopting a simple boilerplate clause.

If a mere no rescission clause would *not* suffice, and, therefore, a bank could ensure the validity of a contract tainted by *someone else's* (the husband's) misrepresentation (of which the *bank had notice*) *only if* it took reasonable steps to satisfy itself that the wife, knowing the true facts, freely entered into the transaction with the bank knowing: then, the case must be *a fortiori* where the contract was tainted by *the bank's* own misrepresentation.

On this view of *O'Brien* and *Etridge*, the current orthodoxy, that no rescission clauses preclude a party from rescinding the contract of which the clauses form a part (on the ground that it was induced by the other party's misrepresentation), simply cannot stand.

5. The Assumptions under Current Orthodoxy

All this makes it necessary to examine why current orthodoxy assumes that clauses purporting to preclude rescission for non-fraudulent misrepresentation should be singled out for this exceptional treatment. First, limitation and exclusion clauses restricting the

right to damages ought, generally, to have effect.[63] This does not seem controversial, so long as their validity is not in issue. A contract tainted by a vitiating factor such as misrepresentation is voidable, not void, and the contract and its terms including any limitation or exclusion clauses could remain effective for a variety of reasons. For example, the representee's right to rescind may be lost because it would prejudice the intervening property rights of an innocent third party purchaser, substantive restitution is no longer possible, the contract has been affirmed or because the court exercised its statutory discretion under section 2(2) of the MA to award damages in lieu of rescission. In such cases, the limitation or exclusion clause remains valid as a matter of general law, but it may be subject to the *contra proferentem* canon of construction and any relevant statutory controls of unreasonable exemption clauses such as section 3 of the MA.

However, the controversy begins when the point is extended (from clauses restricting the right to damages) to cover clauses which purport to exclude the right to rescind. Thus, O'Sullivan, Elliott and Zakrzewski say that 'the right to rescind for non-fraudulent misrepresentation can be limited or excluded by an express provision of the agreement':[64] furthermore, citing *Peekay*,[65] *HIH*,[66] *Boyd & Forrest*,[67] *Toomey*[68] and *Pan*

63 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 88 ([4-17] and fn 77).

64 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.02]).

65 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582, [56]-[57] (Moore-Bick LJ).

66 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [9].

67 *Boyd & Forrest v The Glasgow & South-Western Railway Co* [1915] SC 20 (HL), 36.

68 *Toomey v Eagle Star Insurance Ltd (No 2)* [1995] 2 Lloyd's Rep 88, 91.

Atlantic Insurance,[69] they explicitly state that a representee 'cannot escape such a provision by arguing that it is avoided ab initio'. These cases will be examined in turn.

First of all, speaking in relation to non-reliance or no representation clauses (rather than no rescission clauses), Moore-Bick LJ opined in *Peekay* that:[70]

> '*The effectiveness of a clause of that kind, may be challenged on the ground that the contract as a whole, including the clause in question, can be avoided if in fact one or other party was induced to enter into it by misrepresentation.* However, I can see no reason in principle why it should not be possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear … [emphasis added]'

It is difficult to see how *Peekay* could be taken to support O'Sullivan, Elliott and Zakrzewski's proposition. It is evident from the quoted passage that Moore-Bick LJ meant exactly the opposite. It is true that his Lordship said that it was 'possible for parties to an agreement to give up any right to assert that they were induced to enter into it by misrepresentation, provided that they make their intention clear'; and this is obviously uncontroversial particularly where the contract containing the exculpatory clause is valid and binding, say, because of affirmation, impossibility of *restitution in integrum*, etc. On the other hand, Moore-Bick LJ's italicised sentence in the above-quoted paragraph made it clear that any exculpatory clause in the contract such as a no representation clause (which purported to negate misrepresentation and hence negate the right to rescind) would be ineffective if the vitiated contract, including the exculpatory clause, was rescinded. This is not surprising in the context of that case because, importantly, the contract in *Peekay* was

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69 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502 (on appeal [1994] 2 Lloyd's Rep 427).

70 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582, [56]-[57] (Moore-Bick LJ).

'not in fact induced by misrepresentation', had not been rescinded and remained binding.[71] Thus, Prof Cartwright does not seem to regard *Peekay* as authority for as wide a proposition as that stated by O'Sullivan, Elliott and Zakrzewski.

Instead, Prof Cartwright cites *Peekay* as authority for the uncontroversial point that where 'the true position appears clearly from the very terms of the contract which the representee claims to have been induced to enter into by the misrepresentation, the misrepresentation would have been "corrected" as long as the claimant is bound by those terms'. [72] Since Prof Cartwright proceeds on the assumption that the exculpatory clause must have been 'binding' in the first place, it seems clear that 'neither Prof Cartwright nor *Peekay* support the dubious proposition that a voidable clause in a voidable contract which is itself being rescinded … could pull itself up by its own bootstraps'.[73]

Secondly, it seems clear that in *HIH*,[74] Lord Bingham accepted that it was 'common ground' between the litigating parties that the relevant clause in that case should be construed to preclude the insurers (HIH) from avoiding the insurance contract with the bankers (Chase) on the ground of misrepresentation by third parties (Heaths). His Lordship and the litigating parties were solely concerned with how the clause should be construed, in particular, whether it should be construed to also mean that the third parties had no authority to make representations on behalf of the bankers. The question of principle, whether one ought to be barred from rescinding the contract induced by the other

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71 KCF Loi, 'Banks, Agency and Misrepresentation' [2012] Singapore Journal of Legal Studies 441, 453.

72 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 34 ([3-12], fn 45).

73 KCF Loi, 'Banks, Agency and Misrepresentation' [2012] SJLS 441, 453.

74 *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 349, [9] (Lord Bingham of Cornhill).

contracting party's misrepresentation merely because of a no rescission clause, was neither suggested nor addressed. The answer to this question must be sought elsewhere.

Although Lord Shaw's dicta in *Boyd & Forrest*[75] was cited by O'Sullivan, Elliott and Zakrzewski, it is unclear whether his Lordship actually supported the proposition that a contract which is voidable for misrepresentation cannot be rescinded if it contains a no rescission clause. The construction contractors' action against the railway company for payment in excess of the contract price, on the ground that they had been induced to enter the contract with the railway company by innocent misrepresentation, failed. The House of Lords held that, in the first place, there was in fact no misrepresentation; secondly, no action for damages for innocent misrepresentation was available (since the case predated section 2(1) of the MA); and thirdly, no *quantum meruit* payment could be ordered because the contract could no longer be rescinded (even if misrepresentation had been established) since *restitutio in integrum* was no longer possible on the facts. Whilst their Lordships were clear that rescission was barred because *restitutio in integrum* was no longer possible, it was not clear whether their Lordships explicitly stated that rescission could be barred simply on the basis of a no rescission clause. Lord Shaw's statement that the exclusion clause at hand 'affords … complete protection' was clearly not directed at the right to rescind and was very naturally directed towards excluding liability for damages (or quantum meruit). There are two reasons for this. First, the House of Lords dealt at length with the issue why *restitutio in integrum* was considered impossible on the facts and how that fact barred rescission. All this would have been unnecessary if rescission was barred merely by a contractual provision. Secondly, and crucially, the relevant clause was not in

75 *Boyd & Forrest v The Glasgow & South-Western Railway Co* [1915] SC 20 (HL), 36.

fact a no rescission clause purporting to preclude the right to rescind. It was simply a general exemption clause in the contract between the construction contractors and the railway company which provided that the railway company was neither liable nor responsible for any inaccuracies in the engineers' journal (of bores of the surrounding strata compiled from the borers' notes). As with *HIH*, no argument was made in *Boyd & Forrest* as to whether rescission ought to be precluded merely on the strength of a no rescission clause, and the answer to that question must be sought elsewhere.

The next case is Colman J's interlocutory decision in *Toomey*.[76] Having noted that the point was assumed but not argued in *Anstey*,[77] Colman J accepted, on the strength of Lord Shaw's dicta in *Boyd & Forrest* and Steyn LJ's judgment in *Pan Atlantic Insurance*[78], that it was 'possible to write a clause into a contract which does in fact exclude the right to rescind the contract for material misrepresentation or material non-disclosure'.[79] The authority of *Toomey* must however be seriously qualified because Colman J made it plain that 'in the absence of authority' he 'would have taken the opposite view', and because neither *Boyd & Forrest* nor *Pan Atlantic Insurance* can be treated as clear authority on the point.

Ironically, the same judicial reluctance expressed by Colman J in *Toomey* is apparent in Steyn LJ's judgment in *Pan Atlantic Insurance*,[80] which must now be

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76 *Toomey v Eagle Star Insurance Ltd (No 2)* [1995] 2 Lloyd's Rep 88, 91 (Colman J).

77 *Anstey v The British Natural Premium Life Association Ltd* [1908] 24 TLR 871.

78 *Pan Atlantic Insurance Ltd v Pine Top Insurance Co* [1993] 1 Lloyd's Rep 496, 502 (Steyn LJ).

79 *Toomey v Eagle Star Insurance Ltd (No 2)* [1995] 2 Lloyd's Rep 88, 91 (Colman J).

80 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502 (Steyn LJ); on appeal [1994] 2 Lloyd's Rep 427.

examined. The reinsurer (Pine Top) purported to avoid a reinsurance contract (the '1982 treaty') with the reinsured (Pan Atlantic) which was induced by material non-disclosure. Whereas contracts induced by misrepresentation are generally susceptible to rescission, rescission for non-disclosure is exceptionally available only where 'non-disclosure was in breach of duty',[81] and contracts of insurance fall within this exceptional category.[82] A clause in the contract, namely art XV of the 1982 treaty, might appear to preclude avoidance for inadvertent omissions because it provided that 'any inadvertent … omissions … made in connection with this Reinsurance shall not be held to relieve either of the parties hereto from any liability which would have attached to them hereunder if such … omission … had not been made, provided rectification be made upon discovery'. The reinsured argued that art XV precluded avoidance on the ground of inadvertent non-disclosure, but this was rejected by Steyn LJ. According to Steyn LJ, there were 'formidable obstacles' to the reinsured's argument because 'prima facie art XV is part of the 1982 treaty'. If the 1982 treaty of which the clause was a part is avoided for material non-disclosure, 'the whole contract including art XV ceases to exist'; that is, apart from invalidating the contract as a whole, 'the non-disclosure also impeaches art XV'.[83]

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81 J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 579-583 ([17-01]-[17-06])).

82 Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 354-357. For example, it has been accepted that insurance contracts governed by the Marine Insurance Act 1906, as well as other non-marine insurance contracts, may be rescinded or avoided if induced by *non-disclosure* (as well as misrepresentation) of material information: *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994] 2 Lloyd's Rep 427, 431 (Lord Goff of Chieveley), 452-453 (Lord Mustill), 430 (Lord Templeman) and 455-456 (Lord Lloyd of Berwick). However, the current law has been changed significantly by statute: see *Anson's Law of Contract*, 358-359; Consumer Insurance (Disclosure and Representations) Act 2012; Insurance Act 2015.

83 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502 (Steyn LJ).

Nonetheless, Steyn LJ referred to the argument by counsel for the reinsured (Mr Beloff) who analogised with arbitration clauses (as well as exclusive jurisdiction and confidentiality clauses) which may survive avoidance of the main contract:[84]

> 'Pan Atlantic seeks to bring the present case within the scope of the first part of art XV, and in particular argues that the non-disclosure … was the result of "inadvertent omissions" within the meaning of art XV. …
>
> *There are, however, formidable obstacles to Pan Atlantic's argument*. Prima facie art XV is part of the 1982 treaty. If it is discharged by avoidance for material non-disclosure the whole contract including art XV ceases to exist. In other words, it can be said that the non-disclosure also impeaches art XV. Mr Beloff [(counsel for the reinsured)] submits that art XV evinces a clear intention that there should be no right of avoidance for non-disclosure if the omission is inadvertent. He cites the analogy of the rule that an arbitration clause in a contract, and an exclusive jurisdiction clause in a contract, survive the avoidance of the principal contract. *And I accept that a similar principle may apply* outside the scope of dispute resolution provisions, such as in the case of reciprocal confidentiality provisions in an agreement for the exchange of information technology. *It can therefore be accepted that conceptually it is also possible to draft a clause which excludes the other party's right to rescind for non-disclosure*, except in the case of fraud, even though the clause excluding rescission forms part of a contract which upon rescission would be rendered retrospectively null and void. *But that is only possible if the clause evinces a clear intention to exclude the right of avoidance. … But I find nothing in the language of art XV, or in its essential nature, to persuade me that art XV was intended to exclude the right of avoidance in cases of inadvertent omission*. In my view *the argument of Pan Atlantic breaks down at this initial hurdle*. [emphasis added]'

Given that it is a question of significant difficulty in principle and Steyn LJ's initial remark that there were 'formidable obstacles' to the reinsured's argument, one would expect his Lordship to devote much time to the question whether a clause in a vitiated contract could pull itself up by its own bootstraps. However, it is strikingly clear, from the

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84 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502-503 (Steyn LJ).

passage quoted above, that Steyn LJ neither (a) referred to *any* authority on how arbitration clauses might survive rescission nor (b) considered *any* argument whether it would be inappropriate for a no rescission clause to preclude rescission where the very contract in which it is found would otherwise have been voidable. Rather, Steyn LJ concentrated instead on imposing a restrictive interpretation on art XV so that it did not preclude avoidance for inadvertent omissions despite its width of expression,[85] and held that the reinsurer was therefore entitled to avoid or rescind the contract of reinsurance for the reinsured's non-disclosure of material information.

This lack of detailed discussion on an admittedly difficult point suggests that in fact Steyn LJ was *not* even trying to *decide* the reinsurer's difficult argument whether a clause excluding one party's right to rescind found in the very contract being rescinded would be able to pull itself up by its own bootstraps. Rather, having acknowledged the difficulty involved, his Lordship *merely held that the clause was in any event not drafted sufficiently clearly to be effective,* even on the *tentative assumption* that the reinsurer's argument might possibly succeed. The tentative nature of his Lordship's presumption is evinced by his use of non-committed language such as 'may apply' or 'can … be accepted' as 'possible … to draft'. Significantly, although his Lordship first mentions the 'formidable obstacles' in the way of the reinsurer's argument that a clause in a vitiated contract might be able preclude rescission before moving on to the interpretation of such clauses, Steyn LJ in fact described the *interpretation* of the clause as 'the *initial* hurdle' at which the reinsurer's argument 'breaks down'. This demonstrates that the very *first* question his Lordship was determining

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85 *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 503 (Steyn LJ); the House of Lords endorsed Steyn LJ's restrictive interpretation of art XV without much discussion ([1994] 2 Lloyd's Rep 427, 453 (Lord Mustill)).

was the one on interpretation; thus indicating that he had not yet addressed, and was not in fact addressing, the question whether or how the aforementioned 'formidable obstacles' could be overcome in principle.

Given that Steyn LJ had not done so, it is probably unnecessary here to examine in detail how arbitration, jurisdiction, confidentiality and (one could add, as Prof Goode[86] did) choice of law clauses might survive the rescission of a contract of which they are a part. Only four pertinent points will be made to demonstrate why it might be inappropriate to analogise by extension from how arbitration, jurisdiction, choice of law or confidentiality clauses survive rescission of a contract to how exculpatory clauses (such as non-reliance, no rescission or no cancellation clauses) might preclude rescission.

First, confidentiality stands apart because neither contract nor breach of contract is necessary for establishing the equitable wrong of breach of confidence, since equity merely requires that a defendant obtained confidential information where the defendant knew it was confidential under circumstances which make it clear that the recipient was not free to use or disclose the information.[87]

Secondly, exculpatory clauses such as no rescission or non-reliance clauses function by excluding substantive claims and remedies by precluding a misrepresentation claim or precluding the right to rescind. On the other hand, arbitration, choice of law and jurisdiction clauses merely direct that the claim be heard by a specified tribunal or

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86 R Goode, 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 Arbitration International 1, 5-6.

87 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203, 215 Lord Greene MR); *Attorney General v Guardian Newspapers (No 2)* [1990] AC 109, 281 (Lord Goff of Chieveley).

according to a specific system of law. The claims and remedies under that system of law are preserved, even though the claim is heard by a specified tribunal.

Thirdly, the notion that a clause of a contract (such as an arbitration clause which is said to be 'separable') could be separated out so that it survives the contract's rescission is inconsistent with the well-established principle that rescission is an all or nothing process: either the entire transaction is rescinded or there is no rescission at all[88] because partial rescission is not part of English law:[89]

> 'Rescission must be total unless there is in truth more than one transaction. In *Myddleton v Lord Kenyon* Lord Eldon LC[90] said: "The deed may be set aside *in toto* … I cannot make a new bargain for the parties ... The consequence is not, that a new agreement is to be made, to be introduced by this Court; but they must be reinstated in their former situation". The principle was applied in *United Shoe Machinery*[91] where Lord Atkinson said: "… the party defrauded cannot avoid one part of a contract and affirm another part, unless indeed the parts are so severable … as to form two independent contracts". If multiple agreements are inseverable parts of a single transaction, all must be rescinded.'

Fourthly, arbitration, jurisdiction and choice of law clauses are said to survive rescission of the main contract because they are treated as if they constituted a separate arbitration, jurisdiction or choice of law contract distinct from the vitiated main contract. This doctrine of separability which was developed for arbitration clauses, and then

88 *TSB Bank plc v Camfield* [1995] 1 WLR 430; *cf Vadasz v Pioneer Concrete SA Pty Ltd* (1995) 184 CLR 182.

89 KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 194-195.

90 *Myddleton v Lord Kenyon* (1794) 2 Ves 391, 408 (Lord Eldon LC).

91 *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330, 340 (Lord Atkinson).

extended to jurisdiction and choice of law clauses, is artificial and circular; and its instrumentalism is explicitly exposed by Prof Goode:[92]

> 'English law adheres to the perceived logic of the proposition that that if the agreement of which the arbitration clause forms part is invalid the reference to arbitration is necessarily invalid. … The essential question is the intention of the parties. … In the law of contract we find nothing inherently illogical in allowing a party to exclude the other's right to rescind for misrepresentation, even though the clause excluding rescission forms part of a contract which upon rescission would be rendered retrospectively null and void. In the conflict of laws, we see no great difficulty in the proposition that the law to be applied to determine the validity of a contract is the law which would be applicable if the contract were in fact valid, a principle now embodied in the Rome Convention which we have enacted. If we can swallow the camel of these particular circularities, why should we strain at the gnat of autonomy of an arbitration clause? Of course, the assumed separate agreement is notional but there is no harm in that; the concept of separability is simply a device to give effect to the presumed intention of the parties that the arbitrator's remit is to include, where necessary, a ruling on the validity of the substantive agreement'.

Of course, the law described by Prof Goode in relation to arbitration clauses has since moved on. The old common law rule, that an arbitration clause would also be invalid if the contract in which it was found was invalid, was said by Evans J in *Overseas Union Insurance*[93] to be founded on 'logic' as much as 'authority'. That rule was later superseded by s 7 of the Arbitration Act 1996,[94] which treats the arbitration clause as a separate contract distinct from the main contract. The result flowing from s 7 is that an arbitration

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92 R Goode, 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 Arbitration International 1, 5-6.

93 *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63, 66

94 The Arbitration Act 1996, s 7: 'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement'. See also *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455.

clause, being treated as a separate contract, is avoided by vitiating factors relating to it directly but not just because the main contract has been avoided.[95]

Nonetheless, Prof Goode's words remain instructive. They expose the weak foundations of the current orthodoxy: apart from its utilitarian artifice, what emerges is its vicious circularity. First, the courts seem to uphold the efficacy of arbitration clauses and exculpatory clauses including no rescission clauses and non-reliance clauses, even though the contract of which they form a part is vitiated by misrepresentation, thus allowing them to pull themselves up by their own bootstraps. The sleight of hand deployed to distract from this circularity is the instrumentalist pretence that the clauses in question comprise separate contracts. Secondly, the reasoning *between* different types of clauses is itself circular: Prof Goode was *extrapolating from the efficacy of no rescission clauses* to justify the efficacy of arbitration clauses where one party purports to rescind the very contract of which the clauses form a part. Yet, in *Pan Atlantic Insurance*,[96] Steyn LJ was open to counsel's attempt to *extrapolate from the efficacy of arbitration clauses* to justify the efficacy of no rescission clauses.

In any event, it seems clear that the doctrine of separability in relation to arbitration, choice of law[97] and jurisdiction clauses is, in truth, no more than a utilitarian device to

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95 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254, [17]-[19] (Lord Hoffmann), [34]-[35] (Lord Hope of Craighead).

96 *Pan Atlantic Insurance Ltd v Pine Top Insurance Co* [1993] 1 Lloyd's Rep 496, 502 (Steyn LJ).

97 In the context of whether a putative 'choice of law' clause in an impugned contract should govern the question of whether the contract itself was validly formed, it has been observed: 'There is no intellectually defensible basis for allowing parts of a challenged contract to stand as if impervious to the challenge, and to apply those parts to determine whether the rest of the contract has fallen.' (VK Rajah & Sundaresh Menon, 'Choice of Law Clauses and the Limits on Party Autonomy' (in Teo KS (ed), *Current Legal Issues in International Commercial Litigation* (National University of Singapore, 1997), 171-172).

uphold clauses which ought to be set aside together with the rest of the vitiated contract.[98] This is because there is no real expectation that the parties must have intended that the arbitration, choice of law or jurisdiction clause in the main contract should constitute a separate ancillary contract supported by separate consideration, unlike the courts' strict insistence on these requirements generally in establishing a collateral contract in other contexts.[99] Besides, even though section 7 of the Arbitration Act 1996 and Article 25(5) of Regulation (EU) No 1215/2012 purport to uphold arbitration and jurisdiction clauses by conferring on them the status of a separate agreement, this is conferred by statutory fiat rather than a finding of a true collateral contract. What if, as would commonly be the case with formal contracts reduced to writing, the arbitration clause in the contract contains language suggesting that it is indeed a part of the main contract? For example, the contract might say that 'the parties to this contract hereby agree to refer to arbitration all disputes arising in connection with this contract' or 'the parties agree to submit to the exclusive jurisdiction of the Courts of England in respect of all disputes arising under this contract'?

Besides, where a party is induced by a vitiating factor to enter into a voidable contract, there is no justification for assuming that cleaving it into two contracts will save one (or both) of them, since both were entered into under the same inducement and therefore constituted by the same defective consent. As stated earlier in this chapter (when dealing with the correction of misrepresentations before an impugned contract is formed

98 *Cf* R Goode, 'The Adaptation of English Law to International Commercial Arbitration' (1992) 8 Arbitration International 1, 5-6 ('simply a device').

99 Eg, *Heilbut, Symons & Co v Bucleton* [1913] AC 30, 47 (Lord Moulton): 'There may be a contract the consideration for which is the making of some other contract. … Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law … Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shewn'.

and the subsequent affirmation of a fully formed contract), this is the 'fatal flaw' of the separability doctrine in the context of no rescission clauses in contracts induced by misrepresentation: absence of an operative vitiating factor (misrepresentation) is essential for the efficacy of a no rescission clause, regardless of whether it is part of the initial impugned contract or in a separate agreement. The argument in this chapter (against a no rescission clause precluding the rescission of a contract induced by misrepresentation) is not just an assertion that the clause is ineffective because the contract in which it is found is *rescinded*. The argument is that, more fundamentally, the same misrepresentation *induced* the impugned contract and the no rescission clause therein; or the same misrepresentation *induced* the impugned main contract as well as the separate no rescission contract, so the no rescission clause or separate no rescission contract are *just as tainted* (and voidable) as the main impugned contract.

Now, arbitration, jurisdiction, and choice of law clauses stand on a footing different from clauses purporting to preclude rescission. Which law is applicable and which forum has jurisdiction are prior questions which must be determined before considering whether the parties may rescind. *Some* forum must decide the substantive issues (such as contract formation, rescission, breach, or remoteness of damage) according to *some* law; yet, the (in)validity of any arbitration, jurisdiction, or choice of law clauses will determine which forum and which law, thus potentially engendering inefficient duplicity of proceedings. Despite the 'bootstraps' problem and the lack of any principled basis for upholding the efficacy of arbitration, jurisdiction, and choice of law clauses in putative agreements, there may arguably be policy reasons for doing so: these include the desirability of promoting arbitration and of efficiently consolidating litigation and arbitration into one set of

proceedings governed by one single law. These policy justifications may not apply equally to clauses purporting to preclude rescission. Whatever policy reasons might underpin the intellectually unsatisfactory doctrine of the 'separability' of arbitration, jurisdiction, and choice of law clauses, the doctrine should not be overextended to clauses purporting to preclude rescission.

In any event, now that the efficacy of arbitration,[100] choice of law[101] and jurisdiction[102] clauses have their own statutory bases, the dubious common law doctrine for upholding arbitration, choice of law and jurisdiction clauses can be laid to rest in most cases (unless the statutory bases are inapplicable). It is not appropriate to over-extend such an unsatisfactory doctrine from arbitration, choice of law and jurisdiction clauses in order to pull non-reliance, no rescission or no cancellation clauses up by their own bootstraps.

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100 The Arbitration Act 1996, s 7: 'Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement'. See also *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] 1 Lloyd's Rep 455.

101 Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). Article 10(1) of Regulation (EC) No 593/2008 (Rome I): 'The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid'.

102 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) ('The Brussels I Regulation Recast Regulation'), Article 25(5): 'An agreement conferring jurisdiction which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. The validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid'. See also *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep 254.

6. 'Basis Clauses', 'Contractual Estoppel' and Exemption Clauses

If the foregoing, main, thesis in this chapter (that impugned contracts and no rescission or non-reliance clauses in those contracts may not pull themselves up by their own bootstraps) is not acceptable, then, it becomes crucial to be able to fall back on the statutory reasonableness requirement to regulate attempts to preclude liabilities and remedies for misrepresentation. Everything then turns on whether a particular clause (whether worded as a basis, duty-defining, definition, non-reliance or no representation clause) is an exemption clause purporting to restrict liabilities or remedies (such as rescission or damages)[103] for misrepresentation. If so, it will be ineffective unless 'reasonable' according to s 3(1) of the MA read with s 11(1) of the UCTA:

> '3.–(1) If a contract contains a term which would exclude or restrict – (a) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or (b) any remedy available to another party to the contract by reason of such a misrepresentation,
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> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977; and it is for those claiming that the term satisfies that requirement to show that it does'.[104]
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> '11.–(1) In relation to a contract term, the requirement of reasonableness for the purposes of … section 3 of the Misrepresentation Act … is that the term shall have been a fair and reasonable one to be included having regard

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103 *Cf* Law Reform Committee, *Tenth Report (Innocent Misrepresentation)* (Cmnd 1782, July 1962), [24].

104 Misrepresentation Act 1967 ('MA'), s 3(1).

to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made'.[105]

Since s 3(1) imposes the reasonableness requirement on exemption clauses purporting to exclude or restrict the defendant's 'liability' or the claimant's 'remedy' for the defendant's misrepresentation, some litigants deploy evasive draftsmanship to prevent the defendant's obligations or duties or an operative misrepresentation from arising at all, thereby precluding any allegation that the defendant is attempting to exclude liabilities or remedies which did not exist in the first place.

On one view, it is said that the courts look to its substance and effect rather than the mere form of its wording in characterising a clause, so it is a regulated exemption clause if it has the substantive effect of constricting one party's right or remedy or restricting the other party's duty or liability. Yet, others consider this approach too blunt and invasive of freedom of contract, and assert that clauses which legitimately define the contours of one party's duty or obligation or prevent a misrepresentation from arising at all are not exemption clauses targeted by s 3(1). 'Freedom of contract' weighs heavily in modern literature regardless of whether the relevant clauses are attempting to evade liability for misrepresentation under s 3(1) of the MA, for negligence under s 2(2) or for breach of contract under s 3(2) of the UCTA.[106]

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105 Unfair Contract Terms Act 1977 ('UCTA'), s 11(1).

106 R Hooley, 'Contractual Estoppel and the Misrepresentation Act 1967' (Paper No 57/2016), *Legal Studies Research Paper Series* (University of Cambridge, November 2016), [27], [52], [59]; J White, 'Defining "Exclusion" Clauses and Excluding "Defining" Clauses: The Need to Clarify the Scope of the Unfair Contract Terms Act 1977' [2016] JBL 373, 376, 382; G McMeel, 'The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy' (Ch 12 in A Dyson, J Goudkamp & F Wilmot-Smith (ed), *Defences in Contract* (Hart, 2017)), 239, 240, 269; N Palmer and D Yates, 'The Future of the Unfair Contract Terms Act 1977' (1981) 40 CLJ 108, 127; E Macdonald, 'Exclusion Clauses: the Ambit of s 13(1) of the Unfair Contract Terms Act 1977' (1992) 12 LS 277, 285.

Litigants have argued, for instance, that 'a distinction should be drawn between an exclusion clause and a so-called "basis clause" which does not exclude liability but, by defining the basis on which the parties are contracting, prevents liability from arising in the first place'; and that the section 3(1) reasonableness requirement simply 'has no application' in respect of such a definition or 'basis clause'.[107] According to Leggatt LJ in *First Tower*,[108] this kind of argument has been fashionable since *Peekay*,[109] *Trident*[110] and *Springwell*;[111] whereas Prof McMeel[112] traced such arguments back to *IFE Fund*.[113] In any case, the clampdown in *First Tower* heralds the decline of this fad.

The increased litigation over basis or definition clauses coincided with the use of contractual clauses to raise a so-called 'contractual estoppel'[114] to prevent (or 'estop') a claimant from asserting: that a misrepresentation was made to him and that he relied on

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107 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [90].

108 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [41] and [67] (Lewison LJ), [91], [92], [99] and [111] (Leggatt LJ).

109 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 1 CLC 582.

110 *Trident Turboprop (Dublin) Ltd v First Flight Couriers Ltd* [2008] EWHC 1686 (Comm), [2008] 2 Lloyd's Rep 581.

111 *JP Morgan Bank v Springwell Navigation Corp* [2008] EWHC 1186 (Comm), [602]-[603] (Gloster J); *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 CLC 705.

112 G McMeel, 'The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy' (Ch 12 in A Dyson, J Goudkamp & F Wilmot-Smith (ed), *Defences in Contract* (Hart, 2017)), 248.

113 *IFE Fund SA v Goldman Sachs International* [2006] EWHC 2887 (Comm); [2007] 1 Lloyds Rep 264 (Toulson J).

114 J White, 'Defining "Exclusion" Clauses and Excluding "Defining" Clauses: The Need to Clarify the Scope of the Unfair Contract Terms Act 1977' [2016] JBL 373, 380.

such misrepresentation (or that the defendant assumed a duty of care to provide the claimant with competent advice).[115]

Between 2006 and 2010, what seemed like a new doctrine – 'contractual estoppel' – appeared to arise from *Peekay*[116] and *Springwell*.[117] The idea of 'contractual estoppel' was that a contract term (say, a 'non-reliance' clause) stating a matter of past or present fact (say, that one party 'acknowledges that he had not relied upon' the other party's misrepresentation) could, by virtue merely that it was a contract term (without any further need to establish reliance or unconscionability), itself prevent or estop a contracting party from acting inconsistently with the term (say, by alleging 'reliance' on a misrepresentation). Prof McMeel demonstrated in 2011 that 'contractual estoppel' was an 'illegitimate' form of estoppel.[118] Others argued in 2012 that when a contractual term, which simply states a past or present fact, is said by judges to give rise to a contractual estoppel, this is simply the judicial enforcement of that term like any other contractual term.[119] This argument was further developed in 2015:[120]

> 'A non-reliance clause acknowledging that one has not relied on prior representations, being a statement as to a past fact and nothing more, is either correct or incorrect; and does not necessarily connote that the maker of the statement has promised anything, and will therefore not entail liability

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115 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [304] (Christopher Clarke J).

116 *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyds Rep 511, [56]-[57] (Moore-Bick LJ).

117 *Springwell Navigation Corp v JP Morgan Chase Bank* [2010] EWCA Civ 1221, [2010] 2 CLC 705, [144]-[169] (Aikens LJ).

118 G McMeel, 'Documentary Fundamentalism in the Senior Courts: the Myth of Contractual Estoppel' [2011] LMCLQ 185; *cf* A Trukhtanov, *Contractual Estoppel* (1st edn, 2018), 162 ([7.05]), 167 ([7.11]), 22 ([1.28]) ('a distinct category of legal estoppel').

119 S Wilken & K Ghaly, 'The Law of Waiver, Variation and Estoppel' (3rd edn, 2012), 316 ([13.24]); KCF Loi, 'Banks, Agency and Misrepresentation' [2012] SJLS 441,445.

120 KCF Loi, 'Contractual Estoppel and Non-Reliance Clauses' [2015] LMCLQ 346, 362-366.

for breach of contract. The question is whether the totality of the evidence of the relevant circumstances and the parties' business objectives require us, through implication of a negative obligation, to construe it to mean also that the maker of the statement implicitly promises that (a) he will not subsequently assert that he had relied on pre-contractual misrepresentations. The alternatives, construing it to mean that he implicitly promises (b) to undertake contractual responsibility for the truth of the statement or (c) to put the other party in the position as if the statement was correct, are highly unlikely where the falsity of the statement is known in advance (because such implied promises would be impossible to perform or would entail inevitable liability to pay compensation). … Construing a non-reliance clause to *imply a promise not to assert reliance* … is, essentially, an invitation to the courts to supplement the written contract by writing in an additional exemption clause. Judicially *implying an exemption clause* in this way cannot be lightly undertaken. … Turning specifically to non-reliance clauses taking the form of statements of past fact, such clauses could under appropriate circumstances be construed to imply a promise by a customer not to assert reliance. It follows, first, that when a court says that a customer is contractually estopped by a non-reliance clause from asserting reliance, it is merely enforcing the non-reliance clause as a term of the contract. Any reference to contractual estoppel is superfluous. … The so-called contractual estoppel has no content whatsoever apart from being the remedial consequence of the threatened breach of contract. The term "contractual estoppel" is thus a misnomer for it comprises nothing more

than the enforcement of a contractual clause which is binding according to its terms (properly construed)'.

This purely contractual analysis of 'contractual estoppel' is supported by *Credit Suisse*,[121] *Chen v Ng*[122] and *First Tower*.[123] These three cases mark the effective end of treating 'contractual estoppel' as if it were a separate novel form of estoppel.[124]

Consequently, there is nothing doctrinally exceptional about non-reliance or no representation clauses even where they are said to raise a so-called contractual estoppel. The real question in this context is whether non-reliance and no representation clauses (regardless of whether they are also called basis or definition clauses) are, like any other exemption clauses, also subject to the statutory reasonableness requirement under s 3(1); thus, whether these clauses also raises a 'contractual estoppel' adds nothing to the

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121 *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [309]-[310] (Andrew Smith J). *Cf* A Trukhtanov, *Contractual Estoppel* (1st edn, 2018), 39-41 ([2.29]-[2.31]).

122 *Chen v Ng* [2017] UKPC 27, [30] (Lord Neuberger and Lord Mance): 'Whether the context is a deed or some other contract, the description contractual or conventional estoppel may in reality be a confusing misnomer, in circumstances where the parties can (even if there is also reliance on the truth of the agreed proposition) simply be regarded as having committed themselves by contractual term to a particular proposition: see Kelry CF Loi, *Contractual estoppel and non-reliance clauses* [2015] LMCLQ 346; Spencer Bower's *Reliance-based estoppel* (5th ed) (2017), paras 1.29 and 8.67-8.71, citing *Prime Sight*'. See also *Prime Sight Ltd v Lavarello* [2013] UKPC 22, [2014] 1 AC 436, [41], [47], [54] (Lord Toulson).

123 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [94], [95] (Leggatt LJ): 'But I question whether a clause, such as clause 5.8 of the lease in this case, which says simply that A "acknowledges" that it has not entered into the contract in reliance on any representation made by B, clearly expresses such an intention. It seems to me that such wording is more naturally understood as stating a fact which may or may not be true. … If what the parties wish to agree is that A will not assert in any future dispute that it relied on a representation made by B even if A did in fact rely on such a representation, then it seems to me that this is what the clause ought to say'. See also *Richards v Wood* [2014] EWCA Civ 327, [16] (Lewison LJ).

124 See also *Sofer v SwissIndependent Trustees SA* [2019] EWHC 2071 (Ch), [135]-[141] (HHJ Paul Matthews), not treating contractual estoppel as a separate, novel, estoppel; but treating contractual estoppel as being founded on contractual *promises* (or, alternatively, as being an analogue of the older estoppel by deed and, hence, subject to the traditional special restriction that an estoppel 'being produced in and for the purposes of a particular' deed/contract should be 'limited in its operation to claims based on that' deed/contract). *Cf BNP Paribas SA v Trattamento Rifiuti Metropolitani SPA* [2020] EWHC 2436 (Comm), [178]-[185] (Cockerill J).

analysis.[125] As the Court of Appeal observed in *First Tower*, the term 'contractual estoppel' (like the terms 'definition clauses' or 'basis clauses') is a misnomer as well as an unnecessary distraction from the real task.[126]

The idea underlying the evasive draftsmanship of definition or basis clauses to attempt to avoid the statutory reasonableness requirement appears to be that: if the claimant cannot assert that a misrepresentation was made or that he had relied on such misrepresentation, then he cannot establish an operative misrepresentation, and no question can arise whether the defendant is purporting to exclude liabilities or remedies flowing from any (non-existent) misrepresentation.

This argument might seem capable of being successful at *common law* to preclude a defendant's liabilities or a claimant's remedies for misrepresentation; however, the real question is 'whether there is a *statute* to the contrary'[127] (such as s 3(1) of the MA). Cases and commentators tend to consider pre-contractual misrepresentation and s 3 of the MA together with breach of contract (and s 3(2) of the UCTA) and with negligence (and s 2(2) of the UCTA).[128] Nonetheless, this thesis is concerned with rescission for

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125 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [59], [66] (Lewison LJ).

126 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [89], [95] (Leggatt LJ).

127 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [49] (Lewison LJ).

128 Eg, J White, 'Defining "Exclusion" Clauses and Excluding "Defining" Clauses: The Need to Clarify the Scope of the Unfair Contract Terms Act 1977' [2016] JBL 373; G McMeel, 'The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy' (Ch 12 in A Dyson, J Goudkamp & F Wilmot-Smith (ed), *Defences in Contract* (Hart, 2017)), 239-273; *Michael Carney v NM Rothschild & Sons Ltd* [2018] EWHC 958 (Comm), [71]-[94] (Judge Waksman QC); *Marz Ltd v Bank of Scotland Plc* [2017] EWHC 3618 (Ch), [241]-[275] (Judge Rosen QC); *IFE Funds SA v Goldman Sachs International* [2006] EWHC 2887 (QB) (Comm), [2006] 2 CLC 1043, [67]-[70] (Toulson J).

misrepresentation and this chapter will therefore concentrate on attempts to evade s 3 of the MA, which is the provision dealt with in *First Tower*.

Until *First Tower* put a welcome conclusion to it in 2018,[129] the raging controversy in English law was whether one may legitimately draft clauses preventing an operative misrepresentation from arising at all, such that these clauses are not exclusion clauses restricting liabilities or remedies and so are not subject to section 3. Such clauses might state the basis of or define the parties' transaction ('basis' and 'definition' clauses); or prevent (or 'estop') parties from asserting that a representation was made or that there was reliance ('no representation' and 'non-reliance' clauses).

Despite the fact that s 3(1) of the MA does not have an anti-avoidance provision (equivalent to the s13(1) supplementation of s 2(2) of the UCTA), early appellate decisions were astutely steadfast that the clear legislative policy underlying s 3(1) should not be easily undermined by evasive draftsmanship. In the result, when determining whether a contractual term is an exemption clause subject to the reasonableness requirement prescribed by s 3(1) of the MA, the general judicial approach was to pierce right through the form of words of that clause to focus on its *substantive effect* using a 'but for' test: would the defendant have been liable, or would the claimant have had a remedy, for misrepresentation in the absence of, or 'but for', that clause?[130] If so, that clause in effect excludes liabilities or remedies for misrepresentation, and will be subject to s 3(1).

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129 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1369, [2019] 1 WLR 637, [51], [66], [67] (Lewison LJ), [94]-[111] (Leggatt LJ).

130 *Cremdean Properties Ltd v Nash* [1977] 2 EGLR 80, [1977] EGD 63 (Bridge LJ).

Nonetheless, having conducted a comprehensive review of the authorities, Prof Hooley argued in 2016 that the important distinction between an exemption clause (which is subject to s 3(1)) and a definition clause (which is not so subject) is not the traditional 'but for' (or 'substance') test; instead, it is to be decided as a question of *interpreting the contract*.[131] Prof McMeel arrived, reluctantly, at a similar conclusion.[132]

The obvious drawback of any test based on contractual interpretation is that the statutory requirement will easily be evaded 'purely by the choice of words' and 'felicity in drafting'.[133] Furthermore, *Thornbridge*[134] and *Titan Steel*[135] might have been misunderstood as casting doubts upon a straightforward 'but for' test in relation to s 3 of the MA (even though they were not cases concerning s 3 and pre-contractual misrepresentations); but *First Tower* has now swept these doubts away.[136] It is now clear

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131 R Hooley, 'Contractual Estoppel and the Misrepresentation Act 1967' (Paper No 57/2016), *Legal Studies Research Paper Series* (University of Cambridge, November 2016), [52], [53].

132 G McMeel, 'The Impact of Exemption Clauses and Disclaimers: Construction, Contractual Estoppel and Public Policy' (Ch 12 in A Dyson, J Goudkamp & F Wilmot-Smith (ed), *Defences in Contract* (Hart, 2017)), 249. By referring to the recommendations of The Law Commission and Scottish Law Commission, *Exemption Clauses: Second Report* (Law Com No 69, Scot Law Com No 39) (August 1975), Prof McMeel's remarks were probably directed at exemption clauses and s 3(2) and s 2(3) of the UCTA; however, his concurrent discussion of cases on pre-contractual misrepresentation together with cases on negligent breach of duty of care and breach of contract suggests that his conclusion also applies to s 3(1) of the MA.

133 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [51]-[53] (Lewison LJ), [99] (Leggatt LJ). Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 209, suggest that whether a contractual provision should be treated as an exemption clause subject to the reasonableness requirement under s 3(2) of the UCTA (or a definition clause that is not so subject) depends on whether it 'deprives a contracting party of the contractual performance which the parties reasonably expected'; however, this suggestion is similarly susceptible to evasive draftsmanship.

134 *Thornbridge Ltd v Barclays Bank Plc* [2015] EWHC 3430 (QB), [110]-[112] (Judge Moulder) (clauses purporting to prevent common law duty of care from arising; whether they were exclusion clauses subject to s 2(2) of the UCTA).

135 *Titan Steel Wheels Ltd v Royal Bank of Scotland Plc* [2010] EWHC 211 (Comm), [2010] 2 Lloyd's Rep 92, [103]- [104] (David Steel J) (clauses purporting to prevent common law duty of care from arising; whether they were exclusion clauses subject to s 2(2) of the UCTA).

136 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [44], [48]-[51] (Lewison LJ), [96]-[99] (Leggatt LJ).

that: whether a contractual clause is subject to s 3 does not turn merely on the interpretation of the clause, but is instead 'a question … of the interpretation of the *statute*'; s 3 'must be interpreted … to give effect to its evident policy'; its policy is 'to prevent contracting parties from escaping from liability for misrepresentation unless it is reasonable'; and 'how they seek to avoid that liability is subsidiary'.[137]

After *First Tower*, the courts will not allow the mere form, label and wording of clauses to detract from their 'substance' as exclusion clauses subject to review for reasonableness; particularly where a misrepresentation was made and relied upon as a historical fact; and the defendant is merely using the clause to 'rewrite history' retroactively.

To be clear, the *general test* propounded in *First Tower* for determining whether a term is an exemption clause subject to s 3(1) is *not* the 'retroactively rewriting history' test propounded by Christopher Clarke J in *Raiffeisen Zentralbank*.[138] Although helpful, the 'retroactively rewriting history' test applies only in one *specific* situation: it peremptorily classifies as exemption clauses caught by s 3(1), those clauses which purport to provide that courts should not recognise that a misrepresentation had been made or that an impugned contract had been induced by misrepresentation (even if in fact the impugned contract was induced by misrepresentation), for example where the clauses are found in the impugned contract which was in fact made in reliance of a misrepresentation. That situation encompasses the second scenario envisaged (below) by Leggatt LJ in *First Tower*.

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137 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1369, [2019] 1 WLR 637, [51], [66], [67] (Lewison LJ); Sir J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (31st edn, 2020), 190, 350.

138 *Raiffeisen Zentralbank Osterreich AG v Royal Bank of Scotland Plc* [2010] EWHC 1392 (Comm), [2011] 1 Lloyd's Rep 123, [286], [307]-[310] (Christopher Clarke J).

Whatever may be said of the *Raiffeisen Zentralbank* test of 'retroactively rewriting history', however, Leggatt J clarified that *timing* is *not* decisive in both of the following scenarios:[139] First, where a clause is found in an earlier contract and purports to prospectively regulate the contracting parties' *future conduct and subsequent contract* by providing that their future communications should not be treated as misrepresentations and their subsequent contract should not be treated as having been induced by misrepresentation, the clause will nevertheless be classified as an exemption clause subject to s 3(1) if, in fact, the subsequent contract was induced by misrepresentation. Secondly, where a clause is found in the very contract said to be induced by misrepresentation and the clause's purported effect is to *retroactively rewrite history* by providing that the parties' past communications should not be treated as misrepresentations and the impugned contract at hand should not be treated as having been induced by misrepresentation, the clause will still be classified as an exemption clause subject to s 3(1) if, in fact, the contract was induced by misrepresentation. As Judge Raymond Jack QC put it in *Government of Zanzibar*: 'A term which negates a reliance which in fact existed is a term which excludes a liability which the representor would otherwise be subject to by reason of the misrepresentation. If that were wrong, it would mean that section 3 could always be defeated by including an appropriate non-reliance clause in the contract, however unreasonable that might be'.[140]

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139 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [106]-[109] (Leggatt LJ); E Peel, *Treitel: The Law of Contract* (15th edn, 2020), 482 ([9-141]). *Cf* A Trukhtanov, *Contractual Estoppel* (1st edn, 2018), 151 ([6.16]), 153 ([6.19]).

140 *Government of Zanzibar v British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333 (Judge Raymond Jack QC).

The *only general test* propounded by Lewison LJ in *First Tower* for determining whether a term is an exemption clause subject to the s 3(1) reasonableness requirement is the 'but for' test,[141] which looks to the substance and effect of the term:[142]

> 'So the question is: … does [clause 5.8] exclude any liability to which the landlords may be subject by reason of any misrepresentation made by them before the contract was made? Looking at that question apart from authority, it seems to me that it can only be answered by enquiring what the position would have been if clause 5.8 had not been there. Absent clause 5.8, I consider that the position is clear. The landlords would have been liable for misrepresentation. The only reason why they may not be is the existence of clause 5.8. On the face of it, therefore, clause 5.8 is a contract term which would exclude liability for misrepresentation. … I would hold therefore that a clause which simply states … "that this lease has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the landlord" is a contract term which would have the effect of excluding liability for misrepresentation, and consequently is subject to the test of reasonableness. … I do not consider that a conclusion to this effect should cause consternation. It will always be open to a contracting party seeking to rely on such a clause to establish that it was reasonable; and in cases involving the sale of complex financial products to sophisticated investors it may well be'.

Significantly, the Court of Appeal[143] has now provided a resoundingly *negative* response to the inquiry here: whether a definition or basis clause purporting to negate the elements of an operative pre-contractual misrepresentation (such as a false representation and reliance), may be immune (on the ground that it does not purport to exclude any liabilities or remedies) from the statutory reasonableness requirement under s 3(1). If liabilities or remedies for misrepresentation would have existed 'but for' the presence of a

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141 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [41] (Lewison LJ), [107] (Leggatt LJ).

142 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [41], [67], (Lewison LJ).

143 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [41], [67], (Lewison LJ), [98], [107] (Leggatt LJ).

contractual term, that term is an exemption clause subject to s 3(1). This is an issue of substance and effect so, whether the term is drafted as a definition or basis (or non-reliance or no representation) clause rather than a straightforward exemption clause explicitly excluding liabilities and remedies (flowing from an existing misrepresentation) is 'a distinction without a difference', as Leggatt LJ put it in *First Tower*:[144]

> 'Even if, by giving the language of section 3 of the Act a strained interpretation, a distinction could be drawn between a contract term which would exclude liability and a term which would prevent liability from arising, there is no reason to draw such a formalistic distinction and good reason not to interpret section 3 in a way which omits the latter type of term from its scope. The result of doing so would be that a lawyer drafting boilerplate provisions could avoid the application of section 3 purely by the choice of words in which the clause is phrased. A clause stating that a party will have no liability for any representation made or on which the other party has relied on any view falls within section 3 and is subject to the requirement of reasonableness. But on this interpretation, if instead the clause were worded to say that A agrees not to assert that B has made or that A has relied on any representation, section 3 would not apply. No rational legislator could have intended that the need for a contract term to satisfy a test of reasonableness could be avoided simply by felicity in drafting the contract term. This was the point made in *Cremdean Properties v Nash* [1977] 2 EGLR 80 and *Government of Zanzibar British Aerospace (Lancaster House) Ltd* [2000] 1 WLR 2333 in the passages quoted by Lewison LJ at paragraphs 51 and 52 above. In my view, it is compelling'.

The importance of Leggatt LJ's words must not be underestimated. The focus on the clause's substance and effect, so as not to allow defendants to easily draft their way to defeat the clear legislative purpose of the Misrepresentation Act 1967, echoes the sentiments of Bridge LJ and Scarman LJ in *Cremdean Properties*.[145]

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144 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [96] (Leggatt LJ).

145 *Cremdean Properties Ltd v Nash* [1977] 2 EGLR 80, [1977] EGD 63 (Bridge LJ, Lord Scarman).

It seems that the Court of Appeal achieved this result by using a three-pronged approach. First, obligations undertaken under a contract are distinguished from tortious duties and liabilities imposed by general law. Since contractual obligations are created by the parties' agreement, the scope of their contractual duties is defined by the terms of their contract, so a contractual term defining the parties' contractual duties may in fact be a term excluding or restricting contractual liabilities and *vice versa*. Secondly, since tort liability, including misrepresentation or negligence liability, is imposed by the general law,[146] the terms of their contract do not create or define the parties' obligations and duties in tort. Therefore, if the parties' contractual terms purport to exclude or restrict their duties or obligations *inter se,* those terms are in effect excluding or restricting tortious liabilities and remedies which would have existed at general law. Thirdly, the language and policy of s 3(1) of the MA does not distinguish definition or basis clauses from exemption clauses, but simply captures all clauses the effect of which is to exclude or restrict liabilities or remedies for misrepresentation, regardless of whether they are phrased as definition or basis clauses. Furthermore, even if s 3(1) could be given a 'strained interpretation' to exempt definition or basis clauses from the reasonableness requirement, the courts should not allow it; otherwise, s 3(1) would be easily circumvented by clever evasive drafting.[147]

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146 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [97] (Leggatt LJ): 'As Lord Goff said in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193, "the law of tort is the general law, out of which the parties can, if they wish, contract.". (The parties' wishes in this regard are of course constrained by those rules, such as the rules contained in the Unfair Contract Terms Act, which limit their freedom to exclude or restrict tortious liability).'

147 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [99] (Leggatt).

At the very heart of *First Tower*, the single, essential, lesson to learn is the Court of Appeal's renewed commitment to uphold, rather than frustrate, the policy and purpose of s 3(1) of the MA (and, by extrapolation, of s 2(2) and s 3(2) of the UCTA).

Fundamentally, one must bear in mind three points. First, just because a clause has the effect of defining or delimiting a duty or obligation, this does not mean that it does not *also* have the effect of excluding liabilities or remedies. Indeed, the motivation for attempting to preclude a duty may, sometimes, be the desire to avoid incurring those liabilities.[148] Secondly, s 3 of the MA and s 2 or s 3 of the UCTA prescribe that certain terms, if they are exemption clauses, will be ineffective unless reasonable; however, those statutory provisions do *not* immunise clauses purporting to define or delimit a duty or obligation from the reasonableness requirement, if these clauses happen to have the dual identity of being exemption clauses as well. Thirdly, as hallowed as the notion of 'freedom of contract' might be, its normative force should not be overstated, particularly so in this world of 'take it or leave it' standard form contracts which no one reads and no one understands,[149] or where one party's consent was induced by misrepresentation.[150] As the Law Commissions put it: 'No legislative formula can distinguish between situations where there is genuine freedom of contract and those where there is not. Only individual scrutiny of all the circumstances … can lead to a valid distinction. This is why a test of

148 *Cf Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] PNLR 35, [135] (Newey J).

149 KN Llwellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co, 1960), 370; TD Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 Havard LR 1174, 1226-1228.

150 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [104] (Leggatt LJ).

reasonableness is needed'.[151] Furthermore, subjecting a clause, whether it purports to be a straightforward exemption clause or appears to be a duty defining clause (with the effect of excluding liabilities), to the reasonableness test under s 3(1) of the MA is not so grave an interference with freedom of contract as 'should cause consternation':[152] after all, the clause is not ineffective, but will only be ineffective if unreasonable, and it may well turn out to be reasonable.

More fundamentally, the statutory reasonableness requirements under s 3(1) of the MA (and s 2(2) and s 3(2) of the UCTA) were specifically *intended as legislative interferences with freedom of contract* in order to pursue the legislative objective of imposing some measure of reasonableness. It seems incongruous to suggest that the application of these statutory provisions is objectionable for interfering with freedom of contract: interfering with freedom of contract in order to impose some reasonableness is in fact *the stated legislative purpose*.

The point is not that freedom of contract or that the parties' right to define the limits of their mutual obligations are not legitimate concerns: of course they are.

Rather, the point (or problem) here is that one may never find a satisfactory method of distinguishing between the 'substance' (instead of the mere 'form' of wording) of clauses which define obligations and of clauses which exclude liabilities.[153] This was

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151 The Law Commission and Scottish Law Commission, *Exemption Clauses: Second Report* (Law Com No 69, Scot Law Com No 39) (August 1975), [67] (in relation to s 2 and s 3 of the UCTA).

152 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [67] (Lewison LJ).

153 *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57, [2017] AC 73, 35: 'words of exception may be simply a way of delineating the scope of the primary obligation' (Lord Toulson, in the context of contractual (not tortious) obligations and liabilities).

recognised long ago by Prof Coote.[154] Must one therefore despair and give up all attempts to give effect to the legislative purpose behind s 3(1) of the MA, or s 2(2) and s 3(2) of the UCTA?

Caught between the lesser evil of over-inclusion (via the 'but for' test, by subjecting to the reasonableness requirement all clauses which have the effect of preventing obligations from arising and liabilities from being excluded) and the greater sin of under-inclusion (by allowing skilful draftsmen to easily evade the reasonableness requirement by dressing exemption clauses up in the form of clauses precluding duties), what is one to do? When one has to sail between Scylla and Charybdis, the wise will always veer towards the lesser evil.

The courts recognise that the law must vigilantly prevent contracting parties from easily evading the policy of the statutory reasonableness requirement in s 3(1) of the MA (or s 2(2) and s 3(2) of the UCTA) by clever drafting.[155] Of course, there will always be those who are not attempting to evade the statutory prescriptions at all but are genuinely defining the scope of their obligations but, likewise, many contract draftsmen will regard it as part of their job to 'design' clauses avowedly to evade statutory controls by 'preventing' liability from arising.[156] Unless a practical way can be found to distinguish

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154 B Coote, *Exception Clauses* (Sweet & Maxwell, 1964), 6-7, 13, 17, 141; B Coote, 'Unfair Contract Terms Act 1977', (1978) 41 MLR 312, 313-314; E Macdonald, 'Exclusion Clauses: the Ambit of s 13(1) of the Unfair Contract Terms Act 1977' (1992) 12 LS 277, 286; E Peel, 'Whither Contra Proferentem?' (Ch 4 in A Burrows & E Peel (ed), *Contract Terms* (OUP, 2007)), 71.

155 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [51]-[53] (Lewison LJ), [99] (Leggatt LJ)

156 *Cf Avrora Fine Arts Investment Ltd v Christie, Manson & Woods Ltd* [2012] EWHC 2198 (Ch), [2012] PNLR 35, [135] (Newey J).

between them, the only pragmatic course is to err on the side of over-inclusion and subject them both to the reasonableness requirement.

This safer, better, course errs on the side of over-inclusion by adopting the 'but for' test, which the Court of Appeal in *First Tower* treated as the only way to answer the question whether a term is an exemption clause within the statutory scheme, and to give effect to the statutory purpose whilst preventing easy evasion of the statutory reasonableness requirement 'simply by felicity in drafting'.[157] This is not such an intolerable sin as to cause 'consternation', since it is always open to a defendant who is aggrieved that his purported definition clause has been subjected to the reasonableness requirement to demonstrate that his clause should be upheld as reasonable.[158]

Imperfect and blunt as the 'but for' or substance test might be, there is simply no better, practicable, alternative. The seductive appeal of 'freedom of contract' and idealistic search for the perfect distinguishing feature between definition and exemption clauses have become, in this context at least, siren calls which one must resist.

7. Conclusion

By analogising with the doctrine of 'separability' of arbitration clauses,[159] current orthodoxy assumes that a contractual term purporting to preclude rescission will be effective to prevent a misled party from rescinding a contract on the ground of non-

157 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [41], [53] (Lewison LJ), [99] (Leggatt LJ).

158 *First Tower Trustees Ltd v CDS (Superstores International) Ltd* [2018] EWCA Civ 1396, [2019] 1 WLR 637, [67] (Lewison LJ).

159 D O'Sullivan, S Elliott & R Zakrzewski, *The Law of Rescission* (2nd edn, 2014), 532 ([26.02]); *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1993] 1 Lloyd's Rep 496, 502.

fraudulent misrepresentation, even if the preclusive term forms part of the very contract impugned for misrepresentation. According to this orthodoxy, the preclusive term is treated as if it were a separate contract apart from the impugned main contract and, so, the term will be ineffective to prevent rescission only if the misrepresentation 'relates directly' to the preclusive term.[160] There is no principled way to defend this assumption.

The central argument in this chapter is that a contractual term purporting to preclude rescission cannot prevent a misled party from rescinding a contract on the ground of misrepresentation, if the term formed part of the impugned contract. The term and the impugned contract cannot pull themselves up by their own bootstraps because the entire contract, including the term purporting to preclude rescission, was infected by and defective because of the same misrepresentation.

Revisiting the point from first principles will provide some clarity.

Consider the situation where X made a misrepresentation of fact (say, in relation to his solvency or personal connections) extraneous to the terms of any proposed contracts; and that misrepresentation induced Y to enter into multiple contracts with X.

In general, each and every one of those contracts is voidable, and Y may elect to rescind them all for misrepresentation. The number of such contracts and their subjects-matter should make no difference. So, there may be one, two or fifty contracts; and they may be contracts for the: sale of goods, supply of financial products, extinguishment of an equitable right or waiver of a legal claim.

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160 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2008] 1 Lloyds Rep 254, [17] (Lord Hoffmann) (on the doctrine of separability of arbitration clauses).

Each and every one of those impugned contracts is voidable in its entirety for precisely the same reason, namely, that Y was induced to enter into those contracts by the very same misrepresentation (say, as to X's solvency) which is extrinsic to any specific contractual term. Furthermore, the misrepresentee, Y, cannot rescind only part of a contract and affirm another part because he must rescind each contract in its entirety.[161]

If *two* of those contracts comprised a contract of sale of goods and a separate contract to preclude the equitable right to rescind the sale contract, both would similarly have been voidable because induced by the misrepresentation as to X's solvency.

It is therefore difficult to see any principled way of asserting that, if there was simply *one* sale contract between X and Y, and it contained a term precluding rescission, that preclusive term should be effective to prevent Y from rescinding.

If the preclusive agreement is ineffective whether as a constituent term of a sale contract or as a truly separate contract distinct from the sale contract, then, it is difficult to see why it should become effective by artificially treating the preclusive term *as if* it were notionally a separate contract distinct from the sale contract. If the preclusive agreement is ineffective regardless of whether it is really a term within a single contract or a separate second contract, then *notionally* treating a preclusive term of a single contract *as if* the term was a separate contract would make no difference.

It is also difficult to see why, when the preclusive term of a sale contract is treated as if it were notionally a separate contract distinct from the sale contract, the preclusive term can only be rescinded for misrepresentation if the misrepresentation 'relates

161 *TSB Bank Plc v Camfield* [1995] 1 WLR 430; J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 84 ([4-13]).

directly'[162] to the preclusive term. After all, misrepresentations of fact which are extraneous to any terms of the contract are generally sufficient to generate a right to rescind a contract for misrepresentation. If a misrepresentation relates directly to the wording or effect of a term of the contract, as in *Curtis*,[163] it may well give the misrepresentee the additional alternative remedy of treating the contract as effective and notionally rectified to comport with the misrepresentation; however, a misrepresentation need not relate to any term in order to give the misrepresenteee a right to rescind.

Even if the foregoing main thesis of this chapter is not accepted, a contractual clause purporting to preclude rescission for misrepresentation will be subject to the statutory reasonableness test under section 3(1) of the MA. The Court of Appeal clarified in *First Tower* that section 3(1) cannot be easily sidestepped by evasive draftsmanship, by dressing up an exemption clause (which excludes liabilities or remedies for misrepresentation in effect and substance) as a 'basis' or 'definition' clause (or non-reliance or no representation clause) which prevents a misrepresentation from arising at all. With respect, the conclusion in *First Tower* makes sense. According to Lord Denning's and Lord Hoffmann's historical account:[164]

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162 *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40, [2008] 1 Lloyds Rep 254, [17] (Lord Hoffmann).

163 *Curtis v Chemical Cleaning and Dyeing Co* [1951] 1 KB 805; J Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (5th edn, 2019), 85 ([4-13]); KR Handley, *Spencer Bower & Handley: Actionable Misrepresentation* (5th edn, 2014), 233 ([18.11]).

164 *BCCI SA v Ali* [2001] UKHL 8, [2002] 1 AC 251, [57]-[62] (Lord Hoffmann); *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 296-297 (Lord Denning MR). E Peel, 'Whither Contra Proferentem?' (Ch 4 in A Burrows & E Peel (ed), *Contract Terms* (OUP, 2007)), 58-59.

(a) traditionally, judges gave exculpatory clauses artificially restrictive interpretations prior to the enactment of statutory reasonableness requirements (under the UCTA and, one might add, the MA);

(b) judges imposed restrictive rules of interpretation on exculpatory clauses 'not to promote certainty … but to remedy the unfairness' inflicted by such clauses upon weaker contracting parties;

(c) subsequently, the statutory prescription (under the UCTA and, one might add, the MA) that exculpatory clauses cannot be enforced under certain circumstances unless they are 'reasonable', was enacted; and

(d) some now think that the need to impose artificially restrictive interpretations upon exculpatory clauses has since been reduced, since any unfair exculpatory clauses should be subject to and struck down by the statutory reasonableness requirements instead.

The law would reach the pinnacle of irony if, now, modern judges were to try to marginalise the restrictive interpretative controls on exculpatory clauses on the basis that those clauses are already subject to statutory regulation; and, yet, say that such clauses may be (drafted as 'basis' or 'duty defining' clauses, instead of as exemption clauses, and) given an interpretation which completely sidesteps the statutory reasonableness requirement.

CHAPTER 8: MISTAKE – CONTRACTING OUT OF RECTIFICATION

> 'There are nonetheless problems in logic about the application of entire agreement clauses to preclude rectification … The agreement which constitutes "the entire agreement and understanding of the parties" is to be found in the rectified contract, not in the instrument which, *ex hypothesi*, does not reflect the true position.'– *LSREF III*.[1]

> 'It must be borne in mind that whilst the construction of the contract [reduced entirely to writing], and the clauses within it, are a matter of law, the question of what are the terms of the contract (and whether a contract is exclusively a contract in writing) is a question of fact in respect of which the courts must review all the evidence. … However, an "entire agreement" clause cannot affect the characterisation of the question of whether an agreement has been integrated or reduced to writing as an issue of fact for the judge. The clause is not self-proving. At best the clause will raise a presumption that the document does contain the entire agreement of the parties, which can nevertheless be rebutted by evidence to the contrary.'– *McMeel on the Construction of Contracts*.[2]

1. Introduction

This thesis is concerned with the rescission of contracts for misrepresentation and rectification of contractual documents for mistake. Clauses purporting to preclude rescission for misrepresentation have been addressed in Chapter 7. This chapter addresses the question whether a contractual clause purporting to preclude rectification would

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1 *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), (2016) 165 Con LR 58, [122]-[123] (Cooke J).

2 G McMeel, *McMeel on The Construction of Contracts: Interpretation, Implication and Rectification* (3rd edn, 2017), 737 ([26.14]), 445-447 ([15.06]-[15.07]). *Carmichael v National Power Plc* [1999] 1 WLR 2042, 2049 (Lord Hoffmann).

prevent a contracting party from seeking to rectify the contractual document, of which the clause is a part, on the ground of mistake.

There is force in the arguments that, first, if any boilerplate provision could effectively prevent a contracting party from seeking rectification, the law of rectification would soon be rendered otiose;[3] and secondly, it is impermissible to contract out of the courts' equitable remedial jurisdiction to order rectification because one cannot prevent a court from remedying against unconscionability.[4]

Nonetheless, it is better here to examine the question afresh from first principles. After all, the Supreme Court has recently asserted *obiter*, albeit in the rather *different context* of assessing the effect of entire agreement clauses on the enforceability of *collateral contracts*, that:[5]

> 'If the parties agree that the written contract is to be the entire contract, it is no business of the courts to tell them that they do not mean what they have said'.

In Chapter 7, it was argued that a contractual term purporting to preclude rescission cannot prevent a misled party from rescinding a contract on the ground of misrepresentation, if it was a term of that impugned contract. The impugned contract

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3 *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102 (HH Judge Roger Cooke).

4 *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch), [104]-[106] (Hildyard J); *Macdonald v Shinko Australia Pty Ltd* [1998] QCA 53 (McPherson JA) ('it may well be impossible for the parties by means of any contractual provision, however artfully drawn, to escape the court's jurisdiction to order rectification'); D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, 2016), 426 ([4-144]) .

5 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [14] (Lord Sumption), quoting from *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715, [82] (Longmore LJ). According to Lord Sumption: (1) although generally the presence of an entire agreement clause will not prevent a collateral agreement from being enforceable as an independent contract; (2) whether an entire agreement clause prevents a collateral agreement from varying a main contract is simply a question of contractual interpretation.

cannot pull itself up by its own bootstraps because the entire contract, including that term, was infected by the same misrepresentation and hence liable to rescission.

If a contractual term purporting to preclude rescission is ineffective when that term is part of the impugned contract which was induced by misrepresentation then, does it follow, *a fortiori*, that a clause purporting to prevent a putative contract from being void should be ineffective if the clause was part of that putative contract attacked as being void? It would seem strongly arguable that the putative contract including that clause should not be able to pull itself up by its own bootstraps. After all, was not the putative contract including that clause, void or non-existent in its entirety because it was invalidated by a vitiating factor which affected the whole contract?[6]

This generalised argument, in truth, raises very complex issues which turn on the precise reasons why a specific putative contract is said to be 'void'. This complexity arises because, apart from illegality and forgery (not fraud *simpliciter*), there are many different types of mistakes (discussed in Chapter 6) which are sometimes said to render a putative contract 'void'.

Fortunately, those complex issues need not detain us here. This Chapter is only concerned with one specific question, and is therefore confined to mistakes which are said to trigger the rectification of contractual documents. The few cases which are relevant to this question merely establish that an entire agreement clause in a contractual document will not, of itself, prevent rectification of that the document for mistake.

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6 *Fiona Trust & Holding Corporation v Prialov* [2007] UKHL 40, [2008] 1 Lloyds Rep 254, [17] (Lord Hoffmann), [34] (Lord Hope of Craighead); *cf Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyds Rep 81, 93 (Steyn J) (both cases on the separability of arbitration clauses).

We therefore analyse the question from first principles.

2. Rectification of Contractual Documents for Mistake

As demonstrated in Chapters 3 and 4 (on rectification for common and unilateral mistakes), where a contractual document is rectified for mistake, this merely makes the document comport with what the law regards as the parties' true agreement.[7]

First, rectification for common mistake may be ordered if the contracting parties' common intention continued up to the time the contractual document was executed, but both parties mistakenly assumed that the document accurately reflected their common intention and said X, when the document in fact said Y.[8] Secondly, a contracting party (the claimant) may seek rectification for unilateral mistake if the claimant mistakenly assumed that the contractual document said X, when it in fact said Y, and the other contracting party (the defendant) knew of his mistake.[9] Where these requirements are satisfied, the document may be rectified to give effect to what the law regards as the parties' true agreement.

Since it is fundamental that courts neither alter bargains nor rectify contracts, but merely rectify contractual documents to make them comport with what the law regards as

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7 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77] (Leggatt LJ); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 (common mistake); *Littman v Aspen Oil (Broking) Ltd* [2006] 2 P&CR 2, [21], [24] and [26] (Jacob LJ), [33] (May LJ) (unilateral mistake); D McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608.

8 *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71, [33] (Peter Gibson LJ).

9 *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova)* [1984] 1 Lloyd's Rep 353, 359, 362, 365 (Slade LJ).

the parties' true agreement,[10] it is clear that, in both instances, rectification does not conjure up non-existent agreements. Even whilst purporting to (partially) abandon the objective approach towards rectification for common mistake, in favour of a supposedly subjective approach, the Court of Appeal in *FSHC* remained firmly committed to this view:[11]

> 'As often been observed, the power of the court to rectify a contractual document is not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed. Moreover, the effect of rectification is not merely to prevent a party from enforcing the written terms of a contract: it is to alter those terms so as to establish legal rights and obligations which differ from those recorded in the original contractual document. Leaving aside for the time being cases of rectification for unilateral mistake, establishing new contractual rights and obligations in this way is only justified if they are founded on mutual agreement. Whether the test applied is subjective or objective, it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide'.

Clearly, in this way, *FSHC* is entirely consistent with the idea in this Chapter that rectification does two things: rectification vitiates the putative contract which was incorrectly expressed; and, rectification also assumes and vindicates the parties' subsisting true agreement, which underlies the contractual document being rectified. This emphasises the importance of remembering the existence of the parties' *true agreement* which underlies, but is not the same thing as, the *contractual document* being rectified. This analysis is instructive when we examine the relationship between entire agreement clauses and rectification.

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10 *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (Sir W James VC); *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, [27] (Lord Neuberger of Abbotsbury PSC); *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova)* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ).

11 *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [77] (Leggatt LJ).

An underlying valid contract subsists in accordance with the parties' true agreement although it is not accurately reflected in the contractual document; and, as such, rectification merely re-phrases the parts of the document which were worded inaccurately. Although consonant with both *Chartbrook* and *FSHC*, this is not a novel idea.[12] As Lord Diplock put it more than four decades ago:[13]

> 'Rectification is a remedy which is available where parties to a contract, intending to reproduce in a more formal document the terms of an agreement upon which they are already *ad idem*, use in that document words which are inapt to record the true agreement reached between them. The formal document may then be rectified so as to conform with the true agreement which it was intended to reproduce, and enforced in its rectified form. … Rectification is concerned with what the parties to a contract did agree and not why they did so'.

As such, although the interpretation of a contract reduced wholly to writing attracts more restrictive evidential rules than rectification,[14] and rectification involves the alteration of the words of a document rather than merely their construction,[15] both interpretation and rectification are ultimately aimed at ascertaining (what the law regards as) the contracting parties' true agreement.

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12 *Maynard v Moseley* (1676) 3 Swans 651, 36 ER 1009, 1011 (Lord Nottingham LC); *Mackenzie v Coulson* (1869) LR 8 Eq 368, 375 (Sir W James VC); *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129, [27] (Lord Neuberger of Abbotsbury PSC); *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 93 (Buckley LJ); *Agip SpA v Navigazione Alta Italia SpA (The Nai Genova)* [1984] 1 Lloyd's Rep 353, 359 (Slade LJ); *Co-operative Insurance Society Ltd v Centremoor Ltd* [1983] 2 EGLR 52, 55 (Dillon LJ); *Littman v Aspen Oil (Broking) Ltd* [2006] 2 P&CR 2, [21], [24] and [26] (Jacob LJ), [33] (May LJ) (unilateral mistake).

13 *American Airlines Inc v Hope* [1974] 2 Lloyds Rep 301, 307 (Lord Diplock).

14 *Prenn v Simmonds* [1971] 1 WLR 1381; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101; *Mihail Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [8]-[13] (Leggatt J).

15 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77; *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [145] (Leggatt LJ).

3. Rectification and Entire Agreement Clauses

The question is whether a contractual *clause explicitly purporting to preclude rectification* would be effective to prevent rectification (on the ground of mistake) of the contractual document, of which the clause is a part. Litigants have argued that *entire agreement clauses* are intended to, *inter alia*, preclude rectification and should be effective to do so.[16]

On current authority,[17] an entire agreement clause in a contractual document will not preclude rectification, but it will be a factor relevant to whether the document ought to be rectified.[18] This, with respect, seems correct in principle.

When parties reach prior consensus and subsequently reduce their contract to writing, they normally *intend* that the document would be treated as *the* record of their bargain. However, that in itself has never prevented courts from ordering rectification of the document if in fact it failed to reflect what the law regarded as the parties' true

16 Eg, *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [70] (Christopher Pymont QC); *DS-Rendite Fonds Nr 106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm), [48] (Hamblen J).

17 See generally, D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, 2016), 420 ([4-137]); D McLauchlan, 'The Entire Agreement Clause: Conclusive or a Question of Weight?' (2012) 128 LQR 521, 533; M Barber, 'The Limits of Entire Agreement Clauses' [2012] JBL 486, 494 (fn 31).

18 Eg, *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102 (HH Judge Roger Cooke); *Phillips Petroleum Co UK Ltd v Snamprogetti Ltd* [2001] EWCA Civ 889, (2001) 79 Con LR 80, [32] (Tuckey LJ); *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [70]-[76] (Christopher Pymont QC); *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2011] EWHC 503 (Ch), [188] (Mann J); *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC* [2011] EWHC 2718 (Comm), [83] (Hamblen J); *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch), [106] (Hildyard J); *DS-Rendite Fonds Nr 106 VLCC Titan Glory GmbH & Co Tankschiff KG v Titan Maritime SA* [2013] EWHC 3492 (Comm), [48] (Hamblen J); *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), (2016) 165 Con LR 58, [122]-[124] (Cooke J); *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [76]-[78] (Coulson J).

agreement.[19] This is because the parties normally *also intend* that the document would correctly reflect their prior consensus. Rectification will *reconcile* and effectuate *both* intentions.

As demonstrated earlier in Chapter 6, the analysis is the same even if an entire agreement clause is inserted. So, entire agreement clauses will not in general prevent an *inaccurate* contractual document from being rectified.[20] When contracting parties insert an entire agreement clause in a contractual document executed after they had reached prior consensus, they commonly intend that the document be treated as reflecting the entirety of their final agreement.[21] However, the contracting parties using such a clause normally *also* intend that the document *correctly* reflects the parties' true agreement, and the clause is therefore not intended to prevent an *inaccurate* contractual document from being rectified in order to give effect to what the law regards as the parties' true agreement. As Cooke J said:[22]

> 'There are nonetheless problems in logic about the application of entire agreement clauses to preclude rectification as pointed out in *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* (1995) 70 P&CR 33. "A clause that says all the terms are in the document ought, in my judgment, not to be read as meaning all the terms are in the document when it is in the wrong form. … When the document is in the wrong form and would otherwise be

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19 D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, 2016), 419 ([4-135]).

20 *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), (2016) 165 Con LR 58, [122]-[123] (Cooke J); *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [73] (Christopher Pymont QC); *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102 (HH Judge Roger Cooke); *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [76]-[78] (Coulson J).

21 *Inntrepreneur Pub Co Ltd v East Crown Ltd* [2000] 2 Lloyds Rep 611, [7] (Lightman J).

22 *LSREF III Wight Ltd v Millvalley Ltd* [2016] EWHC 466 (Comm), (2016) 165 Con LR 58, [122]-[123] (Cooke J). See also *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [73] (Christopher Pymont QC); *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102 (HH Judge Roger Cooke); *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [76]-[78] (Coulson J).

> rectified, the all agreement clause is itself infected by the mistake." The clause itself would not reflect the true agreement of the parties and would itself be liable to rectification … The agreement which constitutes "the entire agreement and understanding of the parties" is to be found in the rectified contract, not in the instrument which, *ex hypothesi*, does not reflect the true position'.

Now, when considering whether entire agreement clauses are inherently inconsistent with rectification, it is instructive to recall the three points emphasised in the preceding paragraphs. First, we must remember the existence of the parties' *true agreement* which underlies, and is not the same thing as, the *contractual document* being rectified. Secondly, rectification vitiates the putative contract which was incorrectly expressed; and thirdly, rectification also assumes and vindicates the parties' subsisting true agreement, which underlies the contractual document being rectified.

Let us presume that the requirements for triggering rectification are satisfied. Consider a scenario where the parties' true agreement comprised *inter alia* clause X and an entire agreement clause, but the contractual document (which was meant to embody that agreement) erroneously contained the entire agreement clause and clause Y instead. There may have been a document with clause Y on it, but there never was any contract which included clause Y. The parties' true agreement which subsisted at all material times is an agreement which includes clause X. Rectification merely means that the *document* is corrected, to make it reflect correctly the parties' true agreement so that it contains both the entire agreement clause and term X. There is no inherent inconsistency between the entire agreement clause and rectification; in fact, the entire agreement clause subsisted at all material times as part of the parties' true agreement and the clause protects the integrity of the rectified, correct, document.

It is simplistic to assume in all cases that, just because the final document contains term Y and an entire agreement clause which says that all the terms of the contract are found in that document and nowhere else, rectification should be precluded and that the document providing for term Y should stand as it is, because that is what the parties have agreed on. It is also simplistic to assume that rectifying the document to make it say term X (rather than term Y) would be contrary to the parties' intentions or would defeat their contract.

Both assumptions are misconceived because founded on the wrong idea that the parties' agreement comprises term Y and the entire agreement clause when, in fact, their true agreement comprises term X and the entire agreement clause. The result is that an entire agreement clause adds nothing to the equation: the clause changes nothing at all if we *presume* that the requirements for rectification have been satisfied.

Of course, we cannot always presume that the requirements of rectification have been made out. And, if we do *not* presume that the requirements of rectification have been made out, the effect of an entire agreement clause on rectification is more nuanced. According to Coulson J:[23]

> '… Tuckey LJ said in *Phillips Petroleum Co UK Ltd v Snamprogetti* (2001) 79 Con LR 80: "where there is an entire agreement clause this may tend to show in fact no inconsistent governing intention has subsisted and that hence no basis for rectification has arisen because the parties have intended to be bound by the document in the material respects regardless of prior or

[23] *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC), [77] (Coulson J).

other intentions". I respectfully agree that, in some cases, an entire agreement clause like this might be relevant to the issue of rectification'.

To similar effect, Hildyard J said: [24]

'… but the parties may perfectly permissibly by clear words preclude any attempt to extend or modify the accord that the written instrument was intended to reflect and implement… This follows, in my view, from the fact that the basis and purpose of rectification is not to vary, modify or extend the parties' contract: it is to reform the instrument by which they have sought to record it in order to conform it with their true common intention when that instrument was made'.

An entire agreement clause does not, of itself, preclude rectification by preventing the court from reforming a document to make it comport with the parties' true agreement. Rather, first, the clause might be *some,* but not conclusive, evidence indicating that perhaps the actual words in the un-rectified document may represent the parties' true agreement after all.[25] It is some evidence suggesting that perhaps the parties' earlier common intention has changed, that perhaps their common intention might not have continued up to the time the document was made or executed, thus not triggering the jurisdiction for common mistake rectification. Secondly, the presence of the entire agreement clause is also *some*, again inconclusive, indication to the defendant that perhaps the claimant was not labouring under a mistake; or that perhaps the defendant might not have known of it, even if the claimant had made a mistake as to terms, thus not satisfying the requirements for unilateral mistake rectification.

It cannot be overstated that the presence of an entire agreement clause is only some, but not conclusive, evidence indicating that the parties' true agreement was to be in

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24 *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch), [104]-[105] (Hildyard J).

25 *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [75] (Christopher Pymont QC).

accordance with the un-rectified words of their contractual document. First of all, the courts have emphasised the principle that in assessing what the parties' true agreement is – and whether that true agreement is only to be found in the document as rectified or whether it is accurately reflected in the un-rectified document – all relevant circumstances must be taken into account,[26] and not just the words of the document itself (including the entire agreement clause):[27]

> 'The problem with this question is that it is not fairly answerable without reviewing the factual material, and thus the undergrowth'.[28]

Secondly, the context-sensitive and fact-sensitive nature of the inquiry therefore impels the courts to conclude that 'it is not permissible to preclude the parties from seeking to establish that the words they both used … failed to give expression to the shared intention of them both'.[29] So, any contractual provision, whether entire agreement clause or otherwise, cannot in principle preclude the courts from exercising their equitable jurisdiction to rectify contractual documents. Thirdly, unless compelling policy reasons

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26 *Surgicraft Ltd v Paradigm Biodevices Inc* [2010] EWHC 1291 (Ch), [75] (Christopher Pymont QC): 'I take the point that the existence of an entire agreement clause like clause 18 may affect the Court's consideration of what was in fact the parties' common intention and of whether they made a mistake. However, it is important in that context to identify from the evidence what, if any, effect the entire agreement clause had on the parties' actual intentions so as to determine what their common intention was. If an entire agreement clause was part of the travelling draft but there is no evidence that the parties themselves actually understood what it meant or let it affect their thinking in any way, it may be difficult to derive anything from it: its existence may simply be part of the mistake in expressing the parties' intentions. It could be different if the evidence showed that the parties actually considered what this clause meant as part of their negotiation. The fact that the parties signed up to this clause in the final form of their agreement and are therefore to be taken, in law, as having agreed to it is not, without more, an indication of what was the parties' common intention'.

27 See also *Carmichael v National Power Plc* [1999] 1 WLR 2042, 2049 (Lord Hoffmann).

28 *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch), [104]-[109] (Hildyard J). *Cf* C Mitchell, 'Entire Agreement Clauses: Contracting Out of Contextualism' (2006) 22 JCL 223.

29 *Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA* [2012] EWHC 498 (Ch), [104]-[106] (Hildyard J).

require the abrogation of the equitable remedy of rectification, the courts remind us to remain conscious that: if an entire agreement clause (or any other clauses purporting to preclude rectification) could effectively prevent a contracting party from seeking rectification, there would be 'no doubt' that 'that the law of rectification can shortly be consigned to the dustbin of legal history'.[30]

These authorities make sense. Having looked at how rectification works if and when its requirements are presumed to have been satisfied, we can see clearly that entire agreement clauses (or indeed any other clauses which purport to preclude rectification) are not conceptually inconsistent with the rectification of contractual documents in which such clauses are found. We cannot say that an entire agreement clause rules out rectification, because it cannot possibly have such an effect where the requirements of rectification are satisfied.

4. Conclusion

The foregoing analysis demonstrates that the presence of an entire agreement clause (or indeed any other clause which purports to preclude rectification) does not of itself prevent a contractual document from being rectified, but it is only *one of the factors* in assessing whether the requirements for rectification have been made out.

The conclusion drawn from these authorities is correct. Whether a contractual document should be rectified, for common or unilateral mistake, turns on whether the written clauses in the document correctly or inaccurately reflects what the law regards as the parties' true agreement. An entire agreement clause, or any other clause (or indeed any

30 *JJ Huber (Investments) Ltd v The Private DIY Co Ltd* [1995] NPC 102 (HH Judge Roger Cooke).

clause purporting to preclude rectification), in a contractual document is merely one factor in assessing what the law regards as the parties' true agreement.

This should not be controversial. The reason for this is intrinsic to the process of rectification.

Rectification of a contractual document is not a remedy which simply vitiates or negates an agreement in the sense of rescinding a voidable contract (say for misrepresentation) or simply declaring a putative contract void (say for common fundamental mistake[31]). Instead, rectification ascertains the parties' true agreement and gives effect to it, by reforming an inaccurate contractual document to make it reflect correctly their true agreement. Even when purporting to (partially) abandon the objective approach towards rectification for some forms of common mistake, in favour of a supposedly subjective approach, the Court of Appeal in *FSHC* remained firmly committed to this view.

If the parties' true agreement comprises the entire agreement clause (or any clause which purports to preclude rectification) and term X, but the inaccurate document contains the entire agreement clause (or any clause which purports to preclude rectification) and term Y instead, there is no necessary inconsistency between rectification and the entire agreement clause (or any clause which purports to preclude rectification). The parties' true agreement is respected because rectification gives effect to *both* term X *and* the entire agreement clause (or any clause which purports to preclude rectification). The entire agreement clause is effective in performing its rightful function of reinforcing the integrity

[31] *Great Peace Shipping Ltd v Tsavliris (International) Ltd ('The Great Peace')* [2002] EWCA Civ 1407, [2003] QB 679.

of the contract as reflected in the correct, rectified, document. Rectification reconciles the parties' intention that the document should be treated as *the record* of their bargain with their concurrent intention that the document should *correctly reflect* their true agreement. Rectification gives effect to both intentions.

In other words, the court is essentially trying to ascertain whether the true agreement between the parties is an agreement comprising term X and the entire agreement clause, or an agreement which comprises term Y and the entire agreement clause. If the parties' true agreement is the former, then rectification ensues.

Ascertaining the parties' true agreement for purposes of rectification is an interpretative exercise.

Although the purpose of both rectification and interpretation is the ascertainment of the contracting parties' true agreement, there are two practical differences between them where the parties' contract is reduced wholly to writing. First, interpretation achieves this purpose by construing the words used in the written document, whereas rectification achieves this by altering those words.[32] Secondly, policy-driven rules artificially restrict the admissibility of evidence of prior negotiations, subsequent conduct or declarations of subjective intentions for the purpose of interpreting a contract reduced wholly to writing, but those restrictions are inapplicable to rectification.[33]

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32 A Burrows, 'Construction and Rectification' (Ch 5 in A Burrows & E Peel (eds), *Contract Terms* (Oxford: OUP, 2007)), 77; *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [145] (Leggatt LJ).

33 *Prenn v Simmonds* [1971] 1 WLR 1381; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101; *Mihail Tartsinis v Navona Management Company* [2015] EWHC 57 (Comm), [8]-[13] (Leggatt J).

There is simply no authority or principle which says that a non-contextual interpretation of a single *clause* (say, an entire agreement clause or any clause which purports to preclude rectification) ought to be *decisive* in the interpretation of an entire *contract*. Indeed, the interpretation of even a single contractual term must not be done in isolation but in the context of the entire contract and other relevant background.[34] Furthermore, when interpreting a contract, the meaning of the parties' true agreement has to be derived by a holistic interpretation of the parties' overall words and conduct in their relevant context.[35] And, where an interpretative exercise is undertaken for the purpose of rectification, the restrictive evidential rules are inapplicable. Logically, a single entire agreement (or other) clause cannot be conclusive as to what the contract says.

The conclusion drawn from the authorities is therefore unassailable in principle. The presence of an entire agreement clause (or any clause purporting to preclude rectification) is only one factor to be taken into account when determining: what the parties' true agreement (and resultant contract) is; whether the document correctly reflects that true agreement; and whether that document should be rectified to make it reflect correctly their true agreement.

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34 Sir K Lewison, *The Interpretation of Contracts* (6th ed, 2015), 363 ([7.02]); *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 384 (Lord Mustill) ('The words must be set in the landscape of the instrument as a whole'); *Re Sigma Finance Corp* [2009] UKSC 2, [2010] BCC 40, [12] (Lord Mance), [35] (Lord Collins).

35 *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441, 502 (Lord Diplock); *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH and Co KG* [2010] UKSC 14, [2010] 1 WLR 753, [45] (Lord Clarke). Likewise, a contextual assessment of the parties' overall words and conduct, and not merely of a contractual document, is necessary for ascertaining the content of the parties' contract and whether it has been reduced wholly to writing (*Carmichael v National Power Plc* [1999] 1 WLR 2042, 2049 (Lord Hoffmann)).

CHAPTER 9: CONCLUSION

> 'By its nature, law needs to be just and consistent, as well as flexible. Practice and theory need to be reconciled. And principles and rules must be adaptable to new challenges.'–*The Evolution of the Species.* [1]

It is now apposite to sum up the conclusions reached in the preceding chapters and respond to some of the questions which prompted the writing of this thesis. The response will not be a perfect answer satisfying everyone, but it will coherently reconcile the demands of justice, principle, precedent, flexibility and practical reality.

As demonstrated in Chapter 2, a contract is an agreement (of sufficient certainty and completeness) reached between contracting parties (supported by consideration and intended to create legal relations) which gives rise to legally enforceable rights and obligations between them. Of course, the law must have rules about *what* it regards as the parties' true 'agreement' and *how* that is established. This is where the 'objective principle' plays a central role.

Uncertainty, incompleteness or the (non-)existence of consideration and intention to create legal relations rarely pose a problem in modern cases. Those rare problems aside, the kernel of the parties' contract is their agreement; however, it is axiomatic that an *agreement*, a *contract* and a *contractual document* reflecting or implementing the contract (even a document by which the contract was entered into) are three different things. The

[1] F Rose, 'The Evolution of the Species' (Ch 1 of A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (OUP, 2006)), 1.

tangible document may be evidence reflecting, or the implementation of, their contract, but the document is not *the* contract. The parties' contract is a set of intangible rights and obligations resulting from an intangible agreement. The parties' contract is based on, but comprises more than, their agreement: just because parties have reached an agreement on terms does not mean that they have a contract. The agreement might yet not amount to a contract because of, *inter alia*, irresolvable ambiguity, incompleteness in respect of essential matters, lack of intention to create legal relations or insufficiency of consideration.

Happily, the law has not reified a contract by fusing it into tangible sheets of paper so as to treat (a) the document as the contract itself. Neither has the law insisted that (b) the document is exclusive evidence of the contract, nor that (c) the document is conclusive evidence that the clauses expressed in the document state exhaustively the terms of the contract. Otherwise, it would be impossible to prove and enforce a contract just because the tangible sheets (on which the contract was documented) have been destroyed or lost. And it would be impossible to rectify a contractual document which by mistake failed to accurately reflect the parties' true agreement. These are long-accepted axioms; however, they must be forcefully reiterated because the oft-repeated mantras which unduly emphasise 'loyalty' to, or 'respect' for, the 'primacy' of the 'written terms of a contractual document' risk causing conceptual confusion, obstructing the flexible, principled attainment of justice, and threatening commercial pragmatism.

Ultimately, English courts accept that:

(a) judges should uphold apparent contracts as far as possible, instead of striking them down for uncertainty, incompleteness or other technical reasons;

(b) a contract, properly interpreted, can have only one meaning at law and in equity (determined according to the circumstances when it was entered into), otherwise it would be void for uncertainty;

(c) contracting parties normally do not thoroughly consider, negotiate or agree upon *all* potential issues which might arise pursuant to their contract;

(d) express contractual provisions may not fully and accurately reflect the parties' agreement; and

(e) contract law adopts the 'objective principle' as its fundamental approach towards how communications are interpreted.

To return to some earlier examples, consider a case where two parties negotiate a contract by email correspondence, going through five drafts, before finally agreeing to settle on the fifth version. What if, instead of version 5, they printed and signed one copy of version 3 and one copy of version 4? Is there one contract or none; or are there two contracts or three? Or, consider another case where two corporate executives negotiate at length and finally shake hands to seal the deal. The major commercial terms, or their 'points of agreement', are written on a sheet of notepaper. The executives hand over copies of the notepaper to their respective lawyers and instruct them to draft a formal contractual document for signing. What if the signed contractual document failed to accurately reflect the 'points of agreement'?

An exclusive preoccupation with loyalty to the text or primacy of the written terms of a contractual document *cannot* provide a solution to any of these questions which delivers principled and pragmatic justice, commercial flexibility and security of transaction

in one balanced package. Modern contract law, painstakingly developed by the courts over many years, *can*.

Unless the courts are now much more willing to strike down apparent contracts for uncertainty or incompleteness, they *must ascribe meaning* to the parties' apparent contract, which meaning may not sit comfortably with either their subjective intentions or with a literal, non-contextual, interpretation of the explicit words found in the parties' final contractual documents. It is *necessary* for the courts to read between the lines using business common sense; assess the parties' words and conduct holistically in the surrounding context; and examine evidence of matter extrinsic to the contractual documents. The courts must attribute to the contracting parties some objectively ascertained undertakings on which the parties never reached subjective consensus: they do so through the techniques of interpretation, rectification or implication, and by the processes of construing, displacing or replacing the parties' explicit words.

It is clear that contract law applies the 'objective principle' towards the interpretation of any serious utterance and communications in general. Contracting must be objective because contracting involves the communication of the contracting parties' choice; and communication must be objective in the sense that what has been communicated by the speaker or writer to the listener or reader must take into account the listener's or reader's perspective.

The foregoing makes it plain that the objective principle is of fundamental importance in this field of study. It is the principle by which the contracting parties' 'intentions' (as manifested in their communications) are interpreted, regardless of whether the communications comprise: the parties' contracts (oral, reduced wholly to writing or

partly oral and partly in writing); offers and acceptances; their expressions of intention, consensus or agreement (amounting or not amounting to a binding contract); (mis)representations; or contractual documents purporting to reflect or implement their agreement, consensus or intention; or any other utterance.

As emphasised throughout Chapter 2, the 'objective principle' (better described as the principle of addressee-centric objectivity) is not entirely objective because it is not wholly detached from the contracting parties and contains some subjective elements. Instead, the objective principle is contextual and addressee-centric: it prescribes that communications between contracting parties should be interpreted objectively from the perspective of a reasonable person in the position of the *addressees* of those communications (namely, the contracting parties), assessing all the words and conduct of the parties holistically, taking into account business common sense and context. The reasonable person is imbued with the known characteristics of the contracting parties, imputed with knowledge of facts which were known to them or reasonably available to a reasonable person in the position of the contracting parties at the time of contracting. So, a contract must be interpreted by assessing how it would be understood by a reasonable person in the position of both contracting parties.

Nonetheless, technical policy-driven rules render inadmissible evidence of some matters extrinsic to the contractual document, particularly the parties' pre-contractual negotiations and their subjective intentions, when interpreting a contract reduced wholly to writing. However, the technical evidential exclusion only applies in one situation, namely, the interpretation of a contract reduced wholly to writing; and can therefore be

sidestepped, for example, by asserting concurrent claims for misrepresentation, estoppel or rectification.

Since the objective principle intrinsically comprises a complex amalgam of subjective and objective elements, little room is left for *additional* subjective considerations to qualify the objective principle.

Specifically, when applying the objective principle to the interpretation of contracts (whether or not reduced wholly to writing), the court, as the ultimate reasonable person, assesses the contracting parties' words and conduct holistically from the parties' perspective to derive the true interpretation of the parties' contract, in light of commercial common sense, context, the parties' known characteristics, and matters known or which ought reasonably to have been known to the parties.

Chapter 3 clarifies that, in like manner, the objective principle also applies to the rectification of contractual documents for 'common mistake'. The meaning of the contracting parties' common continuing intention, prior agreement or consensus, as well as the subsequent contractual document which is being rectified, have to be ascertained; likewise, at the end of the rectification process, the rectified document will express what the law regards, and enforces, as their ultimate contract. All the foregoing involves an interpretative exercise of ascertaining the meaning of communications between the contracting parties and, so, that is reason enough to invoke the objective principle in common mistake rectification.

Examining rectification and rescission for mistake and misrepresentation, side by side, discloses *at least three valuable insights*.

The first of the three valuable insights is that since the ultimate interpretation or meaning of a communication is ascertained by assessing it objectively, so it need not be the interpretation or meaning which either contracting party subjectively had in mind. That is why the so-called 'common mistake' in common mistake rectification cases is only a 'mistake' in an attenuated sense. Rectification ensues in those cases because the court is *giving effect* to the parties' *true agreement*–what the law regards ultimately as the kernel of their contract. So, there is no real need for the parties to have shared some subjective common mistaken belief: the so-called 'common mistake' in common mistake rectification cases does not necessarily have to be a true subjective mistaken belief.

As should be patent from Chapter 3, the key to understanding the rectification of contractual documents for 'common mistake' is that it turns entirely on the crucial questions of (a) whether the contracting parties shared a common intention concerning the contents of the putative contract, and (b) whether that common intention continued, or persisted, up to the time they executed the contractual document which is being rectified. The two crucial questions are to be answered in the same way, regardless of whether their common continuing intention amounted to a binding contract prior to the execution of the document, or whether the document is the means by which the binding contract was formed.

Consider a case where contracting parties negotiate at length and finally reach agreement on commercial terms; and they instruct lawyers to prepare a formal contractual document for execution. Regardless of whether their agreement amounted to a binding contract before signing the document or whether the document was the very means by which their contract was formed, one may reasonably–and objectively–infer that their

intentions were twofold: first, that the document should be *the* statement of their contract, and secondly, that the document should *accurately reflect* their agreement on commercial terms unless they varied that agreement before executing the document. Rectifying the document to make it accurately reflect their agreement will reconcile and give effect to *both* intentions: after rectification, the document will *accurately reflect* the contracting parties' prior agreement *and* the document is *the* statement of their contract.

If the prior agreement or common intention did *not* continue up to execution, then executing the document which is inconsistent with the prior agreement would be additional evidence that the parties' common intentions had changed: the only difference between cases where the prior agreement or common intention amounted to a prior binding contract and cases where the agreement or intention did not amount to a prior binding contract is that the former involves a two contract analysis and the latter a single contract analysis. If the prior agreement amounted to an earlier binding contract then that earlier contract has been varied or superseded by a subsequent contract evidenced by the document; but, if the prior agreement did not amount to a binding contract then there is just one contract which comports with the subsequent document but does not comport with the prior superseded agreement.

In cases of 'common mistake' rectification, regardless of whether the parties' prior agreement or common continuing intention amounted to a binding contract prior to the execution of the contractual document being rectified, rectification does not reform the contract or the parties' prior agreement. Rectification merely reforms the tangible document to make it conform to their agreement or common continuing intention, which

underlies their contract. This should not be controversial once we accept the fundamental distinction amongst agreement, contract and document.

Chapter 4 describes the current orthodoxy which presumes that the rectification of contractual documents for 'unilateral mistake' is a drastic remedy which imposes on the defendant a contract to which he did not agree and allows the claimant to escape from one to which he did agree; and that the remedy is exceptionally imposed to redress inequity, unconscionability or lack of good faith, rather than to give effect to the contracting parties' true agreement. Where a claimant mistakenly assumes that the contractual document (which he and the defendant are executing) contains C terms whereas it contains D terms, rectification may ensue if the defendant knew of the claimant's mistake. It is correct to say that rectification ensues in such circumstances because it would be unconscionable, inequitable or contrary to good faith for the defendant to insist on enforcing the contract on D terms or to deny rectification and the enforcement of the contract on C terms. It is also true that if we focus *only* on the document, then their agreement and hence contract seems to be on D terms; so, rectification and enforcement of a contract on C terms might look like an imposition of terms to which the defendant did not agree. However, the analysis changes complexion once we properly, and holistically, apply the objective principle which is addressee-centric.

A reasonable person in the defendant's circumstances might regard the claimant as contracting on C terms not D terms, because the defendant (and the reasonable person in the defendant's position) knew of the claimant's mistake and knew what the claimant meant. A reasonable person in the claimant's circumstances (imbued with the claimant's knowledge and characteristics, knowing that the claimant is purporting to contract on C

terms) might similarly regard the defendant as contracting on C terms not D terms. Since the objective interpretative exercise is open-textured, context- and fact-sensitive, many contracts are generally susceptible to more than one interpretation which might appear objectively plausible to different reasonable persons. A judge *might* reasonably conclude that there is a contract on C terms according to the addressee-centric objective principle. The decisive factor is that the defendant *knew* that the claimant mistakenly thought he was dealing on C terms (but the defendant acted unconscionably or inequitably) when purporting to enforce the contract on D terms. That factor makes the claimant's interpretation on the basis of C terms a *reasonable interpretation* from the perspective of a reasonable person in the defendant's (and claimant's) position – and also gives the claimant the choice to treat it as the *ultimate binding interpretation*.

Rectification, in unilateral mistake cases, to make the document comport with C terms is therefore easily justified on an *ordinary* application of contract law's objective principle governing the interpretation of communications. So, even in the context of unilateral mistake rectification, the document is reformed to make it accurately reflect what the law regards as the parties' true agreement, to give effect to what the law regards as their contract according to the objective principle. No extraordinary remedy or drastic imposition is involved, so no extra circumspection is warranted when granting rectification for unilateral mistake. The cases are clear that the claimant is entitled to rectification even if he had been negligent in mistakenly assuming that the contractual document states C terms. By parity of reasoning, the defendant's mere negligence (in that he *ought to have known* of the claimant's mistake) is not sufficient to justify rectification. The law must be even-handed; there is no reason to prefer C terms over D terms, unless the defendant is

relatively more blameworthy or the claimant is more meritorious. It makes sense for rectification to ensue only if the defendant *knew* of the claimant's unilateral mistake.

As reflected in Chapter 5, the objective principle also applies to the interpretation of pre-contractual misrepresentations, so that their meaning is determined from the perspective of a reasonable person in the position of their addressees. However, misrepresentations can play different roles in different contexts.

Consider a case where a representation was made before the parties executed a contractual document (by which document they entered into a contract), but the representation finds no expression in the document. If it is a statement of fact which happens to be untrue and which induced the representee to enter into the contract, the statement is *prima facie* an operative pre-contractual misrepresentation entitling the representee to rescind the contract; but, of course, its meaning (and hence its falsity or truthfulness) depends on its true interpretation in accordance with the objective principle. Furthermore, the parties' intentions, again ascertained by interpretation in accordance with the objective principle, determine whether the untrue statement amounts *concurrently* to a term of the contract (giving rise to remedies for breach of contract).

Conversely, if a contractual document contains a clause which also incorporates an untrue statement of fact, again, the parties' intentions determine whether the clause amounts to not just a contractual term but also concurrently a pre-contractual misrepresentation. Their intention is ascertained through interpretation in accordance with the objective principle. There is one additional factual requirement: the contracting party who now seeks rescission for misrepresentation must have seen the untrue clause *before* he finally (put pen to paper and) entered into the contract. That way, the court can infer

that the untrue clause was a *pre-contractual* misrepresentation which *induced* him to enter into the impugned contract, even though the representation is in fact a clause in the contractual document itself.

In other words, depending on the circumstances, false representations can give rise to different legal consequences.

If the statement was a *representation of fact extrinsic to the contract* which turns out to be false, and it induced the claimant to enter into a contract because he believed the statement to be true, then prima facie, that is an operative misrepresentation which vitiates the contract by entitling the claimant to rescind the contract. The operative misrepresentation vitiates the contract because the claimant's consent was vitiated: the claimant's consent was vitiated because his consent was defective since he acted on a false belief which was caused by the defendant's false statement or by a third party's false statement of which the defendant had notice.

The second insight is that the requirement that a representee rescinding a contract for misrepresentation must have subjectively believed in the misrepresentation *can, in principle, be reconciled* with the rule that a misrepresentation is interpreted according to the objective principle. It is well-established that a contract is vitiated by an operative misrepresentation only if a contracting party was induced to enter into the contract under a mistaken belief induced by a false statement. Yet, that must be reconciled with the principle that what a (mis)representation means and whether it is false turns on its interpretation, and its true interpretation is derived in accordance with the objective principle. So, the representation's true objective meaning need not be a meaning by which the claimant subjectively understood the representation: that is consistent with the idea that the objective

true interpretation of a contract need not be the meaning which the contracting parties subjectively attributed thereto. The way to reach reconciliation is to realise that requiring the claimant to subjectively believe in the false representation is a consequence of a *separate, additional, principle* concerning the nature of operative misrepresentations (as comprising mistaken beliefs induced by misstatements), not a consequence of the objective principle. Therefore, the claimant may rescind the contract for misrepresentation only if the true meaning of the representation ascertained according to the objective principle was untrue, *and* he *also* subjectively believed in that true objective meaning.

On the other hand, the analysis becomes more complex where the defendant's *misrepresentation relates to a fact intrinsic to the contract*, specifically a misrepresentation which relates to the terms of their contract. So, where a defendant makes a representation to a claimant which falsely states that a contractual document contains C terms whereas the document in fact contains D terms, and the two parties then purport to enter into a contract by executing that document, the *representation has two effects* at least. It acts as an operative *misrepresentation which vitiates the contract on D terms*, again because the claimant's consent thereto was vitiated because defective. It also acts as a statement which might cause a reasonable person in the *claimant's (and defendant's) position* to objectively interpret the parties' overall words and conduct contextually to mean that they are contracting on C terms. Since the defendant was the one who misrepresented that they were contracting on C terms, the *defendant knew* that the claimant was contracting on C terms, and a reasonable person in the defendant's position might also objectively interpret the parties' words and conduct to mean that they were contracting on C terms. As such, applying the objective principle, the true agreement between the parties might be regarded

as a contract on C terms, not D terms: the contract on C terms subsists but the purported contract on D terms is non-existent or void. This analysis is set out in Chapter 6.

Identifying the true terms of the parties' contract this way is unexceptional. It is essentially a process of holistically *interpreting* the parties' overall words and conduct according to the objective principle; but it is also notionally parallel to the process of *rectification* where a contractual document is involved. The courts could notionally rectify the contractual document for unilateral mistake, where the claimant made a mistake as to terms and the defendant knew of the claimant's mistake.

Their true agreement may be a contract on C terms according to the objective principle despite the document expressing their contract in D terms, but the claimant is not required to insist on taking any particular side.

The third of the three valuable insights is that when mistake or misrepresentation, and rescission or rectification, overlap, it may be open to the claimant to elect between remedies if he is more meritorious and less blameworthy than the defendant. This is examined at length in Chapter 6. Consider, again, the case where a defendant makes pre-contractual misrepresentations which causes the claimant to assume mistakenly that their contractual document contains C terms when in fact the document contains D term; and the claimant and defendant enter into a contract by executing a document in D terms. Since the defendant's misrepresentation caused the claimant's mistake as to terms and since the defendant knew of the claimant's mistake, their positions are not equally meritorious and the defendant is relatively more blameworthy. As such, when the defendant asserts a contract on D terms, the claimant has a *choice of remedies*: the claimant may simply accede; or the claimant may elect to rescind the contract on D terms for misrepresentation

and simply walk away as if there was no contract; or the claimant may elect to assert their true agreement according to the objective principle and insist that they have a subsisting contract on C terms not D terms (and, if necessary, get the document rectified to reflect C terms).

All the foregoing focuses on the default legal position setting out the relationship between the objective principle of contract law and rectification and rescission for mistake and misrepresentation. However, all that would be pointless if the remedies of rescission and rectification could be swept away by boilerplate clauses seeking to preclude those remedies. Nonetheless, respect for freedom of contract means that contractual clauses purporting to exclude rectification or rescission (where no fraud is involved) should *generally* be upheld subject to specific doctrinal limitations (imposed by precedent, principle or policy) and statutory controls (such as the statutory reasonableness requirement imposed by section 3 of the Misrepresentation Act 1967 upon contractual clauses purporting to exclude remedies for misrepresentation).

Chapter 7 considers contractual clauses which purport to preclude a claimant from asserting the right to rescind his contract with the defendant on the ground of non-fraudulent misrepresentation or to preclude him from even establishing a misrepresentation at all. Contrary to what is assumed to be current orthodoxy, where a preclusive clause is found in the impugned contract itself (which is being rescinded because it was induced by misrepresentation), the impugned contract including the clause *should not* be able to pull itself up by its own bootstraps. The contract in its entirety, including the preclusive clause, was voidable because induced by misrepresentation, and was founded upon the claimant's defective consent, and is therefore subject to his election to rescind. There is simply no

compelling policy or intellectually defensible, principled, way to resist this conclusion. Even if such a clause were *prima facie* effective to preclude rescission, it would be subject to the statutory reasonableness requirement. The courts have clearly set their faces against attempts to draft preclusive clauses in the form of 'basis' clauses (preventing an operative misrepresentation from arising at all rather than a straightforward exemption clause excluding a remedy for an undoubted misrepresentation) to evade the statutory requirement: the courts look not to the form or label but to the substance and effect of the clause. If its purported *effect* is to prevent a claimant from exercising a remedy which he would have been able to enjoy absent that clause, then that clause is an exemption clause purporting to preclude a remedy for misrepresentation and is therefore subject to the statutory requirement of reasonableness.

Next, Chapter 8 considers contracting parties who reach agreement on terms and proceed to execute a contractual document which, unfortunately, fails to accurately reflect their agreement, but the document also contains a clause (such as an entire agreement clause) which may purportedly preclude rectification. An entire agreement clause typically states that the written terms within the document comprise the entirety of the parties' contractual agreement. The courts have clarified that a clause purporting to preclude rectification for mistake, whether in the form of an entire agreement clause or otherwise, will not in and of itself conclusively bar rectification. The clause is a relevant consideration–some relevant evidence–of what the parties' true agreement entails, but it cannot *decisively and conclusively of itself* determine that their true agreement only comprises the un-rectified terms expressed in the document. This is because the objective principle prescribes that their true agreement is ascertained by a holistic, commonsensical,

contextual, interpretation of their overall words and conduct; their agreement cannot turn entirely and solely on one clause.

Furthermore, entire agreement clauses are consistent with rectification. For instance, when parties first reach agreement and subsequently reduce their contract wholly to a document (regardless of whether the document contains an entire agreement clause), it is a reasonable objective inference that they typically have two concurrent intentions: first, that the document should be *the* statement of their contract; and secondly, that the document *accurately reflects or implements* their true agreement. Rectification *reconciles*–and gives effect to–*both* objectively ascertained intentions. As rectified, the document will be *the* statement of their contract and will *also accurately* reflect their true agreement.

The central idea in Chapter 8, that the parties' intentions (ascertained according to the objective principle) can lead to a pragmatic reconciliation of rectification and entire agreement clauses, simply underscores the fundamental importance of the objective principle. And that is the very point made in Chapter 2, where this thesis begins.

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