I. INTRODUCTION

Mistake in Contracting

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Part B CONTEXTS OF MISTAKE

Chapter 5 RECTIFICATION

I. INTRODUCTION

§5-001 Rectification is a peculiarity in the over-all law of mistake in that it relates not to a mistake in contracting *per se* — *i.e.*, the agreement between the parties or the process of agreeing — but to an error in the written record of that agreement. In the words of Stoljar, rectification is a type of "correspondence mistake" — the (written) record does not match the writing.[1] It is also peculiar in the law on mistake in that it results not in the elimination of the contract between the parties — either by saying such a contract never existed (void) or by saying it can be set aside (as voidable). Rather, it *saves* the contract, but in the version assumed by or asserted by the mistaken party. The doctrine was known historically as reformation — and it still goes by that label in the United States. Rectification is allowed for both common (sometimes called "mutual") and unilateral mistake. Both versions are based on the idea that the written evidence of the contract (*i.e*., the instrument) does not reflect the actual bargain the parties entered into.

§5-002 Brown J. for the majority in *Canada (Attorney General) v. Fairmont Hotels Inc*., described rectification as follows:

> If by mistake a legal instrument does not accord with the true agreement it was intended to record — because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement — a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions … .
>
> … It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at s. 8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, *The Law of Contract* …; *Mackenzie v. Coulson* … ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* [*Sylvan Lake*] (at para. 31), "[t]he court's task in a rectification case is … to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".[2]

§5-003 This restricted role for rectification finds many forms of expression in case law. For, despite its restricted role, rectification is the most frequently argued area of the law of mistake[3] and it has a long history. In *Mackenzie v. Coulson*, James V.-C. said: "Courts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."[4] In *Lovell & Christmas Ltd. v. Wall*, Buckley L.J. said: "As I said at starting, the court does not set to work to rectify contracts. Its business is to rectify erroneous expressions in contracts."[5] In *American Airlines Inc. v. Hope*, Lord Diplock said: "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."[6] More recently, in *Concord Pacific Group Inc. v.*

Temple Insurance Co., Chiasson J.A. said: "Rectification does not add to or subtract from the bargain made by the parties. It operates to conform a written instrument to the agreement they made. The fact the agreement was made by their agents does not change this."[7]

§5-004 The limited nature of what a court will do with rectification was emphasized in *H.F. Clarke Ltd. v. Thermidaire Corp.*, by Brooke J.A., who said:

> When may the Court exercise its jurisdiction to grant rectification? In order for a party to succeed on a plea of rectification, he must satisfy the Court that the parties, all of them, were in complete agreement as to the terms of their contract but wrote them down incorrectly. It is not a question of the Court being asked to speculate about the parties' intention, but rather to make an inquiry to determine whether the written agreement properly records the intention of the parties as clearly revealed in their prior agreement. The Court will not write a contract for businessmen or others but rather through the exercise of its jurisdiction to grant rectification in appropriate circumstances, it will reproduce their contract in harmony with the intention clearly manifested by them, and so defeat claims or defences which would otherwise unfairly succeed to the end that business may be fairly and ethically done … .[8]

§5-005 Rectification might be said to be based to a certain extent on an *objective* approach to contracts: the written "contract" — the instrument — is meant to be an authoritative, objective record of the contract, *i.e*., the agreement. That record should, therefore, reflect what objectively the parties have agreed. That said, in contexts of unilateral mistake, there is a significant subjective element in the requirement that the non-mistaken party knows or ought to know of the other's mistake.

Footnote(s)

1 See S.J. Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principle*s (London: Sweet & Maxwell, 1968).

2 *Canada (Attorney General) v. Fairmont Hotels Inc*., [2016] S.C.J. No. 56 at paras. 12-13, 2016 SCC 56, [2016] 2 S.C.R. 720 (S.C.C.), citing A. Swan & J. Adamski, *Canadian Contract Law*, 3rd ed. (Markham, ON: LexisNexis Canada, 2012) at s. 8.229; E. Peel, *The Law of Contract*, 14th ed. (London: Sweet & Maxwell, 2015) at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 at 375; and *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.,* [2002] S.C.J. No. 20, [2002] 1 S.C.R. 678 (S.C.C.).

3 Apart from misrepresentation and estoppel, if they are considered part of the larger law on mistake.

4 *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368 at 375. See also *Can-Dive Services Ltd. v. Pacific Coast Energy Corp*., [2000] B.C.J. No. 259, 2000 BCCA 105 (B.C.C.A.), leave to appeal refused [2000] S.C.C.A. No. 166 (S.C.C.).

5 *Lovell & Christmas Ltd. v. Wall* (1911), 104 L.T. 85 at 93 (C.A.). See Andrew Burrows, "Construction and Rectification", in Andrew Burrows & Edwin Peel, eds., *Contract Terms* (Oxford: Oxford University Press, 2007), 77.

6 *American Airlines Inc. v. Hope*, [1974] 2 Lloyd's Rep. 301 at 307 (H.L.).

7 *Concord Pacific Group Inc. v. Temple Insurance Co*., [2010] B.C.J. No. 1038 at para. 49, 2010 BCCA 275 (B.C.C.A.).

8 [1973] O.J. No. 1870 at para 25, [1973] 2 O.R. 57 (Ont. C.A.), revd on other grounds [1974] S.C.J. No. 151, [1976] 1 S.C.R. 319 (S.C.C.), citing *Frederick E. Rose (London) Ltd. v. William H. Pim Junior & Co.*, [1953] 2 Q.B. 450 (C.A.); *Vaudeville Electric Cinema Ltd. v. Muriset*, [1923] 2 Ch. 74 (Ch. D.); *United States of America v. Motor Trucks Ltd.*, [1923] O.J. No. 217, [1924] A.C. 196, [1923] 3 D.L.R. 674, 25 O.W.N. 78 (P.C.).

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