

Remedies: Rectification and Rescission

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Maintained

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Rectification and rescission are both equitable remedies that attempt to deal with issues arising out of contractual mistakes. **Rectification** permits the court to amend the terms of a written **contract** in order to reflect the true intention of the parties; *rescission* allows the court to set aside a **contract** from the day it was made and to restore the parties to the position they were in prior to date of the **contract**. While the remedies are distinct and generally apply in different scenarios, they share a common feature in that they are each intended to address (and are therefore reliant on the existence of) a serious mistake that goes to the essence of the purported agreement. Of note, these remedies are intended to protect the contractual intentions of the parties and will not be applied in order to simply correct for errors of judgment by the parties (*Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, [2002] S.C.J. No. 20).

Rectification

Rectification is a remedy by which the court essentially re-writes the terms of a written agreement in order to correct a mistake and restore the parties to their original bargain. Before ordering **rectification**, the court must be satisfied that: (a) there is an enforceable agreement amongst the parties; (b) the written evidence of that agreement does not represent the true intent of the parties at the time the agreement was made; and (c) the mistake or discrepancy is not the fault of the party seeking **rectification**.

Based on the foregoing, a party seeking **rectification** must be prepared to prove that the written document purporting to evidence the agreement does not accurately reflect the contractual intent of the parties. This can be accomplished in a number of ways, including early drafts of the written agreement, memorandums regarding the negotiation process and evidence of the individuals involved in the negotiations themselves. In most cases documentary evidence will be necessary, although the *parol evidence* is not applicable and, therefore, oral evidence alone may be sufficient in exceptional cases. The crucial issue is to establish that the parties agreed to a bargain that is different than the one that is apparent on the face of the document — the plaintiff/applicant must prove there is a “mistake”; **rectification** is not intended to assist where the dispute arises out of the interpretation of a particular agreement or a clause therein.

Rescission

The remedy of rescission exists to essentially tear up a purported **contract** where, due to a mistake or misunderstanding, there is in fact no agreement between the parties (*i.e.*, they are not *ad idem*). Rescission is also available as a remedy under certain statutes (*e.g.*, the *Condominium Act, 1998*, S.O. 1998, c. 19, s. 73). Rescinding a **contract** is distinct from terminating a **contract** — the court will only order rescission where it is satisfied that no true agreement ever existed, whereas termination deals with the situation where an agreement that existed has come to an end prior to its completion.

When ordering rescission, the court will attempt to unwind the purported transaction and place the parties in the position they were in prior to the aborted agreement. Accordingly, an order rescinding a purported **contract** will often be accompanied by an order that any funds or property transferred under the auspices of the “agreement” are

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held in a constructive trust by the recipient. For example, where a deposit has been paid and the **contract** is subsequently rescinded, the recipient of those funds will be deemed to be a constructive trustee of those funds.

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