# THE COURT'S RECTIFICATION POWER IN CONTRACTS, TRUSTS, AND WILLS

## 20TH ANNUAL ESTATES AND TRUSTS SUMMIT (DAY ONE)

**C.D. Freedman***

*Abstract:*
The equitable jurisdiction of the Court to order rectification of a document is a powerful one and should be exercised sparingly. In its latest consideration of the proper operation of the Court's rectification power, the Supreme Court of Canada has reigned in doctrine along traditional lines. In particular, the Court held that the more generous approach previously endorsed by the Court of Appeal for Ontario must be rejected. Developments in English law are to similar effect. It appears that the approach that should be taken to rectification in contracts, Wills, and trusts is largely the same save some contextual distinctions. The most immediate consequence is that rectification may well be refused where a transaction was undertaken based on professional advice which was wrong.

"Isn't it nice to think that tomorrow is a new day with no mistakes in it yet?"

— Lucy Maud Montgomery, *Anne of Green Gables*

## I. INTRODUCTION

Mistakes happen, and one expects that mistakes in regards to legal matters are as common as in any other area of life. Sometimes the mistake is in the wording of a document. Other times, the mistake is a substantive one; an agreed upon course of conduct as captured in a document simply will not produce the desired consequences that a party or parties seek. The former problem is easy to resolve and the law has a variety of tools that can be used to correct the error; principally, through the interpretation of a patent or latent ambiguity in a document or as the Court may order that the document be rectified on its face. The latter problem is rather more difficult.

* LLB, MA, PhD, TEP. Certified Specialist (Estates & Trust Law). Faculty of Law, Queen's University & Counsel, Hull & Hull LLP. Contact details at *davidfreedman.ca*.

The doctrine of rectification deals with the equitable jurisdiction of the Court to correct mistakes in a document that does not accurately reflect the true intention of its maker(s). It is a powerful remedy and is available in a wide variety of circumstances. Recently, the Supreme Court of Canada[1] and the United Kingdom Supreme Court[2] have considered the proper scope of rectification. These developments are probably most significant for those drafting and entering into conventional contracts but they are important and warrant attention for trusts and estates practitioners as well, particularly where tax advice is offered.

## II. 'INTERPRETATION', 'RESCISSION, AND 'RECTIFICATION' DESCRIBED

While it is well beyond the scope of this paper to offer a detailed treatment of the law on point, it is useful to describe and differentiate three central concepts.

### *(i) 'Interpretation'*

In the context of interpretation of documents, one obviously does not talk of the direct correction of mistakes. It is trite law that the Court's role in interpreting a document is to give effect to the intentions of the parties by curing latent or patent ambiguities and not by rectifying errors. The principle becomes difficult only in respect of the range of extrinsic aids that may or may not be put before the Court beyond the language set out in the four corners of the document and for any presumptions that have been recognized as a matter of law in a given context. Context, then, is important. In the law of contract, one takes an objective approach to discerning the intentions of the parties from the language used rather than looking for subjective understanding of individual words or phrases.[3] Evidence

---

[1] *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56 (S.C.C.); *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*, 2016 SCC 55 (S.C.C.).

[2] *Marley v Rawlings* [2014] UKSC 2 (UK Supreme Court); cf. *Bullard v Bullard*, [2017] EWHC 3 (Ch). See also *Pitt v Holt and Re Futter* [2013] UKSC 26 (UK Supreme Court).

[3] See *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98, 114 (H.L.), per Lord Hoffmann ("Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."); *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 47-48 (S.C.C.) per Rothstein J. ("… a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the

setting out the "factual matrix" in which the agreement was concluded is admissible,[4] although the extent to which parol evidence is admissible is still a matter of uncertainty (at least formally)[5]. In the context of Wills, the doctrine of "surrounding circumstances" fills a similar role[6] with a less restrictive approach to most evidence.

*(ii) 'Rescission'*

Rescission is an equitable remedy that responds to defects in the *formation* of contracts and seeks to place the parties in the same position that they were before the contract was formed.[7] Here one looks to unconscionable conduct such as misrepresentation, duress, undue influence and the like to set up the remedy's availability.[8] Rescission no longer responds to mistake of a fundamental nature; rather than ordering that the contract was never formed, the better view is that it is void or voidable as a matter of common law through rectification.[9] Equity, however, still retains the power to intervene[10] where there has been a mistake known to one of the parties such that it would be unconscionable to allow the contract to stand.[11] I shall return to rescission below, in the context of the

---

parties at the time of the formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning. The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement…"); *Starrcoll Inc. v. 2281927 Ontario Ltd*., 2016 ONCA 275 at Paras. 17-18 (Ont. C.A.); *Dumbrell v. The Regional Group of Companies Inc.*, 2007 ONCA 59 (Ont. C.A.).

[4] See *Primo Poloniato Grandchildren's Trust (Trustee of). v. Browne*, 2012 ONCA 862 (Ont. C.A.).

[5] Cf. *Eli Lilly & Co. v. Novopharm Ltd.; Eli Lilly & Co. v. Apotex Inc.*, [1998] 2 S.C.R. 129 (S.C.C.) and *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.).

[6] See generally *Haidl v. Sacher* (1980), 106 D.L.R. (3rd) 360, 368 (Sask. C.A.).

[7] See John McGhee (ed.), Snell's Equity, 32nd Ed., §15-002; Dominic O'Sullivan, Steven Elliott, and Rafal Zakrzewski, *The Law of Rescission* (OUP, 2015); *Johnson v. Agnew*, [1980] A.C. 367 (H.L.); *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 39 (S.C.C.), approving *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773, 781 (H.L.) ("by reason of fraud or essential error of a material kind").

[8] See Alexander J. Black, "Undue Influence and Unconscionability in Contracts and the Equitable Remedy of Rescission in Canada" (2012), 40 Adv. Q. 80.

[9] See *Associated Japanese Bank (International) Ltd. v. Credit du Nord S.A.*, [1989] 1 W.L.R. 255 (Q.B.); *Own v Wong*, 2017 ABQB 35 (Alta. Q.B.).

[10] *Miller Paving Ltd. v. B. Gottardo Construction Ltd*., 2007 ONCA 422 (Ont. C.A.); *Lee v. 1435375 Ontario Ltd.*, 2013 ONCA 516 (Ont. C.A.); John D. McCamus, "Mistaken Assumptions in Equity: Sound Doctrine or Chimera?" (2004) 40 Can Bus. L.J. 46.

[11] *Solle v. Butcher*, [1949] 2 All E.R. 1107, 1120 (C.A.); *McMaster University v. Wilchar Construction Ltd.*, [1971] 3 O.R. 801,810-11 (Ont. H.C.), affd (1973), 12 O.R. (2d) 512n (Ont. C.A.).

judgment of the UK Supreme Court in *Pitt v Holt* and *Re Futter*[12] and the question of judicial intervention where trustees have made an error causing an unintended tax consequence in exercising some power.

*(iii) 'Rectification'*

One starts from the presumption that in making some instrument, the parties thereto accept it as truly representing their intentions when the instrument is executed.[13] Rectification is an equitable remedy available when that presumption is rebutted. For example, where there is a common mistake or even a unilateral mistake.[14] Equitable rectification is available in a wide variety of contexts. In all cases, it is fundamental that rectification is concerned only with defects in the recording of the instrument in question and not its formation - "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".[15] That is, the expression of the agreement may be corrected but not the nature of the agreement itself. In the context of the interpretation of Wills, the Court of Appeal's judgment in *Rondel v. Robinson Estate*[16] holds a traditional course such that direct extrinsic evidence of a testator's intent is inadmissible as a basis for rectification.

Obviously these devices are sensitive to context. A contract bilaterally negotiated by self-interested parties is a document different in nature than a Will or trust which is made unilaterally. However, there can be considerable overlap. For example, where the Will captures assets that themselves are subject to shareholders' agreements or other contracts negotiated at arm's length some of which may involve the beneficiaries under the Will.

## III. RECTIFYING RECTIFICATION IN THE SUPREME COURT OF CANADA

---

[12] [2013] UKSC 26 (UK Supreme Court).
[13] *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505, 521 (C.A.).
[14] See *Fraser v. Houston,* 2006 BCCA 66 (B.C.C.A.), leave to appeal refused [2006] S.C.C.A. No. 133 (S.C.C.).
[15] *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, 375 per James V.C.
[16] 2011 ONCA 493 (Ont. C.A.).

In two recent companion cases, *Canada (Attorney General) v. Fairmont Hotels Inc.*[17] and *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*,[18] the Supreme Court of Canada has offered a detailed treatment on the nature and proper use of the Court's rectification power both as a matter of common law and under the Quebec *Civil Code* particularly in relation to tax matters. It is helpful to first review some of the jurisprudence that forms the doctrinal context.

*(i) Canada (Attorney General) v. Juliar*[19]

*Canada (Attorney General) v. Juliar* was a controversial development in the law of rectification. The facts were simple enough. A father was the owner of a number of variety stores in Niagara Falls. He wished to pass on the business to his two daughters and their husbands. The stores were owned through a numbered company and the father transferred shares to the daughters and their husbands. Each couple then transferred their shares to their holding companies, Juliar and Roffco. Three years later, a CRA re-assessment of the numbered company resulted in additional tax being owed by Juliar and Roffco. In the case of Juliar, there was a mistaken assumption made by professional advisors respecting tax remittances made by the numbered company. The upshot was that a roll-over of Juliar's shares on a tax deferred basis was prejudiced. At trial and appeal, it was held that the doctrine of rectification was available to relieve against the unintended and unwanted tax burden. In the Court of Appeal, Austin J.A. held:[20]

**The Decision Below**

---

[17] 2016 SCC 56 (S.C.C.).
[18] 2016 SCC 55 (S.C.C.).
[19] (2000), 50 O.R. (3d) 728; 2000 CanLII 16883 (Ont. C.A.). See generally Catherine Brown, "Re-Doing Trusts and Gifts for Tax Purposes - The Equitable Rs: Rectification, Rescission, and Resulting Trusts" (2013), 32 Est. Tr. & Pensions J. 123.
[20] (2000), 50 O.R. (3d) 728; 2000 CanLII 16883 at Paras. 11-13, 18-25 (Ont. C.A.).

[11] Cameron J. concluded that rectification should be allowed. In so concluding he relied both on facts as agreed between the parties and on additional findings of fact. Amongst the former were [at pp. 107-08]:

> The Juliars did not anticipate that tax consequences would be triggered when restructuring the family business.
>
> **Karen and Paul received advice from Fast in respect of the tax consequences of the transaction. They were advised by him that the tax effect of transferring their shares would be nil or negligible. Fast believed this was the case because the shares had been subject to a prior transfer upon which, according to Paul's advice to Fast, taxes had been paid.** Accordingly Fast believed the cost base of the shares was $200,000 for Paul and $270,000 for Karen and therefore, as the shares in 867 were being transferred to Juliar Holdings for an amount equal to or lesser than their cost base, it wouldn't matter whether promissory notes or shares were used because there would be no capital gain and, thus, no tax consequences.
>
> . . . . .
>
> **Fast felt that since promissory notes could be used in the circumstances of this transaction, they were preferable because they would be easier to redeem when cash became available**.
>
> . . . . .
>
> The shares transferred to Juliar Holdings had been subject to a prior "rollover" when they were transferred from Sam Gold, Karen and Sandra's father, to Karen and Sandra. The shares of Gold's Tobacco had been rolled into 867 in 1989 and were then gifted to Sandra and Karen on a tax deferred basis.
>
> **Fast understood from information provided to him by Paul that taxes were paid at that time on the capital gain and, therefore,**

> **whether this transaction proceeded using shares, promissory notes or cash, there would be no gain and no tax consequences.**
>
> **Following the reassessments by Revenue Canada, Fast learned that taxes had not been paid** following the transfer of shares from Sam Gold to his daughters and, therefore, the cost base was lower than he thought. **This meant there was in fact a gain on the transfers** to the Juliars and tax liability resulted.

[12] The Minister relies heavily upon the argument that "intention" in the context of rectification is referable to the purpose of a transaction and not to its consequences or side effects. The intention here was to divide the assets of 867 and to transfer them to Juliar Holdings and to Roffco, and that purpose was successfully accomplished.

[13] In this regard, **Cameron J. made an additional finding [at p. 109] that "the Juliars had intended from a date prior to March 1993 that . . . these transactions would not trigger an obligation to pay income tax immediately**."

…

[18] He [Cameron J.] went on to discuss the significance of tax consequences on commercial transactions and noted [at p. 114] that:

> Division of a family business among the children of the founder of the business is not an uncommon occurrence and is invariably intended to be effected with little or no cash and on a basis that does not attract immediate liability for income tax.

[19] He found on the evidence [at p. 114] that **the Juliars had a common and continuing intention from the outset to transfer their half interest in the business of Juliar Holdings and to do so "on a basis which would not attract immediate liability for income tax on the transaction."**

[20] He also found [at p. 114] that:

> . . . the structure of the transaction would have been in accordance with s. 85 of the Income Tax Act had the mistake in determining the cost of the 867 shares not been made. This intention is confirmed by the advice of Niven to the Roffs in a parallel transaction.
>
> …

[23] Cameron J. concluded his reasoning as follows [at p. 115]:

> **Denial of the application would place on the Juliars a heavy burden which they were entitled to avoid and which they sought to avoid from the inception of the transaction. It would yield to Revenue Canada a premature gain solely because of an error in understanding or communication between Paul and Fast.**

**[24] I agree entirely with the reasons and conclusions of the judge below.**

[25] The trial judge effectively found that the true agreement between the parties here was the acquisition of the half interest in the Gold's tobacco business by transfer of shares in 867 to Juliar Holdings in a manner that would not attract immediate liability for income tax. In these circumstances, that had to be, not a transaction pursuant to s. 84.1 of the Income Tax Act, but a shares for shares transaction. Hence, it was appropriate for the trial judge to permit rectification to reflect that transaction.

[Emphasis added.]

Thus *Juliar* allowed for rectification to be ordered based on a "*a common and continuing intention* [to effect a transaction]… on a basis which would not attract immediate liability for income tax on the transaction." There was simply an error made by the professional advisor and rectifying the transaction based on the error resulted in the tax treatment that

the parties had anticipated. The only disappointed party, perhaps, was the Canada Revenue Agency.

### (ii) *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, and, *Shafron v. KRG Insurance Brokers (Western) Inc.*

In two later cases, *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*[21] and *Shafron v. KRG Insurance Brokers (Western) Inc.,*[22] the Supreme Court of Canada considered rectification in the context of contracts without considering the propriety of *Juliar*.

In *Performance Industries*, a contract was entered into by a developer and a golf course for the development of some land owned by the golf course. The President of the golf course didn't read the contract which contained an error but the developer assured him that the written contract truly reflected their earlier oral agreement. Binnie J. held:[23]

> 29 **When reasonably sophisticated businesspeople reduce their oral agreements to written form, which are prepared and reviewed by lawyers, and changes made, and the documents are then executed, there is usually little scope for rectification…**
>
> …
>
> A. Rectification of the Contract
>
> 31 **Rectification is an equitable remedy whose purpose is to prevent a written document from being used as an engine of fraud or misconduct "equivalent to fraud". The traditional rule was to permit rectification only for mutual mistake, but rectification is now available**

[21] 2002 SCC 19 (S.C.C.).
[22] 2009 SCC 6 (S.C.C.).
[23] 2009 SCC 6 at Paras. 31, 37-41 (S.C.C.).

**for unilateral mistake (as here), provided certain demanding preconditions are met. Insofar as they are relevant to this appeal, these preconditions can be summarized as follows. Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed to orally were not written down properly. The error may be fraudulent, or it may be innocent. What is essential is that at the time of execution of the written document the defendant knew or ought to have known of the error and the plaintiff did not. Moreover, the attempt of the defendant to rely on the erroneous written document must amount to "fraud or the equivalent of fraud". The court's task in a rectification case is corrective, not speculative. It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other… Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.**

…

37 **The first of the traditional hurdles is that Sylvan (Bell) must show the existence and content of the inconsistent prior oral agreement.** Rectification is "[t]he most venerable breach in the parol evidence rule" (Waddams, supra, at para. 336). **The requirement of a prior oral agreement closes the "floodgate" to unhappy contract makers who simply failed to read the contractual documents, or who now have misgivings about the merits of what they have signed.**

38 **The second hurdle is that not only must Sylvan (Bell) show that the written document does not correspond with the prior oral agreement, but that O'Connor either knew or ought to have known of the mistake in reducing the oral terms to writing. It is only where permitting O'Connor to take advantage of the error would amount to "fraud or the equivalent of fraud" that rectification is available.** This requirement closes

the "floodgate" to unhappy contract makers who simply made a mistake. Equity acts on the conscience of a defendant who seeks to take advantage of an error which he or she either knew or ought **reasonably to have known about at the time the document was signed. Mere unilateral mistake alone is not sufficient to support rectification but if permitting the non-mistaken party to take advantage of the document would be fraud or equivalent to fraud, rectification may be available**: Hart, supra, at p. 630; Ship M. F. Whalen, supra, at pp. 126-27.

39 **What amounts to "fraud or the equivalent of fraud" is, of course, a crucial question.** In *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 1989 CanLII 2868 (BC SC), 43 B.L.R. 29 (B.C.S.C.), McLachlin C.J.S.C. (as she then was) observed that "in this context **'fraud or the equivalent of fraud' refers not to the tort of deceit or strict fraud in the legal sense, but rather to the broader category of equitable fraud or constructive fraud. . . . Fraud in this wider sense refers to transactions falling short of deceit but where the Court is of the opinion that it is unconscientious for a person to avail himself of the advantage obtained"** (p. 37). Fraud in the "wider sense" of a ground for equitable relief "is so infinite in its varieties that the Courts have not attempted to define it", but "all kinds of unfair dealing and unconscionable conduct in matters of contract come within its ken"...

40 **The third hurdle is that Sylvan (Bell) must show "the precise form" in which the written instrument can be made to express the prior intention** (Hart, supra, per Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

> 41 **The fourth hurdle is that all of the foregoing must be established by** proof which this Court has variously described as "beyond reasonable doubt" (Ship M. F. Whalen, supra, at p. 127), or "evidence which leaves no 'fair and reasonable doubt'" (Hart, supra, at p. 630), or "convincing proof" or "more than sufficient evidence" (Augdome Corp. v. Gray, 1974 CanLII 172 (SCC), [1975] 2 S.C.R. 354, at pp. 371-72). The modern approach, I think, is captured by the expression **"convincing proof", i.e., proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil "more probable than not" standard.**
>
> [Emphasis added.]

In this case, then, rectification was allowable as a discretionary remedy against a unilateral mistake in a conventional contract as a matter of principle; as a response to "fraud or the equivalent of fraud". As a matter of discretion to order rectification, the lack of due diligence by the respondent in signing the contract was offset by the equitable fraud of the appellant in inserting terms into the contract and then representing that the written contract accurately reflected the parties' oral agreement (which it did not). Rectification was expansive but the remedy was more in the way of a response to a wrong than the sort of mistake in *Juliar*.

*Shafron v. KRG Insurance Brokers (Western) Inc.* was a case dealing with a restrictive covenant in an employment contract in respect of an area described therein as the "Metropolitan City of Vancouver". One issue before the Court was "whether the doctrine of severance or rectification may be applied to resolve an ambiguity in a restrictive covenant in an employment contract or render an unreasonable restriction in a covenant reasonable."[24] After reviewing the facts, Rothstein J. held with respect to rectification:[25]

---

[24] 2009 SCC 6 at Para. 13 (S.C.C.).
[25] 2009 SCC 6 at Paras. 52-57 (S.C.C.).

[52] However, this is not a case in which rectification is properly applicable. In *Frederick E. Rose (London) Ld. v. William H. Pim Jnr. & Co.*, [1953] 2 Q.B. 450 (C.A.), Denning L.J. stated at p. 461:

> Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties — into their intentions — any more than you do in the formation of any other contract.
>
> Here, there was nothing to indicate what the parties intended by the use of the term "Metropolitan" when they entered into the covenant and nothing to indicate that they agreed on an area and then mistakenly wrote down "Metropolitan".

**[53] In *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club* Ltd., 2002 SCC 19 (CanLII), [2002] 1 S.C.R. 678, Binnie J., at paras. 37-40, set out the necessary requirements for rectification: (1) the existence and content of the inconsistent prior oral agreement; (2) that the party seeking to uphold the terms of the written agreement knew or ought to have known about the lack of correspondence between the written document and the oral agreement, in circumstances amounting to fraud or the equivalent of fraud; and (3) "the precise form" in which the written instrument can be made to express the prior intention.**

[54] **In this case, KRG Western has shown no prior oral agreement, let alone the content of one. Rather, it simply asserts that "something must have gone wrong with the language" of the contract. Without pointing to a prior agreement that was departed from when the contract was put into writing, rectification is not available.**

[55] In Binnie J.'s discussion of the "precise form" requirement, at para. 40, he stated:

> The third hurdle is that Sylvan (Bell) [the respondent in that case] must show "the precise form" in which the written instrument can be made to express the prior intention (Hart, supra, per Duff J., at p. 630). This requirement closes the "floodgates" to those who would invite the court to speculate about the parties' unexpressed intentions, or impose what in hindsight seems to be a sensible arrangement that the parties might have made but did not. The court's equitable jurisdiction is limited to putting into words that — and only that — which the parties had already orally agreed to.

In my view, the Court of Appeal imposed what in hindsight seemed to it to be a sensible arrangement that the parties might have made, but did not.

**[56] I would also note Binnie J.'s comments, at para. 31:**

> **In *Hart*, supra, at p. 630, Duff J. (as he then was) stressed that "[t]he power of rectification must be used with great caution". Apart from everything else, a relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts.**

**[57] In this case, KRG Western can point to no prior agreement, written or oral, that explains the term "Metropolitan City of Vancouver". Rectification is used to restore what the parties' agreement actually was, were it not for the error in the written agreement. In the present case, there is no indication that the parties agreed on something and then mistakenly included something else in the written contract. Rather, they used an ambiguous term in the written contract. The original restrictive covenant was drafted by a Toronto lawyer who apparently did not know**

> **that "Metropolitan City of Vancouver" was not a legally defined term. The doctrine of rectification is not applicable.**
>
> [Emphasis added.]

Here, then, the absence of fraud did not allow rectification given that the public interest in promoting due diligence was superior than the wish of the employer to be rescued from shoddy drafting at the expense of the employee. At the same time, the defect could not be cured merely through interpretation as there was simply nothing that pointed to agreement on the meaning of the term "Metropolitan City of Vancouver". Not only does the case assist with respect to rectification, it also demonstrates the close relationship between interpretation and rectification where terms are unclear in matters of contract. Moreover, it draws a distinction between errors in recording agreements between two or more parties rather than the intentions of the individual makers of unilateral documents.

### *(iii) Canada (Attorney General) v. Fairmont Hotels Inc.*

The tension between *Juliar* and *Performance Industries* / *Shafron* was resolved in the latest treatment of the law of rectification by the Supreme Court of Canada.

In *Canada (Attorney General) v. Fairmont Hotels Inc.*, Fairmont owned a minority interest in Legacy Hotels REIT, a Canadian real estate investment trust. In 2002, Legacy wished to purchase American two American hotels and Fairmont agreed to finance the transactions through two subsidiaries, FHIW Hotel Investments (Canada) Inc. and FHIS Hotel Investments (Canada) Inc. One point in the financing agreement was the treatment of foreign currency and the potential for Fairmont to pay foreign exchange tax given that the loans were to be in American dollars and market fluctuation could result in a taxable increase in value. Fairmont wanted to structure the loans to ensure tax neutrality. However, Fairmont was acquired by another company the next year. This triggered foreign exchange tax liability for Fairmont and its two subsidiaries. A plan was considered to unwind the financing agreements and later abandoned. Notwithstanding, an officer of

Fairmont mistakenly believed that the plan to unwind the financing agreement was acted upon and certain preference shares in the two subsidiaries were redeemed resulting in a taxable gain. Could the decision to redeem the shares be rectified? No.

Justice Brown, for the majority, held that rectification was unavailable and that *Canada (Attorney General) v. Juliar* was bad law. Justice Brown wrote:[26]

> [12] 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**…
>
> **[13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy"** (*Snell's Equity* (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (*Shafron v. KRG Insurance Brokers (Western) Inc.,* 2009 SCC 6 (CanLII), [2009] 1 S.C.R. 157, at para. 56, citing *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19 (CanLII), [2002] 1 S.C.R. 678, at para. 31), **be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts"**: *Performance Industries*, at para. 31. 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

[26] 2016 SCC 56 at Paras. 12-18, 23 (S.C.C.)

§8.229). **It is not concerned with mistakes merely in the making of that antecedent agreement**: E. Peel, *The Law of Contract* (14th ed. 2015), at para. 8-059; *Mackenzie v. Coulson* (1869), L.R. 8 Eq. 368, at p. 375 ("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* (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".**

[14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. **Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement**. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement...

[15] In *Performance Industries* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that **rectification is also available where the claimed mistake is unilateral — either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries* and S*hafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: specifically, that the party resisting rectification knew or ought to have**

**known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).**

[16] **As I have recounted, both courts below considered the Court of Appeal's decision in *Juliar*, coupled with the chambers judge's findings, to be dispositive. In my respectful view, however, *Juliar* is irreconcilable with this Court's jurisprudence and with the narrowly confined circumstances to which this Court has restricted the availability of rectification.**

[17] In *Juliar*, the parties had, by a written agreement and in the course of the restructuring of a family business, transferred shares to a corporation in exchange for promissory notes for an amount equal to what the parties believed to be the value of the shares. Upon discovering that the promissory notes were worth more than the shares' value (resulting in the taxpaying party being assessed as having received a taxable deemed dividend), the parties sought rectification in order to convert what had originally been structured as a shares-for-promissory notes transfer into a shares-for-shares transfer (which would have been tax-deferred). For the Court of Appeal, and citing the decision of *Re Slocock's Will Trusts*, [1979] 1 All E.R. 358 (Ch. D.), Austin J.A. held that the written agreement could be rectified as sought, citing the trial judge's finding that the parties had "a common . . . continuing intention" to transfer shares in a way that would avoid immediate tax liability (para. 19). In order to achieve that objective, Austin J.A. said, the deal "had to be . . . a shares for shares transaction" (para. 25).

[18] This reasoning presents several difficulties. First, as many commentators have observed, it is indisputable that Juliar has relaxed the requirements for obtaining rectification, and correspondingly expanded the scope of cases in which rectification may be sought and granted beyond that which the governing principles allow …

> [19] I agree with this observation. **As I have stressed, rectification is available not to cure a party's error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to do.** The parties' mistake in *Juliar*, however, was not in the recording of their intended agreement to transfer shares for a promissory note, but in selecting that mechanism instead of a shares-for-shares transfer. By granting the sought-after change of mechanism, the Court of Appeal in *Juliar* purported to "rectify" not merely the instrument recording the parties' antecedent agreement, but that agreement itself where it failed to achieve the desired result or produced an unanticipated adverse consequence — that is, where it was the product of an error in judgment…
>
> …
>
> [23] Finally, ***Juliar* does not account for this Court's direction, in *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622, at para. 45, that a taxpayer should expect to be taxed "based on what it actually did, not based on what it could have done".** While this statement in Shell Canada was applied to support the proposition that a taxpayer should not be denied a sought-after fiscal objective merely because others had not availed themselves of the same advantage, it cuts the other way, too: taxpayers should not be judicially accorded a benefit based solely on what they would have done had they known better.

As to the exercise of the Court's discretion, Justice Brown went on to hold:[27]

[27] 2016 SCC 56 at Paras. 32-37 (S.C.C.)

[32] **It therefore falls to a party seeking rectification to show not only the putative error in the instrument, but also the way in which the instrument should be rectified in order to correctly record what the parties intended to do. "The court's task in a rectification case is corrective, not speculative": *Performance Industries*, at para. 31. Where, therefore, an instrument recording an agreed-upon course of action is sought to be rectified, the party seeking rectification must identify terms which were omitted or recorded incorrectly and which, correctly recorded, are sufficiently precise to constitute the terms of an enforceable agreement. The inclusion of imprecise terms in an instrument is, on its own, not enough to obtain rectification; absent evidence of what the parties had specifically agreed to do, rectification is not available.** While imprecision may justify setting aside an instrument, it cannot invite courts to find an agreement where none is present. It was for this reason that the Court in *Shafron* declined to enforce the restrictive covenant covering the "Metropolitan City of Vancouver". The term was imprecise, but there was "no indication that the parties agreed on something and then mistakenly included something else in the written contract": *Shafron*, at para. 57.

…

[34] **The second point requiring clarification is the standard of proof. In Performance Industries, at para. 41, this Court held that a party seeking rectification will have to meet all elements of the test by "convincing proof", which it described as "proof that may fall well short of the criminal standard, but which goes beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil 'more probable than not' standard"…**

[35] In light, however, of this Court's more recent statement in *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40, that there is "only one civil standard of proof at common law and that is proof on a balance of probabilities", the question obviously arises of whether the Court's

description in *Performance Industries* of the standard to which the elements of the test for obtaining rectification must be proven is still applicable.

[36] **In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which *McDougall* identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged.** As the Court also said in *McDougall* (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". **A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action.** This idea was helpfully encapsulated, in the context of an application for rectification of a common mistake, by Brightman L.J. in *Thomas Bates and Son Ltd. v. Wyndham's (Lingerie) Ltd.*, [1981] 1 W.L.R. 505 (C.A.), at p. 521:

The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, **convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties**.

> [37] In brief, while the standard of proof is the balance of probabilities, the essential concern of *Performance Industries* remains applicable, being (at para. 42) "to promote the utility of written agreements by closing the 'floodgate' against marginal cases that dilute what are rightly seen to be demanding preconditions to rectification".

It should be noted that *Canada (Attorney General) v. Fairmont Hotels Inc.* was released with the Court's companion judgment in *Jean Coutu Group (PJC) Inc. v. Canada (Attorney General)*[28] which considered the same issue under Article 1425 of the *Civil Code of Québec*.[29] For present purposes the policy identified by the Court is of utility. Wagner J. held:[30]

> [23] A taxpayer's general intention of tax neutrality cannot form the object of a contract within the meaning of art. 1412 C.C.Q., because it is insufficiently precise. It entails no sufficiently precise agreed-on juridical operation. Nor can such a general intention in itself relate to *prestations* that are determinate or determinable within the meaning of art. 1373 C.C.Q. It says nothing about what one party is bound to do or not do for the benefit of the other. Therefore, a general intention of tax neutrality, in the absence of a precise juridical operation and a determinate or determinable prestation or *prestations*, cannot give rise to a common intention that would form part of the original agreement (*negotium*) and serve as a basis for modifying the written documents expressing that agreement (*instrumentum*). As a result, art. 1425 C.C.Q. cannot be relied on to give effect to a general intention of tax neutrality where the writings recording the contracting parties' common intention produce unintended and unforeseen tax consequences.

---

[28] 2016 SCC 55 (S.C.C.).
[29] CQLR c CCQ-1991 ("The common intention of the parties rather than adherence to the literal meaning of the words shall be sought in interpreting a contract.").
[30] 2016 SCC 55 at Paras. 23-25 (S.C.C.)

> [24] **In my opinion, when unintended tax consequences result from a contract whose desired consequences, whether in whole or in part, are tax avoidance, deferral or minimization, amendments to the expression of the agreement in accordance with art. 1425 C.C.Q. can be available only under two conditions. First, if the unintended tax consequences were originally and specifically sought to be avoided, through sufficiently precise obligations which objects, the *prestations* to execute, are determinate or determinable; and second, when the obligations, if properly expressed and the corresponding *prestations*, if properly executed, would have succeeded in doing so. This is because contractual interpretation focuses on what the contracting parties actually agreed to do, not on what their motivations were in entering into an agreement or the consequences they intended it to have.**
>
> [25] Such a reading of arts. 1412 and 1373 C.C.Q. doesn't mean that amendments to the expression of the agreement in accordance with art. 1425 C.C.Q. can be available only to correct clerical errors. It upholds, however, **the requirements stipulated in the C.C.Q. according to which the object of a contract needs to be precise and the object of an obligation sufficiently determinate or determinable to be recognized as the common intention of the parties to be sought when interpreting a contract.**
>
> [Emphasis added.]

Before considering the implications of the Supreme Court of Canada's realignment of rectification it is worth considering developments in the United Kingdom on functionally similar issues.

## IV. RESCISSION AND RECTIFICATION: U.K. DEVELOPMENTS

The correction of mistakes has been the subject of two fairly recent decisions in the United Kingdom's highest court which warrant attention. The first concerns a judicial jurisdiction that has not really featured in Canadian trusts law, the rescission of trustee action where an unintended consequence arises due to breach of fiduciary duty in exercising a discretionary power improperly. The second concerns rectification of Wills.

*(a) Rescission for Mistaken Trustee Action*

*Re Hastings-Bass*[31] was a case which featured a resettlement of trust funds in an attempt to procure a tax advantage to the beneficiaries which eventually went awry due to every law student's nemesis, the rule against perpetuities. In its wake arose a jurisdiction of unknown latitude to order a remedy in cases where the trustee has acted honestly but where some rule of law or limitation on the power was misapprehended (or even mistake of fact). In the English Court of Appeal, Buckley L.J. described the rule in *Hastings-Bass* as follows:[32]

> Where by the terms of a trust, a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations that he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.

The rule is controversial whether stated in its original formulation above, or as a positive ('the court will interfere if it is clear that he would not gave acted as he did had he not failed to take into account considerations which he ought to have taken into account')[33] or in a later formulation:[34]

---

[31] [1975] Ch. 25 (C.A.).
[32] [1975] Ch 25, 41 (C.A.).
[33] *Mettoy Pension Trustees v Evans*, [1991] 2 All E.R. 513, 555 (Ch.).
[34] *Sieff v Fox,* [2005] 1 W.L.R. 3811at Para. 119 (C.A.).

> Where trustees act under a discretion given to them by the terms of the trust, in circumstances in which they are free to decide whether or not to exercise that discretion, but the effect of the exercise is different from that which they intended, the court will interfere with their action if it is clear that they would not have acted as they did had they not failed to take into account considerations which they ought to have taken into account, or taken into account considerations which they ought not to have taken into account.

In *Pitt v. Holt and Re Futter*,[35] United Kingdom Supreme Court considered *Hastings-Bass*. Lord Walker set out the context:[36]

> [1] These appeals raise important and difficult issues in the field of equity and trust law. Both appeals raise issues about the so-called rule in *Hastings-Bass*. One appeal (Pitt) also raises issues as to the court's jurisdiction to set aside a voluntary disposition on the ground of mistake. **It is now generally recognised that the label 'the rule in Hastings-Bass' is a misnomer. The decision of the Court of Appeal in *Re Hastings-Bass, Hastings-Bass v IRC* [1974] 2 All ER 193, [1975] Ch 25 can be seen, on analysis, to be concerned with a different category of the techniques by which trust law controls the exercise of fiduciary powers. That decision is concerned with the scope of the power itself, rather than with the nature of the decision-making process which led to its being exercised in a particular way**... But the misnomer is by now so familiar that it is best to continue to use it, inapposite though it is.
>
> [2] **… the rule is concerned with trustees who make decisions without having given proper consideration to relevant matters which they ought to have taken into consideration. It has also been applied to other**

[35] [2013] UKSC 26 (U.K.S.C.). See the case note by Joel Nitikman, (2013), E.T.P.J. 1.
[36] [2013] UKSC 26 at Paras. 1-2. 8 (U.K.S.C.).

> **fiduciaries… [b]ut since the turn of the century there have been several cases concerned with family trusts, and in particular with tax-planning arrangements involving trusts, where the arrangements have for one reason or another proved unexpectedly disadvantageous, and the court has been asked to restore the status *quo ante* under the *Hastings-Bass* rule.**
>
> …
>
> [8] The way in which the law seemed to be developing, especially in cases concerned with unsuccessful tax-planning arrangements, led one legal scholar (Professor Charles Mitchell 'Reining in the Rule in Re Hastings-Bass' (2006) 122 LQR 35 at 41) to ask:
>
> **'Why should a beneficiary be placed in a stronger position than the outright legal owner of property if he wishes to un-wind a transaction to which he has given his consent, but which turns out to have unforeseen tax disadvantages?'**
>
> Professor Mitchell went on to comment, presciently (at 42):
>
> **'The courts will have to look elsewhere for the means of reining in the rule in *Re Hastings-Bass*, most probably to the equitable bars to unwinding a transaction that would come into play if it were decisively recognised that the rule renders transactions voidable rather than void.'**
>
> This court now has the opportunity of confirming the Court of Appeal's recognition of that essential point.

After considering a number of judgment decided under the *Hastings-Bass* line of cases, Lord Walker agreed with a number of propositions as correctly stating the law:

First, "'the rule does not require that the relevant consideration unconsidered by the trustee should make a fundamental difference between the facts as perceived by the trustee and

the facts as they should have been perceived. All that is required in this regard is that the unconsidered relevant consideration would or might have affected the trustees' decision, and in a case such as the present that the trustee would or might have made a different appointment or no appointment at all."[37]

Second, "[w]hat has to be established is that the trustee in making his decision has… failed to consider what he was under a duty to consider. If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect… If in exercising a fiduciary power trustees have been given, and have acted on, information or advice from an apparently trustworthy source, and what the trustees purport to do is within the scope of their power, the only direct remedy available (either to the trustees themselves or to a disadvantaged beneficiary) must be based on mistake (there may be an indirect remedy in the form of a claim against one or more advisers for damages for breach of professional duties of care)."[38]

Third, where the rule applies, it makes the trustees' disposition voidable, not void. "The rule, properly understood, depends on breach of duty in the performance of something that is within the scope of the trustees' powers, not in the trustees doing something that they had no power to do at all." [39]

The importance of *Pitt v. Holt and Re Futter* is to hold that the exercise of a discretionary power outside its terms is void (for example, a distribution to the wrong beneficiary) but that a breach in the exercise of a power may be voidable in certain circumstances. Such a breach will not yield a voidable result, however, where the trustee was advised by a suitable professional. In that case, the remedy is to sue the advisor where the advice was

[37] at para 39
[38] at paras. 40-41/
[39] para. 43

negligent.[40] Mistakes that cause tax to be attracted rather than avoided are not rectifiable mistakes unless the legal nature of a transaction rather than its consequences is at issue and the mistake is serious. This substantially cuts down the *Hastings-Bass* rule and aligns it, in principle, with the policy choices made by the Supreme Court of Canada in *Canada (Attorney General) v. Fairmont Hotels Inc.* in respect of rectification.

*(b) Rectification of Wills*

A year after *Pitt v. Holt and Re Futter* was decided, the UK Supreme Court gave its judgment in *Marley v Rawlings*.[41] Here a husband and wife made mirror Wills but the solicitor mistakenly allowed the husband to sign his wife's Will and vice-versa.[42] The mistake was only discovered after the death of the husband, the wife already having predeceased him. Litigation then broke out between the biological children of the couple with their adoptive son (who was to inherit his parents' estates). In the litigation, a legal issue arose with respect to the Court's rectification powers under a statute passed to consolidate the common law on point. The *Administration of Justice Act 1982*[43] provides in part as follows respecting the rectification and interpretation of Wills:

> **20 Rectification.**
>
> (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
>
> (a) of a clerical error; or
>
> (b) of a failure to understand his instructions, it may order that the will shall be rectified so as to carry out his intentions.

---

[40] Or, perhaps, seek a rectification based on mistake or even some sort of partial remedy such as "partial-rescission." See *Kennedy v. Kennedy*, [2014] UKSC 26 (U.K.S.C.); Tom K.C. Ng, "Recification and Rescission of Trust Appointment for Mistake", [2015] Conv. 266.
[41] [2014] UKSC 2 (U.K.S.C.).
[42] Cf. *Re Brander*, [1952] 4 DLR 688 (BCSC); *Re Malichen Estate* (1994), 6 E.T.R. (2d) 217 (Ont Gen. Div.).
[43] 1982 c.53 (U.K.).

(2) An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out.

…

**21 Interpretation of wills—general rules as to evidence.**

(1) This section applies to a will—

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

Lord Neuberger held with respect to the common law position:[44]

[17] Until relatively recently, there were no statutory provisions relating to the proper approach to the interpretation of wills. The interpretation of wills was a matter for the courts, who, as is so often the way, tended (at least until very

[44] [2014] UKSC 2 at Paras. 17-20, 22-23, 28, 50, 68, 74-83 (U.K.S.C.).

recently) to approach the issue detached from, and potentially differently from, the approach adopted to the interpretation of other documents.

[18] During the past forty years, the House of Lords and Supreme Court have laid down the correct approach to the interpretation, or construction, of commercial contracts in a number of cases starting with *Prenn v Simmonds* [1971] 3 All ER 237, [1971] 1 WLR 1381 and culminating in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] 1 All ER 1137, [2011] 1 WLR 2900.

**[19] When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words:**

**(a) in the light of:**

**(i) the natural and ordinary meaning of those words,**

**(ii) the overall purpose of the document,**

**(iii) any other provisions of the document,**

**(iv) the facts known or assumed by the parties at the time that the document was executed, and**

**(v) common sense, but**

**(b) ignoring subjective evidence of any party's intentions.**

**…**

**[20] When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary,**

**factual and commercial context.** As Lord Hoffmann said in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667, para 64, [2005] RPC 169, "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre." To the same effect, Sir Thomas Bingham MR said in *Arbuthnott v Fagan* [1995] CLC 1396, that "[c]ourts will never construe words in a vacuum".

…

[22] Another example of a unilateral document which is interpreted in the same way as a contract is a patent - see the approach adopted by Lord Diplock in *Catnic Components Ltd v Hill & Smith Ltd* [1981] FSR 60, [1982] RPC 183, 243, cited with approval, expanded, and applied in Kirin-Amgen at paras 27 - 32 by Lord Hoffmann. A notice and a patent are both documents intended by its originator to convey information, and so, too, is a will.

**[23] In my view, at least subject to any statutory provision to the contrary, the approach to the interpretation of contracts as set out in the cases discussed in para 19 above is therefore just as appropriate for wills as it is for other unilateral documents. This may well not be a particularly revolutionary conclusion in the light of the currently understood approach to the interpretation of wills (see eg *Theobald on Wills*, 17th edition, Ch 15 and the recent supplement supports such an approach as indicated in *RSPCA v Shoup* [2010] EWCA Civ 1474, [2011] STC 553, [2011] 1 WLR 980 at paras 22 and 31). Indeed, the well known suggestion of James LJ in *Boyes v Cook* (1880) 14 Ch D 53, 56, 49 LJ Ch 350, 28 WR 754, that, when interpreting a will, the court should "place [itself] in [the testator's] arm-chair", is consistent with the approach of interpretation by reference to the factual context.**

…

[28] As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of

such a power has been advanced. However, it is unnecessary to consider that point further, as Parliament has legislated on the topic, in s 20 of the 1982 Act.

…

[50] The principal ground upon which the Appellant contended that the Will should be held to be valid was that it should be rectified pursuant to s 20, so that it had the effect which Mr Rawlings intended, namely that it essentially stated what was in the wife's Will.

…

[68] The final issue raised by the Appellant's rectification claim is whether it is within the ambit of s 20(1). It is not suggested that the claim falls within para (b), "a failure to understand [the testator's] instructions", but Mr Ham argued that it is within para (a), "a clerical error". There is no doubt that there was an error. The question is whether it can be said to be "clerical". Proudman J concluded that it could not, and the Court of Appeal did not determine the point.

…

[74] However, Mr Le Poidevin contended that, even if a slip of the pen, a mistyping, or a failure to cut and paste correctly, which extend to virtually the whole of the document, can all be characterised as "clerical errors", giving the testator the wrong will is a mistake of a rather different character, which cannot naturally be referred to as a clerical error.

**[75] I accept that the expression "clerical error" can have a narrow meaning, which would be limited to mistakes involved in copying or writing out a document, and would not include a mistake of the type that occurred in this case. However, the expression is not one with a precise or well-established, let alone a technical, meaning. The expression also can carry a wider meaning, namely a mistake arising out of office work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent**

**that the activity involves some special expertise). Those are activities which are properly be described as "clerical", and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called "a clerical error".**

[76] For present purposes, of course, "clerical error" is an expression which has to be interpreted in its context, and, in particular on the assumption that s 20 is intended to represent a rational and coherent basis for rectifying wills. While I appreciate that there is an argument for saying that it does nothing to discourage carelessness, it seems to me that the expression "clerical error" in s 20(1)(a) should be given a wide, rather than a narrow, meaning.

[77] First, rectification of other documents (including unilateral documents) is not limited to cases of clerical error, however wide a meaning that expression is given. Accordingly, given that there is no apparent reason for a different rule for wills, it would appear appropriate that the grounds for rectification is as wide for wills as the words of s 20(1) can properly allow.

[78] Secondly, there is no apparent limit on the applicability of s 20(1)(b), which supports the notion that s 20(1)(a) should not be treated as being of limited application. However, s 20(1)(b) also has a potential limiting effect on the ambit of s 20(1)(a), in the sense that s 20(1)(a) should not be given a meaning which significantly overlaps with, let alone subsumes, that of s 20(1)(b).

[79] Thirdly, ss 17 to 21 of the 1982 Act are, as I see it, all aimed at making the law on wills more flexible and rendering it easier to validate or "save" a will than previously. Section 17, which re-enacts s 9, is concerned with the "relaxation" of formalities (see para 14 above); ss 18 and 19 introduce greater flexibility in relation to the effect of the testator's marriage and death of his issue; s 20 introduces rectification for the first time for wills, and s 21 permits the testator's subjective intention to be taken into account for the first time.

The whole thrust of the provisions is therefore in favour of a broad interpretation of a provision such as s 20(1)(a).

[80] Fourthly, I consider that the law would be somewhat incoherent if subtle distinctions led to very different results in cases where the ultimate nature of the mistake is the same. If a solicitor is drafting two wills, and accidentally cuts and pastes the contents of B's draft will onto what he thinks is A's draft will, and hands it to A, who then executes it as his will, that will would be rectifiable under s 20(1)(a), as the solicitor's mistake would, on any view, be a clerical error - see paras 72 and 73 above. On the other hand, if the solicitor accidentally gives B's will to A to execute, and A executes it, that would not, on the respondents' case, be a clerical error and therefore rectification would not be available.

[81] While I accept that fine distinctions can often lead to different outcomes where one is near the limits of the scope of some statutory provisions, a distinction of this sort seems to me to be capricious or arbitrary. The position is essentially the same in the two cases. In each case, it was because his solicitor accidentally handed A a document which contained B's will rather than A's will, that A executed B's will thinking that it was his will. In each case, the reason that the will which A executed did not represent his intentions was a silly mistake by the solicitor in the mechanics of faithfully carrying out his instructions. In neither case did the mistake involve the solicitor misunderstanding or mischaracterising the testator's intention or instructions, or making any error of law or other expertise, so the error may fairly be characterised as "clerical" - and there is no question of trespassing into s 20(1)(b) territory.

[82] As explained in para 75 above, the term "clerical error" can, as a matter of ordinary language, quite properly encompass the error involved in this case. There was an error, and it can be fairly characterised as clerical, because it arose in connection with office work of a routine nature. Accordingly, given that the present type of case can, as a matter of ordinary language, be said to

> involve a clerical error, it seems to me to follow that it is susceptible to rectification.
>
> [83] I accept that the error in this case is not within the narrower meaning of "clerical error", as is reflected by the approach to the expression summarised by Blackburne J in *Bell* as representing the effect of the first instance authorities. However, for the reasons given in paras 75 - 82 above, I have concluded that, the expression can, and, in the context of s 20(1)(a) should, be given its wider meaning, which covers the mistake made in this case.

Lord Neuberger's remarks are quite helpful, but controversial.[45] Rectification deals with mistakes and their correction. In the context of contract and unilaterally made instruments such as Wills and trust settlements, interpretation gives effect to intentions that are found within the text of the document and extrinsic evidence that may be admissible to discern intention. Rectification relates to mistakes in expression, and, more expansively, "work of a relatively routine nature, such as preparing, filing, sending, organising the execution of, a document (save, possibly, to the extent that the activity involves some special expertise). Those are activities which are properly be described as "clerical", and a mistake in connection with those activities, such as wrongly filing a document or putting the wrong document in an envelope, can properly be called "a clerical error"."[46]

As a matter of common law, his Lordship held that the approach to interpreting and rectifying contracts, Wills, and trusts is the same, with context dictating subtle variations. Thus the rectification of Wills in respect of "clerical errors" (that term being interpreted in a principled manner), allows for the rectification of the two Wills in question under the statute, and, one expects, the common law.

---

[45] See David Hodge, "The Correction of Mirror Wills: Interpretation Versus Rectification", [2017] Conv. 45; Paul David, "Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction" (2016), 75 C.L.J. 75.
[46] [2014] UKSC 2 at Para. 75 (U.K.S.C.).

## V. CONCLUSION

Ultimately technical doctrine such as the Court's rectification jurisdiction masks some rather straightforward policy choices. Should the Court relieve a party of obligations under a contract where some serious problems means that giving effect to the contract would be fundamentally unfair ("unconscionable")? Should the Court relieve a party settling a trust or benefitting from a trust from an otherwise avoidable tax consequence where some serious mistake was made in devising or expressing the trust? Should the Court rectify a Will rather than preferring that the parties whose rightful interests were prejudiced by shoddy drafting suing in negligence? These are hard questions.

The upshot of *Canada (Attorney General) v. Fairmont Hotels Inc.* is that the interpretation and rectification of contracts seem to be moving closer with some clearer boundaries being placed on the extent to which an error may be rectified. Where the parties were advised by professionals, it now seems clear that rectification will now be largely unavailable. The rationale is to induce contracting parties and their advisors to be duly diligent – contractual promises should be kept and it is not the proper role for the Court to be in the business of relieving parties of the consequences of their agreements where those consequences were avoidable. There is simply too much scope for prejudice to third parties and, perhaps, undermining the taxation statutes.

The situation is quite different with Wills and trusts as unilaterally made documents. Developments in English law highlight that the same sorts of concerns that were identified by the Supreme Court of Canada in *Fairmont Hotels Inc.* operate with respect to unilateral agreements in the form of Wills and trusts. Rectification for a mundane errors such as the husband and wife signing the wrong Wills as in *Marley v Rawlings* is quite a bit different than the situation in *Pitt v. Holt and Re Futter* in which a discretionary equitable remedy was also sought. Again, the need for something substantial, a fiduciary wrong, sits well with the reasoning in *Fairmont Hotels Inc.*

Consider a case such as *Balaz Estate v. Balaz*.[47] Here the testator left a Primary and Secondary Will; the latter settled a spousal trust which was tainted and would not be

[47] Balaz Estate v. Balaz, 2009 CanLII 17973 (Ont. S.C.J.).

accepted as a valid spousal trust for taxation purposes absent rectification. Justice Brown described the problem:

> [4] Robert Finlayson, the lawyer who drafted the Secondary Will, deposed that Ms. Balaz instructed him to draft it so that shares in the holding company would be held in trust for the lifetime of her husband. Mr. Finlayson stated that Ms. Balaz instructed him to set up a spousal trust in accordance with s. 70(6) of the *Income Tax Act*, which allows for a deferral of the tax consequences that would otherwise arise from the deemed disposition of capital property occurring as a result of her death.
>
> [5] Following Ms. Balaz's death. Mr. Finlayson learned that a problem might exist under the *Income Tax Act* in regards to some of the trustees' powers in section 5 of the Secondary Will. Specifically, he stated that the portions of clauses 5(d), 5(i) and 5(l) of the Secondary Will underlined above could be construed as conferring a benefit to someone other than Ms. Balaz's husband and, as a result, could taint the spousal trust. Mr. Finlayson deposed that these clauses were included inadvertently in the Secondary Will, without Ms. Balaz's knowledge or approval.

Here, then, the insertion of the powers that might taint the trust were included inadvertently and without the "knowledge and approval" of the testator. With respect to knowledge and approval, one suspects that the testator might not have appreciated the significance of the effect of the included powers as a matter of tax law. As to the question of rectification, Justice Brown held:[48]

> [10] The common law recognizes that proceedings involving wills may involve two distinct questions: (i) What document constitutes the will of which the testatrix knew and approved? (ii) What does the language of the will mean? There is some suggestion that historically a broader range of evidence has been admissible to determine the first question, than the second…

[48] Balaz Estate v. Balaz, 2009 CanLII 17973 at Paras. 10-14 (Ont. S.C.J.).

> Whether that remains the case is a question I need not consider. Suffice it to say, where a court seeks to ascertain whether the testatrix knew and approved of certain language in her will, it can take account of evidence about the circumstances surrounding the making of the will, including referring to earlier wills or drafts of the particular will, as well as direct evidence of her intention...
>
> [11] On those points Mr. Finlayson's evidence was clear and uncontradicted. Ms. Balaz intended that her Secondary Will create a spousal trust that would meet the requirements of the *Income Tax Act*, and she instructed Mr. Finlayson to draft the will accordingly. He deposed that Ms. Balaz did not intend that capital gains taxes triggered by her death would be payable at that time; instead, it was her intention that their payment be deferred until the date of her husband's death.
>
> [12] The evidence shows that through inadvertence language was included in the section of the Secondary Will dealing with the trustees' powers which could taint the spousal trust intended by Ms. Balaz.
>
> [13] I am satisfied that the underlined language in clauses 5(d), 5(i) and 5(l) of the Secondary Will was included inadvertently in it, without the knowledge or approval of Ms. Balaz. The language was a mistake, and should be deleted so that the Secondary Will conforms to the wishes of the testatrix.
>
> [14] No prejudice will result to any beneficiary from such rectification, as evidenced by their consents to this application. As well, the Minister of National Revenue, who stands to lose a significant amount of tax, also recognizes, by his approval of the draft judgment, that the testatrix intended to create a spousal trust and that the inclusion of the offending language was inadvertent.

Thus, the rectification power of the Court was exercised based upon the inadvertence of the drafting solicitor, the consent of the CRA to the draft Order before the Court, and the lack of prejudice to the beneficiaries of the Estate. What, however, would have been the

result if the terms of the settlement of the spousal trust in the Will reflected an agreement between the testator and the spouse in a domestic agreement or the treatment of the assets in question in respect of a Shareholders' Agreement? That is, where the trust or Will reflects agreement entered into by the testator rather than mere gifting – would rectification be forthcoming? One expects not. The closer that third party interests may be prejudiced by rectification, the greater the likelihood that rectification will not be available.

The Court of Appeal for Ontario revisited rectification of Wills in *Rondel v. Robinson Estate.*[49] In holding that direct evidence of testamentary intent could not be admitted to rectify a Will said to contain an inadvertently inserted general revocation clause, Juriansz J.A. held:[50]

> [35] … The evidence of disappointed beneficiaries and other third parties is simply not as probative of testators' intentions as their own clear and unambiguous expressions in the will. Departing from the well-established general exclusionary rule would not lead to a more faithful implementation of testators' true intentions. It would, however, lead to increased litigation. I agree with the observation of Brown J. in *Kaptyn Estate (Re)* (2010), 2010 ONSC 4293 (CanLII), 102 O.R. (3d) 1, [2010] O.J. No. 3347 (S.C.J.), at para. 36:
>
> The rationale for this principle of admissibility rests in preserving the role of the written will as the primary evidence of the testator's intention and avoiding displacing the written will with an "oral will" gleaned from evidence of the testator's declarations of intent. (Footnotes omitted)
>
> [36] A testator of sound mind knows her intentions and is able to express them. The very raison d'être of a written will, formally executed, is to record the testator's own expression of intentions. The formalities required for the proper execution of the will advance that goal by confirming that the will provides an accurate record of those intentions.

[49] 2011 ONCA 493 (Ont. C.A.).
[50] 2011 ONCA 493 at Paras. 35-37.(Ont. C.A.).

> [37] Third party evidence of a testator's intentions gives rise to both reliability and credibility issues. Credibility is a concern because would-be beneficiaries can, without fear of contradiction by the deceased, exaggerate their relationship and fabricate the promises of requests. Reliability is a concern because testators are not obliged to write their wills to accord with the sincere or mendacious assurances they may have given to those close to them. Until they die, testators may freely revoke or vary the directions they have given for the distribution of their estates. The evidence of third parties, who cannot directly discern the mind of the testator, is logically incapable of directly proving the testator's intent.

Here, then, the rectification power of the Court was restricted in the testamentary context in respect of the admissibility of third party evidence of direct testamentary intent. There is a need to respect testamentary documents from frivolous objections based on witnesses who were told this or that by testator in contradiction to the expressed testamentary intent of the testator in the Will. There is a also need to ensure that drafting solicitors do their work properly and the possibility of liability is one such device,[51] as well as due diligence by testators in expressing their testamentary intentions. Notwithstanding the unilateral nature of a document with testamentary effect, the public interest in promoting sounds legal advice and due diligence by a testator is not an unimportant one.

Where does this leave us? Without wishing to fudge too much, I would suggest that a deeper analysis may be required in future in rectification cases where the nature of the trust set up in the Will may reflect broader concerns beyond the mere correction of simple errors in a Will. Second, there will be decreasing judicial inclination to rectify all but the most simple errors. Third, the question of prejudice to third parties will be significant. Last, the attitude of the CRA to rectification will be important.

---

[51] *White v. Jones*, [1995] 2 A.C. 207 (H.L.); *Hall v. Bennett Estate* (2003), 64 OR (3d) 191 (Ont. C.A.); *Johnston Estate v. Johnston*, 2017 BCCA 59 (B.C.C.A.); *Graham v. Bonnycastle*, 2004 ABCA 270 (Alta. C.A.).