



That's What It Says... But It's *Not* What We Meant: Rectifying a Contract

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Parties to a contract (or one party to a contract) may discover that the contract they signed and filed away in their desks does not accurately reflect the deal into which they thought they had entered. This can lead to a significant dispute when steps are taken by one party to enforce a provision that the other does not believe accurately reflects the original intention of the parties.

Although the courts are generally loath to interfere with executed, written documents entered between commercial parties, in certain, limited circumstances, a court may enable a party to “rectify” the agreement to reflect what was actually intended.

There are two ways to seek rectification -- by establishing a mutual mistake (i.e. when entering into the written agreement, neither party intended to create the obligations set out), or by proving a unilateral mistake [where one party negligently entered into the agreement while the other party was aware of the (disputed) provision at the time the agreement was entered into and such other party intended to rely on it]. The “tests” to establish rectification differ, depending on the argument presented.

Mutual Mistake

Traditionally, proving a mutual mistake was the only route to rectification. In *Royal Bank of Canada v. El-Bris Ltd.*, the Ontario Court of Appeal makes it clear that the prerequisites for rectification in respect of a unilateral mistake (set out below) do not apply in common or mutual mistake cases. Rather than setting out an express test for a mutual mistake, the Court cited, with approval, the following portion of the reasons of Lord Denning of the English Court of Appeal in *Frederick E. Rose (London) Ltd. v. Wm. H. Pim Jnr. & Co.*:

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. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document.[emphasis added]

Evidence of later conduct (throughout the contract's terms) consistent with a claim for rectification is also relevant and admissible when seeking a claim for rectification.

Unilateral Mistake

The concept of rectification of a unilateral mistake is newer, and because only one party is contending that a mistake was made, the standard to prove entitlement to rectification is much higher than the standard for proving a mutual mistake.

In *Performance Industries Ltd. et al. v. Sylvan Lake Golf & Tennis Club Ltd.*, the Supreme Court of Canada sets out the conditions precedent for rectification where a unilateral mistake has been made.

Mr. Justice Ian Binnie, writing for the court, sets out four prerequisites for parties seeking rectification of a unilateral mistake: (i) a previous oral agreement inconsistent with the written document; (ii) the other party knew, or ought to have known, of the mistake and permitting that party to take advantage of the mistake would amount to unfair dealing; (iii) the document can be precisely rewritten to express the parties' intention; and (iv) each of the first three prerequisites must be demonstrated by convincing proof (i.e. proof that may fall well short of the criminal standard but that 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).

As can be seen, the test to establish rectification of a unilateral mistake comes close to requiring that a party prove that a fraud has been committed. While the concept is available to an aggrieved party, the number of cases in which a unilateral mistake has been proved is rare, and pursuing rectification on this basis must be considered carefully based upon the unique facts of each potential claim. ■