

"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 they thought they had entered. This can inevitably lead to significant disputes when steps are taken by the other party to enforce a provision of an agreement that one of the parties does not believe accurately reflects the intentions of the parties.

In certain, limited circumstances, a Court may enable a party to “rectify” the agreement to reflect what was actually intended to be contained in an agreement, although the Courts are generally loath to interfere with executed, written documents entered between commercial parties.

There are now two ways that rectification can be sought; either by establishing a mutual mistake (i.e. when entering into the written agreement, neither party intended to create the obligations set out in the agreement), or by proving a unilateral mistake (where one party negligently enters the agreement, while the other party is aware of the (disputed) provision at the time the agreement is entered and intended to rely upon it). The “tests” to establish rectification differ depending upon the argument presented.

Mutual Mistake

Traditionally, proving mutual mistake was the only manner to seek the equitable remedy of rectification. The Ontario Court of Appeal case of *Royal Bank of Canada v. El-Bris Ltd.* makes it clear that the prerequisites for rectification in respect of unilateral mistake (which are set out below) do not apply in common or mutual mistake cases. Rather than setting out an express test for mutual mistake, the Ontario Court of Appeal 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 by unilateral mistake is a newer concept, and because only one party is acknowledging a mistake was made, the standard to prove an entitlement to rectify the contract is much higher than proving a mutual mistake.

The Supreme Court of Canada case of *Performance Industries Ltd. et al. v. Sylvan Lake Golf & Tennis Club Ltd.* sets out the conditions precedent for rectification in the context where a unilateral mistake was made.

Binnie J., writing for court, set out four prerequisites for parties seeking rectification for 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 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.

As can be seen, the test to establish rectification by way of 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 unilateral mistake has been proven is very rare, and pursuing rectification on this basis must be considered carefully based upon the unique facts of each potential claim.