

RECTIFICATION IN PROPERTY LAW

- practical guidance for litigators

**A paper presented to
The Property Litigation Association Autumn Training Day
at the Royal Society of Medicine on 2 October 2007**

by

**Julian Greenhill
Wilberforce Chambers**

Julian is a specialist property practitioner with a practice which encompasses all aspects of property litigation including landlord and tenant (both commercial and residential), contracts of sale, development contracts, land options, leasehold enfranchisement, mortgages, restrictive covenants, easements, and adverse possession as well as related professional negligence and insurance claims, and claims for trespass and nuisance. Julian is named in the Legal 500 2007/8 as a leading junior for commercial litigation. He is a member of the Chancery Bar Association and the Property Bar Association and regularly gives talks and participates in seminars on property law topics, and related procedural issues.

jgreenhill@wilberforce.co.uk

Introduction

1. What is rectification? It is an equitable remedy by which the Court can correct an error of expression in a written document that does not match the intention of the parties to that document. It follows that it is a remedy that is available only in relation to written contracts and other documents. You cannot seek to rectify an oral agreement.
2. Overcoming errors in written agreements is an important part of any property litigators practice. Mistakes frequently happen in the drafting of written agreements. Their implications can be startling. In *Chartbrook v Persimmon Homes Limited* [2007] 1 All ER (Comm) 1083 the error in question made a difference of around £4 million pounds to the price payable under a development contract. The nature and transfer of interests in land, and the use to which land is put is necessarily governed largely by written agreements. So as property litigators we will often be faced with cases in which it is of great importance to our clients to correct an error in a document.

3. Many of the leading cases have been decided in the context of disputes over interests in land and their use. Claims concerning the correction of errors both by interpretation and by rectification have continued to be a fertile area of litigation and reported cases in recent years, including a number of Court of Appeal decisions on important points of principle in the last few years. So now seems like a good time to review the current state of the law and try to offer some practical guidance.

Can the error be solved by interpretation?

4. The starting point in considering a claim for the correction of an error is to consider whether the error in question can be solved by means of interpretation of the agreement as opposed to rectification. At common law the remedy of rectification was not available and so the only way in which an error of expression could be “corrected” was by application of the ordinary rules of interpretation. In practice the application of these rules will always be the starting point for the Court. As a matter of principle, the equitable remedy ought not to be granted unless there is no suitable alternative remedy by way of interpretation.
5. So it is important in the first instance to apply carefully the principles of interpretation to the agreement you are concerned with to ascertain the likelihood of your client needing to go further and rely upon a claim for rectification.
6. Where the wording of an agreement is obviously mistaken, the court may, by seeking to make sense of the commercial purpose of the agreement or by implying words necessary to make business sense of the bargain, in effect “rectify” the mistake. The correction of mistakes by interpretation has a long history. Brightman LJ in *East v Pantiles Plant Hire Ltd* [1982] 2 EGLR 111 said:

It is clear on the authorities that a mistake in a written instrument can, in certain limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of

construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention. In Snell's Principles of Equity 27th ed p 611 the principle of rectification by construction is said to apply only to obvious clerical blunders or grammatical mistakes. I agree with that approach. Perhaps it might be summarised by saying that the principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, 'Of course X is a mistake for Y'.

7. For an example of a property case which applies Brightman LJ's two-stage approach see *Great Bear Investments Ltd v Solon Co-Operative Housing Services Ltd* [1997] EGCS 177. In that case although there was machinery for rent review, the lease only required the tenant to pay, after review, "a rent equal to the rent previously payable or such rent as is reviewed". The landlord did not seek the remedy of rectification as such, but rather invited the court to allow rectification by construction, by implying the words "whichever is the higher". The Court held that this was permissible where: (a) it was clear that a mistake had been made; and (b) a reader with sufficient experience of the sort of document in issue would inevitably say to himself, "of course X is a mistake for Y". The insertion of the words "whichever the higher" fell within that principle because the clause was unworkable without some machinery for deciding which of the two alternatives should apply.
8. The two conditions laid down by Brightman LJ in *Pantiles* remain the applicable test. But his approach has been given renewed vigour through the definitive restatement of the principles of contractual interpretation by the House of Lords in *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896. Among his five stated principles of interpretation, Lord Hoffman included the following:

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever

reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] A.C. 749.

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] A.C. 191, 201:

“if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

9. This restatement has broadened the scope for errors to be corrected by interpretation. Two recent Court of Appeal decisions have underlined the importance of the application of the ordinary rules of interpretation as a means to overcoming errors in the expression of a written agreement, both in a property context.
10. In *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579 the Court of Appeal had to consider a break clause contained in a lease which said that “in the case of a notice given by the Landlord, the Tenant shall have paid the rents hereby reserved and shall have duly observed and performed the covenants on the part of the Tenant...” etc. The Court of Appeal rejected a series of various alternative errors hypothesised by the Appellants in to persuade the Court that the second of Brightman LJ’s conditions could not be satisfied. Instead the Court held that the most obvious solution was the correct one – the word “Landlord” should simply be interpreted as “Tenant”.
11. In *KPMG v Network Rail Infrastructure* [2007] EWCA Civ 363 the Court of Appeal overturned the finding of the first instance judge on the question of interpretation and interpreted a break provision as if it included additional wording which appeared in an earlier draft lease agreed between the same parties. The case highlights the difficulties of seeking to correct errors and omissions by reference to precedents either general or specifically drafted. Carnwarth LJ expressly acknowledged the

extent to which the restatement in *ICS v West Bromwich* had broadened the scope for the correction of errors by interpretation (see paragraphs 48-50) and, after referring to a House of Lords case on the correction of obvious errors in a charterparty (*Homburg Houtimport BV v Agrosin ("The Starsin")* [2004] 1 AC 715) made three comments of principle (paragraphs 63-4):

First, it should not matter in principle that the draft in this case was tailor-made, rather than "off-the-peg", as in The Starsin. What matters is the help it can give in practice, as a matter of common sense rather than law, as to the nature of the mistake and how it should be corrected. Secondly, it is to be noted that the House was untroubled by the facts that the clause appeared in a number of versions, and that there were changes of detail. What mattered was its relevance to the particular passage in issue. So here, the changes made to other parts of the lease, or even to this paragraph, do not detract from the value of the 1974 draft in explaining the place of the relevant words in the parenthesis.

*Thirdly, and perhaps more contentiously, I think it would be wrong to apply too literally Lord Bingham's reference to the need for clarity both as to the omission of words and "what those relevant words were". As Lord Millett said, it is sufficient if the court is able to ascertain "the gist" of what has been omitted. I would go further. Once the court has identified an obvious omission, and has found in admissible background materials an obvious precedent for filling it, it should not be fatal that there may be more than one possible version of the replacement, or more than one explanation of the change. Thus, in *The Starsin*, even if the various versions of the standard clause had contained some material variations of detail in the relevant passage, I do not think that the court would have been forced for that reason alone to adopt the construction proposed by the claimants. Of course such variations may be sufficient to throw doubt on the precedent as providing an explanation for the error. But, if not, the court is simply faced with the ordinary task of choosing between the competing interpretations, using the ordinary techniques of construction.*

12. So the process of deciding whether the "error" in your case is one which requires an order for rectification is potentially complex, all the more so in the light of the wide range of material forming part of the relevant matrix of fact under the modern approach to interpretation. It will be necessary to consider the available background material and decide whether the error is readily soluble by interpretation before you

rush off to launch a costly rectification claim. Conversely you must also be alert to the point at which your argument on interpretation is sufficiently weak that rectification may be your most realistic option. Often of course, prudence will dictate that you run both interpretation and rectification arguments in the alternative. But it is important to have a clear idea of the merits of both arguments before embarking on a claim.

Relevant types of mistake

13. It is equally important as part of this initial process to consider carefully the precise nature of the mistake with which your case is concerned. Is it one in respect of which rectification is available at all? For example the following “mistakes” (within the ordinary meaning of the word) do not come within the scope of the doctrine of rectification:

- Not where the parties (or one of them) subsequently decide they want to alter the document: it is not the function of the courts to assist the parties to resile from particular aspects of an earlier agreement by granting rectification, for example where there would be a tax advantage if the contract were differently worded¹. A recent example of a rectification claim that was held to have fallen foul of this principle is *Connolly v Bellway Homes* [2007] EWHC 895 (Ch). In that case the judge concluded that a particular pricing figure which was included in the agreement was one the parties had both agreed, but Connolly subsequently appreciated that they ought not to have agreed to it. This was not the sort of error that could ground a claim in rectification, though Connolly was able to succeed in a claim for deceit in that case.
- Not where the parties have failed to apply their minds to the subject matter of a particular issue but if they had would have sought different provision in the document: again the court will not fill in gaps in the agreement where the parties failed to consider matters that later become important – the Court will deal with such gaps through the process of interpretation or implication of terms if necessary.

¹ see *Racal Group Services Limited v Ashmore* [1995] STC 1151

Framing a claim for rectification

14. Once you have decided that your case is one to which interpretation may not be the solution, but in respect of which rectification might be available, you will need to explore the principles of rectification with a view to framing your claim. Obvious though this may sound, it is not easy in practice to frame a persuasive rectification claim. And yet it is essential to plead the rectification claim clearly and fully raising each element and identifying the facts upon which you rely.
15. As I said earlier, it is a fundamental rule that the Courts rectify documents and instruments, not agreements². The essence of a rectification action is a discrepancy between the agreement which the parties have made and the written document which purports to set out that agreement.
16. Equity recognises two different two types of mistake upon which a claim for rectification can be based, namely, a common or mutual mistake on the part of both parties, or a unilateral mistake on the part of only one party.

Common or mutual mistake – the written contract does not reflect what the parties agreed

17. There is a common (or mutual) mistake where the document or instrument that is intended by the parties to set out the agreement between them fails to do so due to the use of the wrong words or the omission of other words.
18. To rectify a document on the basis of common mistake, it has traditionally been necessary to satisfy the following criteria (per Peter Gibson LJ in *Swainland Builders Limited v Freehold Properties Limited* [2002] 2 EGLR 71):
- (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the Agreement;
 - (2) there was an outward expression of accord;
 - (3) the intention continued at the time of the execution of the agreement; and
 - (4) by mistake the Agreement did not reflect the common intention.

² *MacKenzie v Coulson* (1869) LR 8 Eq 368, 375

19. It is important to note that it is not necessary to demonstrate that there was an anterior binding agreement reached between the parties, merely that there was an objectively ascertainable common intention that continued up to and including the moment of execution of the contract. Any suggestion that an anterior agreement was required was decisively abandoned in *Jocelyn v Nissen* [1970] 2 QB 86.
20. Moreover there is an increasing move away from a rigid application of the criteria requiring an “outward expression of accord”. The Court of Appeal, relying upon a number of recent cases favouring a more flexible approach, has suggested that it is wrong to treat the expression “an outward expression of accord” as a strict legal requirement for rectification as it is “more of an evidential factor”: *Munt v Beasley* [2006] EWCA Civ 370. In that case the Court relied upon the sale particulars of a flat as being sufficient to discharge any requirement for “an outward expression of accord” to the effect that the demise of a flat should include a loft space.

Unilateral mistake – one party took advantage of a mistake by the other by staying silent when he spotted the mistake

21. A document may be rectified on the grounds of a unilateral mistake, but only in limited circumstances.
22. The test for rectification on the grounds of unilateral mistake was identified by Buckley LJ in *Thomas Bates & Son v Wyndham’s (Lingerie) Limited* [1981] 1 WLR 505 at 515 (recently approved by the Court of Appeal in *George Wimpey UK Limited v VI Construction Limited* [2005] BLR 135 per Peter Gibson LJ at paragraph 38 and *Littman v Aspen Oil Broking* [2005] EWCA Civ 1579). In *Bates* Buckley LJ said that for the doctrine to apply it must be shown:

‘first, that one party A erroneously believed that the document contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A’s

intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake.'

23. Therefore in order to obtain rectification for unilateral mistake, the claimant must show:

- (1) that it believed and intended that the agreement in question should provide otherwise than it in fact does;
- (2) that the other party was aware that the written agreement did not so provide;
- (3) that the other party was aware that this was due to a mistake on the part of the claimant;
- (4) that the other party omitted to draw the mistake to the notice of the claimant; and
- (5) that the mistake was one that was calculated to benefit the other party ie it was to the detriment of the claimant.

24. Accordingly where a landlord and tenant were supposed to be extending a lease on the same terms and the landlord's solicitor mistakenly included a break clause operable by the tenant which the tenant's solicitor noticed but chose not to mention, the landlord obtained rectification of the lease documentation almost six years later³.

25. It is essential that the defendant be found to have taken advantage of the claimant's mistake in such a way as to make it be inequitable (or "unconscionable") for him to require the claimant to keep to the terms of the written document. Unconscionability as opposed to "sharp practice" is now the touchstone. It is the combination of knowledge of a mistake which will benefit him together with a failure to draw it to the attention of the other party that will usually render a party's silence inequitable. Without this, it would be wrong to force the party who was not mistaken to keep to the terms of a contract that he did not intend to make⁴. The central importance of the conduct being inequitable is underlined by the case of *Littman v Aspen Oil (Broking) Ltd* [2005] EWCA Civ 1579. In *Littman* the effect of the replacement of the word

³ *Coles v William Hill Organisation* [1999] L&TR 14

⁴ *Templiss Properties Ltd v Hyams* [1999] EGCS 60, *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259

“Landlord” with the word “Tenant” was to give the landlord an advantage under the lease which had never been agreed by the parties. But in the face of what it saw as obvious inequitable conduct the Court of Appeal, had it not found for the landlord on the question of interpretation, would have upheld the decision of the trial judge on rectification.

The type of knowledge for unilateral mistake

26. The requirement that the defendant to the claim for rectification for unilateral mistake must have knowledge of the mistake is strict. A landlord and tenant agreed to a clause under which the landlord promised not to “permit any other gift shop to be operated in the building provided that this restriction shall not apply to any hotel in the building” and in doing so had mistakenly given away a lot of the commercial value of the building: *Oceanic Village v Shirayama Shokusan Co Ltd* [1999] EGCS 83. The landlord contended that the restriction was never intended to extend beyond the sale of articles having a connection with the tenant’s London Aquarium, and sought to have the clause rectified accordingly. The claim failed. There was no common mistake because the tenant was not, at any point, labouring under a mistake as to the terms of the lease. But equally there was no unilateral mistake because the tenant could not fairly be said to have been aware of the mistake on the part of the landlord. Neuberger J emphasised that it is not the function of the court to rectify an agreement simply because one negotiating party has been tough and successful and the other has been unwise or has missed a point or has failed to appreciate the effect of a particular provision.

27. What, then, constitutes knowledge of a mistake for these purposes? Actual knowledge will, of course, suffice. But knowledge for these purposes need not be actual knowledge. Where A intended B to be mistaken, prevented B discovering his error by making misleading statements and B therefore make the very error A intended, the mere fact that A does not know that B made an error did not prevent A’s conduct being held to be sufficiently unconscionable for rectification to be ordered⁵. It is sufficient for the claimant to show that the other party either wilfully shut its eyes to the obvious, or, at the very least, wilfully and recklessly failed to

⁵ *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259

make such inquiries as an honest and reasonable person would make: *George Wimpey UK Ltd v VIC Construction Ltd* [2005] BLR 135 paragraphs 42 – 46.

28. It is important from the outset to be clear what your client's case is to be as to the other party's knowledge. In order to frame a case in unilateral mistake it is essential to plead the precise type of knowledge you are alleging the other party to have had and the facts underlying your allegation. The difficulties are to some extent compounded by the persistent, but distracting, concern in the cases over whether particular categories of knowledge constitute "dishonesty". It is not open to the Court to infer dishonesty from facts which have not been pleaded: per Peter Gibson LJ in *Wimpey*. Dishonesty must not be pleaded unless there is a clear prima facie case. The claimant can be faced with some awkward pleading decisions. Deciding how to frame your case requires careful analysis and consideration of the evidence.
29. It is advisable to focus on the categories of knowledge identified in *Wimpey* and on the underlying facts which you say support your allegation of that category of knowledge, rather than getting unduly distracted by the question of dishonesty. It will often be the case that a claim for actual knowledge (or even for unilateral mistake at all) cannot be made out in advance of disclosure or witness statement. In that case the pleaded case must be carefully revisited once further material is available in order to decide whether to amend the claim to include an allegation of dishonesty if this is the case the Claimant intends to run at trial. *Wimpey* illustrates the problems that can arise for a Claimant who fails to think through fully the evidential and forensic implications of the case they wish to run at trial.

Whose mistake, whose knowledge?

30. Considering the merits of a claim for rectification in a commercial property context can be further complicated by the nature of the parties and the agents through whom they act. It is common in a commercial property context for a party to negotiations (a) to be a company and / or (b) to employ agents to negotiate on its behalf, either as employees or retained professionals such as property managers or surveyors. Both these factors require careful consideration in determining how to frame your claim for rectification.

31. There are two separate issues, but they can be confused. When considering whether a mistake has been made by a corporate body, it is the decision-taker whose understanding and intention is decisive: *London Borough of Barnet v Barnet Football Club* [2004] EWCA Civ 1191. The “mind” of a company can only exist in the understanding and intentions of its directors and in the context of a corporate person the decision-taker will usually be the board or other relevant body of persons charged with contracting on the company’s behalf. In the *Barnet* case the London Borough of Barnet failed to obtain rectification of an instrument of sale of land because it pleaded its case solely by reference to the intention and understanding of an officer who was charged with negotiating the instrument, but failed to adduce evidence of the intentions of those persons actually charged under the Borough’s delegated powers procedure with deciding upon what terms to effect the sale.
32. Conversely, a corporate body may decide to delegate to an individual officer authority for taking certain decisions. In *Hurst Stores and Interiors Limited v M L Europe Property Limited* [2004] EWCA Civ 490 the Court concluded that the individual project manager of the claimant company had had delegated authority to agree certain accounts with the result that a mistake on his part was sufficient to entitle the claimant to rectification.
33. But it is important to keep separate the question of who is authorised to take decisions (which determines who it is that must be mistaken for the purposes of rectification) from the question that arises in a unilateral mistake claim of whether a party knew of a mistake by another party.
34. Knowledge on the part of an agent may well be sufficient to fix a company (or indeed an individual) with notice of the other party’s mistake, even though that agent is not the decision-taker and even though the decision-taker did not have knowledge of the mistake. This point has rarely been directly addressed in the reported cases, but it accords with the principles under which knowledge acquired by an agent may be imputed to his principal, and a principal made liable for the acts of his agent.
35. So in *QRS Sciences v BTG International* [2005] EWHC 670 (Ch) a successful claim for rectification for unilateral mistake was founded upon “sharp practice” on the part

of an in-house solicitor. Equally in *Templiss v Hyams* [1999] EGCS 60 it is reasonably clear that the trial judge took the view that it would have been sufficient (had the evidence demonstrated it on the facts) for the Defendant's solicitor alone to have known about the mistake in question and to have taken advantage of it for a claim to lie in unilateral mistake. The case of *George Wimpey UK Ktd v VIC Construction Ltd* [2005] BLR 135 illustrates both points. Wimpey failed to obtain rectification for unilateral mistake among other things because (a) even though the regional director negotiating on its behalf was mistaken, it failed to adduce evidence from its board whose authority and approval was essential to any decision and (b) the persons negotiating on behalf of VIC did not "know" of Wimpey's alleged mistake.

Drafting your statement of case

36. It bears repeating - it is essential to plead a rectification claim clearly and fully, identifying each element and the facts upon which you rely in support of the allegation that they are made out. In the light of the discussion above, the following are examples of the questions you are likely to need to ask and to consider carefully in the light of the evidence available:

- what precisely is the mistake that has been made in the drafting of the written agreement?
- who on each side was charged with deciding what the terms of the agreement should be?
- who was acting for each side in the negotiations?
- what information did these negotiators pass up the line to the decision-makers?
- in the light of that information, what can be said about the intention of the decision-makers and can it be shown that the agreement said something different to what they intended?
- Or has the error come about by reason of a mistake on the part of the negotiators who have not understood their principals?
- were both parties mistaken as to what the written agreement said?

- if only one party was mistaken, who, if anyone, among the decision-makers and negotiators on the other side knew about that mistake in the required sense? What evidence do you have to suggest that they “knew”?

37. It is also important at the pleading stage to be clear what you allege the agreement should have said. In pleading rectification you must identify clearly the wording of the contract as rectified and the Court will not order rectification unless it is clear what the rectified document should have said. See eg *Connolly v Bellway Homes* [2007] EWHC 895 (Ch). For this reason you cannot, for instance, plead two alternative, inconsistent “real” common intentions⁶.

Evidence and the standard of proof

38. As with any civil claim, the civil standard of proof applies to a claim for rectification ie on the balance of probabilities. However, it has been said that a person seeking to establish a case for rectification must establish his case by “strong irrefragable evidence”⁷ or “convincing proof”⁸.

39. In practice this means that there must really be no doubt as to what the common intention actually was. Otherwise the Claimant will fail to dislodge the obvious inference to be drawn from the existence of the written document in which the parties have purported to record their agreement.

40. In practice there is no substitute for a careful analysis of all the available documentation in an effort to identify material supporting or adversely affecting a claim for rectification. Most cases turn on just a few items drawn from the often huge quantity of documentation available from the negotiations for a commercial contract. Any written negotiations should be carefully traced through in order to ascertain what was and was not agreed in principle. Pay careful attention to handwritten notes and annotations. The most illegible of scrawled marginalia may well hold the key to a party’s true intention and unlock the case.

⁶ *Pearce v. Stonechester* The Times, November 17, 1983

⁷ See eg *Lake v Lake* [1989] STC 865 at 869 per Mervyn Davies J

⁸ *Thomas Bates* *ibid*

41. It is essential that the extent of the rectification (though not necessarily the exact words) should be clearly ascertained and defined by evidence contemporaneous with or anterior to the instrument⁹. However, where the anterior agreement between the parties is imprecise but not so imprecise that it would be void for uncertainty, the Courts may still grant rectification. Thus in *Central & Metropolitan Estates v. Compusave*¹⁰ (a case of unilateral mistake) where a lease failed to include 5-yearly rent reviews which had been agreed, the Court was willing to rectify the lease albeit that no formula or mechanism for rent review had been expressly agreed. It ordered that there should be included in the lease after the rental figure the words “such rent to be reviewed at the expiration of such period and of each subsequent period of 5 years”. The Court considered that such words predicated that the rent would be “fair and reasonable”¹¹ and considered that if the parties could not agree the rent, the Court could direct an inquiry as to the amount of the reviewed rent¹².

42. It is essential too to ensure that oral evidence is adduced from the necessary witnesses. In particular once the decision-makers have been identified they should be called to give evidence. Obvious though this may seem, the *Barnet* and *Wimpey* cases both demonstrate how a case will fail if only the negotiators but not the decision-makers are called to give evidence of their intentions and understanding.

Successors in title

43. A claim to rectification may be made by an assignee of the original lessee or landlord. The benefit of the right to rectify passes under the Law of Property Act 1925 s.63¹³ (or presumably by express assignment).

⁹ See *Bradford (Earl) v Romney (Earl)* (1862) 30 Beav 431

¹⁰ (1982) 266 E.G. 900. For other cases concerning the rectification of rent review clauses see *Stavrides v Manku* [1997] EGCS 58 (review dates omitted in error), *Brimican Investments Ltd v Blue Circle Heating Ltd* [1995] EGCS 18 (upwards/downwards review rectified to upwards only)

¹¹ Compare *Thomas Bates & Sons Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505; see too *ARC Ltd v Schofield* [1990] 2 EGLR 52

¹² Compare *Beer v Bowden* [1981] 1 WLR 522; *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 and see the majority of the House of Lords in *Sudbrook Trading Estate Ltd v Eggleton* [1983] AC 444

¹³ *Berkeley Leisure Group v. Williamson* [1996] E.G.C.S. 18

44. But, though a right of rectification is a mere equity, where it is ancillary to or dependent upon an estate in land it is nonetheless capable of binding a purchaser of land: *Blacklocks v J B Developments* [1982] Ch 183. The principles to be applied in determining whether it does so depend upon whether the estate in question is registered or not.
45. A purchaser of unregistered land will not be liable to rectify if he was a bona fide purchaser for value of the land without notice of the equity of rectification¹⁴. For these purposes “notice” constitutes not only actual knowledge of the equity, but also that knowledge which would have come to a party’s attention if he had made reasonable inquiries and inspections¹⁵. In the ordinary way it seems that an assignee of an unregistered lease will not be required to look beyond the terms of the lease, but you should always be alive to any inconsistency on the face of the lease that might be evidence of an error.
46. In relation to registered land a registered purchaser for valuable consideration will obtain priority over a right of rectification unless (s29(2) of the Land Registration Act 2002) the right of rectification is protected by notice on the register, or it is an interest which overrides registration because the right belongs to a person who was in actual occupation of the land in question at the time of the disposition – see Sched 3 para 2 to the 2002 Act (interests of a person in actual occupation). This exception only applies in relation to the land of which the party with the benefit of the right is in actual occupation and only if either inquiry was made before the disposition and the right was not disclosed when it could reasonably be expected to have been or the occupation is obvious on a reasonably careful inspection of the land or the third party actually knew of the right of rectification.
47. Further it is important to remember that in a case where you also need to rectify the register against a successor in title it will be necessary to overcome the additional hurdle of satisfying the Court it should make such an order. Typically these cases arise where the error in question is contained in a conveyance or demise and consists of an erroneous description or definition of the land transferred. In these cases a claim for rectification of the register is addressed against the third party

¹⁴ See *Smith v Jones* [1954] 1 WLR 1089; *Taylor Barnard v Tozer* [1984] 1 EGLR 21, 22; *Equity & Law Life Assurance Society Ltd v Coltness Group Ltd* (1983) 267 EG 949

¹⁵ Section 199 of the Law of Property Act 1925

purchaser: see *James Hay Pension Trustees v Cooper Estates Limited* [2005] EWHC 36 (Ch).

48. The Court always retains a residual right to rectify the register even against a registered proprietor in possession in cases where it would be unjust not to do so: see Sched 4 to the 2002 Act. Such injustice will often be found to lie in the knowledge of the successor in title. The cases on s82(3)(c) of the Land Registration Act 1925 suggest that fraud, trickiness, full knowledge, intent, willingness to run the risk etc. are all factors which will militate in favour of it being found unjust not to rectify the register against a registered proprietor.