

RECTIFICATION

The Modern Law and
Practice Governing
Claims for Rectification
for Mistake

David Hodge QC

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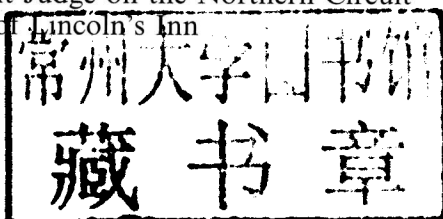
RECTIFICATION

The Modern Law and Practice Governing Claims for Rectification for Mistake

BY

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RECTIFICATION

**The Modern Law and Practice Governing
Claims for Rectification for Mistake**

To Jane, my wife, with special thanks for the time that she
has allowed me to devote to this work; and to the other
members of the Northern Circuit, with thanks for
welcoming me as one of their Judges

ADDENDUM

The following references appeared too late for inclusion in the main text:

CHAPTER 1

THE NATURE OF RECTIFICATION

THE ALTERNATIVE REMEDY OF RESCISSION

- 1-30** NOTE 101. ADD: The principle in *Hastings-Bass* was recently considered by Mr Robert Englehart QC (sitting as a deputy judge of the Chancery Division) in *Pitt v Holt* [2010] EWHC 45 (Ch); [2010] W.T.L.R. 269 and by Norris J. in *Re Futter (No 3) Life Interest Settlement, Futter v Futter* [2010] EWHC 449 (Ch); [2010] W.T. L.R. 609.

CHAPTER 10

PRACTICE AND PROCEDURE

7. SUMMARY JUDGMENT

- 10-41** ADD: In *Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank BA*¹ the Court of Appeal held that where the terms of an application for summary judgment concerned the construction of a written contract, it did not follow that the need to know what the factual matrix was required a full trial with disclosure, evidence and cross-examination of witnesses. If there was no actual conflict of evidence on a relevant point of background matrix, it was only when there really were reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe the contract on a summary judgment (including a strike out) application. According to Jacob L.J.:

“The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to ‘pure’ construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application.”

¹ [2010] EWCA Civ 397 at [4]-[5] per Jacob L.J. (speaking with the agreement of Rix and Longmore L.JJ.).

FOREWORD

Fifty years ago, even twenty years ago, it would have been impossible to persuade any publisher to publish a book solely devoted to the topic of rectification. Indeed, it would have been very difficult to find a lawyer who would be prepared to buy such a book. Within a period of less than a quarter of a century, we have reached a position where, at least in my view, there is not merely a demand, but a positive need, for such a book.

There are various reasons for this development, and, as so often is the case, these reasons are connected. First, there is the sheer growth in the number of commercial contracts and other documents produced in the business world. Secondly, legal documentation has become more and more complex. Thirdly, with the advent of the word processor, there has been a much greater tendency to produce lengthy documents and to borrow provisions contained in a previous document and introduce them into a new document. Fourthly, the nature of business transactions has become ever more complex, international, and multiparty. Fifthly, negotiations have become much more protracted and technical. And finally, in the relatively new electronic world, all records of pre-contractual and drafting negotiations are easily available. The increased volume, size, and complexity of legal documents has compounded the inherent risk of error, and the accessibility of the negotiating material has assisted, even enabled, parties to argue about the effect of their pre-contractual communications to an extent which was simply inconceivable twenty years ago.

As a result, there has been almost an explosion in the number of rectification claims, many of which have ended up in court. As a result, the law relating to rectification has developed very significantly in the past two decades, in a way which is both of practical and commercial importance and legally and intellectually interesting.

Even a casual glance through the contents section of this book demonstrates the wide ambit of the rectification jurisdiction. Far from being limited to commercial contracts, it extends to many other types of documents such as trust deeds, company documents, planning documents, letters of instruction, wills, and even court orders. Accordingly, the need to be up to date on the law of rectification is not limited to lawyers and others who are involved in commercial contracts: the ambit of the subject is far wider.

David Hodge is to be congratulated and thanked for devoting his considerable expertise and a substantial amount of his time to writing a full and interesting book on the topic of rectification. He has produced a book which is not only accurate and full in its coverage of this important topic, but which is also written and structured in a user friendly way, a particularly important feature for any law book, in my opinion. The brief summaries at

FOREWORD

the start of each chapter, and of each section, are particularly useful, as they enable the reader to appreciate the scope of each chapter and section.

It also seems to me that David Hodge has achieved a good balance between the older cases which laid down the basic principles, and the modern cases which have developed them to fit contemporary requirements and developments. Similarly, there is a judicious balance between domestic cases and Commonwealth cases, properly acknowledging the important contribution to this topic of the courts of Australia and New Zealand in particular.

Another impressive feature is that David Hodge is not frightened to include quotations, sometimes very short, sometimes rather longer, from judgments which make points in clear and authoritative terms. There is often no point in a book summarising a passage in a judgment which says all that needs to be said on the topic. On the other hand, in some cases it is better for the writer to summarise the effect of the case, or a number of cases, in his or her own words. In my view, this book achieves that balance very well also.

I note that, in his preface, the author has sought to base his approach on that of Sir Kim Lewison in his book on *Interpretation of Contracts*. That is a high standard to aim for, and he has achieved it. The author also originally practised in the same chambers as Sir Robert Megarry, who wrote first class books on difficult and technical legal subjects, and represents the benchmark for legal text book writers, not least because he also managed to make his books readable, and sometimes even amusing. I am delighted to be able to say that David Hodge has successfully followed in Sir Robert's footsteps as well.

In conclusion, therefore, I welcome this well written, well researched, and well structured book on a topic which needed a comprehensive and thoughtful treatment, and which has now got one.

Lord Neuberger of
Abbotsbury M.R.
Royal Courts of Justice,
Strand, London WC2
March, 2010

PREFACE

This book has undergone a long period of gestation; but its arrival is timely. During my last few years in practice at the Chancery Bar in Lincoln's Inn, I had increasingly felt the need for a practitioner's work directed to the law and practice governing the equitable remedy of rectification for mistake. But the seemingly limitless demands of self-employed practice prevented me from devoting the necessary time to the subject. When, following my appointment to the Specialist Chancery Circuit bench, I found myself under (comparatively) less pressure, I felt the time had come to turn to the task. My perception was that claims for rectification were on the increase, fuelled by a combination of factors, including the ever-increasing complexity of legal documentation, the ever-reducing time-frame within which transactions fall to be concluded, the ever-rising pressure on legal costs, and the greater potential for error inherent in the ever-expanding resort to multiple drafts and computer-generated documents. In the event, I could not have foreseen that, on July 1, 2009, the House of Lords would make such a significant contribution to the exposition of the law in this area. In time, Lord Hoffmann's analysis of the correct approach to the nature of the mistake required for rectification in *Chartbrook Ltd v Persimmon Homes Ltd*² may come to be referred to as frequently as his observations about the correct approach to the interpretation of contracts in *Investors Compensation Scheme v West Bromwich Building Society*.³ Inevitably, Lord Hoffmann's speech features prominently in the text.

Both in its objective and its structure, I had in mind a work along the lines of Sir Kim Lewison's excellent book on *The Interpretation of Contracts*. My object was to provide a source book of material to assist the busy practising lawyer to advance, or to resist (as the interests of his client might dictate), a case for the correction of a mistake in the way in which the parties to a document had purported to record the terms of their transaction. This object was to be achieved by citing extensively from the judgments of the courts, both with a view to reducing the need for the reader to consult the particular case itself in order to establish precisely what the court had actually said, and on the premise that the actual words of a judgment are likely to constitute a more accurate statement of the relevant rule or principle, or a more reliable illustration of its application in a particular context, than any gloss that might be put upon them by the writer of a practitioner's text. This book is intended – and unashamedly so – for the legal practitioner, who is concerned with the application of the law to the particular fact-situation under consideration, rather than the legal academic, whose

² [2009] UKHL 38; [2009] 1 A.C. 1101.

³ [1998] 1 W.L.R. 896 at 912–913.

PREFACE

real interest probably lies in the elucidation of the larger picture. In short, I have endeavoured to produce the sort of book which I would have wished to turn to when considering a point on the law of rectification in the course of my own practice as a Chancery lawyer. But I trust that I have not shunned all analysis of the underlying legal issues, nor abstained from any consideration of the possible direction of future developments in the law. I have included reference to some Commonwealth (and particularly Australian) authorities; but I have done so principally in order to illustrate features of the law and practice of rectification that these jurisdictions share in common with our own, or (occasionally) to emphasise the differences between them. This book does not purport to be a comprehensive statement of the law of rectification as it applies in any jurisdiction other than England and Wales.

The book is divided into ten chapters of varying length. Each begins with a short summary of the main areas covered in that chapter. Each chapter is then divided into a number of sections, each beginning with a summary (in bold type) of the main principles of law or practice expounded in that section. In general, I have tried to state the law on the basis of materials available to me up to March 2, 2010; although in some instances I have been able to incorporate more recent material. I welcome any constructive criticism and suggestions for ways of improving this book.

I am grateful to all the practitioners and judges who have contributed to the body of learning that has gone into this work. Special thanks must go to Guy Holborn and Catherine McArdle, and the other staff of the Library of Lincoln's Inn; to John Murphy and Francis Law, and the other staff who maintain the court libraries in Manchester and Liverpool; to Rose Shaw and Julie Bagnall, and the other Specialist Listing staff on the Northern Circuit; and to my fellow Specialist Judges on that Circuit. I am also grateful to Greg Smith, to Kacey Mann, and to the other staff at Sweet & Maxwell. As Senior Publishing Editor, Greg worked hard to secure the publisher's decision to commission this work; and Kacey has taken my manuscript through to publication. I owe particular thanks to Lord Neuberger of Abbotsbury M.R., who very kindly agreed to write a foreword to this book. But above all, my heartfelt thanks must go to my wife, Jane Woosey, herself a practising barrister on the Northern Circuit, without whose enthusiasm, practical support, and willingness to allow me to sacrifice time on holiday, this work would never have seen the light of day.

David Hodge
Manchester Civil Justice Centre
April 2010

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Paragraph numbers appearing in bold face are, in the writer's opinion, the principal references to the relevant authority.

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