Rectification and other Mistakes

Lecture to the Commercial Bar Association by Lord Hoffmann

3 November 2015

1. When I was reading law sixty years ago, the law on rectification appears to be clear and settled. There had recently been the case of *Frederick E. Rose (London) Ltd v William H Pim Junior & Co Ltd*[1] which gave the Court of Appeal an opportunity to restate the principles. The plaintiff in that case was a London merchant who placed a written order for Moroccan horse beans in the belief that his Egyptian buyer would accept them under the description "feveroles". He had previously discussed this with the seller, another London merchant who was of the same opinion. But both parties were mistaken. In Egypt, horse beans are not necessarily feveroles. There are other kinds of horse beans and those supplied were different.

2. The London buyer brought proceedings to rectify the contract on the grounds that both parties had intended to buy and sell feveroles. There had been a common mistake in thinking that any horse beans would answer to that description. But the Court of Appeal dismissed the claim. Whatever the parties may have thought or intended about the taxonomy of horse beans, it was the only description specified in the contract. It had been agreed on the telephone that the buyer would buy horse beans, that was what the written order said and that was what he got. Lord Justice Denning put the matter with great clarity:

> "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. You look at their outward acts, that is, 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

[1] [1953] 2 QB 450

> document, then you rectify the document; but nothing less will suffice."

3. The clarity and simplicity of the law was enhanced by the fact that no one had then heard of what is now called rectification for unilateral mistake. There existed some illustrations of the general principle from which it was afterwards derived, namely that parties negotiating a contract owe each other certain obligations of good faith, but they had not yet coalesced into a doctrine of rectification of contracts. Perhaps the best illustration of the underlying principle was the curious case of *Hartog v Colin & Shields*[2], decided by Singleton J just before the war. The dealer quoted a price per pound when it was obvious that he meant a price per skin, there being about 3 skins to the pound. The Belgian buyer accepted the quotation and sued for damages for non-delivery. The judge said that although objectively the agreement was clearly per pound, the buyer could not enforce it in those terms because he knew the seller had made a mistake. He had a duty, which one could reasonably describe as an instance of requiring good faith in negotiation, not to take advantage of what he knew to be a mistake. There was no application to rectify the the contract so that it could be enforced in the sense intended by the seller. He had presumably sold his hare skins to someone who was willing to pay the market price. But the principle applied by Singleton J was to be invoked for that purpose in later years.

4. We all of course know that, as |Lord Ackner said in *Walford v Miles*[3] that there is in English law no general principle of good faith in the negotiation of contracts. Indeed it is a selling point for English law in the market of international commerce that that it has no general obligation to negotiate in good faith. It offers no foothold for arbitrators or judges to conduct a wide ranging examination of the conduct of the parties and decide the case according to an unstructured sense of fairness. It does, however, have specific rules of equity which impose obligations to act in good faith: for example, not to make misrepresentations, or exercise undue influence. Likewise, a party may not take advantage of what he knows to be the other party's mistake as to the terms of the contract.

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[2] [1939] 3 All ER 566

[3] [1992] 2 A.C. 128

5. Since those innocent times, various heresies have arisen and continue, if not to flourish, certainly to lurk in the minds of some academic writers and members of the judiciary. They arise out of a confusion between the principle of what is now called rectification for common or mutual mistake, as stated by Denning LJ in *Rose v Pim*, which I shall call "document rectification", and what is now called rectification for unilateral mistake, which I shall call "contract rectification", which is based upon the same requirement of good faith identified by Singleton J in *Hartog v Colin & Shields*.

6. First, some historical background. In *Mackenzie v Coulson*[4] Lloyds underwriters attempted to have a policy rectified to accord with the slip. Sir William James dismissed the bill on the grounds that the slip did not create a binding contract. He said:

> "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. But it is always necessary for a Plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument"

7. In 1911, Sir Herbert Cozens-Hardy explained the need for a prior enforceable agreement by saying that rectification could be "regarded as a branch of the doctrine of specific performance."[5] By that he meant that rectification would be ordered if there had been a specifically enforceable agreement to reduce certain terms to writing. If the document did not comply with this obligation, equity could require the right document to be executed. But not otherwise. However, in two cases in the 1930s[6] judges of first instance decided that the previous agreement did not have to be legally binding. In one of them, Simonds J said:

> "[I]t is sufficient if you find a common continuing intention in regard to a particular provision or aspect of the agreement. If you find that in regard to a particular point the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then this court has jurisdiction to rectify…"

[4] (1869) L.R. 8 Eq. 368
[5] (1911) 104 LT 85, 88.
[6] *Shipley UDC v Bradford Corporation* [1936] Ch 375; *Craig v Hegeman-Harris Co Inc* [1971] 1 WLR 1390 (Note).

8. This statement of the law was afterwards approved by the Court of Appeal in *Joscelyne v Nissen.*[7] There is however an ambiguity in phrases like "common continuing intention". Since Victorian times English judges, probably under the influence of French writers like Pothier, have spoken of contracts expressing the common intentions of the parties. The word "intention" ordinarily signifies a state of mind and that was how the French writers, influenced by Rousseau, intended it to be understood. In England, however, the influences were the empirical philosophies of Locke and Hume. What mattered was the outward manifestation, not what was going on in the mind. And this objective attitude to intention was famously expressed by Blackburn J in his judgment in *Smith v Hughes*:[8]

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

9. You will notice that Blackburn J says: "the other party in that belief enters into the contract within him". That suggests that, as in a plea of misrepresentation or estoppel, the other party has to adduce evidence that he relied upon the words being given an objective meaning. But I know of no case in which such evidence was required. The court simply determines the objective meaning of what passed between the parties or the document which they signed. The parties are assumed to have taken the contract at its objective meaning. If one party wishes to allege that the other party knew that something different was intended, the onus is upon him to allege and prove it. That is what happened in the hare skins case.

10. So when Simonds J said that although there did not have to be a binding contract, but there had to be a common continuing *intention*, what did he mean? Was he using intention in the French subjective sense or was he using it in the English empirical objective sense? This potential ambiguity has been inherent in the terms of English contract ever since English judges starting talking about contractual intentions in the nineteenth century.

11. Simonds J probably thought that objectivity went without saying. He still required an agreement which the final document had inaccurately recorded but said that it did not itself

[7] [1970] 2 QB 86.
[8] (1871) L.R. 6 Q.B. 597, 607.

have to have been enforceable. It could have been subject to contract, or lacking in some formality. The slip in the case of the Lloyd's underwriters was the paradigm of a prior objective but legally unenforceable agreement which the subsequent policy inaccurately reflected. Simonds J would have ordered rectification. But I think he saw that as the only change in the law that he was making. Anyway, whatever Simonds J may have thought, the question was settled by *Rose v Pim* and *Joscelyne v Nissen*. In argument in *Rose v Pim* there was an exchange between Denning LJ and Mr T G Roche, who appeared for the successful defendants. Mr Roche said:

> "When Simonds J. in *Crane v. Hegeman-Harris Co. Inc*. referred to intention and said that it was sufficient to find a common continuing intention, he meant intention expressed in oral agreement, i.e., the objective intention. If he meant more than that "agreement means intention as expressed," the court ought not, in view of the clear expressions of opinion to the contrary in the other decisions cited, to follow him."

12. To which Denning LJ replied:

> "The question could not be: did you intend to sell it as feveroles? but only, did you agree to sell it as feveroles?"

13. In *Joscelyne v Nissen* neither side's counsel suggested that subjective intentions were relevant. Mr Rodney Bax QC for the respondent, citing Simonds J, said it was enough that there was "an expressed mutual intention". Mr Zucker, for the appellant, argued somewhat improbably that a passage in the judgment of Denning LJ in *Rose v Pim* meant that Simonds J had been altogether wrong and that there still had to be a previous binding agreement. Denning LJ had said nothing of the kind and in dealing with the point, Russell LJ said of his judgment:

> "In so far as it speaks of agreement in the more general sense of an outwardly expressed accord of minds it does no more than assent to the argument of Mr. Roche, at p. 457, as to the true width of the views of Simonds J."

14. It seems to me clear that Russell LJ accepted that an objective intention was required.

15. What the authorities show is that document rectification still carries the marks of its origins in the equitable jurisdiction to grant specific performance. In granting specific

performance, equity is making a party to a contract keep his promise. It is not leaving him with a common law claim for damages for the promise being broken. It requires the promise to be performed. Likewise, rectification in the 19th century was an order that he execute, or be treated as having executed, the document which he promised to execute and not some other document which was accidentally or mistakenly executed instead. The modification made by Simonds J was that the earlier promise no longer had to be independently legally enforceable. In such cases, there would have been no contractual obligation to execute a contract in a particular form or any contract at all. The parties could have at any time withdrawn from the negotiations. But if and when a document was executed, equity had jurisdiction to look back, as equity often does,[9] and say: "This is not the document which you promised to execute."

16. The law as laid down in *Rose v Pim* and *Joscelyne v Nissen* in the Court of Appeal appears to me so clear that it is difficult to explain how, fifty years after *Rose v Pim* and without anything having been said in any English case to cast doubt upon the decision, it was assumed without argument at first instance and in the Court of Appeal in *Chartbrook v Persimmon Homes Ltd*[10] that a document could not be rectified on the basis of there having been a previous objective agreement in different terms, unless that previous agreement accorded with the subjective intentions of both parties. I have not been able to find a case at any level in which that was given as a reason why a claim for rectification should fail. I am sure that if there had been such a case, it would have been cited to us in *Chartbrook* and we may have had to say that it was wrongly decided.

17. Indeed, my surprise goes further, because since the decision of the House of Lords in that case restored the law laid down in *Rose v Pim* there has been a fair amount of academic and judicial muttering about whether it was right to do so. To this I shall in due course return.

18. I should say parenthetically that some writers have suggested that rectification has been rendered otiose by the ability of the court to correct obvious semantic or syntactical errors, as exemplified by cases like *Investors Compensation Scheme Ltd v West Bromwich*

[9] Compare *Thorner v Major* [2009] 1 WLR 776.
[10] [2007] 1 All ER (Comm.) 1083 (Briggs J); [2008] 2 All ER (Comm.) 387 (Court of Appeal); [2009] AC 1101 (House of Lords).

Building Society[11] and *Chartbrook v. Persimmon*. In my view, however, reports of the death of rectification have been greatly exaggerated. Many errors are not linguistic. The written contract may make perfectly good sense. It just happens not to be what the parties had agreed. Even if it is clear something has gone wrong with the language, it is often unclear what the parties actually meant, and for the purposes of construction the court has to be satisfied on both points before it can do anything about it.

19. I want now to look at the problems which were created by the abandonment of the rule that there must be a previous binding contract. If there is such a contract, all that a court has to do is to establish its terms, interpret them and then see whether the subsequent document correctly reflects those terms. The previous contract will by definition have precluded any change of mind by one of the parties, whether outwardly expressed or not, unless the other party agrees to a variation. However, when the question is whether an outward agreement as to some or all of the terms continued up to the moment when the final document was executed, the court has the more difficult task of deciding whether a difference between what passed between the parties at an earlier stage and what appears in the final document indicates that the document erroneously recorded their earlier agreement or whether it is rather the outward expression of a change of mind.

20. It is common for negotiations to begin with heads of agreement, term sheets and the like, and for successive drafts to be exchanged until a final document is agreed and signed. Although there may be apparent outward agreement on a provision in heads of agreement or an earlier draft, it may be unrealistic to treat such agreement as expressing a continuing intention that such a provision shall find its way into the final agreement. It will often be the case that such agreement is merely provisional, subject to clarification, amendment or even reversal at a later stage in the negotiation. Such clarifications and amendments are the function of M & A lawyers working all night on the documents.

21. It was this kind of problem which divided the Court of Appeal in *Britoil plc v Hunt.*[12] The parties had signed 21 paragraphs of Heads of Agreement on 8 December 1978 followed by negotiations which resulted in a 50 page Definitive Agreement being signed on 15 February 1979. Hunt claimed that it should be rectified because certain of its provisions were

[11] [1998] 1 WLR 896. Sir Richard Buxton prefers to describe these decisions as "construction" in scare quotes: see [2010] CLJ 253.
[12] [1994] CLC 561

not in accordance with a paragraph in the Head of Agreement. Hobhouse LJ, who gave the majority judgment, said that the Heads of Agreement were ambiguous and in any event could not be assumed to represent more than a stage in negotiation. If they had been a contract, the court would have tried to resolve the ambiguity rather than hold it void for uncertainty. But as a provision in non-binding Heads of Agreement, the existence of ambiguity meant that there was no outward expression of one meaning rather than another. Hunt had failed to satisfy the requirement that there must be convincing proof an earlier expression of agreement, objectively manifested, which the Definitive Agreement had been intended to reflect..

22. ` I should mention that I dissented in the *Britoil* case because I thought that the provision in the Heads of Agreement was sufficiently clear. But that was one of those differences about the interpretation of documents which are unfortunately common and ineradicable. There was no difference of principle between Hobhouse LJ and me.

23. I now turn to rectification for unilateral mistake, which, as I said earlier, is contract rectification rather than document rectification. As I mentioned earlier, this is a principle which did not as such exist at the time of *Rose v Pim*. Its first appearance was in Megarry and Baker's 25th edition of Snell's *Equity*, published in 1960, which contained the following passage:[13]

> "By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common."

24. As Judge Hodge has observed in his book on rectification, the authorities cited for this proposition were not of the strongest. However, the statement was serendipitously picked up less than a year later by counsel in *Roberts & Co Ltd v Leicestershire County* Council[14], which is now the leading case on rectification for unilateral mistake. Roberts & Co had tendered for a building contract which it thought required its services for 18 months. The Council knew this, but tendered a contract for 30 months which Roberts & Co signed. Pennycuick J held that, as the Council knew that Roberts & Co were mistaken about the

[13] At p. 569.
[14] [1961] Ch 555.

length of the contract but nevertheless let them go ahead and sign it, Roberts was entitled to have it rectified.

25. The principle in *Roberts* was approved by a very strong Court of Appeal (Slade, Oliver and Robert Goff LJJ) in the *Nai Genova*[15] in 1984. But the Court insisted that jurisdiction to order rectification depended upon the one party having had actual knowledge that the other party was mistaken about a term of the contract. Slade LJ pointed out that "the effect of allowing rectification of a contract in circumstances such as those of the present case must be to impose on the defendants a contract which, at the date of its execution, they did not intend to make." Not only, I would add, did they not intend to make such a contract, but, and perhaps more to the point, looking objectively at what passed between the parties, they neither entered into such a contract nor previously agreed that they would do so. The court has rectified the contract rather than rectifying the document to reflect the contract. Everything was in the mind and not the outward appearances. The one party had subjective knowledge that the other party subjectively intended a contract in different terms.

26. There is discussion in later cases about what counts as knowledge of the mistake and whether deliberate misrepresentation or some other form of sharp practice calculated to cause the mistake will also do, but the focus is upon what the one party knew or perhaps should be treated as having known about the other party's mistake.[16]

27. That is enough about the principle of contract rectification, or rectification for unilateral mistake, to enable me to explain why its name is a source of confusion. The name suggests that it is a species belonging to the same genus as document rectification. In the one case both parties are mistaken and in the other case only one is mistaken, so the rules need a little adaptation, but generally speaking the concept is the same. Nothing could be further from the truth. Contract rectification and document rectification are altogether different concepts.

28. Document rectification is based upon the equitable principle of making people keep their promises, in the same way as specific performance. Even though there no longer has to be a prior binding contract, there still has to be a prior and continuing agreement, that is to

[15] [1984] 1 Lloyd's Rep 353.
[16] *Commission for the New Towns v Cooper* (Great Britain) Ltd [1995] Ch 259; *George Wimpey UK Ltd v VI Construction Ltd* [2005] BLR 135.

say, promises made by one party to the other about, even if not legally binding, about what the written contract will require them to do. Document rectification gives retrospective effect to the prior agreement of the parties. And the existence of that agreement is objectively determined. It has nothing to do with subjective states of mind.

29. Contract rectification, on the other hand, is entirely about subjective states of mind. It is based upon a different equitable principle, namely the overarching principle of good faith which has generated specific rules imposing upon parties negotiating a contract specific obligations of good faith. Included in such rules are a requirement that they may not induce mistakes as to the terms of the contract, or knowingly allow the other party to be mistaken as to what the terms of the contract are. In such a case, the court has jurisdiction to enforce the contract in the terms in which they were understood by the mistaken party. Unilateral rectification is an equitable exception to the rule that the terms of a contract are objectively determined. It is, as Slade LJ pointed out in the *Nai Genova*, an exceptional order. It is not necessarily made even where there is jurisdiction to do so. But it can be done.

30. It is said that both document rectification and contract rectification are based upon mistakes. That is true, but the important difference is what the mistake must be about. In document rectification, the mistake is about whether the document corresponds with the prior agreement. By signing the document the parties are indicating that it gives effect to their agreement.. If it does not, they are mistaken. That was what happened in *Chartbrook v Persimmon.* Both parties signed the contract, thereby indicating that it gave effect to their prior agreement. In their own minds, they differed as to what that agreement had been. Objectively, however, it did not give effect to the prior agreement and both were therefore mistaken.

31. Unilateral rectification, on the other hand, is about a mistake as to the terms of the contract. That was the very error which *Rose v Pim* said that ordinary rectification could not correct. Rectification, said the court, cannot be used to change the objectively agreed terms of the contract. It is about rectifying documents, not rectifying contracts. But that is exactly what unilateral rectification does. It creates a contract different from that which the parties objectively agreed.

32. Furthermore, it is logical that there can be unilateral rectification even though there has been no objective prior agreement at all.[17] Unilateral rectification is rectification of the *terms* of an otherwise objectively agreed contract, not just rectification of a *document* to reflect the terms which were agreed. For this purpose it does not matter whether the parties had agreed to reduce their agreement to writing. The question is simply whether the breach of this particular rule requiring good faith in the negotiation of the contract should be remedied by refusing to enforce the contract in the objectively agreed terms or enforcing them in different terms.

33. It is clear, therefore, that while document rectification is solely concerned with documents, unilateral rectification belongs to an equitable genus in which changing the terms of a written contract is only one species. The principle that in negotiating a contract you cannot take advantage of what you know to be a mistake, and that if you do, the law might enforce what the other party thought to be the contract against you, can apply to a purely oral contract (e.g. a recording of a telephone conversation) just as well as to a written one.

34. What, then, has gone wrong? Some of the trouble, I am afraid, originates in the work of Professor McLauchlan from New Zealand, who has written much upon the subject in a heroic attempt to fashion a unified theory which includes both document rectification and unilateral rectification. He wishes to show that they are both applications of the same principle. The unified principle is as follows:

> " the remedy of rectification ought ordinarily to be available to a claimant who is mistaken as to the terms expressed in a written contract where it is convincingly proven either (a) that the other party made the same mistake [*that is to say, document rectification only when both parties were subjectively mistaken*], or (b) that, despite what the document on its proper construction provides, the claimant was led reasonably to believe that its understanding of the terms of the contract had been accepted by the other party [*this is a broader version of contract rectification*]."

35. I think that, in England at least, this enterprise is doomed because, as I have shown, they are applications of quite different principles. But I am not going to go into the details at the moment because I am more concerned with the effect of his theory upon English judges

[17] *Littman and another v Aspen Oil (Broking) Ltd* [2005] All ER (D) 262.

and, in particular, the Court of Appeal in *Daventry District Council v Daventry & District Housing Ltd*.[18]

36. The *Daventry* case concerned a contract by which the Council) ("DDC") sold its housing stock and transferred its housing department employees to a social landlord ("DDH"). The employees pension fund was at the time in deficit and the question was whether DDC or DDH would fund the deficiency. Drafts passed between the parties and there was a good deal of evidence of what the various persons involved thought they meant. At one stage it appeared that there was an agreement that DDH would pay, but just before execution of the contract its lawyers sent DDC a new draft which clearly stated that DDC would pay. This draft was accepted and incorporated into the contract. DDC claimed that it was a mistake and that the contract should be rectified.

37. The trial judge (Vos J) and Etherton LJ said there could be no document rectification because, objectively, there had been no continuing intention that DDH should pay. Whatever may have been the position before DDC accepted DDH's final draft, anyone reading that draft would have concluded that DDC had agreed to pay. If they had made a mistake in agreeing, that might be a ground for unilateral rectification but only if DDH realised they had made a mistake. The judge found this had not been established and Etherton LJ agreed.

38. The majority in the Court of Appeal disagreed. Toulson LJ said that the lawyers' final draft did not count as evincing a change in the pre-contractual agreement of the parties. It was put forward as giving effect to the earlier mutual understanding and not as varying it. It should be treated in the same way as if it had been the final agreement which the parties had approved and then, perhaps a little later, signed. Approval of the mistaken final contract before signature would not have counted as a change in the intentions of the parties and neither should approval of the last draft. On the judge's approach, he said, "any claim for rectification of a contract which a party had read before signing would fail."

39. I have some difficulty with this reasoning because the new draft clause was not put forward as an agreed text for signing. It was put forward as a draft for approval. Its language

[18] [2012] 1 WLR 1333

was clearly new. Only when it had been approved was it incorporated into the final version for signing. It was up to the recipient to decide whether he thought it expressed what the parties had agreed. I find it difficult to equate that approval with reading and approving a document put forward as the final contract. I have similar difficulty with the reasoning of Lord Neuberger MR on this point. He said it was true that the language of the new draft was clear, but that was not a reason for denying rectification. He gave good examples of cases in which contracts in clear language had been rectified. But the point is not whether the language was clear but whether it was put forward as an agreed text or as a new draft for approval. In this case it seems to me to have been the latter.

40. However, these are merely problems about characterising what the parties were doing and do not raise any point of principle. Toulson LJ must of course have been right in saying that if a party mistakenly approves what is put before him as document reflecting a prior agreement, that does not amount to a change in that prior agreement. I therefore put this question on one side and go on to consider Toulson LJ's views on Professor McLaughlan's unified theory of rectification. He quoted some of the comments the professor had written in a note on *Chartbrook v Persimmon* good in the Law Quarterly Review.[19] First, he noted that the House of Lords had not disturbed the judge's finding of fact that "Chartbrook's intention was exactly what…the contract provided for." Therefore, he went on to say, "that meant that rectification was not available on the usual ground of common mistake in recording the terms of the contract". It was difficult, he said, "to accept that Chartbrook was mistaken, at least in any usual sense of that word." This seems to me to beg the question of what the mistake must be about. If the mistake has to be about whether the final contract was in accordance with what Chartbrook thought had been agreed, then indeed they were not mistaken. But if the mistake has to be about whether the final contract was in accordance with the previous objective agreement, then, if Chartbrook thought it was, they were mistaken. The authorities seem to me clearly to establish that, at least in English law, the latter is the right question to ask.

41. The right way to decide the case, said Professor McLaughlan, would have been on the basis of a new version of unilateral rectification in accordance with his unified theory. Although there was no finding that Chartbrook knew Persimmon to be mistaken, they ought to have

[19] [2010] LQR 8.

realised this from the previous correspondence. They accordingly led Persimmon to believe that they were assenting to their version of the contract and on this ground it should be rectified. That, he said, was a better ground for the decision. He described the reasoning of the House of Lords as formulaic.

42. Toulson LJ went on to say that he had difficulty in accepting that a mistake by both parties as to whether a written contract conforms to a previous non-binding agreement should give rise to a claim for rectification. He gives the example of an exchange of correspondence which one party A thinks means x and the other party B thinks means y. The final contract says x but a court considers that, objectively construed, the correspondence meant y. Why, he says, should the contract be rectified to impose on A an obligation which the final contract does not contain and which he did not intend to undertake?

43. The answer, in my view, is because A promised that the contract would contain such an undertaking. If it had been a simple contract with no further document in contemplation, A would under the principle in *Smith v Hughes* have been bound by that obligation, whatever his subjective thoughts on the matter. Why should he be better off because there was a mistake in recording that agreement in a subsequent document? Of course it may be that the reason why A thought the correspondence meant x and B thought it meant Y was because it was ambiguous. Then, as in the *Britoil* case, the claim for rectification would fail. The same if the previous correspondence was all part of a negotiation which would not have been taken to reflect any definite agreement before the final agreement. However, if a party satisfies the burden of proving that the parties had definitely agreed that their agreement should contain certain terms and they have been left out, why should he be denied the benefit of his agreement because the other party subjectively thought there had been no mistake?

44. Lord Toulson followed up his judgment with a lecture in October 2013[20] in which he discussed "the nature of the mistake necessary for rectification for common mistake." He said:

> "Until fairly recently the cases all proceeded on the basis that the mistake had to be as to the terms of the contract, i.e. whether they accorded with the parties' true mutual intentions."

[20] https://www.supremecourt.uk/docs/speech-131031.pdf

45. If "true mutual intentions" means "what they subjectively intended", I find this a remarkable statement. In the days in which a previous binding agreement was required, one obviously construed that contract in the ordinary way and then compared it with the final document. True mutual intentions had nothing to do with the matter. And after the rule was modified to allow reliance on a non-binding but clear and continuing agreement, *Rose v Pim* and *Joscelyne v Nissen* made it clear that such agreement was still objectively construed. As I have said earlier, I am not aware of a single case before *Chartbrook v Persimmon* in which rectification of a contract which did not reflect a previous objective agreement was refused because it was in accordance with the subjective view of one of the parties.[21]

46. Lord Toulson claimed to find support for his view about "true mutual intentions" in the majority judgment of Hobhouse LJ in *Britoil plc v Hunt.*[22]. But I think this is mistaken. Hobhouse LJ pointed in the course of his judgment that the judge (Saville J) had paid no attention to the subjective views of the parties. He cited the passage from Denning LJ in *Rose v Pim* without any suggestion that it need no longer be taken seriously. He agreed that the authorities showed that what the appellants needed to prove was a mistake as to whether the Definitive Agreement was in accordance "something with the objective status of a prior agreement."[23] Where he parted company with the appellants (and me) was in refusing to accept that the Heads of Agreement, which was the only evidence relied upon of such a prior agreement, was sufficient to satisfy that requirement. He may well have been right, but whether right or wrong, it does not mean that there was any difference of principle between us.

47. Lord Toulson ended by saying that the law of rectification had become over complicated. In my view the over-complication has been caused by a muddle between two quite different principles: the principle of keeping one's promises and the principle of negotiating in good faith. The first is the basis of document rectification and its requirements have never been stated better than by Denning LJ in *Rose v Pim*. There is nothing complicated about them. The principle of negotiating in good faith has generated the rules of unilateral rectification. Like all equitable principles, it is capable of application in a variety of

[21] *George Cohen Sons & Co Ltd v Docks and Inland Waterways Executive* (1950) 84 Ll L Rep 97 was a case in which the Court of Appeal expressly declared that the subjective view of one of the parties was irrelevant.
[22] [1994] CLC 561
[23] At p. 574.

circumstances. But that doesn't make it complicated. As for the unified theory which somehow combines these two different principles, that is indeed likely to cause complication and confusion. There is a tendency for systematising philosophers of all kinds to try to derive their conclusions from the fewest premises. It is a temptation also for judges and professors. The example of Lord Atkin's much-applauded simplification of the law of negligence seems to call for emulation. But this may be a mistake. As Einstein is supposed to have said, make things as simple as possible, but not simpler.