

AGENCY AND RECTIFICATION

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Commercial contracts have become increasingly long and intricate. This mirrors the fact that business transactions have become more complex in nature. Reaching agreement can involve protracted negotiations. These developments have had a number of effects. One is the increasing amount of paperwork introduced in any legal dispute about the meaning of a contract.¹ A second is that the final, signed contract is often not properly checked by the parties. In *Milton Keynes v Viridor (Community Recycling MK) Ltd*, Coulson J lamented that a mistake in the written agreement was “perhaps a sad reflection of the fact that modern day contracts of this kind are so complicated that nobody (not even the consultants) bothers to check the actual documentation being signed”.² Thirdly, and relatedly, the increased complexity means that mistakes are more likely to be made.³ Fourthly, due to the expertise needed and time taken to reach an agreement, a commercial actor may employ a third party to negotiate the agreement on its behalf.

This article will focus on these last two points. Mistakes are, generally, best corrected through rectification.⁴ Rectification depends on there being a mistake, and it is important to determine whose mistake is relevant for these purposes. In the context of rectification for common mistake, there is much debate about whether a party actually, or subjectively, needs to have made a mistake, or whether it is sufficient if a reasonable observer would consider that party to have been mistaken.⁵ But little attention has been given to what “the party” means in circumstances where agents have been involved in the transaction.⁶

Problems are particularly acute where a principal has entrusted contract negotiations to a third party. That third party is often called an “agent”. However, that term has been used

* Professor of Commercial Law, UCL. An earlier version of this paper was presented at a Faculty Seminar, and at an Agency Workshop, both at UCL in October 2018. I am very grateful to all those who attended for their comments, and to Will Day, Simon Douglas, Charles Mitchell, Richard Moorhead, Tan Cheng Han, Peter Watts and the anonymous reviewer for comments on previous drafts. The usual disclaimer applies.

¹ In *Murray Holdings Investments Ltd v Oscatallo Investments Ltd*, discussed fully in Section III.B.ii below, Mann J pointed out that although 15 lever arch files were presented to the court, the documents which were actually relied upon amounted to no more than one lever arch file: [2018] EWHC 162 (Ch) [65].

² [2017] EWHC 239 (TCC) [67].

³ See eg Lord Neuberger, “Foreword” in D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (London: Sweet & Maxwell, 2010), vii.

⁴ R Buxton, “‘Construction’ and rectification after *Chartbrook*” [2010] C.L.J. 253, 262; P Davies, “Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction” [2016] CLJ 62.

⁵ This latter view was put forward by Lord Hoffmann, *obiter*, in *Chartbrook Ltd. v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 [48]-[66], and accepted without challenge in *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333, but remains controversial: see Section III.A below.

⁶ For discussion of a similar phenomenon in unjust enrichment, see S Watterson, “Agents and Organisations: Attribution Rules in Unjust Enrichment Claims” [2017] RLR 254.

to encompass a variety of situations.⁷ Sometimes the negotiator will have actual authority to bind the principal. But often the negotiator will not have actual authority, and might not have apparent authority to enter into a contract, or even to communicate that a contract has been agreed. For example, it might be made clear to the other contracting party that the “agent” has no authority to bind the principal, and only has the authority to present a negotiated agreement to the board of the company, which will decide whether or not to enter into the agreement.⁸ There has been some confusion about whether, in such circumstances, the intention and mistake of a negotiator should be attributed to the contracting party. This is a difficult topic. It is clear that the application of rules of attribution depends on context; as Lord Hoffmann rightly remarked in *Meridian Global Funds Management Asia Ltd v Securities Commission*, the key question is: “Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company?”⁹ The facts of any given case will need to be examined closely. In the context of rectification, the intention of the person who was authorised to decide whether to enter into the contract should be paramount. It is therefore important to determine who was the “decision-maker” as regards the contract and terms at issue. Particular difficulties arise where a board of a company, which is the only body authorised to enter into the contract, passively follows a negotiator’s recommendations without further enquiries. Earlier cases held that the negotiator’s intentions were irrelevant because the negotiator did not have any authority (apparent or actual) to bind the company, whereas more recent case law suggests that the intention of the negotiator may well be relevant for rectification. This shift away from an exclusive focus upon the intention of the authorised decision-maker is significant. References to “the contracting party” labouring under a mistake for the purposes of rectification therefore need to be examined more carefully. Yet this issue has been largely ignored in the secondary literature, and often overlooked in the decided cases.¹⁰

Such a lack of attention is unfortunate. After all, there are an increasing number of cases which evidence a split between the person negotiating the contract and the person with authority to enter into it. The troublesome decision in *Daventry District Council v Daventry & District Housing Ltd*,¹¹ now a leading decision on rectification for common mistake, is one

⁷ As Rix, LJ remarked in *Mercantile International Group plc v Chuan Soon Huat Industrial Group Ltd*, ‘It is common ground that the word “agent” can be carelessly and indiscriminately used’: [2002] EWCA Civ 288; [2002] 1 All E.R. (Comm) 788 [6].

⁸ See eg *Commission for the New Towns v Cooper* [1995] Ch 259, 282 (Stuart-Smith LJ); *Birse Construction Limited v St. David Limited* (unreported, TCC, 2000). See too eg *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77; [2005] B.L.R. 135; *Murray Holdings Investments Ltd v Oscatillo Investments Ltd* [2018] EWHC 162 (Ch); *Hawksford Trustees Jersey Limited as Trustee of the Bald Eagle Trust v Stella Global UK Limited* [2012] EWCA Civ 55; [2012] 2 All E.R. (Comm) 748, all of which are discussed fully in Section III.

⁹ [1995] 2 A.C. 500, 507. See too *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23; [2016] A.C. 1; S Worthington, “Corporate attribution and agency: back to basics” (2017) 133 LQR 118; J. Payne, “Corporate Attribution and the Lessons of Meridian” in P.S. Davies and J. Pila (eds), *The Jurisprudence of Lord Hoffmann* (Oxford: Hart Publishing, 2015), Ch 19.

¹⁰ An overview of some of the cases is to be found in D Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* 2nd ed (London: Sweet & Maxwell, 2015), para. 4-111 *et seq.*

¹¹ [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.

such example. The case concerned a term of a contract relating to who was to bear responsibility for a deficit in the employees' pension fund as part of a much larger commercial arrangement. The negotiator for Daventry & District Housing Ltd ("DDH") was Mr Roebuck. Mr Roebuck was neither a director nor employee of DDH. Mr Roebuck was instead a finance director of Amber Valley Housing Ltd, which was intended to become a sister company of DDH. But it was understood by all parties that the board of DDH would need to agree to any contract proposed following the negotiations. The board of DDH was presented with such a draft agreement, and its plain meaning was that the Council, not DDH, would bear responsibility for the deficit. The board was not mistaken on this. Significantly, the board of DDH would not have accepted an agreement that required DDH to take on the pension deficit.¹² However, the focus at both first instance and in the Court of Appeal was on whether Mr Roebuck made a mistake. This is understandable: before the trial judge, Mr Roebuck's "intention [was] accepted as being properly regarded as the intention of DDH, whatever its board may have thought".¹³ Such acceptance made it easier for the majority of the Court of Appeal ultimately to rectify the contract so that DDH would bear responsibility for the pension deficit, since a reasonable observer would think that both the Council and DDH had made a mistake. This is unsatisfactory. The result was that the decision-maker for DDH – the board – was found to be mistaken when it was not actually mistaken; any mistake was made by Mr Roebuck, who was not a decision-maker and had no authority to bind DDH.

This article will first outline the types of agents under examination and the principles of attribution in Section I. Brief consideration will then be given in Section II to whether the fact that the contract was negotiated by third parties should affect the factual matrix and hence principles of interpretation. It will be suggested that a restrictive approach to the background context of the agreement is generally appropriate and in line with recent decisions. Section III, which is the core of the article, will then analyse how courts have dealt with negotiators in claims for rectification, in the context of rectification for both common mistake and unilateral mistake.

I Agents and Attribution

An agent may act for a natural person or a legal person. However, the leading cases have all concerned agents negotiating contracts entered into by companies, and that will be the focus of this article. A company cannot itself act or intend something; it acts and intends through the agency of natural persons. Acts and intentions of natural persons can be attributed to a company. Attribution raises a host of difficulties,¹⁴ but it will be helpful to

¹² *ibid* [69], relying upon the conclusions of *Vos J* at first instance: [2010] EWHC 1935 [166].

¹³ [2010] EWHC 1935 [119] (*Vos J*).

¹⁴ See eg S Worthington, "Corporate attribution and agency: back to basics" (2017) 133 LQR 118 (and a response by P Watts, "Actual authority: the requirement for an agent honestly to believe that an exercise of power is in the principal's interests" [2017] JBL 269).

make some general points at the outset before considering the particular context of rectification in more detail.

In the well-known decision of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission*,¹⁵ Lord Hoffmann broke away from the strictures of requiring an individual to be identified as the “directing mind and will” of a company for his or her acts or intentions to be attributed to the company.¹⁶ Actors who cannot be identified as such may still have their acts and intentions attributed to the company. This could, for example, include hired negotiators who are obviously not in control of the company.

In *Meridian*, Lord Hoffmann influentially said that there are primary, general and special rules of attribution.¹⁷ Primary rules of attribution will generally be found in a company’s constitution. They need to be supplemented by general rules of attribution which are equally applicable to natural persons. These may be found in the general principles of agency. The primary and general rules will often suffice, but in some circumstances there may be a rule of law which excludes attribution on the basis of general principles of agency, in which case the court must fashion a special rule of attribution. Such special rules require close attention to the context and purpose of the rule at issue, often regarding statutory liability.

Identifying which individual’s intention should represent the intention of the company for the purposes of rectification might involve recourse to the primary, general or special rules of attribution, depending on the context.¹⁸ It is important to appreciate that principles of agency law are therefore not necessarily conclusive when determining whose intention should count. However, in the vast majority of cases it is to be expected that the relevant intention will be that of the person who had authority to enter into the contract on behalf of the company.

This article will focus upon negotiators who had no actual or apparent authority to bind the company to a contract, which corresponds to the area that currently causes the most problems in practice. Fewer problems arise where an agent is authorised to bind the company and does so. For example, if the board is authorised by the company’s constitution to enter into a contract, and does so under a mistake – perhaps reflected in the minutes of a board meeting – then it is clear why a rectification claim may succeed.¹⁹ However, in some unusual circumstances the correct approach may not be so straightforward. As Sir Terence Etherton C

¹⁵ [1995] AC 500.

¹⁶ Cf *Lennard’s Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705, 713 (Viscount Haldane LC).

¹⁷ [1995] AC 500, 506-507.

¹⁸ See eg *Bilta (UK) Ltd (In Liquidation) v Nazir* [2015] UKSC 23; [2016] A.C. 1.

¹⁹ Eg *George Cohen, Sons & Co Ltd v Docks & Inland Waterways Executive* (1950) 84 Lloyd’s Rep 97. Of course, the other party to the contract must share or at least know of the mistake; if unaware of the mistake made by the board, as a general rule the counterparty to the contract will be protected by the “indoor management rule”: *Royal British Bank v Turquand* (1856) 6 E&B 327; Companies Act 2006 s.40.

observed in *Day v Day*,²⁰ “the doctrine of rectification is concerned with intention, or rather the mistaken implementation of intention, rather than the power and authority to effect a particular transaction”.²¹ That case concerned a voluntary disposition rather than a bilateral contract. Mrs Day granted a general power of attorney to her solicitor. The solicitor then conveyed property from Mrs Day to Mrs Day and one of her sons, Terence, as beneficial joint tenants. Upon Mrs Day’s death, her other children sought rectification of the conveyance since Mrs Day did not intend Terence to acquire any beneficial interest in the property. The trial judge held that what the solicitor did was within the scope of his authority, and since he was not mistaken rectification should not be ordered. But the Court of Appeal allowed the appeal, and insisted that the relevant intention for rectification was that of the principal, Mrs Day. That was because she was the true “decision maker”,²² rather than the solicitor. On the basis that Mrs Day was the person who truly decided to enter into the conveyance of the property, the decision is sensible.²³ It highlights that even if an agent is authorised, a contrary “superior” intention of the principal may trump that of the agent.²⁴ It is suggested that this applies in a similar manner to bilateral contracts, and requires a close analysis of the facts to determine who is the true “decision maker”.

Day v Day was perhaps unusual in that the intentions of the principal and agent were different. Often, where the agent is authorised to enter into a contract and does so, the principal will not have any relevant intention as to the particular terms of the contract, and will not be considered to be the true “decision maker”. In such circumstances, the relevant intention for the purposes of rectification will be that of the agent.²⁵ Difficulties arise where the agent presents the negotiated contract to the principal, and the principal then tells the agent to enter into the contract. The intentions of the principal and agent may diverge, and only one of them may be mistaken. Both parties had authority to enter into the contract, but it is crucial to determine who should be considered the “decision maker” on the particular facts of the case. This issue will be considered further below.²⁶

The situation is further complicated if the agent only has apparent, rather than actual, authority to bind the company. Apparent authority raises difficult questions, including the basis of the doctrine. The traditional justification rests upon a (weak) form of estoppel.²⁷ The principal makes a representation to the third party that an agent has authority to bind the principal, and if the third party relies upon this then the principal should not be able to deny

²⁰ [2013] EWCA Civ 280; [2014] Ch 114.

²¹ *ibid* [25]. See too Lewison LJ at [38]: “equity intervenes not on the ground of lack of authority but on the ground of a failure of intention”.

²² *ibid* [37] (Lewison LJ).

²³ Although whether Mrs Day’s intentions were sufficiently clear has been questioned: F Dawson, ‘Rectification of Voluntary Settlements’ (2014) 130 LQR 356.

²⁴ Cf. *Daventry*, above.

²⁵ Eg *Thomas Bates & Sons Ltd v Wyndham’s (Lingerie) Ltd* [1981] 1 WLR 505. See too *Alliance v Tishbi* [2011] EWHC 1015 (Ch).

²⁶ See Section III below.

²⁷ *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 Q.B. 480; for criticism, see eg T Krebs, ‘Agency Law for Muggles: Why There is No Magic in Agency’ in A Burrows and E Peel (eds) *Contract Formation and Parties* (Oxford: OUP, 2010).

being bound. However, as Sir Terence Etherton C remarked in *Day v Day*, “[a]pparent or ostensible authority of the agent may make the transaction binding on the principal even where it does not coincide with the actual intention of the principal and the express instructions given to the agent, but (subject to the facts of any particular case) there is no obvious reason why such apparent authority should throw any light on the right to rectification”.²⁸ Once again, it is important to decide who was the “decision maker” for the company. Nevertheless, if a negotiator has apparent authority to bind the company, it will generally be reasonable to attribute his or her intentions to the company since the third party will have been dealing with the negotiator as decision-maker. This helps to protect the position of the third party, and is consistent with the principle that the company in relying upon the contract cannot both “approve and reprobate”²⁹ and so should take the contract subject to any mistakes made by the “agent”. If the company resists rectification on the basis that its board of directors, for example, was not mistaken whereas the purported agent was, that may be unfair to the other party to the contract: the company put the agent in a position where it was reasonable for the counterparty to think that the agent was the decision maker. Conversely, if the company seeks rectification on the basis that the board was mistaken whereas the unauthorised agent with only apparent authority was not mistaken, that might also be unfair on the counterparty since the counterparty was reasonably dealing with the agent as decision-maker. On the other hand, if the counterparty was labouring under the same mistake as the board then it may appear equitable to rectify the contract, if ultimately the court concludes that the board was the relevant decision-maker.

Even more difficult is the spate of recent cases, considered in Section III, which consider situations where the negotiator has neither actual nor apparent authority to bind the company to a contract. This can arise where the principal makes no representation to the third party that the agent can do anything more than negotiate terms to present to the principal, who is responsible for making the ultimate decision whether to contract on those terms. In those circumstances, the agency might be termed “incomplete agency”.³⁰ Such agents are not uncommon,³¹ and are often used in the course of negotiations.³² Incomplete agents cannot

²⁸ [2014] Ch 114 [26].

²⁹ *Lloyd v Grace, Smith & Co* [1912] A.C. 716, 738 (Lord Macnaghten); P. Watts and F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 21st edn (London: Sweet & Maxwell, 2017) 2-081, 8-097.

³⁰ P. Watts and F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 21st edn (London: Sweet & Maxwell, 2017) para 1-020.

³¹ The examples typically given involve estate agents, but can arise in a wide range of contexts: eg *Signet Partners Ltd v Signet Research & Advisory SA* [2007] EWHC 1263 (QB) (introducing agents used by hedge funds); *Re LBIE* [2010] EWHC 2914 (Ch), (introducing agents within banking groups); *McWilliam v Norton Finance (UK) Limited* [2015] EWCA Civ 186, [2015] 1 All E.R. (Comm) 1026 (credit broker); *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250 (consultancy services in negotiating the sale of a hotel; that this was an example of incomplete agency is clear from the first instance judgment: [2011] EWHC 2308 (Ch), [2012] 2 B.C.L.C. 39).

³² Eg *PJ Pipe & Valve Co Limited v Audco India Limited* [2005] EWHC 1904 (QB); *Sharab v Prince Al-Saud* [2013] EWHC 2324 (Ch); *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45, [2015] A.C. 250; *Barnsley v Noble* [2014] EWHC 2657 (Ch).

bind their principal to third parties,³³ and it may be very difficult to conclude that the negotiator is the “decision maker”.

There is authority that the intentions of canvassing agents should not be attributed to the principal when considering criminal offences,³⁴ and the same approach might be taken when considering rectification. After all, the principal might be expected to check the contract that it signs,³⁵ and should be bound by its contents.³⁶ However, in some circumstances that might seem unfair, especially if a company is able to defend a claim for rectification where it would not have been able to had it not used a negotiator.³⁷ Where the company relied entirely upon the negotiator, and did not play an active role in deciding whether the contract was commercially advantageous, there is a stronger argument for attributing the negotiator’s intentions to the company. This matter will be explored fully in Section III.

II Interpretation

Before considering rectification, it is important to emphasise that a contract must first be interpreted. Rare suggestions to the contrary should be disregarded.³⁸ The purpose of rectification is to alter the written document because it does not reflect the true intentions of the parties,³⁹ but in order to determine whether this is necessary the meaning of the contractual language must first be ascertained through the process of interpretation. As a result, it is clear that the more willing the law of interpretation is to correct mistakes, the less scope there will be for rectification.⁴⁰

Huge amounts have been written about interpretation and the proper approach to be adopted. Lord Hoffmann’s well-known principles in *Investors Compensation Scheme Ltd. v West Bromwich Building Society*⁴¹ provided for some time the leading guidance on this issue.⁴² Lord Hoffmann emphasised that “[i]nterpretation is the ascertainment of the meaning

³³ For discussion in the context of “law agents” see eg *The Danish Dairy Company Limited v Gillespie* (1922) S.L.T. 487. The distinction is very clear in French law: see eg *Djibzouti v Boreh* [2016] EWHC 405 (Comm) [880]-[883].

³⁴ Eg *The Salvation Army Life Assurance Society v The British Legal Life Assurance Company* (1908) 16 S.L.T. 276.

³⁵ Eg *Life and Health Assurance Association v Yule* (1903) 11 S.L.T. 297, upheld (1904) 11 S.L.T. 690; *D’Silva v Lister House Development Ltd* [1971] Ch 17.

³⁶ *L’Estrange v F Graucob Ltd* [1934] 2 KB 394.

³⁷ Cf P. Watts and F.M.B. Reynolds, *Bowstead & Reynolds on Agency*, 21st edn (London: Sweet & Maxwell, 2017) para 8-210.

³⁸ eg *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363; [2007] Bus LR 1336, cited with approval by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 [23].

³⁹ At least in the context of rectification for common mistake; for unilateral mistake, see Section III.B below.

⁴⁰ See further P Davies, “Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction” [2016] CLJ 62.

⁴¹ [1998] 1 W.L.R. 896, 912–13.

⁴² Considered further in P Davies, “The Meaning of Commercial Contracts” in PS Davies and J Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart Publishing, 2015).

which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.⁴³ His Lordship went on to say that, with narrow exceptions, the background “includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man”.⁴⁴ This encouraged the court to take into account background factors as part of the factual matrix when interpreting a contract, and such considerations could lead to an interpretation that was contrary to the natural meaning of the contractual language chosen by the parties.⁴⁵

More recently, however, the courts have shown a more restrained approach. In *Arnold v Britton*, for example, Lord Neuberger said:⁴⁶

“When interpreting a written contract, the court is concerned to identify the intention of the parties ... it does so by focusing on the meaning of the relevant words ... save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision”.

This is not strictly inconsistent with the guidance of *Investors Compensation Scheme*, but the tenor of Lord Neuberger’s reasoning was very different from that favoured by Lord Hoffmann. Lord Neuberger placed greater emphasis on the words used by the parties, and gave much less weight to the ‘factual matrix’, than Lord Hoffmann tended to do. Indeed, the judgment of Lord Carnwath in *Arnold v Britton* was more consistent with the thrust of Lord Hoffmann’s approach, but Lord Carnwath was the sole dissident.

Admittedly, the Supreme Court did not make clear the extent to which *Arnold v Britton* signalled a shift from a contextual to a more textual approach to interpretation.⁴⁷ And in *Wood v Capita Insurance Services* Lord Hodge expressed the view that “[t]he recent history of the common law of contractual interpretation is one of continuity rather than change”.⁴⁸ However, this may have been partly motivated by a desire to show that “[o]ne of

⁴³ [1998] 1 W.L.R. 896, 912.

⁴⁴ *ibid.* Sir Christopher Staughton remarked with accurate foresight soon after *ICS* that “[i]t is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation”: ‘How do the courts interpret commercial contracts?’ (1999) 58 CLJ 303, 307.

⁴⁵ The high point may be found in *Chartbrook Ltd. v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 A.C. 1101 [25] where Lord Hoffmann said that “What is clear ... is that there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed. All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant.”

⁴⁶ [2015] UKSC 36, [2015] AC 1619 [17].

⁴⁷ The extent to which the Supreme Court has “rowed back” from Lord Hoffmann’s principles in *ICS* has provoked strong and divergent reaction from two New Zealand scholars: see eg R Havelock, “Return to Tradition in Contractual Interpretation” (2016) 27 KLJ 188; D McLauchlan, “Some fallacies concerning the law of contract interpretation” [2017] LMCLQ 506; R Havelock, “Some Fallacies Concerning The Law Of Contract Interpretation: (1) A Reply To Professor McLauchlan” [2018] LMCLQ 40; D McLauchlan, “(2) A Riposte To Mr Havelock” [2018] LMCLQ 46; see too D McLauchlan, “The *ICS* Principles: A Failed “Revolution” in Contract Interpretation?” (2016) 27 NZULR 263.

⁴⁸ [2017] UKSC 24, [2017] A.C. 1173 [15].

the attractions of English law as a legal system of choice in commercial matters is its stability and continuity, particularly in contractual interpretation”.⁴⁹

It is suggested that the emphasis has shifted towards the natural meaning of the words chosen, placing less weight upon the background material.⁵⁰ Indeed, the actual decision in *Wood v Capita* confirms that direction of travel. The contract was a share purchase agreement relating to shares in an insurance company. The agreement contained an indemnity by which the seller would pay the buyer an amount equal to losses that the company might incur from previous mis-selling of insurance products. The dispute was over the scope of that indemnity. The language of the indemnity created an apparently arbitrary approach to which losses for mis-selling would be indemnified. But the Supreme Court refused to depart from the natural language on the basis of “business common sense”. While the buyers of the company had an interest in broadening the indemnity, the sellers had an equal and opposite interest in narrowing it, and it was not for the Supreme Court to second-guess how the “tug o’ war” of commercial negotiations had ended.⁵¹

Whereas previously courts routinely invoked *ICS* as guidance when dealing with questions of interpretation, such references are now much less frequent.⁵² Instead, courts are happy to refer to more recent decisions such as *Arnold v Britton*.⁵³ This shift has been recognised extra-judicially by Lord Sumption, who said that “the Supreme Court has begun to withdraw from the more advanced positions seized during the Hoffmann offensive” albeit in “muffled tones”.⁵⁴

In any event, it might be thought that the relevant background should be more restricted when negotiated by non-contracting parties, since the contracting parties would not (necessarily) be aware of what was discussed during the course of negotiations.⁵⁵ However, in some cases the invocation of negotiating agents has served to broaden the relevant

⁴⁹ *ibid* [15].

⁵⁰ See eg *Globe Motors Inc v TRW LucasVarity Electric Steering Ltd* [2016] EWCA Civ 396; [2017] 1 All E.R. (Comm) 601 [58] (Beatson LJ); *Nobahar-Cookson v Hut Group Ltd* [2016] EWCA Civ 128; [2016] 1 C.L.C. 573 [29] (Briggs LJ); *Trillium (Prime) Property GP Ltd v Elmfield Road Ltd* [2018] EWCA Civ 1556; *Teva Pharma - Productos Farmaceuticos LDA v Astrazeneca - Productos Farmaceuticos LAD* [2017] EWCA Civ 2135; *Mears Ltd v Costplan Services (South East) Ltd* [2018] EWHC 3363 (TCC) [91] (Waksman J).

⁵¹ *ibid* [28].

⁵² Before 10 June 2015, when *Arnold v Britton* was handed down, *ICS* was cited {1207} times according to a Westlaw search conducted on {8 January 2019}. Since then, it has been cited a further {181} times.

⁵³ *Arnold v Britton* has been cited {417} times since being handed down – more than twice as frequently as *ICS*. *Wood v Capita* has been cited {165} times since being handed down – *ICS* has only been cited {61} times in the same period.

⁵⁴ Lord Sumption, ‘A Question of Taste: The Supreme Court and the Interpretation of Contracts’, (Harris Society Annual Lecture, 8 May 2017) <https://www.supremecourt.uk/docs/speech-170508.pdf>. See similarly Sir Geoffrey Vos, ‘Contractual Interpretation: Do judges sometimes say one thing and do another?’ (Canterbury University, Christchurch, 18 October 2017), who further doubted whether *ICS* would be decided in the same way today. For broader discussion, see Sir George Leggatt, ‘Making sense of contracts: the rational choice theory’ (2015) 131 LQR 454. Lord Hoffmann has recently offered a forceful defence of *ICS*: Lord Hoffmann, ‘Language and Lawyers’ (2018) 134 LQR 553.

⁵⁵ Cf *Cherry Tree Ltd. v Landmain Ltd.* [2012] EWCA Civ 736, [2013] Ch. 305.

background,⁵⁶ especially in the context of trade unions and collective agreements.⁵⁷ In the context of commercial contracts, this is rare. One possible example is provided in *Murray Holdings Investments Ltd v Oscatallo Investments Ltd*,⁵⁸ discussed below,⁵⁹ where Mann J thought that the negotiators were both relevant persons “for the purposes of assessing what was shared knowledge of the contractual background”,⁶⁰ although it was important in that case that the principals were passive and did not make any assumptions different from their negotiators.⁶¹ Generally, it is suggested that what the negotiators as “incomplete agents” knew should not be attributed to the contracting parties when constructing the “factual matrix”, beyond perhaps the purpose of the transaction (which was in fact the crucial point in *Murray*). In the area of commercial contracts between sophisticated commercial actors, it is suggested that the background should sensibly be limited to the identity of the parties, the nature and purpose of the transaction, and the market in which the transaction took place.⁶²

A stricter approach to interpretation which gives effect to clear and unambiguous language means that most mistakes will have to be corrected through rectification rather than interpretation. It is therefore important to pay proper attention to the equitable jurisdiction. Indeed, whilst the common law courts have retreated from the “Hoffmann offensive” as regards interpretation⁶³ and implication of terms,⁶⁴ there has not yet been a decisive retreat from Lord Hoffmann’s unorthodox views on rectification in *Chartbrook* and that may be next in line.

III Rectification

A. Common mistake rectification

There are two types of rectification: rectification for common mistake and rectification for unilateral mistake. Unfortunately, the distinction between these doctrines has become somewhat blurred because of a broad approach towards the finding of a common

⁵⁶ Eg *Gehe AG v NBTY Inc* [1999] CLC 1949; see too *Great North Eastern Railway Ltd v Avon Insurance plc* (unreported, QBD, 2000).

⁵⁷ See eg *Adams v British Airways* [1996] IRLR 574, Part V (Sir Thomas Bingham); also eg *Tees and Hartlepool Port Authority v Freer* (Employment Appeal Tribunal, 2001); *Anderson v London Fire & Emergency Planning Authority* [2013] EWCA Civ 321; *Visteon Engineering; Anderson v Tyne and Wear Passenger Transport Executive* (unreported, Employment Tribunal).

⁵⁸ [2018] EWHC 162 (Ch).

⁵⁹ See Section III.A.ii below.

⁶⁰ *ibid* [20].

⁶¹ *ibid* [37]-[38].

⁶² R. Calnan, *Principles of Contractual Interpretation* (2nd ed, OUP, 2017) 77.

⁶³ Eg *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619.

⁶⁴ Eg *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] A.C. 742 retreating from *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER (Comm) 1.

mistake.⁶⁵ Nevertheless, the two should properly be considered separately.⁶⁶ This section will consider common mistake; unilateral mistake will be analysed in the next section.

The requirements for common mistake rectification were summarised in *Daventry* by Etherton LJ:⁶⁷

“(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) which existed at the time of execution of the instrument sought to be rectified; (3) such common continuing intention to be established objectively, that is to say by reference to what an objective observer would have thought the intentions of the parties to be; and (4) by mistake, the instrument did not reflect that common intention.”

This faithfully applies the *obiter dicta* of Lord Hoffmann in *Chartbrook* that the common continuing intention of the parties should be determined objectively by asking what an objective observer would have thought the parties intended. This is troublesome: its doctrinal basis is shaky;⁶⁸ it has the effect that an earlier, objective accord between the parties might trump the later, formal written contract; and seems inconsistent with the principle that equity should only intervene where both parties are actually mistaken.⁶⁹ All these difficulties have been canvassed before.⁷⁰ But they are perhaps particularly acute when it is found by the trial judge as a matter of fact that one of the contracting parties was not actually mistaken, as was the case in both *Chartbrook* and *Daventry*, and yet the contract could still be rectified for a common mistake.

The appropriate test for common mistake rectification is clearly a controversial issue, as shown by the number of extra-judicial comments made by senior judges regarding the

⁶⁵ P Davies, “Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction” [2016] CLJ 62, 82-84.

⁶⁶ See too *Kowloon Development Finance Ltd. v Pendex Industries Ltd.* [2013] HKCFA 35 [19] (Lord Hoffmann NPJ).

⁶⁷ [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333 [80].

⁶⁸ Lord Hoffmann’s reliance upon his own dissenting judgment (as Hoffmann LJ) in *Britoil plc v Hunt Overseas Oil Inc* [1994] C.L.C. 561 rather than that of the majority (Hobhouse and Glidewell L.JJ) is unconvincing: see eg Lord Toulson, “Does Rectification Require Rectifying?” (TECBAR Annual Lecture, 31 October 2013) <https://www.supremecourt.uk/docs/speech-131031.pdf>.

⁶⁹ L. Bromley, “Rectification in Equity” (1971) 87 L.Q.R. 532. This is still the case in Australia: *Ryledar Pty Ltd. v Euphoric Pty Ltd.* [2007] NSWCA 65, (2007) 69 N.S.W.L.R. 603; *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 (noted P Davies, “Interpretation and Rectification in Australia” [2017] CLJ 483).

⁷⁰ P Davies, “Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction” [2016] CLJ 62, 74-76.

approach in *Chartbrook*,⁷¹ and the unease which has been expressed judicially.⁷² It is suggested that the decision and result in *Daventry* was unfortunate, but it is important to appreciate that even under the objective approach supported in *Chartbrook* and *Daventry* difficult issues of attribution should not be overlooked. Regardless of the precise test of common mistake rectification, it still needs to be determined whether a party made a mistake, which requires consideration of who the relevant party must be. Where that party is not the person who negotiated the contract, tricky issues of attribution can arise.

i) Focussing on the contracting party's intentions

It is right to focus upon the intention of the contracting party rather than a negotiator.⁷³ If the principal did not bestow upon a negotiator actual authority to enter into a contract, that indicates that the principal wanted to retain control and make the final decision; the principal should generally be seen as the decision-maker. And if the negotiator does not even have ostensible authority to enter into a contract – since the principal made it clear to the other contracting party that the decision-making power remained with the principal – then the other party should generally be required to show that the principal made a mistake rather than the negotiator. It is important that companies, for example, be able to structure their affairs in a way which protects the way they wish to carry out business. Given the fact that the other party knows that the relevant intentions are those of the principal rather than negotiator, it is incumbent upon that party to make sure that the written draft presented to the principal and ultimately entered into accurately reflects the proposed deal.

Of course, mistakes will still be made. That is inevitable. But it is not inevitable that the courts step in and assist a mistaken party through rectification. Sophisticated commercial actors, perhaps advised by lawyers, consultants and others, may simply have to bear the consequences of their own mistake if it has not been shared by its counterparty to the contract. It is important to encourage parties to take seriously the idea that they are bound by

⁷¹ R. Buxton, ““Construction” and rectification after *Chartbrook*” (2010) C.L.J. 253; K. Lewison, “If it ain’t Broke, Don’t Fix it” in First Supplement (2010) to K. Lewison, *The Interpretation of Contracts* 4th ed., (London 2009) 127; Lord Toulson, “Does Rectification Require Rectifying?” (TECBAR Annual Lecture, 31 October 2013) <https://www.supremecourt.uk/docs/speech-131031.pdf>; N. Patten, “Does the Law Need to be Rectified? *Chartbrook* Revisited” (The Chancery Bar Association 2013 Annual Lecture, 29 April 2013) www.chba.org.uk/for-members/library/annual-lectures/does-the-law-need-to-be-rectified-chartbrook-revisited; P. Morgan, “Rectification: Is it Broken? Common Mistake after *Daventry*” [2013] RLR 1; T. Etherton, “Contract Formation and the Fog of Rectification” [2015] CLP 367. See too C. Nugee, “Rectification after *Chartbrook v Persimmon*: Where are We Now?” (2012) 26 TLI 76; Lord Neuberger, “Reflections on the ICLR Top Fifteen Cases: A Talk to Commemorate the ICLR’s 150th Anniversary” (6 October 2015), at para. 42, available at <<https://www.supremecourt.uk/docs/speech-151006.pdf>>.

⁷² *Crossco No.4 Unlimited v Jolan Ltd.* [2011] EWHC 803 (Ch), at [253] (Morgan J); *Tartini v Navona Management Co* [2015] EWHC 57 (Comm), at [90]-[99] (Leggatt J.). In *FSHC Group Holdings v Barclays Bank plc* [2018] EWHC 1558 (Ch), discussed more fully in section III.A.ii below, Henry Carr J thought the objective approach of *Daventry* was binding upon him (at [26] but placed great weight on the parties’ subjective intentions: eg [160]).

⁷³ The focus here is on bilateral contracts, but it should be noted that the same approach probably applies when considering rectification of a voluntary settlement, for example: the relevant intention is that of the settlor, not of the agent: *Day v Day* [2013] EWCA Civ 280; [2014] Ch. 114 [25] (Etherton C), [55]-[56] (Elias LJ).

the language of the documents they sign. Such a strict approach will no doubt reduce the number of cases where rectification is granted. This has been lamented by some.⁷⁴ But rectification “should not become a belated substitute for due diligence”,⁷⁵ and, as Lord Walker observed in *Pitt v Holt*, it “is a closely guarded remedy, strictly limited to some clearly-established disparity between the words of a legal document, and the intentions of the parties to it”.⁷⁶ It should not be easy to rectify contracts. So, if a negotiator makes a mistake, but the negotiator’s intention is not shared with the board of a company, as the decision-maker, then it is unlikely that rectification will be available.⁷⁷ Moreover, if the board is ignorant of an issue, and so does not have any intention at all on the point, rectification will not generally be granted.⁷⁸

This view has been supported in a series of decisions. For example, in *Mayor and Burgesses of the London Borough of Barnet v Barnet Football Club Holdings Limited*,⁷⁹ the claimant borough transferred Underhill Football Ground to the defendant football club. The borough had an obvious interest in the football club remaining within the borough, and sought to include a term that if the ground was later sold by the defendant without relocating to another stadium in the borough, the net proceeds of sale should be shared with the borough. Terms were essentially agreed with the defendant, but remarkably in one of the drafts the borough altered the relevant clause such that it only applied if the club left Underhill stadium within ten years. The defendant subtly tested whether this time limit was intended to be included in the course of negotiations, and the borough’s negotiator mistakenly confirmed the proposed ten-year time limit.⁸⁰ The version of the agreement entered into by the borough contained this limitation.

Negotiations were carried out by Mr Stephens for the borough, but he made it clear that he had no authority to agree to a contract and would have to report to an appropriate committee who would decide whether to enter into the contract under the borough’s own delegated powers procedure.⁸¹ After the borough entered into the contract, Mr Stephens soon realised that this ten-year time limit was a mistake. His intention had been to provide the borough with a share of any development profit on the sale of the Underhill ground in circumstances other than a permanent relocation within Barnet, and the ten-year period was only supposed to define what would be considered to be “permanent”.⁸² The restriction on the use of the Underhill site for football was, according to Mr Stephens, supposed to be unlimited

⁷⁴ Eg M. Smith, “Rectification of Contracts for Common Mistake, *Joscelyne v Nissen* and Subjective States of Mind” (2007) 123 L.Q.R. 116, 130.

⁷⁵ *Performance Industries Ltd. v Sylvan Lake Golf & Tennis Club* [2002] 1 SCR 678, 703 (Binne J.)

⁷⁶ [2013] UKSC 26, [2013] 2 AC 108 [131].

⁷⁷ For discussion of situations where the negotiator has consciously acted badly in some way, see Section III.B below.

⁷⁸ *Lansing Linde v Alber* [2000] PLR 15 (Rimer J).

⁷⁹ [2004] EWCA Civ 1191.

⁸⁰ *ibid* [28].

⁸¹ *ibid* [7].

⁸² *ibid* [15].

in time. The borough therefore sought rectification. This was refused by the Court of Appeal. In a robust judgment, Peter Gibson LJ said:⁸³

“It is clear that the sale needed to be proposed to and sanctioned by the elected members, by an appropriate organ or individual, and that the sanction, once given, would delegate to some officer the further conduct of the sale authorising that officer to conclude the sale. Mr Stephens’ role was merely that of negotiator and preparer of the relevant proposal. Of the two procedures for obtaining the sanction of elected members, the delegated powers procedure was the one adopted and under that, whilst the proposal would be considered and commented on by senior officers and an elected member, with the agreement of the elected member the proposal would then be decided upon by a senior officer. Mr Stephens was not one of the senior officers, nor of course was the elected member concerned. Therefore, Mr Stephens’ intention was immaterial, as the judge rightly found in paragraph 129.⁸⁴ That was the only case pleaded on behalf of the Borough and with its failure the case for rectification fails.

Of course if Mr Stephens’ intention, as the person involved on behalf of the Borough in the accord, had been shared by the persons concerned in the delegated powers procedure to comment on and consent to and to give the sanction for the sale, then his intention might have been relevant in that indirect way. But the Borough would have had to show that that was the intention of those persons. It was never the pleaded case of the Borough that such persons’ intentions were relevant. Nor did any of such persons give evidence, although there is nothing to suggest that they were not available to do so.”

This approach of Peter Gibson LJ should be supported. The senior officers or elected members were able plainly to see that there was a ten-year limit on the relevant term. This was not hidden or ambiguous. There was no evidence that they were labouring under any mistake in thinking that the clear language meant something different from its natural meaning. Mr Stephens may have made a mistake, but that was irrelevant. He was not the decision maker. That meant that the borough’s claim for rectification could not get off the ground, regardless of whether the defendant also made a mistake, or knew of Mr Stephens’ mistake.⁸⁵

Peter Gibson LJ reiterated this approach to negotiators in the context of rectification in *George Wimpey UK Ltd v VI Construction Ltd*.⁸⁶ The defendant, VIC, sold land to the claimant, Wimpey, for an initial payment with a deferred payment becoming due in a certain contingency. Mr Ketteridge was in charge of the negotiations on behalf of Wimpey. He was a Regional Director of Wimpey, but it was clear that he did not have the authority to enter into a contract with VIC, and neither did the person to whom he reported, Mr Kendal. Instead, the

⁸³ *ibid* [56]-[57].

⁸⁴ [2004] EWHC 519 (Ch).

⁸⁵ [2004] EWCA Civ 1191 [61].

⁸⁶ [2005] EWCA Civ 77.

decision had to be made by the main board for Wimpey, upon presentation of a written commercial report from Mr Ketteridge and a written legal report from its solicitors, Eversheds. VIC was fully aware of this situation.⁸⁷ The contractual formula for the deferred payment was clearly expressed in the written contract executed by the board of Wimpey, but Wimpey later argued that it should be rectified on the grounds of mistake. The Court of Appeal overturned the decision of the trial judge and refused to grant rectification. The primary ground for allowing the appeal was that VIC was not mistaken; nor had it acted dishonestly since it did not know or shut its eyes to a mistake being made by Wimpey. But the appeal was also allowed because there was no convincing evidence that the board of Wimpey actually made a mistake. As Peter Gibson LJ put it:⁸⁸

“In the present case Mr. Ketteridge was also only the negotiator and not the decision-taker. The judge was troubled by the absence from the witness-box of Mr. Kendal, but Mr. Kendal was also not the decision-taker. However, had he been called it may be that he could have given evidence of any presentation which he made to the board of Wimpey to obtain its approval to the contract in its final form. The evidence does not even establish that he did make such a presentation. There is no evidence of what the decision-takers themselves, the members of the board, thought. There are no minutes of any board meeting nor any instructions to the signatory of the contract, Mr. Hewitt, who gave no evidence. ...

There are in evidence Eversheds’ legal reports and Mr. Ketteridge’s commercial reports, but they are worded in general terms and do not draw attention to the specific point of enhancements featuring in the formula. Without further evidence I do not see how one can escape the conclusion that the board, which was supplied with the draft contract in April and with the final draft at the beginning of July 1999, intended to approve the contract in the form in which it was put to the board and in which it was executed. I would allow the appeal on this ground too.”

Sedley LJ⁸⁹ and Blackburne J⁹⁰ both gave similar reasons for allowing the appeal. The focus for rectification properly lies on the intention of the board – perhaps best reflected in the board minutes – rather than that of the negotiator. If the contract is clearly drafted, the very strong presumption is that the board intended to agree to those terms. Convincing evidence is needed to prove the contrary. The fact that a negotiator with no binding decision-making power thought differently is generally irrelevant.

It is important to emphasise that these decisions from the Court of Appeal are sensible starting points for further analysis of this area. However, in *Murray Holdings Investments Ltd v Oscatillo Investments Ltd*, Mann J thought that “[t]hese are really cases which turn on their own facts, and are only of assistance if the facts provide a striking parallel with the present

⁸⁷ *ibid* [47].

⁸⁸ *Ibid* [49]-[50].

⁸⁹ *ibid* [67].

⁹⁰ *ibid* [82]-[84].

case”.⁹¹ Yet no reason was given to justify side-lining *Barnet* and *Wimpey* so easily; their facts are not uncommon, and both decisions can be applied more broadly.⁹²

ii) Exploiting the negotiator’s intention

More recently, there has been a shift away from treating the negotiator’s intention as irrelevant. An important decision in this regard is *Hawksford Trustees Jersey Limited as Trustee of the Bald Eagle Trust v Stella Global UK Limited*.⁹³ Hawksford, a professional corporate trustee, was the sole trustee of a discretionary trust established for the benefit of Mr Begg and his family. Mr Begg was the founder of a travel company, The Global Travel Group Ltd (“Global”). Almost all the shares in Global were owned by the Trust. In 2007, Hawksford agreed to sell its shares in Global to the defendant, Stella Global. The share purchase agreement (“SPA”) provided for a formula to calculate earn-out payments. However, Hawksford subsequently brought a claim for rectification on the basis that it did not accurately reflect the parties’ common intention.

Stella Global resisted the claim for rectification on the basis that there was no shared mistake – which the trial judge rejected – and that the relevant decision-maker for the claimant had not been mistaken when entering into the agreement. The Court of Appeal needed to deal with this latter issue. The agreement had been negotiated by Mr Begg. But there was a “lack of any identifiable legal relationship between Mr Begg and Hawksford”.⁹⁴ Indeed, as Patten LJ explained, “there was no express delegation of any power to Mr Begg nor was he employed as an agent in connection with the sale of the shares. On the contrary, the trustee’s resolution to accept Stella’s offer for the shares and to approve their sale on the terms of the original SPA expressly provided that the agreement should be executed by a director and a representative of the corporate secretary of the company”.⁹⁵

It therefore seems clear that Mr Begg was not the relevant decision-maker for Hawksford. The trial judge had found that “the Claimant itself had no intention whatsoever” as regards what should be included in the relevant formula, and there was no evidence that Mr Begg drew this issue to the attention of the trustees.⁹⁶ As a result, following the lead of *Barnet* and *Wimpey*, the Court of Appeal might have been expected to refuse to rectify the contract, since the claimant was not under a mistake, and the intentions of Mr Begg as a mere negotiator were irrelevant. But the opposite conclusion was reached.

⁹¹ [2018] EWHC 162 (Ch) [199].

⁹² See similarly eg *Commission for the New Towns v Cooper* [1995] Ch 259, 282 (Stuart-Smith LJ); *Kemp v Neptune Concrete Ltd* (1989) 57 P&CR 369, 378-379 (Purchas LJ); *Birse Construction Limited v St. David Limited* (unreported, TCC, 2000)). See too *Connolly Ltd v Bellway Homes Ltd* [2007] EWHC 895 (Ch) [97], [112] (Stephen Smith QC).

⁹³ [2012] EWCA Civ 55; [2012] 2 All E.R. (Comm) 748.

⁹⁴ *ibid* [27].

⁹⁵ *ibid* [28].

⁹⁶ [2011] EWHC 503 (Ch) [144] (HHJ Stephen Davies).

Patten LJ rightly noted that “there is an obvious case for limiting the decision-maker to the person who was authorised to make the contract on behalf of the company”,⁹⁷ and this description was clearly not fulfilled by Mr Begg. However, on the particular facts of the case, their Lordships held that the officer of the trustee company did not apply any independent judgment when deciding whether to enter into the contract, and was content to do as Mr Begg wished. Patten LJ ultimately concluded that:⁹⁸

“the decision-maker ought in principle to be the person who has the authority to bind the company to the contract. The expressed intentions of a mere negotiator will therefore be immaterial unless he is also the decision-maker or shares in a relevant way those intentions with the person who is the decision-maker on behalf of the company. But, whilst those principles are easily stated, their application to the facts of any given case may be less straightforward. In a corporation with a defined and well-understood decision-making structure the division of responsibility should be readily apparent at least if the prescribed procedures are followed. But this is not a case of that kind. Although the trustee alone by its officers had the power to enter into the SPA and the Amended SPA, it is clear from the judge’s findings of fact that this decision was largely a formality provided that the terms of the sale were acceptable to Mr Begg. His role as a negotiator was therefore critical both to his own willingness to see the shares sold on the terms he had agreed and to the trustee’s decision to sell them on that basis.

...

Even if this does not make Mr Begg the decision-maker, what it does, I think, do is to demonstrate, when looked at objectively, that the trustee entered into the Amended SPA with the positive intention that it should give effect to the terms which Mr Begg had negotiated and agreed. On the judge’s findings of fact it would not have agreed to sell on any other terms. Hawksford did nothing to indicate to the defendants that it intended to contract on any different terms from those which Mr Begg had agreed and which the judge found constituted the common intention of both parties. It merely proceeded to execute the document which both sides believed contained those terms. The actual expression of accord which the judge found existed in the e-mails and other communications passing between Mr Begg and the defendants therefore continued up to the execution of the Amended SPA because that was the only and apparent basis on which the trustee and the defendants entered into the contract. Mr Robinson and Mr Carr [Hawksford’s authorised representatives] made no amendments of their own to the Amended SPA and were clearly seen and understood to be giving legal effect to what Mr Begg had agreed. The fact that they were in error in this respect entitles the trustee, in my view, to obtain rectification of the Amended SPA in the form ordered by the judge. It is therefore a case where, on the facts, the

⁹⁷ [2012] EWCA Civ 55; [2012] 2 All E.R. (Comm) 748 [34].

⁹⁸ *ibid* [41], [43].

mistaken assumption on the part of Mr Begg was shared by Hawksford. The fact that Mr Robinson and Mr Carr gave no specific thought to the definition of 2007 EBITDA is irrelevant.”

Granting the claim for rectification seems somewhat generous to the claimant. The decision-maker was considered to have the positive intention that it should give effect to the terms which Mr Begg had negotiated and agreed. This stands in contrast to the approach of Peter Gibson LJ in *Barnet and Wimpey* that the decision-maker should be taken to have intended to give effect to the plain meaning of the language encompassed in the final document. Indeed, it is perhaps not even clear that the claimant and defendant in *Hawksford* shared the same mistake. The defendant may have been mistaken about the earn-out payments, but the claimant was not really mistaken about those payments but that the agreement reflected Mr Begg’s intentions. That is a less precise mistake.⁹⁹

Nevertheless, the decision might be supported. On the basis that the defendant also made a mistake about the formula in the final agreement, it may appear to give the defendant an undeserved windfall to refuse rectification on a “technical point” that the intentions of Mr Begg were irrelevant. However, this argument should not be pressed too far. The claimant made a choice not to delegate its powers or authority to Mr Begg, and this can cut both ways: it can protect the claimant from liability for anything Mr Begg purportedly agrees on its behalf, but then the claimant should not automatically be able to adopt Mr Begg’s intentions for its own advantage. Mr Begg was the beneficiary under a trust. The trustees of a discretionary trust can take advice as to what to do – including from Mr Begg – but must ultimately make their own decision.

It is suggested that *Hawksford* is an unusual case. It was important that the decision-maker was entirely passive and relied completely on the negotiator, and that explains why the intentions of the negotiator were relevant. But it seems clear that Patten LJ supported the general principles put forward in *Barnet and Wimpey*. It is therefore a little surprising that *Barnet and Wimpey* have been said to be restricted to their own facts.¹⁰⁰

Two recent applications of *Hawksford* can usefully be highlighted. *Murray Holdings Investments Ltd v Oscatello Investments Ltd*¹⁰¹ concerned the restructuring of Kaupthing Bank. As part of the restructuring, the defendant, Oscatello, was to acquire an interest in shares in Somerfield supermarkets held by the claimant, Isis (later known as Murray). A term of the contract between the parties provided for a waterfall of payments once the Somerfield interest was realised. On the face of the contract, Oscatello would get back the £44.05 million it paid on entering into the agreement after the payment of any third party costs and expenses, but the £44.15 million invested by Isis would not be returned to Isis. Isis argued that this was

⁹⁹ Compare the situation where the negotiator fully informs the principal decision-maker such that their intentions are shared: see eg *Milton Keynes v Viridor (Community Recycling MK) Ltd* [2017] EWHC 239 (TCC) [73]-[75] (Coulson J).

¹⁰⁰ Eg *Murray Holdings Investments Ltd v Oscatello Investments Ltd* [2018] EWHC 162 (Ch) [199] (Mann J).

¹⁰¹ [2018] EWHC 162 (Ch).

a mistake: the parties only ever intended that Oscatello purchase the “upside” of the investment (in other words, the excess of its value over the acquisition cost) and Isis would get back its investment before Oscatello’s money was returned. As a result, Isis sought rectification of the contract.

The case was somewhat unusual since no oral evidence was called by either side.¹⁰² This perhaps reflects the shift in rectification generally away from a subjective test of intention to an objective one.¹⁰³ In any event, Mr Gunnarsson led the negotiations for the claimant, and Mr Brown for the defendant. Mr Gunnarsson was a Kaupthing employee. Mr Brown’s situation was more complicated. He was an employee of a company hired by the trustees of the defendant to provide the services of Investment Adviser, and the terms of the agreement with Mr Brown expressly stipulated that “the Trustees shall retain the power at all times to decide whether or not to act upon any matter brought to their attention by the Consultant [Mr Brown] as they shall in their absolute discretion determine including, without limitation, the power to determine whether to act, or not to act, upon any recommendation of the Consultant”.¹⁰⁴ It was clear that Mr Brown did not have authority to bind the defendant, nor was he held out as having any such authority.¹⁰⁵ Mr Brown reported to the trustees of Investec, who decided that the contract would be entered into by Oscatello, a BVI shelf company which was only introduced into the transaction at the end of the process in order to provide one of the vehicles for the restructuring. The directors of Oscatello did not exercise any material judgement independent of the trustees, who were the essential decision-makers.¹⁰⁶

Mann J was clear that Mr Gunnarsson and the directors of the claimant intended only to agree to a sale of the upside. This was evidenced in the minutes of the board meeting, which obviated the need to discuss whether Mr Gunnarsson’s intentions should be attributed to the claimant. There was also evidence that Mr Brown had informed the trustee that the intention was to purchase the upside only, and that Isis would get its capital back upon a sale. As a result, the intention of Mr Brown was shared by the trustees. Both parties were mistaken, so rectification on the basis of common mistake was available.¹⁰⁷

However, Mann J went on to consider the situation where the trustees did not share Mr Brown’s intention. The judge relied upon *Hawksford* for the proposition that “authority provides examples of situations where the intention of someone who is not a director falls to

¹⁰² *ibid* [10].

¹⁰³ *ibid* [192].

¹⁰⁴ *ibid* [69].

¹⁰⁵ *ibid*.

¹⁰⁶ Indeed, the individuals involved were the same for both these entities, and Mann J found that trying to raise a distinct issue about Oscatello as opposed to the trustees had “an artificial or contrived air about it”: *ibid* [223].

¹⁰⁷ The contrary had previously been argued by the claimants in an action run by its liquidators ([2013] EWHC 7 (Ch)), but that was not pursued fully and did not prevent the claimant from arguing the contrary in this case: [2018] EWHC 162 (Ch) [162].

be treated as the relevant intention for the purposes of rectification”.¹⁰⁸ Mann J ultimately felt able to derive the following principles:¹⁰⁹

- “(a) One is looking for the person who in reality is the decision maker in the transaction in order to find intentions in relation to rectification.
- (b) In the case of the company that person will usually be the person with authority to bind the company.
- (c) Someone who is not a person with power to bind can nonetheless be treated as the decision maker if that is the reality on the facts.
- (d) The intention of a “mere negotiator” may be relevant if it is shared with the actual decision maker; but, as it seems to me, that is because the intention has become that of the actual decision maker.
- (e) Where a person who would normally be expected to be the decision maker (such as the board of a company) leaves it to a negotiator to negotiate a deal and produce a contract by instructing solicitors, on the understanding that the decision maker would do a deal on those terms, then the negotiator’s intention is the relevant one, either because that person is the decision maker, or, if that description is not apt, because the technical decision maker has simply adopted the intentions of the negotiator (*Hawksford* at paragraph 43; and see *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC) at para 130).”

Propositions (a), (b) and (d) appear uncontroversial. They emphasise that the proper focus is upon the decision-maker, which is usually the person with authority to bind the company. The “mere negotiator’s” intention should be shared with the company for that intention to become the company’s intention. Propositions (c) and (e) go further and should be treated with circumspection. It is not clear exactly when a person who does not have power to bind can be treated as the decision-maker, especially if that would favour the company which refused to give the negotiator power to bind: the flip-side of protecting itself in that way may well be that it cannot then rely upon the negotiator’s unshared intentions to rectify the plain language of a contract it signed. Indeed, that may have been the case in *Oscatello*, had Mr Brown not shared his intentions with the trustees, for example. Proposition (e) is entirely consistent with *Hawksford*, which of course was binding upon Mann J. But it may seem generous to the company to find that the “technical decision maker has simply adopted the intentions of the negotiator” without requiring the company to prove that such intentions were positively adopted by the decision-maker. A “technical decision maker” is still a decision-maker.

¹⁰⁸ *ibid* [195].

¹⁰⁹ *ibid* [198].

On the facts, Mann J held that Mr Gunarsson should be seen as the real decision maker for the claimant, since the directors of Isis were essentially passive in a similar manner to the trustees in *Hawksford*. This again raises the issue of whether it is satisfactory for the person who has authority to bind the company not to exercise independent judgement about the contents of the contract he or she signs. In any event, it seems clear that, as in *Hawksford*, the passive nature of the directors was important. Indeed, Mann J was less willing to attribute the intentions of Mr Brown to Oscatello and the trustees, since those trustees played a more active role than the directors of Isis, so their intentions were important as the real decision-makers.¹¹⁰

The decision in *Oscatello* was relied upon by Henry Carr J in *FSHC Group Holdings Ltd v Barclays Bank Plc*.¹¹¹ The claimant was a parent company which entered into a private equity financing transaction in 2012 that required it to provide security over a shareholder loan. In 2016, it spotted that the relevant security documentation had either never been provided or could not be located. It therefore entered into Accession Deeds with the defendant bank to provide that security. By mistake, much more onerous obligations were undertaken by the claimant than was required, and it sought to rectify the deeds by deleting the additional obligations that were not necessary.

Henry Carr J readily acknowledged that this was a “difficult case”¹¹² and raised a number of issues concerning rectification. The issue of attribution was ultimately not crucial because all the relevant parties – including the decision-makers – on both sides thought the claimant was only doing what was necessary rather than taking on additional obligations. However, the judge did accept that a negotiator’s intention “may be the relevant intention for rectification purposes, either because the third party’s intention has been shared with the corporate entity, or because the corporate entity has adopted the third party’s intention”.¹¹³

It is suggested that the distinction between active and passive authorised decision-makers is crucial. It may be that every contract entered into by a company cannot be properly checked and discussed by a person who has authority to enter into a contract. It may therefore be reasonable to rely upon the person who negotiated the deal, and that negotiator might be considered to be the true decision-maker. This might be particularly appropriate where the principal is essentially committed to follow the recommendations of the agent. However, it is important that the principal be entirely passive if the negotiator’s intentions are to be crucial for the purposes of rectification, at least as regards the aspect of the agreement under dispute.¹¹⁴ Where the principal does seek to understand properly the relevant terms of the contract and plays an active role in deciding to enter into the contract on the written terms

¹¹⁰ See too *Notiondial Ltd v Beazer Homes Ltd* [2009] EWHC 3333 (Ch) [106]-[113] (HHJ Waksman QC).

¹¹¹ [2018] EWHC 1558 (Ch).

¹¹² *ibid* [12].

¹¹³ *ibid* [51]. See similarly *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2013] EWHC 2688 (TCC), [2014] 1 All E.R. (Comm) 761 [130] (Ramsey J); *Girls Day School Trust v GDST Pension Trustees Ltd* [2016] EWHC 1254 (Ch); [2016] Pens. L.R. 181 [10] (Norris J).

¹¹⁴ A board of directors may analyse in detail one part of a contract only, and be entirely passive regarding a different part of the contract which contains the alleged mistake that requires rectification.

presented by the negotiator, then the intentions of the authorised principal should trump those of the negotiator: the principal would be the decision-maker for the purposes of rectification.

On this approach, the result reached in *Daventry District Council v Daventry & District Housing Ltd*¹¹⁵ is unfortunate. The board of DDH did play an active role in the decision-making process and were not mistaken. The intention of the board should have trumped the mistaken intention of its negotiator, Mr Roebuck. However, it was suggested in *Daventry* that the result of the case might have been better reached through rectification for unilateral mistake, rather than common mistake.¹¹⁶ This possibility should now be considered.

B Unilateral mistake rectification

Rectification on the basis of unilateral mistake has rightly been described as a “drastic” remedy.¹¹⁷ After all, it “has the result of imposing on the defendant a contract which he did not, and did not intend to, make and relieving the claimant from a contract which he did, albeit did not intend to, make”.¹¹⁸ Since by definition one contracting party is not mistaken, that non-mistaken party must have acted culpably in some way to justify rectification. Equity will only intervene if the non-mistaken party actually knew of the other party’s mistake, or at least recklessly turned a blind eye to it.¹¹⁹

Where the negotiator was fully authorised to conclude a contract, then the courts have been prepared to hold that the negotiator’s bad conduct can be attributed to the company.¹²⁰ But difficulties will again arise where the person with authority to enter into the contract is different from the person who negotiated the contract, since only the latter but not the former may have acted badly. It is suggested that a company cannot readily disassociate itself from the dishonest conduct of an agent, whether authorised to bind the company or not. In the context of misrepresentation, it has been said that “no person can take advantage of the fraud of his agent”.¹²¹ Even an incomplete agent is authorised to conduct the negotiations for a draft agreement, and the principal may represent to the counterparty that these negotiations will be

¹¹⁵ [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333.

¹¹⁶ [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333, [185] (Toulson LJ), [226] (Lord Neuberger MR).

¹¹⁷ *Agip SpA v Navigazione Alta Italia SpA, (The Nai Genova)* [1984] 1 Lloyd’s Rep 353, 365 (Slade L.J.). *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77; [2005] B.L.R. 135, at [75] (Blackburne J). See also e.g. *A Roberts & Co Ltd. v Leicestershire CC* [1961] Ch 555; *Littman v Aspen Oil (Broking) Ltd.* [2005] EWCA Civ 1579; [2006] 2 P. & C.R. 2. For a different view, see D. McLauchlan, “The “drastic” remedy of rectification for unilateral mistake” (2008) 124 L.Q.R. 608.

¹¹⁸ *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77; [2005] BLR 135 at [75] (Blackburne J.).

¹¹⁹ *A Roberts & Co Ltd. v Leicestershire CC* [1961] Ch. 555; *Thomas Bates v Wyndham’s* [1981] 1 All E.R. 1077; *Commission for New Towns v Cooper* [1995] Ch. 259. See too *Daventry* [2011] EWCA Civ 1153, [2012] 1 W.L.R. 1333 [97] (Etherton LJ): “the critical broad distinction being between honesty and dishonesty”.

¹²⁰ *Eg Thomas Bates v Wyndham’s* [1981] 1 All E.R. 1077; *Littman v Aspen Oil (Broking) Ltd.* [2005] EWCA Civ 1579; [2006] 2 P. & C.R. 2.

¹²¹ *Mair v Rio Grande Rubber Estates Ltd* [1913] A.C. 853 at 872–873, (Lord Moulton). See K. Handley, ‘Exclusion Clauses for Fraud’ (2003) 117 L.Q.R. 537.

conducted honestly. Admittedly, it may often be somewhat harsher to impose a rectified contract on the non-mistaken company than simply rescind the contract *ab initio*, but this outcome would be consistent with the principle that the company cannot absolve itself of all liability for the conduct of its agent. So, if in *Daventry* Mr Roebuck had been found to be dishonest, DDH may still have been lumbered with a contract to which it would not have agreed. That would be tough on DDH, but on balance should be accepted in order to protect the counterparty which was dishonestly allowed to proceed whilst labouring under a known mistake.

The situation is perhaps different where the company wants to rectify a contract for unilateral mistake. This raises similar issues considered as regards common mistake: the company must be able to say it was mistaken. It is therefore important to identify the relevant intention of the decision-maker. If the principal was entirely passive¹²² whilst the negotiator made a mistake, then it would be consistent with *Hawksford* to grant rectification if the counterparty acted culpably. However, if the principal played an active role and was the true decision-maker, then rectification should not be granted if the principal did not make a mistake but the negotiator did.

IV Conclusion

“The precise distribution of management decision-making authority in any particular company may be a matter of chance”.¹²³ Close consideration of the facts at issue is necessary. Nevertheless, it is suggested that the approach of the Court of Appeal in *Barnet* and *Wimpey* should remain the starting point when analysing whether rectification should be granted in situations where a person who negotiated a contract did not have any authority to bind his or her principal. The person with authority to enter into the contract is, presumptively, also the decision-maker. That person’s intention is paramount.

This approach helps to ensure that a company cannot escape the consequences of its “own corporate neglect”¹²⁴ in failing to take care properly to understand the plain meaning of the contract. It is sensible to insist that those with authority to sign carefully check the contents of the agreement. Otherwise, the company would be able to reap all the benefits of not bestowing upon the negotiator any authority to bind, and yet not incur the consequent flip-side of not being able to rely upon the negotiator’s intentions in a claim for rectification, for example.

A strict approach to intention would reduce the number of instances of rectification, but this may be no bad thing. However, there has been a spate of recent cases where the

¹²² At least on this aspect of the contract: see fn 116 above.

¹²³ *Oak Investment Partners XII Ltd Partnership v Boughtwood* [2009] EWHC 176 (Ch); [2009] 1 B.C.L.C. 453 [14] (Sales J).

¹²⁴ See too eg *George Wimpey UK Ltd. v VI Construction Ltd.* [2005] EWCA Civ 77; [2005] B.L.R. 135 [67] (Sedley LJ).

person with authority to enter into the contract is passive, and relies upon the negotiator. Even though the negotiator has no authority to enter into a contract, in effect the negotiator is responsible for making the decision to enter into the contract. That was an important factor in *Hawksford*, for instance. That decision has been influential, although it should be remembered that in both *Murray* and *FSHC* it was not ultimately necessary to rely upon this issue of attribution. *Hawksford* may be considered to depart from a strict application of *Barnet* and *Wimpey*, and might be doubted on its own facts. Trustees cannot normally just let beneficiaries or settlors decide what should be done with trust property. Trustees of a discretionary trust should exercise their own discretion, so their own intentions should count for rectification. In any event, it is suggested that *Hawksford* should not be interpreted expansively, and should be restricted to the narrow context of a person with authority to enter into a contract being entirely passive and accepting the negotiator's presentation of the relevant term of the contract at face value without further discussion.

If the principal exercises any discretion or judgement as regards the term at issue, then it is suggested that the relevant intention should be that of the principal rather than negotiator, in the manner suggested by Peter Gibson LJ in *Barnet* and *Wimpey*. It should not be assumed that the principal simply adopts the negotiator's mistake; clear evidence that the negotiator shared his or her intention with the principal is required. This approach further suggests that the result in *Daventry* should have been different. The board of DDH *did* retain true decision-making powers. As a result, the intentions of the board, and not the negotiator, should have been the focus of attention, and the board was not mistaken. The actual decision in *Daventry* makes it unfortunately difficult for a company to structure its affairs such that the intentions of the negotiator are irrelevant, and the power to decide whether to enter into a commercial agreement remains with the board of a company.