The Chancery Bar Association

2013 ANNUAL LECTURE

Given by The Rt Hon Lord Justice Patten

# Does the law need to be rectified? Chartbrook revisited

1. No-one seriously doubts that if the law is to have any utility as a fair regulator of contractual disputes it needs to provide a mechanism for determining the legal effect of what the parties have agreed. Because we have yet to devise a comprehensive alternative method of recording legally enforceable agreements other than by the use of language, a large proportion of contractual disputes tend to be about the terms. What do the words used mean? What is the scope of the contract and the rights it confers? The law resolves this kind of dispute by giving to the words of the contract a legally correct meaning. It resolves ambiguities of expression on an objective basis by placing itself into the position in which the parties were at the relevant time, with the then knowledge of the transaction which they had, and asks itself what the parties are likely to have understood the words used to mean. The modern approach to construction allows this question to be answered in context regardless of any grammatical or literal restrictions. Recent developments in the law have therefore allowed a construction to be placed on the language of the contract which, according to the established rules of grammar and syntax, would not be a possible meaning of the words. The dictionary and the grammar book are abandoned. Semantics has now become a term of abuse.

2. When the boundaries of contractual interpretation are widened in this way one is inevitably forced to ask whether there is any longer a rôle for some kind of residual jurisdiction to rectify contracts on the basis that they do not accurately record what the parties intended to say. The fault lines created by the decisions of the House of Lords in *Mannai*

*Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 and *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 began to appear very early on. In *ICS* itself Lord Hoffmann (who has been almost single handedly responsible for the current state of the law on this topic) recognised the obvious impact which his speech would have upon the scope and operation of the court's equitable jurisdiction to order rectification of contracts for common mistake:

> "(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them."

3. However, in *Chartbrook Ltd v Persimmon* [2009] 1 AC 1101 he did return to consider what was left of rectification. *Chartbrook* was a dispute about the calculation of the price under a development contract. It turned on the construction of certain defined terms which identified the component parts of what was described as a Balancing Payment and whether one of the constituent elements of the price should be deducted before or after the calculation of another. The judge at first instance and the majority of the Court of Appeal reached a conclusion which Lord Hoffmann recognised was in accordance with conventional syntax but held that the grammatical ambiguity had to be resolved by considering the business purpose of providing for the relevant deduction.

4. *Chartbrook*, like *Mannai* and *ICS*, was a case where according to the House of Lords a conventional interpretation of the words used at least suggested that something had gone wrong with the language of the contract. Although it is not my purpose in this talk to issue a further riposte to the enthusiasts for the *Mannai* approach to construction, it is worth stating at this juncture that the origins of this line of reasoning have been largely ignored in the more recent expositions of the doctrine. The principles of linguistic interpretation set out in *ICS* and repeated in *Chartbrook* were intended primarily to deal with cases where the court can infer that an error has occurred in the drafting process: in *Mannai* there was a patent inconsistency between the reference in the break notice to clause 7(3) of the lease and the date specified for termination. In *ICS* and *Chartbrook* the syntactical construction of the relevant clauses produced a result which was so out of kilter with the obvious commercial purpose of the provisions as to raise the inference that a drafting mistake must have occurred. Lord Hoffmann in *Chartbrook*, referring back to his earlier speech in *ICS*, repeated that:

> "... we do not easily accept that people have made linguistic mistakes, particularly in formal documents"

but said that in some cases context and background have driven the court to conclude that "something must have gone wrong with the language". In such a case, he said, the law does not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had.

5. The principles of interpretation laid down in these cases have enabled the court to remedy the consequences of drafting mistakes through a process of construction where perhaps before, rectification (if available) would have been the only solution. But it was not intended to provide a universal palliative for the parties' failure to produce a commercially better solution where this was not attributable to an actual mistake in the drafting process. The identification of a mistake in the drafting of the contract is not by any means always easy or obvious. The reasonable observer is unable to tell whether the omission of a term was accidental or part of the price paid for some countervailing concession. This was one of the reasons why in *Kookmin Bank v Rainy Sky SA* [2010] EWCA Civ 582 I ventured to suggest that there were limits to this process and that if the result of a conventional construction of the words used produced a result which could not be said to be obviously irrational and unintended, any defects in the scope of the contract should be left to lie at the feet of the parties who negotiated it.

6. But the Supreme Court in *Rainy Sky* has rejected any attempt to confine the *ICS* approach to construction to its particular circumstances. Lord Clarke said in terms that it is not "necessary to conclude that, unless the most natural meaning of the words produces a result so extreme as to suggest that it was unintended, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other". In particular, even where the choice between possible meanings is much more evenly balanced so

that neither can be said to be uncommercial, the court will endeavour to apply the meaning which, in its view, is the more commercial construction.

7. *Chartbrook* shows that the court can intervene to correct errors in drafting which produce unintended consequences without resorting to its equitable jurisdiction to rectify. The exclusion of direct evidence about the parties' pre-contract negotiations and their actual subjective intentions imposes obvious limitations on this process. Its reliance on an expressly objective assessment of the relevant factual matrix means that the court is left to make its own assumptions and judgments about what the parties can be assumed to have intended rather than actually asking them. But the court's willingness to impose upon the parties a construction of their agreement which best meets its view of the commercial purpose of the particular contractual provision is likely (as *Chartbrook* itself illustrates) to pick up many cases in which there has been an obvious drafting error and to conform the agreement to what, in the context of the negotiations, appears to have been the result which the parties intended even if there has been no drafting error at all. On one view, we seem to have reached the point at which it is almost impossible for the parties and those advising them to make an effective mistake.

8. Against this background, one has to ask whether and in what circumstances there remains a need for equity to retain the power to re-write executed contracts in order to correct an alleged mistake on the part of one or both of the contracting parties. That question has a

particular relevance post- *Chartbrook* if in claims for rectification based on common mistake the court's analysis of the pre-contract dealings between the parties is to be limited to a consideration of their objective statements of intent rather than what those charged with the negotiations actually believed they were signing up to. Unlike rectification for unilateral mistake in which an element of sharp practice or unconscionability exists in one party knowingly allowing the other to enter into the contract under a fundamental misapprehension as to the effect of its terms, rectification for common mistake not induced by fraud or misrepresentation requires proof that both parties have signed a contract with the intention that they were to have result A when in fact, on the true construction of the words used, they have obtained result B. Put in the language of the cases, the party seeking rectification must show that:

> "(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;
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> (2) there was an outward expression of accord;
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> (3) the intention continued at the time of the execution of the instrument sought to be rectified; and
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> (4) by mistake, the instrument did not reflect that common intention."

See *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71, 74 at [33].

9. In cases like *Chartbrook* the outward expression of accord in respect of the alleged common continuing intention is likely to be represented by

draft heads of terms or an early draft of the proposed contract. Commercial disputes of this kind are not likely to centre on an orally expressed agreement or understanding as to what the ultimate contract was intended to achieve. The court will therefore need to be satisfied that there was some prior common understanding which differs from the terms of the concluded contract and that it survived the course of the negotiations intact. In some cases the latter question is likely to be determinative. In *Daventry District Council v Daventry & District Housing Ltd [2011] EWCA Civ 1153*, for example, there was relatively clear evidence in the form of the signed agreement in principle that the company which was to acquire the District Council's housing stock and take over its staff was also intended to meet the deficit in the staff pension scheme. The trial judge regarded that as both the natural construction of the relevant clause and the more commercial arrangement. The key issue therefore (on which the Court of Appeal was split) was whether the very late introduction into the draft contract (and the agreement by both sides' solicitors) of clause 14.10.3 which clearly provided that the burden of the deficit should fall on the District Council showed that the earlier accord had been abandoned. In *Chartbrook* that was not a problem because there was no evidence of any subsequent discussions which might indicate an intention to depart from the originally agreed terms.

10. If the effect of the decision in *Chartbrook* on rectification (I say decision because, although technically obiter, it has now to be regarded in the light of what the Court of Appeal said in *Daventry* as

representing the law) is that the court (through the eyes of the notional objective observer) is restricted to comparing the terms of the prior accord with those of the executed contract and must disregard the actual understanding of the respective parties as to the legal effect of the words used then rectification for common mistake has become a very limited remedy indeed. Rectification of the contract will only be available if there is some material difference between the final executed agreement and the prior version which is said to have remained the parties' agreement up to the including the making of the contract. It therefore approximates very closely in scope to what were historically regarded as the limits and purpose of the jurisdiction: namely to ensure that the written instrument containing the contract conformed to the terms of the prior agreement which the parties had made. That prior agreement (even if made orally) had, it was thought, to amount itself to a contract. In *Craddock Bros Ltd v Hunt* [1923] 2 Ch. 136 at page 159 Warrington LJ said that:

> "The jurisdiction of Courts of equity in this respect is to bring the written document executed in pursuance of an antecedent agreement into conformity with that agreement. The conditions to its exercise are that there must be an antecedent contract and the common intention of embodying or giving effect to the whole of that contract by the writing, and there must be clear evidence that the document by common mistake failed to embody such contract and either contained provisions not agreed upon or omitted something that was agreed upon, or otherwise departed from its terms. If these conditions are fulfilled then it seems to me on principle that the instrument so rectified should have the same force as if the mistake had not been made, in which case the Statute of Frauds would be no defence to an action founded upon it."

11. Lord Hoffmann in *Chartbrook* had no difficulty about this. Whilst acknowledging that since the decision of the Court of Appeal in *Joscelyne v Nissen* [1970] 2 QB 86 it is now established that the prior accord need not amount to an enforceable contract, the principle governing rectification for common mistake ought, he said, to remain the same:

> "[59] … Since the decision in *Joscelyne's* case extended the availability of rectification to cases in which there had been no enforceable prior agreement, specific performance is plainly an inadequate explanation of the doctrine. But for present purposes the significance of cases like *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, 27 TLR 236, [1911-13] All ER Rep Ext 1630 is that the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract. Thus the common mistake must necessarily be as to whether the instrument conformed to those terms and not to what one or other of the parties believed those terms to have been.
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> [60] Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be. Perhaps the clearest statement is by Denning LJ in *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ld* [1953] 2 QB 450, 461, [1953] 2 All ER 739, [1953] 3 WLR 497:
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> > "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 document, then you rectify the document; but nothing less will suffice."

12. This passage from Lord Denning's judgment in *Rose v Pim* has, I think, to be read in its historical context. It was delivered some 17 years before the Court of Appeal stated unequivocally in *Joscelyne v Nissan* that the parties' pre-existing accord need not be contractual and it is little more than a statement of what many judges at that time considered the scope of rectification to be. If, as he said, you can predicate with certainty what their contract was and by common mistake it was wrongly expressed in the written document, then the court can intervene to create consistency between the two. All that one is doing: indeed all that one could do in such circumstances was to ensure that the terms of the prior contract were accurately recorded. What the parties believed those terms to mean was irrelevant. All that the court was concerned with was whether there had been a prior contract and what its terms were. That required a conventional application to the facts of the test as to whether a contract had been reached which depends upon an objective assessment of the parties' dealings and takes no account of their subjective intention or understanding of what was agreed.

13. This comes out even more clearly from a little later in the same passage in Lord Denning's judgment (at p. 461) when he said that:

> "It is not necessary that all the formalities of the contract should have been executed so as to make it enforceable at law (see *Shipley Urban District Council v. Bradford Corporation*; but, formalities apart, there must have been a concluded contract. There is a passage in *Crane v. Hegeman-Harris Co. Inc.* which suggests that a continuing common intention alone will suffice; but I am clearly of opinion that a continuing common intention is not sufficient unless it has found expression in outward agreement. There could be no certainty at all in business transactions if a party who had entered into a firm contract could afterwards turn round and claim to have it rectified on the ground that the parties intended something different. He is allowed to prove, if he can, that they *agreed something different:* see *Lovell & Christmas v. Wall*, *per* Lord Cozens-Hardy M.R., and *per* Buckley L.J., but not that they *intended* something different."

14. In *Rose v Pim* as all law students know the parties agreed to trade in "horsebeans" both believing that they were the same as feveroles. Their common misunderstanding remained uncommunicated and, consistently with it, there was no agreement between them to give "horsebeans" a private dictionary meaning of feveroles. Both seller and buyer were middlemen. Once the buyer had contracted by cable to buy 500 tons of horsebeans there came into existence three written contracts under which (i) the seller acquired the horsebeans; (ii) it sold them to the buyer; and (iii) the buyer then sold them on. So far as we know the original seller and the ultimate buyer did understand the difference between horsebeans and feveroles. When the mistake became apparent to the intermediate contracting parties in *Rose v Pim* they were held to the bargain they had actually made. As Lewison LJ has pointed out in his *2008 Jonathan Brock Memorial Lecture*, the existence of the contract in question as one of a chain of contracts involving third parties would undoubtedly be a strong discretionary factor against ordering rectification in that case. But, as I have

indicated, the Court of Appeal dismissed the claim for rectification on the short ground that it was not entitled to look beyond the terms of the original contract which the parties had made by cable and which had always been one to buy and sell horsebeans. There was therefore no mistake in the written document and nothing to rectify.

15. In *Joscelyne v Nissen* [1970] 2 QB 86 the Court of Appeal had to decide whether to rectify a written contract under which the plaintiff's daughter agreed to pay the rent and outgoings on the house they both occupied. The plaintiff sought rectification of the contract to include all household expenses on the basis that this was what they had agreed the daughter should pay and that the written contract was drafted too restrictively. It was not suggested that the prior agreement had been contractual. The Court of Appeal ordered rectification deciding in the process that it was not part of the ratio of various decisions of the Court in such cases as *Rose v Pim* that the prior accord should amount to an enforceable contract. Russell LJ approved as a correct statement of the law the judgment of Simonds J in *Crane v Hegeman Harris Co Inc* [1939] 1 AER 662 at p. 664 that:

> "... in order that this court may exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify. The judge held, and I respectfully concur with his reasoning and his conclusion, that it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement. If one finds 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, although it may be that there was,

> until the formal instrument was executed, no concluded and binding contract between the parties."

16. Of *Rose v Pim* he said (at p. 97H) that:

> "That was a case in which there was nothing that could be described as an outward expression between the parties of an accord on what was to be involved in a term of a proposed agreement. It turned out that locked separately in the breast of each party was the misapprehension that the word "horsebeans" meant another commodity, but as we understand the case there was no communication between them to the effect that when they should speak of horsebeans that was to be their private label for the other commodity. The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties."

17. Russell LJ seems therefore to have accepted that an express and communicated understanding or agreement between the parties that by "horsebeans" they meant "feveroles" could have led to the rectification of the contract. It was not, however, enough in *Rose v Pim* for the parties simply to have stipulated "horsebeans" as the subject matter of the contract in the mistaken and uncommunicated belief that they would thereby be dealing in feveroles. In order to free himself from the legal effect of what he has signed, what then must the party seeking rectification for common mistake prove? Has he to show that both he and the counterparty had a common subjective understanding and intention that they should have result A but ended up with result B; or need he only show that the executed contract does not accord with the previously agreed verbal formula objectively adopted as the terms of the bargain in the course of the pre-contract negotiations? Both possibilities carry dangers and the risk of unfairness within them.

Quite apart from the evidential and forensic difficulties involved in proving what either party actually believed they were committing themselves to at the time, proof that the parties had different subjective intentions will be fatal to the claim for rectification on the first hypothesis if (for example) the party opposing rectification had a change of mind very late in the day even if it remained uncommunicated. But on the purely objective approach there are also problems. At what point in the negotiations does the draft contract come to be regarded as a definitive statement of the parties' common intention? How does one deal with late (but significant) amendments which alter critically the effect of one of the terms and which are accepted without further discussion? Are they to be assumed to represent a new objective statement of accord even if the party seeking rectification thought mistakenly that the change made no difference? And if the agreed draft on its true construction does not in fact correspond to what the parties both intended, are there circumstances in which the party who stands to benefit from its meaning can force it on the other party by an order of rectification simply because, objectively speaking, it represents their prior accord? I want to concentrate this evening on some of those problems inherent in any claim for rectification based on common mistake. But, as a prelude to that, one has, I think, to recognise that equity's response to the myriad situations in which one party complains that he has become bound by a contract which produces an effect he never intended has perhaps, as you would expect, been piecemeal. In relation to unilateral instruments (which, by definition, do not depend upon any common

intention or accord), it is well established that the court does have regard to the maker's actual subjective intentions and not simply to whether there has been a mistake in the preparation of the final executed instrument. The scope of the court's jurisdiction was considered by Brightman J in *Re Butlin's Settlement Trusts* [1976] Ch 251. He said:

> "There is, in my judgment, no doubt that the court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain, such as an ante-nuptial marriage settlement. *Lackersteen v. Lackersteen* (1860) 30 L.J.Ch. 5, a decision of Page-Wood V.-C., and *Behrens v. Heilbut* (1956). 222 L.T.Jo. 290, a decision of Harman J., are cases in which voluntary settlements were actually rectified. There are also obiter dicta to the like effect in cases where rectification was in fact refused; see *Bonhote v. Henderson* [1895] 1 Ch. 742; [1895] 2 Ch. 202.
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> Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention: see *Jervis v. Howle and Talke Colliery Co. Ltd.* [1937] Ch. 67; *Whiteside v. Whiteside* [1950] Ch. 65, 74 and *Joscelyne v. Nissen* [1970] 2 Q.B. 86, 98."

18. The reference in this passage to the judgment of the Court of Appeal in *Joscelyne v. Nissen* is important because it treats that case as support for the view that there is room in relation to contracts and other bilateral instruments for the court to order rectification where the alleged mistake consists of a misunderstanding as to the meaning of the words used rather than merely the careless inclusion in the contract of words which did not form part of the previously agreed draft. Lord

Hoffmann in *Chartbrook* accepted by reference to what Brightman J said in *Re Butlin's Settlement Trusts* that rectification is available not merely to correct clerical mistakes but also when the parties mistakenly thought their words had a different meaning.

19. So what is the reconciliation? There is a now increasingly faint line of support for the view that to obtain rectification for common mistake it has never been necessary to show anything more than that the two contracting parties had the same subjective intention as to outcome and that the terms of the contract failed to give effect to this. One can trace the modern source for this view to the 1971 article in the Law Quarterly Review written by Mr Leonard Bromley QC criticising Russell LJ in *Joscelyne v Nissen* for requiring the parties' common mistake to be outwardly expressed or communicated. Mr Bromley took the view that, as with a unilateral instrument, all that needed to be shown was that the makers of the instrument (in the case of a contract it had, of course, to be both parties) had a subjective intention which was not given effect to in the language used. On this hypothesis, the subjective intention had to be common to both parties, but it did not have to be communicated or shared in the sense of being expressly agreed between them. The equity arose, he reasoned, simply from the mismatch between the intentions of the makers of the document and the inappropriate language in which their intentions were expressed. It was not founded (as in cases of unilateral mistake) upon one of the parties being aware that the other was labouring under a misapprehension as to the effect of what he was signing.

20. Support for the view that the relevant intentions of the parties are their actual subjective intentions is to be found in the decision of Laddie J in *Cambridge Antibody Technology v Abbott Biotechnology Ltd* [2005] FSR 590 who rejected a submission that it was irrelevant to consider evidence of the subjective and uncommunicated state of mind of the parties. In *Munt v Beasley* [2006] EWCA Civ 370 Mummery LJ said that:

> "I would also accept Mr Morshead's submission that the recorder was wrong to treat "an outward expression of accord" as a strict legal requirement for rectification in a case such as this, where the party resisting rectification has in fact admitted (see the solicitors' letter of 7 May 2003) that his true state of belief when he entered into the transaction was the same as that of the other party and there was therefore a continuing common intention which, by mistake, was not given effect in the relevant legal document. I agree with the trend in recent cases to treat the expression "outward expression of accord" more as an evidential factor rather than a strict legal requirement in all cases of rectification: see *Gallaher v Gallaher Pensions Ltd* [2005] EWHC 42 (Ch) at paras 116-118, *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 at 29, 30, and *JIS (1974) Ltd v MCP Investment Nominees Ltd* [2003] EWCA Civ 721 at paras 33-34, cf *Frederick E Rose (London) Ltd v Wm Pim & Co Ltd* [1953] 2 QB 450 at 462, [1953] 2 All ER 739, [1953] 3 WLR 497 per Denning LJ and *Swainland Builders Ltd v Freeland Properties Ltd* **[**2002] 2 EGLR at 74."

21. In *Chartbrook* itself Lawrence Collins LJ said that:

> "There is no dispute on the applicable legal principles…. The court will rectify a contract if the evidence is clear and unambiguous that a mistake has been made in the recording of the parties' intention, what that intention was, and that the alleged intention continued in both parties' minds down to the time of the execution of the agreement… In cases where common mistake is alleged, it is necessary to establish not merely a continuing common intention, but also some outward expression of that prior accord… The requirement of an outward manifestation of

> accord has been said to be an evidential factor rather than a strict legal requirement "

22. It is not entirely clear what outward evidence of a common but uncommunicated subjective intention there is likely to be. If the parties have committed themselves to some form of agreed terms which accurately records and gives effect to their actual intentions but is not then carried forward into the contract, a claim for rectification is likely to succeed post-*Chartbrook* for the simple reason that there has been an objectively evidenced statement of their intention which was agreed and can be given effect to. Evidence that it accurately states their subjective intentions will be a comfort to the judge but is strictly unnecessary. The party seeking rectification need go no further than to rely on the draft agreement. If, however, the draft heads of agreement like the contract which follows fails to give effect to the parties' actual intentions then unless evidence of those subjective intentions can be treated as both admissible and determinative, rectification for common mistake based on those subjective intentions will not be an available remedy. The only relevant intentions will be those expressed in the agreed draft. This, of course, is the scenario that occurred in *Rose v Pim*.

23. In *Chartbrook* Lord Hoffmann does not treat Laddie J's decision in *Cambridge Antibody* to admit evidence of subjective intent as a misdirection even though (as I have explained) his speech is an emphatic endorsement of Lord Denning's view that subjective intention with regard to the prior accord is irrelevant. He accepts that such evidence is admissible even though it does not consist of

communications which (to use the language of the cases) has crossed the line from one party to the other. It has a utility particularly in cases where the prior accord does not take the form of a draft agreement or the like but may be purely oral. In such a case evidence of the parties' subjective intentions may be some form of corroboration of the fact that they reached an agreement or understanding in those terms and is likely any way to be inseparable from the parties' actual recollection of what the prior consensus was. But the court's quest is to identify the terms of the actual agreement and if in writing then the parties' recollections of what they subjectively intended will carry little or no weight.

24. What this amounts to in terms of authority is a clear endorsement of Russell LJ's analysis in *Joscelyne v Nissen* of the Court of Appeal's earlier decision in *Rose v Pim*. Rectification will be available to give effect to shared understandings of the meaning and effect of particular words, but only if the parties have communicated that understanding to each other so that it can be said that there is a real (and therefore outward) agreement between them. But how would that have worked in *Rose v Pim*? Had they told each other and agreed to trade in feveroles even though they both (mistakenly) chose to call them horsebeans then they would have made a mistake, not about what they wanted to trade in but how to describe the commodity. That is the type of mistake which Lord Hoffmann accepts qualifies for rectification. But how does their agreed intention to buy and sell feveroles override the actual terms of their pre-contract accord? The only answer can be that

the court will receive evidence both of the agreement to trade in feveroles and of the cable agreement to buy and sell horsebeans and will have to decide whether the choice of "horsebeans" to describe the subject-matter of the contract was a mistake due to their misunderstanding of what feveroles are called or a genuine subsequent decision to trade in an altogether different commodity. As envisaged in *Chartbrook*, an investigation of this kind is inevitable when the negotiations are oral or partly oral and partly written. But it is also permissible because it seeks to identify what (if anything) represents the state and terms of their final accord prior to contract so as to decide whether the contract and any similar prior draft accurately recorded the agreement or was simply a mistake. Absent such a prior accord, there may be a mistake (and it may be a common mistake as in *Rose v Pim*) but it is not now a basis for the rectification of the contract.

25. All this indicates that unless the Supreme Court at some stage decides to make rectification available on the basis of the parties' subjective intentions at the date of the contract, the battleground in most cases will be to identify whether there was and, if so, what was the prior accord so as to determine whether it was carried forward into the contract. In most cases the intensity of the negotiations on points of serious commercial importance is likely to avoid the making of this kind of mistake at all. In the case of a development contract, for example, one assumes that the negotiators and their legal advisers will spell out in their pre-contract discussions and communications their respective positions on matters such as price and any components of

the development which will be relevant to determine the price. These communications will usually progress by reference to a draft contract or heads of terms and there will be a conscious, express and often very detailed engagement between the parties about the key points of the contract which will mean that by the end of the process they will in a real sense be *ad idem* on the terms agreed. All these communications will be admissible in any proceedings for rectification so that if, by some last minute drafting or word processing error, the final version of the contract which is signed either omits critical words or adopts a verbal formula which, as a matter of construction, fails to give effect to what was actually intended and agreed then any attempt by one party to take advantage of the mistake can be effectively thwarted by the court. There is nothing in *Chartbrook* which would deny rectification in such circumstances. The parties will have evinced an express intention to do X in their recorded pre-contract dealings but the contract, as executed, has done Y. Whether you adopt a subjective or objective test of their intentions the result will be the same.

26. The difficult cases post-*Chartbrook* are those rarer cases where the negotiations produce a written formula on (for example) the calculation of price which both parties actually agree to and adopt as the relevant term of the proposed contract but one or both (unknown to each other) believe it to have a different effect. I say rare because (as just explained) one would normally expect the negotiations themselves not only to expose whatever difference of view exists as to how the price should be calculated but also to resolve that issue. The drafting of the

appropriate clause ought in most cases to follow an agreement between the parties as to what form the price calculation or other provision should take. The agreement will take the form of a fully articulated and understood compromise of the point in issue in which both parties will be aware of the other's prior position; the extent to which that position has changed in order to reach agreement; and the terms and effect of the agreed solution. It will not be a mere assent to a verbal formula which either or both parties (unbeknown to the other) think has some other effect.

27. But when the problem occurs then the thesis that equity should disregard the actual subjective intentions of the parties begins to be tested. The strongest argument in favour of the objective approach to rectification is that the remedy is there to implement the parties' actual agreement; not its intentions. Where the parties have reached an accord on particular terms which are not reproduced in the final contract then equity can intervene. But what if the prior accord which will now usually be non-contractual is itself the product of a mistake? Suppose that, on its true construction, it produces result A but both parties (unknown to each other) intend and believe that it will produce result B? The contract uses the same form of words. Can it be rectified to achieve result B? *Rose v Pim* and *Chartbrook* suggest not. But what if the contract is drafted in a way which in fact produces result B? Can the party in whose favour it would be to have result A seek and obtain rectification simply because the prior accord was in those terms?

28. My own response to that situation is to feel that there is as much injustice in allowing rectification in such circumstances as there would be in denying it to a party where there had been both objective and subjective accord on the terms of the proposed contract but the counterparty was able to satisfy the court that at the last moment he changed his mind. In *Chartbrook* itself Persimmon succeeded on construction. But on the hypothesis that the contract meant what Chartbrook contended, the latter had entered into a contract which it both believed and which did have the effect it intended. Yet the House of Lords would (but for its decision on construction) have required the contract to be rectified so as to conform to a prior accord which, objectively viewed, had the result intended by Persimmon. And this notwithstanding that Chartbrook was never mistaken at all. The contract always meant what it intended. In those circumstances, why should Chartbrook in effect be bound by a prior accord which was not contractual and which the judge found was understood by Chartbrook to have the same meaning and effect as the contract it eventually signed?

29. In *Daventry,* under the original pre-contract accord, the Housing Association was to meet the deficit in the pension fund and the draft contract would have been construed in this way but for the last minute amendment. Each party thought that the other would meet the deficit and were never subjectively *ad idem* on the point. The Council could not make out a case of unilateral mistake because the judge accepted that the Housing Association did not have knowledge of the Council's

mistaken view that the late amendment had not changed the incidence of liability for the deficit. The only issue therefore was whether (applying the objective approach in *Chartbrook*) one should treat the Council objectively as having made a new accord in the form of the contract as executed with the critical amendment.

30. On this point there was a split in the court. The evidence was that the Housing Association's funder had put forward the late amendment and there could be no doubt (objectively speaking) that the Housing Association did intend that the burden of the deficit should be placed on the Council. Etherton LJ considered that the Council's apparently unqualified acceptance of the amendment had to be treated by the objective observer as the making of a new accord on those terms so that the claim for rectification failed notwithstanding that its subjective belief remained that the contract (as amended) still made the Housing Association liable.

31. Both he and Lord Neuberger were agreed that the court had to look at all the objectively observable facts to decide whether the parties were (by the amendment) in the process of negotiating a different deal from the one previously agreed or were merely fine tuning the drafting to give effect to that existing accord. If the correct view of the facts was the latter then it followed that there had been a mistake in the drafting which was susceptible to correction by an order for rectification. But, in the result, Lord Neuberger reached a different conclusion. He said (at para 214) that:

> "The carriage of the matter was then given over to the parties' respective solicitors (who were already in negotiation) on the basis that they would sort out the drafting of a contract which reflected those negotiated terms. Accordingly, a proposal between those solicitors, a couple of days before execution of the contract, to include a new clause in the contract would, at least on the face of it, have been unlikely to have been intended to represent a variation of those terms, or a re-opening of the negotiations, unless, of course, such an intention was explained in clear terms in an accompanying letter or email."

32. Toulson LJ agreed with Lord Neuberger that the objective bystander would have regarded the function of the lawyers to be primarily the drafting rather than the re-negotiation of the contract.

33. *Daventry*, I think, exposes some of the difficulties which a stringently objective analysis can produce. Many people reading the facts of the case might conclude that the result was a fair one. A late amendment which altered the whole balance of the contract was introduced without it being made clear to the Council that it was intended to have that effect. One has some sympathy with the view that, absent some kind of health warning, it was reasonable to assume that no major shift in liabilities was intended. But the difficulty about the purely objective test is that it imports an inherent lack of reality by relying on at least one and possibly two layers of abstraction. Any words used to record the current accord are given a construction which is itself an objective exercise shorn of the parties' actual intentions and beliefs as to what the words meant. On top of this, the court is required to conduct a purely superficial analysis of the situation based entirely on exchanges between the parties which, in the case of *Daventry*, were largely inconclusive in relation to the very last minute but critical amendment.

Although the majority rejected the submission that the radical nature of the amendment, clearly expressed in the language used, was sufficient in itself to evince an intention by the Housing Association no longer to be bound by the prior accord, that also has an element of artificiality about it. As Toulson LJ noted in paragraph 158 of his judgment, in order to decide whether there has been a relevant mistake in the execution of the contract, it would be impossible in most cases for the court to carry out this task without evidence of what the parties in fact intended. In *Daventry* such evidence would have confirmed that although the Council still believed the burden of the deficit would fall on the Housing Association, the Association clearly intended to pass it to the Council with the amendment and no longer to be bound by the effect of the prior draft if it had ever intended so to be. Neither in *Daventry* nor in *Chartbrook* did the losing party in fact make a mistake yet rectification was ordered in *Daventry* and would (but for Persimmon succeeding on construction) have been ordered in *Chartbrook*. In both cases the defendants were bound by a prior accord that was not contractual; which they never thought had the meaning ascribed to it by the court; and which they would have been unwilling to agree.

34. Professor McLauchlan (whose 2008 article in the Law Quarterly Review – "*The 'Drastic' Remedy of Rectification for Unilateral Mistake*" 2008 124 LQR 608 - was referred to by Lord Hoffmann in *Chartbrook* but not adopted) has argued for a less formulaic approach to these problems which would recognise the availability of rectification

in the *Rose v Pim*-type situations and be able to deny it in cases like *Daventry*. Etherton LJ in his judgment postulates various scenarios to demonstrate the unfairness which can result from refusing or denying rectification on the basis of a subjective but uncommunicated change of mind. In paragraph 87 he refers to the case:

> "where there was objectively a prior accord, but one of the parties then subjectively changed their mind, but objectively did not bring that change of mind to the attention of the other party. It is right that, if the documentation gives effect to the objective prior accord, the formal documentation should not be rectified to reflect the changed but uncommunicated subjective intention; and if the documentation as executed reflects the changed but uncommunicated subjective intention, it should be rectified to give effect to the objective prior accord. To do otherwise would be to force on one of the parties a contract which they never intended to make on the basis of an uncommunicated intention and belief."

35. The difficulty, however, which this and the facts of cases like *Chartbrook* and *Daventry* illustrate is that, where the parties have <u>different</u> contractual intentions prior to and at the date of the executed contract, there will always be one party who is disadvantaged whether or not rectification is granted. It will only be a case like *Rose v Pim* where their subjective intentions coincide but the language is inadequate that there can be said to be no injustice in changing the terms of the contract although because of an objective approach to rectification even in that situation a remedy is denied. I recognise the practical and theoretical difficulties in basing rectification for common mistake on subjective (and possibly uncommunicated) intent in all cases. And, as part of that problem, one needs to take into account the fact that equity has never operated as a general antidote to the common

law: quite the opposite in fact. Its intervention has always taken place according to established rules and principles and in readily identifiable circumstances. But if what you might term the objective theory of rectification is unchangeable then, in my view, it should have no place in the law in cases of common misstate and we should revert to what was traditionally thought to be its limited sphere of operation: that is of conforming contracts to the terms and effect of a prior contractual accord.

36. In this context the objective approach is entirely consistent with contractual theory and can cause no injustice. The parties must comply with the terms of what they have signed unless they misstate the terms and effect of the contract which the instrument was intended to record. Subject to that, if the parties cannot agree on what the terms mean then the court can construe them. Beyond that, they must comply. There will be disappointed parties in this situation but they are only being held to the terms of their actual contract. Under *Chartbrook* they are being held to the terms of a prior accord which has no legal effect and is not binding of them. Absent any reference to whether it records what the parties actually intended and what they continued to intend up to the moment of contract, why should it have any greater authority and effect than the terms of the eventual contract itself. Why should one party be able to use it to override the terms of the bargain which he has actually made even without having to show that the other party was genuinely *ad idem* on that being the terms that were agreed? Our principles of construction (as *Chartbrook* shows) can now identify and

correct real mistakes. If we are to embrace this new world we should let it do its work. There is of course an element of rough justice even here but equity should not, in my view, add to it.

The Rt Hon Lord Justice Patten
29th April 2013