Rectification for Unilateral Mistake: Time for a Conceptual Revision?

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The law regarding rectification for unilateral mistake is in an uncertain state. What exactly is required to justify the courts' rectification and enforcement of an agreement where only one party has made a mistake? The orthodox position is that the non-mistaken party must know of the mistake at the time of signing. Yet confusion remains as to whether constructive knowledge will suffice, and the extent to which unconscionability is a separate element. In an attempt to achieve greater clarity, Professor David McLauchlan argues that questions of knowledge and unconscionability should be subordinate to the essential question of whether the promisee was led reasonably to believe that their terms were being assented to; therefore, actual knowledge of the mistake is neither required nor sufficient. This article submits that, present uncertainties in this area of law notwithstanding, McLauchlan's proposal should not be adopted for reasons of principle and practicality. Attention will also be given to Henry J's decision in Tri-Star Customs and Forwarding Ltd v Denning *that equitable rectification for unilateral mistake does not survive the passing of the Contractual Mistakes Act 1977. This article submits that unilateral mistake has survived the Act and is based on the promisor's knowledge of the mistake, such that their conscience is tainted by their attempts to rely on the written agreement.*

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I INTRODUCTION

Rectification is an equitable remedy designed to relieve parties from mistakes made during the creation of a written agreement.[1] Where the remedy's requirements are met, the court will alter the written agreement to conform with the parties' intention. The purpose of the remedy is to align instruments with the intentions they are meant to express. It is not the agreement itself that is rectified but rather the formal instrument, which has imperfectly expressed the agreement.[2]

The courts' equitable jurisdiction to order rectification on the basis of *common* mistake is well recognised.[3] Where there is a common intention as to a provision leading up to execution and the written agreement does not conform to that intention because of a mistake, the court may adjust the writing accordingly.[4] Despite doubts amongst early judges and commentators, the courts have also granted rectification in situations where only one party is mistaken, hereafter referred to as instances of unilateral mistake.[5] The orthodox position is that such an intervention is only justified where the non-mistaken party knows of the other party's mistake and does nothing to correct it.[6] In such circumstances, the non-mistaken party's attempt to rely on the written agreement is unconscionable and Equity can justifiably intervene. However, this area of law suffers from some uncertainty, particularly regarding the standard of knowledge required, and the extent to which unconscionability is itself an additional requirement. Responding to this uncertainty, Professor David McLauchlan argues that rectification for unilateral mistake ought to be placed on the same conceptual footing as common mistake.[7] According to McLauchlan, the concern in both cases is not the presence of knowledge or unconscionability, but whether the plaintiff[8] reasonably believed that

1 Terry Sissons "Rectification" in Andrew S Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) 869 at 870.

2 *Mackenzie v Coulson* (1869) LR 8 Eq 368 (Ch) at 375.

3 Rectification for common mistake was recognised in *Dundee Farm Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647 (CA). The cases recognising the existence of the remedy date as far back as the eighteenth century: See *Henkle v Royal Exchange Assurance Co* (1749) 1 Ves Sen 318, 27 ER 1055 (Ch); and *Simpson v Vaughan* (1739) 2 Atk 31 at 33, 26 ER 415 (Ch) at 416.

4 *Crane v Hegeman-Harris Co Inc* [1939] 1 All ER 662 (Ch) at 664 as cited in *Joscelyn v Nissen* [1970] 2 QB 86 (CA) at 95 as cited in *Dundee Farm Ltd*, above n 3, at 651.

5 See *A Roberts & Co Ltd v Leicestershire County Council* [1961] 2 All ER 545 (Ch).

6 RE Megarry and PV Baker *Snell's Principles of Equity* (25th ed, Sweet & Maxwell, London, 1960) at 569 as cited in *A Roberts & Co Ltd*, above n 5, at 552; and see generally Paul S Davies and Janet O'Sullivan "Rectification" in JA McGhee (ed) *Snell's Equity* (33rd ed, Thomson Reuters, London, 2015) 417 at [16–018] for modern commentary.

7 DW McLauchlan "Rectification for Unilateral Mistake" (1999) 18 NZULR 360; David McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 LQR 608; David McLauchlan "Refining Rectification" (2014) 130 LQR 83.

8 I use the terms "plaintiff" and "defendant" on the assumption that it is the mistaken party bringing the claim. Of course, this is not always the case.

their terms were being assented to.[9] If that belief is established, the true agreement is the agreement as understood by the mistaken party. As with common mistake, the court can then rectify the instrument to reflect that agreement.

The first section of this article will weigh McLauchlan's proposal against the orthodox explanations of the doctrinal basis for rectification for unilateral mistake. It will conclude that, whilst McLauchlan's argument is undeniably attractive in its simplicity, it would be against both principle and practicality to discard the requirement of actual knowledge on the part of the non-mistaken party.

Those familiar with this area of the law would be forgiven for considering a lengthy discussion of the doctrinal basis of unilateral mistake rather futile. Most situations giving rise to a claim for unilateral mistake at common law now appear to be governed by s 6 of the Contractual Mistakes Act 1977. Although s 5(2)(b) of the Act preserves the law relating to rectification, in *Tri-Star Customs and Forwarding Ltd v Denning* the Court of Appeal ruled that the section only preserved rectification for *common* mistake.[10] The latter half of this article will respectfully suggest that this decision ought to be reconsidered, thereby leaving room for rectification claims at common law for both common and unilateral mistake.

II THE DOCTRINAL BASIS FOR RECTIFICATION FOR UNILATERAL MISTAKE

Orthodoxy

In *AGIP SpA v Navigazione Alta Italia SpA* (*The Nai Genova*), Slade LJ described rectification for unilateral mistake as a "drastic" remedy to be deployed in compelling circumstances only.[11] This is emblematic of the orthodox approach. The courts recognise that to rectify an agreement where only one party is mistaken challenges the fundamental principle that the courts should not make agreements for the parties.[12] In circumstances involving unilateral mistake, the non-mistaken party intends to, and ostensibly does, contract according to the words of the written agreement. To rectify the agreement to

9 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 609.
10 *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33 (CA) at 39.
11 *AGIP SpA v Navigazione Alta Italia SpA (The "Nai Genova" and "Nai Superba")* [1984] 1 Lloyd's Rep 353 (CA) at 365 [*The Nai Genova*].
12 At 360.

accord with the mistaken party's understanding is to impose on the non-mistaken party an agreement which they never intended to make. Meanwhile, the mistaken party is relieved from an agreement that they apparently did make, despite not having intended to do so.[13] Such a "harsh" result is only justified where the non-mistaken party knows of the other party's mistake and does nothing to correct it such that their conscience is affected.[14]

The classic modern case is *A Roberts & Co Ltd v Leicestershire County Council*.[15] The plaintiff company submitted a tender to the defendant council for the construction of a school. Negotiations followed during which the company submitted a revised tender containing an amended price and stating the completion period of 18 months for the first time. The council responded with unequivocal acceptance of the tender. However, the council failed to mention that it had resolved that the completion period ought to be 36 months and had changed the term accordingly. It was clear that the greater the contract period, the greater the price of the job. Therefore, the substitution of 18 months with 36 months was significant. Pennycuick J allowed the company's claim for rectification, drawing support from the following statement in *Snell's Equity*:[16]

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

Pennycuick J affirmed the principle that:[17]

> … a party is entitled to rectification of a contract upon proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term *in the knowledge* that the first party believed the term to be included.

Therefore, the company had to establish that the council had actual knowledge of the company's mistake in order to be awarded rectification. The evidence demonstrated that, during subsequent meetings between the parties, the company was still overtly labouring under the assumption that the completion period was 18 months as

13 *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77, [2005] BLR 135 at [75].
14 See *The Nai Genova*, above n 11, at 365.
15 *A Roberts & Co Ltd*, above n 5.
16 Megarry and Baker, above n 6, at 569 as cited in *A Roberts & Co Ltd*, above n 5, at 552; and see generally Davies and O'Sullivan "Rectification", above n 6, at [16–018] for modern commentary.
17 *A Roberts & Co Ltd*, above n 5, at 551 (emphasis added).

initially proposed. The council therefore knew of the mistake. On that basis the agreement was rectified by reinstating the initial 18 month completion period.

Pennycuick J's statement of principle in *Roberts* has experienced widespread approval. In *Riverlate Properties Ltd v Paul*, Russell LJ, delivering the judgment of the Court of Appeal, observed:[18]

> It may be that the original conception of reformation of an instrument by rectification was based solely upon common mistake: but certainly in these days rectification may be based *upon such knowledge on the part of the lessee*: see, for example, *A. Roberts & Co. Ltd. v. Leicestershire County Council*.

However, whilst the courts are in agreement as to the need for knowledge, there appears to be some confusion about the need for additional unconscionable behaviour. In *Riverlate* Russell LJ seemed to regard knowledge alone as insufficient, stating:[19]

> Whether there was in any particular case knowledge of the intention and mistake of the other party must be a question of fact to be decided upon the evidence. Basically it appears to us that *it must be such as to involve the lessee in a degree of sharp practice*.

Yet in *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* the Court doubted the efficacy of an additional "sharp practice" requirement, preferring instead to focus on the existence of actual knowledge of the mistake, which itself provides the unconscionability that forms the basis of the remedy.[20] There have since been mixed dicta on this point. For example, notions of "the line [between] legitimate negotiations [and] unfair dealing" and "dishonest conduct" permeate the decisions at both first instance and on appeal in *George Wimpey UK Ltd v VI Construction Ltd*.[21]

Further complexity was introduced in *Commission for the New Towns v Cooper (Great Britain) Ltd*, where it was suggested that wilful blindness would suffice for actual knowledge.[22] Stuart-Smith LJ, with whom Evans and Farquharson LJJ agreed, held that:[23]

> … where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from

18 *Riverlate Properties Ltd v Paul* [1975] 1 Ch 133 (CA) at 140 (emphasis added, citations omitted).
19 At 140 (emphasis added).
20 *Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA) at 515.
21 *George Wimpey UK Ltd*, above n 13, at [25] and [45]; and *George Wimpey UK Ltd v VI Components Ltd* [2004] EWHC 1374 (Ch) at [73].
22 *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA) at 281.
23 At 280.

> discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted.

Thus, rectification of unilateral mistakes has become difficult to predict. However, as Slade LJ observed in *The Nai Genova*, the common requirement within these cases is that the defendant must possess actual knowledge of the plaintiff's mistake at the time that the contract was executed (whether or not that knowledge encompasses wilful blindness).[24] This knowledge is the orthodox doctrinal basis for rectification for unilateral mistake. It is the defendant's actual knowledge of the plaintiff's mistake that taints their conscience, thereby allowing Equity to enforce the bargain as understood by the plaintiff.

Yet why is it that the court enforces the bargain as understood by the plaintiff? Why is the agreement not merely rescinded, with the parties returned to their original position? In several 19th century cases the courts responded to situations of mere unilateral mistake (where the mistake is not necessarily even known to the non-mistaken party) by ordering the rescission of the agreement, whilst also giving the party resisting relief the option to submit to the agreement as rectified to accord with the claimant's intention.[25] Most famously, in *Paget v Marshall* the Court held that the plaintiff landlord was entitled to rescind a lease which mistakenly included an adjoining area required for his own purposes.[26] However, the defendant was given the option (which he accepted) to submit to the rectification of the lease by the omission of the contested area. Regarding unilateral mistake, Bacon VC stated:[27]

> … if the court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into.

This presupposes that the appropriate remedy in such cases is rescission. However, cases in this vein have been increasingly

24 *The Nai Genova*, above n 11, at 362.
25 See *Garrard v Frankel* (1862) 30 Beav 445, 54 ER 961; *Harris v Pepperell* (1867) LR 5 Eq 1 (Ch); and *Bloomer v Spittle* (1872) LR 13 Eq 427 (Ch).
26 *Paget v Marshall* (1884) 28 Ch D 255 (Ch).
27 At 263.

criticised and are no longer regarded as authoritative.[28] In *Riverlate Properties Ltd v Paul*, Russell J scrutinised and ultimately condemned the *Paget* line of reasoning as having "no justification in principle"[29] and:[30]

> … in so far as [the *Paget* line of cases] may be said to support the view that rescission may be grounded on mere unilateral mistake they are not to be regarded as having been approved.

If the defendant has no knowledge of the mistake, their conscience is clear, and there is no justification for Equity's intervention:[31]

> What is there in principle, or in authority binding upon this court, which requires a person who has acquired a leasehold interest on terms upon which he intended to obtain it, and who thought when he obtained it that the lessor intended him to obtain it on those terms, either to lose the leasehold interest, or, if he wished to keep it, to submit to keep it only on the terms which the lessor meant to impose but did not? In point of principle, we cannot find that this should be so.

The position since *Riverlate* therefore appears to be that if the defendant has no knowledge of the plaintiff's mistake, and assumes that the written document represents the parties' common intention, there is no ground for rectification or rescission. Conversely, if the defendant does know of the plaintiff's mistake, the appropriate remedy is rectification.

Stephen Waddams argues that rectification accompanied by enforcement goes too far even in cases where the non-mistaken party knows of the other side's mistake.[32] Actual knowledge is not enough to justify imposing the plaintiff's understanding of the bargain on the defendant, "for knowledge of another's mistake is not the same as a manifestation of assent to the other's terms".[33] He continues:[34]

> Knowledge is always amply sufficient reason for denying enforcement to the non-mistaken party; it is not necessarily sufficient reason for forcing on the non-mistaken party the intention of the other … .

A full discussion of the propriety of rectification and enforcement is beyond the scope of this article. Despite earlier doubts, the courts now

28 See, for example, *May v Platt* [1900] 1 Ch 616 (Ch) at 618–619 and 623.
29 *Riverlate Properties Ltd*, above n 18, at 145.
30 At 144.
31 At 140–141.
32 SM Waddams "Comment: *Riverlate Properties Ltd v Paul*" (1975) 53 CanBar Rev 339 at 339.
33 SM Waddams *The Law of Contracts* (6th ed, Canada Law Book, Toronto, 2010) at [344].
34 At [344].

widely recognise the availability of rectification accompanied by enforcement. That being accepted, the discussion in this article revolves around the proper basis for Equity's intervention in circumstances of unilateral mistake. As has been canvassed above, the orthodox view is that rectification is justified where the non-mistaken party has actual knowledge (which may or may not include wilful blindness) of the mistake, such that their conscience requires Equity's correction.

An Alternative View

Alternatively, Professor McLauchlan proposes that rectification for unilateral mistake is simply the "routine result" of applying the ordinary objective principles of contract formation.[35] It is common ground that a contract is formed when the parties agree to the same terms in the same sense. Whether this has occurred is to be determined objectively. As Blackburn J famously stated in *Smith v Hughes*:[36]

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

McLauchlan's proposal rests on a conceptualisation of the objective theory as an amalgam of the subjective and objective.[37] The promisee's actual knowledge and beliefs are relevant because the promisee cannot enter into a contract in the belief that their terms are being assented to if they *know* that the counterparty's intention is otherwise.[38] Thus, the concern is whether a person *in the position of the promisee* would reasonably believe that the promisor agreed and intended to be bound by apparent terms. This is often termed "promisee objectivity" and contrasts with "detached" or "pure" objectivity — whereby the parties' subjective intentions and knowledge are deemed irrelevant.

According to promisee objectivity, a contract is formed when the promisee is led reasonably to believe, and does believe, that the promisor intends to be bound by the terms as understood by the promisee. Insofar as rectification for unilateral mistake is concerned,

35 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 639.
36 *Smith v Hughes* (1871) LR 6 QB 597 (QB) at 607.
37 DW McLauchlan "Objectivity in Contract" (2005) 24 UQLJ 479 at 479–480.
38 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 611.

the question is said to be the same.[39] The remedy will be available where the mistaken party was led by the non-mistaken party to reasonably believe that their understanding of the agreement was being assented to. Therefore, "in [McLauchlan's] view, it is neither necessary nor appropriate to conclude that unilateral mistake rectification is based on equitable wrongdoing".[40] McLauchlan's argument is that, whilst a successful claim will often call into question the candour of the defendant, dishonesty or unconscionability ought not to be the *basis* of the claim.[41] Conversely, awareness of the mistake alone will be insufficient to justify rectification if the plaintiff cannot establish that they were led reasonably to believe that their understanding of the terms was being assented to.[42] Waddams similarly argues that "the test should be, in my view, the reasonableness of the expectation rather than proof of actual knowledge".[43]

McLauchlan concludes that rectification can be properly ordered for unilateral mistake in two closely related situations.[44] The first is where, prior to the written contract, the parties had formed an actual common intention regarding a particular term, but that term is omitted or misdescribed in the writing. In such circumstances, the non-mistaken party's assent to the written terms without drawing attention to the error leads the other side to reasonably believe that the earlier agreement still applies. The second category of case is where there is no prior common intention regarding the contentious term, but misleading conduct prior to or at the time of signing justifies the conclusion that the mistaken party was led to reasonably believe that their understanding of the term was being assented to. However, if in the latter situation there is mere awareness of the mistake, the non-mistaken party should not be subjected to the terms as understood by the mistaken party. Instead, the proper result is that the agreement is treated as void for want of consensus ad idem.

Whilst noting that the first category of case is effectively one of common mistake, McLauchlan regards the two situations as "essentially the same. In neither of them is there an actual common intention at the relevant time, the signing of the written contract."[45] In each situation the party claiming relief must establish an objective consensus on the terms they seek to rely on, "i.e. that she was led

39 At 620.
40 At 621.
41 At 620.
42 At 621.
43 Waddams, above n 32, at 341.
44 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 620–621.
45 At 621.

reasonably to believe that her understanding of the terms of the contract had been accepted by the other party".[46] If such a consensus is established, "rectification will be justified because the written contract failed to record the objective consensus, not because of the conduct itself".[47] In that sense, according to McLauchlan, the claimant is not relieved from the contract that they apparently made, but is given the right to enforce the contract that was actually made.

According to McLauchlan, this conceptualisation places rectification for unilateral mistake on the same footing as rectification for common mistake.[48] The object in both situations is to give effect to the objective consensus, which the written agreement fails to reflect. The effect of rectification for unilateral mistake is not to impose on the defendant an agreement that they never made, but to give effect to the true bargain; the bargain on the terms intended by the claimant, who was led by the defendant to reasonably believe that those terms were being assented to.

McLauchlan argues that in shifting the focus from the defendant's conduct to the objective consensus, courts will cease being distracted by such peripheral issues as:[49]

> … must the defendant have actual knowledge of the mistake or will constructive knowledge suffice? What does actual knowledge entail? Is it necessary for the claimant to establish sharp practice or unconscionable behaviour on the part of the defendant? Does a finding of actual knowledge on the part of the defendant necessarily impute dishonesty?

If his approach is adopted, McLauchlan argues that:[50]

> … all of these issues become subordinated to the essential question … was the mistaken party led reasonably to believe that the terms he or she intended to agree to were accepted by the other party? An affirmative answer may be warranted even if the evidence falls short of establishing actual knowledge of the mistake and/or unconscionable conduct on the part of the defendant.

46 At 621.
47 At 621.
48 At 609.
49 At 621.
50 At 621–622.

III EVALUATION

Whilst McLauchlan's approach is undeniably elegant, and certainly appears simpler at first glance than the somewhat complex picture painted by the aforementioned case law, this article respectfully suggests that McLauchlan's alternative doctrinal basis for rectification for unilateral mistake is against principle and practically unwise.

Against Principle

As has been foreshadowed, this article contends that to do as McLauchlan suggests, and remove unconscionability on the part of the defendant as the basis for rectification for unilateral mistake, runs contrary to long-standing principle. I refer to unconscionability not in an abstract sense, but as shorthand for actual knowledge of the other party's mistake, as has been required by the courts. In the interests of clarity, this section will be split into two parts. The first will address Equity's historical preoccupation with unconscionability. The second will discuss the development of rectification for both common and unilateral mistake. I submit that both subjects have significant implications for the doctrinal basis of rectification for unilateral mistake.

1 Equity's Historical Preoccupation with Conscience

Rectification is an equitable remedy. It hardly needs repeating that historically, Equity has been preoccupied with correcting the conscience of the defendant, with the protection of claimants serving merely as a by-product. As Leonard Bromley stated:[51]

> [Equity] sought primarily to relieve the conscience of the potential wrongdoer not, as one might think, to assist him who would otherwise be wronged. The latter may be the consequence but was *not the primary object* of the court's intervention.

These principles comfortably align with the orthodox basis for rectification for unilateral mistake. The remedy is only available where the non-mistaken party *knows* of the other side's mistake, thereby rendering it unconscionable to insist on compliance with the written terms. The remedy is *promisor*-centric — the focus being the state of mind of the promisor, not the promisee. In contrast,

51 Leonard Bromley "Rectification in Equity" (1971) 87 LQR 532 at 533 (emphasis added).

McLauchlan's proposal is *promisee*-centric — it is predicated on the need to protect the innocent and reasonable promisee.

Adopting McLauchlan's conceptualisation, rectification for unilateral mistake is theoretically available even where the promisor has no knowledge of the mistake, and therefore maintains a clear conscience. Such a case would undoubtedly be rare; the fact that the promisee has been led reasonably to believe that their terms have been assented to will almost always call into question the defendant's conscience. Nonetheless, McLauchlan's proposal removes unconscionability as the basis of the remedy. To adopt a classic metaphor, this puts the cart before the horse.

If the defendant retains a clear conscience, what is the basis for Equity's intervention? That very question was discussed by Russell LJ in *Riverlate Properties Ltd v Paul* in relation to rescission on the basis of mere unilateral mistake (where the mistake is not known to the other side). Yet his reasoning also rings true for rectification in the absence of knowledge of the mistake on the defendant's part. The relevance of his comments justifies their quotation in full:[52]

> Is the lessor entitled to rescission of the lease on the mere ground that it made a serious mistake in the drafting of the lease which it put forward and subsequently executed, when (a) the lessee did not share the mistake, (b) the lessee did not know that the document did not give effect to the lessor's intention, and (c) the mistake of the lessor was in no way attributable to anything said or done by the lessee? … In point of principle we cannot find that this should be so. If reference be made to principles of equity, it operates on conscience. *If conscience is clear at the time of the transaction, why should equity disrupt the transaction*? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater party of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties.

The very basis for Equity's intervention in circumstances of mistake is the unconscionability of the defendant's attempts to rely on the written agreement, having had actual knowledge of the other party's mistake at the time of signing. For common mistake, the unconscionability

52 *Riverlate Properties Ltd*, above n 18, at 140–141 (emphasis added).

arises after the conclusion of the agreement, when the non-mistaken party becomes aware of the mistake and seeks to take advantage of it. For unilateral mistake, the unconscionability arises prior to formation. It exists in the non-mistaken party's awareness of the other party's mistake and their acquiescence in that mistake at the moment of signing. At all times Equity's concern is with the defendant's conscience. To remove the requirement that the non-mistaken party know of the other's mistake is to alienate rectification for unilateral mistake from its equitable origins.

Moreover, to foist upon the promisor a bargain based on a mistake of which they had no knowledge is itself against conscience. It is the presence of actual knowledge that has the crucial effect of shifting the equities the other way. Although the result in most cases would be unaffected, abandoning the actual knowledge requirement would make rectification for unilateral mistake unrecognisable to the principles of Equity.

2 The Development of Rectification for Common and Unilateral Mistakes

Having dealt with the historical function of Equity, I now turn to consider the development of rectification more specifically. The object of this discussion is to suggest that adopting a position that theoretically allows rectification in situations of unilateral mistake where the mistake is unknown to the other side would stretch an already conceptually strained doctrine.

The starting point must be that parties are bound by an agreement to which they append their signatures, whether or not they have read and understood its terms.[53] This proposition is of almost sacrosanct status and is rigorously enforced. Abandoning it would introduce intolerable uncertainty into everyday transactions. Persons could escape contractual obligations with absurd ease, merely citing their misunderstanding of a particular term, however unreasonable. The written agreement is therefore paramount, and there is great concern to clearly define — and therefore limit — the circumstances under which a party can escape the effect of a signed agreement.

Rectification for common mistake is a recognised exception. The parties are excused from being bound by their signatures on the basis that an agreement was reached, yet the writing failed to accurately record it.[54] For this reason, rectification for common

53 *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 (KB) at 403.

54 *Crane v Hegeman-Harris,* above n 4, at 664 as cited in *Jocelyn v Nissen,* above n 4, at 95 as cited in *Dundee Farm Ltd*, above n 4, at 651.

mistake requires proof of a prior accord continuing up until execution. The court does not make an agreement for the parties, but rather gives effect to the parties' *real agreement*.[55]

Having said that, the courts were initially reluctant to depart from the written agreement even in situations of what was probably a common mistake.[56] Admitting parol evidence to establish an agreement on terms other than those described in the writing was exceptional, because *the writing itself* was regarded as the expression of the parties' intentions. As such, to depart from the writing the court would require "irrefragable evidence"; that is, evidence "of the highest nature" of the parties' mistake.[57] In effect, what was required was something akin to an admission of the mistake by the defendant.[58] Only then could the court be sure that the defendant was behaving unconscionably in attempting to enforce the agreement; that he or she had shared the mistake, and therefore knew that the writing had recorded the agreement inaccurately. Lord Chelmsford summarised this judicial attitude in *Fowler v Fowler*:[59]

> The power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties and under a mutual mistake is one which has been frequently and most usefully exercised. But it is also one which should be used with extreme care and caution. To substitute a new agreement for one which the parties have deliberately subscribed ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description.

Further limits on the availability of relief in situations of alleged common mistake included doubt about whether an order for rectification could be accompanied by an order for specific performance. In *Wollam v Hearn* the Court refused to enforce the rectified agreement, instead limiting the relief to releasing the claimant from liability under the contract.[60] These limitations have since been relaxed. The purpose of citing them here is to demonstrate the caution with which judges have historically approached the question of rectification. Whilst rectification for common mistake was recognised, its ambit was limited by high evidential standards, and it was a means of avoiding contractual liabilities rather than enforcing them. It is clear that the courts regarded rectification for common

55 Sissons, above n 1, at 870.
56 See *Countess Dowager of Shelburne v Morough Earl of Inchquin* (1784) 1 Bro CC 338, 28 ER 1166 (Ch).
57 *The Marquis Townsend v Stangroom* (1801) 6 Ves 328, 31 ER 1076 (Ch) at 1078–1079.
58 *Attorney General v Sitwell* (1835) 1 Y & C Ex 559, 160 ER 228 (Exch) at 232.
59 *Fowler v Fowler* (1859) 4 De G & J 250, 45 ER 97 (Ch) at 103.
60 *Wollam v Hearn* (1802) 7 VesJr 211, 32 ER 86 (Ch) at 90.

mistake as a limited exception to the fundamental principle that parties are bound by the signed agreement. Its application was justified on the basis that the court is giving effect to the parties' real agreement, thus the need for a continuing common intention prior to signing.

No such requirement exists for unilateral mistake. In cases of unilateral mistake, one party is not mistaken and intends to contract according to the terms expressed in the writing. How then can it be said that the court is determining the parties' "real agreement"? No such agreement exists. The court seems to be doing exactly what is prohibited — making an agreement for the parties in spite of the writing. For precisely this reason, earlier courts rejected outright the possibility of rectification for unilateral mistake; the mistake had to be common to justify the remedy.[61] As it was put more recently by Slade LJ (with whom Oliver and Robert LJJ agreed) in *The Nai Genova*:[62]

> In principle, the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect their true agreement. It follows that the general rule is that rectification will not be granted unless there has been a mistake in verbal expression *common to all parties.*

It is clear since *Roberts*[63] that rectification is now available in circumstances of unilateral mistake.[64] However, the conceptual history of the doctrine must be recognised. Rectification for *common* mistake developed as an exception to the principle that parties are bound by the written agreement, which serves as the ultimate expression of their intentions. Rectification for *unilateral* mistake is an exception to the requirement that the mistake must be common to justify granting relief. As such, rectification for unilateral mistake *is* a drastic remedy that should only be deployed in compelling circumstances. As discussed above, it is consistent with Equity's preoccupation with conscience that those circumstances comprise actual knowledge of the mistake on the part of the defendant, such that it is against their conscience to insist on adherence to the writing. That was correctly the position taken in *Roberts*.

The above is in general harmony with the arguments made by David Hodge QC in his recent text, *Rectification: The Modern Law*

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61 *Fowler*, above n 59, at 102; and see also *Metropolitan Counties, etc Society v Brown* (1859) 26 Beav 454, 53 ER 973 (Ch).

62 *The Nai Genova*, above n 11, at 359.

63 *A Roberts & Co Ltd*, above n 5.

64 One of the earliest recognitions of the possibility of rectification of unilateral mistake is *Garrard v Frankel*, above n 25, in which Sir John Romilly MR stated, at 964, that although a common mistake is ordinarily required, the court "would interfere" where one party knew of the mistake and seeks to take advantage of it.

and Practice. Admittedly, this book is "intended — and unashamedly so — for the legal practitioner, who is concerned with the application of the law to the particular fact-situation" and is therefore more concerned with the law as it is rather than the law as it should be.[65] Nonetheless, Hodge's elucidation of the prevailing principles governing rectification for unilateral mistake is a powerful recommendation for maintaining the status quo: [66]

> It is suggested that the reason why the formulation of the test for rectification for unilateral mistake proposed by Professor McLauchlan is inadequate is that by entering into a written contract, a party is normally to be taken as assenting to the terms it contains.

Hodge continues:[67]

> Good reason must be demonstrated before holding a contracting party to terms which differ, not only from those which he subjectively intended, but also from those to which he objectively assented by his conduct in signing a document which records those terms.

McLauchlan considers that:[68]

> [Hodge's] analysis is surprising because, … the common law rule in *L'Estrange v Graucob* [the rule by which parties are bound by written agreements which they have signed, whether or not they have read and understood their terms] … has never been invoked to defeat a rectification claim.

Although this is undeniably correct, it would be fallacious to say that there is no room for the principle that parties are bound by their written agreements where rectification is concerned. The principle is given recognition in the requirement that the non-mistaken party know of the other's mistake, such that it is unconscionable for them to attempt to enforce the writing. Equity remains respectful and complementary to the Common Law by only intervening in these narrowly defined and compelling circumstances.

65 David Hodge *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (Thomson Reuters, London, 2010) at ix.
66 At [4–22].
67 At [4–22].
68 McLauchlan "Refining Rectification", above n 7, at 96.

Practically Unwise

This article submits that, aside from sitting uneasily with long-standing equitable principles, adopting the notion that rectification for unilateral mistake is not dependant on the non-mistaken party's knowledge of the other's mistake would produce practical difficulties.

McLauchlan accurately observes that his proposal leads to the same result reached in most leading cases, although it is not reflected in the reasoning of the courts.[69] In the leading case *A Roberts & Co Ltd v Leicestershire County Council*, for example, the Court awarded rectification on the basis that the evidence established actual knowledge of the mistake on the part of the defendant.[70] McLauchlan argues that his theory achieves the same result "by more appropriate and transparent"[71] reasoning:[72]

> The decision is consistent with the objective principle. … The defendant had led the plaintiff reasonably to believe that the completion date was 18 months. In other words, there was, in an objective sense, a common intention prior to the execution of the written contract. And, having learned that the proposed change had not been picked up let alone agreed to, the defendant could only insist on performance of the contract as written by specifically calling attention to the change.

This statement aptly captures the practical difficulty arising from McLauchlan's proposal. McLauchlan regards the objective consensus as the agreement as understood by the mistaken party. Yet what is the purpose of the written agreement, if not to demonstrate the terms to the objective outsider? Surely the written agreement is the ultimate indication of the parties' objective consensus. McLauchlan's suggestion that the writing can be demoted in favour of an objective consensus based on the parties' conduct may introduce inconvenient uncertainty into pre-contractual negotiations.

Moreover, it is more palatable in a case like *Roberts* — where the defendant departed from a prior consensus knowing that the other side still believed there to be consensus — to state that the non-mistaken party should be held to the prior accord. But what of McLauchlan's second category of case where there is no prior consensus? As previously observed, it is possible for the non-mistaken party to lead the other side to reasonably believe that their terms are

69 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 621.
70 *A Roberts & Co Ltd*, above n 5.
71 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 624.
72 At 625.

being assented to, having no knowledge of the mistake themselves. In these circumstances, the non-mistaken party might be completely unaware of the content of the other side's understanding of the agreement. Non-mistaken parties could feasibly be held to agreements in accordance with terms that they have not anticipated or prepared for, despite having secured a written agreement in accordance with their own understanding.

This danger is illustrated by the result in *Daventry District Council v Daventry & District Housing Ltd*.[73] *Daventry* involved an agreement whereby Daventry District Council (DDC) transferred its housing stock and staff to Daventry and District Housing Ltd (DDH). The dispute was about who bore responsibility for the payment of a £2,400,000 deficit associated with the staff pension scheme. Due to a term inserted by DDH somewhat late in the negotiations, the contract provided that DDC would be responsible for the deficit. DDC signed the contract not noticing the term or its significance, acting on the understanding that the contract conformed to the position at the outset of the negotiations whereby DDH would be responsible for the deficit (although that position was itself somewhat ambiguous). The majority of the Court of Appeal granted rectification on the basis of common mistake, finding that both parties were mistaken in the sense contemplated in *Chartbrook Ltd v Persimmon Homes Ltd*.[74] McLauchlan argues that the case is better understood as one of unilateral mistake, in which rectification would be granted on the basis that DDH led DDC to reasonably believe that DDH would have responsibility for the deficit.[75] I agree with McLauchlan that the case is better framed as one of unilateral mistake, but the result he suggests (which is the same as the result in the Court of Appeal) is, respectfully, problematic. DDH incurs a liability to the tune of £2,400,000 that it had not intended to accept when the contract was signed. That is in spite of DDC having read the contract (with the term included) numerous times before signing it and raising no objection. Indeed, DDH sought and received DDC's approval of the term. In those circumstances, it seems far from unreasonable for DDH to conclude that its term had been assented to. A finding of actual or even constructive knowledge of DDC's mistake would therefore be inappropriate.[76] Nonetheless, DDH was unable to rely on their written

73 *Daventry District Council v Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333.

74 See *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [59]. This definition has been subject to criticism, a discussion of which is beyond the scope of this article.

75 McLauchlan "Refining Rectification, above n 7, at 101.

76 The Judges of the Court of Appeal took different positions on the state of DDH's knowledge. The majority (Toulson LJ and Neuberger MR), for the reasons they gave at [160]–[170], took the view that other financial aspects of the transaction made it inconceivable that DDC would accept liability for deficit, thereby putting

contract. That result will understandably make commercial players and their legal representatives nervous. McLauchlan argues that:[77]

> Security of contract is achieved because where a promisee establishes that the promisor led her reasonably to believe that he agreed to and intended to be bound by certain terms, the promisor is so bound notwithstanding that he did not actually agree to or intend to be bound by those terms.

This article respectfully submits that the conclusion ought to be that this approach undermines security of contract.

What of the practical benefits of adopting McLauchlan's proposal? The ability to avoid the quagmires of unconscionability and constructive knowledge is surely the greatest of these. McLauchlan also argues that the courts' undue emphasis on the propriety of the defendant's conduct has led to rectification being denied in circumstances where it ought to have been granted. Regarding *George Wimpey UK Ltd v VI Construction Ltd*,[78] McLauchlan argues:[79]

> This was a case where the claimant probably did reasonably believe that its understanding of the term in question had been accepted, but its rectification claim was primarily denied on the basis that the court was not satisfied that the defendant's agents had actual knowledge of the mistake or that they dishonestly set about taking advantage of it.

The defendant, VI Construction (VIC), entered into a contract for the sale of land to the plaintiff for the purposes of a residential development. The contract provided for the payment of an initial price, as well as further payments amounting to half the proceeds of the sale of the residential units beyond an agreed base figure. A primary focus of the parties' negotiations concerned a clause containing a complex formula for adjustment of the base figure depending on the number and size of units eventually built. That formula contained a factor "E", which ensured that certain potential enhancements (with an estimated value of £2,000,000) would be to the benefit of Wimpey. The trial judge found that the parties were in consensus as to this point. Unfortunately, VIC's representative sent Wimpey a revised formula in which factor "E" was omitted, and this went unnoticed by Wimpey's sole negotiator, Mr Ketteridge. The trial

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DDH on notice of their mistake. Etherton LJ (dissenting) took the position that knowledge was not established for the same reasons that I have given.

77 McLauchlan "Refining Rectification", above n 7, at 89.

78 *George Wimpey UK Ltd*, above n 13.

79 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 628. McLauchlan prudently expresses some tentativeness about this conclusion on the basis that the case "turned on perceived pleading and evidential deficiencies": at 628.

judge found that although this omission was initially a mistake by an officer of VIC, it was noticed before being sent to Mr Ketteridge and no effort was made to correct it. The Court of Appeal overturned the trial judge's decision to grant rectification on the basis of known unilateral mistake. The leading judgment was delivered by Peter Gibson LJ, who found that because Wimpey was a "heavyweight" player in the residential property market and VIC "had no relevant experience", VIC could reasonably assume that Wimpey would notice the omission of "E", and that Wimpey's agreement to its omission must have been a conscious decision.[80] Therefore, it could not be said that VIC had actual or even constructive knowledge of Wimpey's mistake.

The facts of the case raise an important question: what of the situation where the non-mistaken party does not actually know, but merely hopes and suspects, that their deceptive conduct has induced the other party into a mistake? Surely justice demands that rectification be available in such circumstances. McLauchlan argues that rectification is denied in cases like *George Wimpey* because of the requirement that the defendant actually know of the plaintiff's mistake.[81] Meanwhile, McLauchlan asserts, such cases are said to fall comfortably within the notion that the mistaken party has been led reasonably to believe that their understanding of the terms has been assented to, allowing rectification to be granted without conceptual difficulty.[82] This article submits that such cases are better conceptualised in terms of constructive or "Nelsonian" knowledge, where a party wilfully shuts their eyes to the obvious. As discussed in Part II above, this standard of knowledge was accepted as sufficient to ground an application for rectification for unilateral mistake in *Commission for the New Towns v Cooper (Great Britain) Ltd*.[83] That decision was acknowledged by the Court of Appeal in *George Wimpey*, yet the Court was unwilling to find constructive knowledge on the evidence available.[84] Such an approach is consistent with Equity's focus on the defendant's conscience, unlike McLauchlan's suggestion that the focus ought to be on the reasonable understanding of the promisee. Even so, the courts should adopt an extremely cautious attitude toward granting rectification on this basis. The concern is with situations of constructive knowledge coupled with an intention that the other party be mistaken and the taking of steps to bring that mistake about.

80 *George Wimpey UK Ltd*, above n 13, at [46].
81 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 631–632.
82 At 630.
83 *Commission for the New Towns*, above n 22, at 280.
84 *George Wimpey UK Ltd*, above n 13, at [45] and [76].

IV THE CONTRACTUAL MISTAKES ACT 1977

A discussion of the effect of unilateral mistakes on contracts in New Zealand would be incomplete without reference to the Contractual Mistakes Act 1997. In defining the problem that the Act seeks to address, the Contracts and Commercial Law Reform Committee observed:[85]

> The law which is presently dealt with as 'mistake' in the textbooks is in fact a fragmented series of doctrines, some of which are overtly announced as rules relating to mistake, and others of which are based upon different concepts, such as failure of 'offer and acceptance to correspond'. … This can result in different techniques of decision being adopted from case to case.

Thus, the Act's explicit purpose is "to mitigate the arbitrary effects of mistakes on contracts by conferring on courts appropriate powers to grant relief in the circumstances mentioned in section 6".[86] Section 6(1)(a)(i) provides:

> **6 Relief may be granted where mistake by one party is known to opposing party or is common or mutual**
>
> (1) A court may in the course of any proceedings or an application made for the purpose grant relief under section 7 to any party to a contract—
>
> (a) if entering into that contract—
>
> (i) that party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or 1 or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); … .

At first glance, s 6(1)(a)(i) appears to cover the ground relating to unilateral mistake. It effectively provides that relief for unilateral mistake is only available where the non-mistaken party knows of the other side's mistake. This appears to exclude relief for unilateral mistake in any other circumstances. That impression is reinforced by s 5(1), which provides that the Act is to be a "code" that shall:

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85 Contracts and Commercial Law Reform Committee *Report on the Effects of Mistakes on Contracts* (May 1976) at [5].

86 Contractual Mistakes Act 1977, s 4(1).

> … have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party.

However, s 5(2)(b) provides that "[n]othing in this Act shall affect [among other things] the law relating to the rectification of contracts." Thus, the law regarding rectification for unilateral mistake is prima facie preserved.

Nevertheless, in *Tri-Star Customs and Forwarding Ltd v Denning* Henry J rejected the plaintiff's claim for rectification for unilateral mistake in Equity on the basis that:[87]

> What is abundantly clear … is that in the context of the Act the law of rectification referred to is that which allows a Court to vary the terms of a concluded contract which does not express the true intention of the parties to it so as to conform with that intention.

In effect, Henry J ruled that the only "law relating to the rectification of contracts" preserved by s 5(2)(b) is rectification for common mistake. This article respectfully argues that this is an erroneous conclusion which ought to be revisited.

First and foremost, this reading of the statute is contrary to the plain meaning of its words. Section 5(2)(b) makes no distinction between rectification for common and unilateral mistake. To do so was entirely open to Parliament, yet it preferred to preserve "rectification" generally.

In reaching his conclusion, Henry J appears to have been heavily influenced by s 6(1)(a)(i), which provides that relief is only available where the mistake is known to the other side. In contrast, Equity potentially regards constructive knowledge as sufficient.[88] His Honour reasoned:[89]

> If the exclusion in s 5(2)(b) is read as covering equitable relief for unilateral mistake, then s 6(1)(a)(i) really becomes at best otiose, but probably also inconsistent with the equitable jurisdiction now relied upon … .

That is consistent with the apparent intention of the Contracts and Commercial Law Reform Committee, who, having "devoted a good deal of time to the consideration of the question", concluded that:[90]

87 *Tri-Star Customs and Forwarding Ltd*, above n 10, at 39.
88 *Commission for the New Towns*, above n 22, at 280.
89 *Tri-Star Customs and Forwarding Ltd*, above n 10, at 39.
90 Contracts and Commercial Law Reform Committee, above n 85, at [20].

> Where only one of the parties has been mistaken, we do not think that relief should be available to him unless the evidence is sufficient to show that the other parties knew of his mistake.

Yet the Committee also took the view that "the court's powers in [regards to rectification] do not require statutory modification as part of the reform of the law of mistake".[91] Moreover, as McLauchlan observes, s 6(1)(a)(i) would still be useful in situations where rectification was unavailable because the mistake did not relate to the terms of the contract — the definition of mistake being seemingly broader under the Act than in Equity.[92] McLauchlan argues that the decision in *Tri-Star* is also erroneous in that it regards the purposes of rectification for common and unilateral mistake as different, when in fact both are directed at giving effect to the parties' objective consensus.[93] As previously discussed, that particular reasoning is to be doubted.

Henry J's reference to the inconsistency between the Act and the position in Equity no doubt encompasses the requirement under s 6(1)(b)(i) that the mistake result in a "substantially unequal exchange of values".[94] That requirement does not exist in Equity. Section 6(1)(b)(i) is perhaps the most obvious example of the Act's attempt to:[95]

> … strike a balance between avoiding the unfairness of holding a party to an inappropriate transaction which was not fully assented to, and protecting other parties to the contract (and those claiming under them) who have a legitimate interest in seeing the contract performed.

It is an expression of the Committee's policy that "[t]he mere fact that a contract has become somewhat different from what was intended ought not to warrant relief unless the contract has also become unfair."[96] Yet it is plausible that Parliament intended that rectification for unilateral mistake continue to be available as an alternative cause of action where s 6(1)(b)(i) precludes relief under the Act, and Parliament plainly provided as much by enacting s 5(2)(b).

Moreover, if relief for unilateral mistake is confined to situations resulting in a "substantial unequal exchange of values" as prescribed by s 6(1)(b)(i), there is potential for injustice. Consider the application of the Act to the facts of *A Roberts & Co Ltd v*

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91 At [12].
92 McLauchlan "Rectification for Unilateral Mistake", above n 7, at 364.
93 At 363.
94 See *Tri-Star Customs and Forwarding Ltd*, above n 10, at 39.
95 Contracts and Commercial Law Reform Committee, above n 85, at [5].
96 At [24].

Leicestershire County Council. In that case there was clearly a mistake known to the other side within the meaning of s 6(1)(a)(i), but was there a "substantial unequal exchange of values"? The Court recognised that a longer completion period would ordinarily result in a greater price.[97] The addition of a further year — almost doubling the completion period — was therefore significant. On the other hand, as the council contended, it remained open to the plaintiffs to complete the job within 18 months, as was their stated intention.[98] On that basis it could be powerfully argued that no substantial unequal exchange of values transpired. If *Tri-Star* is correct, relief would be denied if the facts of *Roberts* were to arise in New Zealand following the enactment of the Contractual Mistakes Act. That is a sorry result indeed.

Henry J also objected to the preservation of rectification for unilateral mistake on the basis that, at Equity, a contract can also be rescinded or annulled by reason of unilateral mistake, reasoning that, "[a]t equity relief is therefore not confined to rectification, yet s 5(2)(b) is concerned only with rectification."[99] Yet it is feasible that in enacting s 5(2)(b) Parliament intended to preserve the equitable jurisdiction to rectify, whilst excluding the jurisdiction to rescind or annul. That is a sensible reading of the plain words of s 5(2)(b).

Moreover, the decision in *Tri-Star* makes no mention of numerous High Court and Court of Appeal decisions handed down since the passing of the Act in which the Courts have recognised the jurisdiction to rectify on the basis of unilateral mistake independent of the legislation.[100] For example, in *Jenkins v Lind* the High Court (with which the Court of Appeal agreed) recognised the jurisdiction to rectify on the basis of unilateral mistake, although rectification was denied because the evidence fell short of establishing that the defendant knew of the mistake when the contract was signed.[101] The decision was cast in terms of the common law rather than the Act. Similarly, in *March Construction Ltd v Christchurch City Council* Williamson J accepted that rectification for unilateral mistake is available where the criteria in the leading authorities are met.[102] However, rectification was denied on the basis that the mistake did not

97 *A Roberts & Co Ltd*, above n 5, at 547–548.
98 At 550–551.
99 *Tri-Star Customs and Forwarding Ltd*, above n 10, at 39.
100 See, for example, *Wellington City Council v New Zealand Law Society* [1990] 2 NZLR 22 (CA); *Jenkins v Lind* CA147/87, 20 September 1990; *Wellington City Council v New Zealand Law Society* [1988] 2 NZLR 614 (HC); *Wellington City Council v Tower Corp Ltd* HC Wellington CP101/87, 25 June 1992; *Henderson v Lentherick Morny (Cyclax) (NZ) Ltd* HC Wellington CP263/92, 15 October 1992; *March Construction Ltd v Christchurch City Council* HC Christchurch CP326/92, 25 March 1994; *Eldamos Investments Ltd v Force Location Ltd* (1995) 17 NZTC 12,196 (HC); *Laurence v Steffert Farms Ltd* HC New Plymouth AP21/96, 23 May 1997; and *Pendergast v Attorney-General* (1998) 3 NZ ConvC 192,729 (HC).
101 *Jenkins v Lind* HC Dunedin CP118/86, 26 August 1987 at 32–36.
102 *March Construction Ltd*, above n 100, at 3–5.

relate to the terms of the contract.[103] As such, *Tri-Star* should be seen as an outlier that ought to be revisited.

Section 5(2)(b) means what it says: "Nothing in this Act shall affect … the law relating to the rectification of contracts". Confronted with s 5(2)(b), Henry J appears to have found the plain meaning of the words problematic, and therefore pursued a strained interpretation based on parliamentary intent. Of course, a purposive approach to statutory interpretation is now the norm. However, s 5(1) of the Interpretation Act 1999 provides: "The meaning of an enactment must be ascertained *from its text* and in the light of its purpose".[104] The words of the enactment still matter.

V CONCLUSION

This article submits that the issues arising from the forerunning discussion are of substantial practical significance. Rectification claims are a common feature of modern commercial litigation. This trend shows no signs of abating. As David Hodge QC observed during his practice at the Chancery Bar, mistakes in the creation of legal documents are on the increase:[105]

> … fuelled by a combination of factors, including the ever-increasing complexity of legal documentation, the ever-reducing time-frame within which transactions fall to be concluded, the ever-rising pressure on legal costs, and the greater potential for error inherent in the ever-expanding resort to multiple drafts and computer-generated documents.

As such, the principles governing rectification should be clear and predictable in their application. Arguably, the principles governing rectification for unilateral mistake are not presently so.

In response, Professor McLauchlan offers a simple solution. According to McLauchlan, the courts ought not to be concerned with whether the non-mistaken party knew of the other side's mistake, but with whether the mistaken party was led reasonably to believe that their terms were being assented to. McLauchlan describes this approach as "a return to first principles", placing heavy reliance on Lord Blackburn's famous description of the objective theory in *Smith v Hughes*.[106] It is respectfully submitted that McLauchlan's theory is

103 At 6–7.
104 (Emphasis added).
105 Hodge, above n 65, at ix.
106 McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake", above n 7, at 630.

actually a departure from first principles as it divorces rectification from its equitable foundations, and places undue strain on the norm that parties are bound by agreements to which they append their signatures. This article further submits that such a proposal is likely to heighten existing uncertainty in the law, because it has the potential to elevate the parties' intention as indicated by their behaviour over and above their intention as expressed in the written agreement. As such, the orthodox approach to rectification for unilateral mistake is to be preferred. The remedy ought only to be available where the non-mistaken party has knowledge of the other side's mistake, such that their conscience is tainted by their attempts to rely on the written agreement.

At first glance, the orthodox approach appears to be in harmony with s 6(1)(a)(i) of the Contractual Mistakes Act, which provides that relief is available where a party's decision to enter into a contract is influenced by a mistake that was known to the other party. However, s 6(1)(b)(i) introduces an additional requirement that the mistake result in "a substantially unequal exchange of values", a condition that was not present in Equity. This requirement holds the potential for injustice. For this reason, and because of the explicit preservation of the law regarding rectification in s 5(2)(b), Henry J's decision in *Tri-Star Customs and Forwarding Ltd v Denning* that rectification for unilateral mistake does not survive the passing of the Act ought to be revisited.