

LITIGATING CONTRACTS: IF IT'S BROKE, FIX IT

Much as corporate solicitors strive for clarity and accuracy in drafting commercial contracts, that goal is not always achieved. What to do when the draftsman (and the contracting parties) err, a contractual dispute arises and the language of the contract fails to properly address the parties' intentions?

This article will focus on the equitable remedy of rectification. It will look at the substantive requirements of that remedy as well as the evidentiary burden that must be satisfied in order to obtain the remedy: In a claim for rectification, the standard of proof has been set higher than the usual balance of probabilities.

In the law of rectification the following distinction is critical: one must distinguish between a mistake in the underlying agreement or transaction itself, as opposed to a mistake in the way that the transaction has been expressed in writing. It is only the latter type of mistake which attracts the rectification remedy.

In *Snell's Principles of Equity* [London: Sweet & Maxwell Ltd., (2000) at page 693] the distinction is described thus: "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of the contract".

As recently expressed by Justice Ian Binnie on behalf of the Supreme Court of Canada in *Sylvan Lake Golf and Tennis Club Ltd.*, [2003] 1S.C.R. 678, "Rectification is predicated on the existence of a prior oral contract whose terms are definite and ascertainable. The plaintiff must establish that the terms agreed-to orally were not written down properly."

If the transaction itself is affected by some form of mistake (either mutual or unilateral) pertaining to some aspect of the contract (be it subject matter or contractual terms), then rectification is not available and one will have to litigate whether or not a contract exists and on what terms.

In order to obtain the rectification remedy, the parties seeking it must establish three elements:

1. The existence and nature of a common intention by the parties prior to the making of the document or instrument which contains the error or deficiency;
2. That the common intention remained unchanged as at the date the document or the instrument was made; and
3. That the document or instrument by mistake does not conform to the parties' prior common intention (see *Wasauksing First Nation v. Wasausink Lands Inc.*, [2004] O.J. No. 810 (Ont. C.A.) at paragraph 81).

As the Court of Appeal reminds us in the *Wasauksing* case, the "defining moment" with respect to the common intention element is at a time prior to the making of the faulty document or instrument. That common intention must exist prior to any effort to put the agreement into words, and it must remain in place and unaltered between that time and the execution of the faulty document.

To move to procedural considerations, the court in granting rectification is exercising equitable and discretionary jurisdiction. Since the rectification remedy essentially “re-writes” the parties’ contract, the jurisdiction is exercised sparingly. The authorities speak to its being exercised with great caution, and only after a heavy onus of proof has been discharged and the court is convinced by evidence that leaves “no fair and reasonable doubt” that the document before the court does not truly represent the parties’ agreement: see Fridman, *Law of Contract in Canada*, 5th Edition at page 827.

In discussing this standard of proof, the Supreme Court of Canada in *Sylvan Lake Golf and Tennis Club Ltd.* places it at less than the criminal standard but “going beyond the sort of proof that only reluctantly and with hesitation scrapes over the low end of the civil more probable than not standard”.

Courts have consistently used the phrase “convincing proof” in discussing the calibre of the evidence that will be necessary to satisfy the court that the parties’ actual agreement is something other than that which the writing reflects.

Finally, keep in mind that a rectification application can be challenged by strangers to the contract in certain circumstances. In *Aim Funds Management Inc.*, a recent decision of Justice Perell released on November 10, 2009, the applicant and respondents were non-arm’s length related parties whose written contracts contained mistakes involving the characterization of certain payments. Canada Revenue Agency was granted intervenor standing and challenged the position of the applicants and respondents as to how the payments between them should be characterized. The court ultimately granted rectification, noting that parties are entitled to contract in such a way as to avoid payment of tax. If their written contract mistakenly fails to express their intentions, rectification will not be refused simply because the revenue authorities will collect less tax as a result from the contracting parties as a result.