

## Book Review

### RECTIFICATION OF DOCUMENTS<sup>1</sup>

by John Tarrant

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1 The law on the rectification of documents is undoubtedly a vital field of study. It is impossible to properly understand, or construe, a document that is intended to have legal effect without possessing a working knowledge of the rules on rectification, together with its companion rules on the interpretation and implication of documentary provisions. Unfortunately it is also accurate to say that the law of rectification is presently as troubled as it is important.

2 In his newest book, *Rectification of Documents*, John Tarrant offers a compelling account and analysis of how rectification got into a mess and how it ought to resolve itself. There have arisen many debatable issues in rectification over the years – some of which are mentioned below by this reviewer, and almost all of which are touched upon by Tarrant in his work – but one disagreement among modern judges and scholars rises above all others: whether an exercise in equitable rectification is dominantly objective or subjective. As Leggatt LJ (as he then was) noted in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*<sup>2</sup> (“*FSHC*”), the controversial nature of this and other related issues is reflected in the unprecedented number of lectures in which judges or retired judges have commented on them. Tarrant’s latest contribution is no less timely or thoughtful.

3 Commencing with a chapter on the use of common law construction (or, as it is sometimes known, common law rectification) as a means of correcting errors in a document, Tarrant notes that minor errors and even more significant errors – such as clauses lacking commercial sense and improbable results like absurdities and inconsistencies – are correctible by a court in the course of interpreting the terms, without having recourse to rectification. There are useful commentaries on

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1 The Federation Press, 2020.

2 [2020] 2 WLR 429 at [130].

cases from across the Commonwealth, a theme repeated to great effect throughout the book, which help to elucidate the relationship between the interpretation and rectification of documents (although Singapore-based readers may note also the possible impact of the Evidence Act).<sup>3</sup> One of Tarrant's conclusions in this chapter is that even as the expansion of common law construction necessarily results in a narrower scope for equitable rectification, the latter should retain a meaningful role primarily to correct mistakes in the recording of agreements, such as where a document makes perfect commercial sense but does not accurately record what was previously agreed between the parties. Now that may yet be a fair assessment, but it is incompletely derived here in not having accounted for the separate role played by implication, which focuses the eye on what the parties would have viewed as commercially necessary to their agreement but resolves any disjoint between the putative and documented agreements in a different way.

4 Tarrant proceeds to examine many of the older authorities on rectification, which he says reveal three important historical developments. Initially rectification required only that there be, as a fact, a mistake between an agreement formed orally or in writing and a subsequent written contract following that earlier agreement. Later cases imposed a requirement for a common or mutual mistake; that in turn resulted in the creation of an exception permitting rectification for unilateral mistakes in certain circumstances. The third important development was that rectification became available not only where there was an antecedent contractual agreement but also to ensure conformance with a continuing common intention between the parties.

5 This sets the stage for Tarrant's key contention, one that is cogently maintained in the remainder of the book. His view is that the law on equitable rectification has taken a wrong fork in the path. There should only be two types of mistakes which possibly warrant rectification: a mistake in the recording of a previous agreement (whether that be an antecedent contractual agreement or a continuing common intention); and a mistake made during the formation of an agreement. The former type of mistake is the core case of rectification, whereas Tarrant freely admits that rectification for the latter type of mistake is much more questionable since rescission is generally the appropriate remedy. Coming back to mistakes in the recording of previous agreements, though, rectification is ultimately an exercise in *comparison*; the identity and number of persons who were mistaken or caused the mistake, or how the mistake came about, are irrelevant matters. In other words, rectification is generally

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3 Cap 97, 1997 Rev Ed. See in this regard Goh Yihan, "Clarifying Rectification in Singapore" (2015) 27 SAclJ 403.

concerned with agreements rather than intentions (the exception is where the document to be rectified has been executed by a single party, in which case its intentions do become directly relevant).

6 As Lord Hoffmann notes in a foreword to the book, this is the most important point in Tarrant's analysis. One is eventually issued an invitation to track that analysis and reach the following conclusions. First, the confusing dichotomy between common and mutual mistake and unilateral mistake can and should be abandoned. Secondly, the comparison undertaken between the previous agreement and the subsequently executed document is not a subjective exercise. What is instead required is to objectively and contextually determine what was agreed and to compare that with what has been recorded. Thirdly, any evidence of prior negotiations or declarations of intent, subjective or otherwise, may form the context for, but is not necessarily conclusive of, such a determination.

7 Whether or not all of Tarrant's conclusions are accepted in future, it is undeniable that he is backed by some authority. The thing is that his opponents have authority on their side too. For instance, the objective approach favoured by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd*,<sup>4</sup> his last case sitting in the House of Lords, has had to yield partially to the later *FSHC* decision, where the Court of Appeal stated that rectification of a document on the basis of a common continuing intention was warranted only by looking at the actual intentions of the parties with regard to the relevant matter. That is the law presently standing in England and Wales unless and until the Supreme Court intervenes in the debate. Judicial disagreements on yet other contentious issues exist elsewhere around the Commonwealth, including in Singapore. What seems certain is that many, if not most, of the issues will have to be resolved by reference to principle and policy, and not simply precedent. Those who have the opportunity to examine them should find Tarrant's proffered analysis a helpful contribution.

8 The final chapters of the book discuss rectification in other limited scenarios, such as where there has been fraudulent behaviour, and rectification in respect of unilateral documents like deeds poll and voluntary transactions, each usefully replete with supporting authority (although *Marley v Rawlings*<sup>5</sup> and *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*<sup>6</sup> are surprising omissions). The tome does not purport to be an exhaustive treatment of the law on rectification, and

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4 [2009] AC 1101.

5 [2015] AC 129.

6 [2002] 1 SCR 678.

that may be the reason why it does not address, or address fully, certain issues which recur in practice, such as the interaction of rectification with the *non est factum* plea or (as mentioned earlier) the rules on implication, or the role of estoppel or an entire agreement clause in a claim for rectification.

9 It leaves this reviewer only to say that *Rectification of Documents* is a beautifully crafted book and a work of solid foundation. Writing with enviable ease and familiarity, Tarrant has produced not just a captivating read but also a substantial thesis that is carried through powerfully and effectively. Every law library should possess a copy, and perhaps that will someday help to illuminate a way forward for its denizens in the tangled law of rectification.

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