M Leeming, “The limits of rectification” (2023) 17 *Journal of Equity* 122-138

The limits of rectification

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This article addresses three aspects of the law of ‘rectification’. The first is the importance of the labels used to name legal concepts, and the scope for confusion between so-called ‘rectification by construction’ and rectification in equity. The second is the proper scope of rectification in equity, which depends upon its relationship with common law rules and (in relation to wills) the role of statute which is more complex than may appear. The third concerns the operation of rectification in practice, in light of modern Evidence Acts.

I Introduction

By some measures, the law of rectification is in a mess, rather more than the usual muddle of the common law described by Brian Simpson[1] echoing Oliver Wendell Holmes.[2] There are many decisions, not all of which can be reconciled. The most notorious source of contention is Lord Hoffmann’s swansong speech in *Chartbrook Ltd v Persimmon Homes Ltd*,[3] which has been criticised in a line of decisions associated with Lord Leggatt as he now is,[4] of which the Privy Council said earlier this year that ‘the previously placid waters of

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1 A W B Simpson, *Legal Theory and Legal History: Essays on the Common Law* (Hambledon Press, 1987) 359, 381: ‘We must start by recognizing what common sense suggests, which is that the common law is more like a muddle than a system, and that it would be difficult to conceive of a less systematic body of law.’

2 O W Holmes Jr, *The Common Law* (Macmillan, 1882) 1: ‘The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.’

3 [2009] UKHL 38, [2009] AC 1101.

4 Notably, *Tartsinis v Navona Management Co* [2015] EWHC 57 (Comm) and *FSHC Group Holdings Ltd v GLAS Trust Corporation Ltd* [2019] EWCA Civ 1361, [2020] Ch 365.

English law about rectification may fairly be said to have been stirred up into a veritable storm’.[5] There is also a great deal of academic writing in this area,[6] including strongly worded complaints about its **[123]** uncertainty, especially in the United Kingdom. Francis Dawson wrote in 2015 that ‘the law on interpretation and rectification of written agreements is in a strangely unsettled state’.[7] David McLauchlan described the position as ‘extraordinarily complex and highly contentious’.[8] The trial judge in *Chartbrook* itself, Mr Justice Briggs,[9] wrote in 2019, now as Lord Briggs, that ‘Equity has lost its way in rectification’.[10] The disputation is far from being confined to points of doctrine such as the contentious requirement that the parties’ common intention be manifested by an outward expression of accord (to which I shall return). Indeed, to my mind a large contributor to the controversy is basal: what are the *limits* of rectification: what is its relationship to and how does it interact with the law of contract, the rest of equity, and the law of evidence. A particular issue is the interrelationship between construction and rectification. By way of example, one of the most prolific commentators in this area, David McLauchlan, has argued for a larger role to be given to interpretation, as opposed to rectification, in cases where an actual common intention is proven,[11] while conversely Paul Davies has argued for a greater role to be given to rectification as opposed to construction.[12]

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5 *Porter v Stokes* [2023] UKPC 11 [37].

6 Without being exhaustive, see D McLauchlan, ‘*Chartbrook Ltd v Persimmon Homes Ltd*: Common-sense Principles of Interpretation and Rectification?’ (2010) 126 LQR 8; R Buxton, ‘“Construction” and rectification after Chartbrook’ (2010) 69 CLJ 253; P S Davies, ‘Rectifying the Course of Rectification’ (2012) 75 *MLR* 412; J Ruddell, ‘Common Intention and Rectification for Common Mistake’ [2014] LMCLQ 48; D McLauchlan, ‘Refining Rectification’ (2014) 130 LQR 83; L Hoffmann, ‘Rectification and other Mistakes’ (Lecture to the Commercial Bar Association, 3 November 2015); F Dawson, ‘Interpretation and Rectification of Written Agreements in the Commercial Court’ (2015) 131 LQR 344; Sir Terence Etherton, ‘Contract Formation and the Fog of Rectification’ (2015) 68 CLP 367; PS Davies ‘Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction’ [2016] CLJ 62; D McLauchlan, ‘Rectification Rectified?’ (2020) 36 JCL 131; H Beale and N Beale, ‘Common Mistake Rectification: Subjective Intentions v Objective Meaning’ [2020] LMCLQ 1; D McLauchlan, ‘The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contractual Interpretation’ (2021) 37 JCL 25.

7 F Dawson, ‘Interpretation and Rectification of Written Agreements in the Commercial Court’ (2015) 131 LQR 344, 344.

8 D McLauchlan, ‘The Many Versions of Rectification for Common Mistake’ in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, 2016) 193, 193.

9 *Chartbrook Ltd v Persimmon Homes Ltd* [2007] EWHC 409 (Ch), [2007] 2 P & CR 9.

10 M Briggs, ‘Equity in Business’ (2019) 135 *LQR* 567, 583.

11 D McLauchlan, ‘The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contract Interpretation’ (2021) 37 *JCL* 25, 47-48.

12 PS Davies ‘Rectification versus Interpretation: The Nature and Scope of the Equitable Jurisdiction’ [2016]

This article does not seek to resolve those controversies. Its goal is more modest. It is addressed to three foundational aspects of the doctrine. The first point addresses the importance of labels to describe legal concepts, and how poorly chosen labels can lead analysis astray. The second concerns the scope of the doctrine of equitable rectification, and why it is more narrowly confined than may sometimes be thought. The third concerns how rectification works in practice, in real litigation in courts, to which the Evidence Acts apply, and how that ought to shape our thinking. The article is written in the beliefs that clarity of thought at the foundations, while it may not solve the doctrinal disputes, may at least avoid confusion and unenforced errors in legal reasoning, and that law is a practised, practical discipline which should have regard to the realities of litigation. **[124]**

II Unnecessary ambiguity in legal labels

There are two quite distinct doctrines of ‘rectification’ in law. It is traditional and convenient to call them ‘rectification by construction’ (or sometimes, and much less preferably, ‘contractual rectification’)[13] and ‘equitable rectification’. One can think of them as doctrines of common law on the one hand and equity on the other, although that is something of a simplification, as shall shortly be shown. There is nothing unusual about the same word being deployed for quite different doctrines, one sourced in common law, the other in equity — think of ‘contribution’ or ‘fraud’ — but such homonyms carry with them the difficulty of disentangling the substantive differences and the risk of an unthinking importation of doctrines from one area into another. In the case of contribution at law and in equity, those difficulties may be seen in Kitto J’s luminous account in *Albion Insurance Co Ltd v Government Insurance Office (NSW)*;[14] in the case of fraud, see the confusion caused by *Derry v Peek*[15] until its resolution in *Nocton v Lord Ashburton*.[16] As Gleeson CJ observed, of Viscount Haldane’s explanation in the latter appeal, ‘the concept of “fraud” is wider in

CLJ 62.

13 I am guilty of referring to ‘contractual rectification’, but in my defence, only when summarising the parties’ arguments. See *Mainteck Services Pty Ltd v Stein Heurtey SA* [2014] NSWCA 184, (2014) 89 NSWLR 633 [108].

14 (1969) 121 CLR 342, 350–52.

15 (1889) 14 App Cas 337.

16 [1914] AC 932.

some legal contexts that in others’.[17]

‘Rectification by construction’ requires there to be an ‘absurdity or inconsistency’ in a written document and also for it to be self-evident what correction ought to be made. Famously, in *Fitzgerald v Masters*,[18] Dixon and Fullagar JJ stated that words may be ‘supplied, omitted, or corrected, in an instrument, where it is clearly necessary in order to avoid absurdity or inconsistency’. Equally famous is Lord St Leonards’ speech in *Wilson v Wilson*:[19]

> Now it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake, or error, on the face of an instrument: there is no magic in words. If you find a clear mistake, and it admits of no other construction, a Court of Law, as well as a Court of Equity, without impugning any doctrine about correcting those things which can only be shown by parol evidence to be mistakes — without, I say, going into those cases at all, both Courts of Law and of Equity may correct an obvious mistake on the face of an instrument without the slightest difficulty.

The principles are ancient. *Wilson v Wilson* was decided in the middle of the nineteenth century, but Lord St Leonards cited a decision from 1780 which mentioned a bond with a condition expressed to be void if the party did *not* pay an amount on a specified day, which was easily regarded as meaning the opposite of what had been written.[20] This is no different from ‘inconsistent’ being read as meaning ‘consistent’. Notwithstanding their antiquity, the **[125]** principles have recently been reviewed in a surprisingly large number of appellate decisions.[21] My impression is that there are considerably more decisions on rectification by construction than there are decisions on equitable rectification.[22] There is room for debate

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17 *Magill v Magill* [2006] HCA 51, 226 CLR 551 [17].

18 (1956) 95 CLR 420, 426–27.

19 (1854) 5 HL Cas 40, 66–67, 10 ER 811, 822.

20 Citing *Bache v Proctor* (1780) 1 Doug 383, 99 ER 247 (Buller J citing an earlier case to that effect in Common Pleas).

21 See, without being exhaustive, *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2019] NSWCA 11, (2019) 99 NSWLR 317 [6]–[19]; *Perpetual Ltd v Myer Pty Ltd* [2019] VSCA 98 [122]; *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* [2020] NSWCA 296, (2020) 104 NSWLR 634 [48]–[66]; *James Adam Pty Ltd v Fobeza Pty Ltd* [2020] NSWCA 311, (2020) 103 NSWLR 850 [26]–[36]; *Tokio Marine & Nichido Fire Insurance Co Ltd v Hans Bo Kristian Holgersson* [2019] WASCA 114 [76]–[77] and *YIC Industrial Pty Ltd v SPA Investments Pty Ltd* [2022] QCA 95, (2022) 10 QR 768 [33]. A topic for another article might seek to determine why with the growth in the length of transactional documents not to mention the cost of legal services there seem to be more and more occasions where documents with obvious mistakes are executed.

22 Certainly, there are more appellate decisions, but that is likely a consequence of the contestability on appeal of arguments based on construction as opposed to findings likely to have been influenced by demeanour of subjective intention.

at the margins as to whether one requires ‘absurdity or inconsistency’ or, as has more recently been suggested, merely a ‘palpable’ or ‘obvious’ mistake[23] (and, indeed, there is room for debate whether there is only a verbal difference between these formulations). A helpful summary of instances and the underlying principle, namely, the ascertainment of the intention to be imputed to the parties, may be found in *Noon v Bondi Beach Astra Retirement Village Pty Ltd*.[24]

Like the equitable doctrine, ‘rectification by construction’ requires the court to be satisfied to a high level of conviction.[25]

But the differences are highly significant. Unlike the equitable doctrine (at least, within its traditional limits — see below), rectification by construction extends to testamentary instruments. Lord Brougham said in *Langston v Langston* that ‘anybody who reads this will cannot, if he has his senses about him, doubt that some mistake must have happened; and that is a legitimate ground in construing an instrument, because that is a reason derived not dehors the instrument, but one for which you have not to travel from the four corners of the instrument itself’.[26] Unlike the equitable doctrine, it is not **[126]** withheld on discretionary grounds, or subject to relief being imposed on terms (see below). Unlike the equitable doctrine, it is based upon an objective intention which is to be imputed to the parties.

Now to turn to labels. ‘*Contractual* rectification’ is, to my mind, particularly unfortunate. It is

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23 See *HDI Global Specialty SE* [51].

24 [2010] NSWCA 202 [46]: ‘The process of construction may bring a marked divergence from the text. In *Wilson v Wilson* (1854) 5 HL Cas 40 “John” was read as “Mary” in a will. In *Fitzgerald v Masters* (1956) 95 CLR 420 “inconsistent” was read as “consistent” in a contract for sale. As a recent illustration in *McHugh Holdings Pty Ltd v Newtown Colonial Hotels Pty Ltd* (2008) 73 NSWLR 53; [2008] NSWSC 542, “lessor” was read as “lessee” in a lease. This is often because a mistake is obvious on the face of the instrument and in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 Lord Hoffmann, with whom Lords Hope, Rodger and Walker and Baroness Hale relevantly agreed, accepted that there must be a clear mistake on the face of the instrument and it must be clear what correction ought to be made in order to cure the mistake. But in *Fitzgerald v Masters* at 437 it was explained “the rejection of repugnant words, the transposition of words and the supplying of omitted words” is a consequence of “the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction”. Ascertaining the intention of the parties, of course, is in accordance with the principles of contract construction abovementioned.’

25 See *Seymour Whyte* [10] and *Tokio Marine* [78] (‘the test for identification of an error in the parties’ language is a stringent one of clear necessity so as to avoid absurdity’).

26 (1834) 2 Cl & Fin 194, 240–41, 6 ER 1128, 1146. See also *Tatham v Huxtable* (1950) 81 CLR 639, 652; *Estate of the late Connie Wai Fong Wong* [2021] NSWSC 967 [30].

quite wrong to regard this as an aspect of the law of contract. It is a basic aspect of the construction of a text, and therefore much more general.[27] Brightman LJ’s unaffected language of ‘correction of mistakes by construction’ is preferable,[28] because it captures what is occurring. Where there is an obvious mistake, and it is obvious what is meant, then the meaning to be attributed to the words is that which was obviously intended to be conveyed. It applies to conveyances,[29] to deeds poll, and to wills. The same principle may be seen in the construction of statutes, readily fitting within the doctrine propounded in *Taylor v Owners — Strata Plan No 11564*:[30]

> The question whether the court is justified in reading a statutory provision as if it contained additional words or omitted words involves a judgment of matters of degree. That judgment is readily answered in favour of addition or omission in the case of simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision.

Similar reasoning may be seen in reading a nonsensical prohibition on race horses with concentration of ‘cobalt chloride’ exceeding 200µg/L for what was obviously intended, namely, a concentration of ‘cobalt’ exceeding 200µg/L.[31]

None of this is especially modern. One leading case is the advice of the Privy Council in 1886 in *Salmon v Duncombe*,[32] where the qualifying words of a provision in an ordinance of

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27 Further, it does not readily apply to those (numerous) contracts formed by conduct, or by spoken words.

28 *East v Pantiles (Plant Hire) Ltd* [1982] 2 EGLR 111, 112: ‘first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction’.

29 *Porter v Stokes* was in fact about rectification of a conveyance of old system title land in Trinidad near Port of Spain.

30 [2014] HCA 9, 253 CLR 531 [38].

31 *Day v Harness Racing New South Wales* [2014] NSWCA 423, 88 NSWLR 594 [78]: ‘Obvious drafting errors may be corrected, even where they occur in legislation: *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40, (2009) 238 CLR 642 [12]. See for example the reading of “person who will forfeit an interest in property” as “person who has forfeited an interest in property” in *New South Wales Crime Commission v Kelly* [2003] NSWCA 245, 58 NSWLR 71 [23]. It is tolerably clear that if the appellants’ factual finding is upheld, there was an obvious drafting error, of “cobalt chloride” for “cobalt”.’ The fact that there is no such thing as a concentration of a salt such as cobalt chloride, while the concentration of chloride ions would be *at least* twice the concentration of cobalt ions, made this a straightforward application of the principle (see further at [21]). For a recent example, see *Coal & Allied Operations Pty Ltd v Crossley* [2023] NSWCA 182, in which ‘$36’ was construed to mean ‘$3’ so as to correct an obvious drafting error.

32 (1886) 11 App Cas 627. See *Singh bhnf Ambu Kanwar v Lynch* [2020] NSWCA 152, (2020) 103 NSWLR 568 [30]–[34], [97]–[131] and [142], and cf *Owners of the Ship ‘Shin Kobe Maru’ v Empire Shipping Company Inc* (1994) 181 CLR 404, 419 and *Australian Securities and Investments Commission v King* [2020] HCA 4, (2020) 270 CLR 1 [18].

the colony of Natal (‘as if such natural-born **[127]** subject resided in England’) conferring testamentary capacity of real and personal property which nullified the conferral of power were in substance read as if they were not there. Lord Hobhouse wrote that ‘It is very unsatisfactory to be compelled to construe a statute in this way, but it is much more unsatisfactory to deprive it altogether of its meaning’, having earlier noticed that ‘Very likely the draftsman, whose want of skill is shewn by other expressions in the Ordinance, attributed to residence a legal effect which it does not possess’.

Thus notwithstanding that the scope and operation of this doctrine is quite different from equitable rectification, *they share the same name*. This matters. There is much that is controversial in *Chartbrook,* but surely Lord Hoffmann was stating an axiomatic fact about language (not law) when he said:[33]

> [T]he contract does not use algebraic symbols. It uses labels. The words used as labels are seldom arbitrary. They are usually chosen as a distillation of the meaning or purpose of a concept intended to be more precisely stated in the definition.

Labels shape our thoughts, and our legal reasoning. It is difficult enough trying to resolve a question of law when both sides are using language as persuasively as they can *and at least one side’s submission is wrong* without introducing extra scope for confusion from slippery labels. Hence, for example, the High Court’s disfavouring of the terms ‘prerogative writ’ for ‘constitutional writ’[34] and ‘*Mareva* injunction’ for ‘asset preservation order’.[35] There are many other examples.[36] The point being made is not novel. Bell CJ said:[37]

> I would personally eschew the terminology of ‘rectification by construction’. … [T]he use of ‘rectification’ in both contexts is, in my opinion, apt to confuse. Rectification in equity is a mainstream doctrine and the principles associated with it are well understood in Australia and are set forth in leading texts. So also, decisions such as *Fitzgerald v Masters* (1956) 95 CLR 420 are well understood as permitting a contract to be construed in very limited circumstances in a way that involves a recognition that the drafting of the contract has miscarried. The principles of contractual construction

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33 *Chartbrook* [17].

34 *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57, (2000) 204 CLR 82 [20]–[21], [137]–[138].

35 *Cardile v LED Builders Pty Ltd* [1999] HCA 18, (1999) 198 CLR 380 [25], [79].

36 See for examples in a wide range of areas G Williams ‘The Legal Unity of Husband and Wife’ (1947) 10 *MLR* 16; *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* [2018] HCA 43, (2018) 265 CLR 1 [76]–[77], and *Clubb v Edwards* [2019] HCA 11, (2019) 267 CLR 121 [415]–[425].

37 *James Adam Pty Ltd v Fobeza Pty Ltd* [2].

> most closely associated in Australia with *Fitzgerald v Masters* do not, in my opinion, need to be elevated to the status of a ‘doctrine’ or fixed with a label which might be thought to undermine the importance of courts adhering to the language parties have chosen to employ in setting out the nature and scope of their contractual relations.

To reprise: the first point is that ‘rectification by construction’ or ‘contractual rectification’ is not an aspect of the law of contract at all, but transcends the law of contract. The second point is that it would be clearer to avoid the label **[128]** ‘rectification’. What is happening in these cases is merely an aspect of construing (which is to say, giving legal meaning to) a legal text. We would be better off adhering to what Sir Martin Nourse said in *Holding & Barnes Plc v Hill House Hammond Ltd*:[38]

> [Correcting clear errors by construction] enables the court to correct an obvious clerical error in a document that it may conform with the obvious intention of the parties. Although in a loose sense the document is rectified, indeed the process is sometimes referred to as common law rectification, it is not rectification in the correct sense. It remains an exercise in construction.

III Consequences of terminological confusion

This section illustrates some of the consequences which flow from failure to attend to the proper scope and limits of the equitable doctrine.

A What comes first — common law or equity?

Rectification in the sense used in this issue of the *Journal of Equity* is an equitable remedy. It may be withheld on discretionary grounds and it may be granted on terms.[39] This is utterly different from the position at law.[40] It is surely therefore clear that a document should not ordinarily be rectified in equity unless it be shown that there is an inadequate remedy at law. If an obvious mistake in a document has an obvious correction, such that ‘rectification by construction’ is available, that should be preferred ahead of rectification in equity. After all, the premise of rectification in equity is that the instrument as construed does not reflect the

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38 [2001] EWCA Civ 1334, [2002] 2 P & CR 11 [47].

39 *Seymour Whyte* [16(4)]. See for example *Sargeant v Reece* [2007] EWHC 2663 (Ch) [86]–[88] and *Konica Minolta Business Solutions (UK) Ltd v Applegate* [2012] EWHC 3242 (Ch) [121]–[123] and [2013] EWHC (Ch) 2536 (Ch) [49]–[53], both noted in D Hodge, *Hodge on Rectification* (Sweet & Maxwell, 2nd ed, 2015) 47–48. Examples of Australian courts withholding rectification on discretionary grounds may be seen in *CMG Equity Investments Pty Ltd v Australia and New Zealand Banking Group Ltd* [2008] FCA 455, (2008) 65 ACSR 650 [28] and *Re Premier Bay Pty Ltd* [2018] VSC 168 [743].

40 A point made by Lord Neuberger in *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 [40].

parties’ actual intentions. Authority is not lacking on this point. Sir Herbert Cozens-Hardy MR said ‘The question of construction logically comes first. The question of rectification only arises if and when the plaintiffs have failed on the question of construction’.[41] There are many other examples.[42] There may be cases where rectification in equity may be appropriate even where the error can be rectified as a matter of construction, for example out of an abundance of caution lest there be confusion,[43] but those cases must be exceptions to the general rule. **[129]**

However, an occasional contrary view has been expressed. Carnwath LJ once said in the Court of Appeal that:[44]

> Although the judge considered the issues of construction first, I find it more logical to reverse the order. The purpose of rectification for mutual mistake is to ensure that the terms of the written document accurately reflect the state of agreement between the parties. If rectification is ordered it is the document as so rectified that has to be construed.

That is expressed as a generally applicable rule, based on what is ‘more logical’. The second and third sentences in that passage of Carnwath LJ’s reasons are of course correct. Even where equity intervenes, the rectified document must be construed, although in most cases that process will be straightforward and uncontroversial. But I share Lord Hodge’s disquiet for this approach.[45] The seeming paradox only arises if one neglects the very different natures of construction and rectification in equity. Once the equitable character of the remedy of rectification is appreciated, which carries with it the consequences that it is discretionary and will not be exercised without cause, it is clear that construction ordinarily comes first. That is to say, remembering that ‘rectification by construction’, or ‘correction of mistakes by construction’ has nothing to do with equity will avoid mistaken reasoning about the limits of rectification in equity.

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41 *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 88.

42 See for example *Harker-Mortlock v Commonwealth Bank of Australia* [2019] NSWCA 56 [43], endorsing *Saxby Soft Drinks Pty Ltd v George Saxby Beverages Pty Ltd* [2009] NSWSC 1486 [10]; *Green Growth No 2 Ltd v Queen Elizabeth the Second National Trust* [2018] NZSC 75, [2019] 1 NZLR 161 [55], [140].

43 See for example *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, (2019) 76 NSWLR 603 [539].

44 *KPMG LLP v Network Rail Infrastructure Ltd* [2007] EWCA Civ 363 [16].

45 *Hodge on Rectification* 44.

(i) (Equitable) rectification is about instruments not agreements

It is difficult to resist the notion that thinking about equitable rectification in terms of contract led the English Court of Appeal to the result reached in *Joscelyne v Nissen*.[46] There it was said that a plaintiff seeking rectification must also show that the parties' common intention was evidenced 'by some outward expression of accord'. This conflates the difficulties of *proof* of uncommunicated states of mind with what is required in order to establish an entitlement in equity. It is on no view of things the law in Scotland.[47] It was criticised by Leonard Bromley shortly thereafter in a famous note in the *Law Quarterly Review,*[48] whose opening paragraph states:

> Rectification is an ancient remedy of equity applicable as well to single party as to multiparty instruments, and it seeks to correct instruments, not contracts or other legal relationships. It requires, it is submitted, the establishment of the subjective intention of the party or of the parties to the instrument (in the latter case an identical intention). Intercommunication, however necessary in the common law of contract, properly plays no part either in the theory or in the practice of this equitable doctrine, however much it may be anathema to the common law to consider subjective intention in relation to contracts.

Bromley's argument is not without controversy, but it seems highly persuasive to me. Its force may be seen in a number of ways. For one thing, rectification preceded the law of contract by centuries. This is obvious the moment one **[130]** begins to think about the lateness of the rise of assumpsit,[49] the inadequacy of the common law prior to the eighteenth century to deal with commercial law,[50] and the fact that Chancellors were rectifying deeds poll and voluntary settlements and conveyances much earlier (although the doctrine seems to have been known as 'mistaking' in the seventeenth century).[51]

But Bromley's real point was that rectification is about instruments generally, not merely about the subclass of instruments which incorporate parties' bargains, and thus the

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46 [1970] 2 QB 86.

47 See Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and *Paterson v Angelline (Scotland) Ltd* [2022] ScotCS CSIH 33; 2022 SC 240 [36].

48 'Rectification in Equity' (1971) 87 LQR 532.

49 See J Baker, 'The Law Merchant and the Common Law before 1700' (1979) 38(2) CLJ 295 and D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 2001) ch 7.

50 See M Leeming, 'The enduring qualities of commercial law' (The Bathurst Lecture 2021, 22 April 2021).

51 Thus, 'the mistaking of a name in a conveyance (being heire-male) holpen, and lands to pass according to the intent of the party': *Goodfellow v Morris* (1619), cited by Bromley, 534.

introduction of an ‘outward statement of accord’ requirement is prima facie inapposite for many applications of the doctrine. In *Marley v Rawlings*,[52] it was said:

> Rectification is a form of relief which involves ‘correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect the [parties’] true agreement’ … It is available not only to correct a bilateral or multilateral arrangement, such as a contract, but also a unilateral document, such as a settlement …

See for example Lord Romilly MR’s statement about the *reformation* of voluntary settlements in *Bold v Hutchinson*.[53] Brightman J spoke of rectifying a voluntary settlement in *Re Butlin’s Settlement Trusts.*[54] Appendix 2 of *Hodge on Rectification* lists a couple of dozen decisions rectifying voluntary settlements.[55]

(ii) (Subject to statute) equitable rectification is not about testamentary instruments

But what is to be made, for the purposes of Australian law, of the following statement from the United Kingdom Supreme Court concerning the rectification of wills?[56]

> However, it has always been assumed that the courts had no such power to rectify a will — see eg *Harter v Harter* (1873) LR 3 P&D 11 per Hannen P, and *In re Reynette-James decd* [1976] 1 WLR 161, per Templeman J.
>
> As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of such a power has been advanced. However, it is unnecessary to consider that point further, as Parliament has legislated on the topic, in section 20 of the 1982 Act … **[131]**

So far as statutory intervention goes, the position in Australian jurisdictions is substantially the same. Section 27 of the Succession Act 2006 (NSW) provides:[57]

> **27 Court may rectify a will** (cf WPA 29A)
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> (1) The Court may make an order to rectify a will to carry out the intentions of the testator, if the Court is satisfied the will does not carry out the testator’s intentions

52 [2014] UKSC 2, [2015] AC 129 [27].

53 (1855) 5 De G M & G 558, 567–69, 43 ER 986, 990–91.

54 [1976] Ch 251.

55 *Hodge on Rectification* 857–66. See also Spry, *Equitable Remedies* (Lawbook Co, 9th ed, 2013) 630–33, esp 632 citing a number of different legal documents in which rectification was granted.

56 *Marley* [27]–[28].

57 See also to the same or similar effect Succession Act 1981 (Qld), s 33; Wills Act 1936 (SA), s 25AA; Wills Act 2008 (Tas), s 42; Wills Act 1997 (Vic), s 31; Wills Act 1970 (WA), s 50; Wills Act 1968 (ACT), s 12A; Wills Act 2008 (NT), s 42.

because—

(a) a clerical error was made, or

(b) the will does not give effect to the testator’s instructions.

(2) A person who wishes to make an application for an order under this section must apply to the Court within 12 months after the date of the death of the testator.

(3) However, the Court may, at any time, extend the period of time for making an application specified in subsection (2) if—

(a) the Court considers it necessary, and

(b) the final distribution of the estate has not been made.

With great respect, large difficulties confront the acceptance of the power to rectify a will aside from statute which was mentioned (tentatively and in obiter) in *Marley*. Obviously Lord Neuberger did not mean ‘as a matter of common law’ in the sense of common law as opposed to equity; he is to be taken to have meant common law in the sense which *includes* equity and in contradistinction with statute. Obviously also his Lordship is not to be understood as saying that there is today a concurrent statutory and equitable jurisdiction to rectify wills. For it is difficult to see how equity could expand into an area where statute now applies *differently*. This is not a case where statute modifies judge-made law expanding the scope or ambit of existing rules or principles.[58] Instead, a new statutory power is conferred, albeit one expressed in the language of equity. It is difficult to see that the limits imposed by statute (including the limitation to the bases in paragraphs (a) and (b) of s 27(1) and the absence of any requirement of ‘clear and convincing proof’ and the time limits and the basis upon which they can be extended) could be reconciled with an expanded equitable jurisdiction extending to wills.

Even so, it is of interest to turn to the position which would have obtained in the absence of

[58] Contrast for example statutes removing a restriction which had been created by judge-made law. One example is s 3 of the Jurisdiction of Courts (Foreign Land) Act 1999 (NSW), which provides that a court’s jurisdiction is not excluded or limited because the proceedings concern land outside New South Wales, thereby abrogating the so-called ‘*Mozambique* rule’. Another is s 9 of the Animals Act 1977 (NSW) which provides that ‘The rule in *Rylands v Fletcher* does not apply in relation to damage caused by an animal’. A third is s 4 of the Wrongs Act 1932 (Vic) which provided that in an action for personal injury ‘the plaintiff shall not be debarred from recovering damages merely because the injury complained of arose wholly or in part from nervous shock’, thereby overturning the rule upheld in *Victorian Railways Commissioners v Coultas* (1888) 13 App Cas 222. In all these cases, a claim made by a plaintiff pursuant to judge-made law as relaxed by statute would remain a claim at common law.

statutory intervention. This was in fact the position facing Fisher J in the High Court of New Zealand in *Re Jensen*.[59] His Honour **[132]** acknowledged long-standing authority against rectification. Rather boldly, he then said that ‘the authorities in question are limited to decisions of the Court of Probate followed by a series of later assumptions without argument’, that the point had not been argued in a court with equitable jurisdiction, and the position being free from binding authority, his Honour said there were good policy reasons for giving effect to the change, that rectification already applied to all manner of other instruments, and that there was no need to wait for Parliament to change the law.

It may respectfully be doubted that that reasoning is sound, but for reasons which are not obvious, and may be of more than casual interest. Not infrequently it is necessary to determine what the position would have been in the absence of a reforming statute (for example, it may be an important part of the legislative context, or the statute may expressly or impliedly preserve the existing law).[60] *Rhodes v Rhodes* was a decision of the Privy Council on appeal from the Supreme Court of New Zealand, and Lord Blackburn explained the position concisely:[61]

> The law of New Zealand, like that of England, requires that a will should be in writing, and executed by the testator, before witnesses, in a particular manner. … [E]ven though the Court is convinced that the words were improperly introduced, so that if the instrument was inter vivos they would reform the instrument and order one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the 9th section of the 7 Will 4 & 1 Vict c 26, the signature at the end of the will required by that enactment having been attached to what bore a quite different meaning.

It is unclear whether *Rhodes v Rhodes* was brought to Fisher J’s attention. To be sure, his Lordship went on to add that the point had never been finally decided, and did not purport to reject the point absolutely. That is an example of the ‘standard common law judicial technique of deciding no more than what needs to be decided’.[62] But Lord Blackburn’s

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59 [1992] 2 NZLR 506.

60 Examples are given in M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 79–81.

61 (1882) 7 App Cas 192, 198.

62 *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32, 267 CLR 560 [76]; see also *Clubb v Edwards* [2019] HCA 11, 267 CLR 171 [137].

reasoning points the way to the obstacle to the proposition favoured by Fisher J, which is statute. Ultimately, the same statute which conferred freedom of testamentary capacity insisted upon certain formalities such as signature and attestation, and (more recently) provided its own remedies when those formalities were not satisfied. That is not fatal to the application of equitable principle, but it is an obstacle that needs to be confronted.

Perhaps few people might answer that the reason for equitable rectification not extending to testamentary instruments is statute, but that may be because the effect of statute is sometimes hard to see.[63] I doubt that it would be open to an Australian court below the High Court to follow the suggestion in *Marley* or the course followed in *Re Jensen*. That is because *Osborne v Smith* **[133]** still rules in this area, confirming the distinct approach in probate (ultimately reflecting statutory formalities and the requirement that a testator ‘know and approve’ a will) which authorised the deletion of words improperly introduced, but even then only where the meaning of what remained was unaltered. That is the ratio of that decision,[64] which concluded:

> if the existing clause in favour of the Home of Peace were to be struck out, the gift to the appellant would necessarily have an effect different both from that which it has on the face of the instrument and from that which the deceased intended it to have. It would stand as a gift of the entire estate without qualification. While refusing recognition to one provision which the deceased did not know and approve, the Court would be turning another, which she knew and approved subject to a qualification, into one which, being unqualified, she did not know and approve. That, plainly, would be to go beyond the jurisdiction of the Probate Court.

The source of the substantive difference is twofold: the rules of the Probate Court, which ultimately derived from civilian practice, and the long-standing requirement of knowledge and approval. Those historical distinctions tell against a more generalised law of rectification. Another way of putting that is that the formalities imposed in a particular area of the law, namely, probate, constrain the potential for the generality of the application of the principles of equitable rectification. Once this may have been seen at an institutional level — the doctrine of rectification applied in chancery, but not in the ecclesiastical courts nor the Court of Probate created in 1857. That would not of itself prevent an extended application of

63 See M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 14–15.

64 (1960) 105 CLR 153, 160–62 (Kitto J, Menzies and Windeyer JJ agreeing).

equitable principle after the Judicature reforms, as Fisher J hinted. But the more substantive justification was the creation of special rules, such as that a valid will be shown to have been ‘known and approved’ by the testator, which at least when *Osborne v Smith* was decided had the force of statute and collided with any extension of equitable rectification in this area. Briefly (the details are described in *Lewis v Lewis*),[65] this requirement was inconsistent with probate decisions of Sir Cresswell Cresswell in 1860 and 1862, was introduced by his successor Sir James Wilde in 1865 first by a decision and then by an amendment to the rules, was eventually accepted as correct in the standard text,[66] was introduced to the Australian colonies no later than the end of the nineteenth century, and was applicable when *Osborne v Smith* was determined. Indeed, it may be argued that the requirement of knowledge and approval is now better regarded as a requirement of judge-made law.[67] The point is that decisions about the scope of the equitable doctrine in the twenty-first century require attention to the **[134]** process by which judge-made law and statutes have interacted over the preceding centuries.

The better view is that statute proceeded on the basis that equitable rectification did not extend to testamentary instruments, and despite using the *name* ‘rectification’ made separate provision which tends to confirm that equitable rectification continues not to extend to this area. The result is that there are three distinct doctrines of ‘rectification’: rectification by construction, an aspect of construction generally applicable to instruments including testamentary instruments, rectification in equity, which does not extend to testamentary instruments, and rectification under statute, which is confined to testamentary instruments. The three doctrines all presuppose a mistake in a written instrument, but in many other respects vary despite their similar nomenclature.

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65 *Lewis v Lewis* [2021] NSWCA 168, (2021) 105 NSWLR 487 [132]–[136].

66 *Lewis v Lewis,* above [134]: ‘For many years, successive editions of Williams, *The Law of Executors and Administrators* stated that “it may be doubted whether the view taken by Sir C Cresswell is not more correct” (7th ed 1873, p 351; 8th ed 1879, p 356; 10th ed 1905, p 255). By the 11th edition in 1921, the author added at p 249 a *volte face*: “And it is now well established that the testator’s knowledge and approval of the contents of the alleged Will is part of the burden of proof assumed by every one who propounds the document”’.

67 See M Leeming, *Contract, Equity and Statute: A Complex Entangled System* (Federation Press, 2023), section 2.6.

IV Rectification in practice and its interaction with the Evidence Acts

Litigants face choices all the time. In two decisions in 2019 and 2020 in which I participated, litigants had pleaded a case and served evidence in support of a claim to equitable rectification, only to abandon it at or shortly before hearing.[68] In an earlier appeal in 2017, where powerful evidence of subjective intention was served in support of an estoppel but no claim for rectification advanced, Professor McLauchlan wrote that ‘it seems inexplicable that rectification was not sought’.[69] I agree, although I would add that it is very difficult even for courts hearing and determining appeals to understand all aspects of the decisions at trial.[70]

One thing that is clear is that there are very few ‘pure’ cases for rectification. The legal system does not encourage litigants to place all their eggs in one basket. Quite commonly, rectification will be put forward as a fallback to a claim based on construction, and in support of the latter, evidence of the parties’ understanding may be relevant to establish aspects of surrounding circumstances, or the use of a ‘private dictionary’[71] or to establish that the parties were ‘united in rejecting’[72] a particular meaning.[73] Further, alongside claims for rectification plaintiffs will run claims in contract and for **[135]** misleading or deceptive conduct contrary to the Australian Consumer Law, and defendants are apt to raise defences based on estoppel by convention and estoppel by representation. In all those cases, evidence of subjective intention is admissible and may be essential.

Why does this matter? First, many formulations of the rules governing evidence in such

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68 See *James Adam* [19] and *Broughton v Leslie (No 2)* [2019] NSWSC 984 [11].

69 D McLauchlan, ‘The Continuing Confusion and Uncertainty over the Relevance of Actual Mutual Intention in Contract Interpretation’ (2021) 37 JCL 25, 33, referring to *Cherry v Steele-Park* [2017] NSWCA 295, 96 NSWLR 548.

70 Possible explanations include (a) a perception of lack of jurisdiction in the District Court to advance a positive case of rectification in equity, (b) a view taken by counsel that the best way to victory was to concentrate fire on construction, (c) a reluctance or unavailability of witnesses or a perception that their cross-examination would harm their prospects.

71 *Commonwealth Steel Company Ltd v BHP Billiton Marine & General Insurance Ltd* [2018] NSWCA 242 [1], [6] and [36], referring to *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd* [1976] 2 Lloyd’s Rep 708, 712 on ‘after 12 months’ trading’ meaning ‘on the expiring of 12 months’ rather than ‘at any time after the expiry of 12 months’.

72 See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352–53 and *Aberdeen Asset Management Ltd v Challenger Wealthlink Management Ltd* [2002] NSWCA 245 [24].

73 See M Leeming, ‘Subjective intention in the law of contract — its role and limits’ (Paper delivered in Banco Court, Queen Elizabeth II Courts of Law, Brisbane, 1 June 2023).

cases are framed in terms of ‘admissibility’. In *Codelfa*, Mason J said that:[74]

> The object of the parol evidence rule is to exclude [prior negotiations], the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.

That passage has been applied on countless occasions.[75] It informs the statement in the joint judgment in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*:[76]

> What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties’ statements and actions reflecting their actual intentions and expectations.

It is a convenient, authoritative encapsulation of the key distinctions between a claim for construction and a claim for rectification. And yet it cannot be correct today in most Australian jurisdictions — or at any time in the last quarter of a century in New South Wales — at least if it is taken literally with ‘inadmissible’ referring to the adduction as opposed to the use of evidence. Under the Evidence Acts, evidence is relevant if it bears on the assessment of facts in issue, and unless otherwise provided by the Act, relevant evidence is admissible.[77] Once admitted, evidence may ordinarily be used for any purpose. The exception in s 95 which precludes relevant evidence being used contrary to the tendency rule demonstrates the point,[78] as does the power in s 136 to make limiting orders, for both proceed on the basis that, generally, relevant evidence may be used for any purpose, and thus that admissibility is different from use. Thus where in the same proceeding a plaintiff advances both construction and rectification, evidence of subjective intentions (typically, a party’s outwardly

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74 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 352. See also the third principle in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 WLR 896, 912–913.

75 Without being exhaustive, *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [2011] QCA 312 [93] (‘the starting point’); *Grainger v Roombridge Pty Ltd t/as Laguna Noosa* [2007] QCA 276 [16]; *Angas Securities Ltd v Small Business Consortium Lloyds Consortium No 9056* [2016] NSWCA 182 [95]; *Johnston v Brightstars Holding Co Pty Ltd* [2014] NSWCA 150 [49]; *GMA Garnet Pty Ltd v Barton International Inc* [2010] FCAFC 38, 103 FCR 269 [182] (‘seminal statement’).

76 [2015] HCA 37, (2015) 256 CLR 104 [50].

77 Evidence Act 1995 (NSW), ss 55, 56.

78 ‘Evidence that under this Part is not admissible to prove a particular matter must not be used to prove that matter even if it is relevant for another purpose’ and ‘Evidence that under this Part cannot be used against a party to prove a particular matter must not be used against the party to prove that matter even if it is relevant for another purpose.’

manifested understanding of the clause, even if not communicated to the other side) is relevant to the latter claim, and therefore admissible. Subject to the making of a limiting order, it will prima **[136]** facie be available for use for all purposes. The question is not one of admissibility, but use. ‘Admissible’ in the passages mentioned above has become homonymous, and indeed its original meaning as an aspect of the rule of evidence has largely been supplanted by the term being deployed as a matter of substantive law.

To be clear, I am not for a moment suggesting that the passage from *Mount Bruce Mining* is wrong. Rather, I am suggesting that it is to be construed contextually, in a way which is surely uncontroversial, such that the reference to ‘inadmissible’ is not to be understood as extending to cases where evidence is sought to be tendered to establish surrounding circumstances or the object or purpose of the contract or whether the parties have used a ‘private dictionary’ or have been ‘united in rejecting’ a particular construction where the evidence discloses a party’s subjective intentions.

Secondly, the ‘parol evidence rule’ (which, despite its name, is a rule of substantive law which is preserved by s 9(1) of the Evidence Act)[79] does not apply to evidence of surrounding circumstances.[80] As Mason J noted in *Codelfa*, these exceptions were long-standing. He reproduced Lord Wilberforce’s statement in *Prenn v Simmonds*:[81]

> The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, antiliteral, tendencies, for Lord Blackburn’s well-known judgment in *River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 763 provides ample warrant for a liberal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view.

What happens in practice? Assuming the absence of a jury, there is no real difficulty in the tender of documents to show the surrounding circumstances, even if they also disclose the

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79 *Cherry v Steel-Park* [162], and see [70]; *Owens v Lofthouse* [2007] FCA 1968 [62]. Section 9(1) provides that ‘This Act does not affect the operation of a principle or rule of common law or equity in relation to evidence in a proceeding to which this Act applies, except so far as this Act provides otherwise expressly or by necessary intendment.’

80 See *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 348.

81 [1971] 1 WLR 1381, 1383–85, [1971] 3 A11 ER 237, 239–41.

subjective intentions of one or other party, so long as the judge bears in mind the dichotomy.[82] And further, it may be doubted whether a limiting order is necessary.[83] The construction of the contract will be determined by a judge who gives reasons, rather than by a jury’s opaque verdict, and if there has been a misuse of some of the evidence which was not available for construction, then that will normally be clear from **[137]** the reasons.[84] Thus, the decline of civil juries and the enactment of the Evidence Acts reveal a gap between the traditional notion of evidence adduced for a particular purpose, and the ‘radical alteration to the position at common law that evidence is usually admitted for a particular purpose and not others’.[85]

The Evidence Act also speaks of proof. Section 140(1) provides that ‘In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities’. What does that mean for the traditional requirement in equitable rectification for ‘clear and convincing proof’?[86] The starting point is the statute itself. Section 140(2) authorises a court to take into account ‘the nature of the cause of action or defence’, and it has been held that that means the heightened requirement for clear and convincing proof is preserved (although this is far from pellucidly clear as a matter of the ordinary reading of the section).[87] That conclusion is bolstered by s 9(1), which preserves principles of equity unless the statute provides otherwise expressly or by necessary intendment. Indeed, in New Zealand the Supreme Court has advanced the view that the traditional rules governing the reception of evidence in contract cases should be reviewed

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82 Cf Finn J’s criticism of the parol evidence rule in *Australian Medic-Care Company Ltd v Hamilton Pharmaceutical Pty Ltd* [2009] FCA 1220, (2009) 261 ALR 501 [121].

83 See *Re Employ (No 96) Pty Ltd (in liq)* [2013] NSWSC 61; (2013) 93 ACSR 48 [66] (‘it is not necessary to make a limiting order in respect of that statement under s 136 of the *Evidence Act*, since there will be no unfair prejudice by the admission of that evidence where the Court may assess the weight to be given to it’).

84 Although it may be acknowledged that there may be a fine distinction between the legitimate use to identify a particular meaning of a word or a relevant aspect of the purpose of the transaction, and the illegitimate use of identifying the subjective purpose of the party.

85 N Williams et al, *Uniform Evidence in Australia* (LexisNexis Butterworths, 2015) 783 and see *Cherry v Steele-Park* [55].

86 For an account of the requirement of ‘clear and convincing proof’ (or variants to the same effect), see *Franklins* [451]–[461] and *Newey v Westpac Banking Corporation* [2014] NSWCA 319 [170].

87 See *Franklins* [458]–[460], and *Rawack v Spicer* [2002] NSWSC 849 [30]–[31].

in light of the modern evidence legislation.[88] It is beyond the scope of this article to address that decision, or whether it is applicable in Australian jurisdictions. The only point made here is that the Evidence Acts have altered the context in which rectification suits take place, and have also quite subtly altered the language used to describe litigation. Earlier decisions need to be read carefully and with an eye to their procedural context if they are to be applied correctly to current cases. This is an example of a more general point:[89]

> Once the context in which a statement in a judgment is made has been forgotten, and the words are simply applied acontextually, it is easy for them to suggest and even dictate answers which were foreign to their original purpose, especially when it is borne in mind that often it will suit at least one litigant’s immediate interests in the case for such a reading to be given. The better one understands how the law has come to where it is, the more can be seen the purposes and rationales in play, and the more easily avoided those inertial tendencies which can tend to decisions being read more widely than they warrant.

V Conclusion

It is important to observe the limits of legal concepts. That plays out in a number of ways illustrated by this article. One is that most legal doctrines have been formulated in a legal system alongside other legal doctrines, and it is necessary to bear in mind the interrelationships, which vary from the **[138]** general principle that much of equity is supplemental to law, to the particular idea that ‘rectification by construction’ precedes rectification in equity. Another is the role of statute, which can easily be overlooked, and presents particular problems when it engages with judge-made law. Thus when a statute authorises courts to ‘rectify’ documents outside the traditional scope of the equitable remedy, one question is whether on its proper construction the provision is modifying the principles of judge-made law or else is conferring a new statutory power. If the latter, that will tend against a parallel development of judge-made law, especially if the statutory power is conferred subject to special conditions. That in turn may lead to the existence of multiple doctrines, all called ‘rectification’ but with different limits and different areas of operation. Lord Diplock was doubtless correct to say that words are imprecise instruments for

88 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696.

89 M Leeming, *Common Law, Equity and Statute: A Complex Entangled System* (Federation Press, 2023) 100.

communicating thoughts,[90] and Felix Frankfurter equally correct to say that words are clumsy tools.[91] But, as the latter added, they are all we have. One theme of this article is that language is subtle, and thus it is not unimportant to be precise in describing the way legal rules and principles operate. ‘Rectification’ is a prime example.

90 *Slim v Daily Telegraph* [1968] 2 QB 157, 171.

91 F Frankfurter, ‘Some reflections on the reading of statutes’ 47 Colum LR 527, 546 (1947).