Rectification of contracts *by conduct* — A dead letter?

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A seeks rectification of a contract for common mistake. A's argument is that both A and B engaged in observable conduct that manifested a common intention not recorded in the document. If A never knew about B's conduct at the time of execution, and B never knew about A's conduct, is rectification nevertheless possible? This article considers the nature and scope of rectification by conduct. How far can the concept of conduct be taken, absent any requirement for an outward expression of accord? The article argues that 'conduct' may extend rectification to scenarios where A and B have parallel intentions which are made apparent through conduct, but where such conduct is not inter se. However, claims for rectification in such situations will rarely be successful, in light of the stringent evidential requirements, which preserve certainty in transactions, regardless of the form of the common intention.

Social philosophers have observed that joint action, and shared intentions are everywhere around us.[1] When we act jointly, we may communicate that fact to each other before the act, but there might be no communication at all. Hume offers the example of two people in a rowboat, rowing together.[2] The rowers are likely to have some shared knowledge of each other's roles on the rowing team, or in the broader context in which people come to row, but they do not need to have said or, indeed, done anything *toward each other* to end up rowing together down the river. This article takes the concept of uncommunicated parallel conduct and considers whether it has a place in the operation of rectification of documented agreements for common mistake.

There has been little judicial and academic focus on the scope of conduct that will be sufficient to justify rectification, including whether uncommunicated intention (in the sense of there being conduct, but not conduct done *inter se*) is sufficient. While rectification where common intention is proved *by conduct* will be rare, this article argues that it ought to be possible, even where the conduct is uncommunicated parallel conduct.

Part I sets out the principles for rectification for common mistake and revisits the most recent debates in England and Australia concerning the use of an objective or subjective standard of assessment. Part II examines how common intention is established in rectification, and other areas of law,

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1 Michael E Bratman, 'Shared Intention' (1993) 104 Ethics 97; Margaret Gilbert, 'Shared Intention and Personal Intentions' (2009) 144 Philosophical Studies 167.

2 David Hume, *A Treatise of Human Nature* (2nd edn, OUP 1978) 490.

including whether communication is required and the role of conduct. In doing so, the article demonstrates how common intention is often a question of proof rather than the substance and form of the common intention itself. Part III explores uncommunicated conduct proving common intention, and the possibility that it may have more work to do in informal contexts, with reference to the England and Wales Court of Appeal's recent decision in *Ralph v Ralph*. Part IV concludes that notwithstanding the possibility that common intention could be proved by uncommunicated parallel conduct, that possibility is unlikely to be applied, largely because of the high evidentiary hurdle.

I Rectification of contract

A Statement of principles

Courts recognise 'it is easy for one such party, upon becoming dissatisfied after the event with some element of the written compact, to seek to brand it as inaccurate'.[3] Rectification of contracts concerns the parties' 'true agreement'. By this, it is often meant that rectification does not apply to intentions in the abstract or mistakes in the particular transaction. Rather, it is concerned with mistakes in the expression of intentions in the written contract.[4] This is reflected in the requirement that the parties had a common intention at the time of execution of the document, and a common intention that the written document would conform to that common intention.[5] The task of rectification is to correct mistaken expressions in contracts.[6] This stands apart from the use of rectification in other areas, such as unilateral dealings including voluntary settlements and trust deeds, where the single intention of a settlor suffices.[7]

Rectification requires that the parties demonstrate 'the written instrument does not reflect the "agreement" because of a common mistake'.[8] What is required for 'common mistake' is often decided in judgments without a full explanation of the nature of mistake required.[9]

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3 *Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust* [2004] NSWSC 214 [30] (Barrett J), cited in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317 [123] (Sackville AJA, Leeming JA and Emmett AJA agreeing).

4 John McGhee and Steven Elliott, *Snell's Equity* (34th edn, Sweet & Maxwell 2020) 465.

5 *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85, [2016] HCA 47 [103] (French CJ).

6 John Tarrant, *Rectification of Documents* (1st edn, Federation Press 2020) 76–77.

7 *Re Butlin's Settlement Trust* [1976] Ch 251, applied in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329; *Day v Day* [2013] EWCA Civ 280.

8 *Simic* (n 5) [103]–[104] (Gageler, Nettle and Gordon JJ).

9 We have not identified any case involving rectification, which has been decided on the basis that there was no 'common *mistake*', for instance, by distinguishing 'common mistake' from other types of errors such as mere ignorance or a false assumption: see John Tarrant, *Rectification of Documents* (1st edn, Federation Press 2020) 145. The authorities indicate that the focus is on 'common intention'. Kay LJ observed (in the context of relief against forfeiture) 'very wisely ... the Courts have abstained from giving any general definition of what amounts to mistake. That view no doubt arises from the myriad of circumstances that may arise and from which a person may be heard to say "I made a mistake"': *Barrow v Isaacs* [1891] 1 QB 417, 425.

The premise underlying a rectification suit is the plaintiff's desire to maintain the contract, but in different terms. Against the possibility of failing in rectification, the plaintiff may plead a particular construction, rescission for mistake, misrepresentation or statutory misleading and deceptive conduct in the alternative, in case the court finds a 'common assumption as to the existence of a state of affairs'[10] or a 'common misapprehension',[11] or only that the plaintiff was misled.

Rectification requires a common mistake. The nature of a common mistake, as compared to a mutual mistake or unilateral mistake, is that the *substance* of the mistake *is the same as between the parties*; one example being two parties contracting with each other believing a painting sold is the genuine work of a particular artist. In the context of rectification for common mistake, the satisfaction of the common mistake requirement may well be *res ipsa loquitur.* By the time a court has reached the question of whether the written instrument is erroneous because of a common mistake, it has already accepted that the parties had a continuing common intention and that the executed instrument was to conform to that intention. Therefore, the fact that the common intention is not found in the executed instrument is taken to demonstrate a common mistake.

Unsurprisingly the language and ideas concerning rectification of contracts overlap with those in contract law, such as construction and contract formation. Both 'rectification by construction' and equitable rectification may be raised in relation to claimed errors in the expression of a contract. While different in nature, both require 'elevated standards of proof' to maintain the certainty and predictability of the principles which apply to contracts.[12] There remain some important differences, although some are conceptual rather than practical in nature.[13] Construction focuses on objectively ascertained intentions. Rectification, in Australia, examines the actual or subjective intentions of the parties, viewed objectively,[14] but involves a 'departure ... from the objective theory of contract'.[15] In *Ryledar v Euphoric,* Tobias JA explained the dividing line between construction and rectification as follows:

> When a party to a contract argues that the known context and common purpose of the transaction gives the words of the contract a meaning which, by no stretch of language or syntax they will bear then, in truth, one has a rectification suit, not a construction suit.[16]

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10 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679 [76] (Phillips MR).

11 *Solle v Butcher* [1950] 1 KB 671, 693 (Denning LJ).

12 *James Adam Pty Ltd v Fobeza Pty Ltd* (2020) 103 NSWLR 850 [31] (Leeming JA).

13 *Simic* (n 5) 95 (French CJ).

14 *SAMM Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132 [113] (McColl JA), discussing *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 [60] (Campbell JA). Special leave was refused in *Ryledar.*

15 *Seymour Whyte Constructions Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317, 324 (Leeming JA).

16 *Ryledar* (n 14) [108] (Tobias JA, Mason P and Campbell JA agreeing).

However, there is an overlap, in that the court must construe the agreement as drafted before determining whether rectification is appropriate and how such a remedy ought to be framed.[17]

B Objective vs subjective intentions

The approaches taken to equitable doctrine of rectification for common mistake in Australia and England have diverged recently. Much has been written on the competing positions in terms of whether it is necessary to prove subjective or objective intention of the parties. Lord Hoffmann's dictum in *Chartbrook Ltd v Persimmon Homes Ltd* was to the effect that an objective approach that is used in establishing the parties' common intention for the purposes of formation of contracts was also appropriate for rectification suits.[18] That view has since been qualified by the Court of Appeal in *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd*[19] and the applicable principles currently remain unresolved as a matter of UK Supreme Court authority.[20] In Australia, the position has been explained by the High Court most recently in 2016 in *Simic v New South Wales Land and Housing Corporation.*[21]

The facts in *Chartbrook* were broadly as follows. Chartbrook contracted with Persimmon. Under the contract, Chartbrook was to obtain planning permission for a commercial and residential development, and then take a licence to develop the land and sell long leases. The dispute arose as to the particular contractual formula to be applied to the calculation of a payment to which Chartbrook was entitled ('Additional Residential Payment'). In the Court of Appeal, Chartbrook succeeded on construction and, by upholding Briggs J's findings of fact below, Persimmon's rectification suit was dismissed because there was no common intention in fact and only Persimmon had been mistaken as to the contractual formula.[22] In the House of Lords, Persimmon succeeded on construction. However, Hoffmann LJ (with whom the Appellate Committee unanimously agreed) considered the rectification issue in *dicta*. His Lordship found:

> Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the 'common continuing intention' were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. *On the*

17 For example, in *Melbourne Property Group Investments (MPGI) Pty Ltd as trustee for the MPGI Trust v Knight 43 Martin Street Pty Ltd* [2022] VSC 41 [401]–[404], rectification was sought of a variation deed to a loan agreement. According to MPGI, the alleged mistake was that the guarantee given under the variation deed should have been given to the lender rather than the borrower in circumstances where the borrower was an entity controlled by the guarantor. In ordering rectification, Garde J considered the text of the guarantee and considered that certain clauses would only make sense if the variation deed were rectified.

18 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101.

19 *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2020] 2 WLR 429 [176] (Leggatt LJ).

20 But *Chartbrook* has been subsequently cited for principles of construction: see, eg, *Arnold v Britton* [2015] AC 1619 [15] (Lord Neuberger, Lords Sumption and Hughes agreeing), [70] (Lord Hodge) and questioned by the Privy Council in *Porter v Stokes* [2023] UKPC 11 [40] (Lord Briggs).

21 (2016) 260 CLR 85714.

22 *Chartbrook* (n 18) [161]–[164] (Collins LJ), [189] (Rimer LJ), [191] (Tuckey LJ).

> *contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be*.[23]

More recently, in *FSHC,* the England and Wales Court of Appeal refused to follow *Chartbrook.* FSHC agreed to provide security to a security agent (GLAS Trust Corp by the time of the appeal) in respect of a financing deal. Security was not provided. FSHC then arranged to provide security via two pre-existing security deeds. The effect of those deeds was to provide the security required, but also imposed on FSHC onerous additional obligations. FSHC sought rectification to remove the onerous obligations. At first instance, Henry Carr J granted rectification on the basis that the parties, at the time of executing the accession deeds, had a common intention that the deeds *only* provide security and this was evident on an objective or subjective assessment.[24] On appeal, GLAS Trust Corp challenged the primary judge's finding that there was a common intention. The Court of Appeal held it was 'necessary to confront' the question of whether the relevant inquiry of rectification was one of subjective intention.[25] Leggatt LJ concluded:

> ... we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann's obiter remarks in the Chartbrook case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord' — meaning that, as a result of communication between them, the parties understood each other to share that intention.[26]

In *Simic v New South Wales Land and Housing Corporation,* the High Court maintained the existing Australian approach to rectification based on the subjective or actual intentions of the parties.[27] The Australia and New Zealand Banking Corporation (ANZ) issued some bank guarantees at the request of a company in liquidation, Nebax, and its director, Mr Simic. The bank guarantees were issued in favour of the 'New South Wales Land & Housing Department Trading as Housing NSW', a non-existent entity. The name of the entity ought to have been the NSW Land and Housing Corporation (NSWLHC). The NSWLHC commenced proceedings seeking a declaration that ANZ's guarantees should 'be construed as describing the Plaintiff'.[28] Alternatively, the NSWLHC said the guarantees ought to be rectified as the common intention of the NSWLHC and Nebax was plainly that the NSWLHC was the beneficiary of the guarantees.

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23 ibid [60] (Lord Hoffmann; Lords Hope, Rodger, Walker and Baroness Hale agreeing) (emphasis added).

24 *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2018] EWHC 1558 [160] (Henry Carr J).

25 *FSHC* (n 19) [10] (Leggatt LJ; Rose and Flaux LJJ agreeing).

26 ibid [176] (Leggatt LJ; Rose and Flaux LJJ agreeing).

27 *Simic* (n 5) [103]–[104] (Gageler, Nettle and Gordon JJ).

28 [2015] NSWSC 176 [32] (Kunc J).

At first instance, Kunc J found that the guarantees could be construed such that the NSWLHC was the beneficiary.[29] In *dicta,* Kunc J also considered that rectification would have been available, had a different result been reached on construction. Although Nebax and ANZ subjectively intended to write the words 'New South Wales Land & Housing Department trading as Housing NSW', ANZ indicated it was indifferent to the particular identity of the relevant entity.[30] Kunc J considered there was a common intention on the basis of objective evidence; namely that the commercial purpose of the guarantees was to facilitate a business transaction with the specific 'favouree' who was the 'principal' in the undertakings in a separate construction contract as well as the 'surrounding circumstances' known to both Nebax and ANZ.[31]

Nebax, by its director Mr Simic, appealed. One ground of appeal was that the primary judge erred in finding that the NSWLHC was entitled to rectification and erred in relying on the objective intentions of ANZ and Nebax.[32] In the NSW Court of Appeal, Emmett AJA, with whom Bathurst CJ and Ward JA agreed, dismissed the appeal. His Honour affirmed the primary judge's findings on construction, and it was therefore unnecessary to consider the question of rectification.[33] However, Emmett AJA did remark that there was limited evidence of the intention of Ms Hanna, as the relevant ANZ official, and nothing to suggest she was even aware of the existence of the NSWLHC. However, it may have sufficed that the relevant officers of the NSWLHC and Nebax had a common intention, even if ANZ did not.[34]

Nebax appealed to the High Court. The appeal was allowed. All five judges concluded that construction could not salvage the misdescriptions in the guarantees, but rectification would be available.[35] As to rectification, there were three separate judgments. Kiefel J (with whom French CJ concurred) discussed Lord Hoffmann's dictum in *Chartbrook*, stating (citations omitted):[36]

> Lord Hoffmann's view involves a departure from the traditional approach of the courts to rectification. Its utility has been questioned. It has been observed that it is difficult to see why a prior agreement, objectively determined, should override the later instrument, unless it reflects the parties' actual intentions. The need for consistency which his Lordship thought desirable may also be questioned. Rectification is an equitable remedy which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement and it does so pragmatically, by reference to considerations such as business efficacy.

Evidence of subjective intention, including in the form of parol evidence, may be used in addition to objective evidence.[37] The classic example of parol

29 ibid [65]–[78] (Kunc J).
30 ibid [91]–[92] (Kunc J).
31 ibid [92], [72]–[73].
32 [2015] NSWCA 413 [57] (Emmett AJA).
33 ibid [118].
34 ibid [120].
35 *Simic* (n 5) 89 (French CJ), 96 (Kiefel J), 105 (Gageler, Nettle and Gordon JJ).
36 ibid [43] (Kiefel J).
37 That is the approach taken by McDonald J in *Fonterra Brands (Australia) Pty Ltd v Bega*

evidence tendered in rectification cases is evidence of prior negotiations in written or oral forms, which would otherwise be excluded as irrelevant for construction, unless they are used to demonstrate the 'genesis' or 'aim' of the transaction.[38] For instance, subjective evidence may be consistent with some objective evidence, or it may be inconsistent with the objective evidence. If inconsistent, a witness advancing subjective evidence is 'unlikely to be believed'.[39]

II Proving common intention by 'conduct'

A How is 'common intention' proven in other areas of law?

The concept of 'common intention' can be found outside rectification for common mistake, such as in the context of contract formation, setting up a common intention constructive trust, and proving 'understandings' in competition law. By considering how common intention is proved in other contexts, it can be seen that evidentiary requirements are often central, without requiring any particular substance or form of the common intention.

For the purposes of contract formation, it is necessary to prove the common intention of the parties to enter legal relations. That expression, according to four members of the High Court:[40]

> ... describes what it is that would objectively be conveyed by what was said or done, in regard to the circumstances in which those statements and actions happen. It is not a search for the uncommunicated subjective motives or intentions of the parties.

The task of ascertaining the intention on the part of each contracting party to enter legal relations is an objective task, informed by the objective theory of contract.[41]

In ascertaining the 'common intention' for the purposes of 'rare'[42] common intention constructive trusts, courts have considered common intention in terms synonymous with an agreement. White J, as he then was, in *Shepherd v Doolan* explained that equity intervenes to prevent the unconscientious denial

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Cheese Ltd [2021] VSC 75 [93], citing *RHG Mortgage Securities Pty Ltd v Elektra Purchase No 19 Ltd* [2009] NSWSC 258 [11]; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2008] NSWSC 274 [29] (Einstein J); appeal allowed without questioning the statement of principles (2009) 261 ALR 382. See also *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740, 752; *Ryledar* (n 14) 657 (Campbell JA).

38 *Righi v Kissane Family Pty Ltd* [2015] NSWCA 238 [48] (Emmett JA); *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 [108] (Kiefel and Keane JJ); *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 350–51 (Mason J, Stephen and Wilson JJ agreeing).

39 This is particularly where evidence of subjective state of mind was uncommunicated or unexpressed: *Ryledar* (n 14) at [182]–[186] (Tobias JA).

40 *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

41 See, eg, *Taylor v Johnson* (1983) 151 CLR 422, 461–62 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). See also Robert Stevens, 'What is an Agreement?' (2020) 136 Law Quarterly Review 599.

42 See, eg, *Bijkerk Investments Pty Ltd v Bikic* [2020] NSWSC 1336 [111]–[119] where Leeming JA does not express a concluded view.

by a legal owner of another party's rights '*where the parties agreed,* or it was their common intention'.[43] The substance of that agreement usually turns on proof that both parties intended a particular arrangement in relation to how beneficial interests in a property would be apportioned; in other words, the same intention has been held by both parties. In practical terms, that common intention turns on express agreement, as well as inferences from particular types of conduct such as financial contributions to the acquisition of property, including payments to mortgages or expenses to free up funds for that purpose.[44] Certain types of conduct are less likely to give rise to any inference of a common intention, including for instance, the mere fact of joint occupation or repairs and renovations to a property.[45] However, that is a matter of evidence and not principle.[46] As Gleeson CJ stated in *Green v Green*, discussing *Grant v Edwards*:[47]

> His Lordship pointed out that proof of such common intention can be direct, as for example, by evidence of express agreement or the making of admissions, or such common intention can be inferred from the making of contributions to the cost of a property, or meeting expenses in maintaining it. That, however, is merely one of the ways, but not the only way, in which the evidentiary basis for inferring a common intention can be laid. As was earlier observed, such conduct may also be of considerable factual importance in establishing an acting to detriment, but once again, in that respect its status is evidentiary and it is not a matter of legal necessity.[48]

Concepts of common intention can also be found in statutory contexts. Joint action is a well-known feature of competition law's regulation of horizontal restraints.[49] In Australia, s 45 of the Competition and Consumer Act 2010 (Cth) prohibits 'contracts, arrangements or understandings' with the purpose, effect or likely effect of substantially lessening competition in a market. The authorities which have considered the construction of 'understanding' have often grappled with the tension between an 'understanding' clearly being a broader and more flexible concept than a 'contract', but at the same time searching for limiting principles. Section 45 jurisprudence demonstrates the different ways in which joint action is controlled in law including through the incorporation of quasi-contractual features such as the need for consensus ad idem. Gray J, after construing s 45 in *ACCC v Leahy Petroleum*, stated 'it must be a consensual dealing between parties ... an understanding must involve a meeting of the minds'.[50] That need for consensus has been

43 [2005] NSWSC 42 [34]–[42], repeated in *Galati v Deans* [2023] NSWCA 13 [54] (White JA).

44 *Calverley v Green* (1984) 155 CLR 242, 251 (Gibbs CJ), 257–58 (Mason and Brennan JJ), 267–68 (Deane J) (in the context of a resulting trust analysis).

45 *Green v Green* (1989) 17 NSWLR 343, 354–56 (Gleeson CJ).

46 *Allen v Snyder* [1977] 2 NSWLR 685, 691 (Glass JA); *Gissing v Gissing* [1971] AC 886, 906–07 (Lord Diplock).

47 *Grant v Edwards* [1986] Ch 638.

48 *Green v Green* (1989) 17 NSWLR 343, 355 (Gleeson CJ; Priestley JA agreeing).

49 Maksymilian Del Mar, 'Concerted Practices and the Presence of Obligations: Joint Action in Competition Law and Social Philosophy' (2011) 30 Law and Philosophy 105.

50 *ACCC v Leahy Petroleum Pty Ltd* (2007) 160 FCR 321 [28] (Gray J). The language of consensus can be seen in rectification as well: see, eg, *Ryledar* (n 14) [290] (Campbell JA).

re-expressed in terms requiring some kind of 'commitment'[51] and even moral obligation and communication.[52] Plainly, these concepts supply stringency to a statutory provision which can lead to substantial civil and criminal penalties, including imprisonment.[53]

B Knowledge/communication of common intention

The English and Australian positions differ on whether 'outward expression of accord' is necessary. The English requirement of an outward expression of accord, which requires more than each party privately or independently having the same intention,[54] can be traced through several English authorities, starting with Buckley LJ, who held in *Lovell & Christmas Ltd v Wall*:[55]

> In ordering rectification the court does not rectify contracts, but what it rectifies is the erroneous expression of contracts in documents. For rectification, it is not enough to set about to find what one or even both of the parties to the contract intended. What you have to find out is what intention was communicated by one side to the other, and with what common intention and common agreement they made their bargain.

In the famous 'horsebeans' or 'feveroles' case of *Rose v Pim,* Denning LJ, who was concerned about certainty and predictability in business transactions, found that a 'continuing common intention is not sufficient unless it has found expression in outward agreement'.[56] Nearly two decades later in *Joscelyne v Nissen,* Russell LJ, in describing the reasoning of the Court of Appeal in *Rose v Pim,* observed there was nothing in that case which could be described as an outward expression of accord.[57] The purchaser had an internal understanding that feveroles were the same thing as horsebeans. The supplier knew the difference.[58] His Lordship went on:

> It turned out that locked separately in the breast of each party was the misapprehension that the word 'horsebeans' meant another commodity, but as we understand the case there was no communication between them to the effect that when they should speak of horsebeans that was to be their private label for the other commodity. The decision in our judgment does not assert or reinstate the view that an antecedent complete concluded contract is required for rectification: it only

51 See, eg, *Apco Service Stations Pty Ltd v ACCC* [2005] FCAFC 161 [47] (Heerey, Hely and Gyles JJ).

52 *Trade Practices Commission v Email Ltd* [1980] 43 FLR 383, 397 (Lockhart J). In the English context, see *British Basic Slag Ltd v Registrar of Restrictive Trading Agreements* [1963] 1 WLR 727, 739 (Diplock LJ).

53 See, eg, Competition and Consumer Act 2010 (Cth) s 79.

54 *Joscelyne v Nissen* [1970] 2 QB 86, 96–97 (Russell LJ, for the court).

55 (1911) 104 LT 85, 95 (Buckley LJ).

56 *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, 461 (Denning LJ).

57 [1970] 2 QB 86, 98. However, it has been noted that there was communication in relation to the order of feveroles itself: See, eg, David Hodge, *Rectification: The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, Sweet & Maxwell 2016) 3-13–3-14, 3-17; *Ryledar* (n 14) [275] (Campbell JA).

58 *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450, 459 (Denning LJ).

> shows that prior accord on a term or the meaning of a phrase to be used must have been outwardly expressed or communicated between the parties.[59]

In Australia, most cases state that communicated intention is a prerequisite to establishing rectification,[60] but not that an outward expression of accord is required.

For some time, in England and Australia it has also been accepted that communication of common intention may be by way of conduct. For example, in *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd*, Street J stated (emphasis added):

> It seems rather that the true principle *involves finding an identical corresponding contractual intention on each side, manifested by some act or conduct from which one can see that the contractual intention of each party met and satisfied that of the other*. On such facts there can be seen to exist objectively a consensual relationship between the parties.[61]

In *Ryledar*, Campbell JA (with whom Mason P agreed) expressed the view that communication of intention need not be express and can arise through conduct, including the parties operating in the same industry. He stated:

> In my view, when that intention relates to the terms upon which they will contract with each other, it is still necessary for them to know enough of each other's intentions for it to be said that there is a common intention. They might come to know of each other's intentions in this way through those intentions being directly stated, or they might come to know of them through the various other means by which one person's intention can become known to another person. Those means can sometimes involve a process of conscious and deliberate inference. Those means can sometimes involve simply perceiving a gestalt in a series of events. Those means can depend to some extent on the people involved sharing a common understanding of how particular bodies of knowledge or markets or social institutions they are operating in work — the experienced surgeon, or the experienced chess player, can sometimes see what another surgeon, or chess player, is seeking to do, in a way that an inexperienced person cannot. What matters for present purposes is that for a negotiating party to perform actions or say words from which the other party can gather his or her intention is itself a form of communication.[62]

This requirement of knowledge or communication was confined to where the relevant common intention concerns the terms upon which the parties will contract. In subsequent decisions, such as *Franklins*, Campbell JA cited

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59 *Joscelyne v Nissen* [1970] 2 QB 86, 96–97 (Russell LJ, for the court).

60 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, 349–50 (Mason J) citing with approval *Lovell & Christmas Ltd v Wall* (1911) 104 LT 85, 95 (Buckley LJ); *Ryledar* (n 14) [281] (Campbell JA); *Commerce Consolidated Pty Ltd v Johnstone* [1976] VR 724, 728–29 (Gowans, Lush and Harris JJ).

61 *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* (1972) 2 NSWLR 467, 473 (Street J). J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis 2015) [27-085]: 'For the purpose of rectification for common mistake, a consensus cannot be reached without its being communicated, in speech, writing or otherwise, between the parties.'

62 *Ryledar* (n 14) [281] (Campbell JA). This has been affirmed by the NSW Court of Appeal on several occasions: see, eg, *Newey v Westpac Banking Corporation* [2014] NSWCA 319 [175] (Gleeson JA; Basten and Meagher JJA agreeing).

Ryledar for the proposition that the intentions are 'otherwise shared by the parties',[63] but did not express a view on communication or knowledge.

The Victorian Court of Appeal held in *Commerce Consolidated* that the critical question in rectification is 'whether there is also a consensus between the parties, which they had communicated to each other ...'.[64] The court also found that it was open for the trial judge to conclude that there had been a communication, absent any 'explicit communication', because the parties had both taken it for granted that interest would be paid from the time of obtaining possession of land sold on any unpaid purchase money.[65]

The examples provided in the cases all relate to knowledge (or communication) obtained through conduct *inter se*: directly stating intentions; conscious and deliberate inferences drawn from another's conduct; acting consistently with business practices or a common understanding of particular social or institutional practices.[66]

The English courts have described a situation where an understanding is thought by the parties to be 'so obvious it goes without saying', picking up the language familiar to implied terms in fact, which involves the objective approach.[67] Campbell JA in *Ryledar* offers the following example:

> [I]f a contract is negotiated in a context where there are well understood business practices and conventions, and nothing is said about those practices and conventions not applying, it can be legitimate to conclude that both parties to the contract intended to act in accordance with those practices and conventions, even if they did not expressly communicate to each other that they intended to act in accordance with those practices and conventions.[68]

This appears analogous to implying terms by custom and trade usage.[69] However, such implication occurs by way of the court deeming or presuming intention,[70] whereas rectification is based on a finding of actual subjective intention by reason of conduct and context.

III Can uncommunicated parallel conduct prove common intention?

A State of the law

Requiring that a counterparty *know* of the particular conduct, is not the same thing as requiring that there is conduct, from which 'one can see that the

63 *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 [444] (Campbell JA).

64 *Commerce Consolidated Pty Ltd v Johnstone* [1976] VR 724, 728 (Gowans, Lush and Harris JJ).

65 ibid.

66 *Ryledar* (n 14) [281] (Campbell JA).

67 *JIS (1974) Ltd v MCP Investment Nominees Ltd* [2003] EWCA 721 [33]–[34] (Carnwath LJ).

68 *Ryledar* (n 14) [281] (Campbell JA). However, compare Campbell JA's earlier statement that rectification requires the parties to know enough of each other's intentions.

69 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226, 236–38 (Gibbs CJ, Mason, Wilson, Brennan and Dawson JJ).

70 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 346 (Mason J).

contractual intention of each party met and satisfied that of the other'.[71] One question that has not been clearly answered is whether evidence of parallel conduct that is not communicated *inter se* could be sufficient to satisfy the requirements for rectification.

There was no need for the High Court in *Simic* to consider proof of common intention by conduct at all, because there was express communication of intention. The High Court plurality, in *dicta*, did observe (emphasis added):

> *There is no requirement for communication of that common intention by express statement*, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party.[72]

It may be that the paragraph was intended to repeat and approve Campbell JA and the Victorian Court of Appeal, to the effect that common intention can be demonstrated by conduct other than express conduct such as communication of intention.[73] That would be uncontroversial.

However, it may be that Gageler, Nettle and Gordon JJ also considered that communication of intention *inter se* was not necessary at all. They cite *Bishopsgate*[74] and *Bush*[75] for the proposition that 'there is no requirement of that communication by express statement'. In *Bush*, Hodgson J held:

> While there need be no formal communication of the common intention by each party to the other or outward expression of accord, it must be objectively apparent from the words or actions of each party that each party held and continued to hold an intention on the point in question corresponding with the same intention held by each party ... the view that there need by [sic] no communication of the common intention is confirmed by *NSW Medical Defence Union.*[76]

However, in *Simic* there is no express consideration of whether conduct that is not *inter se* is sufficient to demonstrate common intention.

There is also single-judge authority that suggests that the focus is on an objective finding of subjective intention, without need for communication; what is necessary is that the party has something more than an undisclosed intention.[77] Also, in *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*, Mahoney AP observed: 'the principle upon which rectification is granted

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71 *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* (1972) 2 NSWLR 467, 473 (Street J).

72 *Simic* (n 5) [104]–[105] (Gageler, Nettle and Gordon JJ).

73 J D Heydon, *Heydon on Contract* (1st edn, Lawbook Co 2019) [30.150].

74 *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429, 431 (Yeldham J).

75 *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390, 405–06 (Hodgson J).

76 *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740.

77 *Bishopsgate* (n 74) 430–31 (Yeldham J); *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467, 473 (Street J); *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193, 253–54 where Gummow J in obiter endorses Yeldham J's statement in *Bishopsgate* 'there may be no requirement that the respective intentions of the parties have been communicated inter se ...'; *Re Streamline Fashions Pty Ltd* [1965] VR 418, 420 (Hudson J); *Johnstone v Commerce Consolidated Pty Ltd* [1976] VR 463, 467 (Crockett J); *Westland Savings Bank v Hancock* [1987] 2 NZLR 21, 30 (Tipping J). See also Gino Dal Pont and Tina Cockburn, *Equity and Trusts in Principle* (4th edn, Lawbook Co, 2019) 631.

involves two things: that the party (in the case of a unilateral transaction) or the parties (in the case of a transaction between parties) had at all relevant times an intention which was to be given effect to in that transaction'.[78]

Therefore, rectification based only on conduct that is not *inter se* appears open on the authorities; it has certainly not been convincingly rejected.

B What ought the position be?

Ought it be accepted that parallel conduct evidencing a common intention that is not communicated *inter se* is never admissible, or ought it be a matter of whether such evidence satisfies the evidentiary burden? Is it the case that evidence of communication simply goes to whether the burden of proof has been discharged rather than the substantive requirements of rectification?[79]

There are existing limits on the way conduct can be used to prove common intention. First, the well-settled principles of burden and onus of proof that require the rectifying party to establish 'in the clearest and most satisfactory manner'[80] the common intention of the parties, or the need to establish common intention by 'clear and convincing proof'.[81] Second, the court's objective assessment of the parties' actual intentions in light of other circumstances, such as prior negotiations.[82]

The need for requiring a further limit in the form of knowledge and communication of any kind has been criticised. Prince and Herzfeld observed the authorities cited by Campbell JA, including Street J's words in *Austarama,* are equivocal, and the need for 'communication' of any kind is vague.[83]

A chief advocate of the view that the evidentiary burden is a sufficient gatekeeper without imposing a requirement of knowledge or communication has been Leonard Bromley QC who has argued that the English requirement for an outward expression of accord in *Joscelyne* was informed by two factors: first, the common law principle that courts, in construing contracts, seek to ascertain the meaning of the words used, and, second, the need for certainty in business transactions. Bromley's argument is that the first factor is misconceived and contrary to authority. The second factor, he argues, is not affected because of the evidential standards at play.[84]

If there is no substantive requirement that communication and knowledge are necessary then rectification would be available in circumstances when the subjective intentions of contracting parties were identical, even if each party

78 *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329, 331.

79 See, eg, Leonard Bromley, 'Rectification in Equity' (1971) 87 Law Quarterly Review 532, 538; *Bishopsgate* (n 74) 431 (Yeldham J); *Pukallus v Cameron* (1982) 180 CLR 447, 452 (Wilson J; Gibbs CJ agreeing); *Munt v Beasley* [2006] EWCA Civ 370 [36] (Mummery LJ).

80 *Fowler v Fowler* (1859) 4 De G & J 250, 265; approved in *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336, 449 (Mason J, Menzies J agreeing); *Pukallus v Cameron* (1982) 180 CLR 447, 457 (Brennan J); *Simic* (n 8) [102] (Kiefel J, French CJ agreeing).

81 *Pukallus v Cameron* (1982) 180 CLR 447, 452 (Wilson J, Gibbs CJ agreeing at 448); *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54, 63–64 (Rich, Starke & Dixon JJ); *Franklins* (n 63) [451] (Campbell JA, Allsop P and Giles JA agreeing); *Mander Ltd v Clements* (2005) 30 WAR 46, 50–51 [13] (Murray J), 57–58 [53]–[54] (McKechnie J).

82 *Simic* (n 5) [20] (French CJ), [46] (Kiefel J), [104] (Gageler, Nettle and Gordon JJ).

83 Thomas Prince and Perry Herzfeld, *Interpretation* (2nd edn, Lawbook Co 2020) [28.110].

84 Leonard Bromley, 'Rectification in Equity' (1971) 87 Law Quarterly Review 532, 537.

kept that intention to themselves. There are two positive ramifications of this conclusion. It would allow for arguably fairer outcomes by not excluding otherwise probative evidence, such as admissions or documentary evidence. Further, it would accommodate situations of parallel behaviour which, as Part IV demonstrates, are likely to arise in informal transactions.

First, admissions. Equity would not enforce an agreement where the defendant admitted the mistake.[85] The concern to preserve the application of rectification where parties made admissions was one of Clarke J's concerns in *Medical Defence Union.*[86] His Honour considered there ought be no need for an outward expression of accord else '[i]t would mean that in a case in which both parties came before the court and gave evidence that they had intended to bind themselves in terms different from the terms of the written document, properly construed, but in which there was no outward expression of accord, the court would be powerless to rectify their contract'.[87]

Yet it is difficult to see how this situation practically arises where parties could otherwise vary the contract without requiring judicial intervention. Perhaps the concern is really that the law ought to be flexible when considering common intention, so that it does not exclude what the parties actually intended and misdirect the flexibility intrinsic to rectification.[88]

Secondly, rectification would also accommodate factual scenarios where there are documents unequivocally manifesting a party's intention which were not provided to the other party, such as board minutes.[89]

Thirdly, rectification could apply in circumstances where there is mere parallel behaviour in which intentions coincide.[90] Two examples are provided below to demonstrate the possible application of conduct that is not *inter se*. Both arise in informal contexts where the document to be rectified has not been subject to full negotiation.

In the land context, suppose two elderly siblings purchase a property without the assistance of a lawyer. On the front page of the contract for sale and purchase of land, they record themselves as purchasing as joint tenants.[91] Before the purchase, the brother goes out with his friends and tells them he will be leaving his half of the property to his children, and he also prepares a will to that effect. The sister does the same. Neither sibling has any subjective knowledge of the other sibling's conversations or will preparations. The sister

85 *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* (2019) 99 NSWLR 317, 323 [13] (Leeming JA).

86 Cf *Ryledar* (n 14) [287] (Campbell JA).

87 *NSW Medical Defence Union Ltd v Transport Industries Insurance Co Ltd* (1986) 6 NSWLR 740, 750.

88 J D Heydon, M J Leeming and P G Turner, *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (5th edn, LexisNexis 2015) [27-085].

89 Such evidence, although not *inter se* or 'crossing the line', are probative: Marcus Smith, 'Rectification of Contracts for Common Mistake, Joscelyne v Nissen, and Subjective States of Mind' (2007) 123 Law Quarterly Review 116, 125; David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 Law Quarterly Review 608, 616–17.

90 Cf H G Beale, *Chitty on Contracts* (30th edn, Sweet & Maxwell 2008) [5-114].

91 Such a recording, being an express provision in an instrument, may close off constructional avenues which would otherwise be available under eg s 26 of the Conveyancing Act 1919 (NSW); see s 26(2).

is diagnosed with a terminal illness and upon becoming aware of the joint tenancy seeks urgent relief to rectify the contract so it reflects that they hold the property as tenants in common. Her concern is that severing the joint tenancy by lodging the requisite documents with the Registrar General will take too long and therefore may not have legal effect before she dies.[92] Assume the brother resists the application by placing reliance on the contract as it stands. Suppose there is no other relevant conduct. The siblings have clearly evinced, through their conduct, a common intention. But the siblings did not *act towards each other.* In principle, why would rectification not be available for the sister?[93]

In a personal property context, suppose two friends purchase a boat together. They find a precedent contract to govern their ownership online. The contract provides that each purchaser is to contribute an equal amount of the maintenance costs. Before the contract is executed, both send messages to their families that the costs of maintenance will reflect the actual time each uses the boat. As it happens, one uses the boat far more than the other, but then asks for a contribution of 50% maintenance costs. A rectification case ensues.

C How would such an approach compare to other approaches taken in equity?

If rectification is available in such situations identified above and 'conduct' is taken to include the concept of subjective *and* uncommunicated intentions, that may be an outlier in equity's treatment of bilateral or multilateral dealings and outflank existing equitable and common law principles.

In the context of trusts, the relevant acts rebutting the equitable presumption of resulting trust are 'not ordinarily to be found in an uncommunicated state of mind' but 'to be inferred from what the parties do or say'.[94] Where equity has acted on a subjective uncommunicated intention, it has been for pragmatic reasons. The classic examples of such a departure include the settlor's intention underlying a declaration of express trust, which does not require communication to the beneficiary,[95] and rectification for unilateral dealings such as voluntary settlements, where the relevant intention can only be discerned from the mental state and conduct of the rectifying party. Of course, where a subjective intention has not been communicated it may lead to an inference that the intention was not irrevocable.[96]

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92 See eg s 97 of the Real Property Act 1900 (NSW). Equitable severance might be argued based on conduct showing the parties treated themselves as tenants in common; see, eg, *Wright v Gibbons* (1949) 78 CLR 313, 322 (Latham CJ).

93 This article does not address all the issues that may arise in the land context because of legislation. The sister would likely seek to vary the registered title to reflect the 'common intention'. The vendor likely had no intention on the issue, and that may raise issues as seen in *Simic* at first instance: [2015] NSWSC 176 [91]–[92] (Kunc J).

94 *Calverley v Green* (1984) 155 CLR 242, 261 (Mason and Brennan JJ).

95 J D Heydon, *Jacobs' Law of Trusts in Australia* (8th edn, LexisNexis, 2016) [5-23].

96 *Re Cozens* [1913] 2 Ch 478, 486 (Neville J).

However, a stricter requirement for intention may be *more* justifiable in the context of rectification for common mistake.[97] First, the pragmatic justification for allowing subjective uncommunicated intention is not present, because rectification for common mistake concerns bilateral dealings. Second, the effect of a rectification suit is to correct a mistake in a document, so it accords with the true prior agreement. The finding of a trust is in essence to create or recognise the existence of a particular type of relationship known only to equity. Insofar as the equitable principles of rectification are capable of modifying common law relationships in the form of agreements, there has been a long-held recognition that the principles must be kept in strict bounds.[98] That view reflects the objective improbability of parties making mistakes in serious dealings committed to writing.[99]

On the other hand, the application of rectification to subjective and uncommunicated intentions may be consistent with its overarching function of preventing unconscientious reliance on strict legal rights,[100] and the maxim that equity looks to intent rather than to form.[101] If rectification required communication *inter se,* that would further blur the lines with contract. Where intentions are communicated in the course of negotiations, particularly in documentary form, that has occasionally been considered as part of a constructional exercise.[102] Even if it were the case that the party resisting rectification can only be described as acting against conscience if they *knew* of the other party's intention in some way,[103] such knowledge could arise after execution of the agreement, provided, of course, that there was a common intention at the time of execution.[104] Insofar as that party now resists rectification in court, if in truth they had the same intention at the time of execution, and they continue to resist rectification, now in the knowledge that they had the same intention, such behaviour can be properly characterised as unconscientious. Knowledge may be seen to play a flexible role in other areas

97 For example, Marcus Smith stated 'what one would expect is for the test for rectification to reflect the criteria that have to be met for the creation of the instrument that is to be rectified': Smith (n 89) 129.

98 *Fox Entertainment Precinct Pty Ltd v Centennial Park and Moore Park Trust* [2004] NSWSC 214 [30] (Barrett J). See also Stevens (n 41) 600–01.

99 *Franklins* (n 63) [461] (Allsop P, Giles JA agreeing).

100 See, eg, *Ryledar* (n 14) 666-7 (Campbell JA); *Franklins* (n 63) [443]–[444] (Allsop P; Giles JA agreeing). Some judges have stated that it is disclosure which is generative of unconscientiousness: see, eg, *Harden v Willis Australia Group Services Pty Ltd* [2021] NSWSC 939 [195] (Sackar J). It is arguably also consistent with equity's broader role in constraining opportunistic behaviour with legal rights, particularly where opportunistic adherence to legal rights can arise before and after contract execution: Andrew S Gold, 'Equity and the Right to Do Wrong' in Dennis Klimchuk, Irit Samet and Henry Smith, *Philosophical Foundations of the Law of Equity* (1st edn, OUP 2020) 72, 74-75.

101 *Ryledar* (n 14) [179] (Tobias JA).

102 *Cherry v Steele-Park* [2017] NSWCA 295 [91] (Leeming JA); cf [136]–[137] (White JA).

103 Australian cases have tended to suggest the animating rationale for rectification is based on unconscionability and concepts of knowledge. See eg J W Carter, *Contract Law in Australia* (8th edn, JW Carter Publishing 2023) [21-08]. See also *Ryledar* (n 14) [315] (Campbell JA); *Franklins* (n 63) [444] where Campbell JA describes the justification this way: 'you and I both knew, when we entered this contract, what our intention was concerning it, and you cannot in conscience now try to enforce the contract in accordance with its terms in a way that is inconsistent with our common intention'.

104 *Simic* (n 5) [103] (Gageler, Nettle and Gordon JJ).

of equity in determining conduct is unconscientious,[105] and there appears no principled reason why knowledge or notice, *as a result of inter se conduct*, is necessary for rectification, particularly where the High Court did not take the opportunity in *Simic* to conclusively determine the role of unconscionability in rectification for common mistake.[106]

Furthermore, a rigid application of conscience to limit the scope of rectification would prevent equitable intervention in otherwise deserving cases. The High Court has elsewhere observed that the invocation of conscience in equity requires a 'scrutiny of the exact relations established between the parties to determine the "real justice of the case"'.[107] As Part IIID develops further, there are clearly cases, in which the exact relations between the parties weighs against the imposition of a restrictive conception of unconscionability. 'Unconscionability' serves as a means of expressing a particular conclusion using the 'language of equity', rather than necessarily or exhaustively explaining why liability arises.[108]

However, even if it is accepted that parallel conduct may sufficiently demonstrate common intention, there may be relatively insignificant practical impact. As demonstrated below, in Australia and since it was reinforced by *Simic,* the main controlling principles in rectification are the evidential principles, not the substantive doctrine itself, and it is very difficult to demonstrate any conduct that will be sufficient. However, one context where it may be engaged could be in more informal contexts, such as family and friend situations.

D Parallel conduct in informal transactions

The development of rectification principles has been guided by an emphasis on negotiated contracts.[109] Campbell JA's comments in *Ryledar* are predicated on features associated with bargaining and negotiation of a contract,[110] and negotiation is a common thread in rectification cases in Australia. Of course, uncommunicated intentions may arise in other informal contexts where the parties have not engaged in negotiation *at all*, such as family settings. These contexts are informed by normative features of reciprocity and trust, and are less likely to involve lawyers and other agents, negotiation, due diligence,

105 See Pranay Jha and Alan Zheng, 'Constructive Notice and Passive Retention Scenarios in Unconscionable Conduct Cases' (2023) 37 Commercial Law Quarterly 4.

106 There is only limited discussion of unconscionability as a distinguishing feature between rectification and construction: *Simic* (n 5) [20] (French CJ). A rigid application of unconscionability as a touchstone of rectification may detract from the exact circumstances in which common intention is pleaded.

107 *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 [18] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

108 See generally Lionel Smith, 'Fusion and Tradition' in Simone Degeling and James Edelman, *Equity in Commercial Law* (1st edn, Lawbook Co, 2005) 19.

109 This led Simonds J in *Crane v Hegeman-Harris & Co Inc* [1971] 1 WLR 1390 at 1391 (emphasis added) to say '[Rectification] is a jurisdiction which is to be exercised only upon convincing proof that the concluded instrument does not represent the common intention of the parties. *That is particularly the case* where you find prolonged negotiations between the parties eventually assuming the shape of a formal instrument in which they have been advised by their respective skilled legal advisers.'

110 *Ryledar* (n 14) [281] (Campbell JA).

formal documentation and other kinds of *inter se* conduct found in a commercial contract-making process.[111]

The England and Wales Court of Appeal recently considered a factual scenario in which rectification for common mistake was sought and where no negotiation took place. In *Ralph v Ralph,*[112] the parties were father and son. The father, David Ralph, and son, Dean Ralph, jointly purchased a property in Sutton. The father could not grant a mortgage in his sole name, so the son granted a mortgage and the father paid the balance of the purchase price. The transferor completed a Land Registry transfer form. On the form, the text 'the transferees are to hold the property on trust for themselves as tenants in common in equal shares' was crossed (by hand) to indicate it applied. Neither party could explain why the cross had been inserted.

Father and son had not discussed how the beneficial ownership was to be split before the purchase. All that was possibly discussed was that the purchase would be a good and sensible investment for the family.[113] The form itself was only signed by the transferors. Both the father and son had the same solicitor. That solicitor did not appear to advise them on beneficial ownership or raise the issue at all. The son sought a declaration that he was entitled to the beneficial ownership of the property in equal shares (consistent with the form) and an order for sale. The order for sale was prompted in part by the son's evidence that he was burdened by a mortgage on the property and he wished to clear the mortgage to purchase another property with his wife. The father resisted the order on the basis that the form had been completed by mistake and no such trust existed such that the beneficial ownership of the property lay with him. The father did not plead rectification, but it was nevertheless considered.

At first instance, the trial judge dismissed the son's claim and considered it was never intended that the parties would hold the property as joint owners in equity. The son appealed. Morris J in the High Court concluded that there was no agreement between the father and son as to the beneficial interests and therefore the parties intended the form to be silent on the issue such that the cross ought to be removed. The son appealed.

In the Court of Appeal, Sir Geoffrey Vos MR (Jackson and Popplewell LJJ agreeing) allowed the son's appeal and refused rectification of the form. However, Vos MR relevantly observed four reasons why the principles of rectification enunciated in *FSHC* should apply differently in a family setting:

(1) The existing principles of rectification assume that the parties have negotiated the contract and that there has been an exchange or discussion of some kind;[114]

(2) A common instance where there is no negotiation is where family members buy property jointly and do not discuss the beneficial interest;[115]

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111 See generally Melanie Leslie, 'Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract' (1999) 77 North Carolina Law Review 551.

112 *Ralph v Ralph* [2021] EWCA Civ 1106.

113 ibid [38].

114 ibid [27].

115 ibid [28].

(3) Different principles already apply to rectification in different settings such as in the case of settlements and declarations of trust;[116] and

(4) As joint purchasers and trustees, the intentions of the trustees are relevant to rectification if they themselves made a bargain.[117]

Vos MR concluded that there was no evidence for the trial judge to conclude that the father and son had a *continuing common intention* that the property should not be held for themselves in equal shares. Further, Vos MR considered the father's intentions were unclear and he may have intended the property to be held for the family with his son, for the family without his son, or for himself.[118]

Therefore, in *Ralph*, there was almost no conduct to allow any inference of any continuing common intention that the parties should *not* hold as joint tenants. The father and son had not communicated prior to the transfer — 'it appears nothing was actually discussed, apart possibly from the fact that the purchase would be a good and sensible investment for the family'.[119] The relevant transfer form was signed by the transferors, but not the transferees. As there was no continuing common intention, Vos MR did not need to consider whether an outward expression of accord ought to be required in the case.[120]

Although Vos MR considered a different set of rectification principles may be required for the family setting, it has not been determined in Australia that rectification is not possible if the conduct of the parties is not *inter se*.[121] While Vos MR distinguished family and commercial settings, in fact the limiting principles in rectification actually emerged through informal family contexts. *Joscelyne,* the modern authority for the 'outward expression of accord' requirement, concerned an agreement between a father and daughter for the transfer of the family car hire business. The signed agreement provided for the transfer of the business to the daughter in exchange for the daughter paying the father a weekly pension and household expenses such as utilities and home help. The daughter initially paid some expenses, then stopped. The parents sought declarations that she was required to pay household expenses on the basis of an oral agreement formed during negotiations. The trial judge rejected the parents' submissions as to construction, but found for the parents on rectification; thus there was no prior concluded contract, but the agreement could be rectified to include household expenses. The daughter appealed. In the Court of Appeal, Russell LJ (for the court) dismissed the appeal, and found no antecedent contract was required, but there still needed to be an outward expression of accord.[122]

In Australia, the concept of conduct is arguably flexible enough already to accommodate informal situations. *Zaffina v Zaffina*[123] provides an example of a party seeking rectification in a family context. There, the stumbling block

116 ibid [29].
117 ibid [30].
118 ibid [37]–[38].
119 ibid [38].
120 ibid [38].
121 Cf *Ralph* (n 112) [18], [20], discussing *FSHC* (n 19) [176] (Leggatt LJ).
122 *Joscelyne v Nissen* [1970] 2 QB 86, 98 (Russell LJ, for the court).
123 *Zaffina v Zaffina* [2000] NSWSC 343.

was sufficient evidence of intention of the individuals, and not whether the common intention was *inter se*. The parties were all members of the Zaffina family. Rosa, the registered proprietor of Lot 88, sought orders giving her possession of the panhandle of a battle axe block in Euston (the property) which comprised several lots. By their cross-claim, Domenico, with his parents Luigi and Lina, sought orders recognising a trust of the panhandle of the property for his benefit. Following a transfer from the grandparents (Luigi and Lina), Domenico became the registered proprietor of the adjoining Lot 87.

The lots were renumbered following the lodgement of a subdivision plan in October 1974. In the 1970s, Domenico along with his two brothers Luigi and Pasquale agreed to subdivide Lot 39 into Lots 87 and 88. The plan for subdivision was registered on 30 October 1974. A family solicitor (Mr Blair) was tasked with preparing an agreement for the easement which would be used to access Lot 88. A surveyor (Mr Pedler) was also engaged. The surveyor's plan of subdivision did not include an easement.

The dispute centred on what was intended at the time of subdivision of the property, specifically whether Rosa had the benefit of an easement granted by Domenico. Domenico claimed the true agreement in 1971 was that the subdivision would allow access to Rosa's lot by easement. Rosa claimed that as the subdivision, partition deed and transfers of title were not in accordance with this agreement, the relevant land the subject of any easement was held on trust for her benefit.

The only evidence of what was intended in 1971 in relation to the subdivision was the oral evidence of the family members. The solicitor who was retained to prepare documentation for the subdivision, Mr Blair, gave evidence that he was informed by the brothers that there was to be an easement but, following an adjustment to account for a local council rule, Mr Blair did not recall there being any adjustment to agreed payments as between the family members as a result. Mr Blair had not taken any written record of his meetings with the brothers.[124]

Hodgson CJ in Eq found it was not possible to define the substance and detail of the common intention as a matter of evidence, particularly in light of the deaths of a number of family members including Luigi.[125] Further, the Chief Judge observed that the parties had all signed the relevant contractual documents:

> As I have mentioned, the five parties signed the deed of partition: again, whether or not they understood it is another question. Three of the parties, probably the three brothers, signed the Deposited Plan in about 1974: again, whether or not they understood it is another question.[126]

Thus, the evidence of subjective intention in *Zaffina* simply demonstrated that the parties did not form the relevant intention. This may be because the parties never turned their minds to the events actually transpiring.[127]

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124 ibid [38] (Hodgson CJ in Eq).

125 ibid [68]–[69] (Hodgson CJ in Eq).

126 ibid [63] (Hodgson CJ in Eq).

127 *Franklins* (n 63) [445] (Campbell JA); *Cao v Zhu* [2020] NSWSC 321 [148]–[149] (Kunc J); *Damien v Combined Home Loans Pty Ltd* [2016] NSWSC 559 [29] (Darke J).

IV Rectification by *conduct* — A dead letter?

This article has considered the limits of *conduct* that may demonstrate common intention for rectification, where the most extreme would be uncommunicated parallel behaviour scenario. Ultimately, whether the controlling principles in rectification are rules of evidence, or substantive requirements as to form, variously expressed as 'accord', knowledge or communication, rectification *by conduct* will rarely succeed. This is demonstrated by cases like *Zaffina*.

Often witness credibility is dispositive of rectification, because a judge makes a factual finding that one party not have the common intention pleaded. In *Cihan v Cihan,* Parker J noted (in the context of a rectification of a trust deed) 'As a result of the rectification issue falling away, it is not necessary for me to make any findings as to the credit of Mr Cihan or Memduh (or Mr Sayan).'[128] Hodgson CJ in Eq in *Zaffina* equally approached the question of rectification 'by first considering factual disputes (including questions of credit); then considering whether a case is made out for rectification'.[129] The continued approach to subjective intentions in Australia means the evidence of the parties and, where applicable, their solicitors and other persons involved in the formation of the contract document, will be highly relevant and any pleaded common intention will be contingent on factual findings.[130]

The conditions which underlie claims for rectification by conduct alone are rare, because of improbabilities of evidence. For example, where lawyers have been involved, the suggestion of a mis-recorded common intention 'involves the solicitors on *both sides* of the transaction having each failed to grasp and express the intention of his or her own client'.[131] Where solicitors are involved, and particularly in commercial dealings, it may be open to find, as the NSW Court of Appeal has observed, that the underlying mistake cured in rectification will in effect be a mistake on the part of the solicitors. As Campbell JA put it, 'one would not ordinarily expect two lawyers, each professional dealers in language, to make the same mistake about the meaning of words that are clear on their face.'[132]

Misunderstanding on the solicitor's part may take the form of a *total failure* to seek instructions on the precise issue in question, inadequate record-keeping and failing to identify relevant issues including, for instance, whether family members will require separate, independent advice. In *Ralph,* the solicitor acting on the purchase failed to seek instructions as to how the beneficial interest in the property would be allocated between family members. The trial judge considered the solicitor had checked the box containing the declaration of trust where neither party had given any thought as to how the property was to be owned beneficially, and further the solicitor had incorrectly assumed that as there was a joint purchase, the property was

128 *Cihan v Cihan* [2022] NSWSC 538 [52] (Parker J). See also *The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)* [2022] NSWSC 1081 [76] (Rees J).

129 *Zaffina* (n 123) [32] (Hodgson CJ in Eq).

130 See, eg, *No 1 Victoria Dragons Pty Ltd v AEN Developments Pty Ltd* [2022] NSWSC 1345 [186] (Black J).

131 *Franklins* (n 63) [461] (Campbell JA, Allsop P and Giles JA agreeing) (emphasis added).

132 ibid.

to be held jointly in equity.[133] Similarly, in *Zaffina*, Hodgson CJ in Eq also found that Mr Blair's conduct was one reason for the difficulty of identifying any common intention as alleged:

> Mr Gregory for the defendants submitted that Mr Blair's evidence should not be accepted. He kept no record of any of the alleged meetings with the brothers, even the second meeting which, according to Mr Blair's affidavit, was so significant that he recommended that the brothers have an interpreter ... Mr Blair acted incompetently in the transaction: he did not explain documents to the family members; he left original letters intended for the family members on the file; and he failed to carry through the transaction by transfers to the intended recipients of the two Lots. Even the alleged Council requirement for a road frontage depended only on Mr Blair's evidence, and that evidence should not be accepted.[134]

Therefore, it may be that rectification by reason of conduct has most work to do where parties contract with each other with limited or no assistance from lawyers, or where the parties have contracted in the context of a particular trade or course of dealing, such that the plaintiff can prove a common understanding and intention.

Acceptance that conduct can include uncommunicated intentions would appear to reflect the flexible substance of the test for rectification, which is subject only to high evidential standards. If rectification cannot embrace such a scenario due to requirements for communication *inter se* or knowledge, this article queries whether that reflects a kind of revived 'outward expression of accord' requirement which has been rejected in Australia. On the former view, it nevertheless remains plain that rectification cases wholly reliant on conduct are rare and the evidential requirements for rectification may not be satisfied.

133 *Ralph* (n 112) [3].
134 *Zaffina* (n 123) [38], [43].