

Is an “outward expression of accord” required for rectification in New Zealand?

Simon Connell, University of Otago, on recent case law

There are two recent parallel lines of authority at Court of Appeal level regarding whether rectification in New Zealand requires an “outward expression of accord”. In *Davey v Baker* [2016] NZCA 313 the Court of Appeal stated (at [37]) that there was no dispute as to the applicable principles of rectification and provided an account of the requirements for rectification that *included* the need for an outward expression of accord. However, in *Robb v James* [2014] NZCA 42, the Court of Appeal stated (at [21]) that an outward expression of accord is *not* required and (at [22]) that the position in New Zealand with respect to outward expression of accord was “relatively settled”.

Law of Contract in New Zealand (Burrows, Finn and Todd (eds) (6th ed LexisNexis, Wellington, 2018) at 353) suggests that rectification *does* require an outward expression of accord and *Equity and Trusts in New Zealand* (Butler (ed) (2nd ed, Thomson Reuters, 2009) at 871) suggests that it does *not*, but in neither text is the conflicting case law squarely addressed.

Here, I argue that the “no outward expression of accord” position is a better authority because the issue of outward expression of accord is obiter in the cases that suggest it is required. Further, I argue that the no outward expression of accord position is preferable in principle. To be precise, the position I support is that, in New Zealand, rectification does not require an “outward expression of accord” as a discrete requirement in addition to the other requirements for rectification.

Cases in support of an “outward expression of accord” as a discrete requirement do not consistently provide a precise answer to what the requirement actually means (see *Depot Corporation v Hollis* [2018] NZHC 100 at [90] and *Ryledar Pty Ltd v Euphoric Pty Ltd* [2007] NSWCA 65, (2007) 69 NSWLR 603 at [280]–[281] and [315]). Taken literally, it could mean that, even when both parties have said to each other that they wanted X in the contract, and X is left out by mistake, rectification is available only if there is an additional communication along the lines of “so, we are agreed to X”. More plausibly, the requirement for an outward expression of accord can be seen as limiting rectification to when the parties communicated their intentions about X to each other, even if there is no express communication of agreement to X. I will return to this point later, but we will turn to the history of rectification to trace the origin of the phrase “outward expression of accord”.

A BRIEF HISTORY OF RECTIFICATION

The “rectification” under consideration here is rectification for common mistake as opposed to rectification for unilat-

eral mistake (for a recent discussion of the latter, see David McLauchlan “Refining Rectification” (2014) 130 LQR 83). Rectification for common mistake allows a court to effectively re-write (and thereby “rectify”) a document that mistakenly fails to reflect the parties’ common intention on a particular point.

Rectification is an equitable remedy, developed by courts of equity in a time when the traditional literalist common law rules of interpretation could easily produce the result that the legal meaning of a document was something other than what the parties had both actually intended. Rectification has never been lightly granted — if it were, that would undermine the certainty parties usually seek in executing a legal document — and the requirement for a party seeking rectification to establish that the parties actually intended the same thing has always been a high one.

Historically, as James VC put it in *Mackenzie v Coulson* (1869) LR 8 Eq 368 at 375: “Courts of Equity do not rectify contracts; they may and do rectify instruments made in pursuance of the terms of contracts”. That is, a party seeking rectification of an instrument had to prove a completed contract, with the terms of the contract providing the parties’ common intentions that the instrument could be brought in line with. However, criticism began to build of the idea that rectification of a contract should be barred “simply because negotiation has not ... crystallised into contract, until the moment of executing the written contract” as Clauson J put it in *Shipley Urban District Council v Bradford Corporation* [1936] Ch 375 at 395. The English Court of Appeal eventually confronted the question head-on in *Joscelyne v Nissen and another* [1970] 2 QB 86, and found that, while rectification required establishing a prior consensus between the parties, that consensus did not have to amount to a concluded contract. Since then, it has been beyond doubt that courts can rectify contracts.

Joscelyne v Nissen also marks the point where the idea of a requirement for an “outward expression of accord” enters the picture. Russell LJ, giving the judgment for the Court, stated that, while no concluded contract was required, the prior consensus must be evidenced by an “outward expression of accord” (at 98). The requirement for an outward expression of accord received some criticism at the time (Leonard Bromley “Rectification in Equity” (1971) 87 LQR 532) but is still part of English law.

The current requirements for rectification (excluding the controversial “outward expression of accord”) in New Zealand can be summarised as follows (adapted from *Robb v James* at [21]):

[2018] NZLJ 186

- (1) The parties had a common actual intention about a particular point;
- (2) That common intention continued up until the point of execution;
- (3) That common intention must be objectively apparent, in the sense that it is evident from the parties' words and deeds;
- (4) The document in question does not reflect that common intention, and would if rectified in the manner requested; and
- (5) A consideration of equitable factors does not preclude the remedy.

The fifth element reflects that, given the equitable origins of rectification and its nature as a discretionary remedy, equitable concerns such as laches, acquiescence or delay (see *Robb v James* at [40]–[51]) or the protection of bona fide third party purchasers (see *Brierly Investments Ltd v Shortland Securities Ltd* (1994) ANZ ConvR 592, (1994) 5 TCLR 615 per McGechan J at 666) might mean it is inequitable to order rectification even when the other requirements are satisfied.

THE “OUTWARD EXPRESSION OF ACCORD” CASES IN NEW ZEALAND

Two recent Court of Appeal cases involving rectification have stated the need for an outward expression of accord. The most recent is *Davey v Baker*, which cites at [37] the second: *Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd* [2013] NZCA 442, (2013) 12 TCLR 702. Both cases reproduce the statement of the requirements for rectification found in the English case *Swainland Buildings Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 at [33], and note that Lord Hoffmann approved of them in obiter in a leading English case on contract interpretation, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] AC 1101 at [48]. The *Swainland Buildings* formulation of rectification includes “an outward expression of accord” as a discrete element to be established in addition to “a continuing common intention”.

Davey v Baker concerned a dispute over an easement put in place after a 1992 boundary adjustment that transferred an area of land from the Daveys to their neighbours the Pavelkas. The easement established a right of way so that the Daveys could retain access to a hilly area on their property. The Bakers later acquired the property from the Pavelkas in 2002, at which time the Daveys were not using the right of way. In 2010, the Daveys decided to exercise a right to construct a roadway provided for in the right of way, which they thought meant that they could build a road along an old farm track.

It was subsequently discovered that the right of way did not follow the route of the old farm track. The Daveys then sought to have the easement rectified to bring it in line with the right of way that they thought they had. The Court of Appeal found that the evidence, which included evidence from the Pavelkas, lacked clarity about the precise location of the right of way and fell short of proving a consensus between the Daveys and Pavelkas (see [44]–[46]). The Court also noted at [47] that the Bakers were subsequent purchasers for value without notice of any mistake in the easement. That would by itself be a sufficient reason for declining rectification.

Hanover Group Holdings Ltd v AIG Insurance New Zealand Ltd concerned a dispute that arose after Hanover, via their

insurance broker, renewed their insurance policy with AIG. Hanover had wanted, and the broker thought that he had achieved, more comprehensive cover than the policy renewal documentation actually provided for. Hanover then sought to have the policy rectified to reflect what they thought AIG had agreed to. The Court of Appeal thought that the evidence established that Hanover's broker was under the impression that there was a consensus about the wider cover, but not that AIG shared his understanding of what was agreed (see [36]–[39]). Accordingly, rectification was not granted.

THE “NO OUTWARD EXPRESSION OF ACCORD” CASES IN NEW ZEALAND

In *Robb v James*, the Court of Appeal reproduced (at [21]) the elements of rectification as set out by Tipping J in *Westland Savings Bank v Hancock* [1987] 2 NZLR 21 (HC) at 30, which include that:

... 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 other party.

The Court of Appeal added that (at [22]):

The terms of that formulation were affected by the issue in the *Hancock* case of whether an outward expression of the accord as determined between the parties was necessary before a rectification could be ordered. The position in New Zealand is relatively settled and Tipping J's 1987 formulation still applies.

And, in a footnote to [22], the Court of Appeal observed that New Zealand's settled position with respect to outward expression of accord could be contrasted with that in England.

In the *Hancock* case, the Westland Savings Bank applied for the rectification of a mortgage that it entered into with a Mr and Mrs Hancock in 1973. Tipping J found that, as a matter of plain meaning construction, the mortgage document allowed the bank to increase the interest rate every three years. In practice, however, the bank had increased the rate more frequently, each time giving notice of at least one month. The Hancocks had made their repayments as requested, until 1985 when they found themselves in a position of financial pressure and requested a copy of the documents. After the discrepancy between document and practice came to light, the Bank sought to have the mortgage rectified to retrospectively legitimise its interest rate increases.

Tipping J was satisfied that both the Bank and the Hancocks had intended that the interest rate could be increased as long as the bank gave reasonable notice of at least one month. Although Mr Hancock gave evidence that he thought that the interest rate would remain fixed at the original rate throughout the 20-year mortgage, Tipping J was unconvinced, especially considering that the Hancocks never challenged the interest rate increases.

Tipping J's conclusions about the parties' common actual intention was reached by considering what they had said and done before and after the execution of the mortgage. Tipping J expressly rejected the need to identify an outward expression of accord — which could have required some specific positive mention of agreement about increasing the interest rate more frequently — but re-affirmed that the evidence for the common intention must be “convincing” (at 9).

[2018] NZLJ 186

THE “NO OUTWARD EXPRESSION” CASES: BETTER AUTHORITY

When it comes to the question of whether an outward expression of accord is needed for rectification in New Zealand, the “no outward expression” cases should be regarded as more compelling authorities. First of all, the Court in *Robb v James*, as Tipping J did in *Westland Savings Bank v Hancock*, consciously turned their minds to the requirement for outward expression of accord and re-affirmed that it does not have a place in New Zealand law. In addition, *Robb v James* is a more compelling authority in that (again, like *Westland Savings Bank v Hancock*) it is a case where the application for rectification was successful.

The plaintiff purchased land from the defendant vendor. At some point, the parties discovered the existence of what was referred to in the case as the “lost land”: a title different from and immediately adjacent to the title mentioned in the agreement for sale and purchase. Both the residence and a double garage spanned both titles to some extent. When the vendors had themselves purchased the property several decades before, it comprised two titles, but the “lost land” had never been transferred to them. They later discovered that the “lost land” title was still in the name of the estate of the previous owner. The vendors contacted the solicitors for the estate, who transferred the “lost land” to them without objection. The purchasers sought to have the agreement rectified to include the “lost land” on the basis that both parties had thought all along that what was being bought and sold was the whole property, now known to comprise both titles. The Court of Appeal thought that such a common intention was clearly established (see [39]).

In my view, these cases are compelling authorities not simply because they turned their minds to whether or not there should be a need for an “outward expression of accord” in the abstract, but because they provide positive examples of cases where rectification was warranted even without identifying a specific “outward expression of accord”. In *Robb v James*, searching for an outward expression of accord about the inclusion of the additional title may have been something of a strained exercise, because the contract was rectified to include a title that the parties did not actually know existed when they entered into their agreement.

In contrast, the judgments in *Davey v Baker* and *Hanover v AIG* simply reproduced the statement of the requirements for rectification in *Swainland Buildings Ltd v Freehold Properties Ltd* without noting that the requirement of “outward expression of accord” has previously been rejected in New Zealand. Furthermore, the parties seeking rectification in *Davey v Baker* and *Hanover Group Holdings v AIG* did not even get close to the line in terms of establishing a common intention, so the discussion of “outward expression of accord” is clearly obiter. The High Court in *Depot Corporation v Hollis* [2018] NZHC 100 reached the same conclusion (at [89]), albeit without identifying *Robb v James* as an alternate authority at Court of Appeal level.

THE “NO OUTWARD EXPRESSION” CASES: PREFERABLE IN PRINCIPLE

Earlier, I noted that the precise meaning of “outward expression of accord” is not clear. One possibility is that “outward expression of accord” is simply a different way of expressing the need for the parties’ common intention to be objectively apparent, that is, apparent from their words and deeds. If that is the case, then the apparently conflicting authorities

can be reconciled. I would submit that the *Robb v James* formulation is still preferable, because “objectively apparent” is clearer and lacks the baggage of “outward expression of accord”.

In *Depot Corporation v Hollis*, Associate Judge R M Bell concluded that the “outward expression of accord” requirement served a legitimate purpose: it is concerned with ensuring that the common intention given effect to is not a coincidence but is the result of a *consensus* in the sense that that each party intended X and, in addition, thought that the other party was in agreement with them about X based on their interactions (see [93]). Essentially the same concept underpins the contract law doctrine of offer and acceptance. The process of offer and acceptance establishes both that the parties intended the same thing *and* that their common intention is the result of an interaction between them whereby each has reason to believe that other agrees to the terms in question. A contract is more than a coincidence of identical intentions. An offer invites an acceptance and an acceptance responds to an offer, and contract law construes the two temporally disconnected acts as components of a single continuous interaction (see Ernest Weinrib’s *The Idea of Private Law* (Harvard UP, Cambridge (Mass), 1995) at 137). Thus, simultaneous offers on the same terms do not make a contract (*Tinn v Hoffmann* (1873) 29 Law Times 271 (Exch. Ch.)).

In my view, that explanation is the most plausible rationale for why some kind of “outward expression of accord” might be desirable. Arguably though, it is just another way of stating the need for an objectively apparent common intention. However, I do not consider that the search for common intention necessitates a forensic search for communications of intentions, as is suggested in the following statement from Campbell JA in *Rydelar* at [315], which the Associate Judge endorsed:

If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?

I have two concerns with that passage. First of all, it is questionable whether a party could truly, in good conscience, hold their fellow signatory to terms that neither intended. It is one thing to hold another party to your intended terms when they have reasonably led you to believe they have assented to them, as Blackburn J’s famous dicta in *Smith v Hughes* (1871) LR 6 QB 597 allows; this is something else entirely.

The second is that it should not be strictly necessary for the parties to have expressly disclosed their intentions. The need for formal communication of intentions was considered and rejected in *Robb v James* and *Westland Savings Bank v Hancock*. The concern that a common intention could arise purely out of coincidence seems to be something of a straw man, or at least an occurrence so rare that it should not drive the general formulation of the law. Where two parties intend that their contract includes X despite neither actually expressly disclosing that intention, it is likely that there is something in their shared background such that they both went into the negotiation with an expectation that X was going to be part

Continued on page 194

Continued from page 188

of the bargain. Or, perhaps X was never expressly disclosed but follows naturally from other aspects of the negotiation that were formally agreed. For example, both parties might have had a general expectation that a bank can change the interest rate in a mortgage by giving reasonable notice. If there is such a shared expectation sourced in the background rather than in the parties' disclosures of intentions but the contract does not actually include X, it would be unjust not to rectify the contract to include X simply because of the lack of disclosure. The parties' words and conduct must be considered, but they are the beginning rather than the end of the objective intentions inquiry and must be placed in a bigger contextual picture.

Finally, a discrete requirement for an "outward expression of accord" cannot be justified with reference to the need for certainty in business transactions. The requirement to establish an objectively apparent continuing common intention is already onerous, and rectification will not be granted

when one party thinks that there is a common intention but cannot prove it was shared, as *Hanover v AIG* demonstrates. Furthermore, rectification will not be granted against the equitable interests of a bona fide third party purchaser without notice, as *Davey v Baker* shows. The only parties who have rectification to fear are those seeking to take advantage of a mistake in expression and shirk obligations that they actually intended to take on.

CONCLUSION

There is a currently unresolved conflict at Court of Appeal level with respect to whether rectification requires an outward expression of accord. *Robb v James* says no, after considering the issue. *Davey and Baker* and *Hanover v AIG* suggest yes, but in obiter. In addition to being a more compelling authority, the "no outward expression" approach in *Robb* is preferable in principle. Imposing an additional requirement of an "outward expression of accord" serves no useful purpose. □