

6.2.2.3 Condition precedent

Page 248, after para 1, **insert** –

More clearly, in *Graves v Graves* [2007] EWCA Civ 660, after a couple divorced, the wife moved out of the family home because she could not afford the mortgage payments and her former husband rented her one of his properties. Both parties proceeded on the basis of the incorrect advice the wife had received that she would be entitled to housing benefit which was to pay 90% of the rent; she could not otherwise afford the rent. The Court of Appeal found that it was an implied condition of the tenancy that housing benefit would be payable. Since the basis for the agreement was one that did not in fact exist the agreement was different in kind from that originally contemplated and did not bind the parties.

6.2.2.2 Fault

Page 247, at the end of this section, **delete-**

In *Kyle Bay Ltd v Underwriters* (2006) K compromised its insurance claim for £100,000 less than it was entitled to. K simply went along with U's mistaken calculation without checking its own policy. Jonathan Hirst QC concluded (at [43]) that the common mistake did not void the compromise; it simply made it 'a rather poor deal' for K.

Add-

In *Kyle Bay Ltd v Underwriters* [2007] EWCA Civ 57 K, the insured, relied on the insurer, U's erroneous statement about the basis for calculating an insurance claim without checking the policy itself. The parties' common mistake resulted in a settlement which was 33% (£100,000) less than K was entitled to. It was relevant that K's agent was professionally qualified and experienced and must be taken to have a copy of the policy. Moreover, it was open to the trial judge to find that K's agent was not induced by U's statement, but simply decided to proceed on the assumption of the correctness of U's contention.

6.2.5.3 Mistake as to an essential quality of the subject matter

Page 257, **add** to the list of examples-

- ✘ In *Kyle Bay Ltd v Underwriters* [2007] EWCA Civ 57, the parties were mistaken about the basis for calculating an insurance claim (they assumed it was on a gross profits basis rather than on the declaration-linked basis) resulting in a settlement which was £100,000 (33%) less than the insured was entitled to. The Court of Appeal held that the mistake had neither rendered the agreement impossible of performance, nor made the subject-matter of the contract 'essentially and radically different' from what the parties believed it to be, although the reduction in its entitlement was 'significant' and even 'substantial'.

6.2.5.4 Mistaken fundamental assumptions

Page 260, para 1, after sub-para 3, **insert** –

- ✓ In *Graves v Graves* ([2007] EWCA Civ 660, see above at **6.2.2.3**), after a couple divorced, the wife moved out of the family home because she could not afford the mortgage payments and her former husband rented her one of his properties. Both parties proceeded on the basis of the incorrect advice the wife had received that she would be entitled to housing benefit which was to pay 90% of the rent; she could not otherwise afford the rent. Although the Court of Appeal found no valid tenancy on the basis of an implied condition precedent that housing benefit would be payable, the case is also an example of invalidity because of a mistaken assumption which was fundamental to the parties' agreement.

6.5 Unilateral mistake at equity

Page 277 before 'Pause for reflection', **insert**-

All these cases can be interpreted as unilateral mistakes as to the terms of the contract known to the other party (see 2.2). The existence of an equitable jurisdiction to relieve

from unilateral mistakes as to fact rather than a term was examined by Aikens J in *Statoil ASA v Louis Dreyfus Services LP* [2008] EWHC 2257 (Comm). S the seller made a mistake in calculating its demurrage claim against LD (US\$103,527.84 as opposed to the correct calculation of US\$ 539,360.96). Aitken J found:

1. The contract was not void for unilateral mistake because, although S's mistake was known to LD, it was **not a mistake as to the term** of the contract itself (*Smith v Hughes* (1870-71) LR 6 QB 597 QB applied).
2. There was **no equitable jurisdiction to grant rescission for unilateral mistake as to fact**. Aitken J said:

With respect to I must disagree with [Andrew Smith J's conclusion in *Huyton SA v Distribuidora Internacional de Productos Agrícolas SA* (2002) EWHC 2088 (Comm)] that there is an equitable jurisdiction to grant rescission of a contract where one party has made a unilateral mistake as to a fact or state of affairs which is the basis upon which the terms of the contract are agreed, but that assumption does not become a term of the contract. None of the cases he cites ...is authority for the existence of that jurisdiction. The *Great Peace* decision strongly suggests that there is no such jurisdiction in the case of a unilateral mistake.

3. Even if there was an equitable jurisdiction it would not be just and equitable to grant rescission in the instant case since the mistake was entirely the result of S's **carelessness**.

6.7 Mistake in recording the contract: rectification

Page 278 before the last paragraph, **insert-**

Where a mistake is obvious, e.g. because the literal meaning of the words would be absurd, and it is clear what is meant, rectification is not necessary; the matter will be dealt with as one of construction. See *Dalkia Utilities Services Plc v Celtech International Ltd* [2006] EWHC 63; [2006] 1 Lloyd's Rep. 599, (at [109] and quoting Brightman LJ in *East v Pantiles Plant Hire Ltd* [1982] 2 E.G.L.R. 111):

[A] mistake in a written instrument can, in limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification. Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake.....”

Indeed, Professor Burrows argues in "Construction and Rectification" (in *Contract Terms*, ed A Burrows and E Peel, 2007 OUP, 99) that rectification of contract for mistake of fact:

has not merely been rendered less important by modern developments in the law of construction [such as *Investors Compensation Scheme Ltd v West Bromwich Building Society*, see 11.1 in text] but is on the point of being rendered largely superfluous. Once there is reform, as it surely must be, of the rule which treats as inadmissible some relevant evidence in constructing a contract (ie the ban on looking at previous negotiations and declarations of intention) the way is clear for the courts to apply construction in a way that largely swallows up rectification for common, and even unilateral, mistakes.

Mistake in recording the contract: rectification

Page 279, at '(ii) no literal disparity...' 6 lines down **insert –**

Again, in *Connolly v Bellway Homes* (2007), C contracted to sell B a development site subject to planning permission. It was agreed C would share in any increase in the land's value pending sale, set off against any increase in building costs, and a formula to calculate this was included. The formula contained two mistakes – it did not work if the increase in building costs exceeded that of the land, and it over-estimated the average sale price per square foot of the land - but rectification was denied because both parties intended for that particular formula to be recorded in the agreement. C's mistake was in not challenging the figures proposed by B.

Page 279 end of page on **rectification for unilateral mistakes, add-**

Professor Burrows points out in "Construction and Rectification" (in *Contract Terms*, ed A Burrows and E Peel, 2007 OUP, 88) that the unilateral mistake does not usually concern the recording of the agreement:

Rather one party has been mistake in during negotiations and the other party has known about that mistake and has not pointed out.... It is the bad faith or, if one insists on using that most slippery of words, the 'unconscionability' of the non-mistaken party that leads to the mistaken party being able to insist on the contract being upheld on the basis of its own understanding of the contract.

On the other hand, Professor MacLauchlan argues in "The "Drastic" Remedy of Rectification for Unilateral" 2008 124 LQR 608, 609-10 that:

[R]ectification for unilateral mistake is not, and ought not to be viewed as, a drastic or unusual means of remedying the unconscionable behaviour of a contracting party. Whether given for common or unilateral mistake, rectification serves, and can only legitimately serve, the purpose of ensuring that the written record of a contract corresponds with the true agreement made by the parties, as determined by applying ordinary principles of contract formation. In neither scenario is the claimant relieved from the contract he made. He is given the right to enforce a contract he did make. By the same token, while in the case of unilateral mistake the defendant is held bound to a contract he did not actually intend to make, this is unexceptionable if he led the claimant reasonably to believe that he assented to the claimant's understanding of the terms, so that rectification will give effect to the parties' agreement as objectively ascertained.