

REMEDIES

Expansion of the Rectification Remedy: *Sylvan* and Its Aftermath

Francy Kussner
Alexa Abiscott*
Goodmans LLP

Introduction

The Supreme Court of Canada has generally maintained a traditional approach to contract interpretation and has been hesitant to consider the subjective intentions of contracting parties in the absence of an ambiguous clause or common clerical mistake. However, in *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*,¹ although there was no ambiguity in the written contract before the Court and the mistake made was unilateral (i.e., only the plaintiff had not read the contract carefully, while the defendant was, in fact, aware of an altered word), the Court held that the remedy was nonetheless available. Justice Binnie, writing for the Court, applied the doctrine of rectification to rewrite the contract by substituting words from a previous inconsistent oral agreement for those of the written contract.² This article is both a case comment on *Sylvan* and an analysis of the application of the rectification remedy since the *Sylvan* decision was rendered.

* Alexa Abiscott is an articling student at Goodmans LLP and will be called to the Bar on July 22, 2004.

¹ [2002] 1 S.C.R. 678 [hereinafter *Sylvan*].

² When certain circumstances exist, the equitable doctrine of rectification allows the court to substitute its own words (as derived from the parties' previous oral agreement) into that of the written contract. It is, in effect, a remedy that re-writes a contract that was read, understood and signed, often by sophisticated parties. See G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough, Ont.: Carswell, 1999) at 867-880 for a detailed discussion before *Sylvan* concerning the doctrine of rectification.

The Judgment in *Sylvan*

In *Sylvan*, the plaintiff and the defendant jointly agreed to purchase a golf club property. The parties agreed that the plaintiff would have the right to develop a residential area around the property if he subsequently bought out the defendant's interest at a set price. When the defendant's lawyer reduced the terms of the oral agreement to writing, the agreement, by substitution of "feet" for "yards" as the unit of measurement, confined the residential development to one-third of the area orally agreed. The plaintiff did not read the measurement clause before he signed the contract. When the plaintiff sought to exercise the option, the defendant insisted upon the written terms, despite knowing that these terms did not accurately reflect the prior oral agreement. The plaintiff brought an action to rectify the agreement, asking the Court to substitute the words of the oral agreement for those of the written contract.

Justice Binnie acknowledged that traditionally rectification was permitted only for mutual mistake, but articulated four preconditions which, if met, would permit award of the remedy in a circumstance of unilateral mistake. The Supreme Court and subsequent jurisprudence have interpreted these preconditions, which are listed below, as "high hurdles" that are set in order to ensure that the remedy "does not become an escape route for contracting parties seeking to get out of improvident bargains."³

1. Show existence and content of an inconsistent prior oral agreement.
2. Show that permitting one party to take advantage of the mistake in the written contract would result in fraud or an equivalent to fraud.
3. Show the precise format of the written contract that should reflect the prior oral agreement. An interpreter is limited to substituting only that which the parties previously agreed to, not his or her own speculative words.

³ *Public Service Alliance of Canada v. NAV Canada* (2002), 59 O.R. (3d) 284 (C.A.) at 297 [hereinafter *Public Service*].

4. Establish the above three preconditions on a "standard of convincing proof."⁴

In *Sylvan*, the Court considered draft plans of development and the fact that the measurement of the property could only have been a particular size in order to accommodate the intended development. The Court held that the evidence was sufficient on a standard of convincing proof to prove that the parties had formed an inconsistent prior oral agreement and that the defendant had fraudulently misrepresented the written contract as an accurate representation of the oral agreement. In addition, the Court could precisely determine the words to substitute for those of the written contract.

The defendant argued that the remedy should not be available because the plaintiff did not read the contract as a prudent businessperson should have done. The Court held, however, that "due diligence ... is not a condition precedent to rectification" in circumstances where one party seeks to enforce a prior oral agreement.⁵ Justice Binnie acknowledged that commercial entities should be held to a "reasonable level of due diligence in documenting their transactions. Otherwise, written agreements will lose their utility and commercial life will suffer."⁶ However, he held that because the four prerequisites for rectification were satisfied, and particularly that it would be unconscionable for the defendant to benefit from the mistake he had induced the plaintiff to make, the remedy should be awarded, notwithstanding the plaintiff's failure to carefully review the contract prior to signing it. The Court was clear that in an appropriate case, the plaintiff's lack of due diligence might be a basis to refuse the rectification remedy, but a defendant could not use such fact as a defence to his or her fraudulent or deceitful conduct.

Recent Jurisprudence

Since the decision in *Sylvan* was rendered approximately two years ago, four Ontario cases of note (one of the Court of Appeal⁷ and three of the Superior Court of Justice⁸) and a

recent British Columbia Court of Appeal case⁹ have applied it. Although it is clear from the Supreme Court's decision that the four preconditions are to apply in a situation of unilateral mistake, there appears to be some uncertainty as to whether the preconditions should also apply in a situation of mutual mistake.

In *Public Service*, the Ontario Court of Appeal overturned a decision of the Divisional Court that had set aside an arbitrator's award on the ground that the arbitrator exceeded his jurisdiction in rectifying a collective agreement. The collective agreement between an employer and a union contained a clause that specifically prevented the arbitrator from having the power "to add to, subtract from, alter, modify or amend" the agreement. The Court of Appeal held that the Supreme Court of Canada had, in previous cases, expanded the powers of an arbitrator so as to include the power to grant the rectification remedy.

In the collective agreement in *Public Service*, the parties had agreed to a pay reduction for certain union employees, but this was not reflected in the pay scales that were attached to the collective agreement in an appendix. The arbitrator held that the four preconditions for rectification were met and the Court of Appeal agreed and reinstated the arbitrator's award. Interestingly, both the arbitrator and the Court of Appeal applied the four preconditions even though the mistake could be characterized as mutual. It appears that the Court of Appeal interpreted the preconditions as applying to both a situation of mutual and unilateral mistake, as the Court (in referring to the preconditions) held that the "remedy is available not only for mutual mistake, but also for unilateral mistake, where certain defined requirements are satisfied."¹⁰

In *AMJ Campbell Inc.*, the phrase "average selling price" in a draft agreement was initially defined as "net of taxes, freight rebates and discounts." During negotiations the draft agreement underwent numerous changes,

⁴ *Sylvan*, supra note 1 at 694-697.

⁵ *Ibid.* at 705.

⁶ *Ibid.* at 703.

⁷ *Public Service*, supra note 3.

⁸ See *Dell v. Gentra Inc.* (2003), 22 C.C.E.L. (3d) 82 (Ont. S.C.J.) [hereinafter *Dell*]; *AMJ Campbell Inc. v.*

Kord Products Inc. et al. (2003), 63 O.R. (3d) 375 (S.C.J.) [hereinafter *AMJ Campbell Inc.*]; and *Toronto (City) v. MFP Financial Services Ltd.* (2003), 34 B.L.R. (3d) 53 (Ont. S.C.J.) [hereinafter *MFP*].

⁹ *Buschau et al. v. Rogers Communications Inc.* (2004), 237 D.L.R. (4th) 260 (B.C.C.A.) [hereinafter *Buschau*].

¹⁰ *Public Service*, supra note 3 at 297.

which included the plaintiff's lawyer adding a comma after "freight" so that the final agreement's definition of "average selling price" had an additional comma between the words "freight" and "rebates" and thus read as "net of taxes, freight, rebates and discounts." A word processing "track changes" program highlighted the change during the drafting process. However, the plaintiff himself did not notice the additional comma when he signed the agreement. The addition of the comma significantly affected the calculation of the "average selling price" and the Court considered whether rectification should be awarded. The Court held that, in light of *Sylvan*, rectification is now available in situations of unilateral mistake, as was the case in *AMJ Campbell Inc.* However, the Court ultimately concluded that because there was no definite prior oral agreement and no evidence to support a finding that the defendant was aware of the plaintiff's confusion about the inclusion of the comma, all four preconditions did not exist. Accordingly, no rectification remedy was awarded.¹¹

In *Dell*, a former employee argued that his employer had agreed to provide him with the same option rights as other executive officers in the company. Although this promise was not set out in his employment contract, two human resource employees confirmed it. The employee brought a claim for rectification of his contract. The employer brought a motion for summary judgment on the basis that the facts did not raise any genuine issues for trial since the employee could not establish that his claim for rectification had a real chance of success. The case was one of mutual mistake and the parties disagreed as to whether the four preconditions from *Sylvan* applied. In order to determine whether there was any genuine issue for trial, the motions judge assumed that the four preconditions from *Sylvan* did apply to a case of mutual mistake, as they "raise the broadest ambit of factual issues."¹² The motions judge considered the four preconditions set out in *Sylvan* and dismissed the summary judgment motion, since rectification might be available and this was a matter to be determined by a trial judge. To date, there have been no further developments in this case.

¹¹ This decision has not been appealed.

¹² *Dell*, supra note 8 at 86.

In *MFP*, the parties contracted for the supply of computers and computer services by MFP to the City of Toronto. A provision in the contract required the City to make a payment in the event of default and a provision precluded any defence of set-off or counterclaim. There was also an "entire agreement" provision. The City defaulted and MFP alleged that the City should therefore pay. The City sought, among other things, rectification of various provisions of the contract, including the effective rate of interest. MFP brought a motion for summary judgment on the basis that there was no genuine issue for trial as the "no setoff, counterclaim or defence" [sic] provision was unambiguous. The motions judge held that because there was a dispute with regard to the contract price, such a provision should not be enforced in the circumstances of the case absent a trial. He held further that the City's claims for rectification were so "integrally connected with the City's other claims, and so fact-dependant, that they cannot be determined except in the context of the trial of all of the issues."¹³ In addition, the motions judge held that the "entire agreement" clause did not "bar claims in negligent misrepresentation where the representation is to some overriding or collateral matter."¹⁴

The *MFP* decision is significant within the context of the recently enunciated preconditions for the rectification remedy. The inclusion of an unambiguous "no set-off, counterclaim or defence" provision or an "entire agreement" clause may no longer be sufficient to exclude resort to extrinsic evidence to determine "what the agreement actually is."¹⁵ To date, there have been no further developments in this case.

Finally, in *Buschau*, a final court order contained an error in the calculation that directed the amount an employer was to pay to its pension plan members. The court order was approved by both parties, although one party's actuary was responsible for the error. There was some question as to whether the mistake was unilateral or mutual and whether the order amounted to a contract between the parties. The trial judge held that rectification was not available because the defendant had made a unilateral mistake and there was no suggestion

¹³ *MFP*, supra note 8 at 69.

¹⁴ *Ibid.*

¹⁵ *Ibid.* at 66.

that the plaintiff's conduct was deceitful. On appeal, the British Columbia Court of Appeal held that the parties had in fact made a mutual mistake and that the final order was unlikely a contract. Accordingly, the Court of Appeal held that the Court maintained inherent jurisdiction to amend the order on the ground that it contained an error in expressing the manifest intention of the Court.

Alternatively, the Court of Appeal held that if the order was a contract between the parties, the Court also had the jurisdiction to rectify the order on the basis of common mistake. Although the Court relied upon *Sylvan* as an authority to determine whether the mistake was unilateral, it did not consider the four preconditions to award the rectification remedy in its decision. The Court held that simply because of the parties' mutual mistake, the order failed to correctly express what the Court had intended and the rectification remedy was therefore awarded. The Court concluded that the fact that the contract was embodied within a court order did not preclude it from ordering the remedy.

Conclusion

The Supreme Court of Canada's decision in *Sylvan* clearly enunciated how the remedy of rectification is to be awarded in a situation of unilateral mistake. The cases following *Sylvan* suggest that there may be some uncertainty as to whether the four preconditions are also to apply to a situation of mutual mistake. In cases where a unilateral mistake has occurred, it appears that the factual "high hurdles" of the four preconditions may not be as difficult to establish as would appear from *Sylvan*. Although *Dell* and *MFP* were summary judgment motions, in both these cases, and as concluded in *Public Service*, the courts found that the circumstances may exist on a standard of convincing proof to rectify both a mutual and unilateral mistake, respectively. As a result of *Sylvan*, commercial uncertainty may now exist in situations where the preconditions for a rectification remedy may be present. The party seeking the remedy can make the mistake alone, rely upon a prior oral agreement and need not exercise due diligence before signing the contract, if it can be shown that to deny the remedy and endorse the other party's conduct would be unjust.