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Article

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The Rectification (and Construction) of Computer-Generated Documents

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Abstract
This article considers the issues concerning the rectification and construction of computer-generated legal documents, whether bilateral instruments such as contracts or unilateral instruments such as wills. There will inevitably be errors in some of these documents due to bugs in the computer programs that direct the document assembly process of producing them from a set of precedents. It considers how the law, never designed for this novel situation, will be applied or developed.

There are particular difficulties for wills because the law was set down in in the Administration of Justice Act 1982, ss 20–21, and statutory law is less flexible than judge-made law. This article also presents the results of a small investigation, revealing errors actually made in commercially available generated wills, showing the problem is not merely theoretical.

1. Introduction
This article is a fresh consideration of the courts' powers to construe or rectify defective written instruments, specifically where they are assembled by computer program ('document assembly' or 'computer-generation'). This is where the computer takes instructions from a client – usually via a web form – and generates the document through a serious of logical programmatic instructions that in effect copies, pastes and fills in standard precedents with no human intervention.

It is not concerned with electronic execution; these documents are manually executed by people. Nor does it address 'smart contracts'. Smart contracts are, in essence, the reverse of document assembly, pre-assembled by humans into computer instructions and then executed by machine. Some of the issues are indeed shared, but the overall process is different, and this article focuses on document assembly.[1]

The risk is, of course, that the final document may not reflect the true intention of the party or parties if there is an error in the design of the program such that it produces incorrect output. The question is how the present law, designed for human drafters, can deal with document assembly.

In answering that question, this article focuses on two broad types: unilateral instruments, such as wills; and bilateral instruments, such as contracts. In both cases, it examines how document assembly influences the debate over whether the mistake made must be 'subjective' or 'objective'. Here, the existence of the forms (or input menus) exacerbates this difference, because of the powerful inference that one or both of the parties relied on the forms and their

[1] See, e.g., Sarah Green, 'Smart Contracts, Interpretation and Rectification' [2018] LMCLQ 234. The main common issue is whether a subjective or objective approach is appropriate. Another is the level of agency ascribed to the computer in such a process. See, e.g., the case of *B2C2 Ltd v Quoine Pte Ltd* [2019] SGHC(I) 03 as an example of where a smart contract is created by a third party electronic trading platform.

selections rather than the final document. Here the recent Court of Appeal decision in the new leading case of *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* ('*Four Seasons*') is of great assistance.[2] It appears to have settled this debate in the general case, holding that a hybrid approach is appropriate. Objective mistake is required if there is a prior enforceable contract, or subjective mistake, albeit communicated, if not. However, quite understandably, it does not consider the circumstances of document assembly. It is thus necessary to consider the options from first principles. It is shown that the general law as set down in *Four Seasons* will deal fairly well with document assembly, albeit small tweaks may be required.

There is an additional complication for wills, because the provisions of the Administration of Justice Act 1982, ss 20–21 are somewhat rigid and were never designed with computer-generated documents in mind. While judge-made law has the flexibility to adapt, statutory law is much more rigid. However, given the inherent flaws in the 1982 Act and the courts' response to strain it to fit more situations within its gateways, it may well be strained further to cover these circumstances.

Finally, the results of a small investigation into computer-generated wills are presented, which demonstrates this is a real, and not merely theoretical, problem. The production of wills is a major application of this technology, and thus a priority for investigation. Thus while this article aims to deal with the issue of document assembly in the general case, because of the specialist law and investigation, around one-half of it specifically concerns wills.

2. Document Assembly

We begin with the process of document assembly and how errors can creep in. It is easier to understand the discussion with reference to simple examples. The following is a mock-up of both form and output, working correctly. The advantages for the layperson are clear. First, technical language is replaced by plainer language. Second, there are fixed fields for each option. There is therefore less chance of omitting things than there would be starting from a blank page. Third, there should be at least a rudimentary level of validation – for instance limiting the maximum age – which is more than one can say for pre-printed stationery.

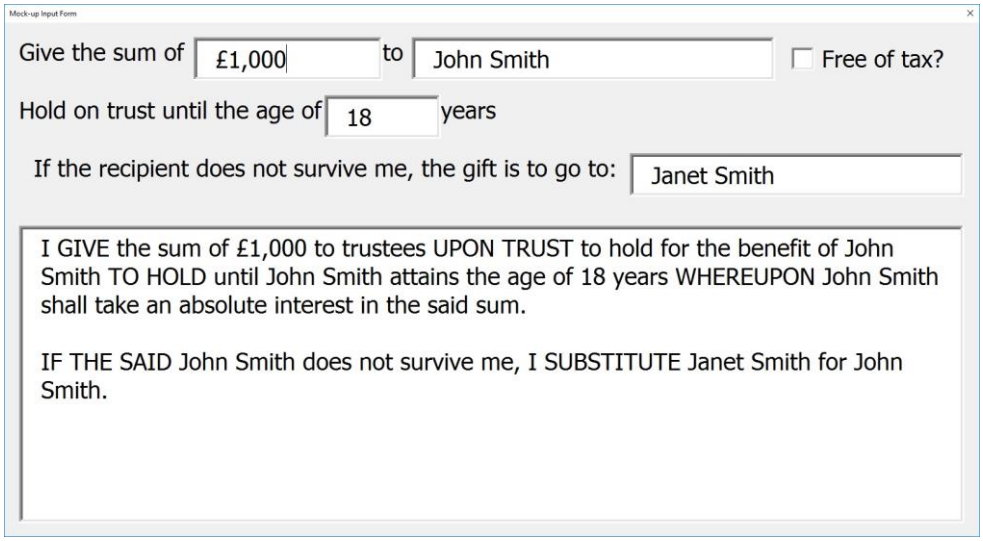

Figure 1: A mock-up of an input form with sample output to illustrate.

[2] *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361.

As running example 1, imagine the consequences if the box 'free of tax' had been ticked, but the output had not changed accordingly. On a plain reading, the recipient would have to pay tax, contrary to the client's intentions. However, if evidence of the error is available, there is a good *prima facie* claim for rectification.

There are various kinds of relevant evidence to support that claim. First, unprocessed logs of the selections in the fields and checkboxes should have been kept by the service provider and, preferably, sent to the user in unprocessed form, along with the options offered.[3] Here, for instance, there would have been a record that the 'free of tax' box had been ticked all along. Second, the program could be rerun; if the claim is that the 'free of tax' box didn't work, that can easily be verified if the very same program is available by rerunning it. However, if the online service is no longer available or has been updated, it will be necessary to obtain historic versions of the program (indeed, one would hope such errors would be corrected in updates to the program). Third, a skilled programmer could determine the effect of errors in the logic if the source code were made available. This evidence will be pivotal for rectification in many cases.

The legal mechanisms for disclosure and indeed third-party disclosure already exist. 'Document' in CPR r 31.4 has been held to extend to computer programs.[4] Moreover, the provisions for non-party disclosure in r 31.17 are very wide.[5] Refusals tend to be made when there is a public interest to do so, such as protecting witnesses in other proceedings.[6] However, where there is a public interest in disclosure or the risk of a party succeeding on a false basis, disclosure is usually ordered.[7] Any issues, therefore, are likely to be practical and related to the existence of the information and whether the costs of obtaining it would be disproportionate.

Now consider the document assembly process itself. The present generation of services offering document assembly is copying and pasting. Copying and pasting by a human drafter, even if carried out on a computer, is a reassuringly human process. One skilled person will have created the book of precedents. Then, a skilled, or semi-skilled, person will select precedents and assemble them, fill in the blanks, and, one must hope, use their skill to check the output against its operation at law.

There are key differences for computer generation. The creator of the precedents is replaced by, or perhaps complemented with, a skilled programmer, who must create the program and its logic, which *later* generates the final document from the *end-user's* selections. Any sophistication is coded during the design phase by the *programmer*. At 'run-time' – when the *end-user* makes the selections – unlike the human assembler, the *computer* will make no attempt to check or understand the output. The *computer* understands nothing. If it makes an error, the *computer* is operating correctly by reproducing the error in the *program*.[8] In both

[3] In the investigation, only provider 3 sent such an unprocessed record. Provider 5 sent logs of a kind, but given they were processed and resembled the output document rather than the user's choices, they are likely to be afflicted with the errors of the program's logic where an unprocessed log would not be.

[4] *Format Communications v ITT (UK) Ltd* [1983] FSR 473 (CA). That expertise is required to decode the document is no bar: Geoffrey Vos (ed), *Civil Procedure (Sweet & Maxwell 2019) (The White Book)* para 31.4.1 and the authorities cited therein.

[5] *Frankson v Secretary of State for the Home Department* [2003] EWCA Civ 655, [2003] 1 WLR 1952; *Three Rivers District Council v Bank of England (No 4)* [2002] EWHC 1118 (Comm) [77] citing *Black v Sumitomo Corporation* [2001] EWCA Civ 1819, [2002] 1 WLR 1562 [62].

[6] *Mitchell v News Group Newspapers Ltd* [2014] EWHC 879 (QB); *Mitchell v News Group Newspapers Ltd* [2014] EWHC 1885 (QB); *Flood v Times Newspapers Ltd* [2009] EWHC 411 (QB), [2009] EMLR 18 [29].

[7] *Henry v News Group Newspapers Ltd* [2011] EWHC 296 (QB) [30].

[8] As noted in *B2C2 Ltd v Quoine Pte Ltd* (n 1) [208]–[209].

cases, the *end-user* or *end-users* may or may not pay particular attention to the options proffered on the forms and selections and may or may not pay attention to the final document.

These differences are compounded where there is the possibility of interaction between precedents. To illustrate this, and again to provide some context for later analysis, let the following be running example 2. Consider the interaction between provisions for: (i) a class gift (used to distribute a fixed sum of money amongst the class); and (ii) an option to hold a gift on trust until the recipient attains a certain age. The precedents would be:

> *(i): '£x to be distributed equally amongst beneficiaries [a, b, c, d …].'*
>
> *(ii): 'as shall attain y years.'*

Faced with instructions that (only) A is a child and should wait until 18 years to receive her share, a human drafter would instinctively combine the two precedents correctly. The computer logic would have to be programmed correctly to have the appropriate ordering, namely to apply precedent (ii) *within* precedent (i). The output should be that £10,000 be distributed equally 'amongst A as shall attain 18 years, and B, C, D and E' (or perhaps 'amongst A, B, C, D and E as shall attain 18 years'). If the logic were faulty, the result might be 'amongst A, B, C, D and E as A shall attain 18 years'. This would make B, C, D and E wait until A is 18, which would be a mistake.

Thus document assembly can be much more sophisticated than simply copying and pasting from an electronic book of precedents. Particularly, it can include rules of compatibility and ordering. All this brings the greater possibility of error – as well of greater convenience – as the degree of sophistication increases.

The utility of rectification when such errors are made is evident. Provided there is good evidence and any preliminary requirements are satisfied, there is no objection to rectifying them. For instance, in example 1, should the provision 'free of all tax' have been omitted by the computer but its selection clearly visible in the logs, there would be an overwhelming case for rectification. The same goes for example 2, where the logs may show that only the checkbox to delay the gift was ticked for beneficiary A and not the others. Alternatively, rerunning the program would demonstrate its fault clearly, which would also be convincing evidence of what the testator actually intended.

3. Rectification

3.1 General Principles

With this in mind, we can turn to both the general principles of rectification and the present law, with the aim of seeing how the law fits with the ideal. Ultimately, rectification is a remedy to correct the defective recording of the terms of the agreement; it is not to rewrite a bad bargain or reverse a change of mind or misapprehension.[9] It therefore requires some kind of mistake in recording the true intention in the instrument. Then, the ultimate questions are these: did the party or parties make a mistake such that the instrument failed to accurately record their intentions; and is there convincing evidence of this. In principle (and for the inherent

[9] *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450 (CA); *Four Seasons* (n 2) [46].

jurisdiction to rectify) all evidence[10] is admissible and even formal documents such as deeds can be rectified; any such restrictions have fallen away.[11]

The application of that question differs depending on whether the instrument is unilateral or bilateral and whether the mistake is unilateral or common. Note that for unilateral instruments such as trust deeds, there are circumstances where they are treated as though they are bilateral, namely when there are multiple authors, or where the trust terms are the result of a bargain.[12] It is therefore appropriate to divide the discussion accordingly.

The debate concerns how the evidence makes out the appropriate kind of mistake. This has usually been framed in terms of whether that mistake must be subjective or objective. Subjective mistake means the party or parties must have *actually* been labouring under the error. Objective mistake, however, means the party or parties must appear to have been labouring under the error given their appearance to a reasonable objective observer, irrespective of whether they actually were mistaken. Subjective and objective knowledge and subjective and objective intention are defined likewise. There is also the matter of whether an 'outward expression of accord'[13] is required. This was explained in *Four Seasons* to mean that each party understood that each other had 'an intention which the parties not only each held but understood each other to share as a result of communication between them.'[14] This requirement, when applied to subjective mistake rectification, introduces some objective elements. It yields, in effect, a hybrid of the two methods.[15]

Four Seasons is a thorough and closely reasoned analysis of the law of common mistake, which also touches on unilateral mistake. It therefore makes sense to use it, its reasoning and the above concepts stated in it, as reference points. However, since we are considering a novel situation, it is necessary to look behind the subjective/objective distinction to how the process of weighing the evidence actually works in order to evaluate how these rules interact with the peculiar facts of document assembly cases. Facts are as much made as found by the court during the trial process[16] and it is at this level these novel factors are actually processed.

There are various facets to the objective method. One is that, where there are two parties, it resolves any differences in their subjective opinions and manufactures a common intention that yields the common obligations they owe each other. This is quite simply unnecessary for unilateral instruments not arrived at through a bargain. The objective method binds the parties to terms that may have been signed off, but never read, and is a pragmatic and possibly essential requirement of a law of contract. It justifies, under certain conditions, implying terms neither party put their mind to, but are necessary to make the contract work.[17] In the absence of

[10] Computer evidence was once restricted: Civil Evidence Act 1968, s 5, now repealed by the Civil Evidence Act 1995. For wills, what is admissible is limited: Administration of Justice Act 1982, s 21.
[11] It was once thought that terms recorded in formal documents were immune to rectification: *Woollam v Hearn* (1802) 7 Ves Jun 211, 32 ER 86; *Rich v Jackson* (1794) 4 Bro CC 514, 29 ER 1017. See also 'Power of Courts of Equity to Reform Written Executory Contracts for the Sale of Land and Decree Specific Performance of the Contract as Reformed' (1913–14) 1 Va L Rev 620, 628.
[12] *Re Butlin's Settlement Trusts* [1976] Ch 251 (Ch) 260; *Joscelyne v Nissen* [1970] 2 QB 86 (CA).
[13] *Joscelyne v Nissen* (n 12) 98.
[14] (n 2) [72].
[15] See James Ruddell, 'Common Intention and Rectification for Common Mistake' [2014] LMCLQ 48, 72: 'the two requirements of common intention and outward expression of accord are separate. If the former were objective, there would be no purpose in stating the latter: it must be subjective.' It follows that the outward expression requirement puts an objective element into the subjective test.
[16] Paul Roberts and A A S Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010) 135.
[17] *Four Seasons* (n 2) [149].

telepathy, it is a good proxy for subjective intention.[18] Given the difficulties of inferring what is actually going on in someone's mind, it brings 'greater predictability and consistency of decision-making'.[19]

As Etherton C points out, there is a practical difficulty in discovering the author's subjective intention if there is no outward accord of it (albeit before the definition put on 'outward accord' in *Four Seasons*).[20] His observation goes some way to illuminating the consequences of the objective method; even for a unilateral instrument with one author, the objective method will weight documentary evidence higher and the characteristics of the author lower than the subjective method. There is thus a significant difference between objective and subjective mistake even for unilateral instrument rectification, albeit the difference is somewhat narrower because there is no need to manufacture a common intention, and because of the practical difficulties in determining subjective intention.

To reach a finding of mistake, the objective or subjective method (as appropriate) must be applied to both the interpretation of the document and the state of mind of the relevant party. If they are different, there is a mistake. It is at least clear that the *interpretation* of the instrument is via the objective method, whether the instrument is bilateral[21] or unilateral.[22] Then, whether there is an operative mistake depends on whether the party's or parties' (subjective or objective) belief as to the effect of the words matches that objective interpretation of them.[23]

3.2 Illustration and Brief History

The live issue is then whether it is subjective or objective belief (or intention) that matters and this is what has dominated the debate. It is instructive to sketch the history and illustrate with an example the distinction between the subjective and objective methods matters in the general case before considering their application to document assembly.

Prior to the case of *Chartbrook Ltd v Persimmon Homes Ltd*, it was thought that, for common mistake, the mistake had to be subjective, albeit with an outward expression of accord of it.[24] In *Chartbrook*, Lord Hoffmann said, *obiter dictum*, that the mistake should objective,[25] a proposition accepted and applied in *Daventry District Council v Daventry & District Housing*

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[18] See, e.g., Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29 Melb UL Rev 179.
[19] *Four Seasons* (n 2) [148].
[20] *Day v Day* [2013] EWCA Civ 280, [2014] Ch 114 [22].
[21] *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL).
[22] *Four Seasons* (n 2) [165]; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL) (notices); *Staden v Jones* [2008] EWCA Civ 936, [2008] 2 FLR 1931 [18]ff and *Hageman v Holmes* [2009] EWHC 50 (Ch), [2009] 1 P & CR DG17 (trusts); *Perrin v Morgan* [1943] AC 399 (HL) 406 (wills); *Marley v Rawlings* [2014] UKSC 2, [2015] AC 129 [20]–[23] (wills); see further *Millar v Millar* [2018] EWHC 1926 (Ch), [2018] WTLR 563 [16]ff.
[23] It is not clear whether, in the case of trusts, there is a further general requirement that there must be a causative mistake which is sufficiently grave such that it would be unconscionable not to set it aside, as stated in *Pitt v Holt* [2013] UKSC 26, [2013] 2 AC 108 [121], in the context of rescission of a trust deed. The rectification cases pre-dating *Pitt v Holt* adopted then then-requirement for rescission, that the mistake must go to the legal effect of the provision and not merely its consequences. This was replaced by the 'sufficiently grave' requirement in *Pitt v Holt*: *Gibbon v Mitchell* [1990] 1 WLR 1304 (Ch) 1309; see also *Allnutt v Wilding* [2007] EWCA Civ 412, [2007] WTLR 941 [6]. This does suggest that, at least for trusts, something more may be required, particularly a requirement of gravity. See Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (19th edn, Sweet & Maxwell 2015) para 4–061.
[24] *Four Seasons* (n 2) [6] and [51]ff; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 [48] quoting *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 2 EGLR 71 [33].
[25] *Chartbrook* (n 24) [57]ff.

Ltd.[26] Despite a sound theoretical underpinning – if one is rectifying a contract, the rules ought to be harmonised with those of contract – this has proved controversial. Criticism has been centred around particularly these issues: (i) that an earlier, more informal, document is afforded too much weight vis-à-vis a final, formal contract; and (ii) the increased risk of a party being bound by a term she would never have agreed to.[27]

The interplay and balance between the two issues can be illustrated by the litigation in *Four Seasons*. The mistake in *Four Seasons* was two-fold. As part of Four Seasons Health Care's acquisition by private equity, the benefit of a shareholder loan ought to have been assigned to a US hedge fund via its security agent, the predecessor of the defendant, but was not. This mistake was not litigated. Instead, upon noticing the problem, a new deed confirming the assignment was executed. It included additional onerous obligations in favour of the defendant with nothing new in return. By mistake, both sides thought it did not; the expectation was that it merely confirmed the assignment.

The defendant pressed for the objective approach because, one presumes, it would give greater weight to documentary evidence and less to the parties' individual characteristics, and this would have been in its favour given the particular facts. Conversely, a subjective approach would have favoured the claimant, who would then argue and show that they were sensible enough not to take on such onerous extra obligations for nothing in return. Ultimately the defendant lost. The Court of Appeal held that even objectively both parties were mistaken, but given there was no prior binding agreement, the requirement was subjective mistake.

3.3 Application to Document Assembly: General Matters

For computer-generated documents, matters are complicated by the existence of the menu choices made by the user (or users), which one will expect to be simpler than the language of the final document, but still definitive. It is entirely possible, perhaps probable, that one or both parties relied on the forms and selections for this reason. By rely, what is meant is that the relevant party or parties understood the forms and selections to indicate the true legal effect of the final document, but did not check or understand the true legal effect from the final document, took no or no effective advice, and remained mistaken about the different effect of the final document.

To see how document assembly and the law interact, it is necessary to examine the various permutations of mistakes. Before that, recall some preliminary points. The main division is that of unilateral mistake and common mistake. The party seeking rectification is of course the claimant, and the party resisting the defendant. And note that while again the error that was the root cause of the mistake was made by the programmer, that is not the operative mistake for present purposes. The party or parties themselves may make another mistake, namely believing that the final document was a faithful reproduction of their choices, and it is this mistake that is directly relevant.

[26] [2011] EWCA Civ 1153, [2012] 1 WLR 1333.

[27] Paul S Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (2016) 75 CLJ 62, 75. See also Christopher Nugee, 'Rectification after Chartbrook v Persimmon: Where are we now?' (2012) 26 TLI 76; Paul Morgan, 'Rectification: Is It Broken: Common Mistake after Daventry' [2013] RLR 1; David McLauchlan, 'Refining Rectification' (2014) 130 LQR 83.

4. Rectification of Bilateral Instruments

The closeness and interaction between common mistake rectification and unilateral mistake rectification of bilateral instruments has already been noted in the literature.[28] Indeed, in *Daventry*, both were claimed and while the case was decided on the basis of common mistake rectification, Toulson LJ had 'anxieties' about the then-law – the objective method – and thought the case might have been better decided on the basis of unilateral mistake.[29] There are two significant differences here and now. First, the subjective approach has been confirmed. Second, unlike in *Daventry* and *Chartbrook*, there are the forms – very persuasive documentary evidence – in a document assembly case. Thus one must consider the interaction between common mistake rectification and unilateral mistake rectification under the present law in this context. The two claims, perhaps surprisingly, appear to mesh well, as their application to the different possibilities show.

First, suppose neither party relied on the forms and selections. This scenario is most likely to occur if they were supplied with a final document produced by a third person operating the computer. Then there would not be any difference in the debate or the applicable law vis-à-vis conventionally drafted documents. One would still have to consider the parties' instructions, but their non-interaction with the technology seriously weakens any case for having different rules for rectification in these circumstances.

Second, suppose both parties relied on the forms and selections. Perhaps they filled in the forms together or the forms were presented to the party not then present. The information on the forms is typically clear and well-defined, minimising the influence of the parties' individual characteristics. It is akin to a written document. Consequently, a wide class of people – including the parties – would be led to believe the true legal effect of the final document was represented by the forms and selections. The difference between subjective and objective mistake therefore narrows considerably here. Moreover, any requirement of communication of the mistake will be met by the mere existence of the forms and selections in this scenario. Furthermore, the strength of this evidence, which would be extremely good, should satisfy the high bar for convincing the court there should be common mistake rectification.

Third, suppose one party (the defendant) did not advert to the forms or the error on them and thus did not rely on them. Perhaps the defendant ignored or did not see the forms and selections or the claimant's explanation of the document's effect, if any. Subjectively, the defendant has not made a mistake. However, it is likely that the *claimant* has made a mistake, both subjectively and objectively, by relying on the forms. This is then a case of unilateral mistake rectification. The concern here is that the high-quality documentary evidence – the faulty forms – will create a powerful, but false, inferences that the defendant also made the same mistake and also the inference that both parties realised they had made the same mistake, for the reasons given in the previous paragraph.

4.1 Common Mistake

If neither party spots the same problem, the matter is scenario 2 and will fall under rectification for common mistake (if the parties make different mistakes it is mutual mistake and the contract

[28] E.g. McLauchlan (n 27); Davies (n 27) 63.
[29] (n 26) [185].

may be void).[30] According to the Court of Appeal in *Four Seasons*, the common mistake rectification requires either:

> *(1) [objective mistake:] that the document fails to give effect to a prior concluded [and legally enforceable]*[31] *contract; or*
>
> *(2) [subjective mistake:] 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 … [I]t 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 [the hybrid element].*[32] *[This could well be a tacit understanding, shown by the circumstances.]*[33]

Four Seasons thus brings an emphatic resolution of the question of whether the law should require an objective or subjective mistake in an impressive synthesis of the principles.[34] The reasoning in it explores the justifications for the different approaches. In the objective limb, there is the need to accord with the law of contact – but only when there is, in fact, an enforceable contract and after the parties' chance to walk away has expired. Here, the court is in effect ordering specific performance of an existing contract and thus contractual principles apply.[35] While, even absent mistake, there is the risk of imposing obligations contrary to one's actual intention to be so bound, this is a risk the courts have accepted in adopting the objective method for construction in the law of contract and thus rectification should not be a route out of it. In this situation, the rules for rectification have to be harmonised with those for construction, as noted in *Chartbrook* itself.[36] A subjective approach would undermine the objective basis of the law of contract and is therefore inappropriate.

As regards the subjective limb, the Court of Appeal in *Four Seasons* endorsed the decision of an earlier Court of Appeal in *Britoil plc v Hunt Overseas Oil Inc*.[37] In *Britoil*, the issue was that there was a heads of agreement document that differed in meaning to the terms in the final document. However, Hobhouse LJ refused to allow rectification, arguing that:

> *It cannot be right to treat as conclusive evidence of the existence of a mistake in the execution of a carefully prepared and clearly expressed later contract the fact that language has been used in an earlier document which is bona fide capable of being understood in more than one way.*[38]

This was not a fully exclusionary rule; the judgment left open the possibility that the earlier document would prevail. But Hobhouse LJ acknowledged the need to place more weight on a final, formal document. In *Four Seasons*, the Court agreed; an earlier, non-binding intention should not have priority over a formal contract.[39] However, it went further, insisting on an enforceable contract for the objective limb. This is perhaps because it had opened up the

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[30] *Bell v Lever Brothers Ltd* [1932] AC 161 (HL).
[31] *Four Seasons* (n 2) [142].
[32] ibid [176]. For the previous law, see *Chartbrook* (n 24) [48] quoting *Swainland Builders* (n 24) [33].
[33] *Four Seasons* (n 2) [80]–[87].
[34] The synthesis rejects as false the dichotomy proposed by, e.g., Davies (n 27) 85, that common mistake rectification has to choose between consistency with the common law and its traditional equitable roots. The Court of Appeal essentially adopted the proposal in Ruddell (n 15) rather than that of McLauchlan (n 27). See also Nugee (n 27); Morgan (n 27).
[35] *Four Seasons* (n 2) [140]–[141].
[36] (n 24) [100].
[37] [1994] CLC 561 (CA).
[38] ibid 573.
[39] (n 2) [144].

possibility of a second, subjective limb which would accommodate the circumstances left open in *Britoil*, if the parties positively and subjectively intended the earlier document to prevail.

Thus, the Court argued that in the absence of a previous binding accord, the justification for rectification is not that promises should be kept, but the equitable principle of good faith.[40] This precludes enforcing a later formalised agreement that each party did not actually intend and knew that the other did not intend.[41] This is a subjective requirement, as is traditional in equity. Moreover, this limb comports with the unilateral mistake requirement that one party knew or had blind-eye knowledge that the other was mistaken,[42] and with the contractual principle that, for terms to be binding, they must be communicated.[43]

Furthermore, it is the analogue of the 'exclusionary rule' in construction, which precludes the consideration of pre-contractual negotiations. While usually justified in terms of convenience – the evidence is usually unhelpful[44] – it also has the effect of preventing previous drafts colouring the interpretation of a final agreement. Since the exclusionary rule does not apply to rectification,[45] this mitigation was absent – at least until now, where its analogue has been established in the requirement to show that each party actually understood each other to have shared the same different intention.

It may be very difficult to distinguish between the second and third scenarios on the available evidence. What the mistake was, and that it was communicated, is clear, but the issue is to determine whether both claimant and defendant actually made that mistake. Since we cannot read minds, it comes down to drawing an inference. Under the objective method, good evidence of an error in the computer program will be almost conclusive in determining the existence of an *objective* mistake by both parties, creating a powerful presumption for scenario 2 and elevating the importance of the forms over the final document. The risk of the defendant being bound to a contract she would never have agreed to is magnified considerably.[46] She would no doubt protest that she had taken the utmost care, had relied only on the final document, and yet this was not enough.

However, this escape route, opened up by the adoption of the subjective method, yields an immediate and powerful counter-objection. The defendant, provided she had seen the forms as well as the final document, and thus had adverted to the mistake, should have alerted the unmistaken party to the problem. This matter will be dealt with in the next subsection concerning unilateral mistake.

For now the issue is how the courts will go about finding subjective common mistake in scenario 2. The adoption of the subjective method means that the personal characteristics of each party – and how they differ from each other – will be much more important in making a determination of (subjective) mistake. One would have to infer that both relied on the forms and not the final document. Significantly, one likely personal characteristic of both parties will be in point. It is likely that they will be relatively legally unsophisticated and less likely to have

[40] ibid [142].
[41] ibid [146].
[42] ibid [147], [103]–[106]; *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259 (CA).
[43] *Four Seasons* (n 2) [77].
[44] *Chartbrook* (n 24) [31] citing *Prenn v Simmonds* [1971] 1 WLR 1381 (HL) 1384.
[45] *ICS* (n 21) 912; *Chartbrook* (n 24).
[46] There is of course the converse situation – the risk that the parties' subjectively made a mistake but, under the objective analysis, are considered not to. See McLauchlan (n 27) for discussion. This issue is not likely to come up in the matters presently under discussion.

taken advice than in the 'big money' cases such as *Chartbrook*. In turn this means they are more likely to have relied on the forms and to have made the same mistake. While the methods are different in theory, they may converge in practice, and will tend to do for document assembly.

Nonetheless, because we are looking for subjective mistake, the key facts to be proven are that the defendant actually saw and adverted to the incorrect information on the forms. Without this, the defendant's protestations she should be able to rely on the final document will be enough to end the claim, because she neither made a mistake nor noticed one. But provided this is proven, that may be enough circumstantial evidence to infer that both parties were subjectively mistaken. If not, there more evidence may help. The nature of the mistake will be relevant. A good example is found in *Chartbrook* itself, because the term in question made no commercial sense (although this is less likely to come up in cases of gifts, trusts and wills.)[47] If there is a glaring problem, this assists the inference that the parties made a mistake.

This outcome appears to match the policy of the law. In *Four Seasons* the Court said that rectification requires a 'demanding test to satisfy and one which affords appropriate respect to the primacy of the final, agreed, written terms of a contract … As a matter of policy, rectification should be difficult to prove.'[48] The difficulty is proving the defendant adverted to the screens, and this protects innocent defendants, albeit at the risk of denying rectification to claimants who simply do not come up to proof. It is perhaps not as difficult as the general case, particularly if the parties both worked from the forms, and this seems right given the good probative quality of the evidence of the fault in the computer program, if available.

4.2 Unilateral Mistake

That leaves the counter-objection; where the defendant adverted to the error and thus was not mistaken, but the claimant did not and was, i.e. scenario 3. If the law can sensibly provide for rectification here, then we would have the best possible solution: an effective law of rectification for computer-generated documents that meets the law's policy requirements and works as well as possible in practice. It appears that the law is very close to doing this.

The starting point for unilateral mistake rectification (regarding bilateral instruments) is that if only one party is mistaken, the other ought to be able to rely on the plain words of the document she executed.[49] The key requirement is that the unmistaken party, A, actually knew, or had 'blind-eye knowledge'[50] of the mistake of the mistaken party, B, because that is the only justification for binding B to a contract she did not agree to.[51] While the forms and selections will be probative evidence of what A thought B knew, it is still necessary to prove A actually knew B had made a mistake, making the process subjective.

However, the peculiar facts of document assembly go some way to supplying these requirements. One way a defendant might rebut the inference that there is a common mistake is to argue she relied on the final document and was therefore not mistaken. This then leads

[47] (n 24) [16].
[48] (n 2) [173], [174] (emphasis supplied). One might also note the reduced susceptibility to appeal of the subjective method. Objective interpretation, as the plethora of cases demonstrate, is a matter of law and thus susceptible to appeal, but the primary finding of fact and thus subjective mistake is the purview of the trial judge, and can only be challenged if outside the range of possible findings, a much higher bar.
[49] *New Towns Commn v Cooper* (n 42).
[50] ibid 280ff.
[51] See also *Thomas Bates & Son v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 (CA) 516. See Hugh Beale, *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) para 3–069 regards the complexities.

directly to unilateral mistake rectification. If she notified the claimant of the error, and the claimant did nothing, then there will be no rectification because B would no longer be mistaken. If not, she is taking advantage of him. It would be monstrous if this admission led to her escaping the claim for rectification.

The difficulty is that A will probably not have actual knowledge that B was mistaken. A must, however, suspect that B was mistaken because A did advert to the error. However, it may be difficult to say this is blind-eye knowledge, because it goes further than simply looking away; B may not have alerted A to anything to look away from. It requires active enquiry, and that enquiry may disturb difficult and sensitive negotiations. It may, therefore be unreasonable to demand that enquiry and fix A with blind-eye knowledge if she declines to make that enquiry.[52]

There is thus a good case for adopting McLauchlan's suggestion that it should be enough if A merely ought to have known of B's mistake. McLauchlan points out that in *Chartbrook* the defendant ought to have known from the communications with the claimant that the claimant had make a mistake, and this justifies rectification.[53] In a document assembly there are the forms, which are analogous to the communications, supplying the same suspicion.

There is limited authority supporting this extension in *Daventry*, but ultimately the matter was left open in *Four Seasons*.[54] I agree that the principle is, as McLauchlan says, wider. It appears to fall squarely within the principle of good faith that is said to justify rectification. It is hard to see why good faith should limit the rule to actual knowledge of the mistake, and if it does not, why the rule demarcating susceptibility to rectification should stop at blind-eye knowledge. McLauchlan justifies this extension with reference to case law which founded unilateral mistake rectification in the estoppel principle, which does not require dishonesty: 'if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he … will be precluded from resisting rectification'.[55] It is hard to disagree, except on the technical level that this brings objective elements into the test, and the Court in *Four Seasons* was concerned with real consequences rather than such niceties.[56]

Finally, there is the possibility that no contract is formed at all. If the difference between the final document and the forms and selections is sufficiently fundamental, there is objective ambiguity, and accordingly there is no agreement and therefore there cannot be a contract.[57]

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[52] See particularly David McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (2008) 124 LQR 608, 628ff.

[53] ibid; McLauchlan, 'Refining Rectification' (n 27) 93.

[54] *Daventry* (n 26) [173]ff; *Four Seasons* (n 2) [104].

[55] *A Roberts & Co Ltd v Leicestershire CC* [1961] Ch 555 (Ch) 570; see McLauchlan, 'The "Drastic" Remedy of Rectification for Unilateral Mistake' (n 52) 620, 622.

[56] In *Smith v Hughes* (1871) LR 6 QB 597 (QB) 607 the court characterised the objective method in interpreting contracts in terms of estoppel where one party maintained a false impression. See also *Freeman v Cooke* (1848) 2 Ex 654, 154 ER 652; *Krell v Henry* [1903] 2 KB 740 (CA) 752; *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 (HL) 502.

[57] *Raffles v Wichelhaus* (1864) 2 Hurl & C 906, 159 ER 375. There is a similar issue where the defendant is aware the claimant made a mistake, but is not sure what the mistake is. In such instance it is thought that the contract should be void because of the risk of binding the defendant to a contract to which he would never have agreed. Moreover, there is no justification on the grounds of fault, because the defendant's fault does not extend so far to the claimant's mistake because he is unaware of it: *Chitty* (n 51) para 3–075; *BP Oil International Ltd v Target Shipping Ltd* [2012] EWHC 1590 (Comm), [2012] 2 Lloyd's Rep 245.

Rectification cannot be used to turn a non-agreement into an agreement except in the limited circumstances described above.

Thus, provided scenario 3 is caught (because it is thought to amount to blind-eye knowledge or the law moves to accommodate the circumstances where the defendant merely ought to have known), the law will be equipped to deal with the rectification of document assembly as well as it could be expected. No other change in the underlying principles appears to be desirable. On the facts, the main barrier to rectification is where the defendant did not advert to the error, and once documentary evidence of the computer fault is available, proving the former will be the claimant's biggest hurdle.

5. Rectification of Unilateral Instruments

5.1 Subjective Mistake

The simpler case is that of a unilateral instrument, such as a deed of gift, trust deed, will or notice.[58] Just as the restrictions on rectifying formal documents fell away, so did those specific to unilateral instruments. It was also once thought that this inherent jurisdiction was limited to matters other than technical drafting errors such as errors in recording instructions. This rule fell away with *Re Butlin's Settlement Trusts*, where it was held that that jurisdiction was not so limited.[59] This leaves a highly flexible inherent jurisdiction to rectify, one that the courts can refine as is necessary.

Absent the conditions where the instrument is treated as if it is bilateral (a trust deed arrived by bargaining or one having multiple authors), because it is unilateral, there can be no concern that by rectifying the document one is binding a second party to terms she would never have agreed too. There can also be no question of different rules for unilateral or common mistake.

It has been expressly stated that it is subjective belief the court searches for, despite the difficulty in finding it,[60] and the proposition that an 'outward manifestation' of the party's mistaken belief as to the effect of the instrument has been rejected.[61] However, neither the judgments nor the literature have gone terribly far in asking why. Even though, given the emphatic judgment in *Four Seasons*, it is unlikely an objective approach to unilateral instrument mistake would be adopted, it is worth exploring the issues in the context of document assembly.

First, there simply is no need to manufacture a common intention, which takes away a big advantage – and difference – of the objective method. Second, there is no need to imply terms. Third, it is then fairer to look to true, subjective intention, which would better give effect to what this party actually wanted. Fourth and connected to the last point, the courts must be mindful of the tendency for those giving away their wealth to make placatory comments and reassuring noises to potential beneficiaries which they may not wish to actually put into effect, although, crucially, this point would not apply to evidence from the document assembly process. Fifth, if the objective method were adopted, there would be no danger of biasing the process against the diligent party who actually took the care to check the final document.

[58] E.g. a disclosure notice: *Persimmon Homes Ltd v Hillier* [2019] EWCA Civ 800; a notice to break a tenancy: *Mannai Investments* (n 22).
[59] (n 12) 260, approved in *Chartbrook* (n 24) [46] and *Four Seasons* (n 2) [70].
[60] *Day v Day* (n 20) [22]. See also *Allnutt v Wilding* (n 23) [11] ('true intentions'). For wills, see Administration of Justice Act 1982, s 20.
[61] *AMP (UK) Ltd v Barker* [2001] WTLR 1237 (Ch) [66].

What is left is only a very slight difference between the two approaches. That difference is that it must still be proven, albeit usually through inference, that the author did actually make a mistake, i.e. that he relied on the forms. Given that person must have used the computer – and thus adverted to the forms – in most cases this inference will be supplied by good evidence of a fault in the computer program that affected the output. Of course, it may be that that person did not, but the inference is so strong the burden to show that may be in effect thrown on those opposing rectification. For most cases, it will come down to obtaining good evidence of the computer fault.

5.2 Statutory Law: The Rectification of Wills

For wills, there is a statutory jurisdiction, which brings up rather different issues. One must mention, in passing, of the potential existence of an inherent jurisdiction to rectify wills, but this is a difficult and controversial matter that is beyond the scope of this article.[62] But for statutory rectification, it is not clear whether the kind of mistakes made by bugs in the document assembly process will engage the gateways. Much analysis is required to answer that question.

Part IV of the Administration of Justice Act 1982 was enacted because it was thought the courts had no inherent power to rectify wills and the rules of evidence as to construction were too limited.[63] Its gateway system requires restrictive tests to be passed before a wider range of matters may be considered in the substantive rectification process. Section 20 provides that:

> *(1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—*
>
> *(a) of a clerical error; or*
>
> *(b) of a failure to understand his instructions,*
>
> *it may order that the will shall be rectified so as to carry out his intentions.*

This arrangement reflects the policy choices of the Law Reform Committee in 1973.[64] It was thought that technical drafting errors, i.e. mistakes as to legal effect of the words used, were a matter for construction only.[65] Three reasons were given. First, this maintained parity with what was then thought to be the extent of the remedy of rectification for other unilateral instruments under the court's inherent jurisdiction.[66] Second, there were concerns that rectification was inappropriate when a drafting error had been made, for that would 'pass into wider realm of the testator's purpose', second-guessing what cannot actually be determined, or rewriting the plain words of the will.[67] Third, the gateways were chosen to preclude unmeritorious claims where disappointed beneficiaries applied with only poor evidence.[68]

The foundation for the first reason collapsed with *Re Butlin*, which infelicitously post-dated the 1973 report, if not the Act itself. Consequently Hodge argues that it was this

[62] Accepted in *Quinn v Hanna* [2017] NIMaster 6, at first instance, relying on a *dictum* of Lord Neuberger in *Marley v Rawlings* (n 22) [28]. See Birke Häcker, 'What's in a Will? – Examining the Modern Approach Towards the Interpretation and Rectification of Testamentary Instruments' in Charles Mitchell (ed), *Current Issues in Succession Law* (Hart 2016) 153ff for detailed discussion. One significant argument against the existence of this jurisdiction is the point that it would inappropriate for the court to assume for itself powers wider than those granted to it by Parliament (*Marley v Rawlings* (n 22) [30]).
[63] Law Reform Committee, *Interpretation of Wills* (Cmnd 5301, 1973) paras 9–11; *Marley v Rawlings* (n 22) [30].
[64] Rectification: Law Reform Committee (n 63) para 17ff; Construction: para 34ff.
[65] ibid para 17.
[66] ibid para 25.
[67] ibid para 23.
[68] ibid para 28.

misapprehension of the true inherent jurisdiction to rectify that caused the Committee to wrongly think that correcting drafting errors would intrude into the impermissible realm of imputing an intention to a testator. Such a restrictive gateway should not, therefore, have been imposed.[69]

The second reason is also doubtful *per se*. Correcting technical drafting errors simply does not always pass into the illegitimate realm of second-guessing the testatrix's intention and rewriting her will. As Hodge points out – and as shall be seen – cases of misapplied precedents in truth straddle clerical error and drafting error and it is not a binary choice.[70] As for the third reason, the Committee did not anticipate the new scenario of computer-generated documents and it is not surprising they did not make recommendations accordingly.

5.3 Benevolent Interpretation of the Statutory Law

Driven by the absence of a provision permitting rectification for drafting errors in wills, the courts have interpreted the gateways of the 1982 Act generously. The question is whether the courts will extend this benevolent interpretation to computer-generated documents. On the one hand, the mechanical assembly of wills from precedents, just as in a document assembly process, has been held to be clerical work. On the other, it is not the computer making the mistake but its programmer. The computer produces the erroneous output, at run-time, without fault.

The question is whether the above combination of events amounts to either a 'clerical error' or a 'failure to understand instructions'. Certainly any error made by the programmer would not be clerical, since programming requires expertise by any definition. It therefore depends on whether any error made at run-time is considered clerical, or whether the programming error is considered to be a failure to understand instructions. The expansive trajectory in the case law suggests the courts may be prepared to bring computer-generated wills within it.

5.3.1 Clerical Error

Regarding 'clerical error', an important early holding was that the gateway did not import a requirement that the error be made by a clerk. It is the type of error, not who makes it, that matters. It can be made by the testator or any other drafter. Various formulations have been produced, but the essence of them is that a clerical error is an unthinking error of inadvertence. The phrase '*per incuriam*' has also been used.[71] Hence, if a professional drafter possessed, but did not use, the technical drafting skills in the part of the will where the error is found, the court will consider the error merely clerical. Only if 'special expertise' were required would

[69] David Hodge, *The Modern Law and Practice Governing Claims for Rectification for Mistake* (2nd edn, Sweet & Maxwell 2016) para 8–39; David Hodge, 'The Correction of Mirror Wills: Interpretation versus Rectification' (2017) 81 Conv 45, 50.

[70] Hodge, 'The Correction of Mirror Wills: Interpretation versus Rectification' (n 69) 51 citing *Jump v Lister* [2016] EWHC 2160 (Ch), [2017] WTLR 61. The analysis of *Re Martin, Clarke v Brothwood* [2006] EWHC 2939 (Ch), [2007] WTLR 329 in Roger Kerridge and A H R Brierley, 'Re Martin: Rectification of a Will – The Right Result for the Wrong Reason?' [2007] Conv 558 considering it an example of failure to understand instructions rather than a clerical error, also supports the point.

[71] *Re Segelman* [1996] Ch 171 (Ch) 184–186; *Re Williams* [1985] 1 WLR 905 (Ch) 912 (summarily); *Wordingham v Royal Exchange Trust Co Ltd* [1992] Ch 412 (Ch) 419 citing *R v Commissioner of Patents, ex p Martin* (1953) 89 CLR 381 (HCA). See also John Ross Martyn and Nicholas Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (20th edn, Sweet & Maxwell 2013) para 40–21; once Clifford Mortimer and Hamish H H Coates, *The Law and Practice of the Probate Division of the High Court of Justice* (2nd edn, Sweet & Maxwell 1927) 91–92, this edition quoted in *Re Morris* [1971] P 62 (P) 80 and approved in John G Ross Martyn and others, *Theobald on Wills* (18th edn, Sweet & Maxwell 2016) 419. Cf *Theobald* para 14–004 stating that drafting errors cannot be rectified.

rectification be refused.[72] In the leading case of *Marley v Rawlings*, handing the wrong wills to a husband and wife for signature was held to be a clerical error and enough to engage the gateway; then the remedy was to replace the entire body of each will with the contents of the other.[73] This accords with the mechanical, unthinking process of assembly at run-time in document assembly. However, analysis in greater depth is needed.

In *Re Segelman* the drafting solicitor had, on his own initiative, inserted a proviso that if any of the beneficiaries in a schedule should predecease the testator, (under certain conditions) his or her issue should benefit instead. When the testator gave the solicitor the list of persons, five of the six included the words 'and his issue'. This rendered the proviso inappropriate and it was probable that the outcome would have been to have made the issue wait until the other relatives had died. This is a similar kind of conflict to the one in the class gift example above. While, on the face of it, drafting the proviso was not clerical work and thus rectification would have been refused, Chadwick J said, albeit *obiter dictum*, that rectification would be allowed because the solicitor had not adverted to the proviso's effect when combining it with its inputs. This act of combination was *per incuriam*.[74] To similar effect is *Austin v Woodward*, where in the process of updating a will a solicitor changed some wording taken from a precedent to that from a newer version of the precedent, which again turned out to be inappropriate. It was held that this too was a clerical error.[75] The computer's inadvertence at run-time is close to the kind of human inadvertence that has been accepted as sufficient in these cases. Therefore, at first blush, the benevolent interpretation of the statute is extensible to a computerised generation process.

A less generous case is *Reading v Reading*, where Asplin J refused rectification of the word 'issue' which, on its technical reading, excludes stepchildren, contrary to this testator's actual intention.[76] The drafter had chosen a precedent and not given any thought to how 'issue' would exclude stepchildren.[77] While he had 'overlooked' the fact that issue does not include stepchildren,[78] for Asplin J this was not clerical work. It involved 'special expertise' and the error was outwith s 20(1)(a) accordingly.[79] This does give some cause for concern, because *Reading* is a newer case and, unlike the others, follows and indeed cites the definition of clerical work in the case of *Marley v Rawlings*: 'arising out of office work of a relatively routine nature such as preparing, filing, sending and organising the execution of a document'.[80] That was enough for the facts of *Marley*, but the error there was considerably less technical.

Nonetheless, this definition may actually be in favour of deciding that s 20(1)(a) applies to defective computer-generated wills. Asplin J distinguished *Re Segelman* by considering the drafter's error in selecting the wrong word to be part of his 'professional judgment'.[81] In other words, he failed in his checking function. At run-time, the computer does no such thing. It has no checking function and is merely arranging the final document. Any checking would have

[72] *Reading v Reading* [2015] EWHC 946 (Ch), [2015] WTLR 1245 [51].
[73] (n 22).
[74] (n 71) 186. N.B. the case was actually decided on the basis of construction.
[75] [2011] EWHC 2458 (Ch), [2012] WTLR 559.
[76] (n 72). The gift to the stepchildren was saved by construing 'issue' as including stepchildren.
[77] ibid [22].
[78] ibid [51].
[79] Criticised in Roger Kerridge and A H R Brierley, *Parry and Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016) para 10–13.
[80] *Reading v Reading* (n 72) [51] quoting *Marley v Rawlings* (n 22) [75].
[81] *Reading v Reading* (n 72) [53].

been done during the programming process. Hence computer-generated documents are not caught by *Reading v Reading*.

The reader will surely be left with an uneasy feeling that the cases are whatever one makes of them. This, I suggest, springs from two things: first, as Hodge says, drafting error cannot be said to be conclusively a clerical error or not; and second, because a generous approach has been taken to the statutory gateway. Had it been tightly interpreted and all drafting errors excluded, these difficulties would never have arisen, but many wills would have been excluded from its purview. The statute has been managed accordingly.[82] Given this, extension looks possible, even if it creates further strains.

5.3.2 Failure to Understand Instructions

Since, at run-time, the computer program has no intelligence, it seems impossible that it could satisfy the other gateway, failure to understand instructions. But that leaves the question of whether the gateway accommodates the situation where the *programmer* failed to understand the testator's instructions. The economically-worded s 20(1) requires the testator's instructions to be misunderstood, but not necessarily by the person – or process – producing the final document. This gateway does not, on a literal reading, require the misunderstanding to occur at the time of drafting the final document is drafted either.

I therefore propose the following somewhat ambitious argument: In the event of a bug in the logic, it is the case that the programmer, when creating the system of precedents, failed to understand, via an intermediate step, the instructions of the testator and this should satisfy the gateway. The first step is the creation of the program by the programmer from a general specification. It is true this is not specifically and solely from the end-user's instructions. That general specification would have catered for a larger set of options from which the testator could, and did, select from. That selection is the second step. Then, if the programmer had failed to understand the specification and caused the program to produce the wrong legal output for some of the precedents she consequently, albeit indirectly, failed to understand, amongst other things irrelevant to the instant case, the specific instructions the testator gave. If the error had been made at the second step, the statute would uncontroversially be engaged. However, the first step is merely the second plus additional work – work that is irrelevant to the case in question. Hence, one can see this as an error within the wording and policy of the statute, and thus the gateway should be engaged.

It is also reasonable to characterise the events as a failure to understand the testator's instructions by the process as a whole. This is because there is an unbroken chain of causation between the testator's instructions and the person who made the mistake. This can be contrasted with the case of a skilled drafter who breaks that chain of causation by failing to understand how to produce the output from the instructions. Section 20(1)(b), therefore, could well apply – providing the error is not considered to be a technical drafting one.

Again, the sensation that this is a little artificial is perhaps inevitable. However, the statute was drafted in general terms, even if its designers did not anticipate the coming of computer-generated wills. The ultimate design goal for the statute was to avoid the risks of people 'having a go' on weak evidence.[83] However, this is less likely to be a problem in a document assembly case where the evidence could be very good. Accepting that the mistake could be made by an additional party, unanticipated by the drafters of the statute but closely connected with the

[82] Hodge, 'The Correction of Mirror Wills: Interpretation versus Rectification' (n 69) 50.
[83] Law Reform Committee (n 63) para 28.

process it did anticipate, is arguably within its purpose, particularly as the statute has been interpreted broadly in the cases. It is still just failure to understand instructions, albeit a less direct failure. For the same reason in the s 20 cases – there is a need and a way – there could be a route to rectification here too.

6. Construction

6.1 The Role of Construction

The role of construction as a substitute for rectification has undoubtedly increased in recent times. Indeed, Burrows had argued that it may eclipse the role of rectification altogether.[84] The increased use of context permits the courts to strain to find the true intention from even unambiguous text if the context is clear enough. If '12 January' can be construed as '13 January' in the light of (compelling) extrinsic evidence, there may be a role for construction.[85] Ignoring for now the fact that example 2 is from a will, it is possible the lack of sense in the output means the error could be construed away under this doctrine.

However, not only has the recent jurisprudence on construction suggested this power has retreated somewhat, it seems unlikely that it is broad enough to cover all the possible mistakes in the general case, let alone where a computer adds the wrong clause. Put simply, if there is text that bears a clear and plain (but incorrect) meaning, this natural meaning cannot usually be altered by the context.[86] If the text is ambiguous, there is a greater chance it can be 'corrected' through construction. However, the mistakes made by defective document assembly will often produce very clear text, in contradistinction to human error which is more likely to produce ambiguities. This makes construction inherently less adaptable to address errors in computer-generated documents. For instance, in example 1 the text is perfectly clear, but utterly wrong. Therefore, while rectification is a remedy that can correct very extensive mistakes, as in *Marley v Rawlings*,[87] construction simply does not have the same reach; it simply is not designed for the job.[88] Given the retreat, and that construction lacks the safeguards rectification does (the need for 'convincing proof' and the protection of third-party rights),[89] it will therefore likely to be useful in two circumstances.

Its use is thus likely to be limited to where rectification does not apply, which will be in two circumstances. One is where it cannot be shown that one of the parties relied on the forms. Then, provided there is an ambiguity, construction – using the more claimant-friendly objective method – would allow that to be resolved if the forms and selections point to one interpretation of the final document over the other. This seems correct; if it is an ambiguity rather than a clear and different obligation, the risk of the defendant being bound an obligation he would not have agreed to is much reduced.

[84] Andrew Burrows, 'Construction and Rectification' in Andrews Burrows and Edwin Peel (eds), *Contract Terms* (OUP 2007).
[85] *Mannai Investments* (n 22).
[86] *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 [19].
[87] (n 22).
[88] See also Ruddell (n 15) 50; Davies (n 27) 65.
[89] Paul S Davies, 'Finding the Limits of Contractual Interpretation' [2009] LMCLQ 420, 426; Davies, 'Rectification Versus Interpretation: The Nature and Scope of the Equitable Jurisdiction' (n 27) 69.

6.2 The Statutory Powers: Wills

The other circumstance where construction may useful is as a fallback is for wills, because of the problems discussed above. For wills, construction is governed by section 21 of the Administration of Justice Act 1982, which is another gateway system:

> *(1) This section applies to a will—*
>
> *(a) in so far as any part of it is meaningless;*
>
> *(b) [Patent ambiguity] in so far as the language used in any part of it is ambiguous on the face of it;*
>
> *(c) [Latent ambiguity] in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.*
>
> *(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.*

Whether the errors pass any of the gateways will depend on their substance. If the courts did stretch the meaning of ambiguity so far as to catch example 2, gateway (b) may be enough. Gateway (c) will be important as it may be the forms or logs that make it clear the testatrix's intention is not reflected in the final document and would require less stretching to encompass example 2. It is clearly required for example 1.

Somewhat troubling is the requirement in gateway (c) that the ambiguity be proven by only indirect evidence of the testator's intention. Hence even if there is a latent ambiguity, it will only pass the gateway if it is shown from evidence other than the log of what the testator selected when operating the computer. It would have to be from the computer code, or by reproducing the error by running the program again with the same inputs. The rationale behind gateway (c) was to exclude unreliable evidence of loose conversations with the now-dead testator, which is quite justifiable. But is simply does not apply in cases of document assembly error. It excludes highly probative evidence on a basis that does not apply.

However, reform of s 21 cannot be justified by document assembly. If there is to be statutory reform to deal with computer-generated documents, it should be targeted at the primary solution – rectification. The only reason to distort the law of construction is if rectification cannot do the job and cannot be reformed, which would not be the case if statutory reform were on the cards.

7. Errors in Computer-Generated Wills on the Market

Real examples of computer-generated wills were examined in order to show that this issue is not merely theoretical. In an investigation in August 2018, dummy wills were purchased from eleven will-writing services with the assistance of a small grant from the 2018 Society of Legal Scholars' Research Activities Fund. They were chosen from providers of varying reputations and prices, from £156 for mirror wills from a household name to little-known providers offering free services. The essence of this qualitative investigation was to specify as many complexities and features as each provider offered in the hope of flushing out an error, not to show quantitatively how often such errors occur. To this end, any option for a human checker was declined and mirror wills were purchased when offered, as the interaction between partners' wills brings greater scope for error.

Before considering the specifics, it is worth making a few observations about the general quality of these offerings. It was extremely variable; while the household name kept its options

simple and its output was of good quality, the other providers did not. For instance, two expressly exclude the Apportionment Act 1870 and the rules in *Howe v Dartmouth* and *Allhusen v Whittell*, quite unnecessary since their statutory disapplication for new trusts in 2013.[90] One of those two expressly excludes the Apportionment Act 1834, which was repealed in 1977.[91] It seems their precedents were out of date. Three services defaulted to suggested professional executors and reserved the right, in the final wills, to set their fees unilaterally, which suggests poor motives.[92]

7.1 Incorporation of External Documents

Due to the low number of complex and interacting clauses offered, the number of errors found was fairly small (albeit from a small number of providers). However, some of them were serious. The worst was probably the following incorporation clause. The user was invited to leave 'Personal Effects and furniture' … 'all my possessions set out in any list or memorandum left by me trusting …' (the rest of the text was truncated on screen). It produced the following output:

> *I give to (beneficiary) living at my death all my possessions set out in any list or memorandum left by me trusting that these shall be distributed to the persons and in the manner therein contained.*[93]

Under the rules for incorporating external documents, this provision for distribution is void. To be valid, the relevant memorandum must pre-exist the will, be described as such[94] and be sufficiently well-identified in the will.[95] Vague statements do not suffice.[96] Here specifying 'any' list or memorandum is as defective as can be. In the alternative, the clause might be supposed to be a half-secret trust, but it falls quite short of what is required for certainty of intention – the words are clearly precatory. It appears to leave an outright gift, which is at best apt to mislead the layperson who would reasonably expect this clause to be legally binding.

One does see the full clause when choosing it, but only if the web browser window is expanded, on a widescreen monitor set to high resolution, and only while the drop-down box is active and not after the choice is selected. An ordinary user who is not investigating, and uses a conventionally sized window, simply will not have sight of the full clause until after the will is generated.

It may be impossible to resolve this problem via construction or rectification under the 1982 Act because its error is not merely one of wording, or misassembly by the program, but of

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[90] Providers 5 and 6; *Allhusen v Whittell* (1867) 4 Eq 295 (VC); *Howe v Dartmouth* (1802) 2 Ves Jun 137, 32 ER 56; Trusts (Capital and Income) Act 2013.

[91] Provider 5; Statute Law (Repeals) Act 1977.

[92] Providers 2, 3 and 9. The default position is that reasonable fees are permitted: Trustee Act 2000, s 29. This raises the difficult question of whether an executor, *qua* fiduciary, could charge fees that were not sufficiently identified at the time the will was drawn up. One suspects that this would be treated at best as a half-secret commission and then only market rates could be taken: *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299, [2007] 1 WLR 2351 [36]ff. This is not the only possible outcome. See also Peter Watts, *Bowstead and Reynolds on Agency* (20th edn, Sweet & Maxwell 2016) para 6–086 who argues that the 'half-secret commission' in the example may attract the remedy of account of profits but not rescission. If so, it is possible that no fee at all would be permitted. The leading case of *Jemma Trust Co Ltd v Liptrott* [2003] EWCA Civ 1476, [2004] 1 WLR 646 and the texts (*Theobald* (n 71); *Williams, Mortimer & Sunnucks* (n 71) ch 33) are concerned with the reasonableness of fees but do not consider the effect of breach of fiduciary duty in the *Bristol and West Building Society v Mothew* [1998] Ch 1 (CA) sense.

[93] Provider 3.

[94] *Re Sunderland* (1866) 1 P&D 198 (P); *Re Reid* (1868) 19 LT 265 (P).

[95] *Re Garnett* [1894] P 90 (P); *Re Mardon* [1944] P 109 (P).

[96] *Allen v Maddock* (1858) 11 Moo PC 427, 454; 14 ER 757, 767.

substantive aim. It falls foul of the technical formalities rules intended to prevent evasion of the Wills Act 1837, s 9, requiring a will to be formally signed and witnessed, which is in turn to prevent fraud. One might argue that *Marley v Rawlings* means that it is the will, post-rectification, that must be valid rather than pre-rectification, but it is by no means clear the courts will carry this principle further.[97]

7.2 Commorientes Clauses

Nine out of the eleven providers gave the option to apply commorientes precedents. These provide for when the testator wishes to leave property to substitute beneficiaries if the primary beneficiary does not survive the testator. They are commonly used for partners where the intention is that the partner will take the gift, perhaps the entire estate, but if he or she does not survive the testator, substitute beneficiaries will take instead. These clauses are commonly deployed in mirror wills. The complication is when the two die together.

Four of the providers' clauses were satisfactory, following the usual practice of providing that the primary beneficiary must survive the testator by a reasonable period, usually 30 days, before taking.[98] This means if the couple die together, but in uncertain circumstances such that it is impossible to tell who dies first, the substitute beneficiaries take in accordance with that commonplace intention. The remainder conjure up the spectre of the well-known (and heavily criticised) case of *Re Rowland* by not doing this.[99]

The two providers who did not offer a commorientes clause did not purport to offer mirror wills, which makes its absence excusable, although couples who try to make mirror wills out of two individual wills may suffer these problems.[100] One which did offer mirror wills did not have such a clause, but did not permit different substitute beneficiaries for testator and testatrix, which means the problem to be described cannot occur, for reasons to be explained below.[101] None offered mirror wills without at least some option for substitute beneficiaries.

The remaining four are problematic. Via a variety of different formulations, they require the beneficiary to 'survive' or 'predecease' the testator or for the 'gift to fail' in order for the substitute to take.[102] None of these four attempted to use any method of providing that the substitute beneficiary is to take when the deaths are proximate, whether via the usual 30 day period method, or even an unsatisfactory route, namely a variation of the clause to divert the gifts 'if our deaths coincide', as was specified in *Re Rowland*.

Before considering how that authority would influence matters, consider the worst of these clauses. For convenience's sake, consider a husband and wife as testator and testatrix, although the relationship is not required. The following was produced by selecting the husband as the 'first choice to receive "the rest of our estate"' and then a named substitutionary beneficiary in

[97] (n 22) [55]ff; particularly [65].
[98] See, e.g., R F D Barlow and others, *Williams on Wills* (10th edn, LexisNexis 2014) para 219.14ff. The providers doing so were numbers 2, 6, 7 and 11.
[99] [1963] Ch 1 (CA); e.g. Michael Albery, 'Coincidence and the Construction of Wills' (1963) 26 MLR 353. This case will be considered below.
[100] Providers 8 and 10.
[101] Provider 1.
[102] Providers 3 ('provisions … fail'), 4 ('fails to outlive'), 5 ('[gift shall] fail') and 9 ('fail to survive').

response to 'if all of your first choice beneficiaries are not around [sic] to receive the balance of your estate, who would you like your estate then to go to?':

> *Gift of Residue*
>
> *I give my Residuary Estate to my partner,* (name) *absolutely.*
>
> *Substitutional Provisions*
>
> *If the above provisions for the distribution of my Residuary Estate fail then the following shall apply.*
>
> *Further Gift of Residue*
>
> *I give my Residuary Estate to* (substitute beneficiary 1) *absolutely.*[103]

Consider now what happens if: (i) both die in uncertain circumstances; and (ii) the substitute beneficiaries are different (i.e. the testator chooses one substitute and the testatrix another). The first is quite commonplace, for instance in fatal car crashes. The victims may lie dying, undiscovered for many hours. The second is perhaps unusual, but may arise when one partner is in a second marriage and each partner wishes to cater for the children differently. What is most likely intended is that the testator wishes *his* property to go to his partner and in the alternative to *his* substitute, and the testatrix wishes *her* property to go to him and in the alternative to *her* substitute. However, this will not happen on a literal reading of that wording.

To determine what will happen, the first step is to establish which will's instructions are carried out first. That is the will of the first to die. The survival of one over the other must be positively proved,[104] otherwise it is deemed, under the Law of Property Act 1925, s 184, that the younger has survived the older. Thus, where the order of deaths is uncertain, if the testator is older, his wife will take (momentarily, before she is deemed to die), and henceforth both his and her residuary estates will go to *her* substitute. Conversely, if his wife is older, he will take (momentarily, before he is deemed to die), and henceforth both his and her residuary estates will go to *his* substitute. This is arbitrary and unfair, being based on the partners' relative ages and not their intentions. This is where a proper commorientes clause is essential to avoiding this outcome, by diverting *both* deceased's estates to the appropriate substitutes.

In *Re Rowland*, the testator and testatrix, writing home-made wills, attempted to forestall this problem by each specifying that a substitution be made if the death of the partner was 'preceding or coinciding with my own decease'. On a literal interpretation of these words, a majority of the Court of Appeal held that since the deaths of two passengers of a ship which had sank could have been hours, even days, apart, the clause was not engaged (the presumption in s 184 does not apply to a construction). Therefore the younger's substitute beneficiary took both residues. Lord Denning, dissenting, adopted a purposive approach to construction. He held that they meant to cover precisely this problem. Given the overwhelming dominance of the purposive approach nowadays, cemented by the *dicta* of Lord Neuberger in *Marley v Rawlings*, it is overwhelmingly likely that such words, while far from ideal, would do the job intended of them.[105]

Unfortunately, the passages quoted from the test will do not even go this far.[106] While recognisably a substituting clause, the words do not attempt to address the circumstances of deaths close in time, let alone in uncertain circumstances. One might suppose that a court may

[103] Provider 3.
[104] *Hickman v Peacey* [1945] AC 304 (HL).
[105] (n 22) [17]ff.
[106] Provider 4 ('fails to outlive') may do better.

generously construe the terms purposively and save the gifts, but this is not certain. Even a poorly drafted phrase such as 'should our deaths coincide' suggests the intention was to write a commorientes clause, whereas 'if the provisions fail' is considerably further away. Here is where more information as to the testator's and testatrix's intentions – from the forms or logs – would be of great assistance to the court. The forms would provide the context for construction under s 21(1)(c) and both the forms and logs would provide evidence for rectification under s 20.

8. Final Reflections

That small survey is enough, it is submitted, to show that there are real problems that will eventually find their way into the legal system. The problem is perhaps worst in the law of succession, because of the relatively unsophisticated client base and the problem unique to that subject, that the chief witness has taken the best chance of clarifying any mistakes to the grave. Moreover, there is a time lag. It is not until the users of this technology begin to pass away that the problem will arise in practice. However, one positive consequence is that there is time to reform the Administration of Justice Act 1982, s 20 to accept direct evidence of testamentary intention when it comes from a reliable documentary source, and to expressly permit the rectification of technical drafting errors. Absent reform however, there is a good chance that since s 20 has already been strained, it will be strained a little more in order to accommodate this problem.

The examination of how the judge-made law of rectification will apply to computer-generated documents shows that there is no perfect formulation of the law. Both the subjective and objective approaches are compromises that tend to prefer one party over the other. It seems that where there is a risk to a diligent party who relied on the final document, the courts will favour that party. For bilateral instruments (and unilateral instruments treated as such because they are bargains), it will be necessary to positively prove both parties adverted to the forms. If this cannot be done, it may be hard on a claimant, but that is the preference the courts have expressed. If that is proven, and for unilateral instruments, there will usually be an inference that a mistake was made. Then, evidence of the computer fault will be then be highly probative of what the mistake was, and then the law will favour rectification accordingly.

Finally, one must note that there is a significant tension in the cure-not-prevention strategy discussed in this article. The routes to construction and rectification are examples of the traditional, high-quality, highly skilled approach that places emphasis on getting things right the first time. It sees a facility for the correction of errors as a necessity last resort, but not something to be invoked routinely. Conversely, the services offering computer-generated legal documents are designed to reduce costs, and they often do so at the expense of quality. For will writing, this shift was facilitated by the deregulation of this activity.[107] All this, unfortunately,

[107] The then-government declined to make will-writing a reserved activity when passing the Legal Services Act 2007. This approach did not change: Ministry of Justice Gov.UK, 'Decision Notice: Re Extension of the Reserved Legal Activities' (2013) <https://www.gov.uk/government/publications/decision-notice-extension-of-the-reserved-legal-activities> accessed 20 March 2019; Ministry of Justice, 'Call For Evidence on the Legal Services Regulatory Framework: Summary of Responses to the Government's Call for Evidence on Concerns with, and Ideas for Reducing Regulatory Burdens and Simplifying the Legal Services Regulatory Framework' (1 May 2014) , 4–5; Better Regulation Task Force, 'Routers to Better Regulation' (2005) <https://www.eesc.europa.eu/resources/docs/routes_to_better_regulation.pdf> accessed 20 March 2019; the BRTF was supplanted by the Better Regulation Executive in 2005; see <https://www.gov.uk/government/groups/better-regulation-executive> accessed 20 March 2019.

means the cure-not-prevention strategy discussion will have to take more of the strain that is ideal.