

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION**

Royal Courts of Justice
Strand, London, WC2A 2LL

19/03/2008

Before :

MR JUSTICE MORGAN

Between:

Ali Oun

Appellant

- and -

Ishfaq Ahmad

Respondent

**Colin Green (instructed by J Esner & Co) for the Appellant
Richard Carter (instructed by Fieldings Porter) for the Respondent
Hearing date: 19th February 2008**

Mr Justice Morgan:

Introduction

1. This is an appeal under Section 111 of the Land Registration Act 2002 against the decision of a Deputy Adjudicator (“the Adjudicator”) given on the 24th May 2007. The appeal raises issues as to the application of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (“the 1989 Act”) and as to the availability of rectification in a case where a written document contains only some of the express terms of a contract governed by section 2 of the 1989 Act.

Section 2 of the 1989 Act

2. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides (so far as is material):
 - (1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.
 - (2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.
 - (3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) ... nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(6) In this section—

“disposition” has the same meaning as in the Law of Property Act 1925;

“interest in land” means any estate, interest or charge in or over land;

...

The facts in outline

3. Mr Ahmad is the owner of a long lease of premises at 318 Halliwell Road, Bolton. The lower part of that property has been used as an off licence and the upper part has been used for residential purposes. Mr Ahmad is registered with good leasehold title at the Land Registry, under title number LA299795. In December 2004, Mr Oun and Mr Ahmad came to a certain arrangement which provided for Mr Ahmad to sell the lease of the property to Mr Oun. The terms of that arrangement were recorded in writing in a way which I will describe below. Subsequently, Mr Ahmad and Mr Oun disagreed as to completion of the sale. On 21st June 2005 Mr Oun registered against Mr Ahmad’s registered title a unilateral notice in respect of a contract of sale said to have been entered into in December 2004. Mr Ahmad applied to cancel the unilateral notice. Mr Oun objected to the cancellation by an objection letter dated 22nd July 2005. The dispute between the parties was referred to an Adjudicator pursuant to Section 73 of the Land Registration Act 2002. Directions were given for the resolution of the dispute. There was an oral hearing of the dispute on the 17th and 18th January 2007 when Mr Oun and Mr Ahmad and other witnesses attended and were cross-examined. On 24th May 2007, the Adjudicator gave his written decision in the matter. He held that the arrangements made between the parties in December 2004 did not comply with Section 2 of the 1989 Act, that the non-compliance could not be cured by an order for rectification of documents and that, accordingly, Mr Oun did not have the benefit of a contract binding Mr Ahmad with the result that Mr Oun’s unilateral notice against Mr Ahmad’s title ought to be, and was, cancelled. On 22nd June 2007, the Adjudicator refused permission to appeal but permission to appeal was granted by David Richards J on the 10th August 2007.

The two documents

4. There are two documents which were brought into existence on the 10th December 2004 and which are at the heart of the dispute. The first document is on a single sheet of paper and has the heading “CONTRACT TO SELL”. I will refer to this as “the first document”. The first document continues by describing itself as “this deed” but the document is executed under hand and not under seal and is not a deed. The first clause, which is unnumbered, states that the document “is meant to be a contract to sell” between Mr Ahmad as “the vendor” and Mr Oun as “the vendee”. The property was described as 318 Halliwell Road, Bolton which was defined as “the property”. Clause 2 of the document stated that the term “property” meant and included both the commercial property under the name of AIG Off Licence 318 Halliwell Road and the residential property. By clause 3 of the document, the vendor agreed not to remove any of the fittings, furniture and fixtures “which have now become part of deal under this contract”. By clause 4 of the document, the vendor agreed to sell the property to the vendee for £75,000. By clause 5, the vendee agreed to a payment of £5,000 as a sum in advance, leaving a remaining sum of £70,000 on completion. By clause 6, the vendor agreed to extend all possible co-operation to complete the sales process “in reasonable course of time”. The document recorded that it was signed by way of

a commitment to abide by the agreement and in the presence of witnesses. The document bears the signature of Mr Ahmad and Mr Oun and the signature of one witness, a Mr Shakoori. There is a type written date on the document of 9th day of December 2004 and a hand written date of 10th December 2004.

5. The second document is a single sheet of paper with handwriting. This sheet of paper states the following:

“Building – £55,000

Fixtures and fittings – £5,000

Business – £15,000

Total = £75,000

+ stock”

The document refers to a deposit of £5,000 being paid on the 10th December 2004 and £70,000 “remaining”. The document then includes this statement:

“£17,000 will be paid on completion”.

This document is signed by Mr Ahmad and Mr Oun. I will refer to this document as “the second document”.

The parties’ cases before the Adjudicator

6. In his decision, the Adjudicator described the cases put forward by the parties. He stated that Mr Oun’s case was that a draft written agreement was prepared by Mr Shakoori on the 9th December 2004. On the 10th December 2004, Mr Shakoori attended upon Mr Oun, Mr Oun’s wife and Mr Ahmad at which time the terms of the draft first document were read out to those three persons in both English and Punjabi. Mr Oun’s case was that he and Mr Ahmad then signed the first document and Mr Shakoori signed as a witness and the first document was then dated, possibly by Mr Ahmad, with the date of 10th December 2004. Mr Oun gave Mr Ahmad a cheque for £5,000. Two hours after the first document was signed, Mr Ahmad returned to Mr Oun’s premises and expressed concern about the absence in the first document of a term that apportioned the consideration of £75,000 between the leasehold property, the fixtures and fittings in it and the goodwill of the business conducted therein. There was also concern expressed that there was no mention of what was to be done about the trading stock. Mr Oun’s case was that the parties then signed the second document recording the agreed apportionment of the £75,000 and that £17,000 should be paid for the stock.
7. In view of the difficulties which have been raised in relation to the interpretation of certain findings of fact later made by the Adjudicator, I have looked at the Statement of Case on behalf of Mr Oun. That alleged, in relation to the first meeting on 10th December 2004, that Mr Oun and Mr Ahmad had agreed an apportionment of £75,000 at that first meeting; the relevant apportionment was £55,000 for the building, £5,000 for the fixtures and fittings and £15,000 for the business.
8. Mr Ahmad’s case was radically different. He accepted that he signed the second document. He contended that he had also signed a blank sheet of paper with no writing or typescript of any kind. He says that it was intended that there would be written on the blank sheet of paper the same information as was recorded in the second document. Accordingly, it was Mr Ahmad’s case that the first document which bears the signatures of Mr Ahmad and Mr Oun and Mr Shakoori was created after the event out of the blank sheet of paper he had signed for a different purpose.

The evidence before the Adjudicator

9. The Adjudicator recorded in his decision some of the evidence given at the hearing. He described Mr Oun's evidence about the events of 10th December 2004. Mr Oun is recorded as giving evidence that there was "a discussion" at the first meeting between the parties about an apportionment of the price but no such apportionment was inserted in the agreement. Mr Oun also asserted that the sum of £17,000, mentioned in the second document was the wrong value of the stock at the time the arrangement was made on the 10th December 2004. The Adjudicator also recorded that Mr Oun's evidence was supported by his wife who was present at both meetings on the 10th December 2004 and that Mr Shakoori, who was named as a witness in the first document, also gave evidence. He is recorded as giving evidence that there was some discussion about the apportionment of the price but he says he was told by the parties that there was no need to refer to this in the first document that was signed.
10. In view of the difficulties in interpreting later findings of the Adjudicator, I have also read the witness statements served on behalf of Mr Oun for the hearing before the Adjudicator. In his witness statement, Mr Oun explained that before December 2004, he and Mr Ahmad had made an earlier bargain for the sale of the property to Mr Oun but because it was not recorded in a binding contract, Mr Ahmad had resiled from it. However, in December 2004, the possibility of a sale by Mr Ahmad to Mr Oun was revived and Mr Oun had involved Mr Shakoori in order to have a draft contract prepared which the parties could enter into so as to bring about a binding contract between them. Mr Oun's witness statement stated that at the first meeting on the 10th December 2004, the apportionment of the price of £75,000 between the property, goodwill and fixtures and fittings was expressly agreed. He said that Mr Shakoori asked if it was necessary to put the apportionment details into the contract to which Mr Oun and Mr Ahmad both replied that this was not necessary. Mrs Oun's witness statement described the matter in essentially the same way. Mr Shakoori's second witness statement also referred to this discussion about the apportionment of the price. He said that Mr Oun and Mr Ahmad had a discussion about the appointment of the purchase price and both of them informed Mr Shakoori, in response to his enquiry, that there was no need to mention "each and every bit of it" in the written contract.
11. The Adjudicator also recorded some of Mr Ahmad's evidence in his decision. Mr Ahmad contended that the commercial terms agreed between the parties involved Mr Oun paying £75,000, as a figure to be stated in the contract, with a further £17,000 being paid "separately on a private basis". Mr Ahmad described how he signed the second document and a blank sheet of paper but did not sign a document in the form of the first document. He contended that Mr Shakoori was not present at any relevant time.
12. I have also read Mr Ahmad's witness statement which was before the Adjudicator. Mr Ahmad described a meeting on the 10th December 2004 when a price of £75,000 was agreed and this was "split down", which I take to be a reference to the apportionment as it appears in the second document. Mr Ahmad also said that in addition to the £75,000, Mr Oun would pay on completion a further £17,000, making a total price of £92,000.
13. I understand that the witnesses were cross-examined at the hearing before the Adjudicator but neither side has shown me, on this appeal, any transcript or note of what the witnesses said in cross-examination. In particular, neither party suggested to me that when Mr Oun and his witnesses were cross-examined, they departed from the evidence contained in their witness statements as to the agreement, at the first meeting on the 10th December 2004, on the apportionment of the price of £75,000 and on the fact that that apportionment was not to be recorded in the written agreement.

The submissions made to the Adjudicator

14. In order to assist with the interpretation of some of the findings of fact made by the Adjudicator, I will summarise briefly the submissions made to the Adjudicator. The submissions made by Mr

Green on behalf of Mr Oun invited the Adjudicator to accept the evidence given by and on behalf of Mr Oun. It was accepted that the consequence of doing so was that the first document did not comply with Section 2 of the 1989 Act and rectification was sought to include terms which were expressly agreed between the parties but which were not included in the first document. More particularly, Mr Oun's case before the Adjudicator was that on the 10th December 2004, at the first meeting between the parties, they agreed an express apportionment of the purchase price of £75,000 as to £55,000 for the Property, £5,000 for fixtures and fittings and £15,000 for goodwill. Mr Oun's case was therefore that the first document should be rectified to include an express term recording the agreed apportionment. Mr Oun's case in relation to stock was put in the alternative; either there was an agreement as to stock at the first meeting, in which case the first document should be rectified, alternatively, agreement as to stock was only reached at the second meeting but this was a separate contract.

15. Mr Carter, on behalf of Mr Ahmad, invited the Adjudicator to accept Mr Ahmad's evidence as to the facts. In the alternative, in the event of Mr Oun's evidence being accepted, it was submitted for Mr Ahmad that the first document did not contain all the relevant terms and, indeed, this was Mr Oun's own case. However, Mr Ahmad relied on the fact that, on Mr Oun's case, the parties had expressly agreed that the terms of the apportionment should not be recorded in the written document and, accordingly, there was no scope for an order for rectification.

The Adjudicator's decision

16. The Adjudicator made a clear finding of fact as to whether the first document referred to above was signed by Mr Ahmad. Throughout his decision, he referred to the first document as "the disputed contract" and to the second document as "the memorandum" and expressed his finding in these terms:

"At the core of this dispute is the question of the disputed contract. I must first consider whether there was any such document at all. In that regard bearing in mind that three witnesses told me it did exist and was signed by the parties I think I must prefer this evidence. I do find it difficult to understand why or how the Respondent would sign a blank sheet of paper notwithstanding he already had the original document a copy of which was meant to be replicated on the blank sheet. Accordingly, I am of the view that the disputed contract was prepared and signed."

17. The Adjudicator referred to Section 2 of the 1989 Act and a number of decided authorities on the operation of Section 2. He then considered the effect of the second document. He held that it was not a contractual document because it did not comply with Section 2 of the 1989 Act. He further held that it did not form part of the first document as it was not made by reference to the first document. He also held that it was not right to regard the second document as a collateral contract. I take that to be a reference to a contract which is separate and independent from a contract for the sale of land. The Adjudicator accordingly held that the second document was a written note of arrangements made that had no contractual force.
18. The Adjudicator then considered the legal effect of the first document and, in paragraph 16 of his decision, he expressed his findings in these terms which I will set out in full:

"16. Both sides concede that the disputed contract as originally drawn does not contain all the terms which the parties expressly agreed. Moreover, there is and was clear disagreement about the apportionment of the price between the property, goodwill and fixtures and fittings. Indeed there was also disagreement over the total price and how stock was to be dealt with in the disputed contract. The Applicant's case is that I should rectify the disputed contract to bring into it the terms that the Applicant says were plainly agreed. However, to do so I must find that the disputed contract does not accurately reflect the joint intention of the parties. As Counsel for the Respondent noted the fact that one party may have intended something different does not give rise to a right to rectify the agreement. I am also mindful of the decision in *Whiteside v Whiteside* [1948] 1 Ch 65. Furthermore for a claim for rectification to be made out I must normally require

convincing proof that the disputed contract does not accurately reflect the terms of the agreement which purported (sic) had been reached, see *Joscelyne v Nissen* [1970] 2 QB 86. It seems to me that whatever the true intention of the parties was at the time of the signing of the disputed contract the memorandum had nothing to do with it and both parties told Mr Shakoori not to put apportionment details in the disputed contract. There was no common mistake and hence there simply cannot be, in my view, an order for rectification.”

The ground of appeal

19. Mr Oun’s single ground of appeal was that the Adjudicator did not find that there were any terms expressly agreed between the parties in addition to those recorded in the first document. Thus, the first document contained all the terms expressly agreed and, accordingly, the first document complied with Section 2 of the 1989 Act. Mr Oun relied upon paragraph 16 of the decision.

The parties’ submissions on the appeal

20. At the hearing of the appeal, Mr Green on behalf of Mr Oun submitted that paragraph 16 could be read in one of two ways. The first way involved the Adjudicator finding that there were no terms expressly agreed other than those recorded in the first document. On that basis, the first document satisfied Section 2. On this basis, the second meeting on 10th December 2004 involved an agreement to vary the terms of the first document but the agreement as to the variation did not itself comply with section 2 and so was ineffective and left the agreement recorded in the first document effective, without variation. Alternatively, if the correct finding was that the parties had expressly agreed terms at the first meeting which were not recorded in the first document, then Mr Green repeated the submission he had made to the Adjudicator to the effect that the right course was for the first document to be rectified to include the terms expressly agreed at the first meeting.
21. Mr Carter on behalf of Mr Ahmad submitted to me that Mr Oun’s ground of appeal was flatly contrary to the case that Mr Oun had presented to the Adjudicator to the effect that there were terms expressly agreed between the parties which were not recorded in the first document. It was further submitted that the Adjudicator had not made the finding now contended for by Mr Oun, namely, that there were no terms expressly agreed apart from those recorded in the first document. Mr Ahmad relied on Mr Oun’s evidence about the express agreement as to the apportionment of £75,000 and the express agreement that that apportionment was not to be recorded in the written document.
22. There was therefore a major dispute as to the way in which paragraph 16 of the decision should be interpreted. I identified the possibility that it might be necessary to remit the matter to the Adjudicator for him to make clear findings of fact as to the terms expressly agreed at the first meeting on the 10th December 2004. Both parties invited me to decide the appeal on the basis of paragraph 16 of the Adjudicator’s decision, doing the best I could to interpret that paragraph and so as to avoid a remission to the Adjudicator.
23. I also raised with the parties at the hearing the possibility that paragraph 16 of the decision could be read as amounting to a finding, in accordance with Mr Oun’s own evidence that the parties had expressly agreed an apportionment at the first meeting on the 10th December 2004, that they had also agreed that the appointment should not be recorded in the written document and that the consequence of those two agreements was that it was not open to the Adjudicator, or the court, to rectify the first document to include the terms agreed as to apportionment.
24. I invited the parties to make written submissions following the hearing on the question whether the court could rectify the first document to include any terms expressly agreed as to apportionment on the basis that there was clear evidence before the Adjudicator that both parties intended the first document to create a legally enforceable contract of sale, that they had made a

mistake of law as to the effect of the first document and that mistake of law could be corrected by rectification.

25. In his written submissions following the hearing, Mr Carter, on behalf of Mr Ahmad, cited *Whiteside v Whiteside* [1950] Ch 65 and *Swainland Builders Limited v Freehold Properties Limited* [2002] 2 EGLR 71. He submitted that the way in which the parties expressed themselves in the first document was precisely in accordance with their intentions. The parties may have been mistaken as to the legal consequences of proceeding in that way but that mistake could not be cured by rectification of the first document and, in particular, by inserting words into the document which the parties had agreed should not be recorded in the document.
26. In his written submissions following the hearing, Mr Green on behalf of Mr Oun also referred to *Whiteside v Whiteside* and *Swainland Builders Limited v Freehold Properties Limited*. He stressed that the evidence supported a finding that the parties intended to enter into a legally binding contract recorded in the first document. If the first document did not comply with Section 2 of the 1989 Act, because it omitted terms which had been expressly agreed, then the parties had made a mistake as to the legal effect of that document. It was open to the court to correct, by rectification, a mistake as to the legal effect of the document. The appropriate way to correct that mistake was to rectify the document to introduce the terms expressly agreed between the parties, which were not initially recorded in the document. Such rectification would reflect the parties' common intention to be legally bound by the document.

The law

27. I will summarise the legal principles as to the operation of section 2 of the 1989 Act so far as they are material for the purposes of this appeal.
28. Section 2(1) requires the written document to incorporate all the terms which the parties have expressly agreed.
29. The first matter to be explored is a question of fact: what were all the terms which the parties had expressly agreed?
30. Once one has found all the terms which the parties have expressly agreed, then one can examine the written document to see if it incorporates all those terms or whether it omits any.
31. If, on examination of the written document, it is found that it does not incorporate all the terms which the parties have expressly agreed, then prima facie there is no binding contract at all. There cannot be a binding contract for all the terms expressly agreed because not all the terms expressly agreed have been incorporated into the written document. There cannot be a binding contract for only those terms which have been incorporated because they are not the complete set of terms which were expressly agreed.
32. The prima facie position may be displaced in two cases, in particular.
33. The first particular case is where there are two separate contracts and not one composite contract. If it is possible to hold that the terms which have been incorporated into the written document include all of the express terms of a separate and independent contract for the sale or other disposition of an interest in land and other terms agreed between the parties are terms of a second independent contract, then the written document complies with section 2 in relation to the first contract. Questions of this kind have arisen in the past where a party has suggested to the court that there are two contracts one being a contract for the sale of land and the second being a contract which is not a contract for the sale of land. The true question is whether the arrangements are such that the matters are independent in the sense that it is not a term of the contract for the sale of land that the second contract must also be performed: see *Grossman v Hooper* [2001] 2 EGLR 82 at [21] – [22] and *Kilcarne Holdings v Targetfollow (Birmingham)*

Limited (2005) 2 P&CR 8 at [188] – [190] (this point did not arise on the appeal, reported at [2006] 1 P&CR D55).

34. The second particular case is where the written document, which does not incorporate all of the terms expressly agreed, can be rectified to include in the written document all of the terms expressly agreed. Following such rectification, the written document by definition does include all of the terms expressly agreed and therefore complies with section 2.
35. Section 2(4) of the 1989 Act expressly contemplates that a court can order rectification in some cases where the written document does not incorporate all of the terms expressly agreed. However, there is an important issue in the present appeal as to the cases in which rectification is available. Is it every case where the written document does not incorporate all of the terms expressly agreed (whatever the reason for that might be) or is it only those cases where, applying conventional principles, the equity of rectification is available?
36. The process of rectification which is referred to appears to differ somewhat from the normal process of rectification. In this context, before the order for rectification the written document does not have contractual effect (because it does not contain all the terms expressly agreed) but after the order for rectification the rectified written document does have contractual effect. This feature of rectification in this context is acknowledged in section 2(4) of the 1989 Act which refers to the contract “com[ing] into being” as a result of the order for rectification. Further, section 2(4) contemplates that the court has power to specify the date when the contract comes into being and this is different from the usual retrospective effect of rectification.
37. An example of the court ordering rectification in this context is *Robert Leonard Developments Limited v Wright*, Court of Appeal, 23rd March 1994, unreported. In that case, the terms expressly agreed provided for the grant of a lease and the sale of the contents of the property. There was a single agreement for the lease and the contents. The written document did not incorporate the terms as to the sale of the contents and so did not comply with section 2. The Court of Appeal ordered rectification of the written document to include the terms as to the sale of the contents, with the result that the written document as rectified did comply with section 2. Dillon LJ remarked that the availability of rectification in that case was “obvious” and “straightforward”.
38. Although the process of rectification in this context is an unusual form of rectification, it seems to be the case that one applies the usual rules as to the availability of rectification. In the *Robert Leonard* case, Henry LJ adopted a passage in the Law Commission Report (Law Com No. 164) at paragraph 5.6 which dealt with the possibility of rectification. Reference to the Law Commission Report itself shows that the footnotes to paragraph 5.6 refer to the general law as to rectification as set out in Snell’s Equity and in well known cases dealing with rectification.
39. Although the possibility of rectification goes some way to undermine the legislative objective which requires the parties to record in a written contract all of the terms expressly agreed, it is clear that the Law Commission positively supported the availability of rectification in some cases and this has been declared to be the law by the decision of the Court of Appeal in the *Robert Leonard* case. However if, *in every case* where the written document did not incorporate all of the terms expressly agreed, it was open to the court to investigate the detail of the terms orally agreed (but not recorded in the written document) and then write into the written document the terms which were omitted, that seems to me to go much further to undermine the legislative objective. In these circumstances, I will consider the topic of rectification in more detail below.
40. Turning to the issue of variations to a contract for the sale of land, the following propositions are established by *Mc Causland v Duncan Lawrie Ltd* [1997] 1 WLR 38. If there is a written document which complies with section 2 in relation to a contract for the sale of land and the parties wish to vary that contract, then the agreed variation must itself comply with section 2. If the variation complies with section 2 then the contract has effect as varied. If the intended variation does not comply with section 2 then the variation is ineffective and the unvaried

contract continues to have effect, unless the “variation” is sufficiently far reaching so as to amount in substance to a rescission of the first contract.

Rectification: further discussion

41. Because of the arguments addressed to me, it is necessary to consider the possibility of rectification in more detail. I will distinguish between two types of case.
42. In the first type of case, the written document does not incorporate all the terms expressly agreed, by reason of a mistake in the recording of the agreement. In such a case, the court can rectify the written document so as to incorporate all the terms expressly agreed and then the document as rectified complies with section 2.
43. The second (rather more unusual) type of case is as follows. Say the parties expressly agree upon five terms of their agreement. They agree to record four of them in a written document and they do so. They agree that the fifth term shall remain unrecorded in writing. The result is that the written document does not comply with section 2 and is of no effect. Can one party seek an order for rectification to the effect that the fifth term should be incorporated into the written document so that the written document will then comply with section 2? Will the position be different if the court finds that the parties believed that they had made a binding contract and that it was unnecessary for them to record the fifth term in writing?
44. In the present case, I will consider only rectification for common mistake and will not address the further complications involved in those cases where the court orders rectification where the relevant mistake was made by only one party to the contract.
45. In *Racal Group Services Limited v Ashmore* [1995] STC 1151, Peter Gibson LJ approved the following statement in Snell’s Equity (see, now, 31st ed., at para. 14-02):

“What is rectified is not a mistake in the transaction itself, but a mistake in the way in which transaction has been expressed in writing”.
46. Rectification is about setting the record straight: see *Allnutt v Wilding* [2007] WTLR 941 at [11]. In that case, Mummery LJ (when discussing a voluntary settlement) described the availability of rectification in these terms:

“This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor’s true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document, or putting in words that were not intended to be in the document or, through a misunderstanding by those involved about the meaning of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor’s intentions.”
47. Although those remarks were made in a case involving a voluntary settlement, in my judgment, they apply generally and are a sufficient guide to the established principles as to the availability of rectification.
48. It appears from the above formulation that the court can order rectification where the relevant mistake is as to the meaning or effect of the words used in the instrument and, indeed, as to the legal effect of the instrument as a whole.
49. An example of rectification being available in a case where the mistake was as to the legal effect of the words used is *Re Butlin’s Settlement Trusts* [1976] Ch 251.

50. An example of rectification being available in a case where the mistake was as to the legal effect of the instrument as a whole is *Swainland Builders Limited v Freehold Properties Limited* [2002] 2 EGLR 71.
51. But rectification is not available where the parties have executed the document they intended to execute and the mistake is as to the legal consequences of that document. In *Allnutt v Wilding*, the parties had created a discretionary trust. They believed that the creation of a discretionary trust would be a potentially exempt transfer for the purposes of inheritance tax. It was not. If they had appreciated that legal consequence, their claim was that they would have created an interest in possession trust. It was held that a change in the document from one which created a discretionary trust into one which created an interest in possession trust was outside the ambit of rectification.
52. Rectification was ordered in *Wills v Gibbs* [2007] All ER (D) 509. In that case, a will left substantial assets to the testator's cousin. The cousin wished to redirect some of his entitlement under that will to the cousin's son by way of a deed of variation. The cousin understood the general nature and effect of a deed of variation under section 142 of the Inheritance Tax Act 1984. He instructed his solicitor accordingly. The solicitor prepared a deed of variation and the cousin executed it. The deed did not comply with the requirement in section 142(2) that the deed should contain a statement to the effect that section 142(1) should apply to the variation. Rimer J held that the purpose of rectification was to enable parties to a transaction to correct mistakes in the way their transaction had been recorded. It was no part of its function to enable parties to change the substance of the transaction they had entered into. On the facts, the cousin did not know of the requirement in section 142(2) that the deed should contain the specific statement. But he had known that he intended his disposition to have the relevant tax advantages. He left the form of the deed to his solicitor. His solicitor did know of the need for the specific statement. A first draft of the deed had probably included such a statement but the statement was omitted by mistake from the final draft. The deed was rectified to include the statement referred to in section 142(2).
53. It can be argued that these various statements of principle support the conclusion that if the parties (in the second type of case referred to above) intended the document to be a binding contract, and if the omission of the fifth term prevents the document being a binding contract, then there has been a mistake of law as to the effect of the document and that mistake should be cured by rectification, in particular, by writing in the fifth term.
54. In my judgment, this argument fails to recognise one important consideration. In the second type of case referred to above, there has been no mistake as to the way in which the transaction has been expressed. It is not necessary to set the record straight. There is no mistake as to the meaning of the words used even though, in one sense, there has been a mistake as to the legal effect of the arrangements made in that the parties intended to make a legally binding contract but, by reason of the deliberate omission of a term, they have failed to do so. The second type of case is different from *Wills v Gibbs* in that in the second type of case there has been an express agreement to omit from the written record the term which has been expressly agreed.
55. In my judgment, this express agreement to omit the term means that there is no defect or mistake in the recording of, or the expression of, the arrangement and it is beyond the ambit of rectification to write into the written agreement a term which the parties expressly agreed should not be so recorded. I reach this conclusion applying what I understand to be conventional principles as to the availability of rectification and not some special set of rules as to rectification for the purposes of section 2(4) of the 1989 Act. In my judgment, this approach serves the legislative objective of section 2 of the 1989 Act.

Discussion

56. Having set out the legal principles which I will apply in this case, the first question I need to consider is whether Mr Oun has made out his ground of appeal, namely, that the Adjudicator has, in effect, held that the parties had not expressly agreed at the first meeting on 10th December 2004 any terms other than those recorded in the first document.
57. I have read and re-read the decision of the Adjudicator and I fear that I have had very great difficulty in reaching a confident conclusion as to what findings of fact, if any, the Adjudicator made on this point.
58. The key issue is whether the Adjudicator was finding that at the first meeting on the 10th December 2004 the parties did expressly agree on an apportionment of the purchase price of £70,000 or whether, conversely, he was finding they did not make that express agreement at the first meeting. The Adjudicator referred to Mr Oun's evidence on that point and he stated that there was "a discussion" between the parties about apportionment but no apportionment was inserted in the agreement. Later, he referred to the evidence of Mr Shakoori which he described as involving "some discussion about the apportionment of the price". The Adjudicator's finding (quoted in paragraph 16 of this judgment) about whether "the disputed contract" existed appears to be confined to a finding that Mr Ahmad did indeed sign the first document in the form which was before the Adjudicator. That conclusion does not in terms amount to a finding that the evidence given, by and on behalf of Mr Oun, that there was an express agreement on the apportionment of price at the first meeting on 10th December 2004, was accepted. Later, the Adjudicator referred to the second document and held that there was only one arrangement between the parties, rejecting a submission that the second document was recording a separate or collateral contract. That conclusion may have led him to conclude that the terms of the contract were the aggregate of the terms agreed at the two meetings on the 10th December 2004.
59. The first sentence of paragraph 16 strongly points to a conclusion that the Adjudicator was accepting, as common ground, the proposition that the parties had expressly agreed terms that were not included in the first document. However, there is an ambiguity as to whether the Adjudicator was accepting that proposition on the basis that the terms expressly agreed at the first meeting on 10th December 2004 were not all recorded in the first document or that the aggregate of the terms agreed at the two meetings on the 10th December 2004 were not in the first document. He went on to say that "there is and was clear disagreement" about the apportionment of the price. From the evidence I have seen, I am not clear why he made that statement. There seems to have been clear agreement about the apportionment of the price at any rate by the time of the second meeting and on Mr Oun's case also at the first meeting. The Adjudicator referred to the disagreement over the way the stock was to be dealt with in this disputed contract. The evidence suggests that that statement is inaccurate as to the second meeting but probably not as to the first meeting. In any event, the Adjudicator ought to have resolved that disagreement by making an appropriate finding of fact if the finding of fact was material to the outcome of the dispute.
60. When considering the claim for rectification of the first document, the Adjudicator directed himself that he could only order rectification if he found that the first document did not accurately reflect the joint intention of the parties. He seems to have proceeded on the basis that he was unable to make that finding but the reason why he felt himself unable is not clearly stated. Was it because he was unable to make a finding that the parties had expressly agreed the terms as to apportionment at the first meeting or was it because he was holding that the parties had expressly agreed not to record the agreed apportionment in the written document? The Adjudicator then seems to make a different point as to the possibility that one party had an intention which was not shared by the other party. That possibility does not appear to be supported by the evidence I have seen. The Adjudicator was "mindful" of the decision in *Whiteside v Whiteside* but he does not say in what way that decision was material. Then he refers to the requirement of convincing proof which seems to suggest that he was not satisfied that the parties had expressly agreed terms which were not recorded in the first document. He then refers to "whatever the true intention of the parties was at the time of signing of the disputed contract".

He ought to have made a finding as to what the parties intended unless this was his way of saying that he did not have proof which was sufficiently convincing that the parties intended something which was not recorded in the first document. His statement that “the memorandum had nothing to do with it” would appear to suggest that the parties had not expressly agreed an apportionment of £75,000 at the first meeting. His reference to Mr Shakoori being told not to put apportionment details in the disputed contract does not make it clear whether he is finding that the parties had expressly agreed an apportionment at the first meeting or whether they did not reach such an agreement. His statement that there was no common mistake does not clearly distinguish between the case where the first document was not mistaken because it contained all the terms expressly agreed and the case where there was no mistake because the parties had agreed the apportionment of the price but went on to agree that the document should not record that apportionment.

61. The Adjudicator’s final conclusion that the first document failed to comply with Section 2 would seem to carry with it a conclusion that the parties had expressly agreed terms which were not recorded in the first document but the conclusion leaves it unclear whether the terms omitted from the first document were agreed at the first meeting or only agreed at the second meeting.
62. For a considerable period of time I inclined to the view that the Adjudicator’s reasoning on the essential matters of fact was so confused that I could not resolve it and I would have to remit the matter to him for him to make clear findings of fact which could then be acted upon. Both parties urged me not to remit the matter but to do the best I could with the material before me. In view of the delay which has already taken place I am reluctant to remit the matter if I can avoid it. I can only avoid remission if I am able to reach a properly reasoned judicial conclusion on the material before me. In the end I feel that I am able to reach such a conclusion. I will now set out my reasons.
63. In my judgment, given the Adjudicator’s earlier finding on the question whether Mr Ahmad had signed the first document, where the Adjudicator had accepted the evidence given on behalf of Mr Oun, there is only one possible finding of fact on the essential question as to what was agreed at the first meeting on 10th December 2004. It is that the parties expressly agreed upon an apportionment of the price of £75,000 and they further expressly agreed that the apportionment would not be recorded in the written document. I also find that they both believed that they had entered into a binding contract by reason of having signed the first document.
64. My findings of fact as set out above are in accordance with the case put forward by Mr Oun and the evidence given by him and his witnesses. Mr Oun did not have an alternative case of the kind now put forward as the ground of appeal. There is no indication in the material before me that such a case was put to Mr Oun by Mr Ahmad; that would have been contrary to Mr Ahmad’s case. Equally, there is no indication that a case of the kind now put forward as the ground of appeal was put to Mr Ahmad; that would have been contrary to Mr Oun’s only case before the Adjudicator.
65. If one makes the above finding of fact then it is possible to make sense of some of the Adjudicator’s findings in paragraph 16 of his decision. The finding explains his acceptance of the concession in the first sentence of the paragraph. His inability to find convincing proof as to the terms orally agreed can be read as referring to the discussion as to stock and the £17,000. His reference to Mr Shakoori being told not to put the apportionment details into the first document also fits with my finding of fact.
66. The right of appeal under section 111 of the Land Registration Act 2002 can be on fact as well as on law. Mr Oun’s appeal requires the court to be persuaded that the Adjudicator made a finding of fact that all the terms expressly agreed were recorded in the first document. For the reasons I have given I am not so persuaded. Further, Mr Ahmad is entitled on the hearing of the appeal to seek to persuade me that the correct finding of fact is the one I have made in paragraph 63 above. He has succeeded in so persuading me.

The result

67. It now remains to apply my understanding of the legal principles to the facts I have found.
68. On my findings of fact, the first document did not incorporate all the terms expressly agreed between the parties and in the absence of rectification the first document does not comply with section 2.
69. On my findings of fact, the parties expressly agreed not to record the terms as to apportionment in the first document. On my understanding of the law, it is beyond the ambit of the court's power to rectify to write in terms which the parties agreed should not be recorded in the first document.
70. The result is that Mr Oun did not have the benefit of a binding contract to buy the property.
71. The appeal must be dismissed.

Costs

72. The parties have agreed that the costs of the appeal should follow the event of the appeal. Accordingly, I order Mr Oun to pay Mr Ahmad's costs of the appeal on the standard basis. I am asked to assess summarily those costs. I do so in the sum of £4103. That figure includes VAT. If Mr Ahmad is able to recover the VAT, then the amount of the VAT should be subtracted from this figure.