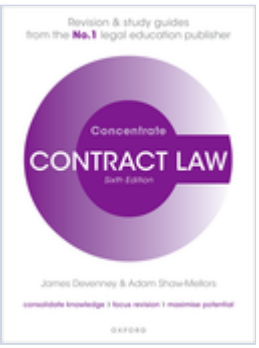

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2. Agreement problems

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter focuses on issues which may prevent the parties from reaching agreement. Agreement problems generally affect the agreement by rendering it void. It is necessary, however, to distinguish a void contract from one which is merely voidable. If an apparent agreement is too uncertain in its terms (e.g. because it is vague or essential terms are missing), the courts will not enforce it because they will not construct a binding contract for the parties. An apparent agreement may be void where the parties entered into the agreement under a 'fundamental' mistake which the law recognizes as preventing the parties from ever reaching agreement.

Keywords: agreement, void contract, voidable contract, certainty of terms, agreement mistakes, mutual mistake, unilateral mistake, identity mistake, rectification, non est factum

Key facts

- The terms of an agreement must be sufficiently certain, or the agreement will be void for uncertainty. Agreements for the parties to agree a matter, such as the price, will generally lack the necessary certainty. If nothing is said about the price, however, in some circumstances statute may imply a reasonable price.
- If there is uncertainty so that no contract results, in some circumstances there may nevertheless be an obligation to pay the reasonable value for requested performance (a ***quantum meruit***).
-

An agreement mistake will occur where one or both of the parties allege that they made a *fundamental* mistake as to a term which prevents agreement. Such a mistake means the contract is void. Alternatively, a contract may be voidable for a mistake as to attributes, and this protects innocent third parties who have acquired the contract goods.

- It may be possible to rectify a written record of an agreement where there is a transcription mistake in recording that agreement accurately. The plea of *non est factum* ('this is not my deed') may very rarely be available where it is claimed that a document has been signed by mistake because the document is fundamentally different in nature to the document believed to have been signed.

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2.1 Introduction

This chapter is concerned with issues which may prevent the parties from reaching agreement (the terms are not sufficiently certain or there is no agreement because of a mistake). Agreement problems generally affect the agreement by rendering it void. It is necessary, however, to be able to distinguish a void contract from one which is merely voidable.

2.1.1 Key terminology

Void: where a contract is void it is automatically of no effect from the very beginning. There is no, and never was, agreement (and hence there is no contract). The important word is 'automatically'. This effect has nothing to do with action being taken by either of the parties. A contract may be void because the terms of the agreement are too uncertain or because a fundamental mistake as to a term has occurred, e.g. the parties are not agreed on the subject matter as they are at cross-purposes and neither party's interpretation is the more reasonable, or one party has misled the other as to a crucial contractual term (such as the other's identity or the contract price).

Voidable: where a contract is voidable it is liable to be set aside by one party using the remedy of **rescission**. Once it is set aside the contract is treated as never having existed. There are, however, bars to rescission so, for example, it is not possible to rescind once a third party has acquired rights in the property which is the subject matter of the contract. In such instances the voidable contract remains valid and binding.

A contract may be voidable for **duress** (see Chapter 10), for **undue influence** (see Chapter 10), or for misrepresentation (see Chapter 9), including misrepresentation as to identity (so-called attributes mistake) which is discussed later.

There are two core topics examined in this chapter: (i) certainty of terms and (ii) agreement mistakes—**mutual mistake** and **unilateral mistake**.

Think like an examiner

Much depends on the individual syllabus but certainty of terms is rarely set as a full question. It can appear (see the practical example '2.2.1 Vague terms') as part of an agreement problem question, or possibly as a problem or an essay concerning agreements to agree and negotiating in good faith—and it may be necessary to consider the consequences of uncertainty and claiming a *quantum meruit* based on performance. In practical terms it is an important subject as it can determine whether or not there is a contract (compare ***British Steel Corp. v Cleveland Bridge & Engineering Co. Ltd*** *(1984)* and the Supreme Court (SC) decision in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co. (UK Production)*** *(2010)*).

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↲ Following the decision of the House of Lords (HL) in ***Shogun Finance v Hudson*** *(2003)* it is difficult to set a full problem question on mistake as to identity, although it may appear as a part, possibly with the other part tackling the issues of cross-purpose and/or unilateral mistake as to terms. The ***Shogun*** decision is sufficiently controversial to be capable of generating an essay title all of its own, e.g. the debate about identifying a written contract.

2.2 Certainty of agreement

If an apparent agreement is too uncertain in its terms, the courts will not enforce it because they will not construct a binding contract for the parties.

A contract may be too uncertain because:

- it is vague; or
- essential terms are missing and the contract is therefore incomplete.

(There is often some overlap between the two.)

2.2.1 Vague terms

Practical example

Alex agrees to sell his bicycle to Becky, price to be determined by independent valuers, one to be appointed by each of the parties. The terms are agreed as 'those usually operating in the sale of bicycles'.

If an essential term is vague, the apparent agreement is *void* (automatically of no effect from the very beginning) and the courts will not supply the 'details' necessary to find a binding contract, *unless*:

- it is possible to do so based on clear commercial practice; *and*
- the 'agreement' has been executed (already acted upon).

Scammell & Nephew Ltd v Ouston (1941) (HL)

FACTS: Agreement to purchase a van on hire purchase terms, but the details of these hire purchase terms had not been agreed.

HELD: There were so many possible interpretations of hire purchase terms that the courts could not imply terms based on commercial practice. The contract was therefore void for uncertainty of terms.

p. 32 ↵ Compare with:

Hillas & Co. Ltd v Arcos Ltd (1932) (HL)

FACTS: The Ps agreed to buy '22,000 standards of softwood goods of fair specification' for 1930, and there was a further option for '100,000 standards' for 1931.

HELD: The agreement was binding as it had been performed in 1930 and there was an accepted understanding of the meaning of these words in commercial practice.

2.2.2 Severing a meaningless clause

It is only possible to sever a clause if it is meaningless (as opposed to a clause that has still to be agreed). The policy objective underlying this principle is the need to prevent a party from escaping from a contract by inserting a meaningless clause.

Nicolene Ltd v Simmonds (1953) (CA)

FACTS: The agreement referred to acceptance as being on 'the usual conditions of acceptance'. In fact, there were no such usual conditions and, when the D failed to deliver, the Ps brought an action for breach of contract.

HELD: The clause in question was severed so that the rest of the agreement was enforceable.

Practical example

It would appear that there are no specific standard terms usually governing the sale of bicycles, so this clause ought to render the contract void for uncertainty. The clause is, however, meaningless in this context, so a court might therefore sever this clause in order to leave the agreement enforceable.

What about the price term in the practical example? Is this sufficiently certain?

2.2.3 Incomplete agreements

The agreement may leave an essential matter (such as price) either undecided or impossible to calculate so that the courts will not enforce that agreement.

Agreements to negotiate

p. 33 Agreements to negotiate on a particular term are incomplete and so are too uncertain to be a contract. ↵

Walford v Miles (1992) (HL)

FACTS: The Ds were negotiating the sale of a company to the Ps. They had entered into an agreement whereby, in return for the provision of a comfort letter from the Ps' bank (indicating that loan facilities had been granted to cover the price of £2m), the Ds agreed to terminate any negotiations with third parties, agreed not to entertain offers from any other prospective purchasers, and agreed to deal exclusively with the Ps (a so-called 'lock out'). Although the Ps complied with their side of the agreement, the Ds withdrew from the negotiations and decided to sell to a third party. The Ps claimed damages for breach of this lock-out agreement.

HELD: It was only an agreement to negotiate and was therefore unenforceable for uncertainty. Although there was **consideration** for the lock out, it extended for an indefinite period (compare ***Pretoria Energy Co. (Chittering) Ltd v Blankney Estates Ltd*** *(2023)*: a time-limited lock-out agreement can be binding).

The HL rejected the argument that there was an *implied* duty placed on the party who had agreed to the lock out to negotiate in good faith with the party to that lock out for a reasonable period of time. Their Lordships considered that such an implied duty could not be reconciled with the adversarial nature of contractual negotiations.

Walford was distinguished in ***Petromec Inc. v Petroleo Brasileiro SA Petrobras (No. 3)*** *(2005)* on the basis that the agreement to negotiate in ***Petromec*** was an express term in a concluded and binding agreement (in ***Walford*** there was no concluded agreement and no *express* term to negotiate in good faith). ***Petromec*** demonstrates the courts' willingness to recognize an obligation to negotiate on some matter in good faith (or, similarly, by using 'reasonable' or 'best' endeavours) if contained in a binding agreement (***Brooke Homes (Bicester) Ltd v Portfolio Property Partners Ltd*** *(2021)*)—indeed, such terms are increasingly common: Leggatt, 'Negotiation in Good Faith: Adapting to Changing Circumstances in Contracts and English Contract Law—Jill Poole Memorial Lecture' (2019) 2 JBL 104.

When the price is missing

If there is no mechanism in the contract for fixing the price (i.e. nothing is said about the price), then statute may provide for a 'reasonable price'.

Section 8(1) Sale of Goods Act (SGA) 1979 provides that, in a contract of sale, the contract may fix the price for goods or provide a mechanism for fixing the price. Where, however, there is no such mechanism, the buyer must pay a reasonable price: **s. 8(2)**. Similarly, with contracts for services, **s. 15 Supply of Goods and Services Act (SGSA) 1982** states that where there is no mechanism for fixing the charge for a service, a reasonable charge is payable (B2B contract) and **s. 51 Consumer Rights Act (CRA) 2015** contains a similar provision requiring a reasonable price to be paid for a service in B2C contracts. **Section 8 SGA 1979** also extends to cover contracts of sale in the B2C context—there being (unlike with contracts for services) no corresponding provision in the **CRA 2015**.

If, however, there is a mechanism for fixing the price but it has not been implemented, **s. 8 SGA 1979**, **s. 15 SGSA 1982**, and **s. 51 CRA 2015** cannot apply to allow the implication of a reasonable price. ↵

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May & Butcher Ltd v R (1934) (HL)

FACTS: The contract provided for the price to be agreed upon by the parties from time to time. There was no party agreement.

HELD: The contract contained a mechanism for fixing the price but this had failed. Therefore, the argument that the agreement should be construed as an agreement to sell at a fair or reasonable price was rejected.

Practical example

The agreement between Alex and Becky provides a mechanism for fixing the price. If that has worked and there is an agreed price, then the terms are certain.

But what if Alex has appointed a valuer but Becky has not and is instead claiming that a 'reasonable price' should apply? Technically the mechanism has failed, ***May & Butcher*** ought to apply, and the contract would be void.

The courts have, however, devised ways around *May & Butcher* and we need to determine whether either of these 'exceptions' applies on these facts.

Exception 1: If the agreement has already been executed and the price is to be agreed by the parties but has not been, the courts may not be prepared to declare the contract void.

Foley v Classique Coaches Ltd (1934) (CA)

FACTS: There was an agreement to purchase petrol at a price to be agreed by the parties from time to time. The Ds had purchased their petrol from the P for three years when they sought to avoid the contract by arguing that it was invalid because there was no agreement as to price.

HELD: The agreement was binding and, if any dispute arose as to a reasonable price, it could be resolved under the terms of the arbitration clause in the contract that covered this type of dispute.

In the practical example there is a specific price mechanism which has not been fully activated in order to fix the price.

Exception 2: Does the principle in Sudbrook Trading Estate Ltd v Eggleton *apply?*

Sudbrook Trading Estate Ltd v Eggleton (1983) (HL)

FACTS: The agreement provided that a tenant was permitted to purchase the premises at a price to be agreed upon by two valuers nominated by the lessor and tenant. The lessor had refused to appoint a valuer and claimed that the agreement was void for uncertainty.

HELD: Where machinery existed solely for the purpose of fixing a fair price (as opposed to an essential factor in determining the price) and it had broken down, the court could substitute its own machinery to calculate a fair price.

p. 35 ↵ ***Sudbrook*** was distinguished by the CA in ***Gillatt v Sky Television Ltd*** *(2000)*: in ***Gillatt*** the machinery was integral and essential. In addition, it had failed because the claimant had not acted in accordance with its terms and so could not turn round and claim that the machinery meant nothing and should be replaced by a determination of the court.

The practical example is also similar to ***Gillatt*** in that the mechanism is the essential factor in fixing the price and Becky is claiming that there should be a 'reasonable price' rather than the one fixed by the valuers (the mechanism she had agreed to for fixing the price). It follows that in this situation ***May & Butcher*** (and not ***Sudbrook***) will apply and the contract will be void.

2.2.4 The significance of performance

As a general factor, where the agreement has in fact been executed (performed) by the parties, it is most unlikely that the courts would refuse to enforce it on the basis that it is too uncertain (***Trentham Ltd v Archital Luxfer*** *(1993)*).

Much, however, depends on the facts and whether there is agreement on the essential terms, e.g. in ***British Steel Corp. v Cleveland Bridge & Engineering Co. Ltd*** *(1984)* the parties were still in the process of negotiating in the expectation that a contract would follow. There was no agreement on essential terms such as the price

despite the fact that performance had been requested and goods manufactured. In ***Baird Textiles Holdings Ltd v Marks & Spencer plc*** *(2001)*, there was no evidence on which to determine the essential terms of the alleged contract, although plenty of evidence of past dealings.

RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co. (UK Production) (2010)

FACTS: The work was completed and 70% of the agreed price paid when a dispute arose as to whether the equipment which had been supplied complied with the specifications.

HELD: The SC considered that a contract had come into existence between the parties although they had been negotiating subject to contract and although the initial understanding was that they would not be bound unless a contract was signed and executed. The parties had reached agreement on all terms of 'economic significance' and had not intended agreement on the terms outstanding to preclude agreement. Since there had been performance on both sides, it was possible to conclude that the parties were proceeding with a contract on the basis of all the essential terms they had agreed.

RTS was followed by the SC in ***Wells v Devani*** *(2019)* where the court was able to identify the event that triggered an agent's entitlement to a commission when the parties' oral contract had not specified what such an event would be, in circumstances where the agent had introduced a buyer to the vendor of a property. The court held that a reasonable person would understand the parties to have intended the commission to be payable upon the event of the completion of the sale.

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2.2.5 Consequences of uncertainty

Although uncertainty of terms means that the agreement will be void and so automatically of no effect from the very beginning, a party *may* still be required to pay for performance under an uncertain contract on the basis of a *quantum meruit* (reasonable value of services). *This is a restitutionary remedy based on the desire to prevent unjust enrichment* (see Chapter 7).

In ***British Steel Corp. v Cleveland Bridge & Engineering Co. Ltd*** *(1984)* although the parties were still in the process of negotiating in the expectation that a contract would follow, the Ps had been requested to commence work immediately, which they had done. No formal contract was concluded but delivery had occurred. The Ps sought payment for the goods manufactured on the basis of a *quantum meruit*. The judge held that, since the Ds had requested the performance and had received a benefit at the expense of the Ps, it would be unjust for them to retain that benefit without recompensing the Ps on a *quantum meruit* for the reasonable value of the goods supplied.

This case was distinguished in ***Regalian Properties plc v London Dockland Development Corp.*** *(1995)* and it is only possible to recover performance expenses where the performance was specifically requested by the other party.

Basis on which expenditure in anticipation of a contract can be recovered on a quantum meruit

Countrywide Communications Ltd v ICL Pathway Ltd *(2000)*: there could be recovery only in 'exceptional cases' and, in particular, there had to be a benefit to the D in performance of the services which the D had requested.

The other factors to be considered were:

- The terms in which the request to perform was made and whether it was reasonable to assume the claimant would be compensated.
- Whether they were services of a kind which would normally be given free of charge.
- The circumstances in which the anticipated contract had failed to materialize and whether the D was at fault.

2.3 Agreement mistakes

An apparent agreement may be void where the parties entered into the agreement under a 'fundamental' mistake which the law recognizes as preventing the parties from ever reaching agreement. In other words, there is an appearance of agreement but there is no sufficient matching offer and acceptance in relation to the contract terms (objectively judged).

There are two types of agreement mistake (which prevent agreement from being reached): mutual (or cross-purposes) mistake and unilateral mistake. (See Table 2.1.) ↵

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Table 2.1 Types of agreement mistakes

Mutual mistake	**Both** parties are mistaken as to term.	Each party makes a different mistake in their reasonable interpretation of a term—***Raffles v Wichelhaus*** (cross-purposes mistakes).
Unilateral mistake	**One** party is mistaken as to a term, e.g. identity.	The other party knows of that mistake—***Shogun Finance v Hudson***.

(There is a third type of mistake—**common mistake**—see Chapter 8. Common mistake does not prevent agreement and is therefore not an agreement mistake.)

2.3.1 Mutual mistakes (where the parties are at cross-purposes)

Both parties are mistaken, but they each make different mistakes.

Practical example

Freddie offers to sell his 'car' to Georgina for £7,000. Georgina accepts, believing that Freddie has only one car and that it is a Volkswagen Golf. She has failed to notice that there are two cars parked on Freddie's driveway. The other car is a Vauxhall Astra and it is the Astra which Freddie is offering to sell and which he believes is the subject matter of their agreement. Georgina is refusing to accept and pay for the Astra.

There will be no agreement as a result of mutual mistake where it is not possible for the reasonable person to say which party's interpretation is the more reasonable (using the objective test for contract formation) because of the ambiguity in the offer terms. Such a 'contract' is void, i.e. of no effect from the very beginning. ↵

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Raffles v Wichelhaus (1864)

FACTS: The P agreed to sell cotton to the Ds that was to arrive 'ex *Peerless*' from Bombay. There were two ships of this name sailing from Bombay and the P intended to sell goods on the December ship whereas the Ds considered that they were buying goods on the October ship.

HELD: The P could not succeed in an action against the Ds for refusing to take delivery of the goods on the December *Peerless*. Objectively it was not possible to say which *Peerless* was intended and which party's interpretation was the more reasonable. Such an agreement will be void.

Scriven Brothers & Co. v Hindley (1913)

FACTS: The Ds mistakenly bid for bales of tow believing they were hemp. At the auction the Ds had examined a sample, which happened to be hemp, and thought that all the bales were hemp because they all had the same shipping mark. This was accepted as a reasonable interpretation, but so too was the auctioneer's belief that the bales being sold were tow.

HELD: There was no contract and the Ds did not have to pay for the tow.

In ***Tamplin v James*** *(1880)*, however, the purchaser mistakenly believed the lot of property being sold included some garden but had failed to check the plan which indicated that no garden was included. The purchaser was at fault and could not avoid the contract by citing his mistake.

2.3.2 Unilateral mistakes

A unilateral mistake occurs where one party is mistaken as to a term of the contract and the other knows or ought to know of this mistake and cannot be allowed to take advantage of it.

Practical example

Haroon sends a letter to Jessica as an email attachment in which he offers to sell his Volkswagen Golf car. Haroon intends to type the price as £11,000, but his finger slips and he types the price as £1,000. Jessica immediately sends back an email stating that she accepts on the terms of Haroon's letter. Haroon later discovers his mistake and claims he is not bound as the agreement is void for mistake.

To avoid the agreement there must be a mistake as to a term.

This occurs where A makes an offer to B and B is aware or ought to be aware that A is making a fundamental mistake relating to a term in that offer and seeks to 'snap it up'.

Hartog v Colin & Shields (1939)

FACTS: The D mistakenly offered to sell hare skins at a price per pound instead of per piece, and the Ps accepted this.

HELD: The Ps could not enforce the contract on the basis of these alleged terms. The negotiations had been conducted on the basis of a price per piece, and this was the normal trade practice. The Ps must have known about the D's mistake as to this term when they accepted (price per pound would have been much cheaper), and therefore the contract was void.

Practical example

Clearly it would not be difficult to establish that Jessica knew that Haroon had made a mistake concerning the price term at which he intended to sell the car and that she had attempted to 'snap it up'. This is a fundamental unilateral mistake as to a term and such a contract is void.

p. 39 ↵ **If, however, the mistake does not relate to a term of the contract but to a collateral matter or matter relating to the quality of the subject matter, then it will not be fundamental and will not prevent agreement.**

Smith v Hughes (1871)

FACTS: D alleged P knew D required old oats (and not new oats which had been purchased) and that therefore the contract was void for mistake.

HELD: There was a valid contract. There was no misrepresentation or term that the oats sold had to be old and therefore this was a collateral matter (relating to the quality of the subject matter) which did not affect the agreement reached between the parties.

Mistakes as to identity

This occurs where one party is mistaken as to the identity of the other contracting party (a term of the contract) and the other knows of the mistake (usually because they will have fraudulently misrepresented their identity).

Practical example

Alex sells his bicycle to Becky because she represents that she is Victoria Pendleton (the Olympic cyclist). He allows her to take the bicycle on credit in return for a promise of the cash the following day. In the meantime Becky sells the bicycle to Charlie for cash and disappears. Charlie knows nothing about how Becky acquired the bicycle but pays a discounted price as Becky tells him she needs a quick sale since she is emigrating to Australia the following day.

Alex wants the return of his bicycle from Charlie. Charlie claims he paid for the bicycle and it is now his.

- This type of mistake will only render the contract VOID if it is *fundamental*.
- If it is not a fundamental mistake, then the contract will only be voidable (capable of being set aside) for fraudulent misrepresentation.

This distinction between void and voidable is particularly important where the goods have been sold by the rogue to an innocent third party:

- The goods can only be recovered from that third party if the contract was void, so that the rogue had no title (ownership) to pass on.
- If the contract with the rogue was merely voidable for fraudulent misrepresentation, the right to set aside the contract will have been lost when an innocent third party acquires rights in the goods. In such circumstances the innocent third party can keep the goods.

Practical example

Alex is the mistaken party. Becky is the rogue. Charlie is the innocent third party purchaser. (See Figure 2.1.)

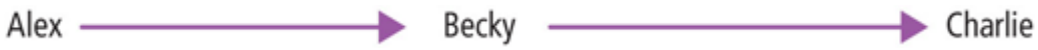

Figure 2.1 Mistaken identity

The parties' position is determined by whether the contract between Alex and Becky is void or voidable. If it is void for fundamental mistake as to identity, then Alex can recover the bicycle (and Charlie will have 'converted' the bicycle since he has possession of property which is not his).

If it is voidable (and has not been avoided before Charlie acquires the goods) Charlie, as innocent third party purchaser, can keep the bicycle.

Until fairly recently the policy of the courts had been seen as protecting the innocent third party by holding that the contract is only voidable for this type of mistake. The courts had achieved this objective by drawing a distinction (artificial and much criticized) between true mistakes as to identity (void) and mistakes as to attributes, such as creditworthiness (which only rendered a contract voidable). They applied a presumption in face-to-face cases that there was an intention to deal with the person physically present so that any mistake was as to attributes, and the contract was merely voidable.

The important distinction since the decision of the HL in ***Shogun Finance Ltd v Hudson*** *(2003)* is between written contracts and these face-to-face contracts without writing.

Written contracts

The HL in ***Cundy v Lindsay*** *(1878)* had held that a contract made by written correspondence was void for mistake as to identity since identity would be of fundamental importance to the formation of a written contract by post. The offer to contract would be made only to the person named in the written contract so that only that person could accept it. ↵

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Cundy v Lindsay (1878) (HL)

FACTS: A rogue (Blenkarn) of 37 Wood Street, Cheapside, had sent a written order for handkerchiefs and had made it appear that the order had come from a respectable firm, 'Blenkiron & Co.' of 123 Wood Street. The Ps had heard of Blenkiron and accordingly sent the goods on credit to Blenkiron at 37 Wood Street. The Ps were never paid. Blenkarn sold the goods to the Ds (innocent third party), and the Ps brought a conversion action against the Ds.

HELD: The contract was void since identity was crucially important and the sellers had intended to deal with Blenkiron and not Blenkarn. It followed that the Ds were liable in conversion.

Shogun Finance Ltd v Hudson (2003) (HL)

FACTS: The rogue expressed an interest in purchasing a Mitsubishi Shogun at a car dealership. He then identified himself as Mr Dulabh Patel and produced a stolen driving licence as proof of identity and address. The dealer faxed a copy of the finance agreement in this name to the claimant finance company with a copy of the driving licence. The rogue signed the agreement as Mr Patel. The finance company carried out the usual credit checks before approving the finance. The dealer therefore allowed the rogue to take the vehicle. The rogue sold the car (dealership price of £22,500) to the D for £17,000. The finance company brought a claim against the D for damages in the tort of conversion.

HELD (3:2): The finance contract was void because Mr Patel was the customer named in the written agreement and his signature had been forged. (This was not a face-to-face contract because the identity term was contained in writing, i.e. the offer to purchase in the finance agreement.)

Revision tip

To answer an essay question concerning mistake as to identity and the policy questions adequately, it is necessary to be familiar with the different approaches taken by the members of the HL in ***Shogun Finance v Hudson***. You also need to be aware that the policy objective of the majority was to protect lenders against the consequences of identity theft.

Boulton v Jones (1857)

FACTS: The D sent a written order to Brocklehurst's (B's) shop, but B had already sold the business.

HELD: P (the new purchaser of the business) could not fulfil the order. Identity was crucial in this case because the D wished to use a set-off (type of credit note) that he had against Brocklehurst (a fact known to the P). It followed that it was clear that the offer was intended for Brocklehurst, and therefore the P could not accept it.

There must be **two existing entities** for identity to be crucial and for the contract to be void for mistake as to identity. An offer can only be made to, and accepted by, an existing entity. It is not enough that there is only one entity with two names, one of which is false.

King's Norton Metal Co. Ltd v Edridge, Merrett & Co. Ltd (1897) (CA)

FACTS: A written order was sent by 'Hallam & Co.' on notepaper which indicated that the company was large and successful. There was no such company. It was merely an alias for a rogue. The rogue acquired the goods on credit and sold them to the Ds (innocent third party). The Ps (mistaken party) sought damages for conversion from the Ds alleging that they (the Ps) had only intended to deal with Hallam & Co.

HELD: The Ps intended to deal with the writer of the letter, whoever that was, and had not mistaken one person for another because there was only one existing person. Therefore, there was a contract between the Ps and the rogue, which was not void for mistake.

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Face-to-face contracts

There is a series of cases applying a presumption in face-to-face contracting whereby the mistaken party is presumed to intend to deal with the person who is physically present. In ***Lewis v Averay*** *(1972)* the rogue went to see the P's car advertised for sale. He made the P believe he was a famous film actor, Richard Greene. He produced a film pass and wrote a cheque in the name 'R. A. Green'. The P allowed him to take the car away. The cheque was dishonoured; meanwhile, the rogue sold the car to an innocent purchaser. The court held the contract was not void since this was a mistake as to creditworthiness and the mistaken party intended to contract with the person physically present. The third party was 'more innocent'. The same approach is seen in ***Phillips v Brooks Ltd*** *(1919)*. These mistakes are therefore treated as attribute mistakes relating to the decision to allow the rogue to have possession of the goods on credit. The contract is voidable, and this protects the innocent third party purchaser who acquires the goods from the rogue.

Practical example

Alex is the mistaken party, and Becky was pretending to be Victoria Pendleton to persuade him to contract with her. The crucial question is whether this contract is void for fundamental mistake as to identity or merely voidable for misrepresentation. If void, Alex can recover the bicycle from Charlie or seek damages in conversion. If voidable, Charlie can keep the bicycle as an innocent third party purchaser for value.

Following ***Shogun Finance v Hudson***, the crucial distinguishing factor is whether the contract is written or is an oral face-to-face contract. It is made face-to-face so that there is a presumption that Alex intends to contract with whoever is physically present—Becky (***Lewis v Averay***). The mistake Alex makes is a mistake as to attributes and creditworthiness. The contract between Alex and Becky is merely voidable and not void. Since Becky has already sold the bicycle to Charlie, Alex cannot avoid the voidable contract. Charlie would keep the bicycle.

Would it make any difference if Becky had written to Alex and he had agreed to sell in a written response? This would be a ***Shogun*** situation. Identity would now be crucially important. Alex would make an offer to sell the bicycle to Victoria Pendleton, and only she could accept that offer. The contract A/B would therefore be void for fundamental mistake as to identity, and Alex could recover the bicycle.

Document mistakes

Rectification

The court may be asked to *rectify a written document* to reflect accurately what the parties in fact agreed, i.e. to reflect their continuing common intention (***Joscelyne v Nissen*** *(1970)*: the parties had agreed that the daughter was to pay certain household expenses, but this had not been spelt out in specifics in the contract. Rectification was ordered to reflect the parties' continued common intention). Key to rectification is that the mistake must be in relation to the ↵ way the parties' agreement has been recorded (i.e. reduced to writing). Rectification has not been allowed where the parties were agreed as to the terms of their agreement but made a mistake as to the meaning of those terms.

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Frederick E Rose (London) Ltd v William H Pim Junior & Co. Ltd (1953) (CA)

FACTS: The Ps were asked to supply 'feveroles' and thought 'feveroles' was another word for 'horsebean'. Accordingly they entered a contract with the Ds for supply of 'horsebeans', but feveroles were a superior type.

HELD: The contract between the Ps and the Ds would not be rectified to read 'feveroles' because the parties were agreed that the Ds were to supply only 'horsebeans'. There was no error in terms of expression of the contract which would permit rectification.

An important question which has caused some uncertainty and debate is whether the parties' continuing common intention should be assessed subjectively or objectively. In ***Chartbrook v Persimmon Homes Ltd*** *(2009)* Lord Hoffmann said an objective approach should prevail. That had been followed by the CA in ***Daventry District Council v Daventry and District Housing Ltd*** *(2011)*. This has been criticized since rectification ought to be based on subjective intentions. In ***FSHC Group Holdings Ltd v GLAS Trust Corp. Ltd*** *(2019)* the CA held that it was not bound by ***Daventry*** (as the court in ***Daventry*** had proceeded on the basis that Lord Hoffmann's approach was correct, with the case argued on that assumption), nor by ***Chartbrook*** (where what Lord Hoffmann had said about rectification was *obiter*). In ***FSHC***, following a comprehensive review of the historical development of rectification and the relevant authorities, Leggatt LJ explained the correct approach as follows:

> (i) Where the parties have reached a binding contract in which they intend X but then upon recording that contract in writing it is recorded incorrectly and given meaning Y, the continuing common intention is to be assessed *objectively*.
>
> (ii) Where the parties have concluded negotiations in which they intend X but on reducing those negotiations to a written contract it actually means Y, the continuing common intention is to be assessed *subjectively*.

FSHC is likely to be treated as the leading authority on rectification for a common mistake (see ***Colicci v Grinberg*** *(2023)*). Following ***FSHC***, an important distinction (explained in Shaw-Mellors, 'Rectifying Rectification: The Subjective Approach to Rectification for Common Mistake' (2020) 5 JBL 368) exists in whether there was an antecedent binding contract (which there is in (i) but not (ii)).

The plea of *non est factum*

A successful plea of *non est factum* ('this is not my deed') means that the person signing a document is fundamentally mistaken as to the nature of the document signed. If the plea succeeds, the written contract is void, and a third party cannot acquire a good title under it. As ↵ innocent third parties may have relied to their detriment upon this signature as being binding, however, the plea has been very narrowly construed:

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- The transaction must be fundamentally different in nature from the one signed.
- The mistake regarding the nature of the document signed must not be a mistake which is the result of carelessness on the part of the person signing.

Saunders v Anglia Building Society (1971) (HL)

FACTS: An elderly widow of 78 signed a written document relating to her interest in a house. She had broken her spectacles and could not read it. She asked the third party requiring her signature about the nature of the document and signed it when told that it was a deed of gift of the house to her nephew. In fact, it was a transfer of the house to that third party who mortgaged it to a building society and then defaulted. The widow pleaded *non est factum* and asked for a declaration against the building society that the transfer was void.

HELD: Her plea failed because she had intended the document to enable her nephew to raise money on the security of the house, and the document she had signed was not fundamentally different. In addition, she had been careless in signing the document.

Key debates

1. Broad questions about the nature of mistake in English law and its history. See: Macmillan, *Mistakes in Contract Law* (Hart Publishing, 2010) and the excellent summary in Morgan, *Great Debates in Contract Law*, 3rd edn (Palgrave Macmillan, 2020), pp. 160–165.
2. ***Shogun Finance v Hudson*** and policy considerations affecting the law's development. See: Macmillan, 'Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law' (2005) 64 CLJ 711.

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Key cases

Case	Facts	Principle
Walford v Miles *(HL)*	Enforceability of agreement not to negotiate with any other prospective purchasers. HL held it was only agreement to negotiate and unenforceable for uncertainty as it extended for indefinite period.	Agreements to agree are uncertain. No implied duty to negotiate in good faith.

Case	Facts	Principle
British Steel Corp. v Cleveland Bridge & Engineering Co. Ltd	Parties negotiating and had not reached agreement on essential terms. Performance had been requested, however, and goods had been delivered. The judge allowed recovery on a *quantum meruit* (reasonable value) on a restitutionary basis.	No contract due to uncertainty of terms, but there can be recovery of reasonable value (not any contract price) in some circumstances for performance requested and received.
Raffles v Wichelhaus	Two ships named *Peerless* sailing from Bombay. Each party thought contract was for different *Peerless*. Objectively it was not possible to say which was intended. No contract.	Mutual (cross-purposes) mistake and not possible to say which party's interpretation is the more reasonable, then there is no contract.
Smith v Hughes	Purchase of 'oats'. D wanted 'old' oats and P was selling 'new' oats. Held: the contract was valid as there was no misrepresentation or term describing the oats.	The mistake must relate to a term of the contract and not to a collateral matter (quality of the goods). The parties were agreed on sale and purchase of 'oats'.
Cundy v Lindsay *(HL)*	Rogue ordered goods by post pretending to be another respectable firm so that the goods were obtained on credit. Rogue sold the goods to innocent third party purchaser. HL held contract was void for mistake as to identity.	Identity was of crucial importance to making this contract by post. The offer to contract would be made only to the person named in the written contract so that only that person could accept it.
Shogun Finance Ltd v Hudson *(HL)*	At car dealership the rogue pretended to be someone else (having stolen their identity documents). The name of the real person was used on copy of finance agreement. HL held the finance contract was void. It was a written contract rather than face-to-face.	Most important decision on principles governing identity mistakes. Considered to be written contract so that only the person named could accept the offer of credit. The innocent third party purchaser lost out.

Exam questions

Problem question

Advise the parties in relation to the following scenarios:

(i) Tahmina was negotiating the sale of her business to Ben. In return for an assurance from Ben's bank that Ben has the appropriate funds, Tahmina promises to stop negotiating with another party and negotiate only with Ben. Three days later, Tahmina changes her mind and sells the business to the other party and not to Ben. Ben is furious and claims Tahmina is in breach of her agreement with him.

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(ii) Jermaine made an oral agreement with Esther to sell his car to Esther, because Esther represented that she is Bianca Green, a famous football goalkeeper. Jermaine allowed Esther to take the car after Esther promised to make the full payment in cash after she had finished football training the following day. In the meantime, Esther sold the car to Rodwell and is now untraceable. Esther told Rodwell she required a quick sale because she needed money for her struggling business. Jermaine has not been paid and, having now discovered what has happened, wants the return of the car.

(iii) Nina wanted to sell her business and was introduced to Amir, who was to introduce potential buyers to Nina. Amir explained his commission would be 3% of the sale price. Nina sold her business to a party introduced to her by Amir but claims she is not bound to pay a commission to Amir because they never agreed the exact circumstance in which Amir would become entitled to payment.

Head to the Outline Answers *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-2-outline-answers-to-essay-questions?options=showName>* **section of the online resources for help with this question.**

Essay question

Critically analyse the extent to which the decision of the HL in ***Shogun Finance v Hudson*** *(2003)* has brought coherence to the law governing mistakes as to identity.

Online Resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer to the essay question *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-2-outline-answers-to-essay-questions?options=showName>*
- Interactive key cases *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-chapter-2-interactive-key-cases?options=showName>*
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You can also find an interactive glossary *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-interactive-glossary?options=showName>* on our online resources. Additionally, to help you focus your revision, there is also a diagnostic test *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/contract-concentrate6e-diagnostic-test?options=showName>* available. For general advice on your revision and exam technique, you can listen to our podcast *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-audio-podcast?options=showName>*, or alternatively, you can access the transcript here *<https://iws.oupsupport.com/ebook/access/content/contract-concentrate6e-student-resources/lawrevision-advice-on-revision-and-exam-technique-podcast-transcript?options=showName>*.

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