
Contract Law: Text Cases and Materials (11th edn)
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# 16. Mistake

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## Abstract

This chapter examines the effects of a mistake on the validity of a contract. A mistake may prevent parties from reaching agreement. First, a court may decide that no contract has been concluded where one party knows that the other is labouring under a mistake in relation to the terms of the agreement and fails to inform that other party of the mistake. Secondly, it may conclude that the terms of the offer and acceptance suffer from a latent ambiguity such that the parties cannot be said to have reached agreement. The third case in which a mistake may prevent the formation of a contract is where there has been a mistake as to the identity of the party who is said to be a party to the contract. The discussion then turns to the leading cases on common mistake, mistake in equity, and rectification. The chapter concludes by considering the *non est factum* defence, which can be invoked by someone who, through no fault of his own, has no understanding of the document that he has signed.

**Keywords:** English contact law, contract validity, mistaken identity, common mistake, rectification, mistake in equity, non est factum

## Central Issues

1. The law relating to mistake is in a state of flux. The law must strike a balance between the need for certainty in transactions (which demands a narrow doctrine of mistake) and the desire to protect a party who discovers that he has entered into an agreement which is radically different in nature from the transaction which he intended to enter (which may demand a more liberal doctrine of mistake).

2. The effect of a mistake may be to prevent the formation of a contract because, for example, the parties are at cross-purposes. But the fact that a mistake has been made is not sufficient, of itself, to set aside the contract. The reason for this is that the law adopts an objective rather than a subjective approach to agreement. One issue that has given rise to particular difficulty in the courts in this connection is the case in which the parties meet face-to-face and one party makes a mistake as to the identity or creditworthiness of his contracting party. The prima facie presumption which the law applies is that a person intends to contract with the person who is in front of him and the presumption will only be displaced on 'special facts'. This presumption does not apply to written contracts. Where the contract has been reduced to writing, the courts will not generally allow extrinsic evidence to be led where that evidence seeks to contradict the written terms of the contract.
3. Alternatively, the parties may reach agreement but that agreement is vitiated because the parties have made the same mistake. This is an example of 'common mistake'. Where the mistake relates to the existence, or possibly the identity, of the subject matter of the contract, the mistake may suffice to set aside the contract where the mistake is sufficiently fundamental. More difficult is the case where the mistake is one that relates to the quality of the subject matter of the contract. In the latter case the courts tend to be reluctant to allow a party to invoke mistake because they do not wish to provide an easy escape route for a party who has entered into a bad bargain. A mistake as to quality will only suffice to set aside a contract in the most extreme of cases.
4. The role of equity in mistake cases has proved to be extremely controversial. Lord Denning sought to enlarge the role for equity and he developed a wider, more flexible doctrine of mistake in equity than that which existed at common law. However, this wider doctrine of mistake in equity has been disapproved by the Court of Appeal, at least in the context of common mistake. The latter decision is one of the central cases in this chapter.

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5. A mistake may be made when recording the agreement. In such a case the court may be able to rectify the document so that it is brought into conformity with the agreement that the parties actually made. But rectification is only available within narrow limits.
6. A party may not be able to understand the document that he has signed. In such a case he may be able to invoke the defence of *non est factum*. A claimant who wishes to invoke this defence must show that he was permanently or temporarily unable, through no fault of his own, to have without explanation any real understanding of the document he has signed and he must show that there was a real or substantial difference between the document which he signed and the document which he believed that he was signing.

## 16.1 Introduction

This chapter and the subsequent chapters in this Part consider the different grounds on which a contract may be set aside by the courts. In some of the cases a contract is initially formed between the parties but it is then set aside by the court, whereas in other cases the conclusion of the court is that, as a result of some defect or impediment, the parties were never actually in a contractual relationship. The words 'set side' may not naturally encompass the latter case because it can be argued that in these cases there is no contract to 'set aside'. Such cases are nevertheless included within this Part on the basis that their exclusion would involve the creation of an artificial barrier between cases that actually have significant common elements. For example, in some cases of mistake, the effect of the mistake is to prevent a contract from coming into existence, whereas in other cases a contract does initially come into being but it is later set aside by the court on the ground of mistake. Rather than separate out the mistake cases into different chapters, they have been brought together in this chapter so that we can examine in a comprehensive manner the effect of a mistake on the validity of a contract.

The grounds on which a contract can be set aside which are considered in these chapters are mistake (the subject of the present chapter), misrepresentation (Chapter 17), duress (Chapter 18), undue influence (Chapter 19), inequality of bargaining power or unconscionability (Chapter 20), incapacity (in the online resources which support this book), illegality or public policy (in the online resources), and frustration (Chapter 21). There are obvious links between some of these grounds. Mistake and misrepresentation are closely linked in the sense that the law of misrepresentation is, in many ways, the law of induced mistake. Common mistake and frustration are closely linked in that they are both concerned with the situation where some common assumption shared by the parties and which is fundamental to the contract turns out to be unfounded. The difference between common mistake and frustration is a matter of timing. In the case of mistake, the
p. 521 common assumption is unfounded at the moment of entry into the contract, whereas in the case of
↵ frustration the common assumption is valid when the contract is concluded but turns out to be unfounded in the light of events that occur subsequent to the making of the contract. Duress, undue influence, and inequality of bargaining power (or unconscionability) are all linked in the sense that they are all concerned with the fairness of the bargain that has been concluded between the parties (although it can be argued that their focus is upon different types of fairness, in that some doctrines, such as duress, are concerned with procedural unfairness, while others, such as unconscionability, demonstrate a concern for the substantive fairness of the terms of the contract).

## 16.2 Mistake: The Difficulties

The law relating to the impact of a mistake on the validity of a contract is in a mess. There are a number of reasons for this. The first is that the terminology used by the courts and commentators is inconsistent. The principal terms employed to describe the different types of mistake are unilateral, mutual, and common mistakes. 'Unilateral' mistake refers to the case in which one party only has made a mistake. 'Common' mistake refers to the case where the mistake is 'common', that is to say the parties both made the same mistake. 'Mutual' mistake is more difficult. The word 'mutual' clearly refers to the case where both parties are

mistaken but it is not clear whether the mistake must be the same one or not. It could apply to the case where both parties are mistaken but they make different mistakes (so that they are at cross-purposes) or it could apply to the case where both parties are mistaken but they make the same mistake. In the latter case they do reach agreement but their agreement is vitiated by a mistake. Given the difficulties that surround the word 'mutual' it will not be used in this chapter unless it appears (as it does appear) in the judgments which are extracted.

The second problem relates to the jurisdictional divide between law and equity. The last fifty years of the twentieth century saw the development of a wider doctrine of mistake in equity (at least in cases of common mistake) under the guiding hand of Lord Denning. This development was brought to a halt in 2002 with the decision of the Court of Appeal in *Great Peace Shipping Ltd* v. *Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, where it was held that this wider doctrine of mistake in equity was inconsistent with the decision of the House of Lords in *Bell* v. *Lever Bros Ltd* [1932] AC 161. While the existence of a wider doctrine of mistake in equity has been denied in the context of both common mistake and unilateral mistake (*Statoil ASA* v. *Louis Dreyfus Energy Services LP* [2008] EWHC 2257 (Comm), [2008] 2 Lloyd's Rep 685), it is not the case that the role of equity has disappeared entirely in cases of mistake. It retains a role but it can no longer be used to undermine decisions that are binding on the courts, such as decisions of the House of Lords.

The third problem is that mistakes can take different forms. The different types of mistake were summarized by the Court of Appeal in *Great Peace Shipping Ltd* v. *Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679 in the following terms:

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28. A mistake can be simply defined as an erroneous belief. Mistakes have relevance in the law of contract in a number of different circumstances. They may prevent the mutuality of agreement that is necessary for the formation of a contract. In order for two parties to conclude a contract binding in law each must agree with the other the terms of the contract. Whether two parties have entered into a contract in this way must be judged objectively, having regard to all the material facts. It may be that each party mistakenly believes that he has entered into such a contract in circumstances where an objective appraisal of the facts reveals that no agreement has been reached as to the terms of the contract. Such a case was *Raffles* v. *Wichelhaus* (1864) 2 H & C 906. The parties believed that they had entered into a contract for the purchase and sale of a cargo of cotton to arrive 'ex Peerless from Bombay'. That term was capable of applying equally to a cargo of cotton on two different ships, each called 'Peerless' and each having sailed from Bombay, one in [October] and one in December. The court accepted that parol evidence could be adduced to prove which shipment the parties had intended to be the subject of the contract. Had one party intended the October shipment and the other the December shipment, the agreement necessary for a binding contract would have been absent.

29. *Raffles* v. *Wichelhaus* was a case of latent ambiguity. More commonly an objective appraisal of the negotiations between the parties may disclose that they were at cross-purposes, so that no agreement was ever reached. In such a case there will be a mutual mistake in that each party will erroneously believe that the other had agreed to his terms. …

30. Another type of mistake is that where the parties erroneously spell out their contract in terms which do not give effect to an antecedent agreement that they have reached. Such a mistake can result in rectification of the contract. …

31. In the present case the parties were agreed as to the express terms of the contract. The defendants agreed that the 'Cape Providence' would deviate towards the 'Great Peace' and, on reaching her, escort her so as to be on hand to save the lives of her crew, should she founder. The contractual services would terminate when the salvage tug came up with the casualty. The mistake relied upon by the defendants is as to an assumption that they claim underlay the terms expressly agreed. This was that the 'Great Peace' was within a few hours sailing of the 'Cape Providence'. They contend that this mistake was fundamental in that it would take the 'Great Peace' about 39 hours to reach a position where she could render the services which were the object of the contractual adventure.

32. Thus what we are here concerned with is an allegation of a common mistaken assumption of fact which renders the service that will be provided if the contract is performed in accordance with its terms something different from the performance that the parties contemplated. This is the type of mistake which fell to be considered in *Bell* v. *Lever Brothers*. We shall describe it as 'common mistake', although it is often alternatively described as 'mutual mistake'.

Paragraphs [28] and [29] refer to mistakes which prevent the formation of a contract. Such mistakes are discussed in Section 3. Paragraph [30] refers to mistakes made when reducing an agreement to writing. The remedy of rectification is discussed in Section 6. Paragraphs [31] and [32] describe the situation in which the contracting parties enter into a contract while labouring under the same mistake. Here we can see the terminological confusion in that these mistakes are either given the label 'common' or 'mutual' mistake. The Court of Appeal in *Great Peace* preferred the label 'common' and that is the label that will be used in this chapter. 'Common' mistakes are discussed in 16.4 and 16.5. This list of the different types of mistake is not, however, exhaustive. A mistake may be induced by a false statement of fact made by the other party to the contract. These mistakes are discussed in Chapter 17 under the heading 'misrepresentation'. A mistake may also arise from the failure or inability of one party to understand the nature of the document which he has
p. 523 signed. This gives rise ↵ to a defence known as *non est factum*. This defence is discussed in 16.8. *Non est factum* cases can be described as mistake cases, although they also have the potential to shade into incapacity.

The fourth problem is the clash of policies that underpins this area of the law. On the one hand, we can see in some of the judgments a desire to promote, or perhaps preserve, certainty in commercial transactions. This policy points in favour of a narrow doctrine of mistake so that parties cannot invoke the doctrine in order to escape from what has turned out to be a bad bargain. Two policies point in the opposite direction, however. The first is a concern for fairness. In some of the cases it is clear that the judges were of the view that it was 'unfair' to hold the mistaken party to the terms of his bargain once he realized the true position. The second policy is a concern to uphold the integrity of the agreement that has been reached by the parties. Where the facts demonstrate that the parties did not actually reach agreement as a result of a mistake made by one or both of the parties then it can be argued that there is no agreement, or no contract, for the courts to enforce. The latter policy is, however, tempered in its application to English law as a result of the courts' adoption of an objective rather than a subjective approach to the existence of an agreement. Nevertheless, an emphasis on the need for '*consensus ad idem*' can be seen in some of the judgments.

The fifth problem relates to the range of factors to which the courts have regard. A number of difficult issues arise here. First, how serious must a mistake be before it suffices to set aside a contract or prevent the conclusion of a contract? Secondly, does it matter that the defendant knew of the mistake or was responsible for inducing the mistake in the mind of the claimant? Thirdly, what is the role of fault? Should the court weigh the relative blameworthiness of the parties before deciding the remedial consequences of the occurrence of a mistake? The variety of factors taken into account by the courts makes it very difficult to stabilize this area of law.

Finally, mistake can have different remedial consequences. Some mistakes render a contract 'void', while others render it 'voidable'. A contract which is void is a nullity in the sense that it is set aside for all purposes and so generally produces no legal effects at all. A voidable contract, on the other hand, is valid in the sense that it is valid until the right to set it aside has been exercised. In other cases the effect of mistake is simply to deny the claimant a particular remedy, such as specific performance (see *Denny* v. *Hancock* (1870) LR 6 Ch App 1, 2.4). As we shall see, the difference between 'void' and 'voidable' can be crucial in relation to the rights of third parties (see the concluding paragraphs of 16.3.3).

## 16.3 Mistakes and Formation

The effect of a mistake may be to prevent the parties from reaching agreement. At this point it is necessary to recall that the courts, when deciding whether or not parties have reached agreement, adopt an objective rather than a subjective approach (see generally Chapter 2). Many of the cases discussed in Chapter 2 are, in fact, mistake cases. So the mere fact that a party has made a mistake is not enough in itself to entitle a court to conclude that the parties have not in fact entered into a contract. The effect of the adoption of an objective approach to the existence of an agreement is to narrow the scope of the doctrine of mistake. But it does not rule it out completely. Cases can be found in which the courts have concluded that the effect of the mistake was to prevent the formation of a contract between the parties.

### p. 524 16.3.1 Knowledge of a Mistake as to the Terms of the Contract

First, a court may decide that no contract has been concluded where one party knows that the other is labouring under a mistake in relation to the terms of the agreement and fails to inform that other party of the mistake (see *Smith* v. *Hughes* (1871) LR 6 QB 597, 2.2). The Court of Appeal in *Smith* distinguished between the case where the plaintiff believed that the defendant thought he was buying old oats and the case where the plaintiff believed that the defendant thought he was buying oats which the plaintiff had promised were old. In the former case the defendant is liable to take the oats and must take the consequences of his own mistake, whereas in the latter he is not liable to take the oats on the ground that the parties were at cross-purposes as to the terms of the contract. Similarly, a party will not be entitled to 'snap up' an offer which he actually knew was not intended by the party who made the offer (see *Hartog* v. *Colin & Shields* [1939] 3 All ER 566, 2.3). There is also a wider category of case in which one party was at fault in failing to notice that the other party's offer contained a mistake or he was himself responsible for inducing that mistake in the other party. In such a case the party at fault may not be entitled to hold the other party to the terms of his offer (*Scriven Brothers & Co* v. *Hindley & Co* [1913] 3 KB 564, 2.4).

### 16.3.2 Latent Ambiguity

Secondly, a court may conclude that the terms of the offer and acceptance suffer from a latent ambiguity such that the parties cannot be said to have reached agreement. Such was the case in *Raffles* v. *Wichelhaus* (1864) 2 H & C 906, a case discussed by the Court of Appeal in paragraph [28] of its judgment in *Great Peace* (16.2). The Court of Appeal in *Great Peace* adopted the traditional understanding of *Raffles*, namely that the offer and the acceptance suffered from a 'latent ambiguity' in that, while both parties referred to the vessel 'Peerless', the buyers apparently intended to refer to the October sailing but the sellers intended to refer to the December sailing. *Raffles* is, however, an obscure case (see AWB Simpson, 'The Beauty of Obscurity: *Raffles* v. *Wichelhaus and Busch* (1864)' in *Leading Cases in the Common Law* (Oxford University Press, 1995), p. 135). The court was not asked to decide whether or not the agreement was binding on the parties. The case came before the court on a point of pleading and the issue before the court was whether or not the fact that there were two vessels of the same name was *capable* of providing the defendant buyers with a defence to the sellers' action for the price. The court concluded that it was so capable and accordingly entered judgment for the defendants. No reasons were given by the judges in support of their conclusion; they simply stated that 'there must be

judgment for the defendants'. In the absence of any further reasoning it is difficult to know quite what to make of the case. Its role as a leading case is obviously not due to the significance of the judgment. Rather, its fame is attributable to the use made of it by academic writers in the late nineteenth century in the context of debates about the basis of contract law. Writers, such as Pollock, who maintained that there could be no contract without true consent, seized on *Raffles* in support of this theory, whereas writers who believed that the law was not concerned with the actual state of mind of the parties were strongly critical of the decision. But the decision of the court does not merit the significance that has subsequently been attributed to it.

**p. 525** Professor Simpson concludes ('The Beauty of Obscurity: ↵ *Raffles* v. *Wichelhaus and Busch* (1864)' in *Leading Cases in the Common Law* (Oxford University Press, 1995), pp. 138–139):

> In terms of contract law the judges seem to have thought that, once it appeared that there were two ships sailing from Bombay which answered the contractual description, and no way of telling which of the two was intended, the contract was latently ambiguous. Consequently, a jury should have been allowed to hear the evidence and decide whether the parties meant the same ship, and if so which, or different ships. …
>
> What would have happened if there had been no demurrer, and the case had gone to a jury? Obviously if the jury thought the agreement related to the October ship, the plaintiff would lose; if the December ship was meant, then the plaintiff would win. But what if the jury thought that the parties meant different ships, or that there was just no way of telling to which the contract related? The judge would then have the tricky task of directing them as to what consequence followed, as a matter of law, from this. But in *Raffles* v. *Wichelhaus* there was no need for the judges to reach any conclusion on what a suitable direction would have been. It was enough that the pleas, if true, might furnish an answer to the claim, for if so the plaintiff's legal objection to it failed. So, 'There must be judgement for the defendant'.
>
> Suppose, however, that the case had gone to a jury, and that it had emerged at a trial that one party meant one ship, and the other the other, and there was just no way of telling which was the ship to which the contract related—whatever that means. What then was to be done? This has all the seductive fascination of a conundrum, and it has subsequently captured the imagination of generations of scholars and students of the law of contract. Consequently they have tried, with some desperation, to prise an answer to the conundrum out of the texts of the reports of the case.
>
> Fortunately for the subsequent uses to which the case has been put, there is no clear answer to be found there. Mellish and Cohen [counsel for the buyers] certainly argued that, if one party meant one ship and the other party the other, there would be no contract at all; they used the expression *consensus ad idem*, agreement as to the same thing, and their argument was that, without such *consensus*, there would be no contract at all. They would know the story behind the case, and as reputable counsel would not seek to mislead the court; common sense suggests that this was indeed the situation. For some reason, which nobody explained, there had been a complete misunderstanding. Their argument was stopped at this point by the judges, but we cannot conclude from this that the judges all agreed with counsel, and even if the parties did mean different ships there might be some reason for preferring one person's understanding to the other. For example, the misunderstanding could have been the fault of one rather than the other. There was no need for the judges to grapple with this conundrum. So, although they may well have agreed with counsel, there is just no way of being sure of this. There is indeed a limit to what can be deduced from any text, or treated as consistent with it. We can, perhaps, sensibly pore over the text of *Macbeth* to determine the number of Lady Macbeth's children, but it is a waste of time to attempt to discover from it whether Macbeth suffered from athlete's foot.

While *Raffles* v. *Wichelhaus* is always discussed in the books and is cited in the courts by way of illustration, it has rarely been followed by the courts. The reason for this is that it is simply too obscure. As Chitty concludes (H Beale (ed), *Chitty on Contracts* (35th edn, Sweet & Maxwell, 2023), para 5-019), in a modern case of similar

character 'it is unlikely that the facts proved would be so sparse as not to give some ground for adopting one interpretation of the contract rather than the other'.

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### 16.3.3 Mistake as to Identity

The third case in which a mistake may prevent the formation of a contract is where there has been a mistake as to the identity of the party who is said to be a party to the contract. The standard case is one in which one party, A, enters into a contract with B in the mistaken belief that B is in fact C. A's mistake is typically induced by B's fraudulent representation that he is C. Does A's mistake render the contract between himself and B void or does it merely render the contract voidable on the ground that it was entered into as a result of B's fraudulent misrepresentation? This question does not admit of a simple answer. In large part, the answer depends on whether the contract between A and B has been reduced to writing. Where the contract has been reduced to writing, and the written agreement states that the parties to it are A and C, then the authorities suggest that the contract between A and B may indeed be void for mistake. But where the contract between A and B has been made orally in face-to-face dealings, then A is unlikely to succeed in his claim that the contract is void for mistake because, in such a case, the law presumes that A intended to contract with the person who was actually in front of him (i.e. B) and that presumption is very difficult to rebut. Not everyone is convinced that the law should distinguish in this way between written contracts and oral contracts but the distinction was affirmed by the House of Lords, albeit by a bare majority, in *Shogun Finance Ltd* v. *Hudson* [2003] UKHL 62, [2004] 1 AC 919.

Given the controversy which surrounds *Shogun*, it is important to set the case in its context. There are a number of important cases which precede *Shogun* and extracts from these cases can be found in the online resources which support this book. Most of these cases are discussed in *Shogun* itself but it may be helpful to describe five of them in outline by way of introduction to *Shogun*.

The first is the decision of the House of Lords in *Cundy* v. *Lindsay* (1878) 3 App Cas 459 (for a detailed discussion of *Cundy* and other leading cases from a historical perspective, see C Macmillan, 'Rogues, Swindlers and Cheats: The Development of Mistake of Identity in English Contract Law' [2005] *CLJ* 711). One Alfred Blenkarn wrote to the plaintiff linen manufacturers and ordered from them goods which included cambric handkerchiefs. The letters were written from 37 Wood Street where Blenkarn had hired a room (although he pretended to have a warehouse there). He signed his letters in such a way as to make it appear as if they had come from Blenkiron & Co. The plaintiffs knew of a respectable firm of W Blenkiron & Co which carried on business in Wood Street, albeit they did so at number 123 and not number 37. The plaintiffs sent the goods on credit to 'Messrs Blenkiron & Co., 37 Wood Street, Cheapside' where they were received by Blenkarn. Blenkarn then sold 250 dozen cambric handkerchiefs to Messrs Cundy, the defendants, who bought them in good faith. The House of Lords held that no contract had been concluded between the plaintiffs and Blenkarn for the sale of the handkerchiefs. The contract was void for mistake and, this being the case, Blenkarn had no title to the goods which he could confer on the defendants. The defendants were therefore liable to the plaintiffs for the value of the goods.

However, it was not the case that every mistake made by a party to a written contract rendered the contract void. In this respect it is useful to contrast *Cundy* with *King's Norton Metal Co* v. *Edridge Merrett & Co Ltd* (1897) 14 TLR 98, where a rogue assumed the name of Hallam & Co and the plaintiffs dealt with him, through written

correspondence, on this basis. The rogue, Wallis, received goods from the plaintiffs on credit and sold them on
p. 527 to the defendants who bought them in good faith. When Wallis' fraud was discovered the plaintiffs
↵ brought an action in conversion[1] against the defendants and relied upon the decision in *Cundy*. Their claim failed. The Court of Appeal held that the plaintiffs intended to contract with the writer of the letters. A.L. Smith LJ stated (at p. 99) that:

> if it could have been shown that there was a separate entity called Hallam & Co, and another entity called Wallis then the case might have come within the decision in *Cundy* v. *Lindsay*.

But on the facts there was 'only one entity, trading it might be under an alias, and there was a contract by which the property passed to' the person who wrote the letters. The difference between *Cundy* and *King's Norton* would appear to be that the plaintiffs in *Cundy* knew of the entity with which they intended to deal, Blenkiron & Co, and that entity was different from the identity of the author of the letters, whereas the plaintiffs in *King's Norton* intended to deal with the author of the letters but were under the mistaken impression that the author was a company called Hallam & Co when in fact it was Wallis.

The remaining three cases concern contracts concluded between parties who dealt with one another face-to-face. The first of these cases is the decision of Horridge J in *Phillips* v. *Brooks* [1919] 2 KB 243. A man entered the plaintiff's shop and asked to see some pearls and some rings. He selected pearls priced at £2,550 and a ring priced at £450. He then produced a cheque book and wrote out a cheque for £3,000. As he signed the cheque he said 'You see who I am, I am Sir George Bullough' and he gave an address in St James's Square. The plaintiff knew of the existence of Sir George Bullough. Having checked the address given in a directory he said to the man 'Would you like to take the articles with you?' The man replied: 'You had better have the cheque cleared first, but I should like to take the ring as it is my wife's birthday tomorrow.' The plaintiff let him have the ring. The cheque was subsequently dishonoured. The person in the shop was not Sir George Bullough but a man called North who was later convicted of obtaining the ring by false pretences. Prior to his arrest North pledged the ring with the defendants who, in good faith and without notice, advanced £350 to him. The plaintiff brought an action for the value of the ring against the defendants. The claim failed. The contract between the plaintiff and North was not void for mistake because the plaintiff was found to have had the intention to deal with the person in front of him. The contract being voidable, North was able to confer on the defendants good title to the ring so that they had a defence to the claim brought against them by the plaintiff.

*Phillips* was distinguished by the Court of Appeal in the second case, *Ingram* v. *Little* [1961] 1 QB 31. The plaintiffs, two sisters, advertised their car for sale at £725 or nearest offer. They were visited by a man who said that his name was Mr Hutchinson. They agreed a price of £717 for the car. The man produced his cheque book but one of the sisters said that they would not take a cheque. He then said that he was Mr P G M Hutchinson, that he lived at Stanstead House, Stanstead Road, Caterham, and that he had business interests in Guildford. On being told this, one of the sisters went to a nearby Post Office and checked in a telephone directory that there was such a person living at this address. The sisters then decided that they could take a cheque. The cheque was later dishonoured but not before the rogue had sold the car to the defendant car dealer who bought the car in all good faith. The plaintiffs brought an action in conversion against the

p. 528 defendant and sought to ↵ recover the car or its value. The Court of Appeal held, by a majority, that the contract between the plaintiffs and the rogue was void for mistake, with the result that the plaintiffs remained the owners of the car and were entitled to bring an action in conversion against the defendant.

*Ingram* was subsequently distinguished by the Court of Appeal in the third case, *Lewis* v. *Averay* [1972] 1 QB 198. The plaintiff advertised his Austin Cooper for sale for £450 in a newspaper. He was visited by a man who claimed to be Richard Greene, a well-known actor who played Robin Hood in a television series. The man agreed to pay £450 for the car and wrote a cheque for £450, signing it 'R A Green'. He wanted to take the car away immediately but the plaintiff was not willing to allow him to do so until the cheque had cleared. The man repeated that he wanted to take the car immediately and so the plaintiff asked him if he had anything to prove that he was Richard Greene. The man then produced a pass from Pinewood Studios, which had an official stamp on it. The pass bore the name 'Richard A Green' and included a photograph of the man. The plaintiff was satisfied at this and gave him the car, the log book, and the MOT certificate in return for a cheque for £450. The cheque turned out to be worthless, as it had been stolen. When the true situation came to light, the plaintiff brought an action in conversion against Mr Averay who had purchased the car from the rogue. The Court of Appeal held that Mr Averay was not liable to the plaintiff. The contract between the plaintiff and the rogue was held to be voidable with the result that Mr Averay acquired a good title to the car because he purchased it in good faith and for value before the plaintiff acted to set aside the contract with the rogue.

Two principal difficulties can be discerned in these cases. The first lies in the relationship between the cases involving written contracts and those involving oral contracts. The mistake made by the plaintiffs in *Cundy* v. *Lindsay* was very similar to the mistake made by the plaintiff in *Lewis* v. *Averay* (in the sense that both plaintiffs entered into the contract with one party in the belief that he was another), yet the mistake in *Cundy* rendered the contract void, whereas the mistake in *Lewis* did not. The second is that the relationship between the cases involving parties dealing with one another face-to-face is not an easy one; in particular, it is no easy task to distinguish between *Ingram* and *Lewis*. The first of these difficulties was confronted directly by the House of Lords in *Shogun*, whereas the latter was only examined incidentally. It is now time to turn to the decision of the House of Lords in *Shogun*.

***Shogun Finance Ltd v. Hudson***
[2003] UKHL 62, [2004] 1 AC 919, House of Lords

A motor dealer agreed a price to sell a car to a fraudster, R, who produced a stolen driving licence as proof of his identity (the driving licence belonged to a Mr Durlabh Patel). The dealer faxed a copy of this driving licence to the claimant finance company, together with a copy of a draft hire-purchase agreement which the fraudster had signed using the name of Mr Patel. The claimant ran a credit check on Mr Patel and, the check being satisfactory, it approved the sale. The fraudster paid a 10 per cent deposit in order to be able to take the car away. The next day he sold the car to the defendant who bought it from him in all good faith. When the true position came to light the claimant brought a claim in conversion against the defendant. The House of Lords, by a majority, held that the claimant was entitled to delivery up of the vehicle or damages for its conversion.

p. 529 ↵ The defendant claimed that he acquired good title to the car as a result of the operation of section 27 of the Hire Purchase Act 1964 (which is set out at [43]). The issue to be decided in relation to this claim was whether or not the fraudster, R, was a 'debtor' under a 'hire-purchase agreement' within the meaning of the section. It was held that he was not. He was not named as the debtor under the hire-purchase agreement and so was not the debtor under that agreement. Nor was evidence admissible to contradict the express terms of the agreement and to show that it was not a written agreement with Mr Patel but an agreement with R. There was no meeting of minds between the claimant and R so there was no contract between the parties, nor was there a bailment of the car by the claimant to R.

## Lord Nicholls of Birkenhead

[dissenting]

### The choice

33. In my view [the decision in *Cundy* v. *Lindsay* (1878) 3 App Cas 459] is not reconcilable with *Phillips* v. *Brooks Ltd* [1919] 2 KB 243 or with *Lewis* v. *Averay* [1972] 1 QB 198 or with the starting point 'presumption' formulated by Devlin LJ in *Ingram* v. *Little* [1961] 1 QB 31. The legal principle applicable in these cases cannot sensibly differ according to whether the transaction is negotiated face to face, or by letter, or by fax, or by e-mail, or over the telephone or by video link or video telephone. Typically today a purchaser pays for goods with a credit or debit card. He produces the card in person in a shop or provides details of the card over the telephone or by e-mail or by fax. When a credit or debit card is fraudulently misused in this way the essence of the transaction is the same in each case. It does not differ from one means of communication to the next. The essence of the transaction in each case is that the owner of the goods agrees to part with his goods on the basis of a fraudulent misrepresentation made by the other regarding his identity. Since the essence of the transaction is the same in each case, the law in its response should apply the same principle in each case, irrespective of the precise mode of communication of offer and acceptance.

34. Accordingly, if the law of contract is to be coherent and rescued from its present unsatisfactory and unprincipled state, the House has to make a choice: either to uphold the approach adopted in *Cundy* v. *Lindsay* and overrule the decisions in *Phillips* v. *Brooks Ltd* and *Lewis* v. *Averay*, or to prefer these later decisions to *Cundy* v. *Lindsay*.

35. I consider the latter course is the right one, for a combination of reasons. It is in line with the direction in which, under the more recent decisions, the law has now been moving for some time. It accords better with basic principle regarding the effect of fraud on the formation of a contract. It seems preferable as a matter of legal policy. As between two innocent persons the loss is more appropriately borne by the person who takes the risks inherent in parting with his goods without receiving payment. This approach fits comfortably with the intention of Parliament in enacting the limited statutory exceptions to the proprietary principle of *nemo dat quod non habet*. Thus, by section 23 of the Sale of Goods Act 1979 Parliament protected an innocent buyer from a seller with a voidable title. The classic instance of a person with a voidable title is a person who acquired the goods by fraud: see Bramwell LJ in *Babcock* v. *Lawson* (1880) 5 QBD 284, 286. Further, this course is supported by writers of the distinction of Sir Jack Beatson: see *Anson's Law of Contract*, 28th ed (2002), p. 332. It is consistent with the approach adopted elsewhere in the common law world, notably in the United States of America in the Uniform Commercial Code, 14th edn (1995), section 2–403. And this course
p. 530 makes practical sense. In a case such as the present the owner of goods has no interest in the identity of the buyer. He is interested only in creditworthiness. It is little short of absurd that a subsequent purchaser's rights depend on the precise manner in which the crook seeks to persuade the owner of his creditworthiness and permit him to take the goods away with him. This ought not to be so. The purchaser's rights should not depend upon the precise form the crook's misrepresentation takes.

36. *Cundy* v. *Lindsay* has stood for a long time. But I see no reason to fear that adopting this conclusion will unsettle the law of contract. In practice the problems surrounding *Cundy* v. *Lindsay* arise only when third parties' rights are in issue. To bring the law here into line with the law already existing in 'face to face' cases will rid the law of an anomaly. Devlin LJ's starting point presumption is a workable foundation which should apply in all cases. A person is presumed to intend to contract with the person with whom he is actually dealing, whatever be the mode of communication.

37. Although expressed by Devlin LJ as a presumption, it is not easy to think of practical circumstances where, once in point, the presumption will be displaced. The factual postulate necessary to bring the presumption into operation is that a person (O) believes that the person with whom he is dealing is the person the latter has represented himself to be. Evidence that the other's identity was of importance to O, and evidence of the steps taken to check the other's identity, will lead nowhere if the transaction proceeds on the basis of the underlying factual postulate.

    [He then applied these principles to the facts of the present case and concluded that the finance company had made the same mistake as the jeweller in *Phillips* v. *Brooks Ltd* but that its mistake did not negative the finance company's intention to let the car on hire to the

person in the showroom on the terms set out in the hire-purchase agreement. He then concluded as follows]

41. One further point may be noted. Some time was taken up in this case with arguments on whether the dealer was an agent for the finance company and for what purposes. This was in an endeavour to bring the case within the 'face to face' principle. The need for such singularly sterile arguments underlines the practical absurdity of a principle bounded in this way. The practical reality is that in the instant case the presence or absence of a representative of the finance company in the dealer's showroom made no difference to the course of events. Had an authorised representative of the finance company been present no doubt he would have inspected the driving licence himself and himself obtained the information needed by his company. As it was, a copy of the licence, together with the necessary information, were faxed to the finance company. I can see no sensible basis on which these different modes of communication should affect the outcome of this case. I would set aside the orders of the assistant recorder and the Court of Appeal, and dismiss this action. Mr Hudson acquired a good title to the car under section 27 of the Hire-Purchase Act 1964.

## Lord Hobhouse of Woodborough

42. The question at issue on this appeal is: Did Mr Hudson acquire a good title to the car when he bought the car from the rogue ('R') who himself had no title? The basic principle is *nemo dat quod non habet*: see the Sale of Goods Act 1979 s.21(1) and *Helby* v. *Matthews* [1895] AC 471 where it was held that the same rule applied to a sale by a hire-purchaser. The hire-purchaser has no title to the goods and no power to convey any title to a third party. The title to the goods and the power to transfer that title to any third party remains with the hire purchase company and with it alone. Clause 8 of the hire-purchase 'agreement' and the printed words in the form immediately below the space for the customer's signature also expressly say the same. There are common law and statutory exceptions to this rule. ...

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43. In the present case, the statutory exception relied on by Mr Hudson is that in Part III of the Hire-Purchase Act 1964 as re-enacted in the Consumer Credit Act 1974:

> 'where a motor vehicle has been *bailed* ... under *a hire-purchase agreement* ... and, before the property in the vehicle has become vested in the *debtor*, he disposes of the vehicle to another person ... [who is] a private purchaser [who has purchased] the motor vehicle in good faith without notice of the hire-purchase ... agreement ... that disposition shall have effect as if the creditor's title to the vehicle has been vested in the *debtor* immediately before that disposition.' (s.27(1) and (2), (emphasis supplied))

Section 29(4) adds:

> 'the "*debtor*" in relation to a motor vehicle which has been *bailed* ... under *a hire-purchase agreement* ... means the person who at the material time (whether the agreement has before that time been terminated or not) ... is ... the person to whom the vehicle is bailed ... *under that agreement.*' (emphasis supplied)

44. The relevant question is therefore one of the application of this statutory provision to the facts of this case (no more, no less). Thus the question becomes: 'Was R a debtor under the hire-purchase agreement relating to the car?' Mr Hudson contends that R was; the Finance Company contends that he was not. The judge and the majority of the Court of Appeal found that he was not; Sedley LJ would have held that he was.

45. What was the 'hire-purchase' agreement relied on? It was a written agreement on a standard hire-purchase printed form purporting to be signed as the 'customer' by one Durlabh Patel, the person who lived at 45 Mayflower Rd, Leicester, to whom driving licence No. 'PATEL506018DJ9FM' had been issued and with a date of birth 01/06/58. This was an accurate identification of the real Mr Durlabh Patel, but in no respect of R who was not the person who lived at that address, not the person to whom the driving licence had been issued and (one suspects) not a twin in age of the real Mr Patel. R forged Mr Patel's signature so as to make the signature on the hire-purchase 'agreement' appear to be the same as that on the driving licence. The parties to the written 'agreement' are Mr Patel (the 'customer'), and Shogun Finance Ltd (the creditor). There is also an offer and acceptance clause:

> 'You ["the customer named overleaf"] are offering to make a legal agreement by signing this document. We [the creditor] can reject your offer, or accept it by signing it ourselves. ... If we sign this document it will become legally binding at once (even before we send you a signed copy). ...'

46. The effect of this is that: (i) it re-emphasises that the customer/hirer is, and is only, the person named on the front of the document; (ii) it makes it clear that the agreement is the written agreement contained in the written document; (iii) the offer being accepted by the creditor is the offer contained in the document and that alone, that is to say, the offer of Mr Durlabh Patel of the address in Leicester and to whom the driving licence was issued; (iv) for a valid offer to be made, the form must have been signed by Mr Durlabh Patel; and, (v) most importantly of all, the question in issue becomes a question of the construction of this written document, not a question of factual investigation and evaluation. I will take these points in turn but the second and fifth are fundamental to them all and to the giving of the correct answer to this case.

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47. The first point is a matter of the construction of the written document. It admits of only one conclusion. There is no mention in the document of anyone other than Mr Durlabh Patel. The language used is clear and specific, both in the substance of the identification—name and address and driving licence number and age—and in the express words of the offer and acceptance clause—'the customer named overleaf.' The 'agreement' is a consumer credit agreement. It is unlike a mere retail sale where, although title may, indeed, will normally have already passed to the buyer, the seller is not obliged to part with the goods until he has

been paid or is satisfied that he will be paid. Credit is only relevant to the release of the seller's lien and to his obligation to deliver, not to the basic transaction; the basic transaction is unaffected and will stand. Under a contract for the sale of goods, the contract has been made and, normally, the title to the goods has vested in the buyer before the time for payment has arrived. (Retention of title clauses are a modern development.) By contrast, in a consumer credit transaction, the identity of the customer is fundamental to the whole transaction because it is essential to the checking of the credit rating of the applicant borrower. All this precedes the making of any contract at all. No title to the goods is obtained by the hirer at any stage. If the finance company does not accept the proposer's offer, the proposer has acquired nothing. Unlike in the sale of goods, there is nothing—no status quo—which has to be undone. The observations of Devlin LJ in *Ingram* v. *Little* [1961] 1 QB at p. 69 are not pertinent; the approach and dicta of Denning MR in *Lewis* v. *Averay* [1972] 1 QB 198 are misplaced and wrong.

48. It has been suggested that the finance company was willing to do business with anyone, whatever their name. But this is not correct: it was only willing to do business with a person who had identified himself in the way required by the written document so as to enable it to check before it enters into any contractual or other relationship that he meets its credit requirements. Mr Durlabh Patel was such an identified person and met its credit requirements so it was willing to do business with him. If the applicant had been, say, Mr B Patel of Ealing or Mr G Patel of Edgbaston, it would not have been willing to deal with them if they could not be identified or did not meet with its credit requirements. Correctly identifying the customer making the offer is an essential precondition of the willingness of the finance company to deal with that person. The rogue knew, or at least confidently expected, that the finance company would be prepared to deal with Mr Durlabh Patel but probably not with him, the rogue; and he was, in any event, not willing himself to enter into any contract with the finance company. This is not a case such as that categorised by Sedley LJ ([2002] QB at 846) as the use of a 'simple alias' to disguise the purchaser rather than to deceive the vendor—the situation which resembles that in *King's Norton Metal* v. *Edridge Merrett & Co* (14 TLR 98). But, even then, in a credit agreement it would be useless to use a pseudonym as no actual verifiable person against whom a credit check could be run would have been disclosed and the offer would never be accepted. Mr Durlabh Patel is the sole hirer under this written agreement. No one else acquires any rights under it; no one else can become the bailee of the motor car or the 'debtor' 'under the agreement'. It is not in dispute that R was not Mr Durlabh Patel nor that R had no authority from Mr Patel to enter into the agreement or take possession of the motor car.

49. Mr Hudson seeks to escape from this conclusion by saying: 'but the Rogue was the person who came into the dealer's office and negotiated a price with the dealer and signed the form in the presence of the dealer who then witnessed it.' The third and fourth points address this argument. The gist of the argument is that oral evidence may be adduced to contradict the agreement contained in a written document which is the only contract to which the finance company was a party. The agreement is a written agreement with Mr Durlabh Patel. The argument seeks to contradict this and make it an agreement with the rogue. It is argued that

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other evidence is always admissible to show who the parties to an agreement are. Thus, if the contents of the document are, without more, insufficient unequivocally to identify the actual individual referred to or if the identification of the party is non-specific, evidence can be given to fill any gap. Where the person signing is also acting as the agent of another, evidence can be adduced of that fact. None of this involves the contradiction of the document: *Young* v. *Schuler* 11 QBD 651, which was a case of an equivocal agency signature and it was held that evidence was admissible that the signature was also a personal signature —'evidence that he intended to sign in both capacities … does not contradict the document and is admissible' (per Cotton LJ at p. 655). But it is different where the party is, as here, specifically identified in the document: oral or other extrinsic evidence is not admissible. Further, the Rogue was no one's agent (nor did he ever purport to be). The rule that other evidence may not be adduced to contradict the provisions of a contract contained in a written document is fundamental to the mercantile law of this country; the bargain is the document; the certainty of the contract depends on it. The relevant principle is well summarised in *Phipson on Evidence*, 15th edn (2000) pp. 1165–1166, paras 42-11 and 42-12:

> 'when the parties have deliberately put their agreement into writing, it is conclusively presumed between themselves and their privies that they intend the writing to form a full and final statement of their intentions, and one which should be placed beyond the reach of future controversy, bad faith or treacherous memory.'

… This rule is one of the great strengths of English commercial law and is one of the main reasons for the international success of English law in preference to laxer systems which do not provide the same certainty. …

50. The argument also fails on another ground. There was no consensus ad idem between the finance company and the rogue. Leaving on one side the fact that the rogue never had any intention himself to contract with the finance company, the hire-purchase 'agreement' to which Mr Hudson pins his argument was one purportedly made by the acceptance by the finance company, by signing the creditor's box in the form, of a written offer by Mr Durlabh Patel to enter into the hire-purchase agreement. This faces Mr Hudson with a dilemma: either the contract created by that acceptance was a contract with Mr Durlabh Patel or there was no consensus ad idem, the rogue having no honest belief or contractual intent whatsoever and the finance company believing that it was accepting an offer by Mr Durlabh Patel. On neither alternative was there a hire-purchase agreement with the rogue. …

54. It follows that the appeal must be dismissed and the majority judgment of the Court of Appeal affirmed.

55. But, before I leave this case, I should shortly summarise why the argument of the appellant's counsel was so mistaken. The first reason was that they approached the question as if it was simply a matter of sorting out the common law authorities relating to the sale of goods. They did not treat it as a matter of applying a statutory exception to the basic common law rule, nemo dat quod non habet. Further, they did not analyse the structure of the overall transaction and the consumer credit agreement within it. Accordingly, they misrepresented

the role of the dealer, wrongly treating him as the contracting agent of the finance company which he was not. They never analysed the terms of the written document and had no regard at all to the offer and acceptance clause it contained which, if there was any contract between a 'debtor' and the finance company, governed their relationship and which expressly set out the only way in which such a contract could come into existence. They made submissions which contradicted the express written contract and were therefore contrary to principle and long established English mercantile law. They submitted that *Cundy* v. *Lindsay* (1878) 3 App Cas 459 was wrongly decided and should be overruled, substituting for it a general rule which, in disregard of the document or documents which constitute the agreement (if any), makes everything depend upon a factual enquiry into extraneous facts not known to both of the parties thus depriving documentary contracts of their certainty. They sought to convert a direct documentary contract with the finance company into a face to face oral contract made through the dealer as the contracting agent of the finance company, notwithstanding that the dealer was never such an agent of the finance company. Finally they sought, having by-passed the written contract, to rely upon authorities on oral contracts for the sale of goods, made face to face and where the title to the goods had passed to the 'buyer', notwithstanding that this was a documentary consumer credit transaction not a sale and, on any view, no title had ever passed to R. In the result they have invited a review of those authorities by reference to the particular facts of each of them. They have sought to draw your Lordships into a discussion of the evidential tools, eg rebuttable presumptions of fact and the so-called face-to-face 'principle', used by judges in those cases to assist them in making factual decisions … notwithstanding that the present case concerns the construction of a written contract. They forget that the, presently relevant, fundamental principles of law to be applied—consensus ad idem, the correspondence of the contractual offer and the contractual acceptance, the legal significance of the use of a written contract—are clear and are not in dispute. Inevitably over the course of time there have been decisions on the facts of individual 'mistaken identity' cases which seem now to be inconsistent; the further learned, but ultimately unproductive, discussion of them will warm academic hearts. But what matters is the principles of law. They are clear and sound and need no revision. To cast doubt upon them can only be a disservice to English law. Similarly, to attempt to use this appeal to advocate, on the basis of continental legal systems which are open to cogent criticism, the abandonment of the soundly based nemo dat quod non habet rule (statutorily adopted) would be not only improper but even more damaging.

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## Lord Phillips of Worth Matravers

178. The correct approach in the present case is to treat the agreement as one concluded in writing and to approach the identification of the parties to that agreement as turning upon its construction. The particulars given in the agreement are only capable of applying to Mr Patel. It was the intention of the rogue that they should identify Mr Patel as the hirer. The hirer was so identified by Shogun. Before deciding to enter into the agreement they checked that Mr Patel existed and that he was worthy of credit. On that basis they decided to

> contract with him and with no-one else. Mr Patel was the hirer under the agreement. As the agreement was concluded without his authority, it was a nullity. The rogue took no title under it and was in no position to convey any title to Mr Hudson.
>
> 179. For these reasons I would dismiss this appeal.
>
> ***Lord Walker of Gestingthorpe*** gave a speech in which he agreed with the speech of Lord Hobhouse.
> ***Lord Millett*** dissented.

## Commentary

When considering the implications of this case it is important to have regard to the transactional structure that was adopted by the parties. Hire purchase is a technique used to provide finance typically for purchasers who do not have immediate access to cash in order to acquire the goods. It is important to realize that there is generally no direct contractual relationship between the car dealer and the customer in a standard hire-
p. 535 purchase transaction. ↵ What happens is that the car dealer generally sells the car to the finance company and the finance company then enters into a transaction with the customer on hire-purchase terms. Hire purchase is a contract under which the finance company agrees to hire the goods to the hirer for a period of time and the hirer in turn promises to pay rental to the finance company (often on a monthly basis). The rental is calculated in such a way that it covers the cost of the acquisition of the asset and also gives the finance company a return on the money which it has advanced to the hirer. At the end of the period of hire the hirer will be given an option to purchase the asset, generally for a nominal sum. The hirer will generally exercise the option so that he or she then acquires ownership of the asset but he or she is under no legal obligation to do so. Should the hirer decide not to exercise the option then property in the goods will remain with the finance company. The fact that the contract is between the finance company and the customer and not between the dealer and the customer explains why it is that the litigation in the present case involved the finance company and not the dealer. The real interest of the finance company in the present case therefore lay in ensuring that it obtained an adequate return on its outlay and in ensuring that it had adequate security against debtor default. So it was not the case that the finance company wished to deal only with Mr Durlabh Patel; it was simply that their credit check revealed that Mr Durlabh Patel's credit history was satisfactory for the purpose of entering into the transaction.

The critical issue, in terms of the difference of opinion between the majority and the minority, is the relationship between *Cundy* v. *Lindsay*, on the one hand, and cases such as *Phillips* v. *Brooks* and *Lewis* v. *Averay* on the other hand. The view of the minority was that the cases were irreconcilable and that it was *Cundy* which should be departed from (see, in particular, the speech of Lord Nicholls at [33]–[36]). In concluding that the cases could not be reconciled, the minority chose to focus upon the nature of the mistake made and they pointed out that the mistake made in cases such as *Cundy* v. *Lindsay* and *Phillips* v. *Brooks* was the same, in the sense that in both cases the seller entered into the transaction under the misapprehension that the person with whom he was corresponding (or, in the case of the oral contract, the person with whom he was talking) was one person, of whose name he was aware, when in fact he was a third party.

The majority, by contrast, affirmed the correctness of *Cundy* (but at the same time did not find it necessary to resolve conclusively the status of cases such as *Phillips* and *Lewis*). The decision of the majority can be explained on one of two grounds. The first approach involves the drawing of a hard and fast distinction

between written contracts and contracts which have not been made in writing. The second approach avoids drawing such distinctions and instead returns to the application of the general objective test of contract formation.

The basis of the first approach lies in the traditional refusal of English law to allow extrinsic evidence to be adduced for the purpose of contradicting a term of a written contract. This justification emerges most clearly in the speech of Lord Hobhouse at [49], where the rule is stated to be 'one of the great strengths of English commercial law'. There are, however, two difficulties with this approach. The first is that it requires that a hard and fast distinction be drawn between contracts which are made in writing and contracts which are not. This approach runs into the difficulties which Lord Nicholls exposes in his speech at [33]. The second difficulty is that the significance of the parol evidence rule has diminished greatly in recent years, and it may be doubted whether Lord Hobhouse's analysis reflects the drift of the modern law (see, for example, D McLauchlan (2005) 121 *LQR* 9).

The second approach avoids drawing such hard and fast distinctions and instead relies upon an application of the general objective test of contract formation. If a party makes a mistake as to the terms of the agreement,
p. 536 and the counterparty knows of that mistake at the ↵ time of entry into the agreement, the counterparty cannot rely upon the objective appearance of agreement in order to prove the existence of a binding contract. It is important to note in this connection that the mistake must be one that relates to the *terms of the agreement*. It is therefore necessary for the party seeking to deny the existence of a contract to prove that the mistake made was one that concerned the identity of the contracting party and that the identity of that party was a term of the contract. However, it can be difficult to prove that the identity of the contracting party was a term of the contract and a court may be readier to reach this conclusion where the contract between the parties has been reduced to writing. Support for the latter approach can be found in the following extract (R Stevens, 'Objectivity, Mistake and the Parol Evidence Rule' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press, 2007), pp. 101, 112–114):

> Whilst it tends to be the case that parties who deal face to face simply intend to contract with the person physically in front of them, without making it part of the deal that one of them is any particular person, there is no necessary reason why this should always be so. Conversely, where the parties deal at arm's length, it will *tend* to be the case that the identity of one or both parties is part of the contract itself, but this need not be so. It is perfectly possible to intend to contract with a person at a particular address, careless as to whom they may actually be.
>
> There are cases on either side of the line, some saying that on the true construction of the negotiations the party's identity is part of the bargain and some saying that it is not. This is exactly what is to be expected, just as sometimes it will be a term of a bargain for the sale of oats that they are of a certain age, and sometimes it will not. There is no single litmus test by which a factual task of construing the negotiations can be resolved and it is a mistake to try to look for one. …
>
> [He then turned to consider the nature of the alleged bargain struck between the parties in *Shogun* v. *Hudson* and observed that the documentation evidenced that the finance company was only prepared to deal with the person whose credit rating it had checked so that it was, as Lord Hobhouse had correctly concluded, a fundamental term of the agreement that the hirer was a particular individual and continued.]
>
> A rule which turned upon 'whether the transaction is negotiated face to face or by letter, or by fax, or by e-mail, or over the telephone or by video link or video telephone' would indeed be impossible to defend. However, this does not represent the law. There is no bright line rule, but the fact that the parties dealt face to face is some indication, albeit not necessarily decisive, as to what was intended. It is pointless to search for a single criterion by which to determine whether the counterparty's identity is part of the deal struck, just as it would be pointless to try to come up with a simple formula as to when it is or is not part of a deal for the purchase of oats that they are of a certain age. It is all a matter of construction of the negotiations, and the relevant factors are diverse. A lengthy review of the authorities is unhelpful therefore, and Lord Hobhouse rightly refused to engage in this exercise.

As Professor Stevens notes, Lord Hobhouse found it unnecessary to consider in any detail the line of authority concerned with contracts concluded as a result of face-to-face negotiations. However, the rest of their Lordships did do so. The general picture which emerges from their review of the cases is that they largely depend on their own facts and that there is a presumption, which is a strong one, that a contracting party intends to deal with the party who is present in front of him and that it will not suffice for a party to assert
p. 537 that there is no contract in existence between the parties because he believed that the person in front of him ↵ was, in fact, somebody else. Thus *Phillips* v. *Brooks* and *Lewis* v. *Averay* were cited with approval by their Lordships. *Ingram* v. *Little* fared rather less well. Lord Millett (at [87]) stated that it should be 'overruled' and Lord Walker (at [185]) was similarly of the view that it was 'wrongly decided'. Lord Hobhouse expressed no view on the case, simply observing (at [47]) that it was 'not pertinent' to the issue that arose on the facts of the present case. The attitude of Lord Nicholls and Lord Phillips is more difficult to discern. Lord Nicholls discussed the case at [20]–[22]. While he clearly preferred the reasoning of Devlin LJ to the reasoning of the majority (see [21]–[22]) he stopped short of saying that the case was wrongly decided. Lord Phillips discussed the case at [142]–[147] and, while he referred to the 'powerful dissenting judgment' of Devlin LJ, he too

stopped short of saying that the case had been wrongly decided. The reluctance of their Lordships to resolve the status of these cases conclusively can be explained in large part because they were held to depend so heavily upon their own facts. If the cases ultimately depend upon their own particular facts, what useful purpose is served by stating that a particular case, decided sixty years ago, was wrongly decided? What would appear to matter is the presumption that is applied by the court. The presumption is one of fact (not law) and it is a difficult one to rebut. In particular, it will not suffice for a party to prove that he intended to deal with an identifiable third party and not with the party who was in fact in front of him. But it may be possible to rebut the presumption on certain exceptional facts. An example may be where the rogue impersonates an individual known to the claimant (as in the example of Isaac and Jacob given by Lord Walker at [187]). All of this tends to lend support to the view of Professor Stevens that these cases are concerned with the construction of the negotiations that took place between the parties and that, when deciding in a particular case whether the identity of a contracting party is a term of the contract, the court must have regard to all the facts and circumstances of the case.

Two final points remain to be made. The first relates to the role of the *nemo dat quod non habet*[2] maxim. The litigation in the present case was conducted between two innocent parties who had been defrauded by a third party. The claim brought by the finance company was, in essence, that the defendant was in possession of their car and that he should return it to them or pay its value. In many parts of the world this would be regarded as a property claim because the claim of the finance company is one to recover property which they say belongs to them. The defendant, by contrast, refuses to return the car because he says that he is the owner of the car, having bought it in good faith from his seller. Thus we have two parties, both of whom are claiming ownership of the car. Legal systems strike the balance between these two claims in different ways. English law starts from the maxim *nemo dat quod non habet*; that is to say you cannot give what you do not have. Thus if the rogue did not have ownership of the car, he had no ownership to give to the defendant. It was for this reason that the distinction between a void and a voidable contract was so important. If the contract was void then the rogue at no time acquired ownership of the car and so had nothing to transfer to the defendant. On the other hand, if the contract between the finance company and the rogue was merely voidable for fraud, the rogue would acquire title to the car until such time as the contract between the rogue and the finance company was set aside and so he would have something to give to the purchaser at least before the contract with the original seller was set aside. The onus was on the defendant to prove that one of the exceptions to the *nemo dat* rule was applicable on the facts of the case and the majority concluded that no such exception was applicable. Other legal systems take a different perspective. They start from the assumption that the third
p. 538 party should be protected and the maxim in which this ↵ is customarily expressed is *possession vaut titre*. In essence the minority in the present case preferred the interest of the third party purchaser and so sought to carve out an additional exception to the *nemo dat* rule. But their attempt to do so failed. As Lord Hobhouse pointed out (at [42]), the *nemo dat* rule has been enshrined in what is now the Sale of Goods Act 1979 and it was not open to the judiciary to abrogate the rule or modify it by the creation of a further exception (contrast the view of Lord Nicholls at [35]).

This leads on to the final point, which concerns whether or not the law ought to protect a party in the position of the claimant finance house. They can be said to have assumed the risk that their debtor would not pay and, given that they would have had to accept the risk if the debtor had told lies about the state of his finances, why should they be entitled to throw the risk onto the innocent third party purchaser in the case where the debtor

tells lies, not about the state of his bank account, but his name? This observation may lie behind the perception of Lord Nicholls and Lord Millett that the third party purchaser is generally more deserving of protection than the seller who allows the buyer to assume possession of the goods on credit terms. Against this, it can be argued that any such reform should come from Parliament and should not be created by the judiciary in response to the facts of a particular case. Resolution of the conflicting policy issues requires careful consideration of the issues and that consideration can only be provided by Parliament, possibly after consideration of the issues by the Law Commission. However, the practical likelihood of Parliament finding the time to consider this issue is low.

One difficulty with the current law is its 'all-or-nothing' nature; either the claimant recovers in full or he recovers nothing. An alternative approach might be to engage in loss-splitting so that the loss occasioned by the fraud of the rogue is shared between the claimant and the defendant. Such a proposal was made by Devlin LJ in his dissenting judgment in *Ingram* v. *Little* in the following terms:

> There can be no doubt, as all this difference of opinion shows, that the dividing line between voidness and voidability, between fundamental mistake and incidental deceit, is a very fine one. That a fine and difficult distinction has to be drawn is not necessarily any reproach to the law. But need the rights of the parties in a case like this depend on such a distinction? The great virtue of the common law is that it sets out to solve legal problems by the application to them of principles which the ordinary man is expected to recognise as sensible and just; their application in any particular case may produce what seems to him a hard result, but as principles they should be within his understanding and merit his approval. But here, contrary to its habit, the common law, instead of looking for a principle that is simple and just, rests on theoretical distinctions. Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part? The true spirit of the common law is to override theoretical distinctions when they stand in the way of doing practical justice. For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fault or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part. In saying this, I am suggesting nothing novel, for this sort of observation has often been made. But it is only in comparatively recent times that the idea of giving to a court power to apportion loss has found a
> p. 539 place in our law. I have in mind particularly the Law Reform Acts of 1935, 1943 ↵ and 1945, that dealt respectively with joint tortfeasors, frustrated contracts and contributory negligence. These statutes, which I believe to have worked satisfactorily, show a modern inclination towards a decision based on a just apportionment rather than one given in black or in white according to the logic of the law. I believe it would be useful if Parliament were now to consider whether or not it is practicable by means of a similar act of law reform to provide for the victims of a fraud a better way of adjusting their mutual loss than that which has grown out of the common law.

This proposal was, however, considered and rejected by the Law Reform Committee in their Twelfth Report (*Transfer of Title to Chattels* (Cmnd 2958, 1966)) on the ground that it would introduce too much uncertainty and complexity into the law (particularly in the case where the asset is the subject of a number of sales before the fraud is discovered).

## 16.4 Common Mistake

The law in relation to common mistake (that is to say a mistake that is shared by both parties to the contract) is dominated by two cases. The first is the decision of the House of Lords in *Bell* v. *Lever Bros Ltd* [1932] AC 161. The second was, until relatively recently, the decision of the Court of Appeal in *Solle* v. *Butcher* [1950] 1 KB 671. But *Solle* has been effectively overruled by the Court of Appeal in *Great Peace Shipping Ltd* v. *Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679. *Great Peace* has therefore dislodged *Solle* and has now assumed the role of a leading case.

The central proposition of law can be simply stated: in order to set aside a contract on the ground of common mistake, the mistake must be 'fundamental'. The difficulty is the obvious one, namely the meaning in this context of the word 'fundamental'. It would appear that the answer depends in part upon the nature of the mistake that has been made. Where the mistake is one as to the existence of the subject matter of the contract (see section 6 of the Sale of Goods Act 1979 and *Couturier* v. *Hastie* (1856) 5 HLC 673, discussed in *Great Peace*, later in this section, at [51]–[55]) or its identity (see *Diamond* v. *British Columbia Thoroughbred Breeders' Society* (1966) 52 DLR (2d) 146) then the mistake is more likely to be fundamental than in the case where the mistake is one as to the quality of the subject matter of the contract (*Bell* v. *Lever Bros Ltd* [1932] AC 161). But it is not the case that a mistake as to the existence or identity of the subject matter of the contract will always constitute a fundamental mistake, whereas a mistake as to quality will never be fundamental. Cases can be found in which a mistake as to the existence of the subject matter of the contract has not sufficed to set aside a contract (see *McRae* v. *Commonwealth Disposals Commission* (1951) 84 CLR 377, discussed in *Great Peace*, later in this section, at [77]–[80]) and cases can also be found in which a mistake as to quality has been held to be sufficiently fundamental to set aside a contract (see *Scott* v. *Coulson* [1903] 2 Ch 349, discussed in *Great Peace*, later in this section, at [87]–[88]). Prior to the decision of the Court of Appeal in *Great Peace* it was also necessary to distinguish between the test applicable at law and the test applicable in equity because the test for a fundamental mistake in equity was more relaxed than that applicable at law. *Great Peace* has, however,
p. 540 overruled this line of authority in equity and concluded that the answer to the question whether or not ↵ a mistake is fundamental is the same, both at law and in equity. However, given the bold and controversial nature of the step taken by the Court of Appeal, it is necessary to devote some attention to *Solle* v. *Butcher* and the line of cases which it generated. It is too soon to cast them into oblivion. The rise and fall of common mistake in equity will be considered in 16.4, after we have examined the great case of *Bell* v. *Lever Bros* and its interpretation by the Court of Appeal in *Great Peace*.

***Bell v. Lever Brothers Ltd***
[1932] AC 161, House of Lords

Lever Brothers Ltd controlled the Niger Company. Lever Brothers agreed to employ Bell to act as the chairman, and Snelling to act as the vice-chairman, of the board of directors of Niger. Bell and Snelling secretly speculated in cocoa, a commodity in which Niger dealt. Their conduct was in breach of their contracts of employment and would have justified Lever Brothers terminating their services. Later, Niger merged with the African and Eastern Trade Corporation so that the services of Bell and Snelling were no longer required. In ignorance of their breaches of duty, Lever Brothers agreed to pay £30,000 to Bell and £20,000 to Snelling as compensation for terminating their contracts of employment.

The jury found that if Lever Brothers had known of the breaches it would have terminated the contracts of Bell and Snelling without paying compensation. When Lever Brothers discovered the breaches it brought an action claiming rescission of the compensation agreements on the grounds of fraudulent misrepresentation and unilateral mistake induced by fraud but not on the ground of 'mutual' mistake. At trial the jury found that Bell and Snelling had not acted fraudulently. However the trial judge held that the pleadings raised the issue of mutual mistake and that the compensation agreements were void, having been made under a common mistake as to the legal relations between the parties, each party believing, contrary to the truth, that the one was entitled to claim and the other was bound to pay compensation. The Court of Appeal held that if the issue of mutual mistake was not raised, the pleadings should be treated as amended in order to raise it and upheld the decision of the trial judge. On appeal the House of Lords held that the issue of mutual mistake was not raised by the pleadings and they could not be amended to raise it. However on the basis that the issue was raised, it was held by a majority (Viscount Haldane and Lord Warrington of Clyffe dissenting) that the compensation agreements were not void as the mutual mistake related not to the subject matter but to the quality of the employment contracts.

## Lord Warrington of Clyffe

[dissenting on the question whether the compensation agreements were void for mistake]

It is in my opinion clear that each party believed that the remunerative offices, compensation for the loss of which was the subject of the negotiations, were offices which could not be determined except by the consent of the holder thereof, and further believed that the other party was under the same belief and was treating on that footing.

p. 541 The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements that the service contracts were undeterminable except by agreement ↵ was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made, or whether it was only a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration.

With the knowledge that I am differing from the majority of your Lordships, I am unable to arrive at any conclusion except that in this case the erroneous assumption was essential to the contract which without it would not have been made.

It is true that the error was not one as to the terms of the service agreements, but it was one which, having regard to the matter on which the parties were negotiating—namely, the terms on which the service agreements were to be prematurely determined and the compensation to be paid therefor, was in my opinion as fundamental to the bargain as any error one can imagine.

### Lord Atkin

Was the agreement of March 19, 1929, void by reason of a mutual mistake of Mr D'Arcy Cooper and Mr Bell?. ...

My Lords, the rules of law dealing with the effect of mistake on contract appear to be established with reasonable clearness. If mistake operates at all it operates so as to negative or in some cases to nullify consent. The parties may be mistaken in the identity of the contracting parties, or in the existence of the subject matter of the contract at the date of the contract, or in the quality of the subject matter of the contract. These mistakes may be by one party, or by both, and the legal effect may depend upon the class of mistake above mentioned. Thus a mistaken belief by A that he is contracting with B, whereas in fact he is contracting with C, will negative consent where it is clear that the intention of A was to contract only with B. So the agreement of A and B to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel. I apprehend that if the seller with knowledge that a chattel was destroyed purported to sell it to a purchaser, the latter might sue for damages for non-delivery though the former could not sue for non-acceptance, but I know of no case where a seller has so committed himself. This is a case where mutual mistake certainly and unilateral mistake by the seller of goods will prevent a contract from arising. Corresponding to mistake as to the existence of the subject matter is mistake as to title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell to him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is *naturali ratione inutilis*.[3] This is the case of *Cooper* v. *Phibbs* LR 2 HL 149, where A agreed to take a lease of a fishery from B, though contrary to the belief of both parties at the time A was tenant for life of the fishery and B appears to have had no title at all. To such a case Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Applied to the context the statement is only subject to the criticism that the agreement would appear to be void rather than voidable. Applied to mistake as to rights generally it would appear to be too wide. ↵ Even where the vendor has no title, though

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both parties think he has, the correct view would appear to be that there is a contract: but that the vendor has either committed a breach of a stipulation as to title, or is not able to perform his contract. The contract is unenforceable by him but is not void.

Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law. …

We are now in a position to apply to the facts of this case the law as to mistake so far as it has been stated. It is essential on this part of the discussion to keep in mind the finding of the jury acquitting the defendants of fraudulent misrepresentation or concealment in procuring the agreements in question. Grave injustice may be done to the defendants and confusion introduced into the legal conclusion, unless it is quite clear that in considering mistake in this case no suggestion of fraud is admissible and cannot strictly be regarded by the judge who has to determine the legal issues raised … [O]n the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known as the fact is that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty. A agrees to take on lease or to buy from B an unfurnished dwelling-house. The house is in fact uninhabitable. A would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public thoroughfare: unknown to A, but known to B, it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy. All these cases involve hardship on A and benefit B, as most people would say, unjustly. They can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e. agree in the same terms on the same subject matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

This brings the discussion to the alternative mode of expressing the result of a mutual mistake. It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties—namely, that the

> contract could not be terminated till the end of the current term. The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties, express or implied. They have agreed, but on what terms? One term may be
> p. 543 that unless ↵ the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect. With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally accepted as underlying the principle of the frustration cases is contractual, an implied condition. Sir John Simon [counsel for Lever Bros] formulated for the assistance of your Lordships a proposition which should be recorded: 'Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e. it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact'.
>
> I think few would demur to this statement, but its value depends upon the meaning of 'a contractual assumption', and also upon the true meaning to be attached to 'basis', a metaphor which may mislead. When used expressly in contracts, for instance, in policies of insurance, which state that the truth of the statements in the proposal is to be the basis of the contract of insurance, the meaning is clear. The truth of the statements is made a condition of the contract, which failing, the contract is void unless the condition is waived. The proposition does not amount to more than this that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contract is avoided if the assumption is not true. But we have not advanced far on the inquiry how to ascertain whether the contract does contain such a condition. Various words are to be found to define the state of things which make a condition. 'In the contemplation of both parties fundamental to the continued validity of the contract', 'a foundation essential to its existence', 'a fundamental reason for making it', are phrases found in the important judgment of Scrutton LJ in the present case. The first two phrases appear to me to be unexceptionable. They cover the case of a contract to serve in a particular place, the existence of which is fundamental to the service, or to procure the services of a professional vocalist, whose continued health is essential to performance. But 'a fundamental reason for making a contract' may, with respect, be misleading. The reason of one party only is presumedly not intended, but in the cases I have suggested above, of the sale of a horse or of a picture, it might be said that the fundamental reason for making the contract was the belief of both parties that the horse was sound or the picture an old master, yet in neither case would the condition as I think exist. Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are 'necessary' for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts … We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject matter as it was in the original state of facts? To apply the principle to the infinite combinations of facts that

arise in actual experience will continue to be difficult, but if this case results in establishing order into what has been a somewhat confused and difficult branch of the law it will have served a useful purpose.

I have already stated my reasons for deciding that in the present case the identity of the subject matter was not destroyed by the mutual mistake, if any, and need not repeat them. …

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### Lord Thankerton

Turning … to the question of mutual error or mistake, I think that the respondents' contention may be fairly stated as follows—namely, that in concluding the agreements of March, 1929, all parties proceeded on the mistaken assumption that the appellants' service agreements were not liable to immediate termination by Lever Brothers by reason of the appellants' misconduct, and that such common mistake involved the actual subject matter of the agreements, and did not merely relate to a quality of the subject matter. …

The phrase 'underlying assumption by the parties', as applied to the subject matter of a contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract; in my opinion it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject matter. In the present case, however probable it may be, we are not necessarily forced to that assumption. *Cooper* v. *Phibbs* LR 2 HL 149, 170 is a good illustration. … There are many other cases to the same effect, but I think that it is true to say that in all of them it either appeared on the face of the contract that the matter as to which the mistake existed was an essential and integral element of the subject matter of the contract, or it was an inevitable inference from the nature of the contract that all the parties so regarded it.

In the present case the terms of the contracts throw no light on the question, and, as already indicated, I do not find sufficient material to compel the inference that the appellants, at the time of the contract, regarded the indefeasibility of the service agreements as an essential and integral element in the subject matter of the bargain.

***Viscount Haldane*** agreed with the judgment of Lord Warrington of Clyffe. ***Lord Blanesburgh*** stated that he was in 'entire accord' with the conclusions of Lord Atkin and Lord Thankerton.

## Commentary

Lord Atkin uses the language of 'mutual' rather than 'common' mistake but the type of mistake under consideration was a common mistake in that both parties entered into the compensation agreements in the belief that Lever Bros were bound to make the payment and that Bell and Snelling were entitled to receive it. In the first extracted paragraph from his judgment Lord Atkin distinguishes between three different categories of mistake, namely (i) a mistake as to the identity of the contracting parties, (ii) a mistake as the existence of the subject matter of the contract, and (iii) a mistake as to the quality of the subject matter of the contract. While he acknowledges that mistakes in the first two categories can suffice to set aside a contract, he

recognizes that mistakes in the third category raise 'more difficult questions'. It is important to note the examples given by Lord Atkin, earlier in this section, of mistakes as to the quality of the subject matter of the contract which would not suffice, in his opinion, to entitle a party to set aside the contract. Particularly striking in this respect is his example of the case of the sale of a picture which both parties mistakenly believe to be 'the work of an old master'. In his view the buyer in such a case has no remedy in the absence of a misrepresentation or a contractual warranty as to the provenance of the picture (see *Leaf* v. *International Galleries Ltd* [1950] 2 KB 86).

Given the size of the mistake made by Lever Bros, why did the House of Lords conclude that the mistake was
p. 545 not a 'fundamental' mistake? The most convincing answer to this ↵ question has been provided by Catharine MacMillan in her detailed historical review of the case (see C MacMillan, 'How Temptation Led to Mistake: An Explanation of *Bell* v. *Lever Bros Ltd*' (2003) 119 *LQR* 625). Professor MacMillan points out that Lever Brothers' primary claim against Bell and Snelling was based on fraud. However, Lever Brothers failed to persuade the jury that Bell and Snelling had induced them to enter into the termination agreements by fraudulent misrepresentation or by fraudulent concealment of their misconduct in trading in cocoa on their own account while employed by the Niger Company. Thus she concludes (at p. 658) that the case was a 'failed case of fraudulent misrepresentation and concealment' and that 'mistake was pleaded in the alternative and left largely unaddressed during the conduct of the trial'. One consequence of the subsidiary nature of the mistake claim was that 'the evidence' in relation to mistake 'was not what it could have been'.

Professor MacMillan further points out that the facts of the case do not support many of the explanations that have been offered in defence of the conclusion that the mistake made by Lever Brothers was not 'fundamental'. One justification that has been offered is that the mistake was not sufficiently fundamental because it was a mistake that related 'primarily to cost', in the sense that Lever Brothers wished to terminate the agreements with Bell and Snelling without paying them any compensation. But she points out (at p. 657) that this explanation does not work because 'money … was not the object of this law suit'. The law suit was brought 'upon principle and not for profit'. The principle was the maintenance of standards of honesty and integrity in the running of the company. The case was decided at a time when the ownership of a company was beginning to be separated from the control of the company. Bell and Snelling were part of a 'new class of professional managers' and Lever Brothers wished to ensure that they adhered to appropriate standards of conduct in the running of the business. Thus the litigation was not about money and any attempt to capture the essence of the case in monetary terms is doomed to failure. Secondly, it has been suggested that Lever Brothers obtained their object in that they secured the co-operation of Bell and Snelling in the corporate restructure upon which Lever Brothers were then engaged. But, as Professor MacMillan points out (at p. 657), this is not consistent with the facts of the case in that Bell and Snelling were not active in the negotiations that led to the amalgamation. So they did not require any inducement to agree to participate in the restructure.

This leaves us with two principal potential explanations of the case. The first is that Lever Brothers 'got exactly what they bargained for', namely 'the termination of the agreements'. Professor MacMillan rejects this explanation (at p. 658) on the ground that the mistake made by Lever Brothers did not merely make the bargain less desirable to Lever Brothers: the bargain would not have been made had Lever Brothers known the true situation. Here it must be remembered that Lever Brothers brought the claim on a point of principle and so it could not be said in any realistic sense that they had obtained what they bargained for. The final

explanation for the case is 'that the principle was applied as it was because the case marks something of a high water mark for sanctity of contract'. Thus Professor MacMillan points out (at p. 658) that the case was decided at the beginning of the Great Depression and that depression would last until the outbreak of the Second World War. At this point in history the courts did place considerable emphasis on the importance of sanctity of contract. But, as she points out, sanctity of contract 'is more of an explanation for the decision' than 'a justification for its result'.

Professor MacMillan concludes (at p. 658) that 'an examination of the historical surrounding to the facts behind the case of *Bell* v. *Lever Bros* reveals that the case is not the stable bedrock necessary to support a functioning doctrine of mistake'. By this it would appear that she means that regard must be had to the
p. 546 particular facts and circumstances of the ↵ case. These facts and circumstances include the following: (i) Lever Brothers' principal claim was based on fraud, misrepresentation, and concealment and that claim failed; (ii) mistake was pleaded as an afterthought and had not been properly thought through by counsel who 'found the mistake cases difficult to reconcile and apply'; (iii) over the years Bell and Snelling had rendered 'magnificent services' to the company and had done an 'outstanding job'; (iv) the profit which Bell and Snelling had made when trading on their own account was 'comparatively small', especially when seen against the severance payments which they stood to lose; and (v) Lever Brothers had benefited considerably from their endeavours on behalf of the company. These circumstances combined to paint for their Lordships the following picture of Bell and Snelling (at pp. 651–652):

> They were presented with two gentlemen who had been absolutely exonerated of fraud. These men had rendered exceptional service to the Niger; they were primarily responsible for its transformation from a failing concern to financial success. Their only error was to succumb, briefly, to temptation. They did not deny that this was a mistake. Their profits were modest, their conduct did not harm their company in any way, and when they realised their error, they made a clean breast of it to Lever Brothers. The conduct of Bell and Snelling was not exemplary, but it was not so egregiously awful as to strip them of all compensation. Bell, in failing health, would never work again. It appears that in the view of the majority, at the end of the day, the breach committed by Bell and Snelling did not justify the termination of their employment agreements. When one reads the judgments with this approach in mind, the opinions with regard to contractual mistake are understood. The majority found that the mistake was not sufficiently fundamental to vitiate the termination agreements. The problem is that while this may be the correct result in the case, it produces unfortunate law with regard to contractual mistake and also as to the standards of business conduct.

Perhaps the most appropriate conclusion to be drawn from *Bell* was summed up by Professor MacMillan in the following passage:

> [T]he reason that the mistake was not considered sufficiently fundamental in this case was because of the peculiar and exceptional circumstances that gave rise to the termination agreements. Hard cases really do make bad law.

The circumstances in which a mistake may be held to be 'fundamental' were considered further by the Court of Appeal in:

***Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd***
[2002] EWCA Civ 1407, [2003] QB 679, Court of Appeal

The defendant salvors ('the appellants') agreed to provide salvage services for a vessel, the *Cape Providence*, which was in serious difficulty in the South Indian Ocean. The defendants contacted Ocean Routes in order to discover the identity of vessels in the vicinity of the stricken vessel. They were told that the *Great Peace* was proximate to the vessel. The defendants contacted the owners of the *Great Peace*, the claimants, by telephone and an oral agreement was made under which the
p. 547 defendants agreed to hire the *Great Peace* for ↵ a minimum of five days. During that conversation no mention was made of the position of the *Great Peace*. The defendants believed that the vessels were 35 miles apart when in fact they were 410 miles apart. The defendants did not attempt immediately to set aside the agreement when they discovered the true state of affairs. They did so only when they found that another vessel was available to provide the necessary services. The claimants, the owners of the *Great Peace*, sued for the five-day hire but the defendants refused to pay on two grounds: (i) that the agreement was void at common law for fundamental mistake; and (ii) that the agreement was voidable in equity. Both defences were rejected by Toulson J and by the Court of Appeal. Judgment was entered for the claimants.

## Lord Phillips of Worth Matravers

[giving the judgment of the court]

50. It is generally accepted that the principles of the law of common mistake expounded by Lord Atkin in *Bell* v. *Lever Brothers* were based on the common law. … The first step is to identify the nature of the common law doctrine of mistake that was identified, or established, by *Bell* v. *Lever Brothers*.

51. Lord Atkin and Lord Thankerton were breaking no new ground in holding void a contract where, unknown to the parties, the subject matter of the contract no longer existed at the time that the contract was concluded. The Sale of Goods Act 1893 was a statute which set out to codify the common law. Section 6, to which Lord Atkin referred, provided:

> 'When there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.'

52. Judge Chalmers, the draftsman of the Act, commented in the first edition of his book on the Act, The Sale of Goods Act 1893 (1894) p. 17: 'The rule may be based on the ground of mutual mistake, or on the ground of impossibility of performance.'

53. He put at the forefront of the authorities that he cited in support *Couturier* v. *Hastie* (1856) 5 HL Cas 673. That case involved the sale of a cargo of corn which, unknown to the parties, no longer existed at the time that the contract was concluded. Other decisions where agreements were held not to be binding were *Strickland* v. *Turner* (1852) 7 Exch 208—the sale

of an annuity upon the life of a person who, unknown to the parties, had died, and *Pritchard* v. *Merchants' and Tradesman's Mutual Life Assurance Society* (1858) 3 CBNS 622—an insurance policy renewed in ignorance of the fact that the assured had died. …

55. Where that which is expressly identified as the subject of a contract does not exist, the contract will necessarily be one which cannot be performed. Such a situation can readily be identified. The position is very different where there is 'a mistake as to the existence of some quality of the subject matter which makes the thing without the quality essentially different from the thing as it was believed to be' (see *Bell* v. *Lever Bros Ltd* [1932] AC 161 at 218). In such a situation it may be possible to perform the letter of the contract. In support of the proposition that a contract is void in such circumstances, Lord Atkin cited two authorities, in which he said that the principles to be applied were to be found. The first was *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co* (1867) LR 2 QB 580. …

60. The other case to which Lord Atkin referred was *Smith* v. *Hughes* (1871) LR 6 QB 597 [see 2.2].

61. We conclude that the two authorities to which Lord Atkin referred provided an insubstantial
p. 548 basis for his formulation of the test of common mistake in relation to the quality of the subject matter of a contract. Lord Atkin advanced an alternative basis for his test: the implication of a term of the same nature as that which was applied under the doctrine of frustration, as it was then understood. In so doing he adopted the analysis of Scrutton LJ in the Court of Appeal. It seems to us that this was a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing. At the time of *Bell* v. *Lever Brothers* the law of frustration and common mistake had advanced hand in hand on the foundation of a common principle. Thereafter frustration proved a more fertile ground for the development of this principle than common mistake, and consideration of the development of the law of frustration assists with the analysis of the law of common mistake.

[He considered the development of the law of frustration and continued]

73. What do these developments in the law of frustration have to tell us about the law of common mistake? First that the theory of the implied term is as unrealistic when considering common mistake as when considering frustration. Where a fundamental assumption upon which an agreement is founded proves to be mistaken, it is not realistic to ask whether the parties impliedly agreed that in those circumstances the contract would not be binding. The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement.

74. In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the 'contractual adventure' which go beyond the terms that are expressly spelt out, in others it will not.

75. Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake.

76. If one applies the passage from the judgment of Lord Alverstone CJ in *Hobson* v. *Pattenden & Co* (1903) 19 TLR 186 … to a case of common mistake, it suggests that the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

77. The second and third of these elements are well exemplified by the decision of the High Court of Australia in *McRae* v. *Commonwealth Disposals Commission* (1951) 84 CLR 377. The Commission invited tenders for the purchase of 'an oil tanker lying on the Jourmaund Reef … said to contain oil'. The plaintiff tendered successfully for the purchase, fitted out a salvage expedition at great expense and proceeded to the reef. No tanker was to be found—it had never existed. The plaintiff claimed damages for breach of contract. The Commission argued that the contract was void because of a common mistake as to the existence of the tanker.

78. In the leading judgment Dixon and Fullagar JJ expressed doubt as to the existence of a doctrine of common mistake in contract. They considered that whether impossibility of performance discharged obligations, be the impossibility existing at the time of the contract or supervening thereafter, depended solely upon the construction of the contract. They went on, however, to consider the position if this were not correct. They observed that the common assumption that the tanker existed was one that was created by the Commission, without any reasonable grounds for believing that it was true. They held at p. 408:

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> '… a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party.'

79. They held (at p. 410) that, on its proper construction the contract included a promise by the Commission that the tanker existed in the position specified. Alternatively, they held that if the doctrine of mistake fell to be applied:

> 'then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground.'

80. This seems, if we may say so, an entirely satisfactory conclusion and one that can be reconciled with the English doctrine of mistake. That doctrine fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality. In *Associated Japanese Bank (International) Ltd* v. *Crédit du Nord SA* [1989] 1 WLR 255, 268 Steyn J observed:

> 'Logically, before one can turn to the rules as to mistake, whether at common law or in equity, one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.'

81. In *William Sindall plc* v. *Cambridgeshire CC* [1994] 1 WLR 1016 at 1035, Hoffmann LJ commented that such allocation of risk can come about by rules of general law applicable to contract, such as 'caveat emptor' in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser.

82. Thus, while we do not consider that the doctrine of common mistake can be satisfactorily explained by an implied term, an allegation that a contract is void for common mistake will often raise important issues of construction. Where it is possible to perform the letter of the contract, but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible, it will be necessary, by construing the contract in the light of all the material circumstances, to decide whether this is indeed the case. ...

84. Once the court determines that unforeseen circumstances have, indeed, resulted in the contract being impossible of performance, it is next necessary to determine whether, on true construction of the contract, one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract, and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one or other of the parties.

85. Circumstances where a contract is void as a result of common mistake are likely to be less
p. 550 common than instances of frustration. Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on true construction of the agreement, one or other will have undertaken responsibility for the mistaken state of affairs. This may well explain why cases where contracts have been found to be void in consequence of common mistake are few and far between.

86. Lord Atkin himself gave no examples of cases where a contract was rendered void because of a mistake as to quality which made 'the thing without the quality essentially different from the thing as it was believed to be'. He gave a number of examples of mistakes which did not satisfy this test, which served to demonstrate just how narrow he considered the test to be. Indeed this is further demonstrated by the result reached on the facts of *Bell* v. *Lever Brothers* itself.

87. Two cases where common mistake has been held to avoid the contract under common law call for special consideration. A case which is by no means easy to reconcile with *Bell* v. *Lever Brothers* is *Scott* v. *Coulson* [1903] 2 Ch 249. A contract for the sale of a life policy was entered into in circumstances in which both parties believed that the assured was alive. The price was paid and the policy assigned. The contract price was little more than the surrender value of the policy. In fact, the assured had died before the contract was concluded and the policy thus carried with it entitlement to the full sum assured. The vendors succeeded, in proceedings in the Chancery Court, in having the transaction set aside. ...

88. This case is often erroneously treated as being on all fours with *Strickland* v. *Turner*—see for example in *Bell* v. *Lever Brothers* Wright J at p. 565, Greer LJ at p. 595, and Lord Warrington at pp. 206–7. The two cases were, however, very different. An annuity on the life of someone deceased is self-evidently a nullity. The policy in *Scott* v. *Coulson* was very far from a nullity. The only way that the case can be explained is by postulating that a life policy before decease is fundamentally different from a life policy after decease, so that the contractual consideration no longer existed, but had been replaced by something quite different—ergo the contract could not be performed. Such was the explanation given by Lord Thankerton in *Bell* v. *Lever Brothers* at p. 236.

89. The other case is the decision of Steyn J in *Associated Japanese Bank* v. *Crédit du Nord SA* [1989] 1 WLR 257. The plaintiff bank entered into an agreement with a rogue under which he purported to sell and lease back four specific machines. The defendant bank agreed with the plaintiff bank to guarantee the rogue's payments under the lease-back agreement. The machines did not, in fact, exist. The rogue defaulted on his payments and the plaintiffs called on the guarantee. The defendants alleged (1) that on true construction of the agreement it was subject to an express condition precedent that the four machines existed; if this was not correct (2) that the agreement was void at law for common mistake; if this was not correct the agreement was voidable in equity on the ground of mistake and had been avoided.

90. The first head of defence succeeded. Steyn J went on, however, to consider the alternative defences founded on mistake. After reviewing the authorities on common mistake, he reached the following formulation of the law:

> 'The first imperative must be that the law ought to uphold rather than destroy apparent contracts. Secondly, the common law rules as to a mistake regarding the quality of the subject matter, like the common law rules regarding commercial frustration, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts. Thirdly, such a mistake in order to
p. 551 attract legal consequences must substantially be shared ↵ by both parties, and must relate to facts as they existed at the time the contract was made. Fourthly, and this is the point established by *Bell* v. *Lever Brothers Ltd* [1932] AC 161, the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. While the civilian distinction between the substance and attributes of the subject matter of a contract has played a role in the development of our law (and was cited in speeches in *Bell* v. *Lever Brothers Ltd*), the principle enunciated in *Bell* v. *Lever Brothers Ltd* is markedly narrower in scope than the civilian doctrine. It is therefore no longer useful to invoke the civilian distinction. The principles enunciated by Lord Atkin and Lord Thankerton represent the ratio decidendi of *Bell* v. *Lever Brothers Ltd*. Fifthly, there is a requirement which was not specifically discussed in *Bell* v. *Lever Brothers Ltd*. What happens if the party, who is seeking to rely on the mistake, had no reasonable grounds for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk. In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief: cf *McRae* v. *Commonwealth Disposals Commission* (1951) 84 CLR 377, 408. That is not because principles such as estoppel or negligence require it, but simply because policy and good sense dictate that the positive rules regarding common mistake should be so qualified.'

91. The detailed analysis that we have carried out leads us to concur in this summary, subject to the proviso that the result in McRae's case can, we believe, be explained on the basis of construction, as demonstrated above. In agreeing with the analysis of Steyn J, we recognise that it is at odds with comments that Lord Denning made on more than one occasion about *Bell* v. *Lever Brothers Ltd* to the effect that 'a common mistake, even on a most fundamental matter, does not make a contract void at law'. As to this Steyn J said at p. 267:

> 'With the profoundest respect to the former Master of the Rolls I am constrained to say that in my view his interpretation of *Bell* v. *Lever Brothers Ltd* does not do justice to the speeches of the majority.'

92. We share both the respect and the conclusion. ...

93. Steyn J held that the test of common mistake was satisfied. He held at p. 269:

> 'For both parties the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines which both parties at the time of the contract believed to exist. The guarantee is an accessory contract. The non-existence of the subject matter of the principal contract is therefore of fundamental importance. Indeed the analogy of the classic res extincta cases, so much discussed in the authorities, is fairly close. In my judgment the stringent test of common law mistake is satisfied: the guarantee is void ab initio.'

94. Our conclusions have marched in parallel with those of Toulson J. We admire the clarity with which he has set out his conclusions, which emphasise the importance of a careful analysis of the contract and of the rights and obligations created by it as an essential precursor to consideration of the effect of an alleged mistake. We agree with him that, on the facts of the present case, the issue in relation to common mistake turns on the question of whether the mistake as to the distance apart of the two vessels had the effect that the services that the 'Great Peace' was in a position to provide were something essentially different from that to which the parties had agreed. ...

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### The result in this case

162. We revert to the question that we left unanswered at paragraph 94. It was unquestionably a common assumption of both parties when the contract was concluded that the two vessels were in sufficiently close proximity to enable the '*Great Peace*' to carry out the service that she was engaged to perform. Was the distance between the two vessels so great as to confound that assumption and to render the contractual adventure impossible of performance? If so, the appellants would have an arguable case that the contract was void under the principle in *Bell* v. *Lever Brothers Ltd*.

163. Toulson J addressed this issue in the following paragraph:

> 'Was the "*Great Peace*" so far away from the "*Cape Providence*" at the time of the contract as to defeat the contractual purpose—or in other words to turn it into something essentially different from that for which the parties bargained? This is a question of fact and degree, but in my view the answer is no. If it had been thought really necessary, the "*Cape Providence*" could have altered course so that both vessels were heading toward each other. At a closing speed of 19 knots, it would have taken them about 22 hours to meet. A telling point is the reaction of the defendants on learning the true positions of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once.'

164. Mr Reeder [counsel for the appellants] has attacked this paragraph on a number of grounds. He has submitted that the suggestion that the 'Cape Providence' should have turned and steamed towards the 'Great Peace' is unreal. We agree. The appellants were sending a tug from Singapore in an attempt to salve the 'Cape Providence'. The 'Great Peace' was engaged by the appellants to act as a stand-by vessel to save human life, should this prove necessary, as an ancillary aspect of the salvage service. The suggestion that the 'Cape Providence' should have turned and steamed away from the salvage tug which was on its way towards her in order to reduce the interval before the 'Great Peace' was in attendance is unrealistic.

165. Next Mr Reeder submitted that it was not legitimate for the Judge to have regard to the fact that the appellants did not want to cancel the agreement with the 'Great Peace' until they knew whether they could get a nearer vessel to assist. We do not agree. This reaction was a telling indication that the fact that the vessels were considerably further apart than the appellants had believed did not mean that the services that the 'Great Peace' was in a position to provide were essentially different from those which the parties had envisaged when the contract was concluded. The 'Great Peace' would arrive in time to provide several days of escort service. The appellants would have wished the contract to be performed but for the adventitious arrival on the scene of a vessel prepared to perform the same services. The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure.

166. The parties entered into a binding contract for the hire of the 'Great Peace'. That contract gave the appellants an express right to cancel the contract subject to the obligation to pay the 'cancellation fee' of 5 days hire. When they engaged the 'Nordfarer' they cancelled the 'Great Peace'. They became liable in consequence to pay the cancellation fee. There is no injustice in this result.

167. For the reasons that we have given, we would dismiss this appeal.

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## Commentary

A number of important issues arise out of this passage. The first is the narrowness of the doctrine of mistake identified by the Court of Appeal. Examples of contracts held void in consequence of common mistake are likely to remain 'few and far between' ([85]), although rare cases can still be found where a common mistake is held to be sufficient to set aside an agreement (see, for example, *British Red Cross* v. *Werry* [2017] EWHC 875 (Ch), where an agreement entered into in settlement of a dispute relating to the estate of someone who was believed to have died without having made a will was set aside when a will was subsequently discovered). But the judgment does contain a discussion of a number of cases in which contracts were held to be void for mistake, including *Couturier* v. *Hastie* (1856) 5 HL Cas 673 ([53], although it is not entirely clear that it is properly analysed as a mistake case); *Scott* v. *Coulson* [1903] 2 Ch 249 (although doubts are expressed about the correctness of the case at [87] and [88]); and *Associated Japanese Bank* v. *Crédit du Nord SA* [1989] 1 WLR 257 ([89]–[93]). What common elements, if any, can be identified in these cases?

The key factors, in the view of the Court of Appeal, are identified at [76] of their judgment. One difficulty with this paragraph, apart from the multiplicity of factors identified, is that it is not altogether easy to ascertain the relationship between the different factors. This is confirmed by the analysis at [77]–[83] which, with respect, is not always easy to follow. Matters become clearer at [84], where a two-stage approach is advocated. At the first stage, the court must decide whether or not 'the contract has become impossible of performance' as a result of the 'unforeseen circumstances' and then, secondly, the court must decide whether 'on the true construction of the contract, one or other party has undertaken responsibility for the subsistence of the assumed state of affairs'. Both stages require further comment.

The requirement that the contract must be 'impossible of performance' is likely to make it very difficult to set aside a contract on the ground of a mistake as to quality (see [86]). But impossibility does seem to lie at the core of mistake cases. A simple example is provided by the case of *Sheikh Brothers Ltd* v. *Ochsner* [1957] AC 136. The appellants gave to the respondents a licence to cut sisal growing on land which had been leased to the appellants. The respondents undertook to manufacture and deliver to the appellants 'sisal fibre in average minimum quantities of fifty tons per month'. Lord Cohen stated (at p. 146) that 'the licence agreement provided for something of the nature of a joint adventure and was entered into on the basis that the sisal area was capable of producing sisal over the period of the agreement at the average rate of 50 tons per month'. This basis proved to be unfounded. The appellants submitted that this mistake did not go to the foundation of the contract. The Privy Council disagreed. Lord Cohen stated (at p. 147) that:

> their Lordships think that it was the very basis of the contract that the sisal area should be capable of producing an average of 50 tons a month throughout the term of the licence. It follows that the mistake was as to a matter of fact essential to the agreement.

The more difficult question is whether or not impossibility should be an indispensable element in a mistake case. The cases do not, as yet, speak with one voice (*Lehman Bros International (Europe) (in administration)* v. *Exotix Partners LLP* [2019] EWHC 2380 (Ch), [2020] 1 All ER (Comm) 635, [190]). Authority can be found to support the proposition that the common mistake must render performance of the contract impossible (see
p. 554 *Brennan* v. *Bolt Burden (a firm)* [2004] EWCA Civ 1017, [2005] QB 303). On the other hand, the analogy ↵ with frustration suggests that the doctrine should not be so confined and that it should extend to cases where performance in the circumstances would be something radically different from what the parties had in contemplation at the time of entry into the contract (*Triple Seven MSN 27521 Ltd* v. *Azman Air Services Ltd* [2018] EWHC 1348 (Comm), [2018] 2 Lloyd's Rep 424, [62]–[72] and *John Lobb SAS* v. *John Lobb Ltd* [2022] EWHC 2306 (Ch), [129]–[131]). The merit of the latter view is that it will assist in the assimilation of the principles of common mistake and frustration and, at the same time, keep the doctrine within narrow confines and so avoid creating unnecessary uncertainty.

At the second stage the emphasis switches to the construction of the contract and the question whether one party has undertaken responsibility for the subsistence of the assumed state of affairs. The formulation of this second stage in paragraph [84] appears at first sight to be wider than the second element listed by Lord Phillips in paragraph [76], namely that 'there must be no warranty by either party that the state of affairs exists'. But, as Edwin Johnson J observed in *John Lobb SAS* v. *John Lobb Ltd* [2022] EWHC 2306 (Ch), [89] a warranty is merely one way by which responsibility for the subsistence of the assumed state of affairs may be

undertaken. It is not, however, the only way. This being the case, the focus of the court should be upon the broader question of whether responsibility has been so assumed, rather than the narrower question of whether a warranty, in the technical sense in which that word is used, has been given ([90]). This reasoning led Edwin Johnson J to conclude (at [94]) that:

> 'one of the reasons why the doctrine of common mistake is only rarely invoked successfully is because the relevant contract usually contains, or general principles of law usually supply, an allocation of risk to one of the parties to the contract, in relation to the risk of an assumed state of affairs turning out to be wrong'.

The emphasis on the construction of the contract and the allocation of responsibility for the subsistence of the assumed state of affairs is particularly noticeable in relation to the analysis of *McRae* v. *Commonwealth Disposals Commission* (1951) 84 CLR 377 at [79]–[80] and of *Associated Japanese Bank* v. *Crédit du Nord SA* [1989] 1 WLR 257 at [80] and [89]. The approval of the result in *McRae* is also significant. *McRae* has always been a problematic case as far as English law is concerned. While most commentators are of the view that *McRae* was correctly decided on its own facts, the problem lies in reconciling it with section 6 of the Sale of Goods Act 1979, which states that a contract for the sale of specific goods is void where, prior to the conclusion of the contract, the goods have perished without the knowledge of the parties. Of course, it is possible to reconcile *McRae* with section 6 on the basis that the tanker never existed and therefore could not 'perish'. While this explanation may be a satisfactory one in technical terms, it is not satisfactory in principled terms because it does not explain why the law should distinguish between cases where the goods once existed but have perished (which are caught by section 6 and declared to be void) and cases in which the goods never existed (which may be valid under *McRae*). The preferable approach is to examine the terms of the contract in all cases in order to ascertain whether or not the rule contained in section 6 has been displaced by the terms of the contract. On this view section 6 is not a mandatory rule of law. It is a default rule and the parties can contract out of it by the simple device of making a promise to the effect that the subject matter of the contract exists. This is the explanation given of *McRae* at [79], where it is stated that 'on its proper construction the contract included a promise by the Commission that the tanker existed in the position specified'.

p. 555 ↵ Equally, this exercise in construction may produce the result that no such promise was made. Such was the case in *Couturier* v. *Hastie* (1856) 5 HLC 673 (discussed at [53]). The parties entered into a contract for the sale of a cargo of corn on what were in effect c.i.f. terms. At the time the contract was concluded the corn was believed to be in transit from Salonica to the United Kingdom. But, before the contract was made, and unknown to both parties, the corn had deteriorated to such an extent that the master of the ship sold it. The seller argued that the buyer remained liable for the price of the corn because he had bought an 'interest in the adventure' or such rights as the seller had under the shipping documents. The House of Lords rejected the seller's argument, holding that the subject matter of the contract was not the rights of the sellers under the shipping documents but the corn and that, since the corn did not exist, there was a total failure of consideration and the buyer was not liable to pay the price. The case has subsequently been rationalized as an example of a common mistake as to the existence of the subject matter of the contract, although the word 'mistake' was nowhere mentioned in the judgment of the House of Lords. Indeed, Lord Chancellor Cranworth stated (at p. 681) that 'the whole question turns upon the construction of the contract which was entered into between the parties'. He continued: 'the contract plainly imports that there was something which was to be

sold at the time of the contract, and something to be purchased'. On the facts there was nothing to be sold and accordingly there could be no liability to pay the price. It is therefore necessary to ascertain the obligations which have been assumed by the parties under the contract before deciding whether or not the contract can be set aside on the ground of mistake.

The final point of significance relates to the analogy drawn by the Court of Appeal between cases of common mistake and cases of frustration. At [62]–[72] of their judgment (a passage which has been omitted from the extract), the Court of Appeal discuss a number of leading frustration cases which will be discussed in more detail in Chapter 21, namely *Taylor* v. *Caldwell* (1863) 3 B & S 826 (21.1); *Krell* v. *Henry* [1903] 2 KB 740 (21.5.3); and *National Carriers Ltd* v. *Panalpina (Northern) Ltd* [1981] AC 675 (21.7). What lessons do we learn from the analogy? The first lesson is that the implied term technique originally used in frustration cases such as *Taylor* v. *Caldwell* is 'unrealistic' (21.1) and so should not be adopted in the context of common mistake (see [73]). The second point is that the doctrines of common mistake and frustration do share important common elements (see [74], [82], and [85]). The closeness of the relationship between the two doctrines can be demonstrated by the 'coronation cases'. The leading case, *Krell* v. *Henry* [1903] 2 KB 740, is a frustration case and it is discussed in more detail in Chapter 21 (21.5.3). The coronation procession of King Edward VII was cancelled because of the King's illness. Many rooms along the procession route had been hired for the purpose of viewing the coronation. In most of the cases (such as *Krell* v. *Henry*) the contracts were concluded before the coronation was cancelled, but there is one case, *Griffith* v. *Brymer* (1903) 19 TLR 434, where the contract was entered into shortly after the decision to cancel the coronation had been made but both parties were unaware of the fact of the cancellation. The issue in these cases is the same: whether they are cases of frustration or mistake. The issue in both relates to the impact of an unforeseen event on the obligations contained in the contract. The difference between common mistake and frustration is simply one of timing. In the case of mistake the unforeseen event has, unknown to both parties, already occurred at the moment of entry into the contract, whereas in the case of frustration the event occurs after the formation of the contract. The common element is therefore that both doctrines are concerned with the allocation of risk of unforeseen events. This being the
p. 556 case, the courts in mistake cases should be able to draw on frustration cases and vice versa. But the
↵ difference in timing does require that care be exercised when drawing the analogy. As the Court of Appeal acknowledged in *Great Peace* ([85]), 'circumstances where a contract is void as a result of common mistake are likely to be less common than instances of frustration'. The reason for this is that the parties can, with greater diligence, find out the true position at the moment of entry into the contract, whereas they cannot discover what will happen in the future. This being the case, the law ought to be slower to relieve a party from the consequences of his failure to discover the true state of affairs at the moment of entry into the contract than from the consequences of his failure to predict the future course of events. But the difference is one of degree, not kind.

## 16.5 Mistake in Equity

The authority of *Bell* v. *Lever Bros Ltd* was challenged by the decision of the Court of Appeal in *Solle* v. *Butcher* [1950] 1 KB 671. It was obviously not open to the Court of Appeal in *Solle* to refuse to follow *Bell*, given that *Bell* is a decision of the House of Lords. The technique used in *Solle* was to distinguish *Bell* on the ground that it was an authority on the doctrine of mistake at common law and that it did not determine the scope of the

doctrine of mistake in equity. According to the Court of Appeal in *Solle*, the doctrine of mistake in equity differed from the doctrine of mistake at common law in three respects. First the scope of the doctrine was wider. While the courts in equity also asked whether or not the mistake was 'fundamental', the definition of 'fundamental' in equity was more liberal and so encompassed a broader range of mistakes. Secondly, the effect of the mistake was different in that mistake in equity rendered a contract voidable, whereas mistake at law renders a contract void. Thirdly, and finally, the courts in equity had greater remedial flexibility when setting aside a contract, in that they could set the contract aside 'on terms'; that is to say they could, within limits, adjust the rights and responsibilities of the parties.

*Solle* was decided back in 1949 and it was relied upon by the Court of Appeal and first instance judges in a handful of cases prior to the decision of the Court of Appeal in *Great Peace*. During this period the courts were aware of the uneasy relationship between *Solle* and *Bell*. The relationship between the two cases was rationalized by Steyn J in *Associated Japanese Bank* v. *Crédit du Nord SA* [1989] 1 WLR 257, 268 in the following terms:

> [A] narrow doctrine of common law mistake (as enunciated in *Bell* v. *Lever Bros Ltd*), supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle* v. *Butcher* and later cases), seems to me to be an entirely sensible and satisfactory state of the law.

On this view the role of equitable mistake was a 'supplementary' one and Steyn J explained the relationship between common law and equitable mistake in sequential terms:

> Where common law mistake has been pleaded, the court must first consider this plea. If the contract is held to be void, no question of mistake in equity arises. But, if the contract is held to be valid, a plea of mistake in equity may still have to be considered.

The Court of Appeal in *Great Peace* took a much more robust line and held that *Solle* was inconsistent with *Bell* and should be disapproved. It is obviously an unusual step for a Court of Appeal to disapprove one of its own
p. 557 decisions, especially a decision that was regarded as ↵ good authority for over fifty years. It is therefore important to examine *Solle* itself before going on to consider the reasons given by the Court of Appeal for disapproving *Solle* and the cases decided in reliance upon it.

***Solle v. Butcher***
[1950] 1 KB 671, Court of Appeal

Solle and Butcher were partners in an estate agency. In 1947 Butcher took a lease of Maywood House, a building which contained five flats. Maywood House had been damaged by a land mine and Butcher took the lease with the intention of repairing the damage. In 1939 Flat 1 had been let for £140 per year. Solle and Butcher discussed what rent could be charged after the repairs were done. Solle told Butcher that he could charge £250 per year for Flat 1 because the rent was not restricted to the £140 charged in 1939 under the Rent Restriction Acts. Butcher relied on Solle's statement and did not attempt to calculate the additions, permitted under the Rent Restriction Acts by virtue of the repairs, to the £140 charged in 1939, on the assumption that it was the maximum rent. The additions would have brought the maximum rent to about £250. On 29 September 1947 Butcher let Flat 1 to Solle for £250 per year. Once the lease was executed no notice of intention to increase the rent could be given under the Rent Restriction Acts.

Solle sued Butcher claiming that the maximum rent was £140. Butcher claimed rescission of the lease on the ground of: (i) common mistake of fact, (ii) innocent material misrepresentation, and (iii) estoppel. The trial judge held that Flat 1 retained its identity notwithstanding the repairs and that the maximum rent was therefore £140 per year. He also held that there was no mistake of fact, though possibly one of law as both parties believed the Rent Restriction Acts did not apply. On appeal the Court of Appeal held, Jenkins LJ dissenting, that the lease should be set aside on terms.

## Denning LJ

It is quite plain that the parties were under a mistake. They thought that the flat was not tied down to a controlled rent, whereas in fact it was. In order to see whether the lease can be avoided for this mistake it is necessary to remember that mistake is of two kinds: first, mistake which renders the contract void, that is, a nullity from the beginning, which is the kind of mistake which was dealt with by the courts of common law; and, secondly, mistake which renders the contract not void, but voidable, that is, liable to be set aside on such terms as the court thinks fit, which is the kind of mistake which was dealt with by the courts of equity. Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts of common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract. In the well-known case of *Cundy* v. *Lindsay* (1876–8) 1 QBD 348; 3 App Cas 459, Cundy suffered such an injustice. He bought the handkerchiefs from the rogue, Blenkarn, before the Judicature Acts came into operation. Since the fusion of law and equity, there is no reason to continue this process, and it will be found that only those contracts are now held void in which the mistake was such as to prevent the formation of any contract at all.

p. 558 Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros Ltd* [1932] AC 161, 222, ↵ 224, 225–7, 236. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it. ...

Applying these principles, it is clear that here there was a contract. The parties agreed in the same terms on the same subject matter. It is true that the landlord was under a mistake which was to him fundamental: he would not for one moment have considered letting the flat for seven years if it meant that he could only charge 140l. a year for it. He made the fundamental mistake of believing that the rent he could charge was not tied down to a controlled rent; but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity. ...

Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance* v. *Bolton* (1872) LR 8 Ch 118, 124 per James LJ.

The court had, of course, to define what it considered to be unconscientious, but in this respect equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. ...

A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault. ...

The principle so established by *Cooper* v. *Phibbs* (1867) LR 2 HL 149 has been repeatedly acted on:. ...

Applying that principle to this case, the facts are that the plaintiff, the tenant, was a surveyor who was employed by the defendant, the landlord, not only to arrange finance for the purchase of the building and to negotiate with the rating authorities as to the new rateable values, but also to let the flats. He was the agent for letting, and he clearly formed the view that the building was not controlled. He told the valuation officer so. He advised the defendant what were the rents which could be charged. He read to the defendant an opinion of counsel relating to the matter, and told him that

> in his opinion he could charge 250l. and that there was no previous control. He said that the flats came outside the Act and that the defendant was 'clear'. The defendant relied on what the plaintiff told him, and authorized the plaintiff to let at the rentals which he had suggested. The plaintiff not only let the four other flats to other people for a long period of years at the new rentals, but also took one himself for seven years at 250l. a year. Now he turns round and says, quite unashamedly, that he
> p. 559 wants to take advantage of the mistake to get the flat at 140l. a year for seven years instead of the
> ↵ 250l. a year, which is not only the rent he agreed to pay but also the fair and economic rent; and it is also the rent permitted by the Acts on compliance with the necessary formalities. If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old. But, in my view, the established rules are amply sufficient for this case. …
>
> There was clearly a common mistake, or, as I would prefer to describe it, a common misapprehension, which was fundamental and in no way due to any fault of the defendant; and *Cooper* v. *Phibbs* LR 2 HL 149 affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.
>
> The fact that the lease has been executed is no bar to this relief. …
>
> In the ordinary way, of course, rescission is only granted when the parties can be restored to substantially the same position as that in which they were before the contract was made; but, as Lord Blackburn said in *Erlanger* v. *New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1278–9. 'The practice has always been for a court of equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.' That indeed was what was done in *Cooper* v. *Phibbs* LR 2 HL 149. Terms were imposed so as to do what was practically just. What terms then, should be imposed here?
>
> I think that this court should … impose terms which will enable the tenant to choose either to stay on at the proper rent or to go out.
>
> ***Bucknill LJ*** held that the lease should be set aside on the ground that there was a common mistake of fact as the repairs made such a substantial alteration to the building as to make it a different flat. ***Jenkins LJ***, dissenting, held that there was no common mistake of fact but a common mistake of law as both parties believed that the Rent Restriction Acts did not have the effect of making £140 the maximum rent.

## Commentary

The judgment of Denning LJ in *Solle* demonstrates all three features of mistake in equity which distinguish it from its common law counterpart: (i) the nature of the mistake which entitles the court to intervene is described in more liberal terms, (ii) the mistake rendered the contract voidable rather than void, and (iii) the lease was set aside on terms.

*Solle* was followed in a number of decisions in the latter part of the twentieth century. It perhaps suffices to cite one of these cases, namely the decision of the Court of Appeal in *Magee* v. *Pennine Insurance Co Ltd* [1969] 2 QB 507. In 1961 Thomas Magee, who was then aged 58 and could not drive, bought a car. The seller completed an insurance proposal form which Thomas Magee signed. The form stated that Thomas Magee held a provisional licence and that he and his elder son John Magee, then aged 35 and the holder of an annual licence, would drive the car in addition to his younger son. By signing the proposal Thomas Magee declared that these details were true. In fact, Thomas Magee held no licence and wanted the car for his younger son John J Magee, then aged 18, to drive. Pennine Insurance Co Ltd issued a policy of insurance to Thomas Magee on the basis of the proposal. The policy was renewed each year. On 25 April 1965 John J Magee wrecked the car. Thomas Magee claimed £600 under the policy. On 12 May 1965 Pennine offered to settle his claim for £385. Thomas Magee accepted the offer. Pennine later discovered that the details in the proposal were incorrect and refused
p. 560 to pay. Thomas Magee brought an action claiming £385 under the policy ↵ or the compromise agreement contained in the offer of 12 May 1965. Pennine argued that it was entitled to repudiate its liability under the policy and the agreement. The judge held that Pennine was entitled to repudiate the policy because of the incorrect details in the proposal. However the judge held that Pennine was liable to Thomas Magee for £385 under the agreement. On appeal a majority of the Court of Appeal (Winn LJ dissenting) held that in entering into the agreement both parties were under the common fundamental mistake that Thomas Magee had a valid claim under the policy and that Pennine were not entitled to have the policy set aside. This case raises, in a stark form, the problem of the relationship between the doctrine of mistake in equity and *Bell* because the mistake that was made in *Magee* was the same as that made in *Bell*. In both cases a payment was made in the belief that there was a contractual obligation to make a payment and a contractual entitlement to receive the payment, when in fact there was no such obligation to pay because of an entitlement in the payor to set aside the contract which created the payment obligation.

The tension between *Bell* and *Solle* was resolved in *Great Peace* when the Court of Appeal concluded that *Solle* should be disapproved on the ground that it was inconsistent with the decision of the House of Lords in *Bell* v. *Lever Bros*. The Court of Appeal's analysis of equitable mistake was divided into three parts. The first part consisted of an analysis of common mistake in equity prior to *Bell*. The focus of attention in this part of the judgment was upon the decision of the House of Lords in *Cooper* v. *Phibbs* (1867) LR 2 HL 149. The second part was an analysis of the effect of *Bell* on mistake in equity, while the third part consisted of a discussion of the effect of *Solle* v. *Butcher*. The extract that follows consists of the conclusion of the Court of Appeal in relation to the effect of *Bell* on mistake in equity ([118]) and the final sections of the judgment in which the Court of Appeal set outs its conclusions in relation to the line of authority represented by *Solle* v. *Butcher* ([153]–[161]).

118. These passages demonstrate that the House of Lords in *Bell* v. *Lever Brothers* considered that the intervention of equity, as demonstrated in *Cooper* v. *Phibbs*, took place in circumstances where the common law would have ruled the contract void for mistake. We do not find it conceivable that the House of Lords overlooked an equitable right in Lever Brothers to rescind the agreement, notwithstanding that the agreement was not void for mistake at common law. The jurisprudence established no such right. Lord Atkin's test for common mistake that avoided a contract, while narrow, broadly reflected the circumstances where equity had intervened to excuse performance of a contract assumed to be binding in law. …

153. A number of cases, albeit a small number, in the course of the last 50 years have purported to follow *Solle* v. *Butcher*, yet none of them defines the test of mistake that gives rise to the equitable jurisdiction to rescind in a manner that distinguishes this from the test of a mistake that renders a contract void in law, as identified in *Bell* v. *Lever Brothers*. This is, perhaps, not surprising, for Lord Denning, the author of the test in *Solle* v. *Butcher*, set *Bell* v. *Lever Brothers* at nought. It is possible to reconcile *Solle* v. *Butcher* and *Magee* v. *Pennine Insurance* with *Bell* v. *Lever Brothers* only by postulating that there are two categories of mistake, one that renders a contract void at law and one that renders it voidable in equity. Although later cases have proceeded on this basis, it is not possible to identify that proposition in the judgment of any of the three Lords Justices, Denning, Bucknill or Fenton Atkinson, who participated in the majority decisions in the former two cases. Nor, over 50 years, has it proved possible to define satisfactorily two different qualities of mistake, one operating in law and one in equity.

154. In *Solle* v. *Butcher* Denning LJ identified the requirement of a common misapprehension that was 'fundamental', and that adjective has been used to describe the mistake in those cases which have followed *Solle* v. *Butcher*. We do not find it possible to distinguish, by a process of definition, a mistake which is 'fundamental' from Lord Atkin's mistake as to quality which 'makes the thing contracted for essentially different from the thing that it was believed to be'.

p. 561

155. A common factor in *Solle* v. *Butcher* and the cases which have followed it can be identified. The effect of the mistake has been to make the contract a particularly bad bargain for one of the parties. Is there a principle of equity which justifies the court in rescinding a contract where a common mistake has produced this result?

> 'Equity is … a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them. In origin at least, it represents the attempt of the English legal system to meet a problem which confronts all legal systems reaching a certain stage of development. In order to ensure the smooth running of society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts, the general rules produce substantial unfairness …' (*Snell's Equity* (30th edn, 2000) p. 4, para 1-03).

156. Thus the premise of equity's intrusion into the effects of the common law is that the common law rule in question is seen in the particular case to work injustice, and for some reason the common law cannot cure itself. But it is difficult to see how that can apply here. Cases of fraud and misrepresentation, and undue influence, are all catered for under other existing and uncontentious equitable rules. We are only concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell* v. *Lever Brothers*. But that, surely, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by application of some other doctrine. The common law has drawn the line in *Bell* v. *Lever Brothers*. The effect of *Solle* v. *Butcher* is not to supplement or mitigate the common law; it is to say that *Bell* v. *Lever Brothers* was wrongly decided.

157. Our conclusion is that it is impossible to reconcile *Solle* v. *Butcher* with *Bell* v. *Lever Brothers*. The jurisdiction asserted in the former case has not developed. It has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence. In paragraphs 110 to 121 of his judgment, Toulson J has demonstrated the extent of that confusion. If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law. That is the conclusion of Toulson J. Do the principles of case precedent permit us to endorse it? What is the correct approach where this court concludes that a decision of the Court of Appeal cannot stand with an earlier decision of the House of Lords? There are two decisions which bear on this question.

[The judgment considered two decisions in which it was held that the Court of Appeal should apply the law laid down by the House of Lords and refuse to follow the decision of the Court of Appeal and continued]

160. We have been in some doubt as to whether this line of authority goes far enough to permit us to hold that *Solle* v. *Butcher* is not good law. We are very conscious that we are not only scrutinising the reasoning of Lord Denning in *Solle* v. *Butcher* and in *Magee* v. *Pennine Insurance Co*, but are also faced with a number of later decisions in which Lord Denning's approach has been approved and followed. Further, a Division of this Court has made it clear in *West Sussex Properties Ltd* v. *Chichester DC* [2000] All ER (D) 887 that they felt bound by *Solle* v. *Butcher*. However, it is to be noticed that while junior counsel in the court below in the *West Sussex Properties* case had sought to challenge the correctness of *Solle*, in the Court of Appeal leading counsel accepted that it was good law unless and until overturned by their Lordships' House. In this case we have heard full argument, which has provided what we believe has been the first opportunity in this court for a full and mature consideration of the relation between *Bell* v. *Lever Brothers Ltd* and *Solle* v. *Butcher*. In the light of that consideration we can see no way that *Solle* v. *Butcher* can stand with *Bell* v. *Lever Brothers*. In these circumstances we can see no option but so to hold.

p. 562

> 161. We can understand why the decision in *Bell* v. *Lever Brothers Ltd* did not find favour with Lord Denning. An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances. Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.

## Commentary

This is a bold decision. On its facts the decision appears correct. Factually, the case would have been more interesting had the 'Great Peace' been two or three days away from the stricken vessel. As it was, the impact of the mistake on the contract was probably insufficient even to satisfy the test laid down by Denning LJ in *Solle*. So, on its facts, *Great Peace* was correctly decided. The difficulty with the case lies in its formulation of the legal principles.

The conclusion that *Solle* 'cannot stand' with *Bell* is probably right in the sense that it is almost inconceivable 'that the House of Lords overlooked an equitable right in Lever Bros to rescind the agreement, notwithstanding that the agreement was not void for mistake at common law' ([118]). A greater difficulty arises from the fact that the Court of Appeal had followed *Solle* on a number of occasions and there is a respectable case for saying that the decision to overrule *Solle* should have been left to the House of Lords (and now of course it would be a matter for the Supreme Court). On the facts there was no need for the Court of Appeal to take the step of disapproving *Solle*. They could have held, quite simply, that the mistake in this case was, on any view, insufficient to set aside the agreement either at law or in equity. In practical terms it is likely that *Great Peace* will be the last word on the issue unless a case goes up to the Supreme Court. It is probably unlikely that a subsequent Court of Appeal will depart from *Great Peace* on the ground that the Court of Appeal in *Great Peace* mistakenly concluded that *Solle* was inconsistent with *Bell* v. *Lever Bros*.

As for *Solle* itself, it would appear that it should now be regarded as having been wrongly decided. It was certainly wrong in terms of legal principle. But was it wrong on its facts? Here it is interesting to contrast the decision of the Court of Appeal in *Great Peace* with the decision of Toulson J at first instance ([2001] All ER (D) 152 (Nov)). He stated at [77]:

> Standing back from *Solle* v. *Butcher*, the striking feature of the case on the facts is that the plaintiff himself, a surveyor, had led the defendant into his mistaken belief. It would seem unjust that he should be allowed to reap a benefit from doing so.

In his judgment (at [118]) he stated that he was 'leaving aside cases where one party's mistake is the product of
p. 563 fraud, misrepresentation or unconscionable dealing by the other, or where ↵ one party is aware that the other is proceeding under a mistake as to the terms of the bargain purportedly being made'. The Court of Appeal does not consider this aspect of *Solle*. To what extent is it possible to outflank the decision in *Great Peace* by submitting that there has been 'unconscionable dealing' by the party seeking to uphold the contract?

The final aspect of *Great Peace* is the reference in paragraph [161] to the flexibility which mistake in equity injected into the law. The statement that 'there is scope for legislation to give greater flexibility to our law of mistake than the common law allows' is a little surprising given that it was unnecessary for the Court of Appeal to excise the equitable jurisdiction in the way that they did. Having judicially removed the flexibility that was present in the law, they then invite Parliament to re-introduce that flexibility. The analogy drawn with the Law Reform (Frustrated Contracts) Act 1943 is also rather dubious. The 1943 Act (on which see 21.6) regulates the remedial consequences of a contract that has already been discharged, whereas the effect of the decision of the Court of Appeal in *Great Peace* is to hold that the contract is still binding on the parties and, if it is still binding, it is difficult to see on what basis a greater degree of flexibility should be introduced into the law.

## 16.6 Reform?

If there is a desire to introduce a greater degree of flexibility into the law, then consideration ought to be given to Articles 4:102–4:105 of the Principles of European Contract Law. Articles 4:103 and 4:105 in particular seem to give the courts greater flexibility both in terms of the types of mistake which give rise to a claim for relief and in terms of the remedial powers available to the court.

### Article 4:102—Initial impossibility

A contract is not invalid merely because at the time it was concluded performance of the obligation assumed was impossible, or because a party was not entitled to dispose of the assets to which the contract relates.

### Article 4:103—Fundamental mistake as to Facts or Law

(1) A party may avoid a contract for mistake of fact or law existing when the contract was concluded if:

(a) the mistake was caused by information given by the other party; or

(i) the other party knew or ought to have known of the mistake and it was contrary to good faith and fair dealing to leave the mistaken party in error; or

(ii) the other party made the same mistake, and

(b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.

(2) However a party may not avoid the contract if:

(a) in the circumstances its mistake was inexcusable, or

(b) the risk of the mistake was assumed, or in the circumstances should be borne, by it.

p. 564

### Article 4:104—Inaccuracy in communication

An inaccuracy in the expression or transmission of a statement is to be treated as a mistake of the person who made or sent the statement and Article 4.103 applies.

### Article 4:105—Adaptation of contract

(1) If a party is entitled to avoid the contract for mistake but the other party indicates that it is willing to perform, or actually does perform, the contract as it was understood by the party entitled to avoid it, the contract is to be treated as if it had been concluded as that party understood it. The other party must indicate its willingness to perform, or render such performance, promptly after being informed of the manner in which the party entitled to avoid it understood the contract and before that party acts in reliance on any notice of avoidance.

(2) After such indication or performance the right to avoid is lost and any earlier notice of avoidance is ineffective.

> (3) Where both parties have made the same mistake, the court may at the request of either party bring the contract into accordance with what might reasonably have been agreed had the mistake not occurred.

An alternative framework for reform has been put forward by Professor Beale (H Beale, *Mistake and Non-Disclosure of Facts: Models for English Contract Law* (Oxford University Press, 2012)). In his book, based on a series of lectures, he contrasts English law with the law of a number of other jurisdictions (both common law and civilian) and in the light of various proposals to harmonize contract law at a European or global level (including the provisions of the Principles of European Contract Law set out earlier). He is critical of the narrowness of the doctrine of mistake as it operates in English law, particularly the rule that relief is not available where one party has made a mistake about the facts underlying the contract, even if the other party is fully aware both of the fact that the mistake has been made and that the mistaken party would never have made the contract had they known the truth. In his view (at p. 30) this rule is 'difficult to square with morality'. Instead (at p. 98) he puts forward the following 'provisional proposal' for consideration:

> (1) A party may avoid a contract on the ground of a mistake of fact or law if:
>
> (a) the party, but for the mistake, would only have concluded the contract on fundamentally different terms, or would not have concluded a contract at all, and
>
> (b) the other party knew of the first party's mistake and its importance but, contrary to good faith and fair dealing, caused the contract to be concluded by leaving the mistaken party in error unless
>
> (i) the mistake was merely as to the value of the performance the mistaken party was to give or receive or
>
> (ii) the risk of the mistake was assumed, or in the circumstances should be borne, by the mistaken party.
>
> (c) A party who had the right to avoid under this provision should also have a right to claim damages to put him into the position he would have been in had the mistake been pointed out.

p. 565 ↵ While Professor Beale notes (at p. 99) that this proposal would be 'less certain than the current law' he concludes that it would 'nonetheless be workable'. In addition to his proposal, he puts forward the following questions for consultation:

> Should the same apply when the non-mistaken party did not have actual knowledge of the importance of the mistake to the mistaken party but should have known of it?
>
> Should the same apply when the non-mistaken party did not have actual knowledge of the fact that the first party was mistaken but should have known of it?

Do you think that English law should develop along the lines suggested by Professor Beale?

## 16.7 Rectification

The mistake made by the parties may relate not to the making of the contract but to the recording of it. In such a case the parties may ask the court to rectify the document in order to make it accord with the document they intended to draw up. The idea behind rectification seems straightforward but the remedy has in fact given rise to a considerable amount of difficulty in recent years.

The first difficulty concerns the relationship between rectification and the principles applied by the courts to the interpretation of contracts. As we shall see, rectification is a remedy that is available within narrow limits. To some extent, the restrictive rules on rectification can be avoided by an application of Lord Hoffmann's restatement of the principles by which contractual documents are to be interpreted (see 11.3). His fourth principle recognizes that it is possible to conclude that 'the parties must, for whatever reason, have used the wrong words or syntax' and his fifth principle states that 'if one would … conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had'. In *Cherry Tree Investments Ltd* v. *Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305, [62] Arden LJ described this as a process of 'corrective interpretation, that is, interpretation to correct a mistake'. The power of the court to engage in 'corrective interpretation' appears to be broader than the ability of a court to order that a contract be rectified, and this has led some commentators to claim that these developments in the law relating to the interpretation of contracts have rendered rectification 'largely superfluous', at least in the context of the rectification of contracts for mistakes of fact (see A Burrows, 'Construction and Rectification' in A Burrows and E Peel (eds), *Contract Terms* (Oxford University Press, 2007), pp. 77, 99). This view was noted by Lewison LJ in *Cherry Tree Investments Ltd* v. *Landmain Ltd* [2012] EWCA Civ 736, [2013] Ch 305, [90]–[91], but he concluded (at [98]) that the facts of that case demonstrated that 'there is still a useful role for rectification to play'. In particular, rectification may be able to reach cases which are beyond 'corrective interpretation'. For example, corrective interpretation may not be possible where, as in *Cherry Tree Investments*, the parties have failed to provide for a particular circumstance or have mistakenly omitted a particular clause. In other words, the more serious the error or omission, the more likely it is that the courts will conclude that it is beyond the reach of corrective interpretation and is properly a case where, if there is to be a remedy, it is to be found in rectification (although it must be conceded that in *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, [25], Lord
p. 566 Hoffmann stated that there is no 'limit to the amount of red ink or ↵ verbal rearrangement or correction which the court is allowed' when engaging in what is now known as corrective interpretation).

While the rise of corrective interpretation may have resulted in a diminution in the practical importance of rectification, it would be going too far to conclude that rectification is now redundant. Rectification remains of practical significance, in large part because prior negotiations are admissible in evidence in a rectification claim when, as we have seen (11.4.4), they are not generally admissible where the issue is one that relates to the interpretation of the contract. This means that a court seeking to ascertain whether something has gone wrong with the language of the contract cannot, when seeking to interpret the contractual documents, have regard to the prior negotiations but it can do so when considering whether or not rectify the contract. This is a point of real practical importance given that it is the prior negotiations that may provide the best evidence that something has indeed gone wrong with the language of the contract (for an example of this process see *Tartsinis* v. *Navona Management Co* [2015] EWHC 57 (Comm)). Rectification also differs from interpretation in

that the interpretation of a contract is governed by an objective test of intention, whereas rectification, at least in certain cases (see later), permits the introduction into evidence of the subjective intentions of the parties. Finally in this context it should be noted that rectification is an equitable claim and, as such, is 'subject to somewhat different rules from interpretation'. In particular, rectification is a discretionary remedy, albeit that the principles applicable to such a claim 'should be as clear and predictable in their application as possible' (*Daventry District Council* v. *Daventry & District Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333, [194]).

The second difficulty with rectification relates to the categorization of the claims that fall within its scope. It is now customary to divide the cases into two groups. Thus Lord Hoffmann, speaking extrajudicially ('Rectifying Rectification' TECBAR Lecture, 21 November 2018) has stated that 'we have two forms of rectification, based on altogether different principles'. The first is rectification of a document because it does not reflect what the parties have agreed, where the underlying moral principle is 'that parties should keep their promises to each other' and so should be bound by what they agreed to record in the document and not by a document which does not give effect to that agreement. The second group consists of cases where one party subjectively knows that the other party is mistaken about the terms of the contract. In such cases the mistaken party may be entitled to rectification, and the underlying moral principle is 'that persons negotiating a contract have to observe certain standards of good faith'. We shall examine both groups of cases, commencing with the second group.

This leads to the third difficulty, which lies in determining when a person who subjectively knows of the mistake of the other party will be precluded from enforcing these mistaken terms, and the innocent party can obtain rectification of the contract. It is clear that unilateral mistake will not suffice of itself to entitle a claimant to rectification. In *Riverlate Properties Ltd* v. *Paul* [1975] Ch 133, 140–141, Russell LJ stated:

> Is the lessor entitled to rescission of the lease on the mere ground that it made a serious mistake in the drafting of the lease which it put forward and subsequently executed, when (a) the lessee did not share the mistake, (b) the lessee did not know that the document did not give effect to the lessor's intention, and (c) the mistake of the lessor was in no way attributable to anything said or done by the lessee? … In point of principle, we cannot find that this should be so. If reference be made to
> p. 567 principles of equity, it operates on conscience. If conscience ↵ is clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the miscalculation or mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which it would soon be in difficulties.

However, a claimant who can establish that the other party knew of his mistake or sought to take advantage of it may be entitled to rectification (*A Roberts & Co Ltd* v. *Leicestershire County Council* [1961] Ch 555). In *Commissioner for the New Towns* v. *Cooper (Great Britain) Ltd* [1995] Ch 259, Stuart-Smith LJ stated (at pp. 277–280):

> The commonest circumstance in which rectification is granted is where the written contract does not accurately record the parties' joint agreement. In other words, there is a mistake common to both parties. In the case of unilateral mistake, that is to say where only one party is mistaken as to the meaning of the contract, rectification is not ordinarily appropriate. This follows from the ordinary rule that it is the objective intention of the parties which determines the construction of the contract and not the subjective intention of one of them. Also, it would generally be inequitable to compel the other party to execute a contract, which he had no intention of making, simply to accord with the mistaken interpretation of the other party. … But the court will intervene if there are 'additional circumstances that render unconscionable reliance on the document by the party who has intended that it should have effect according to its terms'. The debate in this case turns on what amounts to unconscionable conduct. … It was common ground in this court that fraud, in the form of a dishonest misrepresentation, will also amount to unconscionable behaviour. … I would hold that where A intends B to be mistaken as to the construction of the agreement, so conducts himself that he diverts B's attention from discovering the mistake by making false and misleading statements, and B in fact makes the very mistake that A intends, then notwithstanding that A does not actually know, but merely suspects, that B is mistaken, and it cannot be shown that the mistake was induced by any misrepresentation, rectification may be granted. A's conduct is unconscionable and he cannot insist on performance in accordance to the strict letter of the contract; that is sufficient for rescission. But it may also not be unjust or inequitable to insist that the contract be performed according to B's understanding, where that was the meaning that A intended B should put upon it.

Where the parties are involved in arm's length negotiations, it is no easy task to persuade a court that there has been 'unconscionable conduct'. As Sedley LJ observed in *George Wimpey UK Ltd* v. *VI Components Ltd* [2005] EWCA Civ 77, [2005] BLR 135, there is something of 'a paradox in the notion of what an honourable and reasonable person would do in the context of an arm's-length commercial negotiation'. While an 'honourable' person would probably draw the attention of the other party to the mistake that it has made, the 'reasonable' person might not do so on the ground that his primary concern is to protect his own interests or the interests of his principal. Thus the terms 'honesty and reasonableness' are no more than 'a judicial attempt to sketch a line beyond which conduct may be regarded as unconscionable or inequitable'. But 'sharp practice' has 'no
p. 568 defined boundary' and, in deciding whether or ↵ not there has been such sharp practice, the court may have regard to the resources available to the contracting parties. In other words, arm's length negotiations between 'parties of unequal competence and resources may well place greater constraints of honest and reasonable conduct on the stronger party than on the weaker'.

The final difficulty, and the issue that has proved to be most controversial in recent years, relates to those rectification cases where it is said that the document does not reflect the agreement that the parties have made; that is to say where the document fails to reflect the common intention of the parties. At a high level, the factors to be taken into account by the courts in such cases are the subject of general agreement and were set out by Peter Gibson LJ in *Swainland Builders Ltd* v. *Freehold Properties Ltd* [2002] 2 EGLR 71, 74 in the following terms:

> (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2) there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought to be rectified;
>
> (4) by mistake, the instrument did not reflect that common intention.

However, the particular issue which has given rise to considerable controversy is whether the test to be applied when seeking to identify the parties' continuing common intention is an objective one or a subjective one. This controversy and the issues surrounding it were recently examined by the Court of Appeal in the following case.

***FSHC Group Holdings Ltd v. Glas Trust Corporation Ltd***
[2019] EWCA Civ 1361, [2020] Ch 365, Court of Appeal

## Leggatt LJ

6. Rectification is an equitable remedy by which the court may amend the terms of a legal document which, because of a mistake, fails accurately to reflect the intention of the parties to it. As we will discuss, for many years and indeed centuries it was understood that the intention which the court is concerned to identify in deciding whether to grant this remedy is the actual intention of the relevant party or parties as a matter of psychological fact. Recently, however, a different approach has been proposed where the document is a written contract.

7. In *Chartbrook Ltd* v. *Persimmon Homes Ltd* [2009] UKHL 38; [2009] AC 1101, Lord Hoffmann (in a judgment with which all the other members of the appellate committee of the House of Lords agreed) expressed the view that, where the document of which rectification is sought is a written contract, the relevant test of intention is purely 'objective'—meaning by this what a reasonable observer with knowledge of the background facts and prior communications between the parties would have thought their common intention at the time of contracting to be.

8. The observations about rectification made in the *Chartbrook* case were recognised by the House of Lords itself to be *obiter dicta*, which therefore did not create a binding precedent. …

p. 569

9. In the decade since Lord Hoffmann's observations were made, they have proved controversial and have been criticised by both academic commentators and judges. …

10. Uncertainty and dissatisfaction about the present state of the law has grown … On this appeal the question of which test of common intention is correct has been put in issue … and we think it necessary to confront it. …

46. At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed accurately to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed. …

51. The jurisdiction of the Court of Chancery to correct mistakes in written instruments by rectification can be tracked back to its roots in canon and Roman law. …

52. There can be no doubt that where, in these and other cases in which rectification was claimed, judges referred to the 'intention' of the parties, they were referring to what the parties actually intended. Indeed, the use of the term 'intention' to refer to what an 'objective' observer would reasonably have understood the parties' intention to be from their communications (irrespective of their actual states of mind) is, we believe, a comparatively recent legal artefact. …

[The Court of Appeal then engaged in a detailed analysis of the historical development of rectification, including an analysis of Lord Hoffmann's judgment in *Chartbrook* and his articulation of an objective test of intention, and concluded]

141 … We agree with the reasoning … that, if parties make a binding agreement to execute a document containing particular terms but instead execute a document containing different terms, the court may specifically enforce the agreement by rectifying the document; and that, in such a case, the terms of the contract to which the subsequent document is made to conform must be objectively determined in the same way as any other contract.

142. We do not, however, accept that the same reasoning can be applied to a situation in which parties have not made any prior contract but had a common continuing intention in respect of a particular matter in the document sought to be rectified. Where, as we see it, the analysis in the *Chartbrook* case went awry was in regarding rectification to reflect a common intention where there was no prior contract as also based on the principle that agreements must be kept. As we have seen, that was not historically the principle on which equity interfered with written contracts which mistakenly failed to reflect the common intention of the parties; nor in our view does it provide a proper basis for such interference. Rather, rectification to give effect to a 'common continuing intention' not amounting to a legally enforceable contract is justified, and is only capable of being justified, as an instance of the second form of rectification, based on an equitable principle of good faith. …

146. The justification for rectifying a contractual document to conform to a 'continuing common intention' is therefore not to be found in the principle that agreements (as objectively determined) must be kept. It lies elsewhere. It rests on the equitable doctrine that a party will not be allowed to enforce the terms of a written contract, objectively ascertained, when to do so is against conscience because it is inconsistent with what both parties in fact intended (and mutually understood each other to intend) those terms to be when the document was executed. This basis for rectification is entirely concerned with the parties' subjective states of mind. The underlying moral principle can be characterised, to adopt Lord Hoffmann's analysis, as being that persons who make a contract have to observe certain standards of good faith.

147. It is not, however, a new principle … Nor is it limited … to cases of unilateral mistake. We
p. 570 have seen that the principle is of ancient origin and was, historically, the rationale for granting rectification in cases of common mistake. Moreover, it is just as contrary to good faith—if not more obviously so—for a party to take advantage of a mistake about the content or effect of a written contract in a case where both parties were mistaken in believing when the contract was executed that it faithfully recorded their common intention than it is to do so in a case where only one party made such a mistake (to the other's knowledge). Rectification for unilateral mistake can … be understood as an extension of the same basic equitable principle. It is fundamental to the doctrine, in either aspect, that an actual mistake was made by one or more real people in believing that the written contract gave effect to what either was or was understood by one party to be the parties' actual common intention. …

> 176. For all these reasons, we are unable to accept that the objective test of rectification for common mistake articulated in Lord Hoffmann's *obiter* remarks in the *Chartbrook* case correctly states the law. We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an 'outward expression of accord'—meaning that, as a result of communication between them, the parties understood each other to share that intention.

## Commentary

It is unlikely that the decision of the Court of Appeal will be the last word on the issue, not least because of its departure from the opinion expressed by Lord Hoffmann in the House of Lords after 'full' argument: see *Chartbrook* at [58] (for further analysis of the case and the issues which it raises see Stevens (2020) 136 *LQR* 599, Beale and Beale [2020] *LMCLQ* 1, and Peel (2020) 136 *LQR* 205). That said, the analysis of the Court of Appeal has since obtained the support of the Privy Council in *Porter* v. *Stokes* [2023] UKPC 11, [43] where Lord Briggs stated that the distinction drawn by the Court of Appeal was 'well-founded in basic principle'.

The distinction drawn by the Court of Appeal is between the case where the prior agreement between the parties takes the form of a binding contract (where the usual objective test is applicable to that prior contract) and the case where the agreement takes the form of a common understanding which is not legally binding (where the court is concerned with the subjective intention of the parties). In the view of the Court of Appeal the two cases respond to different principles. In the first category the underlying principle is that agreements must be kept but in the second the principle is that it is against conscience to enforce a contract when to do so is inconsistent with what both parties subjectively intended (an analysis broadly supported by the Privy Council in *Porter* v. *Stokes* at [43]).

Although receiving the support of the Privy Council, the distinction thus drawn by the Court of Appeal may be open to question. It does not appear to fit with some powerful dicta in earlier cases. An example is to be found in the judgment of Denning LJ in *Frederick E Rose (London) Ltd* v. *William H Pim Jnr & Co Ltd* [1953] 2 QB 450, 461, where he stated that:

> p. 571 [r]ectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on ↵ the terms of their contract, but by an error wrote them down wrongly; and in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice.

This statement appears to provide unequivocal support for an objective test of intention but it was observed by Leggatt LJ in *FSHC Group Holdings* (at [64]–[65]) that the decision must be 'read in its historical context' on the basis that, at that time at which Lord Denning gave his judgment, rectification could only be sought where the common intention of the parties took the form of a pre-existing contract (where it is accepted that the intention of the parties must be ascertained objectively). It was not until the later decision of the Court of Appeal in *Joscelyne* v. *Nissen* [1970] 2 QB 86 that it was clearly established that a prior concluded contract was not necessary for rectification and that a common intention continuing at the time when a contract is made is sufficient, provided that there has been an 'outward expression of accord'. And it is in this latter context that the Court of Appeal in *FSHC Group Holdings* held that the subjective test of intention is applicable. It should also be noted that in the latter group of cases evidence of the subjective intention of the parties must be combined with an outward expression of accord. The Court of Appeal in *FSHC Group Holdings* justified the latter requirement in the following terms:

> 77. … the power of the court to rectify a contractual document is not a power to make an agreement for the parties; it is a power to correct mistakes in recording what the parties have actually agreed. Moreover, the effect of rectification is not merely to prevent a party from enforcing the written terms of a contract: it is to alter those terms so as to establish legal rights and obligations which differ from those recorded in the original contractual document. Leaving aside for the time being cases of rectification for unilateral mistake, establishing new contractual rights and obligations in this way is only justified if they are founded on mutual agreement. Whether the test applied is subjective or objective, it is fundamental that contractual rights and obligations should be based on mutual assent which the parties have manifested to each other and not on uncommunicated intentions which happen, without the parties knowing it, to coincide. Thus, as noted in *Tartsinis* v. *Navona Management Co* [2015] EWHC 57 (Comm), para 88, it would be capricious if a document which the parties have agreed as the formal record of their contract could be altered to make it conform to the private intention of a party just because, although unknown to that party at the time, it turns out that the other party had a similar intention. We agree with the answer implied to the following question posed by Campbell JA in the Australian case of *Ryledar Pty Ltd* v. *Euphoric Pty Ltd* [2007] NSWCA 65; [2007] NSWLR 603 at para 315:
>
> > 'If two negotiating parties each had a particular intention about the agreement they would enter, and their intentions were identical, but that intention was disclosed by neither of them, and they later entered [into] a document that did not accord with that intention, what would be the injustice or unconscientiousness in either of them enforcing the document according to its terms?'

p. 572

## 16.8 *Non Est Factum*

*Non est factum* is a defence which can be invoked by someone who does not understand a document that he has signed. However, the defence operates within narrow limits, largely to protect the interests of third parties who may rely to their detriment on the validity of a signature contained in a document. A claimant who wishes to invoke the defence must establish two points. First, he must establish that he was permanently or temporarily unable through no fault of his own to have without explanation any real understanding of the document he has signed. Secondly, he must show that there was a real or substantial difference between the document which he signed and the document which he believed he was signing. However, a claimant will not be able to invoke the defence when he has been careless in signing the document or has simply failed to read the document properly (*United Dominions Trust Ltd* v. *Western* [1976] QB 513). In such a case the party signing the document is bound by his signature (see 9.2). The leading case on *non est factum* is the following decision of the House of Lords:

***Saunders (Executrix of the Will of Rose Maud Gallie, dec'd) v. Anglia Building Society***
[1971] AC 1004, House of Lords

Mrs Gallie was a 78-year-old widow. She had a leasehold interest in a house. She intended to make a gift of her interest to her nephew, Mr Parkin. She gave him the deeds knowing that he wished to raise money on the house in collaboration with his business associate, Mr Lee. In June 1962 Mr Lee asked Mrs Gallie to sign a document. As Mrs Gallie had broken her glasses and could not read the document, she asked Mr Lee to tell her what it was. He told her that it was a deed of gift of the house to her nephew. Mrs Gallie signed the document in that belief and her nephew witnessed her signature. In fact, the document was an assignment of her interest to Mr Lee for £3,000. Mr Lee never paid the £3,000 and had never intended to pay it. He mortgaged the house for £2,000 with the Anglia Building Society, used the money raised to pay his debts, and subsequently defaulted on the mortgage repayments. Anglia sought possession of the house. Mrs Gallie brought an action against Mr Lee and Anglia seeking a declaration that the assignment was void on the ground of *non est factum*. The judge held that the plea of *non est factum* was made out and granted the declaration. The Court of Appeal reversed the decision. The House of Lords held that the plea of *non est factum* had not been established.

## Lord Reid

The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteenth century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were
p. 573 signing. I think it must also apply ↵ in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinising the document before signing it was that he was too busy or too lazy. In general I do not

think he can be heard to say that he signed in reliance on someone he trusted. But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change.

We find in many of the authorities statements that a man's deed is not his deed if his mind does not go with his pen. But that is far too wide. It would cover cases where the man had taken no precautions at all, and there was no ground for his belief that he was signing something different from that which in fact he signed. I think that it is the wrong approach to start from that wide statement and then whittle it down by excluding cases where the remedy will not be granted. It is for the person who seeks the remedy to show that he should have it.

Finally, there is the question as to what extent or in what way must there be a difference between that which in fact he signed and that which he believed he was signing. In an endeavour to keep the plea within bounds there have been many attempts to lay down a dividing line. But any dividing line suggested has been difficult to apply in practice and has sometimes led to unreasonable results. In particular I do not think that the modern division between the character and the contents of a document is at all satisfactory. Some of the older authorities suggest a more flexible test so that one can take all factors into consideration. There was a period when here, as elsewhere in the law, hard-and-fast dividing lines were sought, but I think that experience has shown that often they do not produce certainty but do produce unreasonable results.

I think that in the older authorities difference in practical result was more important than difference in legal character. If a man thinks he is signing a document which will cost him £10 and the actual document would cost him £1,000 it could not be right to deny him this remedy simply because the
p. 574 legal character of the two was the same. It is true that we must then deal ↵ with questions of degree, but that is a familiar task for the courts and I would not expect it to give rise to a flood of litigation.

There must, I think, be a radical difference between what he signed and what he thought he was signing—or one could use the words 'fundamental' or 'serious' or 'very substantial'. But what amounts to a radical difference will depend on all the circumstances. If he thinks he is giving property to A whereas the document gives it to B, the difference may often be of vital importance, but

in the circumstances of the present case I do not think that it is. I think that it must be left to the courts to determine in each case in light of all the facts whether there was or was not a sufficiently great difference. The plea *non est factum* is in a sense illogical when applied to a case where the man in fact signed the deed. But it is none the worse for that if applied in a reasonable way.

I would dismiss this appeal.

### Lord Wilberforce

The plea of *non est factum* has a long history. In medieval times, when contracts were made by deeds, and the deed had a kind of life in the law of its own, illiterate people who either could not read, or could not understand, the language in which the deed was written, were allowed this plea (that is what '*non est factum*' is—a plea): the result of it, if successful, was that the deed was not their deed. I think that three things can be said about the early law. First, that no definition was given of the nature or extent of the difference which must exist between what was intended and what was done—whether such as later appeared as the distinction between 'character' and 'contents' or otherwise. ... Secondly, the ... cases are for the most part as between the original parties to the deed, or if a third party is concerned ... he is a successor to the estate granted. Thirdly, there is some indication that the plea was not available where the signer had been guilty of a lack of care in signing what he did: there is no great precision in the definitions of the disabling conduct. ...

In the nineteenth century, the emphasis had shifted towards the consensual contract, and the courts, probably unconscious of the fact, had a choice. They could either have discarded the whole doctrine on which *non est factum* was based, as obsolete, or they could try to adapt it to the prevailing structure of contract. ... They chose the course of adaptation, and, as in many other fields of the law, this process of adaptation has not been logical, or led to a logical result. The modern version still contains some fossilised elements.

We had traced, in arguments at the Bar, the emergence of the distinction, which has come to be made between a difference (of intention from result) of character, which may render a document void, and a difference of contents which at most makes it voidable. ... It was really the language used in the second leading case of *Howatson* v. *Webb* [1907] 1 Ch 537 which has given rise to difficulty. There, in a judgment of Warrington J which has carried much conviction and authority, we find that, although the judgment of Byles J in *Foster* v. *Mackinnon* (1869) LR 4 CP 704 is quoted, the use of the word 'contents' is switched to mean what the deed actually (as a matter of detail) contains, and contrasted with what is called its legal character (see p. 549: 'The misrepresentation was as to the contents of the deed, and not as to the character and class of the deed').

The distinction, as restated, is terminologically confusing and in substance illogical, as the judgments in the Court of Appeal demonstrate. On the one hand, it cannot be right that a document should be void through a mistake as to the label it bears, however little this mistake may be fundamental to what the signer intends: on the other hand, it is not satisfactory that the document should be valid if the mistake is merely as to what the document contains, however radical this mistake may be and however cataclysmic its result.

p. 575 ↵ The existing test, or at least its terminology, may be criticised, but does it follow that there are no definable circumstances in which a document to which a man has put his signature may be held to be not his document, and so void rather than merely voidable? The judgment of the learned Master of the Rolls seems at first sight to suggest that there are not and that the whole doctrine ought to be discarded, but a closer reading shows that he is really confining his observations to the plainest, and no doubt commonest, cases where a man of full understanding and capacity forbears, or negligently omits, to read what he has signed. That, in the present age, such a person should be denied the *non est factum* plea I would accept. … But there remains a residue of difficult cases. There are still illiterate or senile persons who cannot read, or apprehend, a legal document; there are still persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended. Certainly the first class may in some cases, even without the plea, be able to obtain relief, either because no third party has become involved, or, if he has, with the assistance of equitable doctrines, because the third party's interest is equitable only and his conduct such that his rights should be postponed. … Certainly, too, the second class may in some cases fall under the heading of plain forgery, in which event the plea of *non est factum* is not needed, or indeed available … and in others be reduced if the signer is denied the benefit of the plea because of his negligence. But accepting all that has been said by learned judges as to the necessity of confining the plea within narrow limits, to eliminate it altogether would, in my opinion, deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice.

How, then, ought the principle, on which a plea of *non est factum* is admissible, to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used—'basically' or 'radically' or 'fundamentally'. …

To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in *Foster* v. *Mackinnon* (1869) LR 4 CP 704, 711 where it is said that a signature obtained by fraud:

> 'is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended.'

In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable.

Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect. …

> Thirdly, there is the case where the signer has been careless in not taking ordinary precautions against being deceived. This is a difficult area. … In my opinion, the correct rule, and that which in fact prevailed until *Bragg*'s case [*Carlisle and Cumberland Banking Company* v. *Bragg* [1911] 1 KB 489], is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor. I would add that the onus of proof in this matter rests upon him, i.e. to prove that he acted carefully, and not upon the third party to prove the contrary. …
>
> p. 576 ↵ The preceding paragraphs contemplate persons who are adult and literate: the conclusion as to such persons is that, while there are cases in which they may successfully plead *non est factum* these cases will, in modern times, be rare.
>
> As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer. I do not think that a defined solution can be provided for all cases. The law ought, in my opinion, to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.
>
> This brings me to the present case. Mrs Gallie was a lady of advanced age, but, as her evidence shows, by no means incapable physically or mentally. It certainly cannot be said that she did not receive sympathetic consideration or the benefit of much doubt from the judge as to the circumstances in which the assignment was executed. But accepting all of this, I am satisfied, with Russell LJ, that she fell short, very far short, of making the clear and satisfactory case which is required of those who seek to have a legal act declared void and of establishing a sufficient discrepancy between her intentions and her act. …
>
> I would dismiss the appeal.

### Lord Pearson

> In my opinion, the plea of *non est factum* ought to be available in a proper case for the relief of a person who for permanent or temporary reasons (not limited to blindness or illiteracy) is not capable of both reading and sufficiently understanding the deed or other document to be signed. By 'sufficiently understanding' I mean understanding at least to the point of detecting a fundamental difference between the actual document and the document as the signer had believed it to be. There must be a proper case for such relief. There would not be a proper case if (a) the signature of the document was brought about by negligence of the signer in failing to take precautions which he ought to have taken, or (b) the actual document was not fundamentally different from the document as the signer believed it to be. …

> The principle as stated is limited to a case in which it is apparent on the face of the document that it is intended to have legal consequences. … I wish to reserve the question whether the plea of *non est factum* would ever be rightly successful in a case where (1) it is apparent on the face of the document that it is intended to have legal consequences; (2) the signer of the document is able to read and sufficiently understand the document; (3) the document is fundamentally different from what he supposes it to be; (4) he is induced to sign it without reading it. It seems unlikely that the plea ought ever to succeed in such a case, but it is inadvisable to rule out the wholly exceptional and unpredictable case.
>
> ***Lord Hodson*** and ***Viscount Dilhorne*** delivered concurring speeches.

### Commentary

The facts of the case demonstrate the conflicting interests at stake. On the one hand we have the desire to protect Mrs Gallie from being taken advantage of by her nephew and his associate, while on the other hand we can see the need to protect the building society who, as a third party, advanced money on the validity of Mrs
p. 577 Gallie's signature. The defence of *non est factum* ↵ is drawn by the House of Lords in narrow terms, with a view to protecting third parties, but, at the same time, there is an attempt to avoid creating arbitrary distinctions both in terms of the persons entitled to invoke the defence and in relation to the nature of the mistake that must be established in order to entitle a party to rely on the defence. The category of parties able to invoke the defence is not confined to the blind or the illiterate. It encompasses a much broader range of people but at the same time it does not extend to adults of full capacity who do not take the time to protect their own interests by reading the document they have signed. In relation to the type of mistake that entitles a party to invoke the defence, the House of Lords rejects the technical approach taken in *Howatson* v. *Webb* [1907] 1 Ch 537 (see the speech of Lord Wilberforce extracted earlier) and adopts a broader approach which simply requires that the difference between the document as it was and as it was believed to be must be radical or substantial or fundamental.

## Further Reading

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## Notes

[1] Conversion was defined by Atkin J in *Lancashire and Yorkshire Railway* v. *MacNicholl* (1919) 88 LJKB 601 as 'dealing with goods in a manner inconsistent with the rights of the true owner … provided … there is an intention on the part of the defendant in so doing to deny the owner's right or to assert a right which is inconsistent with the owner's right'.

[2] You cannot give what you do not have.

[3] 'By natural reason (or common sense) useless'.



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