
Concentrate Questions and Answers Contract Law: Law Q&A Revision and Study Guide (3rd edn)

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# 8. Mistake

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## Abstract

The *Concentrate Questions and Answers* series offers the best preparation for tackling exam questions. Each book includes typical questions, answer plans and suggested answers, author commentary, and other features. This chapter discusses the three broad classifications of mistake: common, mutual and unilateral. In common mistake (sometimes confusingly referred to as mutual mistake) both parties share the same mistake about a fundamental fact of the contract. With mutual mistake the parties are at cross-purposes but neither realizes it. In unilateral mistake only one of the parties is mistaken and the other party either knows of the mistake or possibly is deemed to know.

**Keywords:** contract law, common mistake, mutual mistake, unilateral mistake, parties, identity

## Are you ready?

In order to attempt the questions in this chapter you must have covered the following areas in your revision:

- The three broad types of mistake: common mistake, mutual mistake, and unilateral mistake;
- The equitable doctrine of rectification;
- The concept of *non est factum*;
- The legal effect of different types of mistake.

## Key debates

### Debate: should there be a doctrine of mistake at all?

Some have suggested that the problems which are addressed by the doctrine of mistake could be better addressed by using other doctrines, such as those relating to unconscionable behaviour.

### Debate: should an operative common mistake always lead to the contract being void?

An alternative view would suggest a more flexible, discretionary approach to the consequences of a common mistake might be more appropriate in many cases.

### Debate: what is the role of equity in mistake cases?

The role of equity in mistake cases was criticized by the Court of Appeal in ***Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*** **[2002] EWCA Civ 1407.**

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## Question 1

Simon, an antiques dealer, is negotiating with Bette the possible sale of a 'nursing chair' and an 'armchair' from the 'mid-Victorian era'. Bette offers to buy the nursing chair for £3,000, provided it is fully re-upholstered. Secretly Bette believes the armchair to be a valuable antique from the Jacobean era and she offers Simon the sum of £25,000 for it. Simon accepts both offers gladly, particularly as he has been trying, unsuccessfully, to sell the armchair for months at the much lower price of £1,000.

During the re-upholstering of the nursing chair, one of Simon's employees discovers that it is an extremely rare Sheraton chair worth at least £100,000. Simon decides not to sell the nursing chair to Bette. A week later Bette is informed that the armchair is a very good twentieth-century copy worth only £2,500. She decides to return the armchair to Simon and demand a full refund but Simon refuses.

**Discuss the legal position of Simon and Bette in each of the two transactions.**

## Caution!

- Your answer must reflect the fact that several types of mistakes have potentially occurred.

■ Where both parties, for example, make the same mistake (ie common), *always* consider first whether the contract allocated the risk of the 'mistake' to one or other party, or in some other way set out the consequences of the 'mistake' occurring, before considering any possible separate doctrine of common mistake.

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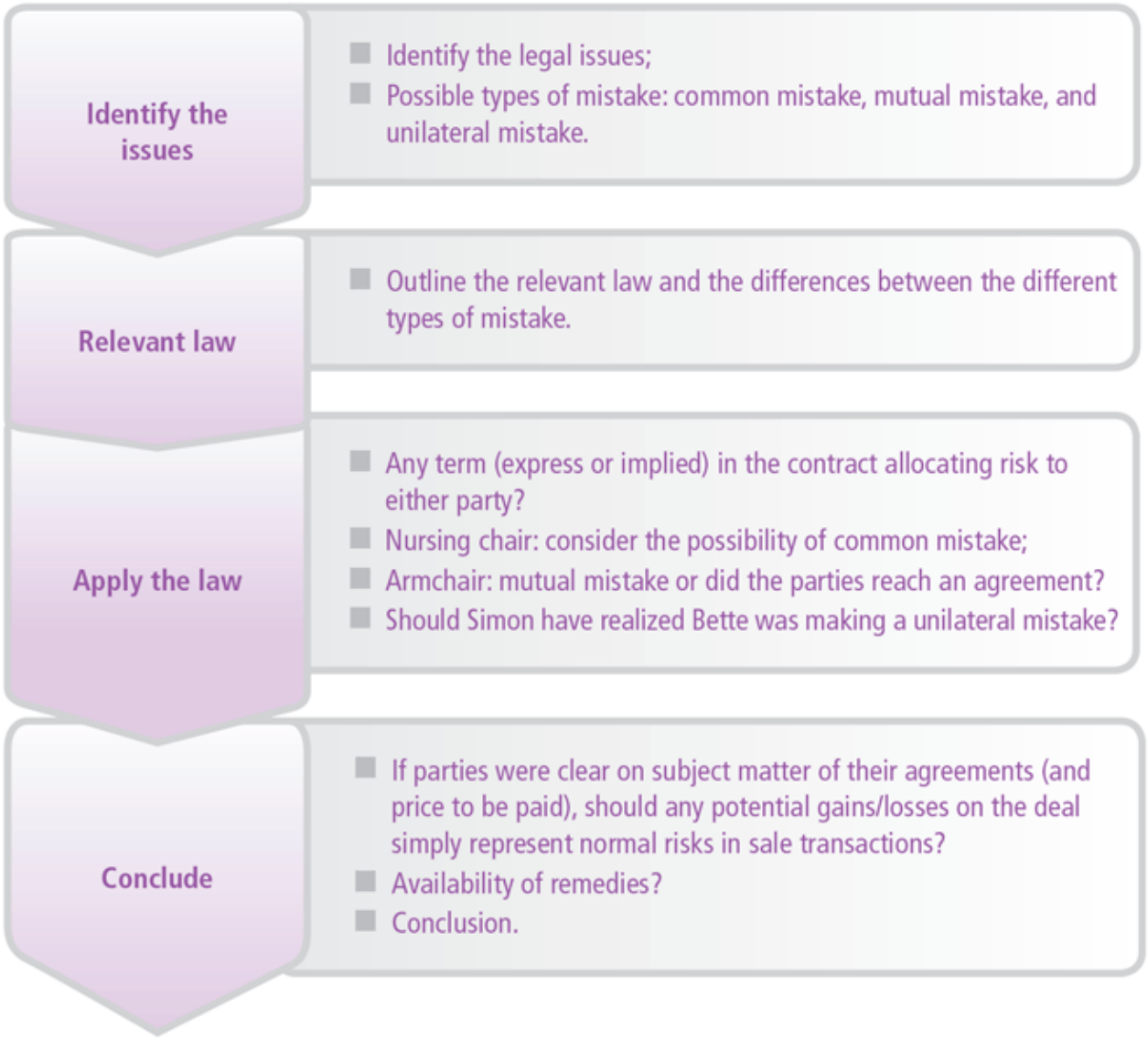
## Diagram answer plan



## Suggested answer

Simon and Bette seem to have entered into a contract for the sale of the two chairs but one or both of the parties have made certain mistakes regarding the subject matter. Regarding the nursing chair, both parties appear to have made the same 'common mistake' that it was manufactured in Victorian times. The sale of the armchair raises issues of mutual and unilateral mistake.[1]

[1] Keep introductions to problem questions brief. Here you identify the different categories of mistake which you will consider separately.

### The nursing chair

Both parties mistakenly believe that the nursing chair[2] was manufactured in Victorian times and therefore was worth £3,000, whereas in fact it is a rare Sheraton chair worth £100,000. Modern case law (see ***Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255** and ***Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407**) clearly emphasizes that, before any independent notion of mistake can be considered, the court should first seek to identify any express or implied terms that might allocate the risk of such a mistake to one or other party.[3]

[2] In problem questions, the use of subheadings, if permitted, can help to structure your answer.

[3] Remember: *always* consider first whether the contract allocated the risk of the 'mistake' to one or other party, or in some other way set out the consequences of the 'mistake' occurring, before considering any possible separate doctrine of common mistake. For a discussion of some of the uncertainties in this area see also ***John Lobb Ltd v John Lobb SAS* [2021] EWHC 1226 (Ch)**.

p. 132 ↵ Here the express terms of the contract identify the subject matter ('nursing chair') and the price ('£3,000'), but it is not immediately clear whether or not the contract allocates the risk of the 'nursing chair' not being 'mid Victorian period' and/or being significantly more valuable than the parties had understood. The possibility of an implied term, through which the contract might be undone if the nursing chair was found to be significantly more valuable, must be considered. However, as the value of the chair is not *necessary* for the contract's performance (the chair can be physically transferred whatever its value), and it does not seem to represent the parties' *common* intention (those buying

antiques often hope to acquire a 'hidden gem'), any implied term that favoured the seller would arguably undermine the entire notion of a bargain and its attendant risks. Therefore, in line with the principle of *caveat venditor*, it is probable that Simon will bear the risk of this mistake.

However, if the court remains uncertain as to who, if anyone, *took the risk* of the 'nursing chair' not being 'mid Victorian period' and/or being significantly more valuable than the parties had understood it might consider the doctrine of common mistake. In ***Bell v Lever Bros Ltd* [1932] AC 161**, the House of Lords seemingly admitted the existence of an independent doctrine of mistake.[4] Lord Atkin proposed at least two tests, based on the notion that only a fundamental mistake can invalidate a contract. The first was whether 'the state of the new facts destroy[s] the identity of the subject matter as it was in the original state of facts'. The second test focused on 'the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be'.

[4] Demonstrates awareness of uncertainties in the law.

Applying the tests in ***Bell*** here, it is unlikely that the contract would be declared void for common mistake.[5] The first test, destruction of the identity of the subject matter, does not seem to apply: the subject matter of the contract is and remains a chair. The second test, which relates to the subject matter being essentially different from what it was believed to be, appears equally fruitless: in ***Bell*** Lord Atkin suggested, *obiter*, that if A bought a picture from B which was believed by both to be the work of an old master, with a commensurately high purchase price, whereas it was a worthless modern copy, A would have no remedy 'in the absence of representation or warranty'. Applying that to our facts, a chair that is less or more valuable than its contract price does not render that article *essentially* different from what it was believed to be: the chair remains a chair.

[5] Apply the law: this is a clear statement of whether the common mistake is sufficient to render the contract void.

In ***Great Peace*** the Court of Appeal acknowledged that, while an independent doctrine of common mistake does exist, it has an extremely narrow ambit and the court must ask whether the fundamental, mistaken assumption renders performance of the contract 'impossible'. This requirement of 'impossibility' is arguably stricter than either of Lord Atkin's tests. The sale of the nursing chair is obviously capable ↵ of performance and, even if a wider interpretation of 'impossibility' were adopted (as in ***Chalcot Training Limited v Ralph* [2020] EWHC 1054 (Ch)**) and it was asked whether the commercial purpose of the contract had ceased to exist, the answer would

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remain negative. The possibility of immense gain (or loss) *is* arguably the accepted, commercial purpose of this contract and so, rather than ceasing to exist, that purpose has been realized (compare ***Pitt v Holt* [2013] UKSC 26**).

Almost certainly, the contract in our facts is valid and binding at common law, so Simon would be in breach of contract if he withdrew from the sale.[6] Finally, where a contract is declared valid and enforceable under the ordinary principles of common law contract law, it is now reasonably clear that rescission cannot be granted in equity on the ground of common mistake (see ***Great Peace*** and ***Pitt v Holt* [2013] UKSC 26** although cf. ***FII Group Litigation v Revenue and Customs Commissioners (formerly Inland Revenue Commissioners)* [2020] UKSC 47** at **[109]** which suggests that the existence of an equitable jurisdiction in this area has not been finally resolved).

[6] Applying the law to the question includes outlining available remedies.

## The armchair

First, we must decide what categories of mistake, if any, might be engaged and then ascertain whether any mistake is an operative mistake rendering the contract void.[7] This might be classified as a mutual mistake in that Bette thinks the armchair is much older (and therefore more valuable), whereas Simon clearly believes that even the contract price overvalues it. It seems neither realizes the other's error as nothing is said. The facts of the problem resemble those in ***Scott v Littledale* (1858) 8 E & B 815**, where the defendants sold by sample 100 chests of tea but later discovered they had submitted a sample of poorer quality than the bulk. The contract was not declared void, allowing the buyer to profit from the transaction. This clearly shows that if the subject matter of a sale is ascertained precisely, a mistake as to quality may be immaterial, otherwise a buyer of goods who has made a bad bargain (as Bette has done) would be able to reopen contracts at will. In short, this mistake should not render the contract void as objectively there is an agreement in the same terms on the same subject matter: the parties are *ad idem*.[8]

[7] Clearly identifies the legal issues to be addressed in this part of the answer.

[8] Applies the law clearly and concisely.

Alternatively, might it be argued that a unilateral mistake has occurred? This would assume that only Bette made a mistake. Here, again, objective appearances count and if Simon has done nothing to mislead Bette, the dominant principle is *caveat emptor*.[9] Following Lord Atkin in ***Bell***, generally this

would still be the position if Simon *knew* that Bette was labouring under a mistake. In this situation, Bette's mistake is arguably one of quality and judgement which is not induced by Simon: if Bette has poor judgement she should make provision for it in the terms of the contract. However, this dominant principle can occasionally give way to evidence of subjective mistake.[10] It is usually said ↵ that the contract will be void if one party is mistaken as to the *promise itself* and this is known to the other party. Here Simon accepted Bette's offer but there is no suggestion that he even knew of Bette's mistaken assumption that the chair was more valuable. Moreover, although it appears sufficient that an operative mistake is one that a reasonable person *ought* to have been aware of (see ***Centrovincial Estates plc v Merchant Investors Assurance Co. Ltd* [1983] Com LR 158**), the decision in ***Bank of Credit and Commerce International v Ali* [1999] 4 All ER 83** makes clear that the doctrine of mistake should not be used to extricate parties from 'bad bargains'. Does Bette's offer of £25,000 for the armchair indicate that she is labouring under some sort of mistake that Simon ought to have realized? Given that the value of antiques is inherently subjective (it all depends on what the buyer is prepared to pay) and that often no two experts would agree on a fair value for an item, it is unlikely that a court would depart from the standard principle of *caveat emptor* unless there was clear evidence that Simon had led Bette to believe that the armchair was worth a lot more than its true value. This means that Bette will be unable to return the chair and demand a full refund.[11]

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[9] Identify the legal rule.

[10] Address any exceptions to that rule which appear relevant on the facts.

[11] Again, remember to apply the law.

## Looking for extra marks?

■ You could briefly mention that it is unlikely that cases involving *res extincta* (ie where goods have perished at the date of contract or never existed) would prove helpful here. Such cases generally involve a total failure of consideration (see ***Couturier v Hastie* (1856) 5 HL Cas 673**—the buyer did not have to pay for the goods as the seller could not deliver them), but in our facts the nursing chair does exist and does have value.

## Question 2

Albert owned three Rolls-Royce cars, manufactured in 1950, 1960, and 1970, respectively. He wanted to sell the 1970 model but he also wanted to ensure that the buyer was a private car collector. Accordingly, he advertised it for sale in his local newspaper as: 'For sale only to a private car collector.' Unfortunately, due to a printing error, the car advertised for sale was the 1960 model. Byron, a car dealer, wished to acquire the 1950 model and was informed, incorrectly, by a friend that Albert had the 1950 model advertised for sale in the newspaper.

Byron knew that, because he was a car dealer, Albert would not sell the car to him. He therefore telephoned Albert and said: 'Hello, I am Mr Jones. I should like to buy the car that you have advertised in the newspaper and will give the full asking price of £80,000 for it.' Albert replied: 'I am pleased
p. 135 ↵ to sell the car to you Mr Jones and I am glad it will have a good home.' When Albert delivered the 1970 model, he discovered the buyer's identity and refused to complete the sale but Byron wished to enforce the contract even though the car was not the 1950 model.

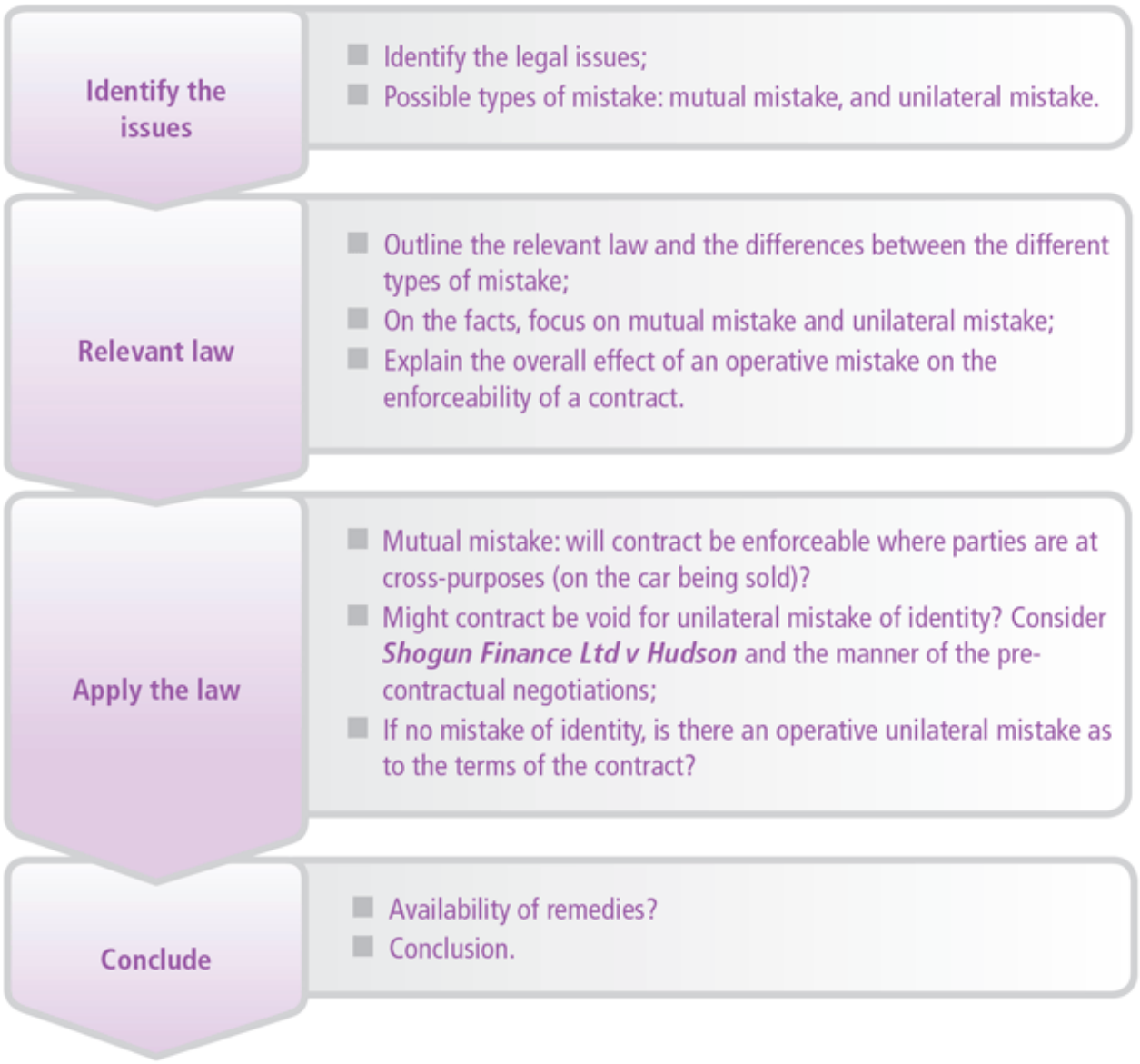
**Discuss the legal position.**

## Caution!

■ This is quite a difficult problem. It potentially involves mutual mistake and unilateral mistake which must be considered separately in the answer.

■ In answering any exam question on mistake of identity, you will probably need to demonstrate some knowledge of the case law that predated the House of Lords' decision in ***Shogun Finance Ltd v Hudson*** **[2003] UKHL 62, [2004] 1 All ER 215**.

## Diagram answer plan

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## Suggested answer

Two different types of mistake arguably may arise here.[1] First, the misunderstanding between the parties regarding the year of manufacture of the car and, secondly, Albert's (A's) 'mistake' as to the identity of the other contracting party, Byron (B). Each mistake must be considered. It should be noted that although issues of mistake permeate this transaction, it does not necessarily follow that the contract will be affected. The key question relates to which mistakes the law regards as

sufficiently fundamental to render a contract void.[2] In the interests of commercial certainty the courts are reluctant to invalidate contracts. As a general rule, if the parties objectively agree in the same terms on the same subject matter, the contract will be binding, even if both parties are subjectively mistaken; any potential gains/losses resulting from their deal arguably simply represent the normal risks associated with transacting.

[1] Identify immediately an awareness that the problem involves mutual mistake and unilateral mistake, and that each will be considered separately in the answer.

[2] This is an important point to make in answers about mistake.

There is, it seems, a mutual mistake in relation to which car is being sold, the parties therefore making different mistakes and being at cross-purposes but neither realizing the other's mistake at the date of contract.[3] Because of confusion caused by third parties, A intends to sell the 1970 model whereas B intends to buy the 1950 model.[4] To be operative, a mutual mistake must entail an absence of genuine agreement; offer, and acceptance thus failing to coincide. It is tempting to conclude that if the parties are at cross-purposes, there can be no agreement, but the test is an objective one and so real, subjective intentions may be dominated by ostensible objectivity, meaning that the contract is valid and binding. In ***Wood v Scarth* (1858) 1 F & F 293**, the defendant offered in writing to let a property to the plaintiff for £63 per annum. The plaintiff negotiated with the defendant's clerk and then accepted the offer by letter. The defendant intended that a premium of £500 would be payable as well as the rent and assumed that his clerk had made that clear but the plaintiff thought that the only liability was the £63 rent. The contract was held binding. Similarly, in ***Scott v Littledale* (1858) 8 E & B 815** the defendants sold by sample to the plaintiff 100 chests of tea but later discovered that the sample was poorer in quality than the bulk. The defendants had made a bad bargain but the contract was held to be valid and the plaintiff's claim for non-delivery upheld. In both of these cases the reasonable man would see a coincidence between offer and acceptance but the opposite conclusion can be reached where the evidence is ambiguous and conflicting. In ***Raffles v Wichelhaus* (1864) 2 H & C 906** the defendant agreed to buy from the plaintiff a cargo of cotton to arrive '*ex Peerless* from Bombay', but while the defendant meant a *Peerless* which sailed in October, the plaintiff meant a
p. 137 *Peerless* which sailed in December. The description of the goods covered either of the ↵ ships' cargoes. The court did not in fact decide whether there was a contract or not but upheld the defendant's refusal to accept the goods from the December shipment on the basis that he could show that the contract was ambiguous and that he intended the October ship. The buyer and seller were similarly at cross-purposes in ***Scriven Bros & Co. v Hindley & Co.* [1913] 3 KB 564** where the plaintiff intended to sell a quantity of tow and the defendant to buy hemp, the court holding that there was

such ambiguity that the subject matter of the contract could not be established with certainty. No contract will exist if the parties arrive at fundamental cross-purposes because of the act of a third party (as in ***Henkel v Pape* (1870) LR 6 Ex 7**).[5]

[3] As regards mutual mistake, it must be decided whether the parties are in agreement or sufficiently at cross-purposes to nullify any notion of contract.

[4] Think: does the fact that third parties (the newspaper and B's friend) induce the contracting parties' mistake make any difference?

[5] Might this apply here, where third parties (the newspaper and B's friend) induced the contracting parties' mistake?

It is arguable that these cases are not based upon an independent concept of mistake but, instead, are illustrations of lack of concurrence between offer and acceptance. In the problem, the parties are not (objectively) *ad idem* and there is nothing in the contract which could clarify the ambiguity. Indeed, the advertisement to which the parties refer advertises the 1960 model for sale and *neither* party wants to make that car the subject of a contract. It is therefore at least arguable that there is no contract on the facts of the problem.

There are further difficulties if A attempts to prove that he did not intend to contract with B. Until the House of Lords' decision in ***Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 All ER 215**, if A appeared to contract with B yet alleged mistaken identity, he had to meet four requirements: A intended to contract with some person other than B; identity was fundamental and material; B knew of A's mistake; and A took reasonable steps to verify B's identity. The mistake needed to be a fundamental mistake of substance, here a mistake of identity rather than one relating to the attributes or qualities of a person. However, the decision in ***Shogun*** reviewed the then-existing common law.[6] The facts involved a rogue who sought to purchase a car on hire-purchase terms, pretending to be a Mr Durlabh Patel. The rogue had stolen Mr Patel's driving licence and other personal documents. The car dealer faxed the information to the claimant, Shogun Finance, who carried out a full credit check on Mr Patel. Satisfied with the result, the claimant agreed to finance the purchase of the car by the rogue on standard hire-purchase terms, signed by both parties. The rogue took possession of the car and wrongfully sold it to the defendant. The House of Lords, by a simple majority, concluded that the parties to the hire-purchase contract could only be Mr Patel, as named in the contract, and the claimant finance company. The contract stated the name and address of Mr Patel

and did not refer to the rogue. As no offer and acceptance had taken place between these two parties, no contract could come into existence and no title to the car could be transferred to the defendant. It remains unclear whether this was an alternative way of saying that the contract had become 'void for mistake of identity'.[7]

[6] An answer must include detailed analysis of this important case.

[7] Acknowledges uncertainties in the law.

p. 138 ↵ The problem here involves an apparent exchange of offer and acceptance by telephone rather than in writing. If this is classed as face-to-face dealings, in line with ***Shogun***, there will be an almost irrebuttable presumption that A intended to reach an agreement with B. However, the meaning of 'face-to-face' in ***Shogun*** is unclear. Lords Millett and Nicholls saw no logic in excluding televisual links and telephone conversations from any definition of the term. Lord Walker accepted that the face-to-face presumption might be extended to cover telephone conversations, although any presumption might be more easily rebutted. Lord Phillips saw no reason to depart from the standard meaning of face-to-face, while Lord Hobhouse offered no view on the matter. Clearly, it is open to a future court to view A and B's telephone call as being 'face-to-face', in which case it could conclude that A intended to deal with B, making the ensuing contract enforceable.

Conversely, if a telephone conversation is not an example of face-to-face dealings (ie the dealings are considered to be *inter absentes*) then it is difficult to find any clear test in ***Shogun*** that would resolve the matter. The intent test advocated by Lords Phillips and Walker suggests that A did not intend to contract with B or, put another way, he did not intend to accept the offer from B. A might argue that his advertisement clearly evidenced a desire to receive offers only from private car collectors and therefore explicitly or implicitly excluded B. If so, A could successfully argue that he had not displayed any objectively verifiable intention of accepting an offer from B and, thus, no contract could arise. The alternative dealing test proposed by Lords Nicholls and Millett (dissenting) in ***Shogun*** would reach a more definite, albeit different, conclusion: A spoke to the physical person at the other end of the telephone line and therefore an exchange of offer and acceptance occurred between those persons. The known intention of A would have no bearing on this issue.

Clearly, the arguments as to whether the contract was concluded face-to-face or *inter absentes*, and whether an 'intent' or 'dealing' test should be employed, are finely balanced.[8] However, whatever the outcome, one should note that in the light of ***Shogun*** the failure of A to take reasonable steps to verify B's identity no longer appears fatal to his claim that the contract is void (a condition that was previously considered to be important, eg ***Phillips v Brooks* [1919] 2 KB 243**).

[8] Where the law is unclear a definitive conclusion may not be possible, but detailed analysis will gain the marks.

In conclusion,[9] there is probably a sufficient mutual mistake regarding the age of the car to render the contract void. There also remains the possibility that A could successfully assert that he was mistaken as to B's true identity, rendering the contract void, or, alternatively, that B misrepresented his identity in pre-contractual negotiations, rendering the contract voidable.

[9] Conclude with a brief summary of advice.

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## Looking for extra marks?

■ You might briefly discuss whether B is guilty of a misrepresentation and what effect this might have on the contract. For example, if B's statement that he is 'Mr Jones' is false, this may be a false statement of fact capable of representing an actionable misrepresentation. A may also argue that he was induced into the contract by the fraud-induced assumption that he was not dealing with a car dealer. If none of the normal bars to rescission apply, the contract is voidable at A's option.

## Question 3

The single thread of principle running through the law of mistake is that, no matter how serious, the courts will not relieve mistakes of quality.

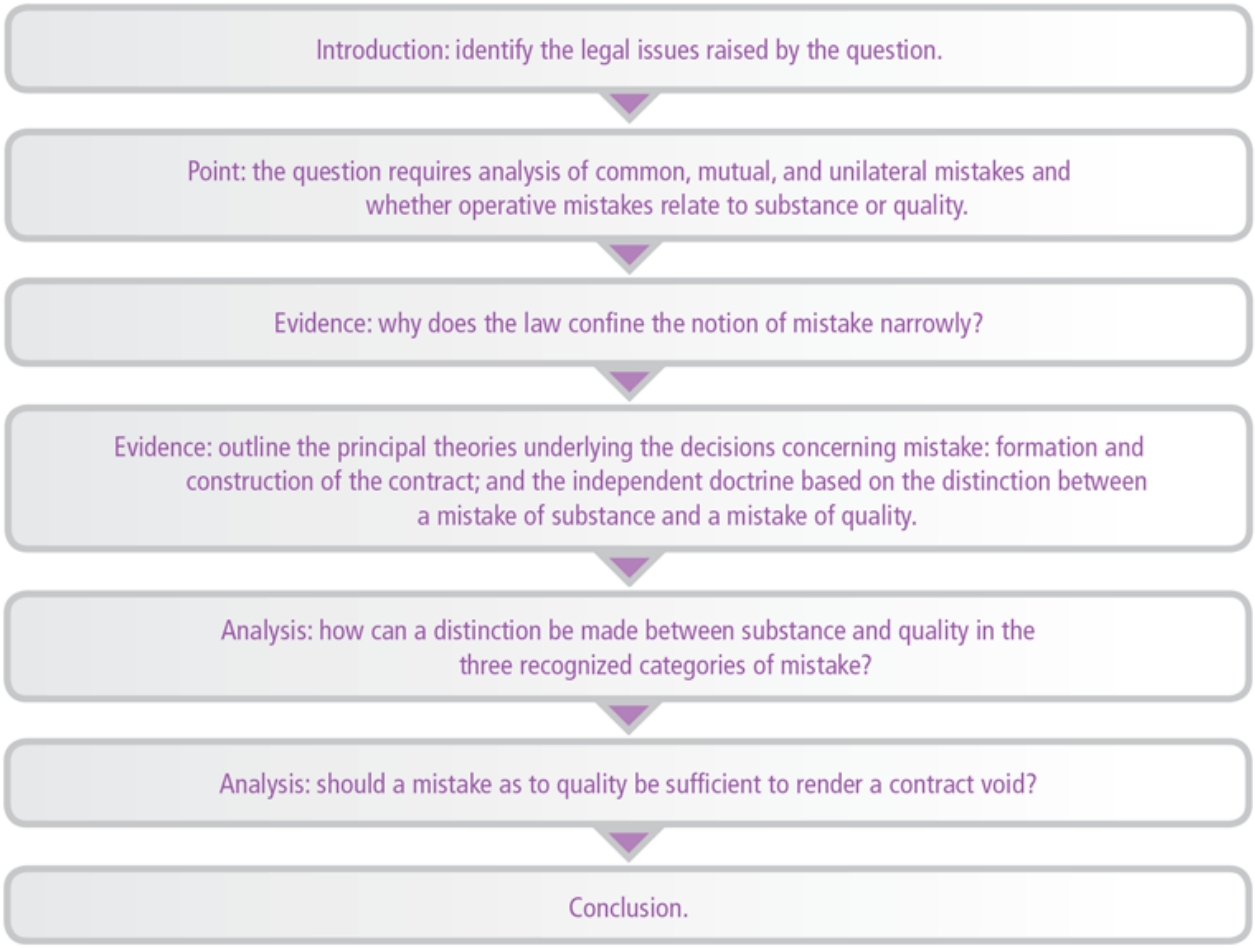
**Discuss.**

## Caution!

■ This essay requires a critical analysis of common, mutual and unilateral mistakes, and an investigation of whether, for example, operative mistakes relate to substance or quality. It also raises the issue of whether a meaningful distinction can be made between substance and quality in reality.

■ A close knowledge of the cases is required, as well as comparing and contrasting the decisions and evaluating the rationale(s) of doctrines of mistake.

## Diagram answer plan

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## Suggested answer

At common law, the notion of mistake is confined within narrow limits but if it is operative its effect is to render a contract void *ab initio*. By placing mistake in a straitjacket, both freedom of contract and certainty of contract are arguably preserved.[1] A may make a bad bargain due to his/her own error and receive something of inferior quality in comparison with his/her expectations but the courts will not grant relief on that ground alone, in order to preserve the essence of bargain and *caveat emptor*

(although compare, for example, the **Consumer Rights Act 2015**). The general rule[2] is that, if the parties agree in the same terms on the same subject matter, they are bound and should look to the contract for 'protection from the effects of facts unknown to them' (***Bell v Lever Bros Ltd* [1932] AC 161**, per Lord Atkin).

[1] Explains why the law considers that the notion of mistake must be confined narrowly.

[2] State the general rule.

Arguably the so-called mistake cases really turn on questions of formation, contract interpretation and risk allocation, rather than representing an independent theory of mistake.[3] If so, cases of common mistake may be resolved by asking whether the contract terms put the risk on one or other of the parties, or whether a term can be implied regarding the presence or absence of the fact at issue (see, eg, ***McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377**). Similarly, the cases on mutual mistake, where the parties are at cross-purposes, and unilateral mistake, where only one party is mistaken, arguably involve nothing more than contract formation in terms of offer and acceptance. Nevertheless, in ***Bell v Lever Bros*** the House of Lords appeared to acknowledge an independent doctrine of mistake based upon the distinction between *substance* and *quality/attributes*.[4] Subsequently, in ***Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255** and ***Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679**, it was held that the question of whether the contract allocated the risks to either party should be considered first and separately from mistake, thereby acknowledging the existence of independent rules of mistake.

[3] Outline the principal theories underlying the decisions concerning mistake.

[4] Your answer must analyse this important case, and compare and contrast this and later decisions on mistake.

p. 141 ↵ In ***Bell v Lever Bros*** Bell had been compensated by Lever Bros for the premature termination of his contract of service, both parties assuming the contract to be valid when, in fact, Bell could have been dismissed summarily without compensation because of previous breaches of duty. Lever Bros sought recovery of the money. In terms of quality, both parties thought that Bell was 'worth' £30,000

whereas he was worth nothing. The House of Lords held the contract to be valid and binding as the substance of the contract was a compensation agreement which remained unchanged by the mistake. Lord Atkin appeared to accept the possibility of a contract being declared void for mistake of quality if the contract was 'essentially different' from that which the parties agreed upon. However, as the mistake in ***Bell*** could not have been much worse (ie payment for no reason), some commentators argue that a contract will only be void for common mistake when the contract has no subject matter, supporting the contention in the question that quality will never be a ground of relief.[5] This may be an overly narrow interpretation of Lord Atkin's approach, but it raises the question of how the test of 'essentially different' applies to mistakes of quality. Indeed, in ***Swynson Ltd v Lowick Rose LLP (In Liquidation) (formerly Hurst Morrison Thomson LLP)*** **[2017] UKSC 32** Lord Sumption refused to be drawn into this 'controversy'.

[5] Remember to retain the focus of your argument. It is clear that it is not necessarily enough that the contract would not have been entered into if the true facts had been known: see ***Triple Seven MSN 27251 Ltd v Azman Air Services Ltd*** **[2018] EWHC 1348 (Comm)**.

It seems difficult to prove a thing could be so deficient in quality that it becomes a different thing. In ***Solle v Butcher*** **[1950] 1 KB 671**, a mistake as to whether a lease agreement was subject to the **Rent Restriction Acts** was not insufficient to invalidate the contract at common law. The same result was reached in ***Leaf v International Galleries*** **[1950] 2 KB 86** where the parties contracted to sell a painting which both erroneously believed to be painted by Constable. It follows that *defects* in the subject matter of the contract, no matter how serious, are rarely a ground of relief and that the threshold of operative common mistake for quality can rarely be reached (compare ***Pitt v Holt*** **[2013] UKSC 26**).[6]

[6] Here your case analysis contributes to your overall argument.

The decision in ***Great Peace*** also sanctions a restricted view of common mistake. The *Great Peace* (GP) was chartered for five days to offer assistance to a stricken vessel, the *Cape Providence* (CP). The exact location of the GP was never discussed but cancellation of the contract required payment of the minimum hire charge. When the defendant was informed that the GP would take 39 hours to reach the CP, they chartered another closer vessel and cancelled the contract with the claimants, refusing to pay the cancellation charge. The defendant argued that the contract had been entered into on the basis of a common, fundamental, mistaken belief that the GP was 'in close proximity' to the CP and that the contract was either void at common law or voidable in equity. The Court of Appeal found for the claimant. First, the GP could still perform its standby function for part of the ↵ five-day charter period (ie this was not a total failure of consideration). Secondly, no term could be implied that the GP should be closer to the CP as this would contradict the pre-contract negotiations where

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the precise location of the GP had not been mentioned—the defendants must bear the risk of their fault. Finally, the requirements of the common law doctrine of common mistake had not been met. The Court of Appeal made several observations to clarify the law relating to common mistake. If no express or implied risk allocation is evident in the contract, the test was whether the mistake was of sufficient magnitude to render performance of the contract *impossible*, and therefore void.[7] This strict test follows the narrow view of mistake from ***Bell v Lever Bros*** and appears to almost rule out a mistake of quality. A court could not draw on its equitable jurisdiction to declare the contract voidable (eg for a fundamental mistake of quality—see ***Solle v Butcher***) as this would be inconsistent with ***Bell v Lever Bros***.

[7] Address the question: should a mistake as to quality be sufficient to render a contract void?

The restrictive approach to mistake is also present in mutual mistake[8] where the parties must be at such fundamental cross-purposes that it is impossible to construe an agreement between them. If they are crossed on the question of quality alone this will not render the contract void, allowing one party to profit at the expense of the other, as in ***Scott v Littledale* (1858) 8 E & B 815**. Similarly, in unilateral mistake where only one party is mistaken as to quality and the other party knows it, the contract is still binding on the basis of *caveat emptor*.[9] In unilateral mistakes of identity, the House of Lords in ***Shogun Finance Ltd v Hudson* [2003] UKHL 62,** reinterpreted the issue as being a matter of offer and acceptance, relieving courts from attempting to distinguish identity and attributes.

[8] Address mutual mistake.

[9] Address unilateral mistake.

In conclusion, one might argue that a mistake as to quality which goes to the root of the undertaking should render a contract void. If, for example, where parties agree to buy and sell a painting which they both mistakenly believe to be painted by Picasso,[10] the identity of the artist arguably lies at the root of the contract; it would be unreasonable to argue that the subject matter of the contract is 'a painting' with the artist's identity merely an attribute relating to the painting's value rather than its substance. However, one might equally argue that, without express or implied terms of the contract indicating that the painting is by Picasso, the parties have agreed merely to buy and sell 'a painting'. While the ***Great Peace*** decision recognized an independent doctrine of mistake, this was not based on the distinction between substance and quality but, instead, upon whether performance became

'impossible'. If both parties mistakenly believe a painting to be painted by Picasso, performance of the contract is not impossible as the painting exists and it is the correct subject matter of the contract: the impossibility test in ***Great Peace*** would result in the contract being binding.

[10] The use of analogy here illustrates and reinforces your argument.

p. 143 ↵ The distinction between substance and quality is criticizable as being elusive but provides a basis for distinguishing acceptable from unacceptable contractual risks. While the ***Great Peace*** approach avoids the terminology of substance and quality, arguably it introduces debates concerned with 'impossibility'. Regrettably, the difficulty which the terminology attempts to resolve remains as intractable as ever.

## Looking for extra marks?

■ Examples could illustrate the substance/quality divide in unilateral mistake: if S sells a painting to B knowing that it is not a Constable yet knowing that B thinks it is a Constable, the contract is valid where S has not misled B. B's mistake relates to quality or his motive for entering into the contract. If B is mistaken as to the *promise itself* and S knows it, S cannot take advantage of B, the contract being void. If S intends to sell a painting but B thinks S intends to sell a Constable and S knows of B's mistake, the contract is void, B being in error on the nature of S's promise (see also ***Hartog v Colin and Shields*** **[1939] 3 All ER 566**).

## Question 4

Pike buys and sells paintings and antiques. He sees that Shark, an art dealer, has a Renoir for sale but he knows that Shark would never sell the painting to him as Pike still owes a debt to Shark from a previous contract. Pike therefore emails Shark, stating: 'Hello, I am Lord Chub. I am staying at the Grand Hotel. I should like to acquire the Renoir that you have advertised for sale as it fits into my personal collection perfectly.' Shark has to bribe the porter at the Grand Hotel in order to discover whether Lord Chub is staying there but when he discovers that Lord Chub is registered at the hotel he feels pleased to have attracted a prestigious customer. In fact, Pike is staying at the Grand Hotel in the name of Lord Chub, having stolen the latter's driving licence and chequebook.

The next day, Pike faxes Shark a copy of his driving licence as proof of identity and tells Shark that he will arrange for a courier to visit his premises with a cheque for the correct amount. Shark is agreeable to this proposal and when the courier arrives with the cheque Shark allows him to take the Renoir away. Pike displays the painting in his shop and sells it almost immediately to Rudd, a private collector, who pays in cash. Shark has now discovered that the cheque has been dishonoured and that Rudd is in possession of the Renoir.

**Advise Shark, paying special attention to how the decision of the House of Lords in *Shogun Finance Ltd v Hudson* [2003] UKHL 62, [2004] 1 All ER 215 might have affected his rights.**

**Would your advice differ in any way if Pike had visited Shark's premises, heavily disguised, and had been allowed to take away the Renoir on handing over his cheque?**

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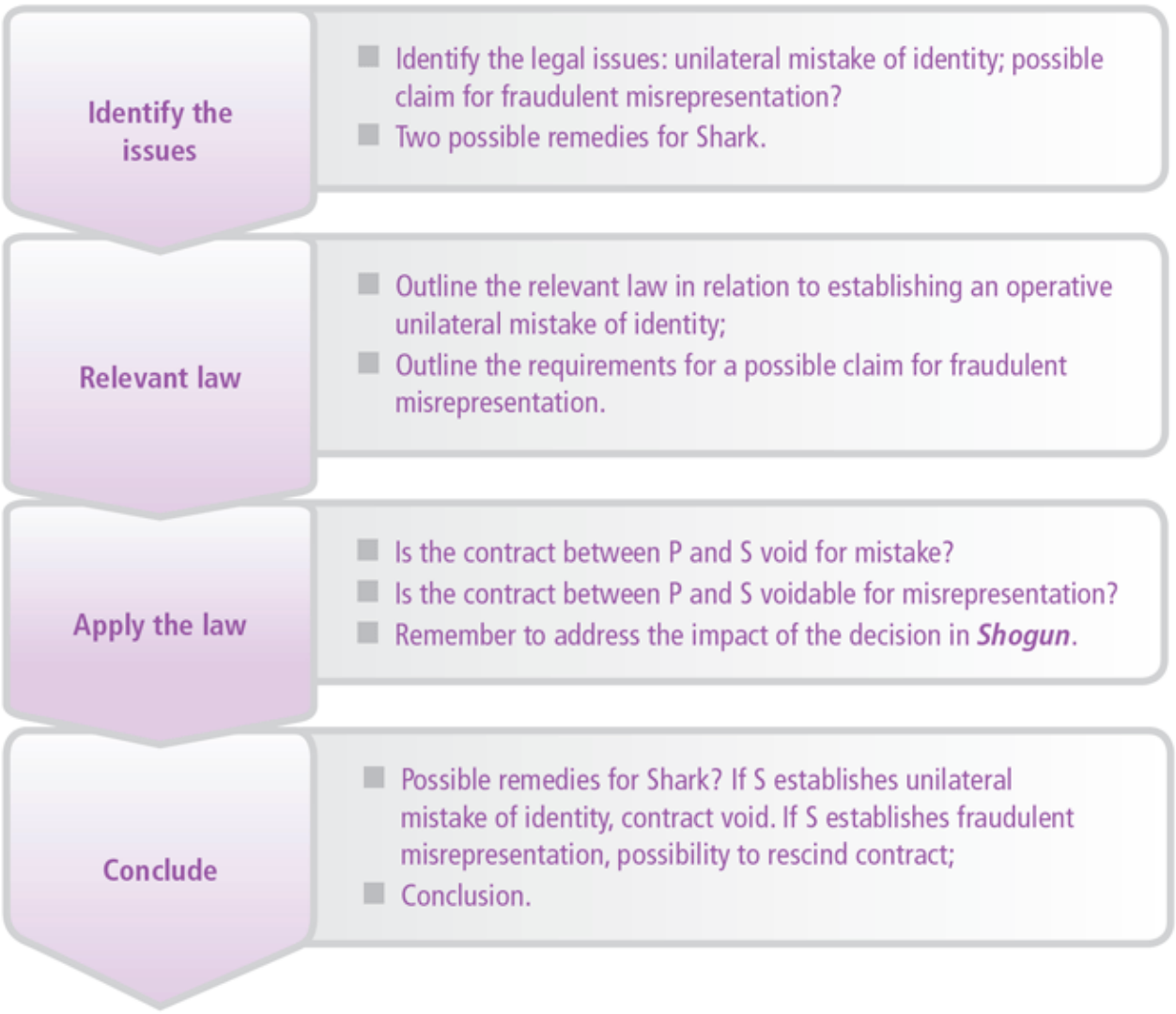
## Caution!

- Think: did Shark accept an 'offer' from Pike or from Lord Chub? The problem concerns unilateral mistake of identity. The contract may also be voidable if Pike made a misrepresentation; if so, consider the effect of the third party, Rudd.
- Clearly, your answer must address ***Shogun***.
- You should also address rescission and how rescission can be communicated.

## Diagram answer plan




## Suggested answer

Shark (S) can explore two possible remedies.[1] First, he can try to establish an operative unilateral mistake of identity which would render the contract with Pike (P) void. If successful, no title in the painting would transfer to P and, consequently, *prima facie* no title would pass to Rudd (R), who would potentially be liable in conversion to S. Secondly, P is almost certainly guilty of fraudulent misrepresentation which would render his contract with S voidable at the latter's option. ↵ S could rescind the contract with P and, if communicated in time, the rescission would mean that no title could transfer to R. There are obvious difficulties here as to which of two innocent parties—the owner or the bona fide third party—should suffer for the act of a swindler who probably cannot be traced.

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[1] Clearly identifies the approach of your answer.

Traditionally, to establish an operative mistake of identity, S had to show that: (a) he intended to deal with Lord Chub; (b) P was aware of this intention; (c) P's identity was crucial in the circumstances; and (d) S took reasonable steps to verify P's identity.[2] On one view the first requirement is easy to prove here, and (b) is self-evident as the facts demonstrate P's fraudulent mind, while requirement (d) might be established by proof of the porter's bribe (an analogy could be drawn with ***Ingram v Little* [1961] 1 QB 31**, where the plaintiffs' quick check of the telephone directory was treated as a reasonable method for verifying the fact that the reputable third party lived at the address provided by the swindler). However, establishing (c) (and the relationship with (a)) under the old law was difficult.

[2] Briefly state the old law and analyse to see how it would have applied to the facts of the problem.

Under the old law, S had to establish that he intended to contract with Lord Chub and P's identity was crucial in the circumstances. Objective appearances were crucial. For example, in ***Phillips v Brooks Ltd* [1919] 2 KB 243**, a swindler named North entered the plaintiff's shop and wrote a cheque saying that he was Sir George Bullough with an address in St James's Square which the plaintiff verified by consulting a directory. North took away a ring which he pledged with the bona fide defendant. The contract was held not void for mistake as the plaintiff intended to deal with the person in front of him; however, the contract was voidable for misrepresentation but had not been avoided, so the defendant acquired a good title. The decision was seemingly ignored in ***Ingram v Little***, but reaffirmed in ***Lewis v Averay* [1972] 1 QB 198**, where a swindler posed as the actor Richard Greene and showed an admission pass to Pinewood Studios bearing a photograph of the swindler. It was held that the plaintiff intended to contract with the person in front of him, especially as the negotiations had been conducted face-to-face. The plaintiff's mistake was only one of attributes rather than identity, so the defendant acquired a good title as the initial contract was voidable for fraud but had not been avoided by the plaintiff. These facts appear very similar to those in the problem except that here Shark (S) never meets Pike (P) in person. Older case law seemed inclined to declare a contract void for mistake where the parties dealt with each other at a distance (eg ***Cundy v Lindsay* (1878) 3 App Cas 459** and ***Boulton v Jones* (1857) 2 H & N 564**) but S would still have to prove a fundamental difference between the person he dealt with and the person he intended to deal with: his mistake had to be of *substance* rather than

p. 146 ↵ *attributes*. So, under the old law, S could argue that if he had known P was an unpaid debtor he would not have dealt with him (ie the contract is void) but a court might conclude that this was simply a mistake of P's creditworthiness (ie the contract might be voidable for fraud but not void for mistake).

How does the House of Lords' decision in ***Shogun*** affect this analysis?[3] Here the parties never dealt with each other face-to-face, or signed a written contract. On this basis Lord Hobhouse's approach in ***Shogun***, which relied on the application of the parol evidence rule to a written contract, is arguably irrelevant. The remaining Law Lords divided equally on the correct approach.[4] Lords Millett and Nicholls (dissenting) advocated a *dealing test* which, in essence, sets up an irrebuttable presumption that the seller (S) intends to deal with the person with whom he physically corresponds (P), or who physically signs the contract. So, for contracts involving face-to-face dealings, that you intend to deal with the person standing in front of you. If correct, the contract between S and P would not be declared void, allowing P to pass good title to R provided S had not rescinded in the meantime. Conversely, Lords Phillips and Walker employed an *intent test*, which presupposed that A intended to direct his offer (or acceptance) to the named individual as stated in the contract or as stated in the written correspondence (ie Lord Chub). On this basis, as P pretended to be Lord Chub when emailing S with his offer (and faxed a copy of Lord Chub's driving licence), it is clearly arguable that no exchange of offer and acceptance took place between S and P: P then cannot pass good title to R.

[3] See the analysis in **Question 2**.

[4] Makes clear that the law is uncertain.

That there was no clear majority in ***Shogun*** regarding the issue of contracts being concluded *inter absentes* without any formal written instrument, makes a definitive conclusion difficult here. A future court, faced with the obvious tension between the 'dealing' and 'intent' tests, may look to the respective conduct of the two innocent parties, S and R: while R appears to have acted in good faith and would have legitimately assumed that P was the owner of the painting, S, in his dealings with P, seems to have taken too much on trust and should therefore suffer the consequences.[5]

[5] Conclusions such as this may be more appropriate to an essay, but are helpful here to indicate how the law might apply on these facts.

Assuming that the contract between P and S is not void for mistake, it will be voidable for misrepresentation.[6] P has misrepresented his identity, which constitutes a false statement of fact, and this seems to have been a key factor in inducing S to sell the painting to P. However, this does not mean S can rescind his contract with P and recover the painting from R: here, R has acquired a valid title and S has made no attempt to rescind. When addressing misrepresentation, if S had discovered the fraud before the sale to R, the possibility of rescission must be considered. The general rule is that

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rescission must be ↵ communicated to the other party who has the voidable title but in ***Car & Universal Finance Co. Ltd v Caldwell*** **[1965] 1 QB 525** it was recognized that a public act (there informing the police and Automobile Association) could suffice if the swindler was deliberately evading the plaintiff. Here, S appears not to know that P perpetrated the fraud. This rule is very protective of ownership but it is of limited application. P is clearly a buyer in possession of the goods under **s. 9 of the Factors Act 1889** and **s. 25(1) of the Sale of Goods Act 1979** and the decision in ***Newtons of Wembley Ltd v Williams*** **[1965] 1 QB 560** establishes that these statutory provisions override an attempted rescission as in ***Caldwell*** meaning that the third party will normally acquire title. As P sells the painting to R in his (P's) shop and R appears to be bona fide, the other requirements of the statutes would seem to be satisfied, meaning that R should acquire a valid title in the painting.

[6] The problem is clearly one of mistake, but the facts also raise this possibility: keep mistake as the focus of your answer, and deal briefly with misrepresentation.

Finally, what if Pike had visited Shark's premises? Prior to the ***Shogun*** decision there was a strong presumption of a binding contract when formed face-to-face and it was difficult to establish a *valid reason* for contracting with some other party (ie Lord Chub) other than that he had the attributes of good reputation and creditworthiness. This would lead to the conclusion that S intended to deal with P (as in ***Lewis v Averay***). The difficulty here is that P is said to be 'heavily disguised'. If this means that *his* identity is hidden, it adds nothing to this conclusion; if it means disguised so as to resemble Lord Chub, S may have a greater chance of proving that he wanted to deal only with Lord Chub.[7] It appears ***Shogun*** has not affected this aspect of mistake, as all of the Law Lords clearly supported the operation of the face-to-face presumption. Here, it would seem reasonable to conclude that the contract between S and P is voidable for fraudulent misrepresentation but not void for mistake of identity.

[7] Your answer addresses both possibilities.

## Looking for extra marks?

■ You could refer to the recommendations of the 1966 Law Reform Committee (Cmnd 2958) that in cases of mistaken identity the contract should be voidable so far as the acquisition of title by third parties is concerned, thereby clarifying the state of the, then, confused body of decisions.

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## Taking things further

■ Chandler, A. and Devenney, J., 'Mistake of Identity: Threads of Objectivity' [2004] 3(1) *Journal of Obligations and Remedies* 7.

*Assesses the significance of mistaken identity in contract negotiations and considers the House of Lords ruling in* ***Shogun Finance Ltd v Hudson*** **[2003] UKHL 62, [2004] 1 All ER 215**.

■ Chandler, A., Devenney, J., and Poole, J., 'Common Mistake: Theoretical Justification and Remedial Inflexibility' [2004] JBL 34.

*Considers the decision in* ***Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*** **[2002] EWCA Civ 1407, [2003] QB 679.**

■ Treitel, G., 'Mistake in Contract' (1988) 104 LQR 501.

*Detailed analysis of* ***Associated Japanese Bank (International) Ltd v Credit du Nord SA*** **[1989] 1 WLR 255**.