



Law of Contract II

JDOC1002

Mistake – Pt 2



Common mistake

- ▶ Contract void under common law where common mistake means that performance of the contract would be impossible, or would essentially be fundamentally different to what was contemplated by the parties
 - ▶ *Bell v Lever Bros Ltd* [1932] AC 161
 - ▶ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679
 - ▶ *Tony Investments Ltd v Fung Sun Kwan* [2006] 1 HKLRD 835



Where subject matter does not exist at time of contract

- Contract prima facie void: *Bell v Lever Bros; Great Peace Shipping*
 - Consent of parties to contract useless and nullified
- Sale of Goods Ordinance (Cap 26) s 8:
 - “Where 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.”



Where subject matter does not exist at time of contract

- ▶ Contract not void if a party expressly or impliedly undertakes responsibility for existence of subject matter
- ▶ *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377
 - ▶ Public tender for purchase of oil tanker said to be wrecked on Jourmaund Reef
 - ▶ No tanker in locality
 - ▶ Contract not void: Commission impliedly warranted existence of tanker



Mistake as to quality of subject matter

- ▶ Test as to whether contract void for common mistake:
- ▶ Whether absence of that quality as to subject matter renders the subject matter (thing) essentially different from the thing that the parties believed it to be
 - ▶ *Bell v Lever Bros* per Lord Atkins
- ▶ Whether the mistake renders the contractual venture impossible
 - ▶ *Great Peace Shipping; Tony Investments v Fung*



Mistake as to quality of subject matter

- ▶ *Bell v Lever Bros Ltd* [1932] AC 161

- ▶ Facts:

- ▶ Agreement for early termination of two employees in return for compensation payable to employees
- ▶ But employer company had right to terminate without paying compensation because of employees' breaches of duties: parties unaware – common mistake

- ▶ HL held:

- ▶ Contract for termination not void
- ▶ Subject matter of contract (early termination of employment) still the same



Mistake as to quality of subject matter

- ▶ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679
- ▶ Facts:
 - ▶ Ship (Cape Providence) in difficulty in South Indian Ocean
 - ▶ Def salvage company agreed with pl (owner of ship Great Peace) for hire of ship (Great Peace) as stand-by vessel to assist
 - ▶ Great Peace believed to be 35 miles away but in fact ships 410 miles apart
- ▶ Eng CA held:
 - ▶ Contract not void for common mistake
 - ▶ Two ships could still meet in 22 hours – contractual venture not impossible despite mistake



Mistake as to quality of subject matter

- *Tony Investments Ltd v Fung Sun Kwan* [2006] 1 HKLRD 835
- Facts:
 - Sale of land agreement in 2004, included a former slipway
 - Vendor did not have title due to reclamation initiated in 1990 and extinguishing of title under statute
- CFI held:
 - Contract not void for common mistake
 - Contract not impossible to perform – vendor had right to seek re-grant from government for nominal premium
 - Also implied warranty that vendor has good title



Contract voidable in equity?

- *Solle v Butcher* [1950] 1 KB 671 (Eng CA):
 - Contract voidable in equity where common mistake fundamental
 - Test more liberal than common law
 - Lease for agreed rent of £250 entered into under common mistake that lease not governed by rent control statute
 - Lease held to be voidable (see in particular judgment of Lord Denning)



Contract voidable in equity?

- ▶ Eng CA in *Great Peace Shipping*:
 - ▶ *Solle v Butcher* inconsistent with HL authority in *Bell v Lever Bros*
 - ▶ No jurisdiction in equity to rescind contract for common mistake
- ▶ HK position not settled
 - ▶ See *Lo Shing Kin v Sy Chin Mong Stephen* (unreported, CACV 148/2012, 8 May 2013)



Rectification of contracts

- Equitable remedy to correct mistakes in written instruments
- Rectification where unilateral mistake as to terms and other party aware of mistake
 - *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013) 16 HKCFAR 336
 - Rectification possible because of lack of good faith by unmistaken party



Rectification of contracts

- Rectification where common mistake
- Elements to be established for rectification of instrument (*Tang Kwai Cheung v Yeung Sze Ting* [2024] 2 HKLRD 1324, HKCA):
 - the parties had a continuing common intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;
 - there was an outward expression of accord;
 - the intention continued at the time of the execution of the instrument sought to be rectified; and
 - by mistake, the instrument did not reflect that common intention.
- Is the common intention determined on the basis of objective intentions or subjective intentions of the parties?

Rectification of contracts

- UK:
- *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 per Lord Hoffmann (obiter):
 - objective intentions
- *FSHC Group Holdings Ltd v Glas Trust Corporation Ltd* [2020] Ch 365 (Eng CA) – two scenarios:
 - If contract formed and then written document used to record contract: objective intentions critical
 - If contract formed at the same time as when the written document was executed: subjective intentions critical
- *Tyne and Wear Passenger Transport Executive (trading as Nexus) v National Union of Rail, Maritime and Transport Workers* [2024] UKSC 37; [2024] 3 WLR 909:
 - Agreed with *FSHC* that focus is on subjective intentions (rejecting *Chartbrook*)



Rectification of contracts

- HK: objective intentions critical in all cases
- *Kowloon Development Finance Ltd v Pendex Industries Ltd* (2013) 16 HKCFAR 336
 - Consent orders allowing further time for repayment of arrears owed by borrower to moneylender
 - Vague as to whether outstanding debt released aside from the specified payments
 - Prior negotiations: clear that debt not intended to be released
 - CFA: rectification ordered either on basis of common mistake or unilateral mistake in the alternative



Non est factum

- Signed contract may be void under doctrine (defence) of non est factum (it is not my deed)
- Non est factum applies where person did not sign document



Non est factum

- ▶ Non est factum also applies where person signed where:
 - ▶ Signer was under disability that prevents them from being able to read or understand document
 - ▶ Fundamental or radical difference between document signed and what signer believed they were signing
 - ▶ Signer was not careless
- ▶ See *Saunders v Anglia Building Society* [1971] AC 1004
- ▶ Failure by person of full capacity to read document before signing not sufficient to establish non est factum



Non est factum

- ▶ Mistake as to legal effect of document also insufficient to establish non est factum
 - ▶ *Saunders v Anglia Building Society*
- ▶ *Kincheng Banking Corp v Kao Yu Kuei* [1986] HKC 212
 - ▶ Guarantor (could not read Chinese) aware document signed involved him taking up some obligation re borrower's liability but not fully aware of precise legal effect
 - ▶ Non est factum not established



Non est factum

- ▶ *Saunders v Anglia Building Society* [1971] AC 1004
 - ▶ Mrs Gaille signed document assigning leasehold to Lee, believing it was gift to nephew (business partner with Lee)
 - ▶ HL held: non est factum not established
 - ▶ Requirement for radical difference not established
 - ▶ Mrs G also careless



Non est factum

- What might amount to radical difference?
- Eg of radical difference: signing extension of period of option under belief that he was signing a receipt
 - *Petulin v Cullen* (1975) 132 CLR 355
- But not radical difference where signing guarantee of existing and future indebtedness, believing guarantee to only cover future indebtedness
 - *O'Brien v Australia and New Zealand Bank Ltd* (1971) 5 SASR 347



Non est factum and unilateral mistake

- ▶ Where unmistaken party seeks to enforce contract:
 - ▶ No need to establish absence of carelessness by mistaken party to render contract void: *Petulin v Cullen*
 - ▶ Apply principles of operative unilateral mistake as to terms where mistake known by other party



Non est factum and unilateral mistake

- ▶ Where case involves rights of third party who acted in good faith in reliance on signed document without notice of mistake
 - ▶ Mistaken party not entitled to assert absence of consensus ad idem against third party (ie unilateral mistake principles not applied; only basis for setting aside contract is non est factum)
 - ▶ Why? Estoppel?
 - ▶ Alternatively not true estoppel but person not allowed to take advantage of own wrong against third party (where there was carelessness): *Saunders v Anglia* per Lord Hodson