Law of Contract II
JDOC1002

1. Mistake – Pt 1

General

- Scenario: one or both parties enter into contract under a mistake as to some matter
- Are the parties bound by the contract?
- Should the parties be bound?

General

- The law: is there a remedy for the mistaken party (or parties)?
- Often no: the contract stands and is binding
- Why?
  - Objective theory of contract
  - Certainty of contracts
- But factors favouring a remedy:
  - Fairness
  - Need for "integrity" of actual agreement: consensus ad idem

Reasons why mistake may arise

- Examples of circumstances involving mistake:
- Mistake caused by misrepresentations
  - Often (but not always), sufficient to analyse under law of misrepresentation
- Mistake arising through no fault of either party

Categories of mistake

- Common mistake – both parties under same mistake
- Mutual mistake – parties at cross-purposes
  - But be careful re terminology: terms not always used consistently by judges or writers
- Unilateral mistake – only one party mistaken

Legal consequences / remedies where operative mistake

- Main remedy: no contract formed (or contract void ab initio)
- Other (potential) equitable remedies:
  - Contract voidable in equity (contract may be rescinded)
  - Refusal to grant specific performance of contract
  - Rectification of contract

Mutual mistake

- Where mutual mistake operative:
  - No contract formed
  - Offer and acceptance do not coincide (no consensus ad idem)
  - Possible that parties not ad idem even if there is literal correspondence between offer and acceptance

Mutual mistake

- *Raffles v Wichelhaus* (1864) 2 H & C 906
- Facts:
  - Agreement for purchase of cotton to arrive by ship "Peerless from Bombay"
  - But two ships named Peerless, one sailing in October, other in December
  - Goods shipped in December
  - Buyer refused to take delivery

Mutual mistake

- Issue:
  - Could fact that there were two ships with same name give def buyer a defence to a claim by pl seller for the price?
- Held: yes
- Case interpreted as giving rise to possibility of contract being void for mutual mistake (no contract formed – parties not ad idem)

Mutual mistake

- Is result consistent with objective theory of contract?
- Yes
- Latent ambiguity in words used: either interpretation of words is reasonable
- Objectively, not possible to determine that there is correspondence between offer and acceptance

Mutual mistake

- *Scriven Bros & Co v Hindley & Co* [1913] 3 KB 564
- Facts:
  - Pl selling hemp and tow by auction
  - Auction catalogue: described 2 sets of goods with same shipping mark (S.L. Lots 63–67 (47 bales) and S.L. Lots 68–79 (176 bales))
  - Samples of both Lots available for inspection at pl's showroom – Lot numbers shown
  - Def buyer inspected first sample (hemp) but did not inspect second sample (tow), believing it was also hemp
  - Def made bids for both Lots at auction; goods knocked down to def
  - After discovering that second set of Lots was tow, def refused to pay

Mutual mistake

- Jury's findings of fact:
  - Auctioneer intended to sell tow (for Lots 68–79)
  - Def intended to bid for hemp
- Held:
  - No contract formed for purchase of tow
  - Parties not ad idem as to subject matter of sale
- True ambiguity: offer and acceptance did not coincide
  - Goods never properly described in catalogue nor showroom

Mutual mistake

- Mutual mistake operative only if the objective facts are equivocal (as to which interpretation is correct)
- If one interpretation can objectively be determined to be correct, then there is only unilateral mistake

Mutual mistake

- *Goldsborough Mort & Co Ltd v Quinn* (1910) 10 CLR 674
- Facts:
  - Contract for sale of land – price of £1, 10s per acre "calculated on a freehold basis"
  - Was price simply £1, 10s per acre (vendor's view) or did price payable require deduction for conversion from leasehold to freehold (purchaser's view)?
- Held:
  - Purchaser's interpretation correct
  - Wording clear and unambiguous in meaning
  - Unilateral mistake on part of vendor and not mutual mistake

Unilateral mistake

- Mistake about some matter relating to the contract is not sufficient on its own to give rise to operative mistake
- Even if other party to contract knows that mistaken party is contracting under the mistake: *Smith v Hughes* (1871) LR 6 QB 597
- Caveat emptor – let the buyer beware

Unilateral mistake

- *Smith v Hughes* (1871) LR 6 QB 597
- Facts:
  - S offered to sell oats to P, with sample given to P
  - P agreed to buy
  - P discovered oats were new oats and not old oats; refused to take delivery
  - S sued P

Unilateral mistake

- Court of Queen's Bench: if contract never specified that oats are to be "old" oats, then –
  - S's knowledge that P intended to purchase old oats is not decisive in rendering mistake operative
  - Parties ad idem if contract was simply for sale of the oats corresponding to the sample inspected by P
  - But position different if S knew that P believed that old oats was a term of the contract (ie P's belief is that S warrants that old oats are being sold)

Unilateral mistake – mistake as to terms of contract

- Principle that can be derived from *Smith v Hughes*:
  - Unilateral mistake is operative if there is a mistaken belief as to a **term** of the contract **and the other party knew** (or ought reasonably to have known) of that mistake

Unilateral mistake – mistake as to terms of contract

- Compare "snapping up" cases
- *Hartog v Collin & Shields* [1939] 3 All ER 566
  - Sale of hare skins stated at a price "per pound"
  - Seller intended to sell at price "per piece"
  - Buyer snapped up offer, as price per pound would be a bargain (3 pieces correspond to 1 pound)
  - No contract as parties not ad idem

Contract void for operative unilateral mistake

- Remedy where unilateral mistake operative: no contract (or contract void) –
  - *Smith; Hartog*
- Is this consistent with objective theory of contract?
- One view: this is an exception to the objective theory (since subjective intention of mistaken party protected)
  - but exception justified and does not conflict with rationale of objective theory

Contract void for operative unilateral mistake

- Alternative view: this is still an application of the objective theory
- Eg *Hartog*:
  - Objectively possible to ascertain that real agreement was price per piece
  - No reasonable person could form view that there was agreement on the literal terms
  - Objectively, not reasonable for P to believe that there was consensus ad idem for sale at price per pound
  - True intentions, objectively ascertained, do not correspond to the literal agreement

Additional remedy for operative unilateral mistake

- "Apparent contract" void (because of mistake of mistaken party)
- But actual contract enforceable on terms as intended by mistaken party (and known to other party) – to reflect true intentions:
  - *Ulster Bank Ltd v Lambe* [2012] NIQB 31

Where unilateral mistake not known by unmistaken party

- Court may deny specific performance if unjust to impose burden on mistaken party due to hardship:
  - *Burrow v Scammell* (1881) 19 Ch D 175 at 182
  - *Tamplin v James* (1880) 15 Ch D 215 at 221
- But mistaken party still liable for damages for breach of contract if party does not perform:
  - *Webster v Cecil* (1861) 30 Beav 62 at 64

Unilateral mistake – mistake as to identity of contracting party

- Usual scenario: mistake induced by misrepresentation of rogue (fraudster)
- Eg A purports to contract with B, believing B to be C because of B's misrepresentation
- Contract voidable for misrepresentation
- But is contract void for unilateral mistake (no contract)?
- Issue is critical where contract involves sale of goods to rogue who then sells to innocent third party
  - Nemo dat quod non habet (no one can give what they do not have)

Unilateral mistake – mistake as to identity of contracting party

- Where offer made personally to specific individual, no other person can accept offer so as to bind the offeror:
  - *Boulton v Jones* (1857) 157 ER 232
- Alternative analysis (putting the same point differently):
  - Where specific identity is intended to be a term of the contract, then unilateral mistake as to identity is operative to render contract void where unmistaken party knew of the mistake
- But contract not void if mistaken party indifferent as to whether only a specific individual is to be the contracting party
  - Ie not intended by mistaken party that specific identity of other party is to be a term of the contract

Mistake as to identity – parties dealing face-to-face

- Strong presumption that parties intend to deal with person in front of them
- *Phillips v Brooks Ltd* [1919] 2 KB 243
- Facts:
  - Pl jeweller sold pearls + ring to rogue (R) in shop
  - R paid by cheque as a Sir George Bullough
  - Pl knew of the latter; checked directory and address given by R
  - Pl allowed R to take ring first after receiving cheque
  - Cheque dishonoured; R pawned ring with def pawnbrokers
  - Pl sued def

Mistake as to identity – parties dealing face-to-face

- Held:
  - Contract between pl and R not void (only voidable)
  - Pl intended to deal with person in shop (R) even though mistaken as to R's identity
  - Pl's claim against def failed

Mistake as to identity – parties dealing face-to-face

- *Ingram v Little* [1961] 1 QB 31:
- Facts:
  - Sale of car by Elsie and Hilda Ingram
  - R test drove car and wished to pay by cheque, but Elsie declined
  - R then said he was Mr P G M Hutchinson of Stanstead House, Stanstead Rd, Caterham
  - Hilda checked phone directory at post office
  - Sisters then agreed to accept cheque
  - R sold car to def

Mistake as to identity – parties dealing face-to-face

- Eng CA (maj) held:
  - Presumption that parties dealing face-to-face intend to deal with person physically present; rebutted only on clear evidence
  - Presumption rebutted on facts of the case

Mistake as to identity – parties dealing face-to-face

- *Lewis v Averay* [1972] 1 QB 198
- Facts:
  - Pl (Lewis) sold car to R who misrepresented that he was the actor Richard Greene
  - Pl accepted cheque after R produced special admission pass to Pinewood Studios with the name "Richard A Green" and photo of R
  - R sold car to def (Averay)

Mistake as to identity – parties dealing face-to-face

- Eng CA held:
  - Contract formed between pl and R
  - Contract voidable but not void
  - Lord Denning MR and Phillimore LJ: nothing to rebut presumption
  - Megaw LJ: pl failed to prove that identity of person was a matter of vital importance, as opposed to general concern for creditworthiness

Mistake as to identity – parties dealing face-to-face

- Can cases be reconciled?
- Each case depends on its own facts/circumstances
- Basic issue: whether identity was intended to be a term of the contract
  - Not easy to prove (face-to-face cases)
  - Strong presumption that it is not (face-to-face cases)
  - Can be rebutted only in exceptional circumstances

Mistake as to identity – parties dealing at a distance in writing

- Same broad principle as for face-to-face cases but presumption different
- *Cundy v Lindsay* (1878) 3 App Cas 459:
- Facts:
  - Blenkarn (R) ordered goods from Lindsay (L) by letter
  - Order form: R gave name of Blenkiron & Co, of 37 Wood St, Cheapside
  - L knew of reputable firm Blenkiron & Co (carried on business at 123 Wood St, Cheapside)
  - L despatched goods without checking address of firm
  - R sold goods to Cundy

Mistake as to identity – parties dealing at a distance in writing

- Held:
  - No contract between R and L
  - L only intended to contract with Blenkiron & Co (as specified in written correspondence)

Mistake as to identity – parties dealing at a distance in writing

- *Shogun Finance Ltd v Hudson* [2004] 1 AC 919
- Facts:
  - Motor dealer was to sell car to R
  - R required loan finance from finance company and transaction was structured as a hire purchase: car to be sold to finance co, who would lease car to R
  - R used stolen drivers licence (Mr Durlabh Patel) as proof of identity; draft hire purchase agreement specified Durlabh Patel as customer
  - Finance co ran credit check on Durlabh Patel and then approved transaction
  - R took car and then sold to def (Hudson)

Mistake as to identity – parties dealing at a distance in writing

- Issue:
  - Did finance co or H own car?
  - Nemo dat: R did not own car and could not confer title on H
  - But exception under Hire Purchase Act 1964 if R was "debtor" under hire purchase agreement with finance co
  - Was there a valid hire purchase agreement?
- Maj of HL Held:
  - Hire purchase contract void; R was not debtor under hire purchase agreement within Act
  - Finance co entitled to car

Mistake as to identity – parties dealing at a distance in writing

- Lord Hobhouse emphasised:
  - Hire purchase agreement referred to contracting party as Durlabh Patel
  - Identity of customer fundamental for finance co under consumer credit contract; not simply willing to deal with any person
- Lord Phillips:
  - Hire purchase co only intended to deal with specific person Durlabh Patel
  - Thus no contract could be formed between hire purchase co and R

Mistake as to identity – parties dealing at a distance in writing

- General principle:
  - Presumption that parties intend to contract with persons named in written agreement
  - Written agreement with named party tends to indicate that identity intended to be a term of the contract [condition precedent to formation of contract]
  - Presumption rebuttable though

Mistake as to identity – parties dealing at a distance in writing

- *King's Norton Metal Co v Edridge Merrett & Co Ltd* (1897) 14 TLR 98
- Facts:
  - Wallis (R) sent letter to pls to seek quotation for purchase of metal
  - Letter had name Hallam & Co on letterhead
  - No such firm existed
  - Pls sent quotation, R made order, goods despatched to R
  - Price not paid; R sold to defs

Mistake as to identity – parties dealing at a distance in writing

- Eng CA held:
  - Contract formed between pls and R
  - Pls intended to contract with writer of letters
  - *Cundy v Lindsay* distinguished because no firm Hallam & Co in existence; no intention on part of pls to contract specifically and only with Hallam & Co

Mistake as to identity – is law satisfactory?

- Critique of English case law and approach in *Cundy v Lindsay*:
- Unprincipled?
  - Possible to rationalise case law on basis of principle – it is a question of whether the mistaken party intended identity to be a term (ie whether the mistaken party intended to only contract with person having that identity)
- But unsatisfactory from policy perspective?
  - Compare *Shogun* per Lord Nicholls (dissent)
  - Original owner who parts with goods without full payment should bear risks