

## COMMON MISTAKE IN CONTRACT LAW

DAVID CAPPER\*

English Contract Law has long struggled to understand the effect of a fundamental common mistake in contract formation. *Bell v. Lever Brothers Ltd.* [1932] A.C. 161 recognises that a common mistake which totally undermines a contract renders it void. *Solle v. Butcher* [1950] 1 K.B. 671 recognises a doctrine of ‘mistake in equity’ under which a serious common mistake in contract formation falling short of totally undermining the contract could give an adversely affected party the right to rescind the contract. This article accepts that the enormous difficulty in differentiating these two kinds of mistake justifies the insistence by the Court of Appeal in *The Great Peace* [2003] Q.B. 679 that there can be only one doctrine of common mistake. However, the article proceeds to argue that where the risk of the commonly mistaken matter is not allocated by the contract itself a better doctrine would be that the contract is voidable.

### I. INTRODUCTION

A common mistake in Contract Law is one shared by both parties to the contract. It must relate to a matter of existing fact or law<sup>1</sup> and can affect the contract in two basic ways. First, it can prevent agreement being reached either through the parties’ failure to produce a matching offer and acceptance on a matter essential for an agreement. Secondly, the parties may have reached agreement but “share an error with respect to some important contextual circumstance”.<sup>2</sup> In the former case no contract is formed because one of the conditions for making a valid and enforceable contract has not been met. In the latter case there appears to be a contract but there is an issue as to whether that contract has been vitiated to some extent. This vitiation could potentially take three broad forms:

- (1) It might totally undermine the contract to the extent that the contract is completely void. A contract that is void is the same in effect as a contract which is not formed.

---

\* Reader in Law, Queen’s University Belfast. This article is a revised version of a lecture delivered at the Institute of Commercial and Corporate Law at Durham University on 13 March 2009. Thanks are very much due to the anonymous referee for comments upon an earlier draft. The author remains responsible for any errors.

<sup>1</sup> This would seem to follow from the abolition of the mistake of law rule in Restitution; see *Kleinwort Benson Ltd v. Lincoln City Council* [1999] 2 A.C. 349.

<sup>2</sup> John D. McCamus, “Mistaken Assumptions in Equity: Sound Doctrine or Chimera?” (2004) 40 Can. Bus. L.J. 46 at 47.

- (2) It might result in a valid but defective contract, where either party has the right to seek rescission<sup>3</sup> of the contract. In practice it would be the party more adversely affected by the common mistake that would seek to do this and the contract would be voidable, not void.
- (3) Although one or both parties might not have made the contract had they been aware of the true position the vitiation is not sufficiently serious to merit any legal intervention.

English law only recognises situations (1) and (3) above. Prior to the decision of the Court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd, The Great Peace*<sup>4</sup> English law did sometimes apply a doctrine of mistake in equity which rendered a contract voidable at the instance of an affected party. Today, however, it is committed to an 'all or nothing' approach. The purpose of this article is to challenge that approach but not through resuscitation of mistake in equity. It is contended that there are some cases where a contract is formed, wherein a serious mistake is made in its formation, that mistake is not the fault of either party or at least not the party seeking relief, and where severe hardship would be caused to that party if it were compelled to perform. Cases answering to this description, which fall into category (2) above, should be cases where the party adversely affected by the mistake may request the court to rescind the contract. It is conceded that acceptance of this proposition probably would come at some expense to the security of contracts and the legitimate expectations of contracting parties that what the contract clearly appears to provide for should be enforced.<sup>5</sup> This makes it important that relief on this ground only be afforded in exceptional circumstances. Before addressing this issue in detail some preliminary issues need to be addressed.

## II. FAILURE TO REACH AGREEMENT

This class of cases can be disposed of quite expeditiously. No contract is formed where the parties do not make a matching offer and acceptance. *Raffles v. Wichelhaus*<sup>6</sup> is often presented as an example of this phenomenon but the absence of any reasons for the House of Lords' decision is also consistent with the proposition that the seller lost for failing to deliver cotton on the agreed ship.<sup>7</sup> *Scriven Brothers & Co. v. Hindley & Co.*<sup>8</sup> is a better example. The sellers' action for the

<sup>3</sup> In other contexts where rescission may be available, *e.g.* misrepresentation, the remedy may be the act of the party itself. See Janet O'Sullivan, "Rescission as a Self-help Remedy: a Critical Analysis" (2000) Cambridge L.J. 509. However in the context of common mistake, where the party against whom relief is sought is not guilty of fault as such, it would seem necessary to seek the remedy from the court.

<sup>4</sup> [2003] Q.B. 679 (EWCA Civ) [*The Great Peace*]. For a very thorough discussion of common mistake in light of this case see Adrian Chandler, James Devenney & Jill Poole, "Common Mistake: Theoretical Justification and Remedial Inflexibility" (2004) J. Bus. L. 34.

<sup>5</sup> In *Associated Japanese Bank (International) Ltd v. Credit du Nord S.A.* [1989] 1 W.L.R. 255 (Q.B.D.) [*Associated Japanese Bank*] at 257, Steyn J. expressed the problem thus:

Throughout the law of contract two themes regularly recur—respect for the sanctity of contract and the need to give effect to the reasonable expectations of honest men. Usually, these themes work in the same direction. Occasionally they point to opposite solutions. The law regarding common mistake going to the root of a contract is a case where tension arises between the two themes.

<sup>6</sup> (1864) 2 H. & C. 906 (Ct. of Ex.).

<sup>7</sup> Edwin Peel, *Treitel on the Law of Contract*, 12th ed. (London: Sweet & Maxwell, 2007) at 339.

<sup>8</sup> [1913] 3 K.B. 564.

price was dismissed because they could not reasonably have believed that the buyers' extravagant bid was for the item for which they sought payment.

### III. ALLOCATION OF RISK

Where the problem with the contract is a shared misassumption it is generally accepted that the first question to ask is whether the contract expressly or by implication allocates the risk of the unanticipated occurrence to one of the parties.<sup>9</sup> This idea seems confusing at first. If the common mistake makes the contract void and a void contract means the same thing as a contract that is not formed how can a solution be found in the contract itself? The answer is that because a coinciding offer and acceptance has taken place there is at least the shell of a contract in existence. What must next be determined is whether the shell contains any substance. If it contains anything which allocates the risk of the unanticipated occurrence to a party then that party will be liable for breach. *McRae*<sup>10</sup> provides a clear illustration of this solution. The defendants sold a tanker supposedly at the bottom of the Pacific Ocean to the plaintiffs. The plaintiffs were unable to find it for the simple reason that it did not exist. They sued the defendants for breach of contract and the defendants' defence of common mistaken belief in the existence of the tanker was dismissed because the contract contained an implied contractual promise that it did exist. The breach of contract was the non-existence of the promised tanker. If there had been no allocation of risk to the defendants they would have succeeded on the basis of the *res extincta* doctrine below.

Professor Sir John Smith and others have argued that the implied term theory can be taken further such that where there is no express or implied allocation of risk the contract is void because of an implied condition precedent to the effect that the assumed circumstances must exist otherwise there is no contract.<sup>11</sup> Whatever the merits of this theory it is unnecessary to explore it further in this article. The theory attempts to provide a rationale for those cases where a contract is not formed. This article acknowledges that there are such cases but also contends that there are other cases where a contract is formed and where relief not currently available should be afforded in exceptional circumstances.

### IV. NO CONTRACTUAL SUBJECT MATTER

In these cases the common misassumption is that there is anything to contract about. There are two cases where a misassumption of this kind by both parties may vitiate the

<sup>9</sup> *McRae v. Commonwealth Disposals Commission* [1951] 84 C.L.R. 377 (H.C.A.) [*McRae*]; *Associated Japanese Bank, supra* note 5; *William Sindall Plc v. Cambridgeshire CC* [1994] 1 W.L.R. 1016 (EWCA Civ) [*William Sindall*].

<sup>10</sup> *Ibid.*

<sup>11</sup> C.J. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 L.Q.R. 385; Kenneth Owen Shatwell, "The Supposed Doctrine of Mistake in Contract: A Comedy of Errors" (1955) 33 Can. Bar Rev. 164; P.S. Atiyah & F.A.R. Bennion, "Mistake in the Construction of Contracts" (1961) 24 Mod. L. Rev. 421; Lee Bowes McTurnan, "An Approach to Common Mistake in English Law" (1963) 41 Can. Bar Rev. 1; J.C. Smith, "Contracts—Mistake, Frustration and Implied Terms" (1994) 110 L.Q.R. 400.

contract. The more typical, although by no means common, case is *res extincta*. This is where the subject matter of the contract does not exist at the time of the contract. A good illustration is provided by the *McRae* case discussed above,<sup>12</sup> where the *res extincta* defence failed because contractual subject matter was found in the implied contractual promise that the tanker did exist.<sup>13</sup>

*Res extincta* has arisen in contexts far removed from sale of goods. Thus in *Galloway v. Galloway*<sup>14</sup> the parties made a separation agreement to end their 'marriage' in ignorance of the fact that they had never been married as Mr. Galloway's presumed to be deceased former wife was still alive. Ridley J. held that the separation agreement was void for this mutual mistake of fact material to the existence of their agreement. With respect, it was not really the mistake which made this contract void. The parties attempted to end their 'marriage' but could not do so because there was no marriage to end.

In cases of *res extincta* the contract is void because there is nothing to contract about, not truly because of mistake. Cases are rare because it will usually be possible, through construction techniques, to find some alternative contractual subject matter, either in one party's promise that the subject of a sale exists, or in cases like *Galloway* by construing the contract as one to provide financial support on the breakdown of a relationship.<sup>15</sup>

The second and less common case where there is a misassumption about contractual subject matter is *res sua*. Here the purchaser of an interest in property already owns an interest in it equal to or greater than what is being sold. The phenomenon is illustrated by the Irish case of *Cooper v. Phibbs*.<sup>16</sup> The contract purported to lease a fishery but the lessee was already the holder of a fee tail estate in the property. The lease was rescinded which might make it seem like the contract was voidable rather than void but this case was brought in the Irish Court of Chancery before the Judicature Acts presumably because it was necessary to cancel the lease and the Chancery had better machinery for doing this. The contract was void because there was no subject matter that could have passed under it. A similar and more likely occurrence than *res sua* is where the seller of property has no title to sell but usually in cases like these the seller is in breach of an implied condition that he or she has sufficient title to sell<sup>17</sup> or the parties agree that the buyer will purchase whatever title the seller has.

*Res sua*, like *res extincta*, is a case where the shell of a contract is apparent but on examination it turns out that there is no content to the shell. In this sense the contract is void. We now proceed to other mistaken assumption cases where both shell and content are usually indisputable. English Law currently takes the position here that

<sup>12</sup> See *supra* note 10 and accompanying text.

<sup>13</sup> An implied contractual promise that the subject matter does exist will usually be the answer in sale of goods cases. See *Couturier v. Hastie* (1856) 5 H.L. Cas. 673; P.S. Atiyah, "Couturier v. Hastie and the Sale of Non-Existent Goods" (1957) 73 L.Q.R. 340; Gerard McMeel, "Interpretation and Mistake in Contract Law: 'The Fox Knows Many Things'" (2006) L.M.C.L.Q. 49 at 58.

<sup>14</sup> (1914) 30 T.L.R. 531.

<sup>15</sup> As Professor McMeel has pointed out, *supra* note 13, construction techniques can solve many but not all problems in this area.

<sup>16</sup> (1867) L.R. 2 H.L. 149. The story of this complex case is well explained in Paul Matthews, "A Note on *Cooper v. Phibbs*" (1989) 105 L.Q.R. 599.

<sup>17</sup> E.g., *Sale of Goods Act 1979* (U.K.), 1979, c. 54, s. 12.

there can only be relief where the contract is shown to be void, *i.e.*, without content. This happens so rarely that relief against the consequences of a common mistake is hardly ever granted. This article calls for a modest relaxation of this principle to the extent of recognising that mistakes of this kind may occasionally justify allowing an affected party to rescind the contract. Shell and content are present but the content is significantly different from what the parties thought it would be. To the extent that it may be said that treating cases of *res extincta* and *res sua* as void contracts deprives litigants of the more flexible remedial regime supported in this article the reassurance can be offered that true cases of *res extincta* and *res sua* are exceedingly rare. Nearly always the better analysis will be that the contractual substance is redefined so that the party seeking relief has a claim for breach of contract and need not rely on any common mistake.

## V. DEFECTIVE CONTRACTS

A defective contract is one where the shell of a contract indisputably exists and there is no apparent basis for the contention that it lacks content. But that content turns out to be significantly different from the parties' expectations, and/or facts are discovered after the contract is made which call seriously into question whether the parties would ever have made that contract had they been aware of those facts.

The leading case of *Bell v. Lever Brothers*<sup>18</sup> is authority for the proposition that a common mistake about the quality of the subject matter of a contract will undermine the parties' assent and make the contract void where that mistake "makes the thing without the quality essentially different from the thing as it was believed to be".<sup>19</sup> Some examples were given of mistakes not sufficiently serious to merit relief—the purchase of an unsound horse believed to be sound, a picture believed to be by a master turning out to be a copy, and an uninhabitable furnished house.<sup>20</sup> That this test is very difficult to satisfy is clearly demonstrated by these examples and the result in *Bell v. Lever Brothers* but one has to question whether Lever Brothers' did not just assume the risk that there were no grounds for dismissing Bell and Snelling without compensation.

*Bell v. Lever Brothers* is a very difficult test to satisfy but at least it makes the law clear. The law became very unclear, however, after the decision of the Court of Appeal in *Solle v. Butcher*.<sup>21</sup> Denning L.J.'s judgment, with which Bucknill L.J. agreed, has been understood to mean that *Bell v. Lever Brothers* applied to those mistakes which prevented a contract from being formed; and that there was a further doctrine of 'mistake in equity' which merely vitiated the contract.<sup>22</sup> Vitiating

<sup>18</sup> [1932] A.C. 161 (H.L.) [*Bell v. Lever Brothers*]. The background and procedural history of this case is impressively told in Catharine MacMillan, "How Temptation Led to Mistake: An Explanation of *Bell v. Lever Brothers Ltd.*" (2003) 119 L.Q.R. 625.

<sup>19</sup> *Ibid.* at 218, *per* Lord Atkin.

<sup>20</sup> *Ibid.* at 220–224.

<sup>21</sup> [1950] 1 K.B. 671 (EWCA Civ) [*Solle v. Butcher*].

<sup>22</sup> As Professor Cartwright has explained in John Cartwright, *Mistake, Misrepresentation and Non-Disclosure* (London: Sweet & Maxwell, 2007) at para. 15.28, Denning L.J. actually said that apart from cases where there is no matching offer and acceptance common mistake only ever makes a contract voidable. This is clearly impossible to reconcile with *Bell v. Lever Brothers*. Lord Denning repeated this view *obiter* in *Leaf v. International Galleries* [1950] 2 K.B. 86 (EWCA Civ) at 89; *Frederick E. Rose*

contracts were voidable and gave a party adversely affected by the mistake the right to seek rescission. The mistake had to be a fundamental common misapprehension about the facts or the parties' respective rights. The party seeking rescission must not be at fault and it must be unconscientious for the other party to avail of the advantage gained.<sup>23</sup> The Court ordered the rescission of a tenancy agreement entered into under the common mistake that rent control legislation did not apply subject to the requirement that the landlord offer the tenant a new lease at the higher rent which the landlord could have demanded under the rent control legislation by serving a notice on the tenant at the time of entering into the agreement.<sup>24</sup> Once again it may be doubted whether the party seeking relief did not accept the risk of circumstances turning out the way they did. He was a surveyor himself and in at least as good a position as the tenant to know whether the rent control legislation applied.<sup>25</sup>

Although 'mistake in equity' at least offers some realistic prospect of relief against common misassumptions that undermine contractual bargains the doctrine was not applied wisely and cannot in any event be squared with *Bell v. Lever Brothers*. In this context any attempt to differentiate mistakes preventing contracts from being formed from mistakes merely vitiating the contract is doomed to suffer the same fate as the Emperor's suit of clothes. It is also implausible to think that if this additional doctrine existed that the House of Lords would make no mention of it in

---

(*London*) *Ltd v. William H. Pim Jnr & Co. Ltd.* [1953] 2 Q.B. 450 (EWCA Civ) at 460; *Oscar Chess Ltd v. Williams* [1957] 1 W.L.R. 370 (EWCA Civ) at 373–374.

<sup>23</sup> *Solle v. Butcher*, *supra* note 21 at 690–93.

<sup>24</sup> Time and space do not permit an examination of whether the court has any power to order rescission on terms. If rescission is the act of the party any such power would be one to impose terms on the previous act of the party. As *Spence v. Crawford* [1939] 3 All E.R. 271 (H.L.) demonstrates the court may be required to make consequential orders upon rescission but this is something different from the order made by the Court of Appeal in *Solle v. Butcher*. The latter was tantamount to making a new contract for the parties and bears a close resemblance to the doctrine of partial rescission apparently applied by the High Court of Australia in *Vadasz v. Pioneer Concrete (SA) Pty* (1995) 184 C.L.R. 102. Partial rescission has not earned the approbation of the English courts as shown by *TSB Bank Plc v. Camfield* [1995] 1 W.L.R. 430 (EWCA Civ) and *De Molestina v. Ponton* [2002] 1 All E.R. (Comm) 587 (Q.B.D.) (*per* Colman J.). For a contrary argument see Jill Poole & Andrew Keyser, "Justifying Partial Rescission in English Law" (2005) 121 L.Q.R. 273.

<sup>25</sup> The same could be said of subsequent 'mistake in equity' cases. In *Grist v. Bailey* [1967] Ch. 532 a house was sold under the common mistaken belief that a protected tenant still lived in it. The protected tenant had died and rescission was ordered. But did not the vendor assume this risk? In *Magee v. Pennine Insurance Co Ltd* [1969] 2 Q.B. 507 (EWCA Civ) a compromised insurance claim was rescinded because of a common mistaken belief that the insured had not breached his obligation of *uberrimae fidei* in obtaining the policy. Again the risk would appear to rest on the insurer here. In *Laurence v. Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128 (Ch.) a business lease was rescinded because of a common mistake that planning permission had been granted. Arguably the lessees should have made enquiries and discovered the true position. Of all the cases here the dictum of Hoffmann L.J. (as he then was) in *William Sindall*, *supra* note 9 at 1035 could be applied: "I should say that neither in *Grist v. Bailey* [1967] Ch. 532 nor in *Laurence v. Lexcourt Holdings Ltd* [1978] 1 W.L.R. 1128 did the judges who decided those cases at first instance advert to the question of contractual allocation of risk. I am not sure that the decisions would have been the same if they had." In *Associated Japanese Bank*, *supra* note 5, the reliance on 'mistake in equity' in a case concerned with the guarantee of an equipment lessee's obligations was misplaced even though the machines did not exist because the lessee's obligations still existed. In *Clarion Ltd v. National Provident Institution* [2000] 1 W.L.R. 1888 (Ch.) the 'mistake in equity' argument was dismissed because the party making it had simply made a bad bargain.

*Bell v. Lever Brothers*.<sup>26</sup> For these reasons the Court of Appeal in *The Great Peace*<sup>27</sup> was right to say it had to go.<sup>28</sup> Nowadays in English Law the only relief available against a common misassumption affecting a contract is that the contract is rendered void. It has already been pointed out that demonstrating a common misassumption sufficiently fundamental to reach this conclusion is extremely difficult. After *The Great Peace* it may even have become more difficult. Lord Phillips M.R. stated that there had to be a common assumption as to the existence of a state of affairs and that “the non-existence of the state of affairs must render performance of the contract impossible”.<sup>29</sup> The judgment draws a link with frustration, a doctrine concerned with supervening events which also must make further performance of the contract impossible.<sup>30</sup>

Decisions subsequent to *The Great Peace* confirmed the demise of ‘mistake in equity’.<sup>31</sup> It is unnecessary to discuss them individually because in none of them should the result have been different no matter what doctrine of common mistake was applied. In *Brennan v. Bolt Burdon*<sup>32</sup> and *Astons Nightclub*,<sup>33</sup> cases concerned with compromised civil and insurance claims respectively, Lord Phillips M.R.’s impossibility test was restated as an intelligible basis test for similar contexts. In *Graves v. Graves*<sup>34</sup> the reasoning of the Court of Appeal was somewhat muddled but the tenancy agreement entered into was rightly voided as there was a clear condition precedent that the tenant be entitled to housing benefit.<sup>35</sup>

The current doctrine of common mistake in the English law of contract is extremely exacting. It requires proof that the entire basis of the parties’ agreement has been undermined. In the next section of this article it will be contended that the current doctrine is unrealistic and unjust and should be liberalised to a modest degree.

---

<sup>26</sup> As Professor Cartwright has pointed out in John Cartwright, “*Solle v. Butcher* and the Doctrine of Mistake in Contract” (1987) 103 L.Q.R. 594 at 605 “...there is nothing to suggest that the courts at the time of *Bell v. Lever Brothers* thought that equity would act *over and above* the common law, in order to hold voidable a contract which the common law would hold valid.”

<sup>27</sup> *Supra* note 4.

<sup>28</sup> Technically it could not do this as it should follow its previous decision in *Solle v. Butcher*; see Stephen B. Midwinter, “The Great Peace and Precedent” (2003) 119 L.Q.R. 180; but nobody seems to doubt that this has happened. For other comments on this case see John Cartwright, “Re-writing the Law on Mistake” (2003) 11 R.L.R. 93; Christopher Hare, “Inequitable Mistake” (2003) 62 Cambridge L.J. 29; Andrew Phang, “Controversy in common mistake” (2003) 67 Conv. 247; F.M.B. Reynolds, “Reconsider the Contract Textbooks” (2003) 119 L.Q.R. 177.

<sup>29</sup> *The Great Peace*, *supra* note 4 at 708–709.

<sup>30</sup> One argument supporting the synthesis between common mistake and frustration is that as frustrating events are future events and common mistakes involve matters of existing fact the latter are more easily guarded against in the contract. It follows from this that the bar for relief should not be set higher for frustration. Against that it might be argued that as a frustrated contract is part performed this raises expectations that should not be lightly disturbed. Of course the mistake might be discovered after a period of part performance but it still undermines the contract from the start.

<sup>31</sup> See *EIC Services Ltd v. Phipps* [2005] 1 W.L.R. 1377 (EWCA Civ); *Brennan v. Bolt Burdon* [2005] Q.B. 303 (EWCA Civ) [*Brennan v. Bolt Burdon*]; *Kyle Bay Ltd (T/A Astons Nightclub) v. Underwriters Subscribing Under Policy Number 019057/08/01* [2007] 1 C.L.C. 164 (EWCA Civ) [*Astons Nightclub*]; *Graves v. Graves* [2007] 3 F.C.R. 26 (EWCA Civ) [*Graves v. Graves*].

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> See David Capper, “More Muddle on Mistake” [2008] L.M.C.L.Q. 264.

## VI. EVALUATION—DEFECTIVE CONTRACTS IN OTHER JURISDICTIONS

We now come to the point where it is necessary to address the central question of this article. Assuming that the parties have reached an agreement the first question will be one of express or implied allocation of risk. As Steyn J. pointed out in *Associated Japanese Bank* “[i]t is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary”.<sup>36</sup> The next question will be whether the contract has any subject matter and many pleas of common mistake will fail here for similar reasons. Those that succeed will result in a void contract for the simple reason that the ‘contract’ has no content; there is nothing to contract about. This leaves one area of common mistake that potentially presents some problems and where English Law has struggled to achieve a coherent solution. This is the common mistake where an identifiable offer and acceptance has occurred, the contract has subject matter, but some significant misassumption has been made and it is not possible to find any express or implied allocation of risk to one or other party.

In these cases English Law has taken the high road. It says that these cases occur very infrequently and where they do this is down to bad contractual planning. Therefore legal certainty is paramount and relief should not be afforded unless the error totally undermines the contract. The high road is not irrational because careful contractual planning can solve many of the potential problems in this area and any greater willingness to grant relief might come at the expense of legal certainty. This is because it is likely that this greater willingness would take the form of a judicial discretion to treat the contract as voidable. Experience of the ‘mistake in equity’ doctrine was not happy but much of this was due to the impossible task of reconciling this doctrine with mistake at common law. Had English law taken a *Solle v. Butcher* approach to common mistake at the time of *Bell v. Lever Brothers* and the courts had attached sufficient weight to allocation of risk in the application of this doctrine it is likely that the law on common mistake would be in a more coherent condition today than it is. It is now proposed to examine the approach of other common law jurisdictions to the problem of common mistake. Based upon the approach taken in these jurisdictions it will be argued that a better principle governing common mistake would be one which recognises an agreement between the parties has not been totally undermined but is defective in the sense that a serious mistake was made in the making of the contract and that it would be unjust to hold the party more adversely affected by that mistake to the bargain.

### A. Ireland

The decision of Costello J. in the High Court of Ireland in *O’Neill v. Ryan (No. 3)*<sup>37</sup> offers a particularly clear picture of the common mistake doctrine this article supports. First the judge analysed the facts surrounding the creation of the contract to see if there had been a failure of offer and acceptance and then he proceeded to consider whether the contract was void because it had no subject matter. He found nothing

---

<sup>36</sup> *Supra* note 5 at 268.

<sup>37</sup> [1999] 1 I.R. 166 (H.C. Ir.).



wrong with the contract on either of these grounds. Then he proceeded to discuss whether the contract could be set aside in equity under the doctrine of *Solle v. Butcher* and held that there had not been any fundamental misapprehension either as to the facts or the parties' rights. What is significant about the judge's analysis is that he made no reference to *Bell v. Lever Brothers* at all. He considered that a contract could be void only if offer and acceptance failed to produce an agreement or if there was nothing to contract about. Otherwise relief from the consequences of common mistake was only possible where a party adversely affected by the mistake asked the court to rescind the contract.<sup>38</sup> In a short judgment the Supreme Court dismissed an appeal, O'Flaherty J. commenting that Costello J.'s discussion of common mistake made a significant contribution to Irish jurisprudence on this aspect of contract law.<sup>39</sup>

### B. Australia

The law in Australia, in the context of *Bell v. Lever Brothers* mistakes, seems to be accurately stated by Professors Carter and Harland as follows:

Therefore, not only is it clear that there is a jurisdiction in Australia to set aside a contract on the ground of common mistake, but also *Solle v. Butcher* can be taken as a vivid illustration of the jurisdiction. However, in order for the contract to be liable to be set aside there must be circumstances which render it *unconscionable* for the party who seeks to uphold the contract to have it enforced.<sup>40</sup>

This means that if a contract has been formed and there is no issue of failure of offer and acceptance or no issue of a lack of substance the only escape route is to convince the court that there has been such a common mistake that it would be unconscionable for the other party to enforce the contract. *Solle v. Butcher* illustrates this jurisdiction and is preferred to *Bell v. Lever Brothers*. Judicial support for this view can be found in the common mistake decision of the High Court in *Svanosio v. McNamara*<sup>41</sup> and its unilateral mistake decision in *Taylor v. Johnson*.<sup>42</sup> In *Svanosio* the High Court unanimously refused to rescind a contract for the sale of a hotel that did not rest fully on the land conveyed because there had been sufficient time between contract and conveyance (four months) to investigate title. Both judgments, those of Dixon C.J. and Fullagar J., and McTiernan, Williams, and Webb JJ. discussed potential relief in terms of *Solle v. Butcher* and voidability rather than *Bell v. Lever Brothers* and voidness. In *Taylor v. Johnson* the majority judgment of Mason A.C.J., Murphy and Deane JJ., in the context of unilateral mistake, differentiated between failures of offer and acceptance that prevented contract formation and other mistakes that might allow an affected party to seek rescission. In doing so their Honours found *Solle v. Butcher* helpful and by-passed *Bell v. Lever Brothers*. The recent decision of the Queensland Court of Appeal in *Australia Estates P/L v. Cairns City Council*<sup>43</sup>

<sup>38</sup> *Ibid.* at 184–185.

<sup>39</sup> *Ibid.* at 196.

<sup>40</sup> John W. Carter & David John Harland, *Contract Law in Australia*, 4th ed. (Sydney: Butterworths, 2002) at para. 1231.

<sup>41</sup> (1956) 96 C.L.R. 186 (H.C.A.) [*Svanosio*].

<sup>42</sup> (1983) 151 C.L.R. 422 (H.C.A.) [*Taylor v. Johnson*].

<sup>43</sup> [2005] Q.C.A. 328.

may cause some doubt as to the state of the law in Australia in so far as it said that the reasoning in *The Great Peace* was persuasive and that *Solle v. Butcher* had been overruled. There was, however, no operative mistake in that case so its precedential value is limited. *Solle v. Butcher* has not been overruled in Australia because it was only persuasive authority to begin with. The same applies to *Bell v. Lever Brothers* and earlier pronouncements of the High Court to the effect that the former was preferred to the latter were not (and could not be) traversed.

### C. New Zealand

Since New Zealand has opted for a statutory solution to the problem discussed in this article, specifically through the *Contractual Mistakes Act 1977*,<sup>44</sup> its value as a guide to the common law is limited. Section 6 of this Act gives the court a wide discretion to grant relief against a common mistake.<sup>45</sup> Prior to this Act Chilwell J. of the High Court, in *Waring v. SJ Brentnall Ltd*,<sup>46</sup> expressed his preference for ‘voidable in equity’ over ‘void at common law’.

### D. Singapore

A very important contribution to the whole area of mistake in contract law has been made by the Singapore Court of Appeal in *Chwee Kin Keong and Ors v. Digilandmall.com Pte. Ltd.*,<sup>47</sup> a case of unilateral mistake. The respondents were a company selling IT products. Their website displayed a HP laser printer at \$3,854 but by a mistake of an employee this was altered to \$66. The appellants in concert purchased a very substantial number of these printers with a view to resale at considerable personal profit. The respondents refused to deliver the goods and the appellants sued for damages for breach of contract. The trial judge found and the Court of Appeal upheld that the appellants all knew that the respondents had made a fundamental mistake. Consequently there had been no *consensus ad idem* and no contract was formed at common law. The Court of Appeal, accepting an argument advanced by *amicus curiae*, further held that the contract would also have been voidable in equity because the appellants had constructive knowledge of the respondents’ mistake. *The Great Peace* was acknowledged to have no application to unilateral mistake<sup>48</sup> but there were a few hints dropped to the effect that it might not find favour with the Court in a case of common mistake. The Court approved Steyn J.’s statement in *Associated*

<sup>44</sup> (N.Z.), 1977/54 [*Contractual Mistakes Act 1977*].

<sup>45</sup> Relief may be granted where the mistake “resulted at the time of the contract—(i) In a substantially unequal exchange of values; or (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor” (see s. 6(1)(b)) and where the risk of the matter in question does not fall upon the party seeking relief (see s. 6(1)(c)).

<sup>46</sup> [1975] 2 N.Z.L.R. 401 (Auckland S.C.).

<sup>47</sup> [2005] 1 S.L.R. 502 (C.A.) [*Digilandmall*]. For discussion see Yeo Tiong Min, “Great Peace: A Distant Disturbance” (2005) 121 L.Q.R. 393 and Lee Pey Woan, “Unilateral Mistake in Law and Equity—*Solle v. Butcher* Reinstated” (2006) 22 J. Contract Law 81 (Lee Pey Woan).

<sup>48</sup> *Ibid.* at para. 74 (*per* Chao Hick Tin J.A., delivering the judgment of the Court).

*Japanese Bank*<sup>49</sup> that a narrow doctrine of mistake at common law supplemented by a wider doctrine of mistake in equity made sense,<sup>50</sup> and generally expressed the view that equitable principles would not be inimical to certainty.<sup>51</sup> The problem with this approach, as Andrew Phang J. pointed out in *Wellmix Organics (International) Pte Ltd v. Lau Yu Man*,<sup>52</sup> is that the common law and equitable formulations of common mistake are only truly different in their consequences. It might also be argued that preserving distinctive rules operating at common law and in equity is unhelpful in any event.<sup>53</sup>

Notwithstanding the fact that *Digilandmall* is about unilateral mistake and that its differentiation between mistake at common law and common mistake in equity is untenable for the reasons explained in the previous paragraph, it is submitted that the authority still provides some support for the thesis presented in this article. This thesis is that common mistake either prevents a contract from being formed or it creates a defective contract which the party more adversely affected can seek to have rescinded. In relation to unilateral mistake *Digilandmall* maintains the same dichotomy which is to be expected in a 'joined up' law of mistake in contract. The dichotomy is maintained in the Court of Appeal's recognition that actual knowledge of the other party's mistake prevents contract formation and that constructive notice of that mistake could make the contract voidable. Differentiating actual and constructive knowledge is a difficult task as *Digilandmall* acknowledged and much further examination of unilateral mistake would be going off on too much of a tangent. However some mention should be made in this context of the recent decision of Aikens J. in *Statoil ASA v. Louis Dreyfus Energy Services LP*,<sup>54</sup> where the judge expressed doubt whether a contract can be rescinded for unilateral mistake. Essentially Aikens J. held that failure of offer and acceptance would prevent contract formation and that rectification could be ordered of a written contract which through unilateral mistake did not conform to the parties' continuing common intention down to the moment of committing their agreement to writing.<sup>55</sup> Beyond that there would be no relief and in particular there could not be any rescission of the contract on the ground that the non-mistaken party unconscionably allowed the mistaken party to enter into it labouring under that mistake. Aikens J. was not helped to avoid this unfortunate conclusion by counsel for the mistaken party citing common mistake

<sup>49</sup> *Supra* note 5 at 267–268.

<sup>50</sup> *Digilandmall*, *supra* note 47 at para. 55.

<sup>51</sup> *Ibid.* at para. 81.

<sup>52</sup> [2006] 2 S.L.R. 117 (H.C.) at para. 70. The judge would, if necessary, have held that a *consent unless* order failed either for cross purposes mistake or because the plaintiff knew that the defendant was labouring under a mistake as to the nature of the order. It was unnecessary to decide this because Andrew Phang J. held that only an ordinary *unless* order had been made.

<sup>53</sup> Andrew Burrows, "We Do This At Common Law But That in Equity" (2002) 22 Oxford J. Legal Stud. 1.

<sup>54</sup> [2008] 2 Lloyd's Rep. 685 (Q.B.D.) [*Statoil*].

<sup>55</sup> On whether rectification for unilateral mistake changes the written contract into an agreement the parties did not make or into one they did see Andrew Burrows, "Construction and Rectification", in Andrew Burrows and Edwin Peel, eds., *Contract Terms* (Oxford: Oxford University Press, 2007) 77 (taking the former position); and David McLauchlan, "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 L.Q.R. 608 (favouring the latter). The present author takes the same position as Professor McLauchlan here and considers that it follows from this that the non-mistaken party's knowledge of the other's mistake would have to be actual.

cases in support of this jurisdiction. Had *Taylor v. Johnson*<sup>56</sup> and *Commission for the New Towns v. Cooper (GB) Ltd.*<sup>57</sup> been cited the outcome might have been different. In the *Statoil* case the defendants' witnesses admitted their awareness of the claimants' mistake in calculating their demurrage claim and that it was their intention to allow the claimants to walk into the trap. The mistake did not relate to a term of the contract so relief could not be granted on the footing that offer and acceptance had failed. In the end Aikens J. did find in the claimants' favour because of a subsequent variation to the original settlement but had this not been possible substantial injustice would have been served. It is respectfully submitted that the common law should and does recognise a power for the court to rescind a contract for unilateral mistake about its commercial consequences and effect, not just its terms, where the non-mistaken party unconscionably allows the other to enter this contract subject to the mistake.<sup>58</sup> The kind of knowledge required to satisfy unconscionability in this context must be left to another occasion. But to return to the point of this digression its purpose is to support the Singapore Court of Appeal's view in *Digilandmall* that there is jurisdiction to rescind a contract entered into under unilateral mistake and by extension this power should be recognised in common mistake cases too.

#### E. Canada

Prior to *The Great Peace* it is striking how much support *Solle v. Butcher* received in common mistake cases. In *Ivanochko v. Sych*<sup>59</sup> a contract for the sale of a house and furniture provided for monthly payments of principal less than the interest; the purchase price would never have been paid. Woods J.A. for the court held that there had been no failure of offer and acceptance, no mistake as to the subject matter of the contract, and no express or implied term prevented the contract from coming into operation. The contract could be rescinded under the principle of *Solle v. Butcher*. In *Hyrsky v. Smith*<sup>60</sup> land sold turned out to be only slightly in excess of 50% of the land described in the contract. In allowing the purchaser to rescind Lief J. followed *Grist v. Bailey*,<sup>61</sup> one of the 'mistake in equity' cases in the *Solle v. Butcher* line. His Honour distinguished *Svanosio*<sup>62</sup> above, which had also favoured

---

<sup>56</sup> *Supra* note 42.

<sup>57</sup> [1995] 2 All E.R. 929 (EWCA Civ) at 946.

<sup>58</sup> Professor Cartwright is of the view that there is no role for rescission in this area because any equitable intervention would be confined to mistakes about terms and these prevent contract formation. See John Cartwright, *Misrepresentation Mistake and Non-Disclosure* (London: Sweet & Maxwell, 2007) at para. 13.31. However, it is not clear that this follows from the authorities cited. In a subsequent passage (paras. 15.10–15.12) Professor Cartwright cites *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 for the proposition that misrepresentation offers the only remedy here but there remains the argument that the law has moved on since that decision. There is support for the position taken in this article in the very comprehensive analysis of rescission in Dominic O'Sullivan, Steven Elliott & Rafal Zakrzewski, *The Law of Rescission* (New York: Oxford University Press, 2008) at paras. 7.07–7.26.

<sup>59</sup> (1967) 60 D.L.R. (2d) 474 (Saskatchewan C.A.).

<sup>60</sup> (1969) 5 D.L.R. (3d) 385 (Ontario H.C.).

<sup>61</sup> See *supra* note 25.

<sup>62</sup> See *supra* note 41 and accompanying text.

*Solle v. Butcher*, on the ground that the misdescription in title amounted to *error in substantialibus*. In *Manwood v. Charter Credit Corporation*<sup>63</sup> a contract for the sale of land mistakenly conveyed the vacant lot next door to the one containing a house that the parties thought they were conveying. Rescission was ordered subject to terms about occupation rent and allowance for improvements. It might be thought that this contract was void but the guiding authorities discussed in the judgment included *Solle v. Butcher*, *Grist v. Bailey*, and *Hyrsky v. Smith*.<sup>64</sup> *Toronto-Dominion Bank v. Fortin (No 2)*<sup>65</sup> was a case about the restitution of a payment made to repudiate a void agreement. Andrews J. held that as the repudiated agreement was void the payment made to escape from it was liable to be set aside in equity, citing *Magee v. Pennine Insurance Co. Ltd.*<sup>66</sup>

*The Great Peace* was considered by the Ontario Court of Appeal in *Miller Paving Ltd v. B. Gottardo Construction Ltd.*<sup>67</sup> Goudge J.A., delivering the judgment of the court, drew upon the article by Professor McCamus cited above<sup>68</sup> to state that Canadian jurisdictions had adopted both the common law and the equitable doctrines of common mistake. The facts of the case clearly supported no relief under either doctrine so it was unnecessary to decide whether any alteration of the law was required. But Goudge J.A. had this to say in passing:

*Great Peace* appears not yet to have been adopted in Canada and, in my view, there is good reason for not doing so. The loss of the flexibility needed to correct unjust results in widely diverse circumstances that would come from eliminating the equitable doctrine of common mistake would, I think, be a backward step.<sup>69</sup>

It is also worth saying that the attention paid by the court to the question of allocation of risk as a reason for denying relief supports the view that acceptance of some flexibility in this area need not come at an unacceptable price to legal certainty.

#### F. *The United States of America*

The jurisdictions which offer the most coherent approach different from the current English approach are probably to be found in the United States. Section 152(1) of the *Restatement 2d of Contracts*<sup>70</sup> provides:

Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake. . .

<sup>63</sup> (1971) 20 D.L.R. (3d) 563 (Nova Scotia S.C.).

<sup>64</sup> *Ibid.* at 569–571.

<sup>65</sup> (1978) 88 D.L.R. (3d) 232 (British Columbia S.C.). See also *Vandekerhove v. Litchfield* (1993) 103 D.L.R. (4th) 739 (British Columbia S.C.).

<sup>66</sup> See *supra* note 25.

<sup>67</sup> (2007) 285 D.L.R. (4th) 568 (Ontario C.A.) [*Miller Paving*].

<sup>68</sup> See *supra* note 2.

<sup>69</sup> See *Miller Paving*, *supra* note 67 at para. 26.

<sup>70</sup> (1981) [*Restatement 2d of Contracts*].

The commentary to this section explains further:

The mere fact that those parties are mistaken with respect to...an assumption does not, of itself, afford a reason for avoidance of the contract by the adversely affected party. Relief is only appropriate in situations where a mistake of both parties has such a material effect on the agreed exchange of performances as to upset the very basis for the contract. . . It is not enough for [the affected party] to prove that he would not have made the contract had it not been for the mistake. He must show that the resulting imbalance in the agreed exchange is so severe that he can not fairly be required to carry it out.

Two elements of the *Restatement's* provision on common mistake are essentially similar to English doctrine—the need for the mistake to relate to a basic assumption underlying the contract and the assumption of risk. ‘Basic assumption’ is probably more liberal than the English formulations, especially when seen in the context of exchange imbalance where the essential difference with the English doctrine truly lies. Where all three elements are present the contract is voidable and it is reasonably clear that as this discretionary doctrine is applied in practice exchange imbalance is highly influential in reaching the conclusion that there has been a basic misassumption. Were any discretionary doctrine introduced to English Law the probabilities are that judges would sometimes reason backwards from a feeling that the contract involves such hardship for the adversely affected party that sufficient misassumption is found too. But open acknowledgement that exchange imbalance is the premise reasoned from is surely better than trying to fit arguments into other premises.

It is worth studying three famous American cases from among those on which the principle of section 152 is based. These cases may not have been decided precisely in line with section 152 but they offer useful fact patterns and are today understood compatibly with section 152. In *Wood v. Boynton*<sup>71</sup> the plaintiff, on a visit to the defendant's shop, sold him a small stone for \$1. She said that it was a topaz and he said that it might be. Afterwards it was discovered that it was actually an uncut diamond worth \$700. The plaintiff's action for rescission of the sale was dismissed because the defendant had been guilty of no fraud and there was no mistake by either party as to the identity of the stone. This case may be contrasted with the fairly contemporaneous decision of the Supreme Court of Michigan in *Sherwood v. Walker*.<sup>72</sup> A heifer, Rose 2d of Aberlone, was sold on the footing that she was barren when she was actually with calf at the time. The buyer's action in replevin was dismissed because the parties had made a fundamental mistake as to the identity of the subject matter of the contract, a breeder as opposed to a beef cow. This highly questionable decision has since been repudiated by the Michigan Supreme Court on the basis that it rested on an unsustainable distinction between the *identity* and the *attributes* of contractual subject matter.<sup>73</sup> But a better ground for the decision would have been that the seller assumed the risk that his cow was barren. The seller in *Wood v. Boynton* would not have assumed the risk that the stone she sold was precious and so this decision quite properly supports section 152 of the *Restatement*.

---

<sup>71</sup> (1885) 25 N.W. 42 (Wisconsin S.C.) [*Wood v. Boynton*].

<sup>72</sup> (1887) 33 N.W. 919 (Michigan S.C.).

<sup>73</sup> See *Lenawee County Board of Health v. Messerly* (1982) 331 N.W.2d 203 (Michigan S.C.).

In *Smith v. Zimbalist*<sup>74</sup> the defendant, an internationally known violinist, was invited to inspect the plaintiff's collection of rare violins. The plaintiff was 86 years old and a collector of rare violins but not a dealer. The defendant picked out two violins which he identified as a Stradivarius and a Guarnerius respectively. A sale price of \$8,000 was agreed and a 'bill of sale' drawn up which described the two violins as a Stradivarius and a Guarnerius but did not expressly warrant that they were. It turned out that they were imitations worth no more than \$300 together. The plaintiff's action for the balance of the price after the defendant had made a \$2,000 down payment was dismissed. In the California Court of Appeals Houser J. construed the bill of sale as a contractual warranty that the violins were what they were believed to be but also made clear that were this not so the defendant would not be bound because of the common mistake.<sup>75</sup>

### G. Conclusions from Other Jurisdictions

Commonwealth jurisdictions and Ireland clearly prefer *Solle v. Butcher* to *Bell v. Lever Brothers*. The United States, where the *Bell v. Lever Brothers* writ does not run at all, has no time for the House of Lords' decision here. More will be said about this issue in the conclusion to this article where the arguments in favour of an approach treating mistakes of this nature as making the contract voidable are discussed. At this stage it is probably sufficient to say that courts in other common law jurisdictions found *Bell v. Lever Brothers* too inflexible to be workable in practice. Under *Bell v. Lever Brothers*, for a contract to be void it must be so comprehensively undermined that it resembles an empty shell with no content at all. There are too few common mistake scenarios where this is a realistic picture of the contract between the parties that this doctrine offers no significant protection to contracting parties in these situations. As courts in other jurisdictions can see in these situations a contract is formed but something serious has gone wrong in the making of the contract. Adherence to the *Bell v. Lever Brothers* approach effectively denies any real prospect of relief in these situations. Courts in other jurisdictions are unwilling to take such a purist approach.

## VII. CONCLUSION

Before setting out the reasons why the English law of contract should adopt a more discretionary approach to 'defective' contracts it is useful to summarise the position reached so far. Where offer and acceptance fails a contract will not be formed. Where offer and acceptance produces an agreement with no subject matter the contract is said to be void. Whether this is different from 'no contract is formed' appears not to matter very much. Sometimes the existence of a contract depends on the satisfaction of an express or implied condition precedent.<sup>76</sup> Before the conclusion of 'no contractual

<sup>74</sup> (1935) 38 P.2d 170 (California C.A.).

<sup>75</sup> Further discussion of Commonwealth and American perspectives on common mistake can be found in David Capper, "Reconfiguring Mistake in Contract Formation", in Michael Bryan, ed., *Private Law in Theory and Practice* (London: Routledge-Cavendish, 2007) 119.

<sup>76</sup> See *Graves v. Graves* *supra* note 31.

subject matter' is reached the preliminary question of allocation of risk must be addressed. If the risk of the events occurring is allocated between the parties then there is contractual subject matter. The same preliminary question should be asked when it comes to examining those cases where offer and acceptance are present and there is contractual subject matter but some fundamental common misassumption of fact has occurred which undermines the contract to a greater or lesser extent. Where there is no allocation of risk here the crucially important considerations of certainty and fairness come into conflict. The English law of contract gives primacy to certainty because it insists that relief can only be afforded where the contract is so fundamentally undermined that it is effectively an empty shell. Other jurisdictions take the line that sometimes the court should retain a discretion to grant relief where common misassumptions occur. It is now proposed to finish this article by explaining why the other jurisdictions have the better argument.

It should be made clear that what is proposed here is not a return to the time when English law had the two doctrines of 'mistake at common law' and 'mistake in equity'. Those doctrines could not operate in tandem because they only truly differed as to their consequences. What is advocated here is something like section 152 of the American *Restatement 2d of Contracts*. This requires a fundamental common misassumption of fact, very harsh contractual imbalance, and no allocation of risk to either party before discretion to render the contract voidable arises.<sup>77</sup> Why would this be better than the current English approach? Any answer must acknowledge that in giving primacy to certainty English law places an extremely high premium on careful contractual planning by the parties and the insertion into contracts of clauses protecting parties against disappointed expectations. It is right that parties should be expected to prepare their contracts carefully and hence there can hardly ever be a role for a judicial discretion to deal with the consequences of common mistake in a commercial contract between two parties who can hire expensive lawyers to get the terms right. Allocation of risk will supply the answer in the vast majority of these cases. However to take the position that if a party did not protect itself by a contractual term there can never be relief is to take a very high road. It requires a lot of faith in rules and is also unfair to contracting parties in situations like *Wood v. Boynton*.<sup>78</sup> The exchange imbalance in that case was monumental and the seller was plainly of insufficient sophistication to be fairly regarded as assuming the risk that the stone was more valuable than she imagined. Provided the courts pay due regard to the context and the allocation of risk question it is not likely that the discretion advocated here would inflict great damage on certainty. On the contrary it would preserve the high road for those cases where it should have primacy and allow flexibility to be applied in cases where justice is the primary consideration.

Two other reasons may be stated why adoption of a more flexible approach would be better than the current English line. First, if a contract is held to be void after it is substantially performed the consequences are drastic, particularly for third parties who have acquired rights by virtue of the contract. Too much should not be made of this, however, because it seems not to affect common mistake very much, featuring most often in the context of unilateral mistake as to the identity of a contracting

<sup>77</sup> If the risk is allocated to the defendant the claimant's remedy is in breach. See *McRae supra* note 9.

<sup>78</sup> See *supra* note 71 and accompanying text.



party.<sup>79</sup> The other reason is, as appears from the discussion above, that other jurisdictions do not find the current English principle attractive. Among common law jurisdictions England is very much on its own in adhering to the high road. When New Zealand altered its common law of contract the statutory scheme adopted, the *Contractual Mistakes Act 1977*, opted for discretion. Both the *Principles of European Contract Law (PECL)*<sup>80</sup> and Article 3 of the UNIDROIT *Principles of International Commercial Contracts* treat common mistake as making the contract voidable.<sup>81</sup> In *The Great Peace* itself Lord Phillips M.R. based the Court of Appeal's rejection of *Solle v. Butcher* mainly on its incompatibility with *Bell v. Lever Brothers*. As possibly appears from the brief mention of the *Law Reform (Frustrated Contracts) Act 1943*<sup>82</sup> towards the end of the judgment<sup>83</sup> a more discretionary approach may have appealed to the judges if only they had felt able to adopt it. This may indicate that if English law is to follow the path of other jurisdictions it may need something like the *Frustrated Contracts Act* to get it there.

---

<sup>79</sup> On this see *Shogun Finance Ltd. v. Hudson* [2004] 1 A.C. 919 (H.L.).

<sup>80</sup> See Ole Lando & Hugh Beale, eds., *Principles of European Contract Law* (The Hague: Kluwer Law International, 2002) Parts I and II.

<sup>81</sup> See Chandler, Devenney & Poole *supra* note 4 at 55–56.

<sup>82</sup> 1943 (U.K.), 6 & 7 Geo. VI, c. 40 [*Frustrated Contracts Act*].

<sup>83</sup> *The Great Peace*, *supra* note 4 at para. 161.