13 Non-agreement mistake

Summary of the issues

This chapter examines the legal treatment of those mistakes which are claimed to nullify consent on the basis that, although the parties have reached agreement, both parties entered into the contract under the same fundamental mistake.

- **In order to protect the interests of third parties and to ensure certainty in transactions, the doctrine of common mistake in English law has traditionally been very narrowly defined.** In any event, like the frustration doctrine, if the parties have allocated the risk of the event in the terms of their contract, that risk allocation clause will govern.
- **There will be a fundamental common mistake in instances of true impossibility or failure of consideration, i.e., where both parties contract on the basis of a mistake as to the existence of the subject-matter or as to ownership of the property which is the subject-matter of the contract. However, a more restrictive approach has been taken to mistakes as to a quality of that subject-matter since it is still technically possible to perform such a contract in accordance with its terms, despite the fact that the subject-matter does not possess a quality which both parties believed it to have.**
- There is authority of the House of Lords (***Bell*** v ***Lever Bros Ltd***) confirming that such mistakes will only be treated as being fundamental (at common law) where the mistake is such as to render the subject matter 'essentially different' but this term is very narrowly defined and it is difficult to identify any instances where it would be satisfied.
- **If a common mistake is sufficiently fundamental, it renders the contract automatically void so that any money or property transferred has to be returned. However, mistakes as to quality will generally not affect validity.** This fact led Lord Denning to recognize an equitable jurisdiction to set aside a contract on terms on the basis of a common mistake which was recognized as being sufficiently 'fundamental' in equity, even if it was not sufficiently fundamental in law. Whilst this generated remedial flexibility in many cases of mistakes as to quality, it was difficult to reconcile with authority and fifty years later the equitable jurisdiction was denied by the Court of Appeal in ***Great Peace Shipping***.

- The result is that the doctrine of common mistake in English law is even narrower than previously supposed and many instances where the parties consider the contract is affected by mistake are not recognized by law as being mistakes having legal consequences.
- Fine distinctions can arise in terms of the legal treatment of impossibility depending upon whether the impossibility is initial (common mistake) or subsequent (frustration doctrine). **Common mistake renders the contract void, whereas frustration discharges future obligations and the 1943 Act provides for an adjustment of the parties' positions with regard to pre-existing obligations.** However, in some instances it will be a matter of pure chance whether the impossibility is initial (already existing before the contract) or subsequent (occurring after it has been made).

13.1 Introduction

As discussed at **3.2.1**, there is no single coherent doctrine of mistake. This reflects the different contexts in which mistake may be said to exist. There are recognized categories of mistake:

(1) **Mistakes which negative consent** (i.e., mistakes which prevent agreement):
- cross-purposes (mutual) mistake; and
- unilateral mistake as to term (see **3.3.1** and **3.3.2**).

(2) **Mistakes which are said to nullify consent.** These mistakes are most often referred to nowadays as 'common mistake', although in past decisions the courts sometimes referred to such mistakes as 'mutual mistakes'. This type of mistake should not, however, be confused with agreement cross-purposes mistakes, which were termed 'mutual mistake' in **Chapter 3**.

The type of mistake discussed in this chapter is a non-agreement mistake (i.e., the parties are not denying that they reached agreement), and it can be termed a 'common' mistake because it is claimed that in entering into the agreement the parties both made the same mistake and the true state of affairs was discovered only after objective agreement had apparently been reached.

(a) The common 'mistake' must have related to a matter which was 'fundamental' to their respective decisions to enter into the agreement; and

(b) Any party who is seeking to rely on common mistake must have reasonable grounds for their belief (per Steyn J in **Associated Japanese Bank (International) Ltd v Credit du Nord** [1989] 1 WLR 255).

The existence and consequences of this type of mistake will arise for court decision where one of the parties wishes to withdraw from the agreement on this ground but the other denies the existence of such a 'fundamental' common mistake, perhaps because the contract has proved advantageous to that other.

Traditionally, the definition of 'fundamental mistake' for these purposes has been narrow so that the operation of the common mistake doctrine at common law has been very limited. This appears to be because such a mistake renders the contract void and therefore of no effect from the very beginning. Accordingly, as there is no contract, the parties are excused all performance. Not surprisingly, therefore, the courts have been anxious not to extend the operation of such a doctrine because of the effect of such a finding on both the positions of the parties and, in particular, on the position of innocent third parties (see the discussion at **3.2.2**).

Although some decisions of the Court of Appeal had determined that equity provided a more extended and flexible remedy in some circumstances (see **13.5**), this has now been denied by the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679.

In addition, there is a further limitation on the operation of the doctrine of common mistake, since it cannot operate if one party has assumed the risk of the event in question (e.g., the non-existence of the subject-matter).

13.2 Contractual allocation of risk

The risk that the assumed state of facts will not materialize may be allocated explicitly, or impliedly, to one or other party. Whether such an allocation of the risk of the relevant mistake to one or other of the parties has taken place must be determined *before* considering the possible operation of the doctrine of common mistake. As Steyn J stated in **Associated Japanese Bank (International) Ltd v Credit du Nord SA** [1989] 1 WLR 255 at p. 268:

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

In *Kalsep Ltd* v *X-Flow BV*, *The Times*, 3 May 2001, the judge applied *Associated Japanese* and held that before concluding that an agreement was based on mistake, it was first necessary to determine whether the contract provided for either party to suffer the risk of the relevant mistake. On the facts, the risk was allocated by the contract so that the doctrine of mistake was excluded.

The fact that the doctrine cannot apply where the contract already allocates the risk of the event was also made clear in the judgment of Lord Phillips MR in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679. Lord Phillips stated (at [76]):

> …the following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be

attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

Elements (ii) and (iii) identify instances of risk allocation, i.e., assumption of responsibility by one of the parties.

13.2.1 Express allocation of the risk

The risk may be *expressly* undertaken by one party.

> In ***William Sindall plc* v *Cambridgeshire CC*** [1994] 1 WLR 1016 the contract to purchase land contained an express term stating that the land was sold 'subject to easements, liabilities and public rights affecting it'. The purchaser later discovered that, unknown to the parties, there was a foul sewer buried under the land. It sought to argue common mistake (for the argument relating to misrepresentation, see **14.5.3.4**).
>
> The Court of Appeal held that the contract term allocated the risk of such incumbrances to the purchaser, and this therefore excluded the operation of the doctrine of mistake.

It follows that where an allocation of the risk has occurred, the fact that the contract as agreed cannot be performed may simply be something that the claimant purchaser has to accept as not being within the promise made by the other party (seller) so that no remedy is available (as in the **William Sindall** case). Alternatively, if the risk of non-performance has been allocated to the seller then the fact of non-performance will constitute a breach of the promise as to existence of the subject matter and will amount to a breach of contract by that party (as in **McRae v Commonwealth Disposals Commission** (1951) 84 CLR 377, discussed below and at **13.3.1.2**, and, as to the measure of damages, at **9.3.4**).

13.2.2 Implied allocation of the risk

McRae v Commonwealth Disposals Commission (1951) 84 CLR 377 is a significant decision because the court implied a promise that the tanker was in the position specified and this implied promise was therefore the basis for the allocation of the risk of the tanker's non-existence.

> The Commission had invited tenders for a shipwrecked oil tanker, which was said by the Commission to contain oil and to be lying at a particular location. The plaintiffs' tender was accepted and they went to considerable expense in equipping a salvage expedition and sailing to the specified location. However, no tanker could be found, and it became apparent that none had ever existed. The Commission sought to resist the plaintiffs' claim for damages by arguing that, since the subject-matter did not exist, the contract was void for mistake and they were not liable. The High Court of Australia held that there was a contract since the Commission had assumed contractual responsibility for the existence of the tanker. Accordingly, since the tanker did not exist, the Commission was in breach of contract.

The existence of the tanker was not expressly promised by the Commission but the Court was prepared to imply such a promise by attributing fault to the Commission in terms of the manner and context in which the assertion of the existence of the tanker had been made.

13.3 Categories of common mistake at common law

The categories of common mistake at common law are based on a restrictive interpretation of mistakes which can be classified as 'fundamental' for this purpose.

These categories appear to equate with situations which are so acute that they constitute 'initial impossibility', i.e., unknown to the parties, the contract (as agreed) is impossible to perform. Usually this will be because the subject-matter has ceased to exist *at* the time the contract was entered into (*res extincta*).

13.3.1 Mistake as to subject-matter (*res extincta*)

In *Strickland* v *Turner* (1852) 7 Ex 208, a contract of annuity was void because, unknown to the parties, the annuity related to the life of a person who was already dead at the time the contract was entered into. A further example of this type of impossibility is provided by *Galloway* v *Galloway* (1914) 30 TLR 531. In this case a separation agreement was void because it was entered into in the mistaken belief that the parties were married to each other and therefore needed a formal separation. However, it transpired that the husband's previous spouse was still alive.

13.3.1.1 Perishing of specific goods

In the context of contracts for the sale of goods, the starting point for discussion is s. 6 of the SGA 1979. Section 6 provides that 'where the contract is for the sale of specific goods' which have 'perished' by the time the contract is made, the contract is void. This section, as originally drafted in the Sale of Goods Act 1893, was said to be based on **Couturier v Hastie** (1856) 5 HL 673. However, it is doubtful that such a wide interpretation can be put on this decision.

> In ***Couturier* v *Hastie***, a cargo of corn was shipped from a Mediterranean port to England. At a time when the cargo owner believed the corn to be in transit, the cargo was sold by him to the buyer. It later emerged that, because the cargo had begun to deteriorate, the master of the ship had sold it at a port en route *before* this contract of sale had been entered into. Neither party was aware of this position at the time of contracting. The seller argued that the buyer was liable to pay the price for the cargo on the basis that the buyer had purchased the cargo and all inherent risks.
>
> The House of Lords held that there was no such liability, because the contract was for the sale of existing goods but the seller no longer had the corn to sell at the time when the contract of sale was made.

It might be thought that this would mean that, if there was an implied term that the goods existed, the seller would be in breach. However, if the basis of the decision is that the contract was void for common mistake then there is no contract to breach. It has been assumed by subsequent commentators that the basis of the decision is common mistake, but the alternative interpretation (placing the risk of non-existence on the seller) is equally consistent with the decision in **Couturier v Hastie**.

The other problem with s. 6 is that it appears to require the goods to have existed at one time but to have subsequently 'perished' or ceased to exist. It is arguable, therefore, that s. 6 will not apply to situations where the goods *never* existed. (For further discussion, see Atiyah, '*Couturier* v *Hastie* and the Sale of Non-existent Goods' (1957) 73 LQR 340.) At common law, it should equally be the case that a contract to purchase non-existent goods should be void for common mistake because there is no logical reason to distinguish it from goods which have perished. The shared misconception will be the same and it must surely be fundamental if the goods have *never* existed.

The case of **Associated Japanese Bank (International) Ltd v Credit du Nord** [1989] 1 WLR 255, might appear to be a further example of *res extincta*.

> Funds were raised against the security of certain non-existent machines on a 'sale and lease back', i.e., the non-existent machines were sold to the plaintiff bank for over £1 million and then immediately leased back. The defendant bank had guaranteed the payments due under this lease. When the perpetrator of the fraud defaulted on the lease payments and disappeared with the £1 million, the plaintiff bank sought to enforce the guarantee given by the defendant.
>
> However, it was held that the guarantee was subject to an implied condition that the machines existed, thereby treating the subject-matter of the guarantee as the machines rather than the lease obligations.

In fact, it can be argued that the mistake was a mistake as to quality, i.e., that the lease related to machines which existed: see discussion of mistake as to quality, at **13.4**.

13.3.1.2 Assumption of contractual responsibility for the existence of the subject-matter

The decision of the High Court of Australia in **McRae v Commonwealth Disposals Commission** (1951) 84 CLR 377 (for facts, see **13.2.2** above), concerned the sale of property which had never existed. However, the decision can be distinguished on the basis that the contractual risk of the non-existence was placed on the seller so that the non-existence constituted a breach of contract.

The judgment of the court reads:

> [T]he Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground. There was a contract, and the Commission contracted that a tanker existed in the position specified. Since there was no such tanker, there has been a breach of contract, and the plaintiffs are entitled to damages for that breach.

Having found there to be a contract, the court was able to award damages to the plaintiffs to compensate them for their expenses in conducting the salvage expedition. The plaintiffs were also able to recover the price paid (see **9.3.4**).

It is important, therefore, not to jump to the conclusion that, in a sale of goods contract, in the event of either non-existence or perishing of the subject-matter the contract will always be void. It may be that the risk of existence has been placed on one of the parties so that there is a contract and the non-delivery of these goods will amount to a breach. A contractual assumption of risk excludes the operation of the doctrine of common mistake, in the same way that an applicable *force majeure* clause excludes the operation of the frustration doctrine. This question of allocation of risk was discussed in more detail at **13.2** above.

13.3.1.3 Impossibility: common mistake and frustration

In a sense, therefore, this type of impossibility mistake has similarities with the factual context for frustration because both doctrines apply, in the absence of a contractual allocation of the risk in question, to instances of contractual impossibility (destruction of the subject-matter: see **12.4.1**). However, whereas the frustration doctrine applies where the impossibility occurs *after* the contract was entered into, common mistake will apply where the impossibility is initial (i.e., unknown to the parties, the contract was impossible to perform at the time that it was entered into). This can lead to some fine distinctions of fact which result in significantly different consequences.

> In ***Amalgamated Investment & Property Co. Ltd v John Walker & Sons Ltd*** [1977] 1 WLR 164, the plaintiffs had agreed to purchase property from the defendants which had been advertised as suitable for redevelopment. Unknown to both parties, a decision had already been taken to list the property as a building of special architectural or historical interest, although the actual listing did not take place until after the purchase contract had been signed. The listing seriously affected the value of the property and the plaintiffs sought to have the contract set aside on the basis of mistake, or alternatively claimed that the contract had been frustrated. It was held that this was not a case involving a common mistake because the listing had not taken place until *after* the contract was made. In addition, the doctrine of frustration did not apply on the facts because this was a risk which was to be borne by the purchaser.

The fine distinction between circumstances requiring the operation of the doctrine of common mistake or the frustration doctrine can also be illustrated by comparing two cases involving very similar facts.

> In ***Griffith v Brymer*** (1903) 19 TLR 434, the contract was void for common mistake so that the advance payment had to be repaid. The contract in question was to hire a room to view the coronation procession of Edward VII. The contract was made at 11 a.m. on 24 June 1902 but, unknown to the parties, the decision to cancel the procession had been taken at 10 a.m. that morning.
>
> This can be compared with ***Krell v Henry*** [1903] 2 KB 740, involving a similar contract to hire a room to view the coronation procession, but this contract was entered into on 20 June so that the cancellation of the procession amounted to frustration. Since *Krell* v *Henry* was a

> case based on frustration, at common law the loss lay where it fell and the deposit could not be recovered. (For a discussion of how the position would differ under the Law Reform (Frustrated Contracts) Act 1943, see **12.8.2.1.**)

It is worth noting that **Griffith v Brymer** is not a case of impossibility due to the non-existence of the subject-matter unless the contract purpose was specifically to hire rooms to view the procession. If it was merely to hire rooms, the contract would still be physically possible. However, the purpose of the parties had clearly become impossible in both cases given that the rooms were advertised for this purpose (see **12.4.5**).

13.3.1.4 Common theoretical basis: common mistake and frustration

The basis for *res extincta* was also similar to the origins of the frustration doctrine which, as we saw in **Chapter 12**, was based on the implication of a term ('a condition') that the subject-matter should continue to exist (e.g., **Taylor v Caldwell** (1863) 3 B & S 826; see **12.3.1**). In other words, the existence of the subject-matter at the time of the contract was interpreted as a condition precedent to the other party's obligation to perform (see **Associated Japanese Bank (International) Ltd v Credit du Nord** [1989] 1 WLR 255 and Smith (1994) 110 LQR 400). However, the theoretical basis for the frustration doctrine evolved in the twentieth century so that it is now based on a rule of law dependent upon the construction of the terms of the contract to determine whether the event which has occurred renders performance in accordance with those terms impossible (**Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696; see **12.3.2** and **12.3.3**).

In **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679, Lord Phillips MR (giving the judgment of the Court of Appeal) stated (at [61]) that the two doctrines had developed in parallel so that 'consideration of the development of the law of frustration assists with the analysis of the law of common mistake'. After reviewing the development of frustration, Lord Phillips concluded:

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

In other words, if performance is impossible then as a matter of law the contract will be void for common mistake. However, in determining whether the contract is 'impossible' to perform it is necessary to construe the express contract terms and any implications arising from the surrounding circumstances, which Lord Phillips referred to as the 'contractual adventure'.

13.3.2 Mistake as to ownership (*res sua*)

In addition to *res extincta*, there is another category of fundamental common mistake at common law, namely mistakes concerning the ownership of property (***res sua***). Such a

mistake occurs, for example, where a person contracts to purchase property which, unknown to both parties, the purchaser already owns.

> In ***Cooper* v *Phibbs*** (1867) LR 2 HL 149, Cooper agreed to lease a salmon fishery from Phibbs, both parties believing that the fishery belonged to Phibbs. In fact, Cooper was already entitled to enjoyment of the fishery as a life tenant. That is, although not absolute owner so that he could not dispose of the fishery, Cooper was effectively owner during his lifetime. He had no need to take the lease, and Phibbs had no power to grant it. It was held that the contract could be set aside (i.e., it was voidable), but the court allowed Phibbs compensation for money mistakenly spent on the fishery.

In **Bell v Lever Bros Ltd** [1932] AC 161, Lord Atkin relied on this decision of the House of Lords as an example of mistake operating to nullify a contract, and he expressly stated that the effect of such a mistake was to render the contract *void* and not merely voidable. The significance of this remark, which it is submitted is the correct position in law, will become clear below (see **13.5**). Lord Atkin did not regard **Cooper v Phibbs** as depending on any special equitable doctrine. It may, however, provide some authority on which to base future arguments in favour of remedial flexibility to do justice on the facts.

13.4 Mistake as to quality at common law

13.4.1 Is it sufficiently fundamental?

A mistake as to quality made by both parties will not generally be sufficiently fundamental to render the contract void at common law since such a mistake does not render performance, as originally agreed, impossible. The emphasis at common law appears to be placed on the sanctity of contract in the absence of clear impossibility.

13.4.1.1 Distinguishing mistakes as to quality and breaches of the satisfactory quality term: identifying the context for a claim based on mistake

It is important at the outset to explain the distinction between mistakes as to quality and promises as to satisfactory quality which are implied in sales contracts where the seller sells in the course of a business (e.g., SGA 1979, s. 14(2)). 'Quality' in the context of mistake refers to some special quality as opposed to the basic overall minimum quality of the goods which is implied by s. 14(2) SGA. For example, mistakenly believing that the contract relates to a high grade of tea or to a particular manufacturer's pottery would not involve any breach of the satisfactory quality term.

13.4.1.2 *Bell* v *Lever Brothers Ltd*

The leading case on mistake as to quality is **Bell v Lever Bros Ltd** [1932] AC 161.

> Bell and another were made executive officers of a subsidiary of Lever Bros. Subsequently, the subsidiary was closed down and a further contract made between Lever Bros and the executive

officers, terminating their appointments in return for substantial compensation. It was then discovered that the officers had earlier engaged in private dealings in breach of their service contracts (which the officers themselves had forgotten about). Therefore, at the time of the contracts to terminate their appointments, Lever Bros could have terminated the service contracts for these breaches, without having to pay any compensation. Accordingly, Lever Bros claimed that the termination contracts were void for mistake and the compensation repayable.

The House of Lords (by a majority of 3:2) refused this claim. The mistake was merely as to a quality of the service contracts, namely whether they needed to be terminated by the payment of compensation, and did not render the contract void. (The consequence was that the compensation paid was not recoverable because the agreement under which the compensation was payable remained valid.)

Therefore, such mistakes will not generally be sufficiently fundamental in nature to render the contract void. Lord Atkin (giving what is generally acknowledged to be the leading speech for the majority) stated that **a mistake as to quality 'will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be'**.

In **Associated Japanese Bank (International) Ltd v Credit du Nord SA** [1989] 1 WLR 255, Steyn J regarded this statement by Lord Atkin as forming the *ratio* of the case and it was regarded as the determinative test by the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679 (for facts, see below), Lord Phillips MR, giving the judgment of the court, stated that the issue on the facts was whether the mistake as to the distance between the two vessels meant that the services to be provided would be 'something essentially different' to what the parties had agreed.

13.4.1.3 The test of 'essential difference'

As a broad test it might be considered that this test of essential difference would provide great scope for judicial discretion in evaluating the facts in mistake cases and that in many instances a mistake as to quality would render 'the thing without the quality essentially different from the thing as it was believed to be'. However, it would be wrong to jump to this conclusion and the case law does not support such an interpretation. In particular, this test would suggest a different result to that in *Kennedy* v *Panama, New Zealand and Australian Royal Mail Co.* (1867) LR 2 QB 580, although this case was one of the cases on which Lord Atkin relied in *Bell* v *Lever Bros*:

The plaintiff had bought shares in a company in the belief, also held by the company, that the company had recently won a contract from the New Zealand Government for the delivery of mail. However, the New Zealand Government failed to ratify the agreement, and so the shares were worth much less. The court said that there was nevertheless a contract. Such a difference in quality, however severe, did not destroy the agreement. Nevertheless, it is difficult to accept that there was no essential difference in this case.

In addition, despite the existence of this broad principle of 'essential difference', Lord Atkin himself gave a number of examples (see [1932] AC 161 at p. 224) of mistakes which would not

be sufficiently fundamental. These examples indicate that 'essential difference' will be very narrowly construed. Lord Atkin's examples included the following:

Example

A buys a picture from B; both A and B believe it to be the work of an old master, and a high price is paid. It turns out to be a modern copy. A has no remedy in the absence of representation or warranty.

In essence, Lord Atkin was saying that it will not suffice to state, 'If I had known the true facts I would not have entered into this contract'. If a quality is important to one of the parties, that party should ensure that its existence becomes a contractual promise or can form the basis for a claim in misrepresentation (a false statement of fact) (see **13.4.2**). Lord Atkin justified this position (at p. 224) by stating that:

> [I]t is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts—i.e., agree in the same terms on the same subject-matter—they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

Lord Atkin put forward another formulation for the test: 'Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?' In Lord Atkin's example, the subject-matter would still be identified as 'the old master'. It is interesting, however, to compare this with the suggested approach in Peel, Treitel's *The Law of Contract,* 12th edn, Sweet & Maxwell, 2007, pp. 322–323. *Peel* argues that the test should be whether the particular quality is so important to the parties that they actually use this quality in order to identify the subject-matter, e.g., if in the example of the sale of 'the old master' the parties used the name of the artist to describe the subject-matter itself. However, this argument was rejected by the Court of Appeal (*obiter*) in **Leaf v International Galleries** [1950] 2 KB 86, on the basis that there was no express term to this effect.

> In ***Leaf* v *International Galleries***, the plaintiff had bought a painting believed to be by Constable, and it had also been represented as having been painted by Constable by the seller. Five years later, when the plaintiff tried to sell the painting, it was discovered that the painting was not a Constable. The plaintiff therefore argued that the original contract of sale should be set aside. His action for misrepresentation failed because of the lapse of time (see **14.5.2.2**), and in passing the Court of Appeal reiterated that no alternative remedy for mistake would be available as this was only a mistake as to quality. The fact that the mistake could be described as essential or fundamental did not change the fact that the contract as originally agreed continued to be capable of performance (and indeed had been performed).

Lord Evershed MR rejected the argument that the plaintiff had 'contracted to buy a Constable' by stating that '[w]hat he contracted to buy and what he bought was a specific chattel, namely,

an oil painting of Salisbury Cathedral' and 'it remains true to say that the plaintiff still has the article which he contracted to buy'.

Similarly, in **Frederick E. Rose Ltd v William H. Pim Junior & Co. Ltd** [1953] 2 QB 450 (the full facts are given at **3.4.1.1**), the contract was for the sale and delivery of horsebeans, although both parties were under a mistake as to whether horsebeans were suitable for the plaintiffs' purposes in fulfilling a contract for the supply of 'feveroles'. It turned out that they were not, but the parties had agreed on the sale and purchase of horsebeans so that the contract as agreed was capable of performance and therefore was not void.

Lord Atkin's test in **Bell v Lever Bros** has generated a good deal of discussion concerning the meaning of 'essential difference'. There is one *obiter* statement in an English case which applies Lord Atkin's test more literally and suggests that the mistake as to a quality would have rendered the contract void. This is a statement by Hallett J in **Nicholson & Venn v Smith-Marriott** (1947) 177 LT 189, in the context of a sale of napkins and tablecloths described as the 'authentic property' of Charles I. In fact the linen was Georgian, and it was held that there was a breach of contract since this was a sale by description for Charles I linen. Hallett J stated that 'a Georgian relic…is an "essentially different" thing from a Carolean relic' so that the goods purchased were 'different things in substance from those which the plaintiffs sought to buy and believed they had bought'. This view was subsequently doubted by Denning LJ in *Solle* v *Butcher* [1950] 1 KB 671 and is generally regarded as weak support for arguing that a contract can be void for mistake as to quality in the light of the decision in the case that the description amounted to a contractual term, which would undoubtedly have influenced the finding of 'essential difference'.

The English approach can be compared with the approach exemplified by the decision of the Supreme Court of Michigan in *Sherwood* v *Walker* 33 NW 919 (1887), where the mistake, relating to whether the cow being sold was barren at the time of the sale, was held to relate to 'the very nature of the thing', i.e., it was held to relate to the subject-matter being sold and not merely to a quality possessed by that subject-matter. This case illustrates the difficulties of divorcing the question of value from the determination of 'essential difference', e.g., one would undoubtedly pay a higher price for a painting by a famous artist. In *Sherwood* v *Walker*, the essential difference was that a cow in calf was worth considerably more than a barren cow, which would be sold for its meat. Therefore, a buyer would expect to pay a higher price for a cow in calf and, arguably, the only way to untangle the contract was to hold the contract to be void for common mistake. The English courts have not shown the same willingness to take account of price paid as indicating the existence of 'essential difference' in the subject-matter (see, e.g., **Bell v Lever Bros Ltd**, where the compensation paid could not be recovered and more recently **Kyle Bay Ltd (T/A Astons Nightclub) v Underwriters Subscribing Under Policy Number 019057/08/01** [2007] EWCA Civ 57, [2007] 1 CLC 164: significant difference in amount could not be recovered because of the mistake).

It seems that it is this problem of 'result' which led Lord Denning in *Solle* v *Butcher* [1950] 1 KB 671 to find that a contract could be voidable in equity for mistake as to quality and be set aside on terms. However, the lack of any basis in precedent for such a jurisdiction in equity has since been confirmed by the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679 (see discussion below at **13.5**).

The decision in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** also confirmed the restrictive interpretation of Lord Atkin's statement of principle in *Bell* v *Lever Bros* and therefore the limited category of mistakes which will be sufficiently fundamental mistakes to render the contract void.

> The contract alleged to be affected by a common mistake was a contract whereby the 'Great Peace' was engaged for a minimum hire period of five days to deviate towards the 'Cape Providence', which had suffered structural damage, and to stand-by for the purposes of saving life. At the time of entering into the contract, both parties were mistaken about the distance between them (and therefore how long it would take for the 'Great Peace' to rendezvous with the damaged vessel). They both thought that the vessels were only about thirty-five miles apart when the true distance was nearer 410 miles. On discovering the true position, the salvage company which had engaged the 'Great Peace', secured the services of an alternate vessel and cancelled the contract hiring the 'Great Peace'. The owners of the 'Great Peace' sought the minimum five day hire payable under the terms of the contract but the salvage company alleged that the contract was either void for common mistake or voidable in equity.
>
> The Court of Appeal held that the crucial test to determine if the contract was void was whether the common mistaken assumption of fact, relating to the proximity of the two vessels, meant that performance of the contract in accordance with its terms would be essentially different from the performance contemplated by the parties, i.e., were the services which the vessel could provide essentially different from those agreed upon? Since the 'Great Peace' would have arrived in time to provide the intended service for a number of days and given that the salvage company had not immediately cancelled the contract on discovering the true position, *performance of the contractual adventure was not impossible*. Accordingly, the contract was not void for common mistake and the salvage company was liable to pay the five day hire charge.

Thus, 'essential difference' in *Great Peace* was equated with impossibility and it must follow that it will therefore be extremely difficult to identify a common mistake as to quality which will be sufficiently fundamental to render the contract void, albeit that the impossibility is not limited to strict compliance with the contractual terms but extends to whether the contractual adventure is impossible. Some of these difficulties are apparent in the post-*Great Peace* case law.

In *Brennan* v *Bolt Burdon* [2004] EWCA Civ 1017, [2005] QB 303 the key question was the effect of mistakes as to law since it was argued that a compromise agreement had been made under such a common mistake of law. The Court of Appeal accepted that in principle a mistake as to law could render a contract void for common mistake but there was no true mistake of law on these facts because at the time of the compromise the law was merely *in doubt*, rather then clearly wrong. When entering into compromise agreements each party accepted the risk that their view of the law might turn out to be mistaken and Sedley LJ stressed the need for certainty of compromise agreements and the ability to rely on their terms. He said:

> A shift in the law cannot be allowed to undo a compromise of litigation entered into in the knowledge of both of how the law now stood and of the fact—for it is always a fact—that it might not remain so.

Although the Court of Appeal did not completely rule out the possibility that compromise agreements could be void for mistake as to law, it was difficult to envisage how a mistake of law would ever render performance impossible (as required by the test in **Great Peace**). On the facts, this compromise was at all times capable of being performed. Sedley LJ expressed some difficulty with the ***Great Peace*** test in the context of mistakes of law and concluded that 'a different test may be necessary'. He considered that a more appropriate test might be whether 'had the parties appreciated that the law was what it is now known to be, there would still have been an intelligible basis for their agreement'.

In **Kyle Bay Ltd (T/A Astons Nightclub) v Underwriters Subscribing Under Policy Number 019057/08/01** [2007] EWCA Civ 57, [2007] 1 CLC 164, the issue again concerned the validity of a compromise agreement which had been entered into with the respondent insurance underwriters.

> The mistake related to the type of insurance cover believed to be in place for a nightclub. When the nightclub was destroyed by fire it became clear to the appellants that a different type of cover was in place to that requested by them and they were advised to agree to compromise the claim for £205,000, about a third less than they would have been entitled to had the applied for cover been in place. However, it later transpired that the policy had in fact been of the type requested so that a larger sum should have been payable under the claim and the settlement had been entered into on the basis of a mistake. However, the judge had held that the mistake was not sufficient to render the compromise agreement void and the Court of Appeal agreed on the basis that the subject-matter was not rendered 'essentially and radically different' since the settlement compromise remained capable of performance at all times.
>
> The only mistake related to the fact that the nature of the cover was assumed to be on one basis rather than another. However, this was a detail of the basis on which the policy was written and 'did not go to the validity of the policy, the parties, the property, the nature of the business or the risks covered'. Neuberger LJ stated (at [26]): 'The difference between the actual and assumed subject matter of the settlement can in my view certainly be characterised as significant, but it is not an "essential . . . and radical . . ." difference.'
>
> In particular, the fact that the appellants received about a third less than they should have done although 'a significant, even a substantial, reduction' was not an 'essentially or radically different sum from its entitlement'.

13.4.1.4 Are the 'essential difference' and impossibility tests to be equated?

In *Champion Investments Ltd* v *Ahmed* [2004] EWHC 1956 (QB), the judge concluded that a mistake concerning the applicable rate of interest (1) was not essentially different to what the parties believed *and* (2) did not render performance of the contract impossible. The implication, therefore, is that there may be two hurdles in the path of a claimant alleging common mistake as to quality. Alternatively, this may be equating essential difference and impossibility and so applying one test.

In **Kyle Bay Ltd (T/A Astons Nightclub) v Underwriters Subscribing Under Policy Number 019057/08/01** [2007] EWCA Civ 57, [2007] 1 CLC 164, the Court of Appeal had first raised the question of whether the mistake concerning the insurance settlement agreement

would satisfy the *Great Peace* test of rendering performance of the settlement impossible, and of course concluded that it would not. (It is difficult to envisage a situation when a compromise or settlement agreement would be impossible to perform but it could have been entered into on a very different basis to the actual position between the parties.) Neuberger LJ referred to the fact that Sedley LJ in *Brennan* v *Bolt Burdon*, had considered that the impossibility test might therefore be inappropriate in this context, although recognizing that it was essentially down to how the mistake was defined. Neuberger LJ went on to add that, if these doubts were justified, the right test was that in *Bell* v *Lever Brothers* and *Associated Japanese*, i.e., the test of 'essentially and radically different'. Although this may suggest that the tests may have different spheres of application, Neuberger LJ helpfully pointed to the fact that the *Great Peace* had appeared to equate the tests. It may be that the most appropriate test will be applied in the particular context, assuming that the tests will not produce different results. It should not be necessary, however, to have to establish both tests as separate and independent requirements, as the judge at first instance had assumed was necessary in *Kyle Bay* [2006] EWHC 607 (Comm), at [43].

Unfortunately, different results would have followed from the application of the tests in *Graves* v *Graves* [2007] EWCA Civ 660, [2007] 3 FCR 26, (2007) 151 SJLB 926, used as justification for the implication of a condition rather than to render the contract void for mistake.

> A maintenance order had resulted in the wife receiving the house and maintenance. However, being unable to continue the mortgage payments she had been forced to sell the house. The ex-husband had then agreed to let her live in another house as a tenant on the basis that 90 per cent of the rent would be paid through housing benefit and it was justifiably assumed by both parties that the wife was entitled to this benefit. However, this was not the case because the 'landlord' was the father of their child who also lived in the premises. The wife was unable to pay the rent and the ex-husband brought proceedings for possession. Neither party had assumed any risk as regards the payment of the housing benefit since the husband knew the wife could not pay the rent without it and the wife knew the husband would not allow her to occupy the premises on any other basis.
>
> The Court of Appeal held that in order to conclude that there was an implied condition that the tenancy contract would end if housing benefit was not payable it needed to be shown that the tenancy was impossible to perform (obviously not the case) *or* 'essentially and radically different' in kind. The court concluded that since the tenancy was made on the basis that 90 per cent of the rent would be covered by housing benefit and that basis did not in fact exist, the agreement was different in kind to that originally contemplated so that the condition could be implied. The court then went on to adjust the parties' positions in relation to the deposit and the rent paid for occupation in the interim.

It seems, from the judgment that Thomas LJ, with whom Hughes and Coleridge LJJ agreed, must have considered that this matter related to the terms of the contract (in which case it may seem surprising that the test applied relates to whether a contract is void for common mistake as to quality) since he stated (at [40]) that the agreement terms were to provide the accommodation through a tenancy under which 90 per cent of the rent would be paid for by the local authority so that it was an implied condition that if housing benefit was not paid

the tenancy would come to an end. This was not the test applied in *Associated Japanese Bank*, which was claimed to be the basis for this conclusion.

It is clear that the tenancy is only determined from the moment the position on housing benefit came to light and the wife could not therefore recover all of her deposit and rent paid (which would have followed if the contract had been void for mistake). However, it is equally clear that the case should have been dealt with on the basis of the implication of a term that housing benefit was to be payable, which implication should be based on the officious bystander test or business efficacy (**6.4.2.2**; and this was in fact the basis for the reasoning of Steyn J in *Associated Japanese Bank*), and not mistake (or even frustration). The doctrine of the implied term as the basis for mistake or frustration has, as Thomas LJ recognized, been sidelined in favour of the construction approach (*Great Peace Shipping*, and see **12.3.3**). It may only have been reintroduced in this context in *Graves* v *Graves* because of the pleadings and in the light of the decision at first instance.

13.4.1.5 Overall conclusion

In any event, in practical terms it is likely that instances of common mistake will be limited to instances involving a total failure of consideration (where one party is unable to deliver what the other party has contracted to receive), such as *res extincta* or *res sua*. This seems clear from the decision in *EIC Services Ltd* v *Phipps* [2004] EWCA Civ 1069, [2005] 1 WLR 1377. The Court of Appeal held that a bonus issues of shares was void because the absence of the applicable shareholder approval meant that any bonus shares would have to be nil paid. However, the fundamental premise on which bonus shares were issued was that the company had profits available for distribution which would extend in amount to pay up the bonus shares. Thus, because of the effects of the defects, the end result of nil paid bonus shares was fundamentally different in nature to what had been contemplated.

13.4.2 Relationship with other possible claims

It is important to make clear the relationship between mistake and the express undertakings or statements of the parties. The fact that a mistake as to quality does not result in the contract being a nullity means, as Lord Atkin made clear in **Bell v Lever Bros Ltd**, that the claimant's only remedies lie in establishing either an express term of the contract by which the promisor undertakes to guarantee that the quality in question is present, or a pre-contractual representation that the desired quality is present. In these cases, absence of the desired quality will provide a remedy respectively for breach of contract or for misrepresentation. In other words, in these situations either by their contract, or as a result of the pre-contractual negotiations, the parties have allocated the risk that the quality will not be present to one or to the other (see, e.g., **Nicholson & Venn v Smith-Marriott** (1947) 177 LT 189 (sale by description within s. 13, Sale of Goods Act) and **Leaf v International Galleries** [1950] 2 KB 86).

In these instances it would be inappropriate for the courts to intervene by means of the doctrine of common mistake, and it must be remembered that common mistake may be very much a last-ditch argument (especially since the equitable jurisdiction to set aside on terms has now been denied by the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679) since more effective remedies

may be obtainable for breach of contract or for the misrepresentation. This principle is sometimes expressed in terms of the rule that mistake must not be the 'fault' of either party.

Common mistake as a last-ditch argument may, however, need to be attempted where there is no contractual promise or pre-contractual statement relating to the quality.

13.5 Is there an equitable jurisdiction to set aside a contract for a common mistake as to quality although the mistake does not render the contract void at common law?

As discussed above, there has been some dissatisfaction with the rule that common mistakes, falling short of those which make performance of the contract as agreed impossible, do not render the contract void. Common mistakes as to quality might be considered to be fundamental in the sense that, in the absence of the mistake, the parties would not have entered into the contract. Thus, a mistake over the authenticity of a painting is no doubt one which is central to the contract. It can be argued that it involves a very narrow interpretation to say that the contract (for the sale of a specific painting) can still be performed and is therefore not void.

As suggested at **3.2.2**, the explanation for the narrow interpretation is that any other rule would leave third-party interests unduly exposed to disputes between parties to transactions over which the third party has no control. Nevertheless, this explanation raised the possibility that a remedy for common mistake as to quality might be acceptable if it operated between the original parties to a transaction but did not operate to defeat third-party interests. This effect would be achieved if the impact of mistake on the contract were to make it merely voidable rather than void (see **3.2.2**). Lord Denning had sought to achieve just such a rule and it is necessary to trace that development before assessing the decision of the Court of Appeal in **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679 which, on the basis of **Bell v Lever Brothers**, has since denied the existence of such a jurisdiction in equity.

13.5.1 Lord Denning's attempts to introduce the equitable jurisdiction

Denning LJ (as he then was) first reformulated the law relating to common mistake in *Solle* v *Butcher* [1950] 1 KB 671.

> The defendant agreed to lease a flat to the plaintiff for seven years at £250 per annum. The parties only arrived at this figure for the rent because both believed that the property was not subject to rent control under the Rent Acts. The plaintiff subsequently discovered that the property was subject to rent control, and the rent payable would have been only £140 per annum. Nevertheless, had the defendant served the necessary statutory notices, the basic rent

could have been increased to approximately £250 to take account of repairs and improvements to the property. The plaintiff sought to recover the overpaid rent over a two-year period, and sought a declaration that he was entitled to continue in occupation for the rest of the lease at an annual rent of £140. The defendant counter-claimed for the lease to be set aside for mistake.

The Court of Appeal gave the plaintiff the choice between surrendering the lease, or continuing in possession but paying the full amount of rent allowable (i.e., about £250) once the necessary statutory notices had been served.

In effect, these terms amounted to enforcement of the original contract term, and arguably this may have been because it was the plaintiff (surveyor) who had supplied the defendant with the information on the rent he could charge.

In *Solle* v *Butcher*, Denning LJ began his analysis of the law of mistake by referring to the statement of the law by Lord Atkin in *Bell* v *Lever Bros Ltd* [1932] AC 161, and by accepting the orthodox interpretation of what Lord Atkin said (see **13.4.1.2**). He went on to suggest, however, that *Bell* v *Lever Bros Ltd* is not the whole law on common mistake and said that there was a doctrine of equity, not referred to in the House of Lords in *Bell* v *Lever Bros Ltd,* by which a contract may be set aside on terms on the basis of common mistake, including in circumstances where the mistake is only one of quality. (Subsequent commentators have expressed surprise that such a talented House of Lords, addressed by such eminent counsel, should have failed to take account of this equitable doctrine if such existed. The most likely explanation is that the doctrine was Denning LJ's own creation and the evidence suggests that this was the case.)

13.5.2 Assessing the evidence to support such an equitable jurisdiction

The argument in favour of a doctrine allowing for a mistake as to quality to be voidable in equity rests on a series of cases, of which a representative sample of two will illustrate that there is little foundation in precedent for it, however desirable the doctrine may have appeared. Perhaps the most important case is **Cooper v Phibbs** (1867) LR 2 HL 149. It was suggested above (see **13.3.2**, where the facts are stated) that this was an example of the *res sua* principle of common mistake, which Lord Atkin in *Bell* v *Lever Bros Ltd* [1932] AC 161 treated as making the contract void. Denning LJ pointed out that, despite this comment, in *Cooper* v *Phibbs* Lord Westbury had stated that the contract was *voidable*, that the action was brought in the Chancery Court, where, had the contract been void at common law, that would have been the end of the matter, and that the court set the contract aside only after imposing terms on the parties. He therefore concluded that *Cooper* v *Phibbs* provided evidence to support the existence of an equitable jurisdiction to set aside the contract for mistake.

The circumstantial evidence is impressive, but can be explained as being consistent with Lord Atkin's interpretation of the case on the following grounds:

(1) The essential fact is that the plaintiff had to show that he was really the owner of the fishery in question. As life tenant he was not full legal owner but had only

an equitable interest. Before the Judicature Act 1873, such an interest would be recognized only in the Chancery Court.

(2) Nevertheless, the rule of mistake applied by the Chancery Court was the common law rule that a contract to acquire an interest in one's own property is void as being impossible of performance.

(3) The court imposed terms because the would-be lessor had spent money on the land, and was entitled to be compensated for the improvements made, probably on the basis of some form of proprietary estoppel (see **4.10**).

The second case relied on by Denning LJ was *Huddersfield Banking Co. Ltd* v *Henry Lister & Son Ltd* [1895] 2 Ch 273.

> The bank was a secured creditor of the defendant company, its security being the business property and all fixed assets. The defendant company was in liquidation, so that a receiver held all the company's assets on trust for the creditors. The plaintiffs agreed to the sale of certain machinery, having determined that it was not fixed. It turned out that it had been improperly loosened, and so should have been treated as a fixed asset and thus part of the plaintiff bank's security. The plaintiffs applied to have the agreement set aside.

The reason the bank had to apply to the Chancery Court was that the agreement was made under its auspices as supervisor of the liquidation, but the court treated the agreement not as voidable but as void. The court relied on two cases (*Cooper* v *Phibbs* and *Strickland* v *Turner* (1852) 7 Ex 208, see **13.3.1**), which have both been analysed as examples of the application of the common law common mistake rule. The reason why the contract was void in this case was that at the time when the agreement for the sale of the unfixed machinery was made there was no unfixed machinery to sell. There is no suggestion that an equitable doctrine of mistake was operating.

It appeared reasonably clear, therefore, that the legal foundation for the proposed equitable doctrine of common mistake was largely insubstantial. Nevertheless, there was significant Court of Appeal authority to support the existence of the equitable jurisdiction, as well as statements indicating that the doctrine was recognized by eminent members of the judiciary, including Steyn J (in **Associated Japanese Bank (International) Ltd v Credit du Nord SA** [1989] 1 WLR 255), who subsequently became a member of the House of Lords. In addition, the doctrine was not without merit. It was certainly much closer to the continental conception of mistake found in the writings of Pothier (see **3.2.1**) than the other elements of the narrow English doctrine.

13.5.2.1 Post-*Solle* v *Butcher*: support from the Court of Appeal and High Court

The supposed equitable doctrine was applied or accepted in a number of judicial decisions after *Solle* v *Butcher.*

> For example, in *Grist* v *Bailey* [1967] Ch 532, Goff J set aside a contract for the purchase of a house believed to be subject to a protected tenancy whereas in fact it was available with vacant

possession, making a difference of some £1,400 to the value of the property. The contract was set aside because the mistake was regarded as being sufficiently fundamental in equity on the basis that the vendor undertook to give the purchaser the chance to buy the property at the true value.

Similarly, in *Magee* v *Pennine Insurance Co. Ltd* [1969] 2 QB 507, the majority of the Court of Appeal set aside a contract of settlement of an insurance claim on the ground that the parties had been mistaken about the insured's entitlement to claim as a result of material misstatements in the original insurance proposal. (It is interesting that the terms in this case did not require the insurance company to return the insurance premium.) In this case there was a spirited dissenting judgment from Winn LJ, who considered the case indistinguishable on its facts from *Bell* v *Lever Bros Ltd.*

13.5.2.2 Steyn J in *Associated Japanese Bank (International) Ltd* v *Credit du Nord*

Perhaps most significantly, there was clear recognition of the equitable jurisdiction in the judgment of Steyn J (as he then was) in **Associated Japanese Bank (International) Ltd v Credit du Nord** [1989] 1 WLR 255, although Steyn J clearly recognized that Lord Denning's interpretation of the majority judgments in **Bell v Lever Bros Ltd** was rather selective. Steyn J stated (at pp. 267–268):

> No one could fairly suggest that in this difficult area of the law there is only one correct approach or solution. But a narrow doctrine of common law mistake (as enunciated in *Bell* v *Lever Bros Ltd*), supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle* v *Butcher* and later cases), seems to me to be an entirely sensible and satisfactory state of the law.

Recognizing the tension that had appeared between the common law and equitable approaches to common mistake, Steyn J had sought to clarify the relationship and had concluded that the equitable jurisdiction was intended to mitigate the harshness of the strict approach at common law and would be relevant only where the mistake was not sufficiently fundamental to set aside the contract at common law. Although he did not need to clarify the circumstances in which the equitable jurisdiction would apply (the contract on these facts being void for mistake at common law), Steyn J appears to have regarded the doctrine in a positive light, e.g., in terms of flexibility and achieving a balance between fairness between the parties and protection of subsequently created third party rights.

However, a number of obvious discrepancies remained:

(1) it was difficult to see why, if there was an equitable jurisdiction to set aside on terms, that jurisdiction had not been exercised (or even mentioned) in *Bell* v *Lever Bros*, where fairness between the parties might have suggested the return of all or part of the compensation payment;

(2) how could a mistake be *insufficiently fundamental* at common law to render the contract void but *sufficiently fundamental* in equity for it to be set aside on terms? The only possible conclusion was that 'fundamental' was being used in different senses.

In **William Sindall v Cambridgeshire County Council** [1994] 1 WLR 1016 at p. 1042, Evans LJ (*obiter*) attempted to explain this distinction:

> It must be assumed, I think, that there is a category of mistake which is 'fundamental' so as to permit the equitable remedy of rescission, which is wider than the kind of 'serious and radical' mistake which means that the agreement is void and of no effect in law . . . The difference may be that the common law rule is limited to mistakes with regard to the subject-matter of the contract, whilst equity can have regard to a wider and perhaps unlimited category of 'fundamental' mistake.

The suggestion therefore was that a 'fundamental' common mistake in equity required only that the mistake be material to the parties' positions. In any event, this explanation was hardly convincing although a reasonable attempt at justifying a position already arrived at.

13.5.3 The denial of the equitable jurisdiction to set aside on terms: *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd*

In **Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679 (for facts see **13.4.1.3**), the alternative argument for the salvage company was that even if the mistake was not such as to render the contract void at common law, it was voidable in equity. However, both the judge at first instance, Toulson J, and the Court of Appeal, denied the existence of any such equitable jurisdiction. Lord Phillips concluded:

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

The Court of Appeal also agreed with Toulson J that Lord Denning's approach in *Solle* v *Butcher* 'is not to supplement or mitigate the common law: it is to say that *Bell* v *Lever Bros Ltd* was wrongly decided'. Lord Denning had been wrong to rely on *Cooper* v *Phibbs* as supporting his position since the nature of the mistake in that case was to render the contract void at law. In addition, there could be no solid jurisprudential basis for recognition of a category of equitable mistake of the kind alleged since it had not proved possible in the subsequent case law to identify a test for distinguishing mistakes at law and in equity (per Lord Phillips at [153]; for evidence for an attempt to make this distinction see Evans LJ in **William Sindall v Cambridgeshire County Council** [1994] 1 WLR 1016 at p. 1042, see **13.5.2.2**). Lord Phillips therefore concluded that there was only one category of 'fundamental' mistake:

> We do not find it possible to distinguish, by a process of definition, a mistake which is 'fundamental' from Lord Atkin's mistake as to quality which 'makes the thing [contracted for] essentially different from the thing [that] it was believed to be'.

On this basis it was impossible to reconcile *Bell* v *Lever Bros Ltd* and *Solle* v *Butcher*.

The result was that there was nothing to mitigate the 'all or nothing' conclusion at common law that the contract was valid.

13.5.4 Consequences of the denial of the equitable jurisdiction

While this conclusion may have the advantage of producing a neat and conceptually sound result and is one which, in terms of legal analysis, must be correct, it does mean that the common mistake doctrine is extremely limited. In addition, the outcome would appear to be based on 'all or nothing', i.e., either the contract is void and of no effect at all, or it remains valid.

Lord Phillips recognized this position when he stated:

> [161] We can understand why the decision in *Bell* v *Lever Bros Ltd* did not find favour with Lord Denning MR. An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances.

In fact, it is not strictly true to state that equity has no possible jurisdiction where the contract is void at common law since **Cooper v Phibbs** provides evidence of equity's ability to intervene in such circumstances. The difficulties relate to situations, such as that in **Great Peace Shipping**, where the mistake is not sufficiently fundamental to render the contract void. There is no remedial flexibility because this is the point at which the line has been drawn. Lord Phillips did suggest that legislative intervention might be called for 'to give greater flexibility to our law of mistake than the common law allows' but he seems to be confining this comment to instances where the contract is void at common law. The New Zealand legislation provides a possible model for legislation which provides for a more flexible doctrine of mistake with flexibility of remedy (see Chandler, Devenney, and Poole [2004] JBL 34). In addition, the Singapore Court of Appeal in *Chwee Kin Keong* v *Digilandmall.com Pte Ltd* [2005] 1 SLR 502, albeit in the context of a unilateral mistake, criticized the decision in *Great Peace Shipping* denying the existence of the equitable jurisdiction. The court considered that the reason for this denial was 'the absence of any test to determine how the equitable jurisdiction should be applied to rescind a contract which was distinct from that which rendered a contract void in law' (at [68]) but concluded that '[b]y its very nature, the manner in which equity should be applied must depend on the facts of each case and the dictates of justice' (at [74]).

It will be interesting to see how the courts react to the denial in *Great Peace Shipping* of the equitable jurisdiction as it will undoubtedly leave less room for manoeuvre. It is likely that other legal principles will be increasingly relied upon to introduce the necessary degree of flexibility, e.g., misrepresentation. The difficulties that might arise are well illustrated by the factual scenario in *Nutt* v *Read* (2000) 32 HLR 761, *The Times*, 3 December 1999 (see also (1999) 96 (42) LSG 44).

> The claimants had agreed to sell a chalet on a caravan park to the defendants. It was also agreed that the defendants were to pay a monthly rent to occupy the pitch (the tenancy agreement). The defendants failed to pay this rent and the claimants sought to eject them from the site. The

defendants' defence was that the agreement had been entered into under a common mistake, namely that both parties mistakenly believed that the chalet could be sold separately from the site pitch on which it stood. The position was complicated by the fact that the defendants had made some improvements to the chalet increasing its value from £12,500 to £28,750.

The two agreements were treated as separate, so that the judge at first instance held the agreement for the sale of the chalet to be void for fundamental mistake, i.e., the common fundamental mistaken assumption that the chalet could be sold separately from the pitch it occupied. Accordingly, the purchase price had to be returned to the defendant because the agreement was impossible in law.

However, as the Court of Appeal made clear, since the contract was void for mistake, there was no entitlement to compensation for the money spent on improvements.

At the time of this decision the courts recognized the existence of an equitable jurisdiction to set aside a contract on terms and the judge at first instance had rescinded the separate tenancy agreement. On appeal, the Court of Appeal confirmed that the tenancy agreement could be rescinded since the parties were under the common misapprehension that the pitch could be used independently of the chalet upon it. However, the issue of rescission on terms had not been appealed so that, although the Court of Appeal accepted that the claimants might have been ordered to pay compensation to the defendants for the improvements, it did not make such an order.

If similar facts were to arise post-**Great Peace Shipping Ltd v Tsavliris (International) Ltd** [2002] EWCA Civ 1407, [2003] QB 679, the possibility of rescinding in equity would not exist so that it is likely that the court would treat this arrangement as a single agreement which was void at common law. This would allow the return of the purchase price but would not allow for any flexibility in terms of compensation for the improvements to the property returned. It might therefore be necessary to search for evidence of misrepresentation in order to achieve what the court might consider to be an acceptable result on the facts.

Further Reading

Atiyah, '*Couturier* v *Hastie* and the Sale of Non-existent Goods' (1957) 73 LQR 340.

Cartwright, '*Solle* v *Butcher* and the Doctrine of Mistake in Contract' (1987) 103 LQR 594.

Cartwright, '*Associated Japanese Bank* v *Credit du Nord*' [1988] LMCLQ 300.

Cartwright, *Unequal Bargaining*, Oxford University Press, 1991.

Cartwright, *Misrepresentation, Mistake and Non-Disclosure*, Sweet & Maxwell, 2nd edn, 2006.

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

Macmillan, 'How Temptation Led to Mistake: an Explanation of *Bell* v *Lever Bros Ltd*' (2003) 119 LQR 625.

Phang, 'Common Mistake in English Law: the Proposed Merger of Common Law and Equity' (1989) 9 LS 291.

Phang, 'Controversy in Common Mistake' [2003] Conv 247.

Smith, 'Contracts—Mistake, Frustration and Implied Terms' (1994) 110 LQR 400.

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