Asif Tufal

MISTAKE

INTRODUCTION

For a mistake to affect the validity of a contract it must be an "operative mistake", ie, a mistake which operates to make the contract void. The effect of a mistake is:

- At common law, when the mistake is operative the contractis usually void *ab initio*, ie, from the beginning. Therefore, no property will pass under it and no obligations can arise under it.
- Even if the contract is valid at common law, in equity the contract may be voidable on the ground of mistake. Property will pass and obligations will arise unless or until the contract is avoided. However, the right to rescission may be lost.

Unfortunately, there is no general doctrine of mistake- the rules are contained in a disparate group of cases. This is also an area of confusing terminology. No two authorities seem to agree on a common classification, and often the same terminology is used to cover different forms of mistake.

COMMON MISTAKE

A common mistake is one when both parties make the same error relating to a fundamental fact. The cases may be categorised as follows:

(A) RES EXTINCTA

A contract will be void at common law if the subject matter of the agreement is, in fact, non-existent. See for example:

Couturier v Hastie (1856) 5 HL Cas 673

In addition, s6 of the Sale of Goods Act 1979 provides that:

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the sellers have perished at the time when the contract was made, the contract is void.

Other relevant cases include:

Griffith v Brymer (1903) 19 TLR 434
Galloway v Galloway (1914) 30 TLR 531

Couturier v Hastie was interpreted differently by the High Court of Australia in:

McRae v The Commonwealth Disposals Commission (1950) 84 CLR 377

(B) RES SUA

Where a person makes a contract to purchase that which, in fact, belongs to him, the contract is void. For example see:

Cooper v Phibbs (1867) LR 2 HL 149

(C) MISTAKE AS TO QUALITY

A mistake as to the quality of the subject matter of a contract has been confined to very narrow limits. According to Lord Atkin:

"A mistake 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."

See:

Bell v Lever Bros Ltd [1931] All ER 1.

In cases since *Bell v Lever Bros* the courts have not been over-ready to find a mistake as to quality to be operative. See:

Solle v Butcher [1949] 2 All ER 1107
Leaf v International Galleries [1950] 1 All ER 693
Harrison & Jones Ltd v Bunten & Lancaster Ltd [1953] 1 All ER 903
Associated Japanese Bank Ltd v Credit du Nord [1988] 3 All ER 902
BCCI v Ali and others [1999] 2 All ER 1005

REMEDIES

Where a contract is void for identical mistake, the court exercising its equitable jurisdiction, can:

- Refuse specific performance
- Rescind any contractual document between the parties
- Impose terms between the parties, in order to do justice.

Relevant cases include:

Cooper v Phibbs (1867) LR 2 HL 149
Solle v Butcher [1949] 2 All ER 1107
Grist v Bailey [1966] 2 All ER 875
Magee v Pennine Insurance [1969] 2 All ER 891

Rescission for mistake is subject to the same bars as rescission for misrepresentation.

UNILATERAL MISTAKE

The case of unilateral mistake is where only one party is mistaken. The cases may be categorised as follows:

(A) MISTAKE AS TO THE TERMS OF THE CONTRACT

Where one party is mistaken as to the nature of the contract and the other party is aware of the mistake, or the circumstances are such that he may be taken to be aware of it, the contract is void.

For the mistake to be operative, the mistake by one party must be as to the terms of the contract itself. See:

Hartog v Colin & Shields [1939] 3 All ER 566

A mere error of judgement as to the quality of the subject matter will not suffice to render the contract void for unilateral mistake. See:

Smith v Hughes (1871) LR 6 QB 597

REMEDY

Equity follows the law and will rescind a contract affected by unilateral mistake or refuse specific performance as in:

Webster v Cecil (1861) 30 Beav 62

(B) MISTAKE AS TO IDENTITY

Here one party makes a contract with a second party, believing him to be a third party (ie, someone else). The law makes a distinction between contracts where the parties are *inter absentes* and where the parties are *inter praesentes*.

Contract made inter absentes

Where the parties are not physically in each others presence, eg, they are dealing by correspondence, and one party is mistaken as to the identity, not the attributes, of the other and intends instead to deal with some identifiable third party, and the other knows this, then the contract will be void for mistake. See:

Cundy v Lindsay (1878) 3 App Cas 459

If the innocent party believes that he is dealing with a reputable firm, not a rogue, see:

King's Norton Metal Co Ltd v Edridge Merrett Co Ltd (1897) TLR 98

Two conclusions are commonly drawn from these two cases: (1) that to succeed in the case of a mistake as to identity there must be an identifiable third party with whom one intended to contract; and (2) the mistake must be as to identity and not attributes.

Contract made inter praesentes

Where the parties are *inter praesentes* (face to face) there is a presumption that the mistaken party intends to deal with the other person who is physically present and identifiable by sight and sound, irrespective of the identity which one or other may assume. For such a mistake to be an operative mistake and to make the agreement void the mistaken party must show that:

(i) they intended to deal with someone else;
(ii) the party they dealt with knew of this intention;
(iii) they regarded identity as of crucial importance; and
(iv) they took reasonable steps to check the identity of the other person (see Cheshire & Fifoot, *Law of Contract*, p257-263).

Even where the contract is not void, it may be voidable for fraudulent misrepresentation but if the goods which are the subject-matter have passed to an innocent third party before the contract is avoided, that third party may acquire a good title. The main cases are as follows:

Phillips v Brooks [1919] 2 KB 243
Ingram v Little [1960] 3 All ER 332 (a controversial case)
Lewis v Avery [1971] 3 All ER 907

The exception to the above rule is that if a party intended to contract only with the person so identified, such a mistake will render the contract void:

Lake v Simmons [1927] AC 487

A more recent case is:

Citibank v Brown Shipley [1991] 2 All ER 690

MUTUAL MISTAKE

A mutual mistake is one where both parties fail to understand each other.

WHERE THE PARTIES ARE AT CROSS PURPOSES

In cases where the parties misunderstand each other's intentions and are at cross purposes, the court will apply an objective test and consider whethera 'reasonable man' would take the agreement to mean what one party understood it to mean or what the other party understood it to mean:

* If the test leads to the conclusion that the contract could be understood in one sense only, both parties will be bound by the contract in this sense.

* If the transaction is totally ambiguous under this objective test then there will be no *consensus ad idem* (agreement as to the same thing) and the contract will be void:

Wood v Scarth (1858) 1 F&F 293
Raffles v Wichelhaus (1864) 2 H&C 906
Scriven Bros v Hindley & Co [1913] 3 KB 564

REMEDY

If the contract is void at law on the ground of mistake, equity "follows the law" and specific performance will be refused and, in appropriate circumstances, the contract will be rescinded. However, even where the contract is valid at law, specific performance will be refused if to grant it would cause hardship. Thus the remedy of specific performance was refused in *Wood v Scarth* (above).

A recent case is:

Nutt v Read (1999) The Times, December 3.

MISTAKE RELATING TO DOCUMENTS

NON EST FACTUM

As a general rule, a person is bound by their signature to a document, whether or not they have read or understood the document: *L'Estrange v Graucob* [1934] 2 KB 394. However, where a person has been induced to sign a contractual document by fraud or misrepresentation, the transaction will be voidable.

Sometimes, the plea of *non est factum*, namely that 'it is not my deed' may be available. A successful plea makes a document void The plea was originally used to protect illiterate persons who were tricked into putting their mark on documents. It eventually became available to literate persons who had signed a document believing it to be something totally different from what it actually was. See, for example:

Foster v Mackinnon (1869) LR 4 CP 704

The use of the rule in modern times has been restricted. For a successful plea of *non est factum* two factors have to be established:

(i) the signer was not careless in signing; and
(ii) there is a radical difference between the document which was signed and what the signer thought he was signing.

The following decision of the House of Lords is the leading case on this topic:

Saunders v Anglia Building Society (Gallie v Lee) [1970] 3 All ER 961

Note: Because of the strict requirements, it may be better for the innocent party to bring a claim based on undue influence.