

"The decision of the Court of Appeal in *The Great Peace* was emphatic and uncompromising: there is no place in the law of contract for a broader doctrine of common mistake in equity than the limited common law doctrine; and there is no place for a judicial discretion in remedying mistake because it would undermine the security of contracts" (Beatson, Burrows & Cartwright (2010) *Anson's Law of Contract*, OUP, p. 296). Discuss this statement with reference to relevant cases, and commentary.

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### ***Introduction***

Under the Contract Law, a common mistake is one where both parties to the contract have attempted the mistake; under this law, the mistake must relate to an existing law or fact,<sup>1</sup> the contract is affected by the common mistake in two fundamental ways. Firstly, the mistake can prevent the execution of an agreement through the failure of the parties to produce an appropriate offer and acceptance of the agreement's essential issue; in this case, a contract is not formed as the condition/s for rendering the contract legal and enforceable has not been met. Secondly, after the agreement has been reached, the parties to the agreement share a mistake in relation to some crucial contextual circumstance;<sup>2</sup> in this case, there exists a contract, but there is a matter of whether it has been vitiated to an extent. Three broad forms are included under the vitiation. First, it could totally compromise the contract so that the contract becomes void. Secondly, the vitiation could result in defective, but otherwise a legal contract; in such a contract, both parties have the right to solicit contract rescission. The party which would seek the recession will probably be the one which has been more unfavourably influenced by the common

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<sup>1</sup> This apparently follows from termination of law of mistake 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

mistake; this would not make the contract void but voidable. Lastly, the vitiating would not sufficiently merit legal intervention had one or both parties refrained from making the contract if they had been well informed of the true situation.

The English law addresses the first and last forms of vitiations. Before the decision made by the Court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Salvage*,<sup>3</sup> the English law applied the mistaken doctrine in equity, which caused the contract to be voidable at the proposition of an affected party. The Law has now committed itself to an ‘all or nothing’ approach.

### *Discussion*

The effect of the basic common mistake in the formation of the contract has long been debated under the English Contract Law. A common mistake has been recognised as the one which completely compromises the contract and makes it void, as was the case in *Bell v. Lever Brothers Ltd*.<sup>4</sup> At another instance of *Solle v. Butcher* [1950],<sup>5</sup> the common mistake was recognised as a mistake in equity doctrine which hasn’t completely compromised the contract, but which gives the unfavourably influenced party, as right for contract rescission. As these aspects of a common mistake are hard to differentiate, it is highly justifiable the decision took by the Court of Appeal in *Great Peace Shipping Ltd v. Tsavliris Ltd* whereby only one mistake doctrine was decreed as functional. The decision presented in *The Great Peace* has been pronounced as uncompromising and emphatic, the law of contract is sufficient as regards to common mistake as it is based on the common law doctrine and doesn’t require a broader

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<sup>3</sup> *Great Peace Shipping Ltd v Tsavliris(International) Ltd* [2002] EWCA Civ 1407

<sup>4</sup> *Bell v. Lever Brothers Ltd.* [1932] A.C. 161

<sup>5</sup> *Solle v. Butcher* [1950] 1 K.B. 671

common mistake equity doctrine. It has also been proclaimed that no judicial discretion is required in redressing the mistake as it would diminish the security of contracts.<sup>6</sup> Although, it can be argued whether an appropriate doctrine would be to render the contract voidable, in cases where no allocation is made in the contract regarding the risk of the mistaken issue.

It is essential to analyse the term 'defective contract' in order to discuss the doctrine of a common mistake as presented in *The Great Peace*.<sup>7</sup> A defective contract is defined as an undisputed yet existing as a shell of a contract and for which there is no evidential basis regarding the contention over its content. However, the contention does exist after the contractual agreement has been made and the content of which has turned out to be different than what was expected; it is such a contract which would not be agreed to, had all the facts were in the knowledge of the parties. This aspect of the contract was included in *Bell v. Lever Brothers*,<sup>8</sup> in which the contract was held as void because the quality of its content potentially undermined the parties' contractual assent. The test which renders the contract void, as presented in *Bell v. Lever Brothers*, is hard to satisfy, but this test lends clarity to the law. However, the clarity of this test became vague after the Court of Appeal's decision in *Solle v. Butcher*.<sup>9</sup> The judgment by Denning L.J., which was agreed by Bucknill L.J. meant that *Bell v. Lever Brothers* exercised such mistakes which hindered the formation of the contract; it also propounded that the contract was merely vitiated through the 'mistake in equity' doctrine. Vitiating contracts gave the parties, which were adversely influenced by the mistake, the right to solicit contract rescission as they are voidable. A common misunderstanding regarding the contextual and contractual facts or the parties' rights constituted such a mistake which would render the contract voidable. The

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<sup>6</sup> Anson, W.R., Beatson, J., Burrows, A.S. and Cartwright, J., 2010. *Anson's law of contract*. Oxford University Press, p.296

<sup>7</sup> *Ibid* 03

<sup>8</sup> [1932] A.C. 161 (H.L.) [*Bell v. Lever Brothers*]

<sup>9</sup> *Ibid* 05

rescission seeking party must not be at fault and or conscientious for the other party if they are to avail the benefit of rescission.<sup>10</sup> A tenancy agreement rescission was ordered by the Court, the agreement was entered under a common mistake that legislation for rent control did not apply to the landlord's requirement to offer the tenant a new higher rent lease; this demand of lease could be made by the landlord by serving a notice, under the legislation for rent control, upon agreeing to the contract.<sup>11</sup> There still exists doubt whether the adversely influenced party did not recognise the risk of possible circumstances. The landlord was a surveyor himself and was in the same position as the tenant to have been aware of the application of legislation for rent control. The mistake in equity doctrine offers the potential for realistic relief in case of common misunderstandings which compromises the contract; the application of this doctrine was not wise and cannot be equated with *Bell v. Lever Brothers*. Using this context as a springboard, any differentiating attempts made during the assessment of the mistakes which hinders the formation of contracts, and mistakes which merely vitiate the contract, are doomed to suffer. Furthermore, it is improbable that the House of Lords would not mention this additional doctrine in the *Bell v. Lever Brothers*.<sup>12</sup> Hence, the Court of Appeal in the *Great Peace* was justified in the omission of this doctrine.<sup>13</sup> Presently, the only relief which the English law provides is that it renders the contract as a void in case of common misunderstanding which influences that contract. As previously stated, the demonstration of the essential sufficiency of common misunderstanding in order to render the contract void is extremely difficult; this demonstration became even more difficult through the decision made in a *Great Peace*. A common assumption must be existent

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<sup>10</sup> *Solle v. Butcher*, supra note 21 at 690–93.

<sup>11</sup> *Ibid* 05

<sup>12</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>13</sup> *Supra* note 4.

regarding the state of affairs as the non-existence of such an affair will render the contract unworkable, as stated by Lord Phillips, M.R.<sup>14</sup> This judgment is connected with frustration, whereby the events' are interrupted or changed through which the contract's further performance becomes impossible. A downfall of mistake inequity was confirmed through the subsequent decisions made after *The Great Peace*.<sup>15</sup> Lord Phillips M.R.'s test of impossibility was confirmed as a comprehensive basis for similar contexts such as *Brennan v. Bolt Burdon*,<sup>16</sup> concerned with a compromised civil claim, and *Astons Nightclub*<sup>17</sup>, which was concerned with a compromised insurance claim.

### ***Conclusion***

The *Great Peace* upheld only one doctrine to treating common mistake under English Law; a decision which circumvented the problem of differentiating between the mistakes which rendered the contract either void or vitiating. However, the current doctrine in the English Law regarding common mistake is, still, hugely exacting as it requires evidence for the undermining of the parties' entire contractual agreement. Hence, the present doctrine is impractical and unjust and needs considerable liberalisation in its test of impossibility.

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<sup>14</sup> *The Great Peace*, supra note 4 at 708–709.

<sup>15</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>16</sup> *Ibid* 15

<sup>17</sup> *Ibid* 15

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