Topic 5: Duress and Mistake

B. Mistake

Common Mistake

- In cases where mistake renders the contract voidable or even void, there must be some absolutely fundamental problem with the subject matter, a fundamental mistake or misapprehension about the subject matter of the contract so that it becomes a condition precedent that the issue is correct before the contract goes ahead, or there must be some unconscionable taking advantage of the other party's mistake where you enter the realm of unconscionable conduct so that equity will step in. But if you don't have unconscionability, a mere mistake may not be enough.
- Many cases involve unilateral mistakes, where 1 party is under some sort of mistake as to the surrounding circumstances such as the reason for entering into the contract or about the contract itself.
- A common mistake is where both parties are mistaken. The question is whether it's a mistake about the subject matter of the contract or merely the quality of that subject matter.
- A mutual mistake is where 2 people make different mistakes and so are at cross-purposes.
- Generally, the person pleading mistake is trying to get out of the contract. They either want to get out of any liability under it by saying the mistake is so fundamental that the contract didn't actually exist. Or they want rescission, to be restored to pre-contract position.
- Rescission can be a self-help remedy. You can have a right to rescind under the contract in certain cases. It will be up to the other party to enforce it and it might end in court that way. Or you might have to go to court to get the court to rescind the contract because you need something back. If you go to court to get rescission, you will be going to equity.
- Rescission is an equitable remedy. This means it is discretionary. So you must act promptly. You mustn't be guilty of *laches acquiescence and delay.* This is an equitable term for a defence. Otherwise, court will refuse to give them a remedy. Is where you know you have a right to rescission but you sit back and take acquiescence. If the delay is so great, equity will say it's too late.
- It may be rights of 3rd parties have intervened such that rescinding 1 contract would cause hardship to a 3rd party. This might be a reason equity might refuse to grant rescission.
- Rule in *Seddon's Case*: If property had been transferred after an innocent misrepresentation, in a contract, then the actual transfer of the property made it too late to rescind the contract. If the contract was executed by a formal transfer of the property, it would be too late then to rescind because the formal conveyance had taken place. There is doubt as to whether it applies. It only applies to an innocent misrepresentation case.
- Mistake may be a factor but very difficult to rely on.
- Mistake deals with circumstances/facts/issues/misapprehensions that happen before the contract.

McRae v Commonwealth Disposals Commission (1950)

- **Case of common mistake. Both parties are in error. They are both under the same misapprehension about the same things in the same respect.**
- Common mistake was recognised at both CL at equity.
- Cth also tried to argue whole contract was void for common mistake because there was no tanker. It was a common mistake that it existed and therefore the whole thing was a nullity. This was of great advantage to them because if it was a nullity from the start, a non-existent contract cannot be breached so they wouldn't be liable for any damages. A void contract is very useful for the party who wants to avoid it. They don't have to provide a remedy on conditions. They can just walk away from what has happened.
- HC held contract was valid. It was not affected by common mistake. To understand their arguments, must go back to *Bell v Lever Brothers*
- Page 894 of casebook

Bell v Lever Brothers Ltd (1932)

- Chapter 31 of the textbook
- D had committed a series of conflicts of interest and so wanted to rescind the retirement contract saying it was void for mistake.
- HOL held contract not void for mistake. The mistake of LB, their ignorance of Bell's conflicts of interest was not sufficiently fundamental to undermine the nature of the contract.
- Lord Atkin said the question to ask is does the state of the new facts destroy the identity of the subject matter as it was in its original state of facts.
- Page 899: Mistake as to the quality of the thing contracted for raises more difficult questions. In such a case, mistake will not affect the 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.
- If court were to allow mistake to be a basis for rescission it would lead to great uncertainty in many contracts.
- Lord Atkin: Mutual mistake must be as to some fact, which by the common intention of the parties, whether express or implied constitutes an underlying assumption, without which the parties would not have made the contract they did and which therefore affects the substance of the whole consideration. It must involve the actual subject matter not just the quality of it. Page 899-900 of casebook
- It is difficult to find examples of contract which have been set aside for common mistake. One example is *Scott v Coulson*.

Scott v Coulson (1903)

- A life insurance policy taken out on someone who was already dead. It wasn't fraudulent. They didn't know the person as already dead. It failed. The subject matter no longer existed when the contract was formed.

Back to McRae…

- 2 strands of reasoning as to why Cth couldn't rely on mistake
- Take similar approach to Lord Atkin in *Bell v Lever*, **that mistake will only be operative to render the contract void if it is the equivalent of an implied condition precedent for the contract to go ahead.** (It could be an express condition precedent, but there wasn't such in this case). So we must look for a fundamental assumption that the contract is only valid if this condition is made out.
- But the Cth couldn't argue that there was an implied condition precedent, that the contract would only go ahead if the tanker was there, because they had promised it was there. Cth could not then turn around and say there was an implied term that the contract would only go ahead if there was a tanker. There was no implied term that the contract would become void if it didn't exist. The was the 1st strand of reasoning in rejecting the argument that the existence of a tanker amounted to a condition precedent.
- The 2nd strand was that if there is a doctrine of mistake which may render the contract void, the Cth cannot rely on it here because they have no reasonable grounds. They were at fault. They had given an assurance.
- Page 897: The Cth could not rely on any mistake as voiding the contract. This is because the mistake was induced by the serious fault of Cth who asserted the existence of a tanker recklessly without any reasonable grounds. Therefore, the other party is entitled to damages for that breach.
- Would the case be run the same way today?

Svanosio v McNamara (1956)- Case of mistake of being sufficiently effective

- Page 914
- Majority of the price referred to the license and goodwill. After conveyance of title, S discovered that about 1/3rd of the building stood on crown land.
- Svanosio tried to get out of the contract and failed.
- Relied on mistake arguing this was a case non-existent subject matter. It was a fundamental mistake which should make the contract void.
- **HC held mistake did not render the contract void. There wasn't a total failure of consideration. It was not a sufficiently fundamental mistake. They got what they paid for**.
- The 2nd strand was that they missed their chance not to go ahead with the sail. During the period between contract formation and settlement, the purchaser has the opportunity to make various enquiries to ensure the land is what they think it is.
- HC said contract already has a mechanism for adjusting the party's rights if such a serious problem is found such that there should be rescission or a more minor problem which would give rise to compensation. They had not taken advantage of this and so could not get rescission.
- Conclusion: **It is very difficult for common mistake to render a contract void. It would have to be something really fundamental such as the non-existence of the subject matter. But not where the non-existence is due to the fault of party who made a representation that the thing existed**. It would have to be where goods perished or something else which meant a condition precedent was not satisfied. If it is merely a mistake as to quality, it may not be treated as sufficiently fundamental. Is it hard to know whether the mistake as to quality is so great that it changes what you thought you were buying?
- That's the common law doctrine.

Solle v Butcher (1950)

- In England *Solle*, which gives rise to an equitable doctrine of mistake, is not good law (*Great Peace Shipping*) but for Australia it is, being accepted in by HC in *McRae.*
- Butcher wanted rescission arguing they both entered into lease under common mistake that flat was not rent-controlled. It was accepted that lease was subject to rent-control. So rent should have been 140 pounds per annum.
- The issue was then whether it could be rescinded by Butcher for common mistake.
- Court said contract was not void from the start. It wasn't a sufficiently fundamental mistake to render it void. Lord Denning said that was not the end of the matter. First it must be considered whether the mistake rendered the contract a nullity. Denning said it was not sufficiently fundamental. The goods had not perished. There was a contract. The parties agreed on the same terms on the same subject matter. There was a mistake. But it wasn't a ground to say lease was a nullity from the beginning. Any other view would lead to uncertain results for other cases. He then considered whether it was a mistake which rendered the contract voidable and liable to be set aside on some equitable ground.
- Page 904: A contract is also liable in equity to be set aside if the parties are under a common misapprehension, either as to facts, or their relative or respective rights, provided the misapprehension was fundamental and the party seeking to set it aside wasn't itself at fault.
- Denning outlines 3 things equity requires.
    - The parties must have entered the contract under a common misapprehension either as to facts or as to their relative and respective rights.
    - The misapprehension was fundamental
    - The party seeking to set it aside was not itself at fault.

- ❖ The 2nd element makes the principle murky. If the mistake was a fundamental mistake it would be void at common law. To reconcile Denning saying the contract was not void at CL because the mistake was not sufficiently fundamental, but voidable in equity because we are satisfied of 3 things, 1 of which being that the mistake was fundamental, we take Denning as meaning 2 different things. When Denning says fundamental at point 2, he means substantial or serious or significant, as opposed to trivial. Therefore, the lease could be set aside on terms. There was a common misapprehension that the flat was rent-controlled. It was serious in its impact on the price. Thus, lease could be possibly rescinded on terms.

- There were 2 alternatives for a remedy. They could end the lease and order rescission i.e. the tenant leaves and the lessor relets at whatever prevailing rent. If that were the case, there should be a declaration that the standard rent is 140 pounds. This would mean that the P's claim for repayment of the rent should be dismissed and he should be liable to pay a reasonable sum. The other possibility was to allow Solle to stay on and avoid rescission but only if he paid 250 pounds because it would be unreasonable for him to now try and enforce the mistake which they had both relied on. There is something unconscionable about both of these parties being real estate agents. There was something unreasonable about the tenant wanting to have the excess back.??

(ii) Mutual Mistake

- Mutual mistake is not a vitiating factor at all. It is just an application of the rules of construction of the contract.
- **If it is so uncertain as to what has been agreed that meaning cannot be made out to the contract, the parties were not ad idem. So, there was never offer and acceptance, and so mutual mistake will mean there was no contract.**
- **If the parties are simply at cross-purposes, but an objective meaning can be made out to the contract using the rules of construction, 1 party's interpretation will be right and 1 will be wrong. The latter will still be bound (*Goldsborough Mort*)**

Goldsborough Mort (1912)

- If the land was not freehold, the difference in price was like $2000 pounds.
- The question was just whose construction was right
- HC held GM's construction was right. GM had not contributed to this mistake in anyway. Quinn was mistaken and it was his mistake alone. There was a meaning that could be ascribed to the contractual term.
- A distinction must always be drawn between ambiguity and uncertainty. If terms are ambiguous, the courts may be able to give them a meaning, and that is what will prevail. If terms are so uncertain that you cannot do that then the whole contract will fail.
- If the parties are so at odds, that they have not agreed on anything, then there will be no contract. If the mutual mistake is simply ambiguous, as long as the court can use the rules of construction to attribute a particular meaning to the term they will do so, meaning 1 party will miss out. 1 party's interpretation will be right, 1 will be wrong. The party missing out will be bound.

(iii) Unilateral Mistake

- Where only 1 party is mistaken, sometimes referred to as a spontaneous mistake, where 1 mistaken not because there has been a misrepresentation creating the mistake (if there was you would argue the case through misrepresentation), but because they themselves have made a mistake about something and have entered into a contract. And so the question is to what extent can they set it aside on that basis.
- The typical situation is where 1 party is mistaken as to identity.
- The problem is the principle of nemo dat quod non habet (you cannot give what you do not have). If you don't have title to goods, you cannot give good title. There is no principle that a bona fide purchaser for value without notice gets good title to goods. They do not get good title because the rogue did not have it to give.
- Seller sells goods to the rogue (1st transaction). The rogue hands over a cheque which bounces. The rogue sells goods to 2nd buyer and pockets money from 2nd buyer. The rogue disappears with the money from 2nd buyer without paying seller. The seller is out of pocket and without the goods. The 2nd buyer has the goods but has paid money for them. The seller wants the goods back. It's a dispute between seller and 2nd buyer.
- **The ability of the seller to get the goods back from the 2nd buyer depends on whether the 1st contract was valid or not. If it was not valid from the start, then no title has passed from the seller to the rogue. If the rogue has not received good title from the seller, the rogue cannot give good title to the buyer because of the nemo dat rule (nobody can give what they do not have). Therefore, the second buyer does not have good title and the goods must be given back.**

Cundy v Lindsay (1878)

- Lindsay received an order from Blenkarn who had setup a business very close to Blenkiron & Co. He thought he was dealing with Blenkiron who were a reputable firm. He delivered the linen to the address. He was delivering it to a rogue. Blenkarn sold the linen onto a 3rd party Cundy. Lindsay tried to get the goods from Cundy.
- It was held that he could.
- **The 1st contract was not valid because Lindsay was not intending to deal with Blenkarn. He was intending to deal with Blenkiron and Co. HOL said there was no correspondence between the parties as to offer and acceptance.**
- **The contract was not valid from the start, so no title passed from the seller to the rogue, which mean that no title passed from the rogue to the second buyer because of the nemo dat rule (that one cannot give what they done have). Cundy does not have good title.** By using the goods, Cundy is liable for the tort of conversion and tort of detune (wrongful detention of some else's goods.)

- Example of the nemo dat rule.

Lewis v Avery (1972)

- Page 941 of casebook
- Lewis advertised his car for sale. A man turned up claiming to be a famous actor. Rogue sold the car to Avery and the rogue's cheque bounced.
- Lewis sued Avery for conversion and for the value of the car. If you sue someone for conversion and they pay out the value of the car, that is a way of keeping the car. If damages are an adequate remedy, that is all the court will order. Property then passes to convertor on payment of damages.
- Lord Denning: Once you move away from it being a void contract to a voidable contract, it is not that equity is saying that a bona fide purchaser for value without notice gets good title, rather a voidable contract is one where the title passes. It could be set aside, and the goods ordered to be returned but the courts will not order rescission if an innocent party's rights have intervened. 3rd party rights operate on the equitable remedy of rescission rather than operating on the issue of whether the title has passed.
- Applying the case to the facts of Lewis v Avery, this is a case of dealing between 2 parties where the person is actually there in front of him.
- **When the parties are face to face, the presumption is that they intended to transact with the person in front of them, and that therefore there is a valid contract. It can be set aside for fraud, but it is a valid contract. Title will pass, unless and until it is voided at a later date.** Mr Lewis intended to make a contract with the man in front of him. He didn't set out to find Mr Green and have a contract with him.
- Lord Justice McGore: When parties are face to face, the presumption is that you are intending to transact with the person in front of you. In this case, there was no evidence to rebut this. This was simply a case of creditworthiness of a man who was there present.
- How to reconcile these 2 cases: They produce a different result. The result of whether the contract is valid depends on whether you are dealing face to face with someone or whether you are intending to deal with someone else.