Neutral Citation [2002] EWCA Civ No. 1407
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT (The Hon Mr Justice Toulson)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 14th October 2002

Before :

LORD PHILLIPS, MASTER OF THE ROLLS

LORD JUSTICE MAY

and

LORD JUSTICE LAWS

- -

Between :

Great Peace Shipping Limited
Respondent

- and -

Tsavliris (International) Limited
Appellant

The "Great Peace" and the "Cape Providence"

- -

John Reeder, QC and Rachel Toney (instructed by Shaw & Croft) for the Appellant
Huw Davies (instructed by Stephenson Harwood) for the Respondent

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Judgment

Lord Phillips MR

This is the judgment of the Court.

Introduction

1. In 1932 in *Bell v. Lever Brothers Ltd* [1932] AC 161 Lord Atkin made a speech which he must have anticipated would be treated as the definitive exposition of the rules of law governing the effect of mistake on contract. In 1950 in *Solle v. Butcher* [1950] 1 KB 671 Denning LJ identified an equitable jurisdiction which permits the court to intervene where the parties have concluded an agreement that was binding in law under a common misapprehension of a fundamental nature as to the material facts or their respective rights. Over the last fifty years judges and jurists have wrestled with the problem of reconciling these two decisions and identifying with precision the principles that they lay down.

2. In the court below Toulson J. used this case as a vehicle to review this difficult area of jurisprudence. He reached the bold conclusion that the view of the jurisdiction of the court expressed by Denning LJ in *Solle v. Butcher* was "over-broad", by which he meant wrong. Equity neither gave a party a right to rescind a contract on grounds of common mistake nor conferred on the court a discretion to set aside a contract on such grounds.

3. Toulson J. gave permission to appeal, observing: "the appeal raises a question of general importance and the Court of Appeal might take the view that my approach to Lord Denning's principle in *Solle v. Butcher* was not open to me and/or wrong".

The facts

4. We gratefully adopt, with a degree of adaptation, Toulson J's clear exposition of the relevant facts, as to which there is no dispute. All the times are stated by reference to British Summer Time.

5. The story concerns two vessels, the *"Cape Providence"* and the *"Great Peace"*. In September 1999 the *"Cape Providence"* was on her way from Brazil to China with a cargo of iron ore when she suffered serious structural damage in the South Indian Ocean. The defendants learned that the vessel was in difficulties and offered their salvage services, which were accepted on the terms of Lloyd's Open Form of salvage agreement. To find a tug they approached a firm of

London brokers, Marint. The individuals involved at Marint were Mr Graeme Little and Mr Andrew Holder. A tug was found, but it was going to take five or six days for the tug to reach the *"Cape Providence"* from Singapore. There was serious concern that in the meantime the vessel might go down with the loss of her crew. So Mr Little was asked by the appellants' representative, Captain Lambrides, to try to find a merchant vessel in the vicinity of the *"Cape Providence"* which would be willing to assist, if necessary, with the evacuation of the crew.

6. Mr Little contacted Ocean Routes, a respected organisation which provides weather forecasting services to the shipping industry and receives reports about vessels at sea. Ocean Routes gave Mr Little the names of four vessels reported to be in the area. He was told that the *"Great Peace"* , a vessel owned by the respondents, was the nearest to the *"Cape Providence"* and should be close to a rendezvous position within about twelve hours. Mr Little noted the name of the four vessels and the estimated position of the *"Great Peace"*. Unfortunately the position which he was given was wrong.

7. At 20.30 on Friday 24 September 1999 Mr Little telephoned a contact number for the *"Great Peace"*s managers, Worlder Shipping Limited of Hong Kong. The call was answered by Mr Pierre Lee. By Hong King time it was 03.30 on Saturday 25 September.

8. Mr Lee was a businessman with no seafaring experience. He had never personally negotiated the fixture of a vessel, because his company always used brokers. But it was the middle of the night and Mr Little explained that the situation was an emergency because of the potential danger to the crew. They did not discuss the exact position of either vessel. Mr Little simply advised Mr Lee that he believed from information received from Ocean Routes that the *"Great Peace"* was the closest vessel to the *"Cape Providence"*. Mr Lee was not able to promise help there and then, because the *"Great Peace"* was under charter, carrying a cargo of soya beans from New Orleans to China, and the charterers would need to be consulted, but he asked Mr Little to send him details by fax.

9. Immediately after the conversation Mr Little faxed Mr Lee as follows:

> Further to our telcon at 22.22 hours BST 24 September, we are working on behalf of the owners of a cape size bulk carrier which has suffered serious structural damage in the southern Indian Ocean. Her position at 10.27 hours BST today was 29 40S/80 20E. She is proceeding at 5 knots on course 050 degrees direction Sunda Strait. Owners have mobilised a tug from Singapore which should reach the casualty in the next 5/6 days. We understand from Ocean Routes that your vessel *"Great Peace"* is in close proximity to the casualty and have been asked by hirers to check whether it would be possible to charter the *"Great Peace"* on a daily hire basis to escort the casualty until arrival of the tug.
>
> We would appreciate greatly if you can check soonest with charterers whether they can agree to the request, bearing in mind that the casualty is in serious danger.

10. Shortly after midnight, Mr Lee phoned Mr Holder (who had taken over from Mr Little) and put forward an offer for the chartering of the *"Great Peace"*. During the conversation all the terms necessary for a contract were discussed. The contract was to be on the basis of a Bimco Towhire form of agreement. (This was somewhat odd because the *"Great Peace"* was a bulk carrier and was not going to be towing the *"Cape Providence"*, but the circumstances were

unusual and the Bimco Towhire agreement was the form of contract with which Mr Holder was familiar). The hire was to be for a minimum of 5 days. The purpose of the charter was to be to escort and stand-by the *"Cape Providence"* for the purpose of saving life. Delivery was to be at the *"Great Peace"*s location at the time of the agreement and the hire would commence as soon as she was fixed and diverted (it being the mutual, and correct, assumption of Mr Lee and Mr Holder that there would be no practical difference between the vessel's position at the time of the agreement and at the time of deviation, since it was contemplated that there would have to be some alteration of course in order to effect a rendezvous and that the alteration of course would happen as soon as instructions could be given on the conclusion of the agreement). During the conversation Mr Holder asked Mr Lee for the position and speed of the *"Great Peace"*, and Mr Lee replied that he would check these matters with the master when he knew if the appellants were interested in the terms of the offer.

11. Captain Lambrides decided not to accept the offer at once, but at 0640 he gave instructions to Mr Holder to fix the vessel at a gross rate of US$16,500 per day (which Mr Holder knew would be acceptable to Mr Lee from their earlier conversation).

12. Mr Holder thereupon called Mr Lee. They went through and confirmed the terms of the fixture.

13. Afterwards Mr Holder sent a fax to Mr Lee thanking him for his assistance with the fixture of the *"Great Peace"* for the services of escort/stand-by to the *"Cape Providence"*; saying that he would complete the recap of the main fixture terms shortly, giving details of the *"Cape Providence"*s latest position, course and speed in order to enable the vessels to rendezvous; and concluding:

> Please instruct your master to contact the master of *"Cape Providence"* and alter course to rendezvous with the vessel as soon as possible.

14. As requested, Mr Lee faxed instructions to the master of the *"Great Peace"* to alter course towards the *"Cape Providence"*. He sent a copy of the fax to Mr Holder.

15. At 08.17 Mr Lee gave Mr Holder contact details of the *"Great Peace"*, which Mr Holder passed on to Captain Lambrides. A few minutes later, at 08.29, the master of the *"Great Peace"* sent a message to Worlder that he had contacted the *"Cape Providence"* to find her latest position and was altering course "right now".

16. Meanwhile, at 08.25, Captain Lambrides called Mr Holder to say that the vessels were 410 miles away from each other. This was not something known to Mr Holder or Mr Lee, so the likely inference is that the master of the *"Cape Providence"* must have reported the positions of the vessels to the appellants after his conversation with the master of the *"Great Peace"*.

17. If the information previously given to Marint by Ocean Routes had been accurate, the vessels should have been only about 35 miles apart when the contract was concluded.

18. Captain Lambrides told Mr Holder that he was looking to cancel the "Great Peace", but not yet, because he first wanted to know if there was a nearer available vessel which could provide assistance to the crew of the "Cape Providence".

19. Mr Holder made a number of unsuccessful enquiries, about which he reported to the appellants, at 0924, recommending that the *"Great Peace"* should be allowed to continue her voyage towards the *"Cape Providence"*.

20. About the same time as that message was being sent, the *"Cape Providence"* was passed by a vessel called the *"Nordfarer"*. By chance the charterers of the *"Nordfarer"* were also the charterers of the *"Cape Providence"* and so had an interest in assisting her. At 10.10 the appellants told Mr Holder that they had contracted with the owners of the *"Nordfarer"* directly and instructed him to cancel the *"Great Peace"*.

21. At 10.25 Mr Holder told Mr Lee that the *"Great Peace"* was no longer required, i.e. she was cancelled. They discussed possible financial terms.

22. At 11.00 Mr Lee sent a fax to Mr Holder, confirming the cancellation and saying that he would do his best to persuade the owners of the *"Great Peace"* to accept 2 days' daily hire in place of the minimum 5 days due under the contract. After speaking to the appellants, Mr Holder told Mr Lee that the appellants were not prepared to pay any sum. So the respondents issued proceedings.

The contract

23. The terms of the fixture, as faxed by Mr Holder to Mr Lee, included the following:

> 1. HIRER: "TSAVLIRIS" SALVAGE: (INTERNATIONAL) LTD
>
> 2. VESSEL OWNER: WORLDER SHIPPING LTD
>
> 3. CASUALTY VESSEL: BULKCARRIER "CAPE PROVIDENCE", 146,019 DWT/76, 324 GRT, 268 M LOA 43 M BEAM, IN LADEN CONDITION, FULL CREW ON BOARD, PLATING CONDITION/FRAME DAMAGE.
>
> 4. ESCORTING VESSEL: BULK CARRIER "GREAT PEACE" LADEN, ON VOYAGE FROM NEW ORLEANS TO CHINA VIA SINGAPORE.
>
> 5. SERVICES: ESCORT/STANDBY ONLY FOR THE PURPOSES OF SAVING OF LIFE AT SEA. "CAPE PROVIDENCE" LATEST POSITION AS OF 0720 HRS BST 25/9/99, LAT 28-20 SOUTH, LONG 082-20 EAST, HEADING 050 DEGREES, SPEED 5 KNTS, TOWARDS SUNDA STRAITS.
>
> 6. DESTINATION: DIRECTION SUNDA STRAIGHTS, WHILST AWAITING THE ARRIVAL OF TUG WHICH DEPARTED SINGAPORE 1205HRS L.T 25/09/99, ETA CASUALTY APPROX 5 DAYS.
>
> 7. DAILY HIRE: USD 16,500 PER DAY, PRO RATA INCLUDING FUEL AND LUBES FOR STANDBY/ESCORT
>
> 8. DELIVERY/ ON HIRE: TIME "GREAT PEACE" ALTERS COURSE TO RENDEZVOUS WITH "CAPE PROVIDENCE" THIS TIME TO BE ADVISED BY MASTER OF "GREAT

PEACE"

9. REDELIVERY/OFF HIRE: UPON ARRIVAL OF THE TUG TO CONVOYS POSITION, TIME TO BE ADVISED BY MASTERS OF "GREAT PEACE" / "CAPE PROVIDENCE"

10. MINIMUM: 5 DAYS DUE AND EARNT UPON "GREAT PEACE" ALTERING DIRECTION, BEING USD 82,500. ANY BALANCE DUE UPON COMPLETION OF SERVICES

11. CANCELLATION FEE: MINIMUM ENGAGEMENT AS DUE.

12. CONTRACT: BIMCO TOWHIRE AGREEMENT TO APPLY

A. IT IS CLEARLY UNDERSTOOD THAT THERE IS TO BE NO CLAIM FOR SALVAGE BY THE VESSEL OWNER, OR THEIR MANAGERS, OR THEIR MASTER, OFFICERS OR CREW.

The issues

24. The claimants claimed $82,500 as monies payable under the terms of the contract. Alternatively, they claimed the same sum as damages for wrongful repudiation of the contract.

25. The defendants contended that the purported contract had been concluded by reason of a fundamental mistake of fact in that both parties proceeded on the fundamental assumption that the *"Great Peace"* was "in close proximity" to the *"Cape Providence"*, when she was not. It followed either that the contract was void in law, or that the contract was voidable and the defendants were entitled to relief in equity by way of rescission.

26. In oral argument in the court below, Mr Reeder QC for the defendants defined "close proximity" as meaning sufficiently close to enable the *"Cape Providence"* to have come up with the *"Great Peace"* in the space of a few hours.

27. Toulson J. rejected the defendants' contentions and awarded the claimants the sum claimed. By this appeal the defendants reassert their defence based upon mistake.

The mistake in this case

28. A mistake can be simply defined as an erroneous belief. Mistakes have relevance in the law of contract in a number of different circumstances. They may prevent the mutuality of agreement that is necessary for the formation of a contract. In order for two parties to conclude a contract binding in law each must agree with the other the terms of the contract. Whether two parties have entered into a contract in this way must be judged objectively, having regard to all the material facts. It may be that each party mistakenly believes that he has entered into such a contract in circumstances where an objective appraisal of the facts reveals that no agreement has been reached as to the terms of the contract. Such a case was *Raffles v.*

Wichelhaus (1864) 2 H&C 906. The parties believed that they had entered into a contract for the purchase and sale of a cargo of cotton to arrive "ex *Peerless* from Bombay". That term was capable of applying equally to a cargo of cotton on two different ships, each called *"Peerless"* and each having sailed from Bombay, one in September and one in December. The court accepted that parole evidence could be adduced to prove which shipment the parties had intended to be the subject of the contract. Had one party intended the October shipment and the other the December shipment, the agreement necessary for a binding contract would have been absent.

29. *Raffles v. Wichelhaus* was a case of latent ambiguity. More commonly an objective appraisal of the negotiations between the parties may disclose that they were at cross-purposes, so that no agreement was ever reached. In such a case there will be a mutual mistake in that each party will erroneously believe that the other had agreed to his terms. This case is not concerned with the kind of mistake that prevents the formation of agreement.

30. Another type of mistake is that where the parties erroneously spell out their contract in terms which do not give effect to an antecedent agreement that they have reached. Such a mistake can result in rectification of the contract. Again, this case is not concerned with that type of mistake.

31. In the present case the parties were agreed as to the express terms of the contract. The defendants agreed that the *"Cape Providence"* would deviate towards the *"Great Peace"* and, on reaching her, escort her so as to be on hand to save the lives of her crew, should she founder. The contractual services would terminate when the salvage tug came up with the casualty. The mistake relied upon by the defendants is as to an assumption that they claim underlay the terms expressly agreed. This was that the *"Cape Providence"* was within a few hours sailing of the *"Great Peace"*. They contend that this mistake was fundamental in that it would take the *"Great Peace"* about 39 hours to reach a position where she could render the services which were the object of the contractual adventure.

32. Thus what we are here concerned with is an allegation of a common mistaken assumption of fact which renders the service that will be provided if the contract is performed in accordance with its terms something different from the performance that the parties contemplated. This is the type of mistake which fell to be considered in *Bell v. Lever Brothers*. We shall describe it as "common mistake", although it is often alternatively described as "mutual mistake".

33. Mr Reeder for the defendants puts his case in two alternative ways. First he submits that performance of the contract in the circumstances as they turned out to be would have been fundamentally different from the performance contemplated by the parties, so much so that the effect of the mistake was to deprive the agreement of the consideration underlying it. Under common law, so he submits, the effect of such a mistake is to render the contract void. Mr Reeder draws a close analogy with the test to be applied when deciding whether a contract has been frustrated or whether there has been a fundamental breach. The foundation for this submission is *Bell v. Lever Brothers*.

34. If the facts of this case do not meet that test, Mr Reeder submits that they nonetheless give rise to a right of rescission in equity. He submits that such a right arises whenever the parties contract under a common mistake as to a matter that can properly be described as "fundamental" or " material" to the agreement in question. Here he draws an analogy with the

test for rescission where one party, by innocent misrepresentation, induces the other to enter into a contract – indeed that is one situation where the parties contract under a common mistake. The foundation for this submission is *Solle v. Butcher*.

Bell v. Lever Brothers

35. We turn without more ado to consider *Bell v. Lever Brothers*. The facts of that case can be summarised as follows. Lever Brothers employed the two defendants. The two defendants committed serious breaches of their contracts of employment, which would have justified their summary dismissal. In ignorance of this fact, Lever Brothers entered into agreements with them under which their services were terminated on terms that they would receive substantial sums in compensation. The defendants themselves did not have in mind, when these agreements were concluded, that they could have been dismissed without compensation. Thus the agreements were concluded under a common mistake as to the respective rights of the parties. According to the headnote to the report, Lever Brothers claimed rescission of the agreements and repayment of the compensation paid under them.

36. It is instructive to consider passages from the judgments at first instance and in the Court of Appeal as well as the speeches in the House of Lords, for while there was judicial dissent as to the result, there was general agreement as to the principles of law that were applicable.

37. Wright J., [1931] 1 KB 557 at p.563, commented early in his judgment on the importance of upholding the binding force of contracts so far as possible, especially in commercial matters, but went on at p.564 to discuss the type of mistake that would result in the setting aside of an apparently valid contract:

> The mistake here invoked is of that type which has often been discussed, and has been described by various terms – for instance, as being mistake of subject matter, or substance, or essence, or fundamental basis. However described, what is meant is some mistake or misapprehension as to some facts (which term here includes particular private rights, as held in *Cooper v. Phibbs*), which, by the common intention of the parties, whether expressed or more generally implied, constitute the underlying assumption without which the parties would not have made the contract they did.

38. Wright J. went on to cite examples of such mistakes. Some of these were situations where, unknown to the parties, the consideration to be provided by one of them had ceased to exist or was illusory, such as a contract for the sale of a specific chattel which had been destroyed, or of an annuity when the annuitant had died. In such cases the contract was void and any monies paid recoverable on the ground of total failure of consideration. Not all, however, fell into this category, as we shall show in due course.

39. Wright J. cited with approval, the test applied by the Court of Queen's Bench in *Kennedy v. Panama, New Zealand and Australian Royal Mail Co.* LR 2 QB 580 at p.588:

> The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of

> the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.

40. Applying that test at p.568 he held that the mistake or misapprehension was as to the substance of the whole consideration and "went to the root of the whole matter".

41. Dealing, at p.571, with the claim to rescission, he observed:

> I am not clear that in such a case as the present, if I am right in my judgment as to there being such a common mistake as I have found, the agreement is not void, and there is thus, when the Court has so declared, a simple claim at common law for money had and received.

He continued on the next page:

> But if the relief here is to be at equity, I think the Court, as a Court of equity, can do all that justice requires to constitute a restitutio in integrum. It can, in ordering rescission of the agreement order repayment of the moneys paid under the agreement.

42. In upholding this judgment, Scrutton LJ, at pp.584-5 held that the principle to be applied was the same as that applicable in the case of frustration:

> In my opinion, the present law is that where at the time of making the contract the circumstances are such that the continuance of a particular state of things is in the contemplation of both parties fundamental to the continued validity of the contract, and that state of things substantially ceases to exist without fault of either party, the contract becomes void from the time of such cessation, the loss falling where it lies. This may be put either on implied contract or on destruction of the foundation or root of the contract before its term of performance has expired. The contract is valid when made, for its implied foundation then exists, but becomes void when during the term the foundation ceases to exist.
>
> Now consider the case where the implied foundation is assumed by both parties to exist at the time of making the contract, but does not in fact exist. One may describe the result as either that the contract is void because of an implied term that its validity shall depend on the existence at the time of the contract, and during its term of performance, of a particular state of facts, or (which is only another way of putting the proposition) that there is a mutual mistake of the parties, who make the contract believing that a particular foundation to it exists, which is essential to its existence, a fundamental reason for making it. In either case the absence of the assumed foundation makes the contract void.

43. Greer LJ, in concurring, said at p.595:

> But it is not, in my judgment, the law that the only mutual mistakes that will avoid an agreement are mistakes as to the existence or identity of the subject matter of the contract. I think a mistake as to the fundamental character of the subject matter of the contract is one which, if mutual, the law will regard as rendering the contract

> void.

Later he continued:

> I agree, subject to qualification with the opinion expressed in Salmond and Winfield's *Law of Contract*, 1927 ed., p.195, in those words: "Error as to the existence of the subject matter of the contract is, however, merely an illustration of the general principle of essential error – the principle, namely, that when the parties to a contract have assumed as its basis and presupposition the existence of a certain fact the law will in proper cases, by way of necessary implication, read into the contract an implied condition ... that such fact actually exists." This statement of the law needs to be qualified by saying that the mistake must be as to some fact which affects the fundamental basis of the contract.

44. It is easy to understand why the Court of Appeal felt that the test set out above was satisfied. The plaintiffs had, by the agreements, purchased at great price the termination of contracts which, had they been aware of the true position, they could have terminated as of right.

45. The House of Lords, by a majority, reversed this decision. Lord Blanesburgh, with the majority, based his decision on a point of pleading. He stated, however, that but for this he would have agreed with the speeches of Lord Atkin and Lord Thankerton. Lord Warrington, with whom Lord Hailsham agreed, was for dismissing the appeal. He did so, not because he differed from the majority as to the law, but on the application of the law to the facts. He said at p.208:

> The real question, therefore, is whether the erroneous assumption on the part of both parties to the agreements that the service contracts were undeterminable except by agreement was of such a fundamental character as to constitute an underlying assumption without which the parties would not have made the contract they in fact made, or whether it was only a common error as to a material element, but one not going to the root of the matter and not affecting the substance of the consideration.
>
> With the knowledge that I am differing from the majority of your Lordships, I am unable to arrive at any conclusion except that in this case the erroneous assumption was essential to the contract which without it would not have been made.

46. Lord Atkin, with whom Lord Thankerton agreed, considered at p.217 the circumstances in which mistake nullified consent. He held that it did so where the parties contracted under the common mistaken assumption that the subject matter of the contract existed when, in fact, this was not the case. He gave the following examples:

> So the agreement of A. and B. to purchase a specific article is void if in fact the article had perished before the date of sale. In this case, though the parties in fact were agreed about the subject-matter, yet a consent to transfer or take delivery of something not existent is deemed useless, the consent is nullified. As codified in the Sale of Goods Act the contract is expressed to be void if the seller was in ignorance of the destruction of the specific chattel ...

> Corresponding to mistake as to the existence of the subject-matter is mistake as to the title in cases where, unknown to the parties, the buyer is already the owner of that which the seller purports to sell him. The parties intended to effectuate a transfer of ownership: such a transfer is impossible: the stipulation is naturali ratione inutilis.

47. Lord Atkin then went on to consider at p.218 the position where two parties purport to conclude an agreement under a common mistaken assumption in relation to the subject matter of the contract:

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case 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. Of course it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to the quality amounts to a condition or a warranty, a different branch of the law.

48. After citation of authority in support of this proposition, Lord Atkin applied it to the facts of the case. This passage has been repeatedly cited by those seeking to define the effect of common mistake at common law, and it is necessary to set it out at length before embarking on that exercise:

> Is an agreement to terminate a broken contract different in kind from an agreement to terminate an un-broken contract, assuming that the breach has given the one party the right to declare the contract at an end? I feel the weight of the plaintiffs' contention that a contract immediately determinable is a different thing from a contract for an unexpired term, and that the difference in kind can be illustrated by the immense price of release from the longer contract as compared with the shorter. And I agree that an agreement to take an assignment of a lease for five years is not the same thing as to take an assignment of a lease for three years, still less a term for a few months. But, on the whole, I have come to the conclusion that it would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise. The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. A buys B's horse; he thinks the horse is sound and he pays the price of a sound horse; he would certainly not have bought the horse if he had known, as the fact is, that the horse is unsound. If B has made no representation as to soundness and has not contracted that the horse is sound, A is bound and cannot recover back the price. 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 would never have entered into the bargain if he had known the fact. A has no remedy, and the position is the same whether B knew the facts or not, so long as he made no representation or gave no warranty. A buys a roadside garage business from B abutting on a public

thoroughfare: unknown to A, but known to B, it has already been decided to construct a bypass road which will divert substantially the whole of the traffic from passing A's garage. Again A has no remedy. All these cases involve hardship on A and benefit B, and most people would say, unjustly. They can be supported on the ground that it 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.

This brings the discussion to the alternative mode of expressing the result of a mutual mistake. It is said that in such a case as the present there is to be implied a stipulation in the contract that a condition of its efficacy is that the facts should be as understood by both parties - namely, that the contract could not be terminated till the end of the current term. The question of the existence of conditions, express or implied, is obviously one that affects not the formation of contract, but the investigation of the terms of the contract when made. A condition derives its efficacy from the consent of the parties, express or implied. They have agreed, but on what terms. One term may be that unless the facts are or are not of a particular nature, or unless an event has or has not happened, the contract is not to take effect. With regard to future facts such a condition is obviously contractual. Till the event occurs the parties are bound. Thus the condition (the exact terms of which need not here be investigated) that is generally accepted as underlying the principle of the frustration cases is contractual, an implied condition. Sir John Simon formulated for the assistance of your Lordships a proposition which should be recorded: "Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached upon the basis of a particular contractual assumption, and that assumption is not true, the contract is avoided: i.e., it is void ab initio if the assumption is of present fact and it ceases to bind if the assumption is of future fact".

I think few would demur to this statement, but its value depends upon the meaning of "a contractual assumption". And also upon the true meaning to be attached to "basis", a metaphor which may mislead. When used expressly in contracts, for instance, in policies of insurance, which state that the truth of the statements in the proposal is to be the basis of the contract of insurance, the meaning is clear. The truth of the statements is made a condition of the contract, which failing, the contract is void unless the condition is waived. The proposition does not amount to more than this that, if the contract expressly or impliedly contains a term that a particular assumption is a condition of the contract, the contact is avoided if the assumption is not true. But we have not advanced far on the inquiry how to ascertain whether the contract does contain such a condition. Various words are to be found to define the state of things which made a condition. "In the contemplation of both parties fundamental to the continued validity of the contract", "a foundation essential to its existence", "a fundamental reason for making it", are phrases found in the important judgment of Scrutton L.J in the present case. The first two phrases appear to me to be unexceptionable. They cover the case of a contract to serve in a particular place, the existence of which is fundamental to the service, or to procure

> the services of a professional vocalist, whose continued health is essential to performance. But "a fundamental reason for making a contract" may, with respect, be misleading. The reason of one party only is presumably not intended, but in the cases I have suggested above, of the sale of a horse or of a picture, it might be said the fundamental reason for making the contract was the belief of both parties that the horse was sound or the picture an old master, yet in neither case would the condition as I think exist. Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which would appear to make the contract more businesslike or more just. The implications to be made are to be no more than are "necessary" for giving business efficacy to the transaction, and it appears to me that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts. Thus, in *Krell v. Henry* [1903] 2 KB 740, Vaughan Williams L.J. finds that the subject of the contract was "rooms to view the procession": the postponement, therefore, made the rooms not rooms to view the procession. This also is the test finally chosen by Lord Sumner in *Bank Line v. Capel (Arthur) & Co.* [1919] AC 435, agreeing with Lord Dunedin in *Metropolitan Water Board v. Dick Kerr* [1918] AC 119, where, dealing with the criterion for determining the effect of interruption in "frustrating" a contract, he says: "An interruption may be so long as to destroy the identity of the work or service, when resumed, with the work or service when interrupted." We therefore get a common standard for mutual mistake, and implied conditions whether as to existing or as to future facts. Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts. To apply the principle to the infinite combinations of facts that arise in actual experience will continue to be difficult, but if this case results in establishing order into what has been a somewhat confused and difficult branch of the law it will have served a useful purpose.
>
> I have already stated my reasons for deciding that in the present case the identity of the subject-matter was not destroyed by the mutual mistake, if any, and need not repeat them.

49. Lord Thankerton reached the same conclusion as Lord Atkin. At p.235 he held that a common mistake would not avoid the contract unless it related to something that both the parties "must necessarily have accepted in their minds as an essential and integral element of the subject matter". However, he rejected the implied term approach, holding that the frustration cases had "no bearing on the question of error or mistake as rendering a contract void owing to failure of consideration".

50. It is generally accepted that the principles of the law of common mistake expounded by Lord Atkin in *Bell v. Lever Brothers* were based on the common law. The issue raised by Mr Reeder's submissions is whether there subsists a separate doctrine of common mistake founded in equity which enables the court to intervene in circumstances where the mistake does not render the contract void under the common law principles. The first step is to identify the nature of the common law doctrine of mistake that was identified, or established, by *Bell v. Lever Brothers*.

51. Lord Atkin and Lord Thankerton were breaking no new ground in holding void a contract

where, unknown to the parties, the subject matter of the contract no longer existed at the time that the contract was concluded. The Sale of Goods Act 1893 was a statute which set out to codify the common law. Section 6, to which Atkin J. referred, provided:

> When there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

52. Judge Chalmers, the draftsman of the Act, commented in the first edition of his book on the Act, published in 1894:

> The rule may be based on the ground of mutual mistake, or on the ground of impossibility of performance.

53. He put at the forefront of the authorities that he cited in support *Couturier v. Hastie* (1856) 5 H of L Cas. 673. That case involved the sale of a cargo of corn which, unknown to the parties, no longer existed at the time that the contract was concluded. Other decisions where agreements were held not to be binding were *Strickland v. Turner* (1852) 7 Exch. 208 - the sale of an annuity upon the life of a person who, unknown to the parties, had died, and *Pritchard v. Merchants' and Tradesman's Mutual Life Assurance Society* (1858) 3 CBNS 622 - an insurance policy renewed in ignorance of the fact that the assured had died.

54. A year later, in *Huddersfield Banking Corporation v. Lister* [1895] 2 Ch. 273 at 280, Lindley LJ observed, citing *Strickland v. Turner*:

> But I take it that an agreement founded upon a common mistake, which mistake is impliedly treated as a consideration which must exist in order to bring the agreement into operation, can be set aside, formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so.

55. Where that which is expressly identified as the subject of a contract does not exist, the contract will necessarily be one which cannot be performed. Such a situation can readily be identified. The position is very different where there is "a mistake as to the existence of some quality of the subject matter which makes the thing without the quality essentially different from the thing as it was believed to be". In such a situation it may be possible to perform the letter of the contract. In support of the proposition that a contract is void in such circumstances, Lord Atkin cited two authorities, in which he said that the principles to be applied were to be found. The first was *Kennedy v. Panama etc. Mail Co.* (1867) LR 2 QB 580. In that case the plaintiff purchased shares of a company in response to a prospectus which stated, incorrectly, that the company had entered into a contract with the Government of New Zealand for a monthly mail service. He claimed rescission of the contract, alleging (1) that the Directors of the company had made the representation fraudulently and (2) that the prospectus contained a warranty and not merely a representation. Blackburn J., delivering the decision of the Court of Queen's Bench held that there was no fraud and that the prospectus contained an innocent misrepresentation. He went on to say at p.587:

> ... where there has been an innocent misrepresentation or misapprehension, it does not authorise a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so

> as to constitute a failure of consideration. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an honest misrepresentation as to its soundness, though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error, yet the purchaser must pay the whole price, unless there was a warranty; and even if there was a warranty, he cannot return the horse and claim back the whole price, unless there was a condition to that effect in the contract: *Street v. Blay* 2 B & Ad 456.

56. At p.588 Blackburn J. observed that the principle of English law was the same as that of civil law, to the effect that:

> if there be misapprehension as to the substance of the thing there is no contract; but if it be only a difference in some quality or accident, even though the misapprehension may have been the actuating motive to the purchaser, yet the contract remains binding.

57. Summarising the conclusion of the court, he held at p.589:

> We think there was a misapprehension as to that which was a material part of the motive inducing the applicant to ask for the shares, but not preventing the shares from being in substance those he applied for.

58. The judgment of Blackburn J. in *Kennedy v. Panama* was also relied upon by Wright J, as we have already noted, and by Greer LJ as defining the test for a common mistake which avoids a contract.

59. *Kennedy v. Panama* is not an easy case to interpret. What was claimed was rescission on the grounds of fraudulent misrepresentation, or alternatively a warranty, in a prospectus. Blackburn J found that there was no more than innocent misrepresentation. He referred to principles of Roman law, but it is not clear that those principles were dealing with anything more than the circumstances in which misdescription resulted in non-performance of the contract – see Buckland on *Roman Law*, 3rd Ed. at p.419. We agree with the comment in *Chitty on Contracts* 28th ed. Vol. 1 at 5-007 that it is not clear that Blackburn J. was intending to say that a mistake as to substance would make a contract void at English law.

60. The other case to which Lord Atkin referred was *Smith v. Hughes* (1871) LR 6 QB 597. On no view did that difficult case deal with common mistake and we are not able to see how it supported the test formulated by Lord Atkin, as set out at paragraph 47 above. Indeed, Lord Atkin himself commented at p.222:

> In these cases I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take; and therefore the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration.

61. We conclude that the two authorities to which Lord Atkin referred provided an insubstantial

basis for his formulation of the test of common mistake in relation to the quality of the subject matter of a contract. Lord Atkin advanced an alternative basis for his test: the implication of a term of the same nature as that which was applied under the doctrine of frustration, as it was then understood. In so doing he adopted the analysis of Scrutton LJ in the Court of Appeal. It seems to us that this was a more solid jurisprudential basis for the test of common mistake that Lord Atkin was proposing. At the time of *Bell v. Lever Brothers* the law of frustration and common mistake had advanced hand in hand on the foundation of a common principle. Thereafter frustration proved a more fertile ground for the development of this principle than common mistake, and consideration of the development of the law of frustration assists with the analysis of the law of common mistake.

62. The foundation of the law of frustration was Blackburn J's famous judgment in *Taylor v. Caldwell* (1863) 3 B.& S. 826. The parties had entered into an agreement for the hire of a music-hall for concerts on four specified nights. The hall burnt down before the first of these. Blackburn J., giving the judgment of the Court of Queen's Bench held that performance of the contract was excused by reason of an implied term:

> as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contractor ... The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

63. *Taylor v. Caldwell* was a case in which the subject matter of the contract was destroyed, so that performance of the letter of the contract was rendered impossible. The principle of frustration thus established, its ambit of operation was then extended. Claims for frustration were advanced, not where a supervening event had made it impossible to perform the letter of the contract, but where performance of the letter of the contract had become something radically different from that which the parties contemplated when it was concluded.

64. The first such case was *Jackson v. Union Marine Insurance Co Ltd* (1874) LR 10 CP 125. There a voyage charterparty from Liverpool to San Francisco was delayed for over six months as a result of the vessel stranding before loading her cargo. The charter was held to have been frustrated upon the jury finding that a voyage undertaken after the ship had been repaired would have been a different adventure from that to which the parties had agreed.

65. Particularly instructive in the present context are the "coronation cases". Many rooms were leased, or seats in stands sold, along the route planned for the coronation procession of King Edward VII. He fell ill and the coronation was cancelled. Spectators who had contracted before he fell ill claimed that their contracts were frustrated. In at least one case, a spectator who had contracted in ignorance of his illness claimed that his contract was void for mistake. These claims succeeded. In *Hobson v. Pattenden & Co* (1903) 19 TLR 186, Lord Alverstone CJ

provided the following statement of the test of frustration:

> where there was a contract to do a thing, not in itself unlawful, and the parties when entering into the contract must have contemplated the occurrence of a specified event or the continued existence of a specified thing as the foundation of what was to be done, and the performance became impossible from some cause for which neither party was responsible, and the party sued had not contracted or warranted that the event or thing, the non-occurrence or non-continued existence of which had caused the contract not to be possible of performance, should take place or continue to exist, then the parties were excused from further performance of the contract.

66. Subsequently in *Clark v. Lindsay* (1903) 19 TLR 202, after hearing submissions from Mr Scrutton QC, Lord Alverstone CJ drew the distinction between an assumption embodied in the contract and one that was no more than the purpose leading to the conclusion of the contract:

> If the event that had affected the performance only had relation to the purpose that led to the contract, then the happening of that event which prevented the contract being carried out could not affect the rights of the parties in the same way as when it formed part of the subject matter of the contract. Looking at this contract it was impossible to say that the procession was only the object and motive that induced people to enter into this contract. It really was the happening of the event that was the substance of that which was contracted about and for.

Thus the coronation cases are to be explained on the basis that each contract was for "a room with a view".

67. In *Griffith v. Brymer* (1903) 19 TLR 434 the same principle was applied to a situation where there was a common mistake at the time of conclusion of the contract. The parties entered into an agreement for the hire of a room to view the coronation in common ignorance of the fact that a decision had already been taken to operate on King Edward, which rendered the coronation impossible. Wright J. applied the law as stated in *Clark v. Lindsay*:

> The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a missupposition of the state of facts which went to the whole root of the matter. The contract was therefore void, and the plaintiff was entitled to recover his £100.

68. In *Krell v. Henry*, the coronation case to which Lord Atkin referred, Vaughan Williams LJ advanced the following proposition:

> I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such a case, if the contract becomes impossible of performance by reason of the non-existence of the state of

becomes impossible of performance by reason of the non-existence of the state of things assumed by both parties as the foundation of the contract, there will be no breach of the contract thus limited.

69. Cases where frustration was alleged proved a fruitful source of litigation and, by 1916, Lord Loreburn was able to advance the following proposition in *Tamplin Steamship Co Ltd v. Anglo-Mexican Petroleum Products Company Ltd* [1916] 2 AC 397 at p.403:

> when our Courts have held innocent contracting parties absolved from further performance of their promises, it has been upon the ground that there was an implied term in the contract which entitled them to be absolved. Sometimes it is put that performance has become impossible and that the party concerned did not promise to perform an impossibility. Sometimes it is put that the parties contemplated a certain state of things which fell out otherwise. In most of the cases it is said that there was an implied condition in the contract which operated to release the parties from performing it, and in all of them I think that was at bottom the principle upon which the Court proceeded. It is in my opinion the true principle, for no Court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was a foundation on which the parties contracted.

70. Despite Lord Loreburn's words, the doctrine of frustration was patently judge made law. In *National Carriers v. Panalpina* [1981] AC 675 the House of Lords considered five different explanations for the doctrine of frustration. Lord Hailsham and Lord Roskill favoured the exposition of the doctrine given by Lord Radcliffe in *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 at 728 and Lord Simon advanced the following refinement of that test:

> Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance.

71. Lord Simon's formulation of the doctrine must be read subject to the proviso that the parties may make express provision for what is to happen in the event of what would otherwise be a frustrating event. Such a provision will normally preclude the application of the doctrine of frustration.

72. Initially the effect of frustration was to terminate the parties' respective obligations from the date of the frustrating event, but to leave outstanding any accrued obligations. This harsh result was mitigated to a degree by the decision of the House of Lords in the *Fibrosa* case [1943] AC 32 and to a greater degree by the Law Reform (Frustrated Contracts) Act 1943.

73. What do these developments in the law of frustration have to tell us about the law of common mistake? First that 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 these circumstances the contract would not be binding. The avoidance

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.

74. In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances. In some cases it will be possible to identify details of the "contractual adventure" which go beyond the terms that are expressly spelt out, in others it will not.

75. Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake.

76. If one applies the passage from the judgment of Lord Alverstone CJ in *Hobson v. Pattenden*, which we quoted above to a case of common mistake, it suggests that 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.

77. The second and third of these elements are well exemplified by the decision of the High Court of Australia in *McRae v. Commonwealth Disposals Commission* (1951) 84 CLR 377. The Commission invited tenders for the purchase of "an oil tanker lying on the Jourmaund Reef ... said to contain oil". The plaintiff tendered successfully for the purchase, fitted out a salvage expedition at great expense and proceeded to the reef. No tanker was to be found – it had never existed. The plaintiff claimed damages for breach of contract. The Commission argued that the contract was void because of a common mistake as to the existence of the tanker.

78. In the leading judgment Dixon and Fullagar JJ expressed doubt as to the existence of a doctrine of common mistake in contract. They considered that whether impossibility of performance discharged obligations, be the impossibility existing at the time of the contract or supervening thereafter, depended solely upon the construction of the contract. They went on, however, to consider the position if this were not correct. They observed that the common assumption that the tanker existed was one that was created by the Commission, without any reasonable grounds for believing that it was true. They held at p.408:

> a party cannot rely on mutual mistake where the mistake consists of a belief which is, on the one hand, entertained by him without any reasonable ground, and, on the other hand, deliberately induced by him in the mind of the other party.

79. They held at p.410 that, on its proper construction the contract included a promise by the Commission that the tanker existed in the position specified. Alternatively, they held that if the doctrine of mistake fell to be applied:

doctrine of mistake fell to be applied:

> The agreement was made on the supposition by both parties that nothing had happened which made performance impossible. This was a missupposition of the state of facts which went to the whole root of the matter. The contract was therefore void, and the plaintiff was entitled to recover his £100.

80. This seems, if we may say so, an entirely satisfactory conclusion and one that can be reconciled with the English doctrine of mistake. That doctrine fills a gap in the contract where it transpires that it is impossible of performance without the fault of either party and the parties have not, expressly or by implication, dealt with their rights and obligations in that eventuality. In *Associated Japanese Bank (International) Ltd v. Credit du Nord* [1994] 1 WLR 255 at p.268 Steyn J. observed:

> Logically, before one can turn to the rules as to mistake, whether at common law or in equity, 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 have been unnecessary. Only if the contract is silent on the point, is there scope for invoking mistake.

81. In *William Sindall Plc v. Cambridgshire CC* [1994] 1 WLR 1016 at p. 1035, Hoffman LJ commented that such allocation of risk can come about by rules of general law applicable to contract, such as "caveat emptor" in the law of sale of goods or the rule that a lessor or vendor of land does not impliedly warrant that the premises are fit for any particular purpose, so that this risk is allocated by the contract to the lessee or purchaser.

82. Thus, while we do not consider that the doctrine of common mistake can be satisfactorily explained by an implied term, an allegation that a contract is void for common mistake will often raise important issues of construction. Where it is possible to perform the letter of the contract, but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible, it will be necessary, by construing the contract in the light of all the material circumstances, to decide whether this is indeed the case. In performing this exercise, the test advanced by Lord Diplock, applicable alike to both frustration and to fundamental breach, in *Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 at p.65 can be of assistance:

> Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of this undertaking to do that which he has agreed to do but has not yet done. The contract may itself expressly define some of these events, as in the cancellation clause in a charterparty; but, human prescience being limited, it seldom does so exhaustively and often fails to do so at all. In some classes of contracts such as sale of goods, marine insurance, contracts of affreightment evidenced by bills of lading and those between parties to bills of exchange, Parliament has defined by statute some of the events not provided for expressly in individual contracts of that class; but where an event occurs the occurrence of which neither the parties nor Parliament have expressly stated will discharge one of the parties from further performance of his undertakings, it is for the court to determine whether the event has this effect or not.

> The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings.
>
> This test is applicable whether or not the event occurs as a result of the default of one of the parties to the contract, but the consequences of the event are different in the two cases. Where the event occurs as a result of the default of one party, the party in default cannot rely upon it as relieving himself of the performance of any further undertakings on his part, and the innocent party, although entitled to, need not treat the event as relieving him of the further performance of his own undertakings. This is only a specific application of the fundamental legal and moral rule that a man should not be allowed to take advantage of his own wrong. Where the event occurs as a result of the default of neither party, each is relieved of the further performance of his own undertakings, and their rights in respect of undertakings previously performed are now regulated by the Law Reform (Frustrated Contracts) Act, 1943.

83. This test may not, however, be adequate in the context of mistake, for there are cases where contracts have been held void for mistake, notwithstanding that the effect of the mistake was that the consideration proved to have substantially greater value than the parties had contemplated.

84. Once the court determines that unforeseen circumstances have, indeed, resulted in the contract being impossible of performance, it is next necessary to determine whether, on true construction of the contract, one or other party has undertaken responsibility for the subsistence of the assumed state of affairs. This is another way of asking whether one or other party has undertaken the risk that it may not prove possible to perform the contract, and the answer to this question may well be the same as the answer to the question of whether the impossibility of performance is attributable to the fault of one or other of the parties.

85. Circumstances where a contract is void as a result of common mistake are likely to be less common than instances of frustration. Supervening events which defeat the contractual adventure will frequently not be the responsibility of either party. Where, however, the parties agree that something shall be done which is impossible at the time of making the agreement, it is much more likely that, on true construction of the agreement, one or other will have undertaken responsibility for the mistaken state of affairs. This may well explain why cases where contracts have been found to be void in consequence of common mistake are few and far between.

86. Lord Atkin himself gave no examples of cases where a contract was rendered void because of a mistake as to quality which made "the thing without the quality essentially different from the thing as it was believed to be". He gave a number of examples of mistakes which did not satisfy this test, which served to demonstrate just how narrow he considered the test to be. Indeed this is further demonstrated by the result reached on the facts of *Bell v. Lever Brothers* itself.

87. Two cases where common mistake has been held to avoid the contract under common law call for special consideration. A case which is by no means easy to reconcile with *Bell v. Lever Brothers* is *Scott v. Coulson* [1903] 2 Ch 249. A contract for the sale of a life policy was entered into in circumstances in which both parties believed that the assured was alive. The price was paid and the policy assigned. The contract price was little more than the surrender value of the policy. In fact, the assured had died before the contract was concluded and the policy thus carried with it entitlement to the full sum assured. The vendors succeeded, in proceedings in the Chancery Court, in having the transaction set aside. In the Court of Appeal, Vaughan Williams LJ described the position as follows:

> If we are to take it that it was common ground that, at the date of the contract for the sale of this policy, both the parties to the contract supposed the assured to be alive, it is true that both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced. This is so at law; and the plaintiffs do not require to have recourse to equity to rescind the contract, if the basis which both parties recognised as the basis is not true.

88. This case is often erroneously treated as being on all fours with *Strickland v. Turner* [illegible] see for example in *Bell v. Lever Brothers* Wright J. at p.565, Greer LJ at p.595, and Lord Warrington at pp.206-7. The two cases were, however, very different. An annuity on the life of someone deceased is self-evidently a nullity. The policy in *Scott v. Coulson* was very far from a nullity. The only way that the case can be explained is by postulating that a life policy before decease is fundamentally different from a life policy after decease, so that the contractual consideration no longer existed, but had been replaced by something quite different [illegible] ergo the contract could not be performed. Such was the explanation given by Lord Thankerton in *Bell v. Lever Brothers* at p.236.

89. The other case is the decision of Steyn J. in *Japanese Bank v. Credit du Nord* [1989] 1 WLR 257. The plaintiff bank entered into an agreement with a rogue under which he purported to sell and lease back four specific machines. The defendant bank agreed with the plaintiff bank to guarantee the rogue's payments under the lease-back agreement. The machines did not, in fact, exist. The rogue defaulted on his payments and the plaintiffs called on the guarantee. The defendants alleged (1) that on true construction of the agreement it was subject to an express condition precedent that the four machines existed; if this was not correct: (2) that the agreement was void at law for common mistake; if this was not correct the agreement was voidable in equity on the ground of mistake and had been avoided.

90. The first head of defence succeeded. Steyn J. went on, however, to consider the alternative defences founded on mistake. After reviewing the authorities on common mistake, he reached the following formulation of the law:

> The first imperative must be that the law ought to uphold rather than destroy apparent contracts. Secondly, the common law rules as to a mistake regarding the quality of the subject matter, like the common law rules regarding commercial frustration, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts. Thirdly, such a mistake in order to attract legal consequences must substantially be shared by both parties, and must relate to facts as they existed at the time the contract was made. Fourthly, and this

> is the point established by *Bell v. Lever Brothers Ltd* [1932] A.C. 161, the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. While the civilian distinction between the substance and attributes of the subject matter of a contract has played a role in the development of our law (and was cited in speeches in *Bell v. Lever Brothers Ltd.*), the principle enunciated in *Bell v. Lever Brothers Ltd* is markedly narrower in scope than the civilian doctrine. It is therefore no longer useful to invoke the civilian distinction. The principles enunciated by Lord Atkin and Lord Thankerton represent the ratio decidendi of *Bell v. Lever Brothers Ltd*. Fifthly, there is a requirement which was not specifically discussed in *Bell v. Lever Brothers Ltd*. What happens if the party, who is seeking to rely on the mistake, had no reasonable grounds for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk. In my judgment a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief: cf *McRae v. Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, 408. That is not because principles such as estoppel or negligence require it, but simply because policy and good sense dictate that the positive rules regarding common mistake should be so qualified.

91. The detailed analysis that we have carried out leads us to concur in this summary, subject to the proviso that the result in *McRae* can, we believe, be explained on the basis of construction, as demonstrated above. In agreeing with the analysis of Steyn J., we recognise that it is at odds with comments that Lord Denning made on more than one occasion about *Bell v. Lever Brothers Ltd* to the effect that "a common mistake, even on a most fundamental matter, does not make a contract void at law". As to this Steyn J. said at p.267:

> With the profoundest respect to the former Master of the Rolls I am constrained to say that in my view his interpretation of *Bell v. Lever Brothers Ltd* does not do justice to the speeches of the majority.

92. We share both the respect and the conclusion. We shall shortly consider in some detail the effect of Lord Denning's treatment of the decision in *Bell v. Lever Brothers Ltd*.

93. Steyn J. held that the test of common mistake was satisfied. He held, at p.269:

> For both parties the guarantee of obligations under a lease with non-existent machines was essentially different from a guarantee of a lease with four machines which both parties at the time of the contract believed to exist. The guarantee is an accessory contract. The non-existence of the subject matter of the principal contract is therefore of fundamental importance. Indeed the analogy of the classic res extincta cases, so much discussed in the authorities, is fairly close. In my judgment the stringent test of common law mistake is satisfied: the guarantee is void ab initio.

94. Our conclusions have marched in parallel with those of Toulson J. We admire the clarity with which he has set out his conclusions, which emphasise the importance of a careful analysis of the contract and of the rights and obligations created by it as an essential precursor to consideration of the effect of an alleged mistake. We agree with him that, on the facts of the present case, the issue in relation to common mistake turns on the question of whether the

mistake as to the distance apart of the two vessels had the effect that the services that the *"Great Peace"* was in a position to provide were something essentially different from that to which the parties had agreed. We shall defer answering that question until we have considered whether principles of equity provide a second string to the defendants' bow.

Mistake in equity

95. In *Solle v. Butcher* Denning LJ held that a court has an equitable power to set aside a contract that is binding in law on the ground of common mistake. Subsequently, as Lord Denning MR, in *Magee v. Pennine Insurance Co.* [1969] 2 QB 507 at 514, he said of *Bell v. Lever Brothers*:

> I do not propose today to go through the speeches in that case. They have given enough trouble to commentators already. I would say simply this: A common mistake, even on a most fundamental matter, does not make a contract void at law: but it makes it voidable in equity. I analysed the cases in *Solle v. Butcher* [1950] 1 K.B. 671, and I would repeat what I said there, at p.693:
>
> > A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

96. Neither of the other two members of the court in *Magee v. Pennine Insurance Co.* cast doubt on *Bell v. Lever Brothers*. Each purported to follow it, although reaching different conclusions on the facts. It is axiomatic that there is no room for rescission in equity of a contract which is void. Either Lord Denning was purporting to usurp the common law principle in *Bell v. Lever Brothers* and replace it with a more flexible principle of equity, or the equitable remedy of rescission that he identified is one that operates in a situation where the mistake is not of such a nature as to avoid the contract. Decisions have, hitherto, proceeded on the basis that the latter is the true position. Thus, in *Japanese Bank v. Credit du Nord* Steyn J. remarked at p.266 that it was clear that mistake in equity was not circumscribed by common law definitions. He went on to say at p.267:

> 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 Brothers Ltd.* [1932] A.C 161), supplemented by the more flexible doctrine of mistake in equity (as developed in *Solle v. Butcher* [1950] 1 K.B. 671 and later cases), seems to me to be an entirely sensible and satisfactory state of the law: see *Sheikh Bros. Ltd. v. Ochsner* [1957] A. C 136. And there ought to be no reason to struggle to avoid its application by artificial interpretations of *Bell v. Lever Brothers Ltd*.

97. Toulson J. has taken a different view. He has concluded that it is not possible to differentiate between the test of mistake identified in *Bell v. Lever Brothers* and that advanced by Lord Denning as giving rise to the equitable jurisdiction to rescind. He has examined the foundations upon which Lord Denning founded his decision in *Solle v. Butcher* and found them

defective. These are conclusions that we must review. If we agree with them the question will then arise of whether it was open to him, or is open to this Court, to rule that the doctrine of common mistake leaves no room for the intervention of equity.

98. The following issues fall to be considered in relation to the effect of common mistake in equity: (1) Prior to *Bell v. Lever Brothers* was there established a doctrine under which equity permitted rescission of a contract on grounds of common mistake in circumstances where the contract was valid at common law? (2) Could such a doctrine stand with *Bell v. Lever Brothers*? (3) Is this court nonetheless bound to find that such a doctrine exists having regard to *Solle v. Butcher* and subsequent decisions?

Common mistake in equity prior to *Bell v. Lever Brothers*

99. The doctrine of common mistake at common law which we have identified cannot be said to have been firmly established prior to *Bell v. Lever Brothers* **&#65533;** see the comments of the High Court in *McRae* and of the authors of Meagher on *Equity: Doctrines & Remedies* 3rd Ed. at p.372. Little wonder if litigants, confronted with what appeared to them to be agreements binding in law should invoke the equitable jurisdiction of the Court of Chancery in an attempt to be released from their obligations, when they considered justice so demanded. Nor is it surprising if the Chancery Court granted the relief sought on the basis upon which it was claimed. It is not realistic to infer that when such relief was granted, the court implicitly determined that the contract was binding in law.

100. The precise circumstances in which the Court of Chancery would permit rescission of a contract were not clearly established in the latter half of the 19th century. Thus, not until after the Judicature Act did the judgment of Sir George Jessel MR in *Redgrave v. Hurd* (1881) 20 Ch D 1 at p.12 make it clear that equity would order rescission of a contract induced by innocent, as opposed to fraudulent, misrepresentation. In such circumstances both parties would normally be labouring under a common mistake when the contract was concluded, but a significant further step was needed if equity was to grant rescission where a contract was based on a common mistake that was not induced by one of the parties. While a number of 18th and 19th century cases prior to the decision in *Cooper v. Phibbs* (1867) LR 2 HL 149 lend some support to the thesis that equity had taken that step, "no coherent equitable doctrine of mistake can be spelt from them" **&#65533;** see the discussion in Goff & Jones on the *Law of Restitution*, 5th ed. at pp.288-9 and Meagher at pp.375-6. *Cooper v. Phibbs* was however the decision primarily relied upon by Denning LJ in *Solle v. Butcher* **&#65533;** he described it as "the great case", and it is necessary to consider it with care. In this task we have been assisted by the analysis in "A Note on *Cooper v. Phibbs*" by Mr Paul Matthews in 105 LQR at 599 which was informed by access to the record of proceedings in the House of Lords.

101. At the heart of the case was a dispute as to title to a fishery in Ireland. The fishery, together with a cottage, was the subject of an agreement for a three year lease entered into by Phibbs, the respondent with Cooper the appellant. Phibbs was acting as agent for five sisters, who believed that they had inherited the fishery from their father. He, in the belief that he was the owner of the fishery in fee simple, had expended much money in improving it. Cooper contended that, after entering into the lease, he had discovered that the fishery had at all material times been trust property and that, in consequence of a series of events of very great

material times been trust property and that, in consequence of a series of events of very great

complexity, he was entitled to an equitable life interest. It was ultimately not disputed, however, that the head lease of the cottage was vested in the sisters.

102. Cooper petitioned the Court of Chancery in Ireland seeking an order that the agreement be delivered up to be cancelled and that Phibbs be restrained from suing upon it. Cooper at all times made it plain that he was prepared to submit to any terms which the court might impose. The Lord Chancellor of Ireland dismissed the petition, without prejudice to the question as to ownership of the fishery, holding that no ground for the grant of relief had been made out. Cooper appealed, contending that the agreement ought to be set aside as made under mistake of fact and that he should be declared to have title to the fishery.

103. The House of Lords resolved the issue of title in favour of Cooper. Lord Cranworth dealt with the legal consequences of this in a short passage:

> The consequence was, that the present appellant, when, after the death of his uncle, he entered into the agreement to take a lease of this property, entered into an agreement to take a lease of what was, in truth, his own property - for, in truth, this fishery was bound by the covenant, and belonged to him, just as much as did the lands of *Ballysadare*; therefore, he says, I entered into the agreement under a common mistake, and I am entitled to be relieved from the consequence of it.
>
> In support of that proposition he relied upon a case which was decided in the time of Lord Hardwicke, not by Lord Hardwicke himself, but by the then Master of the Rolls, *Bingham v. Bingham* 1 Ves. Sen. 127, where that relief was expressly administered. I believe that the doctrine there acted upon was perfectly correct doctrine; but even if it had not been, that will not at all shew that this appellant is not entitled to this relief, because in this case the appellant was led into the mistake by the misinformation given to him by his uncle, who is now represented by the respondents. It is stated by him in his Cause Petition, which is verified, and to which there is no contradiction, and in all probability it seems to be the truth, that his uncle told him, not intending to misrepresent anything, but being in fact in error, that he was entitled to this fishery as his own fee simple property; and the appellant, his nephew, after his death acting on the belief of the truth of what his uncle had so told him, entered into the agreement in question. It appears to me, therefore, that it is impossible to say that he is not entitled to the relief which he asks, namely, to have the agreement delivered up and the rent repaid. That being so, he would be entitled to relief, but he is only entitled to this relief on certain terms, to which I will presently advert.

104. *Bingham v. Bingham* (1748) 1 Ves. Sen. seems to have been the only authority cited in support of the plea to have the agreement set aside on the ground of mistake. The short report of that case shows that it involved a bill to have the purchase money refunded in respect of the sale by the defendant to the plaintiff of an estate which it transpired was already owned by the plaintiff. The plaintiff was successful. The headnote of the short report states "Mistake ◆ Equity relieves against bargains made under misconception of rights". The reason for the decision was reported as follows:

> For though no fraud appeared, and the defendant apprehended he had a right, yet

there was a plain mistake, such as the court was warranted to relieve against, and not to suffer the defendant to run away with the money in consideration of the sale of an estate, to which he had no right.

105. Reverting to *Cooper v. Phibbs*, Lord Westbury, who made the only other speech of substance, also dealt shortly with the law. He said at p.170:

> The result, therefore, is, that at the time of the agreement for the lease which it is the object of this Petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights. The Petitioner did not suppose that he was, what in truth he was, tenant for life of the fishery. The other parties acted upon the impression given to them by their father, that he (their father) was the owner of the fishery, and that the fishery had descended to them. In such a state of things there can be no doubt of the rule of a Court of equity with regard to the dealing with that agreement. It is said, *Ignorantia juris haud excusat*; but in that maxim the word *"jus*" is used in the sense of denoting general law, the ordinary law of the country. But when the work *"jus"* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if the parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties - the respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand.
>
> But then, when the appellant comes here to set aside the agreement, an obligation lies upon him so to constitute his suit as to enable a Court of Equity to deal with the whole of the subject matter, and once for all to dispose of the rights and interests of the parties in the settlement.

106. The words "rights and interests" are important. The terms under which relief was granted were designed to protect the rights of those affected by the decision. It appears to have been common ground that the monies expended by the father of the five sisters on what transpired to be trust property had given rise to a lien. The effect of this could not be addressed by the court, because not all of those interested were before the court. Equally Cooper had been enjoying the use of the cottage which belonged to the sisters and the sisters were entitled to "an occupation rent" in respect of such use. In discussing the Order to be made, Lord Westbury said:

> That is the reason, therefore, why the decree is proposed to be put in the form which your Lordships have heard, namely, that although a declaration is made, in order to shew the basis upon which the opinion of the House is founded, with respect to the invalidity of the agreement, yet the House stops short of giving positive relief, except on the terms imposed on the Petitioner, to which in reality, by the prayer of his Petition, he submits, by giving an opportunity to the respondents to ascertain the full measure of their rights and interests, in order that complete justice may be done.

107. The Order itself is a lengthy and interesting document. After reciting by way of declaration

107. The Order itself is a lengthy and interesting document. After recital by way of declaration the circumstances in which Cooper came to have a life interest in the fishery, it continued:

> and it is farther declared, that the aforesaid agreement of the 14th October, 1863, in the said Cause Petition mentioned, was made and entered into by the parties to the same under mistake, and in ignorance of the actually existing rights and interests of such parties in the said fishery: and it is farther declared, that the same agreement is not in equity binding upon the appellant and respondents, but ought to be set aside, subject to the appellant paying to the respondents a proper occupation rent for the said excepted piece of land and cottage, and the buildings on the said land, to be ascertained by the Master in the usual manner, and subject also ...

108. The further matter to which equitable relief was made subject was that appropriate proceedings were taken to ascertain the amount that should be paid by Cooper to discharge the lien. The Order provided that, if such sum was ascertained and paid by Cooper:

> it is ordered, that a deed be settled and approved as shall be necessary or proper for the purpose of releasing or conveying the said lands, hereditaments, and fishery, including therein the rights, interests, and works acquired and made by the said *Edward Joshua Cooper*, unto or for the benefit of the appellant and such other persons as shall be found to be entitled thereto ...

109. It is not easy to analyse the precise principles that led the House of Lords to set aside the agreement in this case. In an article in (1954) 70 LQR 385 Mr Christopher Slade suggested that misrepresentation was the basis of the decision, and that was certainly stated by Lord Cranworth to be one ground for granting relief. But, equally, he affirmed the "doctrine acted upon" in *Bingham v. Bingham* and Lord Westbury founded his decision fairly and squarely on common mistake – "the Respondents believed themselves to be entitled to the property, the Petitioner believed that he was a stranger to it, the mistake is discovered and the agreement cannot stand".

110. The authors of *Meagher* suggest, at paragraph 1423 that Cooper commenced the proceedings in the belief that the agreement failed in law, claiming only ancillary relief of delivery up of the agreement and an injunction restraining Phibbs from suing on it. We think it more likely that Cooper believed that he needed the assistance of equity to escape from an agreement that a court of law would hold binding – he could hardly have been confident that in 1865 common law judges would recognise his equitable title as a ground for holding the agreement void for mistake. At all events we agree with the authors of Meagher that it is plain from the terms of the Order of the House of Lords that they approached the case on the basis that "in equity alone did the agreement fail". The speeches do not expressly define the nature of the mistake as to rights that justified the intervention of equity, but the reference by Lord Cranworth to the doctrine in *Bingham v. Bingham* and the words of Lord Westbury that we have quoted in the previous paragraph indicate that the type of mistake under consideration was one whereby a party agrees to purchase a title which he already owns. There is nothing that suggests that their Lordships were seeking to lay down a broader doctrine of mistake. It is, however , right to observe that in *Earl Beauchamp v. Winn* (1873) LR 6 HL 223 at p. 233 Lord Chelmsford observed, obiter:

> The cases in which Equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contracts, or a fact is known to one party and unknown to the other, and there

> the contracts, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party.

The effect of *Bell v. Lever Brothers*

111. The report of argument before the Court of Appeal indicates that counsel for the appellants grouped together common law authorities and equitable authorities, including *Cooper v. Phibbs*, in support of the proposition that a contract was void for mistake only where the mistake was as to the existence of the subject matter of the contract. Counsel for the respondents also relied on *Cooper v. Phibbs*, observing "The contract is not merely liable to be set aside. It is void". Scrutton LJ appears to have accepted this submission. At p.585 he gave examples of mistakes as to assumed assumptions which might render a contract void:

> It may be a right to a thing, as where the thing purchased is really the property of the purchaser and not of the vendor. As Lord Westbury puts it in *Cooper v. Phibbs* : "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." Later authorities show that the language should be "is void" and any revival is made, not by electing not to set aside, but by a new contract."

112. Lawrence LJ agreed. He held at pp.590-1:

> The locus classicus on this particular branch of contract law is the passage in Lord Westbury's speech in *Cooper v. Phibbs*, where, after pointing out the difference between ignorance of the general law of the country and ignorance of a private right, although the latter might also be the result of a matter of law, Lord Westbury states the rule where private rights are concerned as follows: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." The only criticism to be made on that statement of the rule is that the word "void" ought to have been substituted for the expression "liable to be set aside", as what really happens in such cases is that the agreement fails to become a contract.

113. In the House of Lords the report shows that the appellants relied on both common law authorities and *Cooper v. Phibbs* in support of the submission that a common mistake had to be as to the existence of the subject matter of the contract if it was to render it void. The respondents do not appear to have suggested that equity might provide relief where common law would not. They relied upon frustration cases in support of the proposition that a mistake would render a contract void if it was based on a mistaken assumption that was contractual and was as to the essence of the contract.

114. Lord Blanesborough, when considering the pleadings, remarked at p.190:

> the claim made by the heads of claim is for rescission of the agreements of settlement, relief properly consequent upon a case of voidability either for fraud or unilateral mistake induced by fraud. But if the allegation, even alternative, was that the agreements were entered into under mutual mistake of fact, then these

> the agreements were entered into under mutual mistake of fact, then these agreements were not voidable but void ab initio, and no order on that footing is even hinted at in the relief sought.

115. Lord Warrington, who was for dismissing the appeal, does not appear to have believed that there was a significant difference between the situation where the common law would declare a contract void and that where equity would grant rescission on the ground of common mistake. He stated at p.210:

> This case seems to me to raise a question as to the application of certain doctrines of common law, and I have therefore not thought it necessary to discuss or explain the special doctrines and practice of Courts of equity in reference to the rescission on the ground of mistake of contracts, conveyances and assignments of property and so forth, or to the refusal on the same ground to decree specific performance, though I think, in accordance with such doctrines and practice, the same result would follow.

116. Lord Atkin at p.218 cited *Cooper v. Phibbs* as an example of mistake as to the subject matter of the contract:

> This is the case of *Cooper v. Phibbs*, where A agreed to take a lease of a fishery from B, though contrary to the belief of both parties at the time A was tenant for life of the fishery and B appears to have had no title at all. To such a case Lord Westbury applied the principle that if parties contract under a mutual mistake and misapprehension as to their relative and respective rights the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Applied to the context the statement is only subject to the criticism that the agreement would appear to be void rather than voidable.

117. Lord Thankerton at p.235, when considering the type of mistaken assumption that would render a contract void in the light of a number of common law authorities, added:

> The phrase "underlying assumption by the parties," as applied to the subject matter of a contract, may be too widely interpreted so as to include something which one of the parties had not necessarily in his mind at the time of the contract: in my opinion it can only properly relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter. In the present case, however probable it may be, we are not necessarily forced to that assumption. *Cooper v. Phibbs* is a good illustration, for both parties must necessarily have proceeded on the mistaken assumption that the lessor had the right to grant the lease and that the lessee required a lease.

118. These passages demonstrate that the House of Lords in *Bell v. Lever Brothers* 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 Brothers 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.

intervened to excuse performance of a contract assumed to be binding in law.

The effect of *Solle v. Butcher*

119. The material facts of *Solle v. Butcher* can shortly be summarised as follows. The defendant agreed to let a flat to the plaintiff for £250 a year. The flat had previously been let at a rent of £140. Substantial work had been done on the flat and both parties believed that this so altered the nature of the premises as to free them from relevant rent control. In this they were mistaken. The defendant would have been able to charge the plaintiff an increased rent of £250 to reflect the work done on the flat had he complied with the requisite formalities but, under the influence of the mistake, he failed to do so. In the result he could not lawfully charge a rent higher than £140. The plaintiff obtained a declaration in the county court that the rent was restricted to £140 and an order for repayment of rent overpaid. The Judge rejected the contention that the contract had been concluded under a common mistake of fact, holding that the mistake was one of law.

120. The Court of Appeal, by a majority, reversed this decision. Bucknill LJ held that the parties had concluded the agreement under a common mistake of fact, namely that the alterations had turned the premises into "in effect, a different flat". He held that this common mistake was on a matter of fundamental importance and that the defendant was entitled to rescind the agreement under the principle in *Cooper v. Phibbs* (1867) LR 2 HL 249. He remarked that he had read the judgment of Denning LJ and agreed with the terms proposed by him on which the lease should be set aside.

121. Jenkins LJ dissented. He held that the common mistake was one of law, namely whether or not the flat was subject to rent control. He held that no right to rescind could be based on an error of law.

122. Denning LJ first identified the effect of common mistake under principles of common law:

> Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell v. Lever Bros Ltd* [1932] A.C. 161, 222, 224, 225-7, 236. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance.

123. Applying those principles he held that it was clear that there was a contract. The parties had agreed in the same terms on the same subject matter. True it was that there was a

had agreed in the same terms on the same subject-matter. True it was that there was a fundamental mistake as to the rent which could be charged, but that did not render the lease a nullity. Turning to equity, he observed that the court could set aside a contract when it was unconscientious for the other party to take advantage of it. As to what was considered unconscientious, equity had shown a progressive development. A material misrepresentation would suffice, even if not fraudulent or fundamental. He continued at p.693:

> A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

124. For this proposition Denning LJ relied primarily on *Cooper v. Phibbs*. Of this he said:

> In that case an uncle had told his nephew, not intending to misrepresent anything, but being in fact in error, that he (the uncle) was entitled to a fishery; and the nephew, after the uncle's death, acting in the belief of the truth of what the uncle had told him, entered into an agreement to rent the fishery from the uncle's daughters, whereas it actually belonged to the nephew himself. The mistake there as to the title to the fishery did not render the tenancy agreement a nullity. If it had done, the contract would have been void at law from the beginning and equity would have had to follow the law. There would have been no contract to set aside and no terms to impose. The House of Lords, however, held that the mistake was only such as to make it voidable, or, in Lord Westbury's words "liable to be set aside" on such terms as the court thought fit to impose; and it was so set aside.
>
> The principle so established by *Cooper v. Phibbs* (1867) L.R. 2 H.L. 149 has been repeatedly acted on: see, for instance, *Earl Beauchamp v. Winn* (1873) L.R. 6 H.L. 223, 234 and *Huddersfield Banking Co. Ltd v. Lister* [1805] 2 Ch. 273. It is in no way impaired by *Bell v. Lever Bros. Ltd.* [1932] A.C. 161, which was treated in the House of Lords as a case at law depending on whether the contract was a nullity or not. If it had been considered on equitable grounds, the result might have been different. In any case, the principle of *Cooper v. Phibbs* has been fully restored by *Norwich Union Fire Insurance Society Ltd. v. William H. Price, Ltd.* [1934] A.C. 455, 462-3.

He added at p.695:

> *Cooper v. Phibbs* affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.

125. Denning LJ held that the lease should be set aside because there had been "a common misapprehension, which was fundamental". The terms on which the lease was set aside were such as, in effect, to give the tenant the option of substituting the lease for one at the full rent which the law permitted.

126. Toulson J. described this decision by Lord Denning as one which "sought to outflank *Bell v. Lever Brothers*". We think that this was fair comment. It was not realistic to treat the House of Lords in *Bell v. Lever Brothers* as oblivious to principles of equity, nor to suggest that "if it had been considered on equitable grounds the result might have been different". For the reasons that we have given, we do not consider that *Cooper v. Phibbs* demonstrated or established an

equitable jurisdiction to grant rescission for common mistake in circumstances that fell short of those in which the common law held a contract void. Insofar as this was in doubt, the House of Lords in *Bell v. Lever Brothers* delimited the ambit of operation of *Cooper v. Phibbs* by holding, rightly or wrongly, that on the facts of that case the agreement in question was void at law and by holding that, on the facts in *Bell v. Lever Brothers*, the mistake had not had the effect of rendering the contract void.

127. It was not correct to state that *Cooper v. Phibbs*, as interpreted by Denning LJ, was "in no way impaired by *Bell v. Lever Brothers*", nor to make the inconsistent statement that the principle of *Cooper v. Phibbs*, as interpreted by Denning LJ, had been "fully restored" by *Norwich Union Fire Insurance v. Price* [1934] AC 455. That was a decision of the Privy Council, on appeal from the Supreme Court of New South Wales. Insurers had paid the insured value on a cargo of lemons under a mistake, shared by the assured, that they had been destroyed by a peril insured against. In fact they had been sold in transit because they were ripening. The Privy Council allowed the insurers appeal against the refusal of the Supreme Court to allow them to recover the insurance monies on the ground that they had been paid under a mistake of fact. At pp.462-3 of their advice they observed:

> The mistake was as vital as that in *Cooper v. Phibbs* in respect of which Lord Westbury used these words: "If parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake." At common law such a contract (or simulacrum of a contract) is more correctly described as void, there being in truth no intention to contract. Their Lordships find nothing tending to contradict or overrule these established principles in *Bell v. Lever Bros Ltd*.

128. This passage reinforces the approach of the House of Lords in *Bell v. Lever Brothers* of equating the test of common mistake in *Cooper v. Phibbs* with one that renders a contract void at common law.

129. Nor was it accurate to state that *Cooper v. Phibbs* afforded ample authority for saying that the lease could be set aside "on such terms as the court thinks fit". As we have demonstrated, the terms imposed by the House of Lords in *Cooper v. Phibbs* were no more than necessary to give effect to the rights and interests of those involved.

130. In *Bell v. Lever Brothers* the House of Lords equated the circumstances which rendered a contract void for common mistake with those which discharged the obligations of the parties under the doctrine of frustration. Denning LJ rightly concluded that the facts of *Solle v. Butcher* did not amount to such circumstances. The equitable jurisdiction that he then asserted was a significant extension of any jurisdiction exercised up to that point and one that was not readily reconcilable with the result in *Bell v. Lever Brothers*.

131. If the result in *Solle v. Butcher* extended beyond any previous decision the scope of the equitable jurisdiction to rescind a contract for common mistake, the terms of Denning LJ's judgment left unclear the precise parameters of the jurisdiction. The mistake had to be "fundamental", but how far did this extend beyond Lord Atkin's test of a mistake "as to some quality which makes the thing without the quality essentially different from the thing as it was believed to be"? The difficulty in answering this question was one of the factors that led Toulson

believed to be ? The difficulty in answering this question was one of the factors that led Toulson J. to conclude that there was no equitable jurisdiction to rescind on the ground of common mistake a contract that was valid in law. Was it open to him after half a century and is it open to this Court to find that the equitable jurisdiction that Denning LJ identified in *Solle v. Butcher* was a chimera? Principles of both equity and common law have been developed by the judges and that is not a process which ceased with the Judicature Act. Does the doctrine of precedent require, or even permit, this court to hold that the jurisdiction that Denning LJ purported to exercise in Solle v Butcher does not exist because that decision was in conflict with that of the House of Lords in *Bell v. Lever Brothers*?

132. That question first requires consideration of the judgment of Bucknill LJ in *Solle v. Butcher*. He did not purport to agree with the statements of principle in the judgment of Denning LJ, which he had read in draft. He simply stated that he was applying the principle in *Cooper v. Phibbs* to an agreement concluded under a mistake as to a matter of fundamental importance. Nonetheless, he expressly concurred in ordering rescission on terms. At p.689, at the end of his judgment, he observed that the defendant had "established his point that the lease should be rescinded on the ground of common mistake, on a suitable undertaking being given by him as regards a new lease to the plaintiff". This was not a finding that was open to him if *Bell v. Lever Brothers* had established that common mistake had no effect on a contract unless it was so significant as to render the contract void. It follows that the majority decision in *Solle v. Butcher* was based on the assumption of a jurisdiction founded in equity to order rescission of a contract binding in law.

133. We turn to consider the decisions on common mistake in the years that have followed *Solle v. Butcher*.

134. In *Rose v. Pim* [1953] 2 QB 450 the parties entered into a contract for the purchase and sale of "horsebeans" under the common, mistaken, belief that these were a specific type of bean known as "feveroles". The plaintiffs sought, unsuccessfully, rectification of the agreement after it had been performed. In the course of his judgment, Denning LJ repeated the analysis that he had made of the law of common mistake in *Solle v. Butcher*. He expressed the view at p.461 that, had the buyers reacted before they had accepted the goods, they could have rescinded the agreement on the ground of common mistake.

135. In *Grist v. Bailey* [1967] 1 Ch. 532, Goff J. followed *Solle v. Butcher* in granting rescission of a contract for the sale of freehold land. Both parties had believed that the land was encumbered by a statutory tenancy, when this was not the case. The effect of this mistake was that the land was worth over double the agreed price. The Judge first considered *Bell v. Lever Brothers*, and held that the agreement did not satisfy the criteria necessary to establish that it was void for common mistake. He then considered *Solle v. Butcher* and concluded at pp.538-9 that it established that the jurisdiction to grant rescission for common mistake was wider than the jurisdiction to hold a contract void at law. He concluded that the facts satisfied the requirement that the mistake should be "fundamental" and ordered rescission on terms that the vendor enter into a fresh contract to sell the land, if so required by the purchaser, at "a proper vacant possession price".

136. The next case of common mistake came before a division of the Court of Appeal presided over by Lord Denning as Master of the Rolls. In *Magee v. Pennine Insurance Co. Ltd.* [1969] 2 QB 507 motor insurers entered into a compromise agreement under which they agreed to pay

their assured £385 in respect of damage sustained as the result of a collision. They then discovered facts that would have entitled them to repudiate the policy. They denied liability under the compromise agreement, relying on, among other matters, *Solle v. Butcher*.

137. We have already cited in paragraph 95 above Lord Denning's short summary of the law. He went on at p.514 to apply it:

> This brings me to a question which has caused me much difficulty. Is this a case in which we ought to set the agreement aside in equity? I have hesitated on this point, but I cannot shut my eyes to the fact that Mr Magee had no valid claim on the insurance policy: and, if he had no claim on the policy, it is not equitable that he should have a good claim on the agreement to pay £385, seeing that it was made under a fundamental mistake. It is not fair to hold the insurance company to an agreement which they would not have dreamt of making if they had not been under a mistake. I would, therefore, uphold the appeal and give judgment for the insurance company.

138. As Toulson J. pointed out, this passage suggests that the exercise of the jurisdiction to order rescission for fundamental mistake is discretionary, depending on consideration of what is "fair".

139. Winn LJ dissented on the basis that the relevant test was that laid down in *Bell v. Lever Brothers*, a test which, on the facts of the case, was not satisfied. Fenton Atkinson LJ at p.517 stated that on the issue of mistake he agreed with Lord Denning. He then, however, went on to say:

> applying in this case the proposition which was accepted by all of their Lordships in *Bell v. Lever Brothers Ltd* [1932] A.C. 161, set out in *Chitty on Contracts*, 23rd ed. (1968), para. 207, in these terms:
>
> > Whenever it is to be inferred from the terms of a contract or its surrounding circumstances that the consensus has been reached on the basis of a particular contractual assumption and that assumption is not true, the contract is avoided.
>
> And to that has to be added the additional rider: "The assumption must have been fundamental to the continued validity of the contract or a foundation essential to its existence". Applying the rule there laid down to the facts of this case, I think it is clear that, when the agreement relied upon by the plaintiff was made, it was made on the basis of a particular and essential contractual assumption, namely that there was in existence a valid and enforceable policy of insurance, and that assumption was not true. In my view it is the right and equitable result of this case that the insurers should be entitled to avoid that agreement on the ground of mutual mistake in a fundamental and vital matter.

140. This passage is not entirely clear. The language raises a doubt as to whether the Lord Justice was holding the contract void or voidable. We doubt whether he was intending to contradict Lord Denning by holding that the mistake rendered the contract void in law, but do not consider that his judgment can be treated as an endorsement of the full reasoning of Denning LJ in *Solle v. Butcher*.

Denning LJ in *Solle v. Butcher*.

141. In *Laurence v. Lexcourt Holdings* [1978] 1 WLR 1128 the purchasers sought rescission of a 15 year lease of business premises. Unknown to either, planning permission restricted their use as offices to a period of no more than two years. Mr Brian Dillon QC, sitting as a Deputy Judge of the Chancery Division, found that there had been a misrepresentation by the lessors which entitled the lessees to rescind the agreement. Dealing with an alternative plea of common mistake, he followed *Solle v. Butcher* and *Grist v. Bailey* in holding that the lease could be rescinded on the ground that it had been concluded under a mistake which was fundamental.

142. The next case in sequence is *Japanese Bank v. Credit du Nord*, to which we have already made reference. At p.266 Steyn J. had this to say about the relationship of common law and equity:

> It seems to me that the better view is that the majority in *Bell v. Lever Brothers Ltd* [1932] A.C. 161 had in mind only mistake at common law. That appears to be indicated by the shape of the argument, the proposed amendment (see p.191) placed before the House of Lords, and the speeches of Lord Atkin and Lord Thankerton. But, if I am wrong on this point, it is nevertheless clear that mistake at common law was in the forefront of the analysis in the speeches of the majority. The law has not stood still in relation to mistake in equity. Today, it is clear that mistake in equity is not circumscribed by common law definitions. A contract affected by mistake in equity is not void but may be set aside on terms: *Solle v. Butcher* [1950] 1 K.B. 671; *Magee v. Pennine Insurance Co. Ltd* [1969] 2 Q.B. 506 and *Grist v. Bailey* [1967] Ch. 532. It does not follow, however, that *Bell v. Lever Brothers Ltd* is no longer an authoritative statement of mistake at common law. On the contrary, in my view the principles enunciated in that case clearly still govern mistake as common law.

143. At the end of his judgment at p.270, he added:

> Having concluded that the guarantee is void ab initio at common law, it is strictly unnecessary to examine the question of equitable mistake. Equity will give relief against common mistake in cases where the common law will not, and it provides more flexible remedies including the power to set aside the contract on terms. It is not necessary to repeat my findings of fact save to record again the fundamental nature of the common mistake, and that the defendants were not at fault in any way. If I had not decided in favour of the defendants on construction and common law mistake, I would have held that the guarantee must be set aside on equitable principles.

144. The results in two of the cases to which we have referred were questioned by Hoffman LJ in *William Sindall plc v. Cambridgeshire CC* [1994] 1 WLR 1016 at 1035. In that case the purchasers of land for development sought to rescind the agreement on grounds which included common mistake. The mistake relied on was common ignorance of the fact that a sewer ran under the land, which would impede any development. Hoffman LJ held that an express provision that the contract was subject to easements left no room for rescission on the grounds of mistake. He also observed that in *Grist v. Bailey* and *Laurence v. Lexcourt Holdings* the judges did not advert to the question of the contractual allocation of risk and suggested that the

results might have been different had they done so.

145. Hoffman LJ did not, however, question the existence of a jurisdiction to order rescission on the ground of common mistake. Evans LJ at p.1042 addressed this question. He commented:

> Logically, there remains the question whether the contract, notwithstanding that on its true construction it covers the situation which has arisen, and that it cannot be set aside for misrepresentation, nevertheless may be rescinded on the ground of equitable mistake, as defined by Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671. 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: see *Chitty on Contracts*, 26th ed. (1989), vol. 1, para. 401; Treitel, *The Law of Contract*, 8th ed. (1991), p.276; and *Cheshire, Fifoot and Furmston's Law of Contract*, 11th ed. (1991), p.245. 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.

146. We were referred to an unreported decision of the Court of Appeal, which provides a recent application of the doctrine of common mistake by this court. In *Nutt v. Reed* (21st October 1999), the court was concerned with two linked agreements, one for the sale of a chalet and the other for the right to pitch the chalet on a plot of land. In fact, the chalet was affixed to the land, so that it could not be sold independently of it. At first instance the contract for the sale of the chalet was held void for mistake. This was not challenged on appeal. The Judge did not hold that the pitch agreement was void in law, but rescinded it on the application of the owners of the plot, applying *Solle v. Butcher*. Chadwick LJ held that the Judge might have taken the view that the second agreement also was void in law. There was, however, no appeal on that point. In the circumstances Chadwick LJ held that "the Judge was right to reach the conclusion that he had power, in equity, to set aside the second agreement". Later he said:

> He made his decision as to the terms of rescission on the basis of the arguments put before him; and, on the basis of those arguments, reached what seems to me to be the only conclusion that he could reach - namely that the agreement for the use of pitch 23 should be rescinded on the grounds that it had been entered into on the basis of a fundamental mistake; and that it would be wrong to refuse to rescind it simply because it gave rise to an assured tenancy - see *Solle v. Butcher*.

147. The other two members of the court agreed that the appeal should be dismissed.

148. Toulson J drew attention to Chadwick LJ's remark that the proceedings had been beset by muddle and confusion and observed that it was perhaps not surprising that the case had not been reported. It is, nonetheless, a further example of a decision of this court which proceeded on the basis that *Solle v. Butcher* was good law.

149. The most recent decision to which we were referred was that of Rimer J. in *Clarion Ltd v. National Provident Institution* [2000] 1 WLR 1888. The relevant issue was whether a complex agreement in relation to the switching between funds of blocks of investments should be rescinded for unilateral mistake of one party as to how it would operate, that mistake being

known to the other. All that one need note is that both parties proceeded on the basis that equity's role was to be identified from the judgment of Denning LJ in *Solle v. Butcher*. And that, proceeding on that premise, the Judge held that the case for rescission was not made out. He did, however, observe at p.1898 that this was an area of the law where there had been little merging of the stream of common law and equity and commended the discussion of the relevant law of Steyn J. in *Japanese Bank v. Credit du Nord*.

150. After the conclusion of argument an unreported decision of the Court of Appeal has come to our attention. In *West Sussex Properties Ltd v. Chichester District Council* (28th June 2000) the trial Judge had granted to the respondents an order rescinding an agreement revising, in purported pursuance to a rent review clause, the rent of property leased by the appellants to the respondents. The calculation of the new rent was based on a common mistake as to material facts of what had occurred nearly 30 years before the agreement was concluded. In the result the revised annual ground rent agreed exceeded by over £33,000 that which should have been agreed, had the mistake not been made. As we understand the position, rescission was ordered on terms that the rent payable from the date of review would be that which should have been agreed, and the rent overpaid was ordered to be repaid under principles of restitution.

151. The Court of Appeal upheld the decision. In the leading judgment, Morritt LJ recorded that, in the court below, junior counsel had challenged Denning LJ's judgment in *Solle v. Butcher* but that, before the Court of Appeal, leading counsel had accepted that *Solle v. Butcher* was good law, unless and until overruled by the House of Lords. The Court of Appeal proceeded on the basis that this concession was properly made and held that, while not void in law, the agreement had been properly rescinded on the ground of common mistake.

152. In the course of his judgment, Sir Christopher Staughton remarked at paragraph 42:

> It is a matter of some satisfaction, in my view, that we can and do regard ourselves as bound by the decision in *Solle v. Butcher* [1950] 1 KB 671. That decision has now stood for over 50 years. Despite scholarly criticism it remains unchallenged in a higher court; indeed there have been remarkably few reported cases where it has been considered during that long period. As this case shows, it can on occasion be the passport to a just result.

Summary

153. A number of cases, albeit a small number, in the course of the last 50 years have purported to follow *Solle v. Butcher*, yet none of them defines the test of mistake that gives rise to the equitable jurisdiction to rescind in a manner that distinguishes this from the test of a mistake that renders a contract void in law, as identified in *Bell v. Lever Brothers*. This is, perhaps, not surprising, for Lord Denning, the author of the test in *Solle v. Butcher*, set *Bell v. Lever Brothers* at nought. It is possible to reconcile *Solle v. Butcher* and *Magee v. Pennine Insurance* with *Bell v. Lever Brothers* only by postulating that there are two categories of mistake, one that renders a contract void at law and one that renders it voidable in equity. Although later cases have proceeded on this basis, it is not possible to identify that proposition in the judgment of any of the three Lords Justices, Denning, Bucknill or Fenton Atkinson, who

participated in the majority decisions in the former two cases. Nor, over 50 years, has it proved possible to define satisfactorily two different qualities of mistake, one operating in law and one in equity.

154. In *Solle v. Butcher* Denning LJ identified the requirement of a common misapprehension that was "fundamental", and that adjective has been used to describe the mistake in those cases which have followed *Solle v. Butcher*. 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".

155. A common factor in *Solle v. Butcher* and the cases which have followed it can be identified. The effect of the mistake has been to make the contract a particularly bad bargain for one of the parties. Is there a principle of equity which justifies the court in rescinding a contract where a common mistake has produced this result?

156. "Equity is ... a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them. In origin at least, it represents the attempt of the English legal system to meet a problem which confronts all legal systems reaching a certain stage of development. In order to ensure the smooth running of society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts, the general rules produce substantial unfairness ..." (*Snell's Equity*, 30th edn. Paragraph 1-03)

157. Thus the premise of equity's intrusion into the effects of the common law is that the common law rule in question is seen in the particular case to work injustice, and for some reason the common law cannot cure itself. But it is difficult to see how that can apply here. Cases of fraud and misrepresentation, and undue influence, are all catered for under other existing and uncontentious equitable rules. We are only concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell v. Lever Brothers* . But that, surely, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by application of some other doctrine. The common law has drawn the line in *Bell v. Lever Brothers*. The effect of *Solle v. Butcher* is not to supplement or mitigate the common law; it is to say that *Bell v. Lever Brothers* was wrongly decided.

158. Our conclusion is that it is impossible to reconcile *Solle v. Butcher* with *Bell v. Lever Brothers*. The jurisdiction asserted in the former case has not developed. It has been a fertile source of academic debate, but in practice it has given rise to a handful of cases that have merely emphasised the confusion of this area of our jurisprudence. In paragraphs 110 to 121 of his judgment, Toulson J. has demonstrated the extent of that confusion. If coherence is to be restored to this area of our law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law. That is the conclusion of Toulson J. Do the principles of case precedent permit us to endorse it? What is the correct approach where this court concludes that a decision of the Court of Appeal cannot stand with an earlier decision of the House of Lords? There are two decisions which bear on this question.

159. *Noble v. Southern Railway Company* [1940] AC 583 involved a claim under the Workmen's

Compensation Act 1925 in respect of a railway employee killed by a passing train. The Court of Appeal dismissed the claim, holding itself bound to follow a previous decision of the Court of Appeal that was on all fours – *Clarke's* case (20) BWCC 309 – notwithstanding that this was in conflict with an earlier decision of the House of Lords – *McFerrin's* case [1926] AC 377. Lord Wright made the following comment on this situation at p.598:

> I can understand the difficulty in which both the county court judge and the Court of Appeal were placed in the present case. What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by the House and refuse to follow the erroneous decision.

160. Lord Lane CJ, when delivering the judgment of the Court of Appeal, invoked this statement of opinion in *Holden & Co v. Crown Prosecution Service* [1990] 2 QB 261. At issue was the scope of the jurisdiction of the court to order a solicitor to pay personally costs thrown away in criminal proceedings. The court was faced with reasoning on the point in a previous decision of the Court of Appeal which was at odds with an earlier decision of the House of Lords. Lord Lane, having referred to the opinion of Lord Wright, went on to hold that the court regarded itself as free to disregard the previous decision of the Court of Appeal.

161. We have been in some doubt as to whether this line of authority goes far enough to permit us to hold that *Solle v. Butcher* is not good law. We are very conscious that we are not only scrutinising the reasoning of Lord Denning in *Solle v. Butcher* and in *Magee v. Pennine Insurance Co*, but are also faced with a number of later decisions in which Lord Denning's approach has been approved and followed. Further, a Division of this Court has made it clear in *West Sussex Properties Ltd v. Chichester DC* that they felt bound by *Solle's* case. However, it is to be noticed that while junior counsel in the court below in *West Sussex* had sought to challenge the correctness of *Solle*, in the Court of Appeal leading counsel accepted that it was good law unless and until overturned by their Lordships' House. In this case we have heard full argument, which has provided what we believe has been the first opportunity in this court for a full and mature consideration of the relation between *Bell v. Lever Brothers Ltd* and *Solle v. Butcher*. In the light of that consideration we can see no way that *Solle v. Butcher* can stand with *Bell v. Lever Brothers*. In these circumstances we can see no option but so to hold.

162. We can understand why the decision in *Bell v. Lever Brothers Ltd* did not find favour with Lord Denning. 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. Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.

The result in this case

163. We revert to the question that we left unanswered at paragraph 94. It was unquestionably a common assumption of both parties when the contract was concluded that the two vessels

were in sufficiently close proximity to enable the *"Great Peace"* to carry out the service that she was engaged to perform. Was the distance between the two vessels so great as to confound that assumption and to render the contractual adventure impossible of performance? If so, the appellants would have an arguable case that the contract was void under the principle in *Bell v. Lever Brothers Ltd*.

164. Toulson J addressed this issue in the following paragraph:

> Was the *"Great Peace"* so far away from the *"Cape Providence"* at the time of the contract as to defeat the contractual purpose - or in other words to turn it into something essentially different from that for which the parties bargained? This is a question of fact and degree, but in my view the answer is no. If it had been thought really necessary, the *"Cape Providence"* could have altered course so that both vessels were heading toward each other. At a closing speed of 19 knots, it would have taken them about 22 hours to meet. A telling point is the reaction of the defendants on learning the true positions of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once.

165. Mr Reeder has attacked this paragraph on a number of grounds. He has submitted that the suggestion that the *"Cape Providence"* should have turned and steamed towards the *"Great Peace"* is unreal. We agree. The appellants were sending a tug from Singapore in an attempt to salve the *"Cape Providence"*. The *"Great Peace"* was engaged by the appellants to act as a stand-by vessel to save human life, should this prove necessary, as an ancillary aspect of the salvage service. The suggestion that the *"Cape Providence"* should have turned and steamed away from the salvage tug which was on its way towards her in order to reduce the interval before the *"Great Peace"* was in attendance is unrealistic.

166. Next Mr Reeder submitted that it was not legitimate for the Judge to have regard to the fact that the appellants did not want to cancel the agreement with the *"Great Peace"* until they knew whether they could get a nearer vessel to assist. We do not agree. This reaction was a telling indication that the fact that the vessels were considerably further apart than the appellants had believed did not mean that the services that the *"Great Peace"* was in a position to provide were essentially different from those which the parties had envisaged when the contract was concluded. The *"Great Peace"* would arrive in time to provide several days of escort service. The appellants would have wished the contract to be performed but for the adventitious arrival on the scene of a vessel prepared to perform the same services. The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure.

167. The parties entered into a binding contract for the hire of the *"Great Peace"*. That contract gave the appellants an express right to cancel the contract subject to the obligation to pay the "cancellation fee" of 5 days hire. When they engaged the *"Nordfarer"* they cancelled the *"Great Peace"*. They became liable in consequence to pay the cancellation fee. There is no injustice in this result.

168. For the reasons that we have given, we would dismiss this appeal.

Order: Appeal dismissed with costs to be assessed on an indemnity basis. Agreed sum of £45,000 to be paid on account of costs. Counsel to prepare agreed minute of order.