SHOULD THERE BE A DOCTRINE OF COMMON FUNDAMENTAL MISTAKE IN THE WEST INDIES?

by Winston Anderson*

Introduction:

The doctrine of English Law, that a common fundamental mistake makes a contract void "ab initio", is one that has often attracted polemical assertions. Eminent judicial and academic authorities have maintained with equal rectitude the existence[1] and the non-existence[2] of the doctrine.

It is therefore somewhat disheartening that the Jamaica Court of Appeal in the case of Aircool Awning Co. Ltd. v Silvera based their decision on "the general doctrine of mistake."[3]

This article seeks to demonstrate that West Indian Judges can find ample support, upon authority, for deciding that a common fundamental mistake does make a contract void "ab initio". It will be submitted that none of the substitutive theories can explain this doctrine away. Further, it appears that much of the confusion current in academic and judicial circles arises from the illogical attempt at deriving the descriptive from the normative, what it ought to be, and from an uninformed view of what the normative ought to be.

In order to draw up the boundaries of this discussion, it must be stated at the outset that we are concerned solely with common mistake. This is because the other two species of mistake, viz. mutual and unilateral, are merely vehicles used by the plaintiff to show that offer and acceptance

never coincided and consequently, that there was no contract.[4] It is also important to note that although the courts in Amalgamated Investments and Property Co Ltd v John Walker etc[5] and Cooper v Phibbs[6] used the concepts of mutual and common mistake synonymously, that the label of "common" mistake preferred by Messrs. Cheshire and Fifoot is adopted here[7] We are not concerned here with measuring fundamentality to do so is "a familiar task for the courts."[7a]

In a common fundamental mistake both parties make the same mistake. Each knows and accepts the intention of the other. Each is, however, mistaken as to some underlying and fundamental fact. For example, they may be unaware that the subject matter of their contract has already perished[8]

At one level, the controversy as to whether a common fundamental mistake has the effect here argued is, really, a non-issue. The House of Lords, the highest Court of the English Common Law recognised, albeit "obiter," the existence of the doctrine in 1932. In the celebrated case of Bell v Lever Bros Ltd[9] all five learned law lords stated in unambiguous language, that such a mistake makes a contract void from the very beginning.[10] Indeed, for Lord Warrington such an effect was "established law."[11]

The authority establishing this law is of impressive pedigree. In Strickland v Turner, the Court of Exchequer expressly recognised the doctrine in 1852[12] Here, the purchaser of an annuity upon the life of another who, unknown to the buyer and the seller was already dead was able to recover the purchase money. On substantially similar facts the

court applied the doctrine of common fundamental mistake to arrive at a similar decision in Scott v Coulson.[13] Other cases lending judicial support to the existence of the doctrine include Kennedy v Panama Royal Mail Co,[14] Nicholson v Smith-Marriott Co,[15] and the rather tentative decision in the Aircool Awning Case.[16]

The first recalcitrant objection was taken by Lord Justice Denning (as he then was) in Solle v Butcher.[17] Here, that learned judge decided that the House of Lords had decided in Bell's Case that there was no doctrine of common mistake.

"The correct interpretation of (Bell's case) to my mind," said Denning, L.J., "is that ... the contract is good unless and until it is set aside ..."[18] This feat in the cavalier interpretation of inconvenient judicial precedence has been adopted in subsequent Court of Appeal decisions[19] and sanctioned by high academic authority.[20]

Lord Denning's difficulty seems to reside in reconciling the dicta of the House of Lords in Bell's case (the familiar facts of which need no repetition) with their actual decision. Reduced to a question, the difficulty is this: if the mistake which cost Lever Bros Ltd., $30,000 was not fundamental enough, what mistake could ever be?

It is well known that the decision is perfectly harmonious with the then judicial preoccupation with character, as opposed to content. When a mistake was as to the content (e.g. of a document) being the same in kind, it could not be so fundamental as to render the contract void. This theory took no cognisance of the monetary difference.[21] Thus, as the mistake in Bell's case was relative to a misapprehension, as to the value of the service

contract (i.e. between $10 and $30,000) and not to the character of the document, the mistake could not be regarded as fundamental.

It is submitted that after 1971, when in Saunders v Anglia Building Society[22] the House of Lords clearly indicated its willingness to consider as fundamental, a mistake as to kind or as to monetary value,[23] Bell's case might be decided differently.

But there lingers an act of charity, current in respected academic circles to rescue Lord Denning's interpretation. It has been argued that the decision is irreconcilable with the doctrine of mistake, since "res extincta" (which is a genus of common mistake) was applied here. In order to arrive at this conclusion, one argues that the parties were contracting on the basis of a valid service contract. Since the contract was in fact voidable, a valid contract did not exist.

Apart from its commendable regard for the ground rules of interpreting judicial interpretations, this argument, it is respectfully submitted, is palpably wrong. As early as Street v Blay,[24] it was held that where an unsound horse is sold and the seller makes no representation as to is soundness, the contract cannot be avoided, even if both seller and buyer believe it to be sound. There must be, as Blackburn, J. said, "a complete difference in substance between what was supposed to be and what was taken..."[25]

Thus, since Bell in the leading case made no representation as to the validity of his service contract, a common mistake as to the validity of such contract could not operate so as to render it void.[26] "A fortiori" one may arrive at the same decision on

the grounds that Bell owed no duty to disclose his prior breach of duty, which might render the contract voidable.[27]

Moreover, it is completely erroneous to argue, with respect to the instant case, that the voidable contract is in substance different from a valid one. A voidable contract is defined in Halsbury's Laws of England as one which is "valid, unless and until a right of avoidance is exercised."[28] Since Lever Bros. Ltd., had not exercised their right of avoidance, the Service Contract was still valid at the "golden hand shake."

As long as it is admitted that decision and dicta in Bell v Lever Bros Ltd. are reconcilable that there is ample support in the authorities for West Indian and other judges to hold that a common fundamental mistake makes a contract void at the out set, the legal roost is in a quandary. Many Court of Appeal decisions are then brought perilously close to being adjudged "per incuriam".[29]

It is in this cause that the scramble has ensued for alternative ways of replacing the mistake doctrine. Fundamentally, it is hoped that should any of these "sub infudatory" arguments succeed at being "co-terminus" with the doctrine that the latter would be relegated to the realm of innocuous superfluity.

The three most significant of these attempts appear in the form of the "implied terms test"; "the total failure of consideration", and the "reasonable man test". These will be considered "seriatim".

Implied Terms Test:

Among the many academics who regard the doctrine of

common mistake as the mere implications of terms by the courts[30], Slade states the position with some clarity. In his view "... a contract is void only at law if some term can be implied in both offer and acceptance which prevents the contract from coming into operation".[31]

Thus, in Couturier v Hastie[32], for example an implied term of the contract would be that neither party should bear the risk, in the event that the corn ceased to exist, at the time the contract was completed.

In Scott v Coulson[33], it would be an implied term that neither party was to face contractual liability should the annuitant be dead. In McRae v Commonwealth Disposal Commission[34], it was expressly recognised that it was an implied term that the vendor took the risk of the non-existence of the wreck. Similarly, it is argued that an implied term, with respect to the contract in March v Pigott[35], was that both parties took the risk that the father of the other had already died.

This approach appears,"prima facie" to rescue Lord Denning's rather mystic interpretation, and to negate the doctrine of common mistake. Indeed Lord Denning left open first such a possibility in Solle v Butcher.[36]

Attractive as this theory appears, however, it raises certain difficulties. The treatment of mistake as dependent upon construction would destroy all certainty in the law of contract. An entire body of case law by its very subjective nature, would have to be a deviation from the general doctrine of binding precedent.

Secondly, such an approach is still faced with the

mammoth task of reconciling cases which, though indistinguishable on their facts have gone in opposite directions. Bell v Lever Bros Ltd., and Magee v Pennine Insurance Co Ltd., are two such cases.[37] It appears that even an "ex post facto" analysis cannot yield a sensible distinction. It surely cannot be that the implied terms were different because the courts were different.

Thirdly, this approach was rejected by a majority of the House of Lords in Bell's case. In that case Lord Atkin asserted "Nothing is more dangerous than to allow oneself the liberty to construct for the parties, contracts which they have met in terms made by importing implications ... to make the contract more businesslike or more just"[38] "Similarly Lord Thankston opposes that the theory of implied terms has no bearing on the question of ... mistake as rendering a contract void..."[39]

Total Failure of Consideration Test:

Messrs. Cheshire and Fifoot adopt the view that Bell v Lever Bros Ltd., decided that a fundamental mistake exists, only in cases of "res extincta" and "res sua".[40] This has led, it is submitted, to another erroneous theory. Since "res extincta" and "res sua" are pictured as subsets of the doctrine of common mistake, it has been contended that mistake merely signifies the total failure of consideration.

It is submitted, primarily, that the argument is logically a "non sequitur", in that it treats the absence of the "res" as identical with the mistake doctrine when, with respect to the late authors of

Cheshire and Fifoot's Law of Contract, any sort of reasonable reading of the judgments will clearly reveal a wider perspective. Moreover, it is further submitted that apart from this failure of logic, common fundamental mistake cannot be explained away by the total failure of consideration.

In the first place comparative law is against it. Whereas the English Law of Contract shares the doctrine of fundamental mistake with civil Law Systems, consideration is, generally an aberration peculiar to the English Legal System. The general principle in the Civil Law is stated in the Digest, lib.18 tit.4 De Contrahendia Emptiore leges 9,10, 11. Here, "error in copore" results in no contract. As Blackburn, J., said, "our principles of the law (in this respect) are the same as the civil law."[41]

It is therefore not glaringly obvious to see how mistake can be analysed solely in terms of consideration when only mistake is recognised in a legal system upon which the English Law of Contract is based.

Furthermore, after Saunders v Anglia Building Society,[42] it seems perfectly possible to have the revelation of a fundamental mistake by the presence of a negligible portion of consideration.[43] But the courts will not enquire into the adequacy of consideration as the parties are deemed able to appreciate their own self interest and reach their own equilibrium.[44] Consideration could not explain the operation of mistake.

Again, if the subject matter does not exist but one of the parties had been negligent in representing that it does, there may be a contract even though strictly speaking, there is no consideration.

In McRae's case, the contract was held valid even where its subject matter, a wrecked ship, was not in existence.[45]

The Reasonable Man Test:

Another recent attempt at whittling away the efficacy of the mistake doctrine is the assertion of the umbrella test of reasonableness. The plaintiff invariably stands to suffer a loss if the contract is held void or valid against his wishes. All that is essential it is argued, is to answer the question whether this plaintiff had acted reasonably. Thus, if the defendant sold a dog to the plaintiff, arguing and believing it to be a goat it would be unreasonable, "ceteris paribus", for the plaintiff to obtain an avoidance of the contract. No reasonable man would have been mistaken.

Consequently, in McRae's case, it would be unreasonable to expect the plaintiff to know of the non-existence of the wreck, which was 7,000 miles away. His plea for relief was therefore granted. In Couturier v Hastie, it was unreasonable of the seller to expect that the buyer paid for anything but existing corn. The contract was therefore held void.

This theory seems to be closely affiliated to one of the law of torts. This is justified on the grounds, "simpliciter" that both areas of law are substantially inseparable, in that they both involve various degrees of obligation between subjects of the "lex fori". The standard of the reasonable man - the hallmark of tortious liability,[46] is therefore imported with ease into contractural liability.

Frankly, this appears to be an argument "ab incon-

venienti" and evades rather than answers the issues. It seems to be merely a less convincing way of stating the old "implied terms test", which as has been shown, is unsatisfactory for a number of reasons. "Mutatis mutandis", this test can be rejected out of hand for the same deficiencies. Thus one is faced with the insurmountable difficulty, for example, of saying that practically the same behaviour was reasonable in Magee's cases, but unreadsonable in Bell v Lever Bros Ltd.[47]

Finally, a major flaw of this approach, it is submitted, is that it concentrates exclusively on one aspect of a factual situation. It might be clear for example that both parties acted unreasonably, that both acted reasonably (Scriven Bros v Hindley)[48], and that one of the parties was fraudulent. The latter is apparently ignored by this test.[49] The first two illustrations would depend, it appears upon which of the parties came before the courts first - in any event nothing is said to guide the courts as to what constitutes reasonable behaviour in contract or is course of action when unable to choose between two reasonable (or unreasonable) "modi operandi".

The Problem of deriving the Normative from the descriptive:

The functional relevance of mistake in the law of contract is to allocate loss between contracting parties. Where the doctrine is held to be existant the contract is deemed to be void "ab initio" and the loss is relieved from one party "in toto". The converse is the result where either the mistake is held not to be fundamental enough or inoperative for some other reason. This rather crude result has let in some quarters to the view that normatively

the equitable approach of setting the contract aside on terms is preferable to the elementary and naive approach at common law.[50] It is this rationale that has been prayed in aid of Lord Denning's decision in Solle v Butcher and subsequent Court of Appeal decisions; this when all the alternative theories have failed.

However, it is not at all clear that equity will always stretch its just hands into the coffers of the enriched and subtract an equitable portion to the use of the innocent party. In any event David Hume illustrated over two centuries ago that the descriptive cannot be logically derived from the normative.[52] Law is not always synonymous with justice. It is therefore a "non-sequitur" to argue the non-existence or the existence of a legal doctrine as contingent upon the justice it dispenses.

As far as the common law is concerned it appears that only normative proposition which is defensible is that the law ought to be obeyed and followed,[53] not least of all by the judiciary until and unless it is changed by those who have the legislative and judicial responsibility to do so. And if it makes for any comfort it is significant that the birth of equitable remedies does not depend upon the death of the common law.

Conclusion:

The English Law on the doctrine of common fundamental mistake is in a state of flux. The House of Lords holds to the view that the doctrine makes a contract void "ab initio" and therefore Court of Appeal decisions to the contrary remain only as good a source of law as they ever were.

With the troubled and unsettled state of law, some anxiety might be felt for West Indian judges, who exhibit an unerring singularity of purpose in following all English precedents. Perhaps the most satisfactory aspect of the Aircool Awning case is not its analysis. In applying "general doctrine of mistake" the court came to the conclusion that the contract was void, presumably, right from the start?[54]

It would be heartening if this discussion could be seen as an indication that, upon principle and authority the region's judges have the opportunity to bypass dubious English Court of Appeal interpretations, upon the doctrine of common mistake. The track record for West Indian judicial assertiveness however, whispers that this is a timid hope.

FOOTNOTES

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The author wishes to express his sincere appreciation to Mr Burgess for the indispensible guidance in compiling this thesis.

1. See(eg.) Anson, W. Law of Contract (25th ed.1979) p.273. Trietel, G.H., The Law of Contract (4th ed. 1975) p.168; Kennedy v Panama Royal Mail Co. (1867) L.R.2 Q.B.580 per Blackburn J. at p.587; Bell v Lever Bros Ltd (1932) A.C.161 at pp.197,206,217,233; Ingram v Little (1961) 1.Q.B.31.

2. Atiyah, An Introduction to the Law of Contract (2nd ed.) p.50; Slade, The Myth of Mistake in the English Law of Contract, 70 L.Q.R. 385 (1954) at p.385; Atiyah and Bennion, 24 M.L.R.

421 (1961) at p.425; Solle v Butcher, (1950) 1.K.B.671 per Denning L.J. at p.691 - foll. in Grist v Bailey (1967), Ch.532, Lawrence v Lexicourt Holdings Ltd. (1978) 2 All E.R. 810

3. (1966) 10 W.I.R. 14 per Shelley J.A. at p.18
4. See e.g. Slade, op.cit.388; Atiyah and Bennion, op.cit.423; Cheshire and Fifoot, Law of Contract, (9th.ed.1976) p.225.
5. (1976) 3 All E.R.509 per Buckley L.J. at p.515
6. (1867) L.R.2 H.L. 149 at p.170
7. Cheshire and Fifoot, op.cit.p.206; Atiyah, op.cit p.56 but C.F. Anson, op.cit. p.273

7a Saunders v Anglia Building Society (1971) A.C.1004 pev Lord Reid.

8. Cheshire and Fifoot, loc.cit.
9. (1932) A.C. 161
10. See Note 1.
11. Ibid
12. (1852) 7 Ex.802. See too implicit recognition in Couturier v Hastie (1852)8.Ex.40.
13. (1903) 1 Ch.453 per Kekewich J. at p.455.
14. (1876) L.R.2 Q.B., 580, per Blackburn J. at p. 587
15. (1947) 177 L.T., 189 per Hallet J. at p.192
16. Op.cit p.14.
17. Op.cit.p.691
18. Ibid
19. See e.g. Leat v International Galleries,(1950) 2.K.B.86; Magee v Pennine Insurance Co. Ltd.

(1969) 2 Q.B.507; and cases cited in note 2.

20. See Note 2 above.

21. See e.g. Tsakiroglou and Co Ltd v Noblee Thorl G.M.6.H.(1962) A.C.93 per Viscount Simmas, at p.113

22. (1971) A.C.1004

23. Loc.cit.per Lord Ried at p.1016

24. (1831), 109, E.R. 1212

25. Kennedy v Panama Royal Mail Co (1876), L.R.2 Q.B.580 at p.587

26. Analogously, the horse in Street v Blay (1831) 109.E.R.1212.

27. Op.cit, Bell v Lever Bros Ltd. (1932) A.C.161, per Lord Thankerton at p.231

28. Halsbury's Laws of England 4th ed. Imperfect Contracts. para.207 (1974)

29. Scott v Coulson (1903) 2 Ch. 249 was decided by a Court of Co-ordinate jurisdiction. But in some cases "obiter dicta" of the House of Lords it has been considered Law. See e.g. Bell v Lever Bros Ltd. (1932) A.C.161. at p.206.

30. Slade, op.cit p.385; Atiyah and Bennion, op. cit.p.423; See too Stoljar, A New Approach to Mistake in Contract, 28 M.L.R. 265 at p.273(1965)

31. Ibid.

32. Op.cit, at footnote, 12.

33. Op.cit, at footnote 29

34. (1951) 84 C.L.R. 37 per Dixon and Fullagar JJ. at pp.403-405.

35. (1771) 5 Burr.2802.

36. Ibid.at p.691

37. Note that the effect of the "Uberrimia fides" clause in Magee's Case (Ibid at footnote 19) was solely, to make the contract voidable (the situation in Bell's Case). Moreover the executed contract theory of Seddan v N.E.S. Co Ltd (1905) 1. Ch.326 had been abolished by the Misrepresentation Act 1967 (U.K.) and would in any case, be contrary to Earlier Case Law (e.g.) Solle v Butcher (op. cit.at footnote 2) where the contract was executed.

38. Ibid. per Lord Atkin at p.226

39. Ibid. p.237, Lord Wilberforce's dicta in Photo Productions Ltd v Securicor (1980) 1 All E.R.556 are limited vis-a-vis exemption clauses and legal/factual presumption of the effect of a "fundamental breach."

40. Op.cit.at.p.208

41. Kennedy v Panama Royal Mail Co. op.cit at footnote 1 p.588. See too: Buckland and McNair, Roman Law and Common Law, (3rd ed. 1965) pp.199-203; Schwartz, B, The Code Napolean and the Common-law World, (1975) pp.382, 388, note 15.

42. Loc.cit.1017

43. Ibid

44. See e.g. Thomas v Thomas (1842) 2 Q.B. 851; Cheshire and Fifoot, op.cit.p.75

45. Op.cit.

46. See e.g. Donoghue v Stevenson (1932) A.C. 562 at P.580; Winfield and Jolowicz, On Tort, (IIth

ed. 1979) pp. 46-47

47. See note 37 above

48. (1913) 3 K.B. 564 cf Tamplin v Jones (1880), 15 Ch.D.215

49. Supra

50. See e.g. Ingram v Little (1961) 1.Q.B. 31 per Devlin L.J; Lawson, The Rational Strength of English Law, (1951) at pp.69-70 but cf. Law Reform Committee, 12th Report (Cmnd.2958) (1966)

51. Magee's Case op.cit. at footnote 19

52. Hume, D.A. Treatise of Human Nature, (ed.1777) pp.516-534

53. Allott, A, The Limits of the Law (1st.ed.1980) pp. 152,153,159

54. (1966) 10 W.I.R.:14, but Note the case dealt with a unilateral mistake situation in 1966.

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