

## COMMON MISTAKE IN CONTRACT: RARE SUCCESS AND COMMON MISAPPREHENSIONS

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ABSTRACT. *Disputes involving shared mistakes should be resolved by considering the meaning (explicit and implicit) of the parties' agreement. There is no room for a free-standing doctrine of mistake. The argument is illustrated by considering three recent decisions on common mistake.*

KEYWORDS: *contract, common mistake, implied terms.*

### I. IMPLIED TERMS AND FACTUAL BASIS

Common mistake is a hopeless plea. It succeeds rarely – if not never then at least “hardly ever”, one might unoriginally quip following Lord Hailsham L.C.’s invocation of the well-bred Captain of the *Pinafore*.<sup>1</sup> One can see why parties might still try. To escape liability for breach, or from the unappetising performance of a bad bargain, would often be useful indeed – and deciding that an apparent contract was void *ab initio* permits such an escape. But when should it be permitted? The problem is scarcely novel. Peter Birks identified the fear – in Roman law as today – that disappointed parties might go about “concocting mistakes *ex post facto*”, unsettling transactions in a way that is undesirable because in commercial life, “successful and efficient businessmen” should prosper while those with bad judgment are rightly “driven to the wall”. As Professor Birks said, as true today as in classical Rome, the result is difficult law, full of “puzzles and artificialities”.<sup>2</sup>

One can press the analogy further. Then as now, some jurists evince “determination to give no relief at all” while others accept that contracts may be avoided for “a very fundamental mistake”. The latter is the modern English position. But the “test” is intractable. This problem too vexed the Roman jurists. As Birks noted, Ulpian sought to “crisp up” the “spongy

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<sup>1</sup> *National Carriers Ltd. v Panalpina (Northern) Ltd.* [1981] A.C. 675, 688.

<sup>2</sup> P.B.H. Birks, *The Roman Law of Obligations*, E. Descheemaeker (ed.) (Oxford 2014), 76–77.

notion of fundamentality” with “a mechanical test” (*viz. error in substantia*); but this was “itself not very satisfactory”.<sup>3</sup>

English law has been unable to cast off this Roman inheritance.<sup>4</sup> The test of whether a mistake is sufficiently “fundamental” remains entrenched. This has its quaint side. Is vinegar fundamentally different from wine? Does it matter whether it is *wine vinegar* (i.e. ex wine, now soured)?<sup>5</sup> Such questions have a metaphysical flavour. Yet judges have often refused invitations to “adventure themselves with philosophers”, in other branches of private law.<sup>6</sup> Understandably so. That they must do so here is faintly embarrassing. Perhaps for this reason the “fundamental mistake” issue has been classified as one “not capable of elaborate analysis”; it is “a matter of first impression” for the court.<sup>7</sup> The judge knows it when she sees it. Given the undoubted good sense and sharp minds of the judiciary, why not leave it at that? Still, there is something intellectually unsatisfactory about the oracular approach, one leaving the validity of contracts dependent *entirely* upon that “educated reflex to facts” which, for Lord Goff, epitomises the judicial function.<sup>8</sup>

The law can do better. Common mistake cases should be determined by the meaning of the contract, and nothing else. Of course this approach (“construction”) is also present in the orthodox test. Unfortunately, it is *additional* to the “fundamentality” inquiry. Since the late 19th Century the courts have felt it necessary to expound the parties’ intentions using a “doctrine” of mistake inspired by Civilian learning.<sup>9</sup> But the additional stage is unnecessary, indeed unhelpful. It would simplify matters to have just one question: the meaning of the contract. This would revert to an earlier common law approach. It would also be in accordance with principle. On what basis can the court claim a dispensing power to set aside contracts, when there is no suggestion of impropriety,<sup>10</sup> unless giving effect to the parties’ expectations? The right question is whether the contract, on its true construction, was conditional on the existence of the facts which (it turns out) do not exist.<sup>11</sup> Contracting parties can (of course) expressly

<sup>3</sup> *Ibid.*, at p. 77.

<sup>4</sup> Civilian law was influentially relied upon by Blackburn J. in *Kennedy v Panama, New Zealand & Australian Royal Mail Co.* (1867) L.R. 2 Q.B. 580. See J. Cartwright, “The Rise and Fall of Mistake in the English Law of Contract” in R. Sefton-Green (ed.), *Mistake, Fraud and Duties to Inform in European Contract Law* (Cambridge 2005), 67–73.

<sup>5</sup> D.18.1.9.2 (Ulpian).

<sup>6</sup> *H.M.S. London* [1914] P. 72, 78, per Evans P., quoting Sir F. Pollock (causation). See also e.g. *Benham v Gambling* [1941] A.C. 157, 166, per Viscount Simon L.C. (damages for loss of expectation of life).

<sup>7</sup> *Associated Japanese Bank (International) Ltd. v Credit Du Nord S.A.* [1989] 1 W.L.R. 255, 263, per Steyn J.

<sup>8</sup> *Smith v Littlewoods Organisation Ltd.* [1987] A.C. 241, 280.

<sup>9</sup> See Cartwright, “The Rise and Fall of Mistake”, pp. 67–73, 81, 84.

<sup>10</sup> Unconscionable conduct might justify (equitable) relief for mistake. But there seems no good justification for an equitable discretion to avoid contracts in the absence of such impropriety: cf. *Solle v Butcher* [1950] 1 K.B. 671.

<sup>11</sup> This was also Denning L.J.’s view of mistake at common law: *ibid.*, at p. 691 (*res extincta* cases are “really contracts which are not void for mistake but are void by reason of an implied condition precedent,

include a condition precedent. The “construction” inquiry seeks to establish whether such a condition precedent is *implicitly* part of a contract containing no express condition. Can a condition precedent be implied “in fact”?

The implied term approach is unorthodox today. In the leading case of *The Great Peace*, Lord Phillips M.R. said that just as the implied term theory had been repudiated by the House of Lords for frustration, so it should be rejected for common mistake.<sup>12</sup> While conscious of the high authority behind both these propositions, they should themselves be rejected. Once we accept that the meaning of contracts does not depend on what either party actually (subjectively) believed, thought or intended, there is no necessary illogicality in implying a term about an unusual occurrence that *ex hypothesi* the actual parties had not considered – contrary to the superficially attractive reasoning in the *Davis Contractors* case.<sup>13</sup> If the alleged contract’s binding operation is implicitly dependent on a particular fact’s existence, on its proper construction, it matters not that the parties never turned their minds to this point. For that is most assuredly not the test for implying a term. Lord Hoffmann has warned that what the actual parties would have thought about a proposed implied term is “irrelevant” and speculation about it “barren”; such an approach risks “diverting attention from the objectivity which informs the whole process of construction”.<sup>14</sup>

The implied term approach is superior in principle: implication of terms is still best conceptualised as making explicit the implicit meaning of a contract.<sup>15</sup> Any other conception of implication must mean that the court is going beyond what the agreement meant. A power to “improve” a particular contract by adding ad hoc terms would be inconsistent with basic notions of freedom of contract and the judicial role.

The implied term approach would also enhance common mistake’s elegance and clarity. There is considerable judicial authority on the implication of terms. Above all it emphasises restraint – the rarity with which terms should be implied, especially not into lengthy detailed contracts between well-advised commercial parties.<sup>16</sup> In his unfairly maligned judgment in the *Belize Telecom* case,<sup>17</sup> Lord Hoffmann stressed that the starting point and “most usual inference” when a contract is silent on the disputed point is “that nothing is to happen. If the parties had intended something to

because the contract proceeded on the basic assumption that it was possible of performance” (emphasis added).

<sup>12</sup> *Great Peace Shipping Ltd. v Tsavlis Salvage (International) Ltd.* [2002] EWCA Civ 1407, [2003] Q.B. 679, at [70], [73].

<sup>13</sup> *Davis Contractors Ltd. v Fareham Urban District Council* [1956] A.C. 696, 728, per Lord Radcliffe.

<sup>14</sup> *Attorney General of Belize v Belize Telecom Ltd.* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [25].

<sup>15</sup> A. Kramer, “Implication in Fact as an Instance of Contractual Interpretation” [2004] C.L.J. 384.

<sup>16</sup> *Marks and Spencer plc. v BNP Paribas Securities Services Trust* [2015] UKSC 72, [2016] A.C. 742.

<sup>17</sup> For criticism of Lord Neuberger’s criticism, see J. McCunn, “*Belize It or Not: Implied Contract Terms in Marks and Spencer v BNP Paribas*” (2016) 79 M.L.R. 1090.

happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls”.<sup>18</sup>

This abstentionism harmonises perfectly with the marked reluctance of courts to uphold common mistake pleas.<sup>19</sup> It would be preferable to conceive common mistake within the broader power to imply terms – and subject to the “strict constraints” upon that “intrusive . . . extraordinary” power.<sup>20</sup> There is no need to view common mistake as a free-standing doctrine governed by its own special rules (especially not if those rules require quasi-metaphysical distinctions between shades of “fundamentality”). Legal doctrines, like other entities, should not be multiplied without reason.

If these arguments were accepted, the position would reduce simply to this. When it is a condition precedent for a contract that certain facts should exist, those facts’ non-existence entails that the supposed “contract’s” obligations never came into force. If the condition precedent is express this is straightforward and obvious. If there is no express condition precedent, the court will reach that conclusion if and only if such a condition is present as an implicit term of the contract – something part of the agreement even though it was left unsaid. It will be difficult to convince a court that there was such an implicit term (condition precedent). Most claims that the parties intended some drastic consequence to follow from a factual mistake will fail for the usual good reason: if so, why didn’t they say so? But in rare cases the plea may succeed, as the third recent case discussed below indicates. The first two cases exemplify the more typical failure to invoke common mistake in commercial disputes. The courts clearly reached the right decisions in all three cases: but we suggest that the implied term approach would reinforce their reasoning and confine still further the scope of common mistake in commercial law. If the implied term argument is unorthodox we nevertheless suggest it has principle, clarity, economy and commercial good sense to recommend it.

## II. COMMON FAILURE (NO. 1):

### *TRIPLE SEVEN MSN 27251 LTD. v AZMAN AIR SERVICES LTD.*

Common mistake failed in the first recent case. Peter MacDonald Eggers Q.C. (sitting as a Deputy High Court Judge) held the mistake not fundamental enough (and that the express terms of the contract were inconsistent with

<sup>18</sup> *Belize Telecom* [2009] UKPC 10, [2009] 1 W.L.R. 1988, at [17].

<sup>19</sup> Cf. *EIC Services Ltd. v Phipps* [2003] EWHC 1507 (Ch), [2003] 1 W.L.R. 2360, at [178], per Neuberger J. holding the “officious bystander” test useful to demonstrate the uncommerciality of a common mistake plea, notwithstanding rejection of the implied term approach in *Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679 (reversed on the facts: [2004] EWCA Civ 1069, [2005] 1 W.L.R. 1377).

<sup>20</sup> *Philips Electronique Grand Public S.A. v British Sky Broadcasting Ltd.* [1995] EMLR 472, 481, per Bingham M.R.

the plea).<sup>21</sup> The dispute concerned a five-year lease of two large passenger jets from the claimant to the defendant. As was clear throughout the negotiations, the defendant lessee intended to use the aircraft to ferry pilgrims from West Africa to the Hajj in Mecca. To do so the defendant needed official approval in both Nigeria and Saudi Arabia. When the aircraft lease was signed on 20 June 2016, the Nigerian authorities had already issued the necessary approval. It was expected that the Saudi General Authority of Civil Aviation would do the same. In fact on 15 June 2016 the Saudi authority had written to the defendant denying permission (citing financial and security concerns). This decision was received by the defendants on 20 June 2016, but only after they had signed the lease. The defendant tried to persuade the Saudi authority to change its decision; this was unsuccessful. The defendant then refused to take delivery of the aircraft, and the claimant terminated the lease according to its terms and claimed damages for breach. The defendant's plea was common mistake. It failed (leaving it liable for some \$22 m. damages, plus interest).

The Deputy Judge rejected the plea because the mistake was insufficiently fundamental (i.e. the incorrect belief of both parties that the Saudi authority had not refused permission). So the court's primary reasoning addressed whether the mistake was serious enough to justify relief. No criticism can be made of the judgment, for it is entirely consistent with precedent. But as suggested, this orthodox inquiry leads the court into an ill-defined morass. It would be better not to require judges to venture there.

The learned judge accepted that "no precise test" exists for a mistake's fundamentality.<sup>22</sup> He rejected some possible candidates. It was insufficient that a mistake had induced entry into the contract – that is, that had the truth been known, the parties would not have contracted.<sup>23</sup> That "causative" approach would greatly widen the scope of a plea which "necessarily applies to a small number of cases"; for as Steyn J. has said, the court's first imperative is to uphold bargains.<sup>24</sup> More controversially, the learned Deputy Judge doubted the "impossibility" test advanced in *The Great Peace*. If taken literally it would provide an easy answer to *Triple Seven v Azman Air Services* (where it remained perfectly possible for the aircraft to be delivered and the rent paid); it would also suggest that Steyn J.'s leading decision in *Associated Japanese Bank* was wrong (for it had been quite possible for the bank to pay under the guarantee there, even though the security for the transaction turned out not to exist). The judge also rejected Henderson J.'s suggested reformulation that what must be impossible is "performance of the contract in accordance with the [parties'] common

<sup>21</sup> [2018] EWHC 1348 (Comm) ("*Triple Seven*").

<sup>22</sup> *Ibid.*, at para. [70].

<sup>23</sup> *Ibid.*, at paras. [70], [72].

<sup>24</sup> *Ibid.*, at paras. [69]–[70].

assumption”.<sup>25</sup> In the end, all the court can do is to compare the actual state of affairs with what had been assumed by the parties, and ask whether the difference is “sufficiently fundamental or essential or radical” – in Steyn J.’s words an “unexpected and wholly exceptional” change.<sup>26</sup>

On the facts, the defendant submitted that the Saudi authority’s refusal of permission removed “the very purpose” and a “vital attribute” of the aircraft leases, and the “commercial feasibility” of their performance.<sup>27</sup> The learned judge disagreed, holding that even if the purpose of taking pilgrims to the Hajj in 2016 had been defeated, the leases ran for five years of which the 2016 Hajj was a relatively short proportion.<sup>28</sup> The leases as a whole had not become “essentially and radically different”. While the parties would not have signed the contract had the truth been known, that was insufficient for relief.

The decision seems (with respect) entirely correct. But the approach raises difficult questions of degree. What if the leases had been for 12 months? Was counsel for the claimants correct to concede (with impunity on *these* facts) that had the leases been for the 2016 Hajj only, the mistake *would* have been sufficiently fundamental?<sup>29</sup>

The implied term approach recommended above would apply as follows. Was it implicit (an unspoken term) that if the parties’ factual assumptions about Saudi authorisation were wrong, the contract would never come into being? Posed thus the plea would be doomed to fail. The courts are properly reluctant to accept that the parties were content to leave important matters tacit and unsaid in a lengthy, detailed contract expressly covering numerous other matters. It is exceptionally difficult to establish a term *by necessary implication* in such contracts. To revert to counsel’s concession in *Triple Seven v Azman Air Services*, would the hypothetical reasonable parties have issued the testy “oh, of course” to an officious bystander seeking to express something which (surely) went without saying?<sup>30</sup> Arguably not. A reasonable lessor might well have thought that the risk of permission being refused (or having *already* been refused) was entirely the lessee’s affair, and at its sole risk.

Previous courts have accepted this. Although not reasoned as an implied terms case (but using the “doctrines” of mistake and frustration), *Amalgamated Investment & Property Co. Ltd. v John Walker & Sons Ltd.* is directly analogous.<sup>31</sup> Unknown to either party to the sale of a building, the Secretary of State had decided to “List” it (as possessing special

<sup>25</sup> *Ibid.*, at paras. [64]–[65] citing *Apvodedo NV v Collins* [2008] EWHC 775 (Ch), at [43].

<sup>26</sup> *Ibid.*, at paras. [66], [69].

<sup>27</sup> *Ibid.*, at para. [83](4).

<sup>28</sup> *Ibid.*, at para. [89].

<sup>29</sup> *Ibid.*, at para. [89](1).

<sup>30</sup> *Shirlaw v Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206, 227, per Mackinnon L.J.; cf. *EIC Services Ltd.* [2003] EWHC 1507 (Ch), [2003] 1 W.L.R. 2360.

<sup>31</sup> *Amalgamated Investment & Property Co. Ltd. v John Walker & Sons Ltd.* [1977] 1 W.L.R. 164.

architectural merit). The formal “Listing” order was issued just after the contract was signed. The Court of Appeal held this was a change of circumstances postdating the contract. But there was no relief for the disappointed purchaser (the building’s value declined because it could no longer be redeveloped): the contract was not frustrated. For Buckley L.J. the risk of “Listing” was one that inhered in all property, and therefore a risk that every party to transactions in land had to accept. Lawton L.J. reasoned likewise, emphasising that the parties *in casu* were commercial organisations well aware of this possibility. They took the risk of declining value not only from physical causes (“fire and tempest”) but also from government intervention. This reasoning is equally compelling in *Triple Seven v Azman Air Services*. Of course this seems hard on the lessee, but no harder than the *John Walker* case. A deal can make perfect commercial sense despite being tough for the losing party.<sup>32</sup>

The Deputy Judge further held that the contract’s terms excluded common mistake.<sup>33</sup> The aircraft lease allocated the risk of refused approval to the defendant lessee. The contract expressly said that the lessee’s obligations were “absolute and unconditional, irrespective of any contingency or circumstance whatsoever ... [which] would or might otherwise have the effect of terminating or in any way affecting any obligation of Lessee under this Agreement”. Also, the defendant’s failure to obtain any necessary government permissions was defined as an “Event of Default”. Undoubtedly these provisions placed the risk of mistakes (or mispredictions) about Saudi authorisation upon the defendant. No doubt the prudent drafter would include such provisions to place the matter beyond doubt. But they were not strictly necessary to exclude common mistake, because it was impossible to suggest that the lease contained an implied condition precedent.

### III. COMMON FAILURE (NO. 2): *DANA GAS P.J.S.C. v DANA GAS SUKUK LTD.*

In another recent case where common mistake was again unsuccessfully pled, Leggatt J. (as he then was) took an approach closer to that advocated here.<sup>34</sup> Leggatt J. did not consider the intractable question of “fundamentality” because there was no “gap” in the contract through which common mistake could come into play. Such contractual space or silence was, as Steyn J. held in *Associated Japanese Bank*, an anterior question.<sup>35</sup> Only if the contract does not deal with the matter in question is it proper to

<sup>32</sup> E.g. *Aquila Wsa Aviation Opportunities II Ltd. v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm), at [66], per Cockerill J.

<sup>33</sup> *Triple Seven*, at [91].

<sup>34</sup> *Dana Gas P.J.S.C. v Dana Gas Sukuk Ltd.* [2017] EWHC 2928 (Comm), [2018] 1 Lloyd’s Rep. 177 (“*Dana Gas*”).

<sup>35</sup> [1989] 1 W.L.R. 255, 268 (see also *Great Peace* [2002] EWCA Civ 1407, [2003] Q.B. 679, at [75]).

turn to common mistake. On the facts of *Dana Gas*, Leggatt J. held that the contract was deliberately structured to create a payment obligation which was *not* contingent on the existence of a certain fact.

The validity of a Purchase Undertaking deed governed by English law was in question. The financial product being purchased was supposed to be Shari'a compliant (under the law of the United Arab Emirates which governed the product). The preliminary issue was whether, assuming (without deciding) that the product violated Shari'a and therefore U.A.E. law, the Purchase Undertaking was void for common mistake in English law. Leggatt J. held not. Payment of the "exercise price" under the deed was a distinct obligation, clearly separated from and prior to any "sale agreement" of the underlying product. Leggatt J. held that this structure was no accident but deliberately included, precisely to insulate the purchaser's obligation to pay from "the risk that . . . the transaction documents governed by U.A.E. law will turn out to be invalid".<sup>36</sup>

On those facts, it is evident that no "gap" existed and common mistake became a hopeless plea.<sup>37</sup> But the case should not be taken to suggest that clever drafting is needed to plug possible gaps and thereby preclude pleas of mistake. As Leggatt J. stated, common mistake "seldom succeeds" precisely because such gaps are unusual – "the risk of a mistake is usually allocated by the contract to one of the parties".<sup>38</sup> We would put it even more strongly than did his Lordship. The contract *always* allocates the risk. Silence is not a "gap" waiting to be filled. Silence is a positive abdication entailing that the loss lies where it falls. This follows from the quite generally applicable rules on implication of terms – that is, the reason why courts will not usually find an *unspoken* term with such far-reaching effects on the contract's validity. The starting point, and nearly always the finish point, is an inference that if the parties did not say anything on the matter, the intention was that nothing (legally) is to happen if it occurs. This does not depend on special rules relating to particular areas, as Leggatt J. could perhaps be taken to suggest with his reference to *caveat emptor* in the law of sales.<sup>39</sup> The point is quite general.

The "gap" is not just an anterior question, but the only one. Let us leave aside contracts which expressly provide for voidness in the event of a mistake – or more likely positively require that mistakes are *not* to avoid the contract (as in both *Triple Seven* and *Dana Gas*). How is contractual silence to be approached? Nearly always, such silence must be understood as the contractual allocation of risk to whichever party loses from the mistake

<sup>36</sup> *Dana Gas*, at [54].

<sup>37</sup> *Ibid.*, at paras. [57]–[78].

<sup>38</sup> *Ibid.*, at para. [64].

<sup>39</sup> *Ibid.* (N.B. Leggatt J. was discussing Lord Atkin's example of sale of a supposed "old master painting": *Bell v Lever Bros* [1932] A.C. 161, 224). See further *William Sindall plc. v Cambridgeshire County Council* [1994] 1 W.L.R. 1016, 1035, per Hoffmann L.J.



of fact. (With “old master paintings” the loser could be the buyer, if the painting is actually a copy, or equally the seller, if what turns out to be a priceless “undoubted Raphael” had been sold as a “Gerard Dow” or “Zoffany”.) Silence means the loss lies where it falls – in a mistake case, that the contract remains in force. There is no room for a gap of any kind. The only alternatives are (as stated) that nothing is to happen or, exceptionally, that the court implies a term (condition precedent) avoiding the contract for mistake. Unless such a condition precedent is implicit, the “gap closing” inference of *non-intervention* is inevitable, and the plea of mistake must fail.

This approach would provide an even shorter answer to the cases discussed. In neither *Triple Seven* nor *Dana Gas* is it plausible that avoiding the contract must have been intended by the parties, but was left unsaid. In a commercial contract such drastic consequences of factual mistakes would surely be spelled out, and not left implicit. The express contract terms fortify that conclusion. But even in the absence of those provisions, common mistake would still have failed.

#### IV. UNCOMMON SUCCESS: *BRITISH RED CROSS v WERRY*

In suitably rare situations, a common mistake plea can still succeed – as in our third case.<sup>40</sup> This raised the status of an agreement compromising litigation under the Inheritance (Provision for Family and Dependents) Act 1975. The claimant was the unmarried partner of an intestate individual, who was (since unmarried) not a beneficiary under the intestacy rules, and the defendants were the beneficiaries under the intestacy. The defendant beneficiaries agreed in 2011 to transfer certain interests in land to the claimant partner, for whom proper provision had not been made. Subsequently, to general surprise, the will of the supposedly “intestate individual” turned up during a house clearance. It left all the testator’s property to the claimant absolutely. In a very brief judgment, Judge Elizabeth Cooke held it was “beyond dispute” that the 2011 agreement was void for common mistake; compromising intestacy litigation when the “intestate” individual had in fact left a will involved a mistake “as fundamental as that referred to by Lord Atkin in *Bell v Lever Bros* [1932] A.C. 161, where a party contracted to purchase land that he or she already owned”.<sup>41</sup>

This will become a textbook example of a “sufficiently fundamental mistake”, which is how the learned judge reasoned. But it also exemplifies the situation when the parties must implicitly have intended that in the event of a will being found, the compromise agreement would be void. Had the “officious bystander” spoken up to this effect in 2011, he would

<sup>40</sup> *British Red Cross v Werry* [2017] EWHC 875 (Ch).

<sup>41</sup> *Ibid.*, at paras. [21]–[22].

have been speedily silenced. Here it really did go without saying that the compromise of claims against the deceased's intestate beneficiaries depended on there *being an intestacy* (without which they would not in fact be "intestate beneficiaries" and the distribution of assets challenged by the claim would not in fact occur). The existence of intestacy was necessarily the basis for the compromise agreement. It falls into the rare category of matters so obvious that they would (understandably) not be spelled out.

#### V. CONCLUSION: FAREWELL TO THE "DOCTRINE OF COMMON MISTAKE"

Our modest proposal is that there is no "doctrine of common mistake". Slade was right.<sup>42</sup> Only when a contract makes the mistaken fact a condition precedent for binding obligation is the court permitted to "avoid" the supposed contract. Only rarely will such a condition precedent be implicit although unsaid. Rarer still in "big fish" commercial cases, where parties can be expected to spell out such important matters and not leave them unspoken ("going without saying"). This demanding test for implication can be met, as *British Red Cross v Werry* shows (significantly this case did not involve sophisticated commercial parties).<sup>43</sup> But if the contract contains no condition precedent, express or implied, the contract continues to bind *according to its terms*. It would violate those terms to avoid the contract: there is no room for a "doctrine of common mistake".<sup>44</sup>

Even if the "doctrine of frustration" is based on the need to make an exception in the interests of justice – a commercially questionable assertion despite its high authority<sup>45</sup> – that dispensing power must not be imported into cases of mistake. In *The Great Peace*, Lord Phillips M.R. approached frustration and common mistake as closely related doctrines; the facts of *Amalgamated Investments v John Walker*, discussed above, show why it is desirable to align the tests for unexpected events whether preceding or succeeding the contract. Thus, if the argument here is correct it suggests that there is no "doctrine" of frustration either.<sup>46</sup> That conclusion would return frustration to its implied term roots.<sup>47</sup> But this is a subject for another day.

As suggested, the implied term approach (really the "implicit meaning" approach) is entailed by respect for the bargain struck by the contracting parties. It also avoids the need to distinguish degrees of fundamentality of mistake, when these shade imperceptibly into each other. That orthodox

<sup>42</sup> C.J. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 L.Q.R. 385.

<sup>43</sup> Cf. Cartwright, "The Rise and Fall of Mistake" (noting the commercial context for the confinement of common mistake, and wondering whether it could ever enjoy a renaissance in non-commercial cases).

<sup>44</sup> For unconscionable mistakes cf. n.10 above.

<sup>45</sup> E.g. *Hirji Mulji v Cheong Yue Steamship Co. Ltd.* [1926] A.C. 497, 510, per Lord Sumner; *J. Lauritzen AS v Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1, 8, per Bingham L.J.

<sup>46</sup> J.C. Smith, "Contracts – Mistake, Frustration and Implied Terms" (1994) 110 L.Q.R. 400.

<sup>47</sup> *Taylor v Caldwell* (1863) 3 B. & S. 826. For a very similar approach to mistake, see *Pope v Buenos Ayres New Gas Co.* (1892) 8 T.L.R. 758, 759, per Lindley L.J.; *Solle* [1950] 1 K.B. 671.

test is bound to vex the courts and wrong-foot those trying to predict their decisions – that is, the very unpredictability of the test invites litigation. Given the congruity of the implicit meaning approach with the three recent decisions analysed here, we also suggest it reaches sensible results.

It is preferable to another approach suggested by Andrew Tettenborn: a doctrine with initially permissive withdrawal for mistake (i.e. for all significant mistakes), but denying relief once the contract is performed (in whole or in part).<sup>48</sup> Professor Tettenborn argues that this strikes the right balance, being fair to the mistaken losing party but not requiring the complicated “unscrambling” of executed contracts. But is the balance correctly struck? In *Dana Gas*, none of the obligations under the (English law) Purchase Undertaking had yet been performed: performance of the first stage of that transaction (i.e. payment) was resisted. If the Tettenborn approach would allow withdrawal from that transaction because it remained “executory”, it permits parties to escape the consequences of their mistakes too readily, with insufficient weight on the commercial importance of upholding even executory contracts. Conversely, would the Tettenborn doctrine deny avoidance of the compromise agreement in *British Red Cross v Werry* because steps *had* been taken to implement it? That would be inconsistent with the agreement’s true (implicit) meaning.

Professor Tettenborn’s approach is a refreshing attempt to reconceptualise common mistake. In the end it is misconceived, in common with nearly all writing on the subject, because it assumes that there *is* a “doctrine of common mistake”. There is not. The only question is the meaning of the contract. As Slade wrote many years ago, it is unfortunate that Lord Atkin attempted to flesh out this simple point, since confusion has resulted.<sup>49</sup> *Bell v Lever Bros*’s authority has since suffered grievous harm: Catharine MacMillan excoriates the uneasy incorporation of half-digested ideas of (subjective) “will theory” in *Bell*’s famous (and difficult) speeches.<sup>50</sup> Alas, Professor MacMillan’s book was published after *Bell*’s definitive status was reaffirmed in *The Great Peace*. It is scarcely likely that the Supreme Court will reappraise this area of law in the near future. When the opportunity finally comes, the unhappy “doctrine” of common mistake should receive its quietus. Until then, courts should adopt this article’s approach (which is substantially the reasoning of Leggatt J. in the *Dana Gas* case),<sup>51</sup> which leaves no room for a “doctrine” of common mistake.

<sup>48</sup> A. Tettenborn, “Agreements, Common Mistake and the Purpose of Contract” (2011) 27 J.C.L. 91.

<sup>49</sup> (1954) 70 L.Q.R. 385, 401. See also Cartwright, “The Rise and Fall of Mistake”.

<sup>50</sup> C. MacMillan, *Mistakes in Contract Law* (Hart 2010).

<sup>51</sup> See further *Pope* (1892) 8 T.L.R. 758.