(1981), 68). Whatever the merits of the socio-legal approach, this is still a view to be reckoned with.

CATHERINE MITCHELL

INEQUITABLE MISTAKE

IN *Great Peace Shipping Ltd.* v. *Tsavliris Salvage (International) Ltd.* [2002] 3 W.L.R. 1617 the Court of Appeal considered the circumstances in which a contract, entered into as a result of a mistaken assumption shared by the parties, would be invalidated. In that case, the defendant, a salvage operator, agreed to provide its services to the owners of *The Cape Providence*, which had suffered severe structural damage. Unfortunately, the only tug that the defendant could find to perform these services was six days away from the vessel. This gave rise to concerns over crew safety if the vessel sank whilst awaiting the tug. The defendant's brokers, therefore, sought to hire a vessel which was sufficiently close to be able to evacuate the crew if necessary. The brokers were informed by a well-respected information agency that *The Great Peace*, a vessel owned by the claimant, was "in close proximity" to the stricken vessel, approximately 35 miles away. As a result, the defendant's brokers negotiated with the claimant for the hire of *The Great Peace* for a period of five days, both parties assuming that the information as to *The Great Peace*'s location was correct. On discovering that the vessels were in fact some 410 miles apart, the defendant hired an alternative vessel and sought to cancel the contract with the claimant. Proceedings were commenced to recover the full amount of the hire, or alternatively damages for breach of contract. The defendant resisted the claim on the ground that the contract was either void at common law or voidable in equity, as both parties had laboured under a fundamental mistake at the time of contracting. Both arguments were rejected by Toulson J., at first instance, and by Lord Phillips of Worth Matravers M.R. delivering the judgment of the Court of Appeal.

In considering the doctrine of mistake at common law, Lord Phillips followed the general approach of the House of Lords in *Bell* v. *Lever Bros* [1932] A.C. 161, accepting that the doctrine's ambit was extremely narrow and that its application in the case of a *res extincta* (*Associated Japanese Bank (International) Ltd.* v. *Crédit du Nord SA* [1989] 1 W.L.R. 255) or of a *res sua* (*Cooper* v. *Phibbs* (1867) L.R. 2 H.L. 149) was uncontroversial. His Lordship does, however, appear to have refined Lord Atkin's judgment in

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Bell in several ways. First, in *Bell*, Lord Atkin stated that, in general, a contract would not be void if the parties were only mistaken as to some quality or characteristic possessed by the subject matter of the contract, unless "the thing without the quality [is] essentially different from the thing as it was believed to be". Accordingly, a contract could be void even if "it may be possible to perform the letter of the contract". Lord Phillips, however, stated that the authorities did not actually support Lord Atkin's formulation of the test and that, in future, for a contract to be void for mistake "the non-existence of the state of affairs must render performance of the contract impossible". Arguably, this reformulation (based upon the frustration case of *Hobson* v. *Pattenden & Co.* (1903) 19 T.L.R. 186) narrows the scope of the doctrine even further in those situations where the parties mistakenly assume that the subject matter of the contract possesses some quality or characteristic. Second, the House in *Bell* provided conflicting explanations of the doctrine's theoretical basis. At one stage, Lord Atkin accepts that the doctrine is based upon the implication of a term that the fulfilment of the parties' assumption would be a condition of the contract's continued operation, whilst at the same time accepting, as does Lord Thankerton, that the doctrine is based upon a rule of law which renders the contract void when the parties' mistake is sufficiently fundamental. Lord Phillips has now resolved this conflict by accepting that the doctrine is based upon a rule of law. This must be correct, given the rejection by Lord Radcliffe in *Davis Contractors Ltd.* v. *Fareham UDC* [1956] A.C. 696 of the "implied term theory" as the theoretical basis of the allied doctrine of frustration (see *contra* Smith (1994) 110 L.Q.R. 400). Third, Lord Phillips made clear that the mistake doctrine is subject to two important limitations. The first limitation is that the doctrine will not operate if, upon the proper construction of the contract, the parties have expressly or impliedly allocated the risk of their assumption proving false or have otherwise provided for the consequences of their assumption failing to materialize. The second limitation is that a party at fault cannot avail himself of the doctrine. This presumably would exclude a party who cannot show reasonable grounds for his mistakenly-held belief. Given that similar limitations would appear to restrict the operation of the doctrine of frustration (*The Super Servant Two* [1990] 1 Lloyd's Rep. 1), one effect of the *Great Peace* decision is to bring the doctrines of mistake and frustration more into line with one another. This is to be welcomed, given that it may only be a matter of timing as to which doctrine is applicable

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to the facts of a given case (see *Amalgamated Investment & Property Co. Ltd.* v. *John Walker & Sons Ltd.* [1977] 1 W.L.R. 164).

The real importance of the *Great Peace* decision must, however, lie in Lord Phillips' statement that "there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law". His Lordship's refusal to recognise the existence of a doctrine of equitable mistake, which operates to supplement the common law doctrine, means that the controversial decision in *Solle* v. *Butcher* [1950] 1 K.B. 671 is no longer good authority. There are several reasons why *Solle* could no longer stand either in terms of precedent or in terms of the coherent development of this area of the law. First, the equitable doctrine was simply inconsistent with the House's decision in *Bell*. In *Solle*, Denning L.J. had stated that their Lordships in *Bell* had only considered the common law principles of mistake, but that "if [*Bell*] had been considered on equitable grounds the result might have been different". His Lordship purported to demonstrate this by citing *Cooper* v. *Phibbs* as authority recognising the existence of an equitable doctrine. It is, however, clear that their Lordships in *Bell* did consider *Cooper* v. *Phibbs* and decided that the court in that case ought to have concluded that the contract was void at common law. Lord Phillips quite correctly concluded, therefore, that there was no scope for the development of any further doctrine of equitable mistake after *Bell*. Second, Lord Phillips expressed concern as to how one could distinguish the equitable doctrine from its common law counterpart, given that both doctrines required the existence of a "fundamental" mistake. This uncertainty favoured the removal of the doctrine. Third, the remedial discretion to rescind a contract "on terms" that was recognised in *Solle* arguably gave the court too wide a power to re-write the contract for the parties and was, in fact, inconsistent with the way rescission operates when a contract is set aside on other grounds, such as misrepresentation (*TSB* v. *Camfield* [1995] 1 W.L.R. 430).

The removal of *Solle* is, therefore, largely to be welcomed, since it is surely better to deal with any defects in the common law doctrine by altering that doctrine, rather than by subverting its operation with a second and more flexible doctrine operating in tandem. Do any such defects, therefore, exist? The first potential defect is that a court no longer has any of the remedial flexibility afforded by the equitable doctrine, but is limited to declaring the contract void and ordering the restitution of any benefits conferred. It may be that the courts should be provided with some degree of

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flexibility by means of legislation increasing their remedial options (see for example New Zealand's Contractual Mistakes Act 1977, s. 7). The second potential defect is that the departure from *Solle* reduces the protection afforded to innocent third parties. This is because, whilst equitable mistake only rendered a contract voidable, its common law counterpart renders the contract void: a third party may acquire good title to goods which have passed under a voidable contract, but not under a void contract. The Court of Appeal has recently called for legislation which would increase the protection afforded to third parties in mistake cases by allowing the courts to apportion losses between the various innocent parties (see *Shogun Finance Ltd.* v. *Hudson* [2002] 2 W.L.R. 867). Let us hope that this happens sooner rather than later.

Christopher Hare

EXEMPLARY DAMAGES—TWO COMMONWEALTH CASES

The topic of exemplary damages has often been shrouded in controversy. Indeed, in some jurisdictions (such as England), the very award of such damages is confined to an extremely narrow compass (though *cf.* the recent House of Lords decision in *Kuddus* v. *Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2002] 2 A.C. 122). Although the jurisdiction to award such damages is broader in other Commonwealth jurisdictions, difficult issues remain, two of which were recently explored by the highest appellate courts in New Zealand and Canada, respectively.

The (New Zealand) Privy Council decision of *A* v. *Bottrill* [2002] UKPC 44, [2002] 3 W.L.R. 1406 raised the interesting (and significant) issue of whether exemplary damages in cases of *negligence* should be restricted to cases of intentional wrongdoing or conscious recklessness (even though the basic criterion of outrageous conduct by the defendant had been established), or whether such damages could be awarded so long as the defendant had been guilty of outrageous conduct. The Board held, by a bare majority of three to two, that exemplary damages could be awarded on the latter broader basis.

In *Bottrill*, the claimant brought an action against the defendant, a pathologist, for negligence in misreading or misreporting four cervical smears taken from her. This led to far more severe treatment than was necessary, resulting in the destruction of the claimant's ovaries (and the opportunity to conceive) as well as leaving her with a weakness in her left leg. She

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