MISTAKE IN CONTRACT LAW—TWO RECENT CASES

THE doctrine of mistake in contract law has had a chequered history. Indeed, its very existence has been questioned (see, *e.g.*, Slade, (1954) 70 L.Q.R. 385 and Atiyah and Bennion, (1961) 24 M.L.R. 421). But, like a bad penny that will not go away, the doctrine remains stubbornly embedded in the contractual landscape and has in fact witnessed a small revival of sorts in recent years (see, *e.g.*, *Clarion Ltd.* v. *National Provident Institution* [2000] 2 All E.R. 265 (noted Phang, (2002) 1 J.O.R. 21)).

Two recent cases add to the not unimpressive corpus of case law. One is, at the time of writing, unreported but both merit comment because they raise extremely interesting issues.

The first, *Kalsep Ltd.* v. *X-Flow BV* (*The Times*, 3 May 2001), concerned an application for summary judgment in an action by the licensor for unpaid royalties and damages under a licence agreement which it had terminated (albeit not for breach). The defendant licensee had been allowed to utilise the licensor's patents and know-how in order to conduct development work in the context of the filtration of fluids under what Pumfrey J. described as a "remarkable" and "at least grossly improvident" agreement. There was, *inter alia*, an important clause which effectively excluded any warranties by the licensor with respect to the validity and utility of the patent and know-how under the agreement.

The defendant argued that the agreement had, alternatively, been entered into on the basis of either a mutual or a unilateral mistake. At this juncture, it should be noted that Pumfrey J. rejected (rightly, it is submitted) arguments centring on consideration and an implied term. Turning to the doctrine of mistake, the learned judge endorsed the approach advocated by Steyn J. (as he then was) in *Associated Japanese Bank (International) Ltd.* v. *Crédit du Nord SA* [1989] 1 W.L.R. 255, to the effect that before applying the doctrine of mistake, the court must first construe the contract in order to ascertain whether or not the contracting parties had allocated the risk *vis-à-vis* the mistake, and that mistake would be relevant only if the contract were silent on this point. In the event, he accepted the claimant's argument that the clause referred to above excluding warranties evinced a clear intention by the parties that the defendant was to bear the risk of any mistake. Whilst such an approach may appear to have come perilously close to endorsing the arguments (briefly alluded to above) to the effect that there is no need for a substantive doctrine of mistake because everything depends, in the final analysis, on the construction of the contract, it is possible that the parties may in

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fact have omitted to allocate the risk of mistake. On the other hand, because (at least insofar as common mistake is concerned) the doctrine of mistake is closely related to the doctrine of frustration (see the *Associated Japanese Bank* case at 268), it could be argued that the approach from construction is really the correlative of the concept of the *force majeure* clause in frustration. Looked at in this light, there is no reason in principle why the parties ought not to be able to decide in advance who should bear the risk of a mistake occurring.

The doctrine of unconscionability may provide a more flexible alternative to mistake. Pumfrey J., whilst clarifying some doctrinal issues, nevertheless rejected the application of this doctrine on the facts—illustrating once again the fledgling nature of unconscionability under English law.

Of even more interest is the Court of Appeal decision of *Shogun Finance Ltd.* v. *Hudson* [2002] 2 W.L.R. 867, which adds much from a substantive perspective to the infamous trilogy of cases on mistaken identity in a *face-to-face* context (see *Phillips* v. *Brooks Ltd.* [1919] 2 K.B. 243; *Ingram* v. *Little* [1961] 1 Q.B. 31; *Lewis* v. *Averay* [1972] 1 Q.B. 198; and Goodhart, (1941) 57 L.Q.R. 228).

The factual scenario was a standard one for cases of this nature: a rogue obtained a motor vehicle fraudulently by signing a hire-purchase agreement with a forged signature and then sold on the vehicle to an innocent purchaser, the defendant, who purchased in good faith. The rogue had his identity "verified" by producing a genuine driving licence which he had unlawfully procured. The dealer's sales manager at the showroom telephoned the rogue's details to the claimants' sale supports centre before faxing on a copy of both the licence and the draft agreement with the rogue's (forged) signature. The claimants made a computer search (which included ascertaining the relevant credit rating). They also compared the signatures on the faxed documents and found them satisfactory; they then informed the dealer that the proposal had been accepted. After payment of a deposit, the dealer handed the vehicle to the rogue with the necessary documentation. The claimants now brought a claim against the defendant, the rogue having, of course, absconded. The trial judge found in favour of the claimants and the defendant appealed. The Court of Appeal, however, dismissed the appeal.

The majority (Dyson and Brooke L.JJ.) held (applying *Hector* v. *Lyons* (1988) P. & C.R. 156 with regard to the conclusiveness of the identity of contracting parties in a written agreement) that section 27 of the Hire Purchase Act 1964 did not apply to pass the defendant good title as the rogue did not fall within the definition

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of a "debtor" under the said provision, notwithstanding the fact that the defendant had purchased in good faith and without notice of the hire purchase agreement. Sedley L.J., however, disagreed; he also dissented with regard to the issue of mistaken identity.

Brooke L.J. was content with this holding and did not consider the issue of mistaken identity. Dyson L.J., however, proceeded to consider whether the agreement was void for mistaken identity on the assumption that his holding with regard to the Hire Purchase Act was wrong. Endorsing an objective test, he also rejected the view that a contract is only rendered voidable in the event of a finding of mistaken identity. Dyson L.J. endorsed the view of Pearce L.J. in *Ingram* v. *Little* [1961] 1 Q.B. 31, 57 that "the nature of the proposed contract has a strong bearing" on whether or not there had been mistaken identity. On the facts, he held that the dealer was not the claimants' agent and that this was not, therefore, a face-to-face transaction. More significantly, however, he held that even if this were such a transaction, he would accept the evidence of the claimants' sales support manager that "for the purposes of a hire purchase agreement, the identity of the customer is absolutely crucial", as this was "because every individual has a credit rating and the finance company will only agree to provide credit to the customer if it is satisfied about the customer's credit rating"; also important was the need to comply with the provisions of the Consumer Credit Act 1974 in order for the claimants to be entitled to send copies of the agreement and/or a default notice in the event of default. This is a significant finding for at least two reasons: first, the artificial distinction hitherto drawn between identity and attributes has been at least undermined. This is greatly to be welcomed, at least where the attribute concerned represents, in substance, the identity of that particular party. However, the prevailing view appears to reject this approach insofar as the attribute of creditworthiness is concerned (see Treitel, *The Law of Contract*, 10th ed. (1999), p. 278); in this regard, Dyson L.J. at least hints at another significant departure. It is indeed difficult to disregard creditworthiness in a world where this attribute is increasingly becoming a significant part of everyday life and where expensive purchases are involved. Secondly, Dyson L.J., in holding that the presumption that the intention of party pleading mistaken identity is to deal with the *physical* person in front of him or her (regardless of the precise identity) was rebutted, demonstrated a much more liberal approach than that suggested, on balance, in the existing case law. Is this an anomalous holding necessitated by the specific facts themselves? If so, was this also the cause of the similar "liberality" to be found in *Ingram* v. *Little*? Given

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the generic nature of the transaction in the present case, could we surmise a broader liberality? But this would militate against the strictness that is necessary in order to prevent agreements from being unravelled.

Sedley L.J., whilst dissenting, did not differ, in substance, from Dyson L.J. insofar as most of the basic principles in face-to-face transactions were concerned. However, not surprisingly perhaps, apart from reiterating the presumption referred to briefly above and the need for "strong rebutting evidence" in order to establish a case in favour of mistaken identity, the learned judge's general summary of the law did not really contain any specific guidance.

However,—and this is where Sedley L.J. parted company with Dyson L.J.—the learned Lord Justice was of the view not only that there was at least a limited agency and, hence, a face-to-face transaction but also (and more importantly) that the presumption thus arising had not been rebutted, as he considered the evidence of the claimants' sales support manager to be a mere assertion—the checks were made, but the claimants "had no good reason to be confident" that they were dealing with the person whose identity was being verified and "no reason whatever to think that, simply because he passed a credit check" the person concerned would be able to pay the instalments. With respect, unless some better system is available, and given the generic nature of such transactions, such an approach effectively renders meaningless any effort to confirm the identity of the purchaser and passes all the risk to parties such as the claimants. It is true, however, that there is no good reason to pass all the risk to the third party either. In the absence of failsafe technology, is there any better solution? Devlin L.J. (as he then was) proposed apportionment of loss in *Ingram* v. *Little* (at 73–74): a possibility also acknowledged by Sedley L.J., but which did not find favour with the then Law Reform Committee.

One other solution (which would have found favour with that Committee) was proffered by Lord Denning M.R. in *Lewis* v. *Averay*: mistaken identity would render the contract only *voidable*, not void. This leans wholly in favour of third party rights, and is, in effect, a policy decision: a characterisation buttressed by Lord Denning's view that the claimant seller should bear the burden, having let the rogue have the goods, thus enabling him to commit the fraud. Sedley L.J. did not exactly resurrect this approach, but did think that it offered "a principled basis" for the resolution of such cases, although it was "not the only possible" basis. While one may understand the strictness with which the doctrine of mistaken identity has been applied with respect to face-to-face

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transactions, there was still the possibility of redress in clearly egregious cases. With respect, Lord Denning's blanket proposition takes away such flexibility entirely, since the whole point of pleading mistaken identity is to establish that the contract is *void* as title has otherwise already passed to the third party. If there is to be reform, it might be best to effect this through legislative means (see also *per* Brooke L.J.). Till this occurs, it is submitted that it would be preferable not to adopt such a blanket approach; indeed, the very strictness with which the courts apply the doctrine of mistaken identity ensures that third party rights will not be unnecessarily displaced.

The law relating to mistaken identity continues to be in a state of flux. It is unfortunate that there was no majority view expressed, although both Dyson and Sedley L.JJ.'s (at times contrasting) views give much food for thought.

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ALLOCATING RISK AND LOSS IN MISTAKEN PAYMENTS

TWO fraudsters persuaded Dextra Bank to draw a cheque for $US2,999,000 payable to the Bank of Jamaica ("BOJ"). They led Dextra to believe that BOJ wished to borrow the money as a loan. BOJ, however, was a victim of the same fraud and knew nothing of the loan. The fraudsters had caused it to believe that Dextra was selling US currency to it. BOJ's foreign currency agents received Dextra's cheque, and forwarded it to BOJ which duly received payment on it. Shortly before the agents received Dextra's cheque—and the timing was significant—they had drawn Jamaican dollar cheques on BOJ's behalf, payable to the supposed sellers of the US currency. In this they acted on the fraudsters' instructions. Most of the payees of the cheques were fictitious, and once the proceeds had been paid into the relevant accounts, the fraudsters appropriated them.

In *Dextra Bank & Trust Co. Ltd.* v. *Bank of Jamaica* [2002] 1 All E.R. (Comm.) 193 the Privy Council upheld the decision of the Jamaican Court of Appeal that Dextra had no claim against BOJ to recover the proceeds of the fraud, in either tort or unjust enrichment. BOJ had a good title to the cheque. It was therefore not liable in conversion for negotiating the cheque to its own bank and collecting payment on it. The unjust enrichment ground, on which this note concentrates, also failed. Dextra had not proved an

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