CASE NOTE

Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd; The Great Peace

[2002] 4 All ER 689

By Peter MacFarlane[*]

I INTRODUCTION

For the most part, contract law in South Pacific jurisdictions is governed by the common law. There is a limited amount of legislation in the area, for example Fiji has a *Fair Trading Decree* 1992, some jurisdictions have Sales of Goods legislation and yet some others have specific legislative provisions such as the *Frustrated Contracts Act* (1975) of Samoa and the Marshall Islands *Consumer Protection Act* (Cap 4). Furthermore, certain United Kingdom and New Zealand legislation still have application in the region. However the question of what legal principles govern the formation of a contract and the impact of factors that vitiate a contract are found, for the most part, in the common law.

At common law, one of the factors that is said to vitiate a contract is the mistake of the parties and one example of this is common mistake. Common mistake arises where both parties to the contract share the same mistake. In general terms, this type of mistake can arise in three circumstances. First a common mistake as to the existence of the subject matter of the contract, for example where the subject matter has ceased to exist prior to entry into the contract; [1] second a common mistake as to the ownership of the subject matter of the contract, for example where unknown to both parties the buyer is in fact purchasing his or her own property; [2] and thirdly a common mistake as to the qualities or attributes of the subject matter of the contract, for example where both parties thought they were contracting for a painting painted by a famous artist when in fact this was not so. [3]

At common law a common mistake falling within the first two categories renders the contract void. [4] As to the third category of common mistake – mistake as to the subject matter of the contract - the common law has held that these mistakes do not generally vitiate the contract which remains valid and enforceable. [5]

To the above proposition two comments need to be made. First, in exceptional cases, the common law will hold a ‘contract’ to be void for mistake as to the quality of the subject matter where, according to Lord Atkin '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'. [6] Lord Thankerton put the test in terms of a mistake as to something that was 'an essential and integral element of the subject-matter'. [7]

There is evidence that courts in the South Pacific follow this principle. In the case of *Farid Khan v Ali Mohammed and Others* [8] the parties entered into an agreement concerning the plaintiff’s withdrawal from a partnership. It transpired that in calculating the nature of work in hand an error was made and the

plaintiff's true share was actually considerably less than the amount provided for in the agreement. The plaintiff sued for the money owed under the agreement. The defendants pleaded that the agreement was signed under a common mistake as to the facts. The Supreme Court of Fiji held that the accounts upon which the agreement was based did not represent the true position of the partnership and that this was a fundamental error going to the root of the contract which was set aside as void at common law.

Second, in cases concerning common mistake as to the subject matter of a contract, equity can render the contract not void but voidable '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'. [9]

It is this second aspect of the law that makes the case of the *Great Peace* a case of significance.

II FACTS OF THE CASE

The facts of the case will be briefly summarised here. [10]

The defendant (the appellant in the matter) agreed to provide salvage services for a stricken vessel. To effect the salvage, it obtained the services of a tug which would take five or six days to reach the stricken vessel. It was feared, however, that in the meantime, the vessel might go down with the loss of her crew. Accordingly, the defendant asked its brokers to find a merchant vessel, in the vicinity of the stricken vessel, which would be willing to assist, if necessary, with the evacuation of the crew.

The brokers were informed by a reputable organisation that a vessel, owned by the claimant (the respondent in the matter) was the nearest to the stricken vessel and should be able to reach the stricken vessel within about 12 hours. Shortly afterwards, the defendant, through its brokers, entered into an agreement with the claimant to charter its vessel, for a minimum of five days, to escort and stand by the stricken vessel for the purpose of saving life. If the information given to the brokers had been correct, the vessels should only have been 35 miles apart when the contract was concluded. In fact, unbeknown to either party, the two vessels were some 410 miles apart, and it would have taken the claimant's vessel 39 hours to reach the stricken vessel.

When the defendant discovered the true position, just under two hours after entering the contract, it told its brokers that it was looking to cancel the claimant's vessel, but not until it had discovered whether there was a nearer vessel available which could provide assistance to the crew of the stricken vessel. A few hours later, on finding such a vessel, the defendant cancelled the contract with the claimant's vessel. The claimant (the plaintiff in the original matter) sued under the contract.

The court at first instance found for the plaintiff and from this decision the defendant appealed, contending that the contract was void at common law on grounds of a common fundamental mistake, namely that the two vessels were in close proximity to each other. Alternatively, it contended that the facts gave the defendant a right to rescission in equity. An issue arose as to whether there was an equitable jurisdiction to grant rescission on grounds of common mistake in circumstances where that mistake would not render the contract void at law. The following issues were identified as requiring consideration by the Court of Appeal:

(1) Prior to *Bell v Lever Bros Ltd* 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 Bros Ltd*?

(3) Is this court none the less bound to find that such a doctrine exists having regard to *Solle v Butcher* and subsequent decisions?

III THE DECISION OF THE COURT OF APPEAL

In relation to the principle concerning common mistake at common law, the Court of Appeal endorsed the view expressed by the House of Lords in *Bell v Lever Bros Ltd*. On this basis, the contract concerning the salvage operation was held to be valid at common law. The mistake was not of the kind that made the contract essentially different from the thing as it was believed to be; it did not render the contractual adventure impossible of performance. [11] The test enunciated by Lord Atkin in*Bell v Lever Bros Ltd* is extremely narrow and difficult to meet. Indeed Lord Atkin himself did not give any examples of where a contract might be rendered void in these circumstances; although he did give a number of examples of mistakes which would not satisfy the test.

The significance of the *Great Peace* case is the court's finding that where a contract is not void at common law for common mistake, there was *no* jurisdiction to grant rescission on the basis that such a contract could be voidable in equity. The court concluded that *Solle v Butcher*, itself a decision of the Court of Appeal, could not stand with *Bell v Lever Bros Ltd*, a decision of the House of Lords and should no longer be followed:

The common law has drawn the line in *Bell v Lever Bros Ltd*. The effect of *Solle v Butcher* is not to supplement or mitigate the common law; it is to say that *Bell v Lever Bros Ltd* was wrongly decided. [12]

A major reason for the court coming to this view was that the circumstances where equity might render a contract voidable were indistinguishable from the circumstances where the common law would render the same contract void. In *Bell v Lever Bros Ltd* the test was in terms of 'a mistake that makes the thing essentially different from the thing as it was believed to be'. [13] In *Solle v Butcher* the test was in terms of 'a misapprehension that was fundamental'. [14] The difficulty of course is to discern the difference – if there is any – between these two types of mistake as to quality or attributes. It was this dilemma that played on the mind of the court in the *Great Peace* case.

We do not find it possible to distinguish, by a process of definition, a mistake which is 'fundamental' from Lord Atkin's [definition of] mistake as to quality which 'makes the thing contracted for essentially different from the thing that it was believed to be. ...

Our conclusion is that it is impossible to reconcile *Solle v Butcher* with *Bell v Lever Bros Ltd*. ... 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. [15]

The 1932 decision of *Bell v Lever Bros Ltd* was a binding authority on the Court of Appeal in the 1950 case of *Solle v Butcher*. In *Bell v Lever Bros Ltd* the House of Lords found that a contract concerning an agreement to pay a managing director a certain sum upon termination of his contract was entered into under a common mistake. [16] However it held that the agreement was not void because it was not a mistake that made the contract essentially different from the one entered into by the parties. In holding the contract to be valid, the court did not decide on the possibility of it being voidable in equity. Lord Denning, in *Solle v Butcher* put this down to the fact that the House of Lords was not required to consider the matter and that 'if it had been considered on equitable grounds, the result might have been different.' [17] In the case of the *Great Peace*, the Court of Appeal said:

We do not find it conceivable that the House of Lords overlooked an equitable right in *Bell v Lever Bros*

Ltd to rescind the agreement, notwithstanding that the agreement was not void for mistake at common law. The jurisprudence established no such right. [18]

Apart from expressing its doubts on the issue as to whether the court in *Bell v Lever Bros Ltd* recognised a role for equity in cases of common mistake, the court in the *Great Peace* case was further of the view that the decision in *Solle v Butcher* could not be supported by the authorities. Lord Denning, who gave the leading judgment in *Solle v Butcher,* relied for the most part on what he described as the 'great case' of *Cooper v Phibbs,* [19] a House of Lords decision of 1867. That case was not about common mistake as to quality or attributes but about common mistake as to title. A nephew entered into an agreement to rent a fishery from his uncle's daughters which, due to a common mistake, in fact already belonged to the nephew himself. In that case the House of Lords held that the mistake was only such as to make the contract voidable and liable to be set aside on such terms at the court thought fit; that is, the common mistake gave rise to the equitable right of rescission. In applying that principle to the facts of *Solle v Butcher* Denning LJ held that a lease which was entered into under a fundamental misapprehension as to the amount of rent that could be charged could be set aside even though the contract was not void at common law. In coming to this view Denning LJ concluded:

If the rules of equity have become so rigid that they cannot remedy such an injustice, it is time we had a new equity, to make good the omissions of the old. But in my view, the established rules are amply sufficient for this case. [20]

In the *Great Peace* case, the Court of Appeal disagreed with the view that *Cooper v Phibbs* gave rise to a new equity of the kind being proposed by Denning LJ in relation to a common mistake as to quality or attributes. The court expressed the view that the speeches in the case of *Cooper* indicated that the type of mistake under consideration was one whereby a party agreed to purchase a title which he already owned. The court concluded that 'there is nothing that suggests that their Lordships were seeking to lay down a broader doctrine of mistake.' [21] The court observed that the House of Lords in *Bell v Lever Bros Ltd* 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 and that this was a correct view of the law. [22]

IV COMMENT

A few brief comments are appropriate here.

First, there has been a general acceptance of the decision in *Solle v Butcher :* a fact which was acknowledged by the Court of Appeal itself. In the *Great Peace* case the court considered these decisions and concluded that

[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 contact void in law, as identified in *Bell v Lever Bros Ltd*. This is, perhaps, not surprising, for Denning LJ the author of the test in *Solle v Butcher*, set *Bell v Lever Bros Ltd* at nought. [23]

In addition, a recent Court of Appeal decision [24] recognised the authority of *Solle v Butcher* in the following words:

It is a matter of some satisfaction, in my view, that we can and do regard ourselves bound by the decision in *Solle v Butcher*. That decision has now stood for over fifty 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. [25]

In view of this, even if the Court of Appeal in the *Great Peace* case disagreed with the reasoning of *Solle v Butcher* based on the apparent difficulties of reconciling that decision with the earlier ruling in *Bell v Lever Bros*, it was not necessary, for the *Great Peace* court to disagree with the essential holding of Lord Denning in *Solle v Butcher*. The court could have held that, for the reasons given, it did not think *Solle v Butcher* was good law but that in any case the mistake in the present case was not fundamental as to invoke the decision of *Solle v Butcher* and subsequent case law which followed it - even if there has been a common mistake on the part of both parties. This is especially so when it is recognised that injustice might follow, even if not in respect of the particular case under consideration.

Second, without the benefit of knowing whether or not the House of Lords in *Bell v Lever Bros Ltd* specifically considered the issue, it is perhaps inapposite to conclusively hold that the Law Lords in a case decided in 1932 rejected any equitable jurisdiction in relation to mistakes concerning the quality or the attributes of the agreement. The opinion of Lord Denning LJ in *Solle v Butcher*, that the House of Lords in *Bell v Lever Bros Ltd* were not called upon to decide on the matter and therefore did not consider the question as to whether the contract might be voidable, is arguably as reasonable as the assumption of the Court of Appeal in the *Great Peace* case that the Law Lords in *Bell v Lever Bros Ltd* (probably) were of the view that no such (equitable) jurisdiction existed.

Thirdly, it is perhaps an overstatement for the Court of Appeal to assert that the decision in *Solle v Butcher* 'extended beyond any previous decision' or that 'it was inaccurate to state that *Cooper v Phibbs* afforded ample authority for saying that the lease could be set aside.' [26] Afterall, as noted by the court itself in the*Great Peace* case, Lord Chelmsford in the 1873 case of *Earl Beauchamp v Winn* [27] observed *obiter*: [28]

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...

Notwithstanding the above comments it is perhaps a difficult task for any court especially in 'hard cases' to draw a distinction or delineate between cases that are void at common law for mistake and cases that are voidable in equity. It is not all that clear as to what the requirements are (or should be) for the equitable right of rescission to operate in cases of common mistake. As Carter and Harland observe:

...although we can now accept that there are cases in which rescission may be obtained on the ground of common mistake in relation to a fundamental matter, it is by no means clear that the formulation of Lord Denning in *Solle v Butcher* is an accurate statement of the legal requirements. [29]

V HOW COURTS IN THE SOUTH PACIFIC MIGHT APPROACH THIS QUESTION

When it comes to the question of common mistake as to quality or attributes, courts in the South Pacific apply the common law (including equity). In applying this law it is also true that there is an increasing tendency to look to the common law of Australia and New Zealand. [30]

In the Australian case of *Taylor v Johnson*[31] the High Court, referring to its earlier case of *Svanosio v McNamara*, pointed out that mistake may form the basis for equitable relief. [32] In New Zealand, in the case of *Waring v SJ Brentnall Ltd*, [33] both parties were mistaken as to the identity of the land in the contract. After noting that 'Lord Denning MR must claim the credit for this progression in the field of equity' and after considering those who had criticised the decision in *Solle v Butcher*, Chilwell J concluded that 'it would be appropriate for the Court in New Zealand to adopt the principle formulated by

Denning LJ in *Solle v Butcher*'. [34]

In circumstances where many of the courts in the South Pacific are required (for example under their Constitutions) to look beyond the common law to custom and tradition, it is arguable that greater emphasis will be on 'doing equity' or reaching a just result than on the strict or rigid applications of the English common law. This means that the principles of common law may be discarded by regional courts if they are inappropriate to the country in question. [35]

In light of the above facts and observations, and due also to the fact that a failure to recognise the role of equity in this area of common mistake may cause injustice, it is suggested that courts in the region will continue to follow *Solle v Butcher*, at least where the justice of the case demands it. It could be a different matter if the House of Lords were to endorse the views expressed by the Court of Appeal in the *Great Peace* case.

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[1] *Couturier v Hastie* (1856) 5 HL Cas 673

[2] *Cooper v Phibbs* (1867) LR 2 HL 149

[3] *Leaf v International Galleries* [1950] 2 KB 86

[4] Unless the existence of the subject matter has been warranted or guaranteed. *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377

[5] *Bell v Lever Bros Ltd* [1932] AC 161

[6] Lord Atkin ibid at 218.

[7] Lord Thankerton ibid at 235

[8] (1982) 28 FLR 94 Supreme Court of Fiji

[9] *Solle v Butcher* [1950] 1 KB 671 per Denning LJ at 693

[10] The summary is taken from the Headnote to*Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd; The Great Peace* [2002] 4 All ER 689.

[11] *Great Peace Shipping* per Lord Phillips on behalf of the court at 730 and 731.

[12] Ibid at 729

[13] *Bell v Lever Bros Ltd* [1932] AC 161 per Lord Atkin at 218

[14] *Solle v Butcher* [1950] 1 KB 671 per Denning LJ at 693

[15] *Great Peace Shipping* at 728 and 729

[16] The common mistake being that the managing director could have been dismissed without any payment.

[17] *Solle v Butcher* [1950] 1 KB 671 at 694

[18] *Great Peace Shipping* at 720

[19] (1867) LR 2 HL 149

[20] *Solle v Butcher* [1950] 1 KB 671 at 695

[21] *Great Peace Shipping* at 718

[22] Ibid 720. In *Bell v Lever Bros Ltd at* 218 Lord Aitkin had expressed this view saying that the decision in *Cooper v Phibbs* was only subject to the criticism that the agreement would appear to be void, rather than voidable. See also other references at pages 718 and 719 of the *Great Peace* case.

[23] *Great Peace Shipping* at 728

[24] *West Sussex Properties Ltd v Chichester DC* [2000] All ER (D) 887 per Christopher Staughton para [42].

[25] As cited in *Great Peace Shipping* 728

[26] Ibid 723

[27] (1873) LR 6 HL 223, 233.

[28] Cited in *Great Peace Shipping* 718

[29] JW Carter and DJ Harland; *Contract Law in Australia*, (third edition) 429.

[30] For example in relation to estoppel, in *Nair v Public Trustee of Fiji and the A-G of Fiji* (1996) unreported 8 March, High Court, Fiji Islands and *AG of Fiji v Pacoil Fiji Ltd* (1996) unreported, Court of Appeal 29 November 1996, the wider doctrine concerning estoppel as found in the Australian decision of *Waltons Stores v Maher* (1984) 164 CLR 387 was followed.

[31] (1993) 151 CLR 422

[32] (1956) 96 CLR 186. See for example the discussion in *Taylor v Johnson* (1993) 151 CLR 422 at 430 and 431.

[33] [1975] 2 NZLR 401.

[34] Ibid at 409.

[35] For example in *Australia and New Zealand Banking Group Ltd v Ale* [1980-83] WSLR 468 the Supreme Court of Western Samoa observed: '...the courts of Western Samoa should not be bogged down by academic niceties that have little relevance to real life'. See also Jennifer Corrin Care, *Contract Law in the South Pacific*, (Cavendish publications, 2001).