[1-27] In the early 14th century, the absence of a requirement for sealing in an action of Debt *sur contract* gave rise to the idea that the plaintiff needed to demonstrate that the defendant had received *quid pro quo*; that is, some benefit (*quid*) in exchange for the subject matter of the plaintiff's claim in Debt[43] (*pro quo*):[44]

> By the middle of the 15th century the *quid pro quo* of the action of Debt had become a technical doctrine with marked similarities to executed consideration as it later evolved. … the early common law appears to have recognised as falling within the sphere of Debt a miscellaneous list of transactions common in everyday life, such as loans, sales, leases, hire and contracts of service generally. Seeking a generalisation which would link together and explain the basis of liability in these miscellaneous cases, the fathers of the common law … found it in the fact that the plaintiff in an action of Debt had handed over something in the shape of property or services to the other party (*quid pro quo*). By the 15th century the specific cases in which Debt sur contract lay had been generalised into a technical doctrine of *quid pro quo*, which may be expressed by saying that a party's obligation to pay was legally binding because the plaintiff had conferred a benefit on him.

[1-28] Thus, if a carpenter agreed to make some furniture and received payment, but then did not make the furniture, the customer could claim in Debt *sur contract* because the carpenter had received *quid pro quo* (the payment). But if the carpenter had promised to build the furniture in return merely for the customer's promise of payment, the customer would have no action of Debt *sur contract*. In those circumstances, the customer would need to bring an action of Debt *sur obligation* if the carpenter had given a sealed bond, or an action of Covenant in the royal courts or local courts if the agreement was under seal, or an action of Covenant in the local courts if the agreement was not under seal (see below). The common law thus came to recognise 'two types of clothing for pacts: a document under seal and a *quid pro quo*'.[45]

[1-29] The first recorded instance of the requirement for a *quid pro quo* in an action of Debt based on an informal agreement appears to date from 1338.[46] The requirement quickly gained traction thereafter.[47] Its emergence in the mid-14th century probably reflected gradual changes to English life already detectable in the early part of the century. Certainly, by the middle of the 14th century, 'there was a growing realization that the common law personal actions of Covenant and Debt were ineffective remedies for the money-credit economy beginning to replace feudalism'.[48] The English feudal

43 A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press 1975) at 153–169, 193–196 and 424–426; S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 260–262; John Barton, 'The Medieval Contract' in *Towards a General Law of Contract* (Duncker & Humblot 1990) at 23–37; Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 11–13; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 80–83; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 344.

44 K O Shatwell, 'The Doctrine of Consideration in the Modern Law' (1954) 1 Sydney Law Review 289 at 295–296.

45 David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 82.

46 *Anon* (1338) 11 & 12 E 3 (Rolls Series) 587.

47 Teeven postulates that the doctrine of *quid pro quo* was recognised by about 1400: Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 11.

48 Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 12.

system had entered upon its period of decline. By the early 14th century, England could, indeed, already be regarded as a modern State:[49]

> Magnates remained powerful, as did relationships of loyalty that functioned outside state authority. The overarching concerns nevertheless revolved around control of the bureaucratic centralized state structures. The centralization of concerns was reflected well in the fact that county courts had become inferior courts for relatively insignificant litigation. The king's courts now served as a major forum for litigation from every region of the country; Parliament processed both local and national concerns by handling petitions, passing statutes, and granting taxation in ways that made national government coherent. The emphasis in governance was on central control, even though locally important people functioned often by virtue of royal commissions and those same people still exercised little-regulated personal authority over their unfree tenants. … the king's council, … began to crystallize already prior to the Black Death into a much more professional institution involved in the day-to-day operations of running the country. Fortuitously by 1348, then, the common law already regulated the lives and fortunes of all substantial and many insignificant Englishmen …

[1-30] Significantly contributing to feudalism's decline was the general famine produced by three catastrophically bad harvests in 1315–1317 which substantially reduced the supply of unfree labour required to work the estates. Much manorial land had to be leased out to parties who could arrange for it to be worked.[50] Then, within a generation, came the Black Death (or 'Great Pestilence') which further accelerated English feudalism's decline. The first outbreak in 1348–1349 of this cocktail of diseases,[51] in which bubonic and pneumonic plagues predominated,[52] resulted in a massive death toll.[53] It significantly increased the scarcity of labour and hastened the demise of serfdom, thereby further expanding the proportion of the population engaged in free economic exchange:[54]

> In a society accustomed to very slow changes in conditions of life, the market value of labour had been doubled at a stroke. The consequence was twofold. The labourer who was already free struck for higher wages, while the villein whose labour was not free struggled against the legal demands of the bailiff for customary services which were now worth more to both parties; gradually he was led on to demand his full freedom, the right to take his labour where he would, to plead in the King's court even against his own lord, and to be free of irksome feudal dues. … The activities of the lawyers and well-to-do juries on the side of the landlords exposed the learned profession and its satellites to the popular hatred, as not a few judges and jurymen learnt to their cost in the days of [the peasants' uprising in] June 1381.

[1-31] The emergence of an explicit requirement of a *quid pro quo* in an action of Debt *sur contract* can be seen as an early response to a new situation brought about by

49 Robert C Palmer, *English Law in the Age of the Black Death, 1348–1381* (University of North Carolina Press 1993) at 2–3 (footnotes omitted).

50 Paul Johnson, *A History of the English People* (Weidenfield & Nicolson 1985) at 141.

51 There were three subsequent major outbreaks of the Black Death in the 14th century: 1361, 1368 and 1375.

52 Paul Johnson, *A History of the English People* (Weidenfield & Nicolson 1985) at 141.

53 The population of England was reduced, within the space of 16 months, from about 4 million to about 2½ million. Some villages and hamlets ceased to exist altogether, the whole population having perished: G M Trevelyan, *History of England* (3rd edn, Longmans Green & Co 1952) at 237; The number of beneficed clergy declined by about 40%, and tenants in chief by about 27%. The volume of litigation declined by more than 40% between 1348 and 1353: Robert C Palmer, *English Law in the Age of the Black Death, 1348–1381* (University of North Carolina Press 1993) at 3.

54 G M Trevelyan, *History of England* (3rd edn, Longmans Green & Co 1952) at 237 and 240.

the accelerating decline of feudalism. There arose a need to place the law relating to the enforceability of informal agreements, manifested most obviously in actions on Debt, on a basis more closely corresponding to the changing customs and expectations of the people. This reinforced foundation, incorporating a bargain-oriented conception of *quid pro quo*, better reflected the continuing emergence of an increasingly commercial society and a market-orientated national economy all the more liberated from static feudal rights and obligations: 'For the first time in English history, the ordinary man had the possessing class at his mercy'.[55]

[1-32] The requirement of a *quid pro quo* can also be seen as a fairly simple adumbration of the modern doctrine of consideration.[56] It expressed the fundamental notion that an unsealed agreement was enforceable only if it had been concluded as part of a bargain or exchange between the parties.

[1-33] The common law thus committed itself early to a law of contract in which more than a serious promise was required; there also needed to be a bargain towards which each party had contributed. This reflected the accelerating emergence of a commercial spirit in English life as the middle ages waned, and England assumed a leading role in the European transition to modernity.

[1-34] That the requirement of *quid pro quo* kept, however, one foot firmly planted in a medieval framework is evidenced by the requirement that that the beneficial *quid* conferred by the plaintiff be executed and not merely promissory.[57]

3.3 Action of Debt *sur obligation*

[1-35] A claimant could bring an action of Debt *sur obligation* where the agreement was embodied in a bond. This sealed instrument committed an 'obligor' to pay an 'obligee' a specified penalty, usually in the form of a fixed sum of money. The simplest case was where a borrower executed a bond specifying his obligation to a creditor. If the creditor brought an action of Debt on the bond, and if the debtor could not produce a sealed acquittance or establish a recognised vitiating factor such as fraud, duress or *non est factum*, the debtor would be bound to pay by virtue of the bond itself. Indeed, even if the borrower had repaid the money but could not produce a sealed acquittance he would be obliged to pay again.[58] There was no need to try the underlying transaction as such.

55 David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 141.

56 'In the sixteenth century the notion of *quid pro quo* would have some tenuous and indirect influence on the development of the doctrine of consideration': Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 11.

57 'It was quite clear … that the benefit, whether conferred on the defendant himself or on a third person at his request, must have been actually conferred. A mere promise to confer it would not be sufficient': Sir William Holdsworth, *A History of English Law*, vol III (Methuen, Sweet & Maxwell 1966) at 423. There was an important exception, of sorts, where sale of goods was concerned. A theory developed that ownership in the goods passed at the time of the agreement. This created a right in Detinue if the goods were not delivered to the purchaser, 'but it is clear that a right to sue in detinue is almost as substantial a benefit as performance; and therefore, a contract to sell which conferred such a right would be a *quid pro quo* for the right to sue in debt': Sir William Holdsworth, *A History of English Law*, vol III (Methuen, Sweet & Maxwell 1966) at 356.

58 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 250.

[1-36] Rigidly formal though Debt *sur obligation* might appear, it was nevertheless capable of serving transactions somewhat more sophisticated than simple loans. The parties to an agreed transaction might deposit parallel bonds with a stakeholder, who would then deliver both bonds to the non-breaching party in the event of the agreement's non-performance.[59] Thus, a purchaser of oxen could execute a bond obliging himself to the vendor in the agreed purchase price and the vendor could execute another bond obliging himself to the purchaser in the sum of a penalty (that is, for non-delivery, though this condition would not be mentioned in the bond). In the event of breach, and with the assistance of the stakeholder, the non-breaching party could bring an action on the breaching party's bond claiming the sum therein specified.

[1-37] At a slightly higher level of sophistication, and dispensing with the need of a stakeholder, there was the 'conditioned' or 'conditional' bond.[60] Such a bond would state that the obligor was bound to pay the obligee a specified sum unless a specified condition was satisfied.

[1-38] Thus, the vendor of oxen could bind himself to pay a sum of money (de facto, a penalty) to the purchaser unless he delivered them to the purchaser in accordance with the terms of the condition. Also, the purchaser could bind himself to pay a sum of money (de facto, the purchase price and possibly an additional penalty) unless the oxen were duly delivered in accordance with the terms of the condition. In the event of the transaction's non-performance, the non-breaching party could bring an action of Debt on the defendant's bond, and the defendant would be obliged to pay the sum specified unless he could prove that the condition had been fulfilled.

[1-39] The conditional bond was 'the form in which most important transactions were made and sued upon until the sixteenth century, and it accounts for a considerable proportion of the business of the court of common pleas'.[61]

[1-40] Nevertheless, there were some serious limitations on actions of Debt from the perspective of a sophisticated law of contract. Neither variety of Debt action would succeed if the price of goods the subject of the action was not fixed or if the goods were not in existence at the time of the agreement's conclusion.[62] The action of Debt was also structurally unable to assist with the non-performance of executory promises of future performance—the underlying transaction needed to be executed on one side. The utility of Debt *sur obligation* as a general contract remedy was limited by the requirement of a sealed bond, and Debt *sur contract* was usually not available against the debtor's executors.

3.4 Action of Covenant

[1-41] In the 12th century, a claimant who could not (or preferred not to) satisfy the requirements of an action of Debt might instead have sought some satisfaction

59 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 250–251.

60 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 251.

61 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 251; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 345.

62 Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 7–9; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 348.

in an action of Trespass. The trespassory wrong asserted by such an action was the defendant's breach of the agreement. During the 13th century, this species of Trespass action evolved into the distinct action of Covenant. This new action existed for the enforcement of obligations in the form of executory promises of future performance, originally to protect certain lessees of land. By the early 13th century actions in Covenant had become well established,[63] the action extending also to a wide range of promises beyond leases of land:[64] 'And let there be writs of Covenant according to the complaints of the contracting parties and the diversity of the cases'.[65]

[1-42] By the close of the reign of Edward I (1272–1307), however, access to the action of Covenant was narrowed by a rule that where an action of Debt lay, it was to provide the exclusive remedy.[66] Thus, the primacy of Debt over Covenant was established by the turn of the 14th century, a position to be enjoyed by the action of Debt in the realm of contract law until Stuart times.

[1-43] Further cementing Debt's position of primacy was another restriction on Covenant imposed at about the same time. In the royal courts there arose a rule, already well-established by not later than 1321, requiring that an action of Covenant could succeed only if the agreement had been embodied in a deed.[67] Covenant was an essentially contractual action which was available to enforce executory agreements. Hitherto, Covenant was an action which had permitted the enforcement of informal gratuitous promises:[68]

> This insistence upon formality stopped the growth of Covenant; but it is interesting to reflect that, had the decision been otherwise, the common law would have enjoyed, at the beginning

63 A W B Simpson, *A History of the Common Law of Contract* (Clarendon 1975) at 9; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 21.

64 C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens 1949) at 255–256; Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 5; Ibbetson (1999), note 37 at 21–22.

65 Statute of Wales, 12 Edw I, Cap 6; Cap 10 of the same Statute.

66 C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens 1949) at 258–259.

67 As to the immediate causes of this change in the royal courts, see: D J Ibbetson, 'Words and Deeds: The Action of Covenant in the Reign of Edward I' (1986) 4 Law and History Review 71–94; R C Palmer, 'Covenant, Justices Writs, and Reasonable Showings' (1987) 31 American Journal of Legal History 97–117; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 24–28; Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 6; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 339–342. In 1321, an action of Covenant before a royal court in eyre sitting in the Tower of London against a carrier who had not honoured his promise to convey a cartload of hay from Waltham to London failed for lack of a deed embodying the agreement. In reply to the plaintiff's protest that a deed could not be expected for such an agreement, Herle J replied that 'for a cartload of hay we shall not undo the law' (*Anon* [*Case of the Waltham Carrier*] (1321) B & M 285, 286). A deed was not required in the local courts, but by the later middle ages many local courts had ceased to function either effectively or at all so that for many plaintiffs the royal courts were the only courts available. Nevertheless, it is probably more accurate to say that the requirement of a deed 'was not … a change in the law so much as a demarcation of jurisdiction': J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 341. Furthermore, Covenant actions for sums above 40 shillings were forced into the royal courts and monetary inflation gradually had the practical effect of depriving local courts of jurisdiction: Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 6–7. Nevertheless, it was not a requirement of the common law that a covenant be sealed if the action was brought in a borough court: *Welshe v Hoper* (1533) B & M 286.

68 C H S Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens 1949) at 258.

> of the fourteenth century, a general remedy for breach of contract based, not, as ultimately evolved, upon a bilateral bargain, but upon a unilateral promise.

[1-44] The consequence of requiring a deed was that 'informal agreements were shut out from the central courts, and the development of a law of consensual contracts was therefore stifled by the formal requirement of a seal'.[69]

[1-45] The distinction between sealed and unsealed agreements was fundamental in early English law at least insofar as the jurisdiction of royal courts was concerned.[70] The matter was essentially one of proof. The key to unlocking the distinction lies in the etymology of 'deed' as an act or conduct, as distinct from mere words:[71]

> A covenant or grant consisted in fleeting words, and no action was allowed in the royal courts for mere breath. A sale, a loan, a hiring, on the other hand, were all visible conduct 'of which knowledge may be had'; the act generated the duty to pay, which therefore did not depend merely on words. The deed likewise was an act (*factum*), in that the specialty was sealed and delivered before witnesses as an 'act and deed'. The distinction between words and deeds ran deep in English law.

[1-46] The restrictive character of the requirement of a deed 'made excellent sense in the eyres which were unable to cope with the volume of business brought to them'.[72]

[1-47] It also made sense in the central royal courts. When an action of Covenant was to be tried, there were two principal questions to be answered; was there an agreement in terms asserted by the plaintiff, and did the defendant breach that agreement? If the matter went to trial, the answers could be determined by wager of law or by jury. Wager was regarded as a suspect procedure at Westminster because the compurgators frequently did not know the defendant. Jury trial was also problematic for a similar reason. Medieval juries were not judges of fact in the modern sense. They consisted of men who were expected to use their knowledge of local affairs and personalities in order to establish the facts; in other words, they were required to use their knowledge in order to determine the facts, and were not restricted to the evidence placed before them by the parties. Such a system arose out of, and was reasonably well adapted to, litigation conducted among neighbours from tight-knit communities. A jury assembled at Westminster would usually not have the necessary local knowledge. With the requirement of a deed for actionable covenants there could at least be 'no dispute over what was agreed, so that only performance could be in issue'.[73]

[1-48] It should also be borne in mind that once a covenant was performed by the plaintiff on his side there was a *quid pro quo* (an adumbration of modern consideration)

69 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 341.

70 'Contemporaries would not have viewed this as a drastic denial of justice, when local courts were quite competent to deal with informal agreements. It was true that one could not put every covenant into writing; but then one should not be able to bother the king's central courts with every unwritten covenant'. J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 320.

71 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 322 (citing *Loveday v Ormesby* (1310) B & M 250).

72 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 343.

73 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 248.

that enabled the plaintiff to pursue an action in Debt *sur contract*,[74] for which no deed was required even in the royal courts.

[1-49] Furthermore, in 'the mayor's court of London, and probably in all other local courts, covenants continued to be actionable without a deed; and this was as much the law of the land as the stricter evidential rule of the central courts'.[75] It therefore follows that the absence of sealing would not necessarily have denied justice, at least to those plaintiffs who could avail themselves of an effective local court.

[1-50] Nevertheless, the requirement of sealing in order to gain access to royal justice in an action of Covenant was to have the most inconvenient consequences for the development of the common law of contract. It prompted, as we shall see, a detour through the backstreets of tort which was to last several centuries.

[1-51] The safeguard presented by the availability of justice in the local courts was in the process of breaking down. With the decline of feudalism and the strengthening of royal authority from about the late 13th century, there was also a slow decay in some of the local courts.[76] This was especially true of that most archetypically feudal of judicial forums, the manorial court. By the mid-14th century, the peasants were 'learning to defy' the old manorial courts[77] that were presided over by barons who frequently had an interest in the outcome of litigation. Chancery writs of prohibition and error became more common in response to bias and corruption at the local level. Later in the 14th century, a concern by the royal courts about local bias in favour of the nobility resulted in a right by either party to have local proceedings removed to Westminster. Furthermore, the Statute of Gloucester (1278)[78] was interpreted to require all actions for sums worth more than 40 shillings to be tried in the royal courts.[79] The currency inflation of the 14th century, particularly after the Black Death, meant that progressively fewer claims could be heard at the local level.[80] Consequently, the requirement of sealing in order to access the royal courts became an increasingly effective obstacle to justice in actions of Covenant as the 14th century wore on.

[1-52] The royal courts soon realised, furthermore, that the new requirement of sealing for covenants took the law in a direction at odds with the changing customs of a community in transition from feudalism to a more fluid market-based economic and social order:

74 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 343–344.

75 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 320 (citing *Welshe v Hoper* (1533) B & M 286).

76 One needs to be careful not to fall into the trap of regarding the medieval local courts as a single system subject to a uniform process of decline. In particular, until the end of the middle ages, Borough Courts, the Courts of the Fairs and Markets (Courts of Pie Powder), and the Staple Courts 'were vigorous and flourishing courts exercising a sophisticated jurisprudence over important cases in terms perfectly comprehensible to the modern lawyer': K O Shatwell, 'The Doctrine of Consideration in the Modern Law' (1954) 1 Sydney Law Review 289 at 293.

77 G M Trevelyan, *History of England* (3rd edn, Longmans Green & Co 1952) at 238.

78 Statute of Gloucester (1278) (6 Edw I), c 8.

79 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 244–246; Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 3. In fact, as Milsom and Teeven point out, the Statute of Gloucester was *mis*interpreted—the statutory language applied only to Trespass.

80 Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 7.

> Even if laymen were conscious of the magic of parchment and wax, they often trusted the words of others without further security. They saw no reason why a man's word should not be as good as his bond.[81]

[1-53] Later in the 14th century, the royal courts were hearing cases involving claims based on actions alternative to Covenant. These alternatives were put forward on the basis that it was unrealistic to expect people to make bonds for every agreement they concluded.[82]

[1-54] The action of Covenant became in the 15th century subject to additional inconvenient and unattractive restrictions. In particular, it became unavailable where the claim was for the non-payment of money, the non-delivery of goods, or for substandard or late performance.[83] The reason for adding these new restrictions was to justify the introduction into the common law of new actions for the enforcement of agreements that did not require a sealed agreement.[84]

[1-55] These new actions would also facilitate the transubstantiation of the late-medieval device of *quid pro quo* into the modern doctrine of consideration. They would, furthermore, eventually bring the common law of agreements more into line with the increasingly dynamic and forward-looking practices of a rapidly commercialising society.

[1-56] The common law thus committed itself early to a law of contract in which more than a serious promise was required; there also needed to be a bargain towards which each party had contributed. This reflected the accelerating emergence of a commercial spirit in English life as the feudal Middle Ages waned and England assumed a leading role in the European transition to modernity.

3.5 Early-modern contracts

[1-57] The development of medieval English contract law is part of the story of the common law more broadly. The common law is a highly adaptive and flexible system. Broadly reflective of custom, it is part of the common law's genius that it is in a constant process of adaptation to the gradually shifting general practices and expectations of the various communities it serves. It is not, however, infinitely flexible. Having introduced the requirement of a deed for pursuing an action in Covenant before the royal courts, it could not simply perform a reversal and restore the old rule. Like a stately river winding its way to the sea, the common law frequently meanders but it rarely flows backwards. Indeed, it is precisely the almost complete absence of exposure to sudden reversal that principally lends the common law a greater degree of certainty than is possessed by legislation-based systems.

81 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 348. See also Sir William Holdsworth, *A History of English Law*, vol III (Methuen, Sweet & Maxwell 1966) at 417.

82 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 341. The argument based on the unreality of requiring a bond on every agreement had been famously rejected in 1321 in the *Case of the Waltham Carrier*: see note 67.

83 Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 7; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 341–342.

84 J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 321.

[1-58] The common law does not change by revolution. It proceeds instead by piecemeal adaptations. The cobbling together of solutions that are reflective of the community's customs and reasonable expectations, and with the juridical tools which already lie at hand, characterise the common law's adaptive method. Working with these tools, the common law bridged the gap between the medieval contractual landscape and the modern law of contract in two phases. The first phase, in the late 14th and early 15th centuries, was a temporary return to actions of Trespass. The second phase was the emergence, out of Trespass in the latter half of the 16th century, of a distinct action of Assumpsit. Although Assumpsit was the soil from which modern contract law ultimately sprang forth, until the 16th century it was treated by lawyers merely as a sub-species of Trespass on the Case.[85]

3.6 Special trespass (trespass on the case)

[1-59] In responding to the changed conditions of English economic, social and customary life as the middle ages gave way to early modernity, the King's Bench in the later 14th century accepted certain claims advanced with a view to circumventing the requirement of a seal in actions of Covenant. The way forward in actions of Debt having been effectively blocked,[86] these successful claims manifested a tactical return by plaintiffs to actions of Trespass.[87]

[1-60] As we have seen, the action of Covenant arose out of the action of Trespass in the 13th century. Actions of Trespass were heard in local courts prior to the establishment of the royal courts and their attendant system of writs. Trespass provided relief for the commission of civil wrongs, which originally extended to breaches of agreements or undertakings. The civil wrongs covered were not governed by any general theory, but depended on customary understandings that defied neat theoretical unification. 'A collection of separate substantive wrongs had been given a terminological unity for procedural reasons'.[88] In addition to its early inclusion of matters later covered by Covenant, Trespass extended to losses caused by events as diverse as biting dogs, fire, assault, injuring patients while treating their illnesses, accidentally discharging weapons, and badly shoeing horses. Indeed, so flexible was the action of Trespass that Maitland styled it, 'that fertile mother of actions'.[89]

[1-61] With the royal courts came access to them by writs. Not every civil wrong, however, entitled a plaintiff to the jurisdiction of the royal courts. Only serious misconduct would suffice. The conduct complained of originally needed to be

85 A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press 1975) at 199.

86 In actions of Debt generally, the way forward was blocked by the requirement of a sum certain and the requirement that goods needed to be in existence at the time of the agreement. In the case of Debt *sur obligation*, there was the additional requirement of a sealed bond. In the case of Debt *sur contract*, there were the additional problems that it was usually not available against executors of a deceased debtor and the risk posed to the plaintiff by the defendant's right to wage his law.

87 See generally: A W B Simpson, *A History of the Common Law of Contract* (Clarendon Press 1975) at 207–210; S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 283–313; Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 13–20; David Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press 1999) at 39–56; J H Baker, *Introduction to English Legal History* (5th edn, Oxford University Press 2019) at 350–352.

88 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 299.

89 F W Maitland, *The Forms of Action at Common Law: a Course of Lectures* (A H Chaytor and W J Whittaker eds, Cambridge University Press 1936) at 48.

expressible in the writ formula, *vi et armis et contra pacem regis* ('with force of arms and in breach of the king's peace'). By the mid-13th century, however, plaintiffs in actions of Trespass were increasingly obtaining access to royal justice without pleading either armed force or violation of the king's peace.[90] The Statute of Gloucester (1278) attempted to arrest this tendency by requiring such Trespass actions to be heard exclusively in the local courts.[91]

[1-62] Exchequer continued issuing writs, however, when the plaintiff employed the *vi et armis et contra pacem regis* drafting formula. This formalism encouraged creative pleading by plaintiffs in order to secure the writ that would open the door to royal justice. The King's Bench would also usually accept such writs as conferring jurisdiction on them, even if they were unrealistically or disingenuously framed, provided the correct formula was observed.[92] In likely recognition of the reality lying behind the ritual drafting of many of the writs of Trespass, in the 1360s Chancery began issuing them without even the camouflage of the *vi et armis et contra pacem regis* formula.[93]

[1-63] An important step in the direction of a modern common law of contract was taken in 1372 by the King's Bench in *The Farrier's Case*[94] in which the court accepted jurisdiction in a claim against a smith who had killed or seriously injured a horse by negligently driving a nail into its hoof. The writ was issued in the form of a local court plaint with no allegation of an armed breach of the King's peace.[95] The significance of *The Farrier's Case* is that actions of Trespass were soon thereafter effectively divided into two categories. There was 'Common Trespass' (or 'General Trespass') which required the *vi et armis et contra pacem regis* formula; and then there was 'Special Trespass' (or 'Trespass on the Case')[96] for redressing private wrongs which did not involve the use of armed force or violation of the King's peace.[97]

90 As to some possible reasons why plaintiffs increasingly preferred royal justice to local courts in actions of Trespass at this time, see: Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 15.

91 Statute of Gloucester (1278) (6 Edw I), c 8.

92 For example, in an action of Trespass before the King's Bench in 1317, the plaintiff claimed that he had bought a tun of wine from the defendants who, before the plaintiff took possession, drew off some of the wine and substituted salt water thereby entirely spoiling the purchase. According to the plaintiff's count, the defendant had drawn off the wine 'with force of arms to wit with swords and bows and arrows … against the king's peace': *Rattlesdene v Grunestone* (1317) YB 10 Edw II, 140. See also S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 289.

93 Teeven suggests that 'the royal courts were filling a gap in non-forcible trespass relief created by the decline of county courts in the fourteenth century': Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 16.

94 *The Farrier's Case* (1372) Y B Trin 46 Edw III pl 19 f 19.

95 S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 290–291.

96 'Trespass on the Case' was not a term that entered into wide usage until the 16th century. Special Trespass writs commenced with the phrase '*quare cum*' or '*quod cum*' with 'cum' being understood as 'whereas'. This opening phrase would be followed by a statement of the facts and the violated legal duty, each statement being varied to fit the requirements of the particular case. Hence the eventual emergence of the phrase, 'Trespass on the Case': Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 17–18; see also S F C Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) at 283–284.

97 The reason to sustain the distinction between common Trespass and special Trespass was probably the availability only in the quasi-criminal common Trespass cases of the process of *capias* which could result in the arrest and imprisonment of the defendant. *Capias* was not extended to special Trespass until 1504. It is, indeed, possible that the royal courts 'ceased demanding the fiction of *vi et armis* in non-forcible wrongs … in order to spare the non-violent defendant the extremes of *capias* process': Kevin M Teeven, *A History of the Anglo-American Common Law of Contract* (Greenwood Press 1990) at 16.

instance, the buyer made an offer to change the price in a contract for the sale of a horse. The offer included a stipulation that the seller's silence would constitute acceptance. The seller (who was the buyer's nephew) was willing to accept the proposed variation, and made no reply to the buyer. This sequence of events did not result in a variation of the contract because the seller's response was no more than an uncommunicated mental assent.

3. Certainty

[7-4] The terms resulting from acceptance of the offer must also indicate, with reasonable certainty, an intention to vary, amend or modify subsisting contractual obligations.

[7-5] In *New World Development Co Ltd v Sun Hung Kai Securities Ltd*,[5] for instance, an oral contract by which the defendant acquired a 50% share of the plaintiff's interest in a joint venture was later informally changed to give the defendant a 25% share. There was disagreement between the parties as to whether the variation imposed on the defendant an obligation to contribute 25% of the plaintiff's ongoing liabilities under the joint venture. The Court of Final Appeal held that, notwithstanding their brevity, the agreed terms were sufficiently certain to reasonable persons in the position of the parties to impose such a liability on the defendant. *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd*[6] provides a contrast. Buyers of cocoa proposed a variation of the contract of sale whereby future sales would be designated in British pounds, instead of the Nigerian pounds specified in the contract. The seller agreed that payment could be made in British pounds, but did not state that the price would be designated in British pounds. The British pound was subsequently devalued and a dispute arose as to the agreed price. The buyers argued that the contract had been varied, but the House of Lords held that the exchange of correspondence was too ambiguous to allow a conclusion that the price clause had been varied.

4. Subsisting contract

[7-6] As the decision in *Goss v Lord Nugent* implies, there can be no agreement to vary a contract unless there is a subsisting contract ('if there be a contract'). Thus, it is not possible to vary a contract that has been terminated.

[7-7] For instance, in *Lord Advocate v de Rosa*,[7] Lord Salmon observed that once a person sells a business, his employees' contracts of employment are terminated and those whose services are retained by the new owner have entered into new contracts of employment. Consequently, for the purpose of calculating statutory redundancy payments based on length of service, the period of entitlement ran from the commencement of the new contracts because it was not possible to regard them as

5 *New World Development Co Ltd v Sun Hung Kai Securities Ltd* (2006) 9 HKCFAR 403, [2006] 3 HKLRD 345, [2006] HKCU 1122 (CFA).

6 *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, [1972] 2 WLR 1090 (HL).

7 *Lord Advocate v de Rosa* [1974] 2 All ER 849 at 865, [1974] 1 WLR 946 (HL) at 964.

mere variations of the previous (terminated) contracts. Similarly, in *Royal Exchange Assurance v Hope*,[8] Sargant LJ found that a life insurance policy had been extended before it was terminated, but acknowledged that it would have been 'more difficult' to effect the variation after the policy had terminated.

[7-8] By logical extension, it would seem to follow that it is not possible to vary an executed contractual obligation because there is simply nothing to alter.[9]

5. No Variation After Breach

[7-9] As the court said in *Goss v Lord Nugent*, it is open to the parties to vary their contract 'at any time before breach of it'.[10] This probably means that a breach of contract cannot be retrospectively avoided by variation of the breached term. Such, indeed, was the interpretation of *Goss* adopted in *Lee Yip-kun v The Chius Manufacturing Co Ltd*.[11] The Court of Appeal decided that a buyer's acceptance of late delivery of goods did not imply an agreement to vary the contract of sale because, inter alia, the term specifying the delivery date had already been breached. There is, however, no reason why breach of a term should foreclose the parties' freedom of contract to vary that term with prospective effect, or to compromise a claim for breach of contract.

6. Formal Requirements

[7-10] Some transactions are required to be concluded in the form of a deed. The most important of these are transactions that create, extinguish, or dispose of a legal interest in land, except leases for a term not exceeding three years.[12] At common law, a deed could not be varied or rescinded except by another deed. However, equity now permits variation and rescission of a deed without any formality.[13]

[7-11] Legislation also imposes other formalities as to writing which must be observed in order to establish a legally enforceable contract. The same formalities, if any, that apply to the formation of a contract also apply to an agreement to vary that contract.[14] Consequently, where the law requires an agreement to be in writing,[15] an

8 *Royal Exchange Assurance v Hope* [1928] Ch 179 at 195, [1927] All ER Rep 67 (CA, Eng) at 71.

9 S Wilken QC and K Ghaly, *The Law of Waiver, Variation, and Estoppel* (3rd edn, Oxford University Press 2012) at 15.

10 *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64–65, 110 ER 713 (KB) at 716.

11 *Lee Yip-kun v The Chius Manufacturing Co Ltd* [1976] HKLR 195 at 199, [1976] HKCU 25 (CA).

12 Section 4 of the Conveyancing and Property Ordinance (Cap 219). As to formalities generally, see **Chapter 2**.

13 *A-G v Fulton Corp Ltd* [1963] 2 HKLR 176 at 188, [1963] HKCU 33 (SC); *Berry v Berry* [1929] 2 KB 316 at 319, [1929] All ER Rep 281 (KB).

14 *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995 at 1002, [1997] 1 WLR 38 (CA, Eng) at 44–45, per Neill LJ, citing *Williams v Moss' Empires Ltd* [1915] 3 KB 242 (DC, Eng); *Greenhouse v Paysafe Financial Services Ltd* [2018] EWHC 3296 (Comm) at para 13.

15 For example, section 5 of the Conveyancing and Property Ordinance (contracts creating or disposing of equitable interests in land, including declarations of trust respecting land); section 216 of the Copyright Ordinance (Cap 528) (assignments of copyright); sections 3, 73, and 89 of the Bills of Exchange Ordinance (Cap 19) (bills of exchange, cheques, and promissory notes); sections 76, 77, and 86 of the Companies Ordinance (Cap 622) (company articles of association); section 19 of the Arbitration Ordinance (Cap 609) (agreements submitting disputes to arbitration). As to formalities generally, see **Chapter 2**.

agreement to vary must likewise be in writing.[16] Similarly, where the law requires an agreement to be evidenced in writing,[17] an agreement to vary must be evidenced in writing.[18] Failure to comply with these requirements will result in the variation lacking contractual force, although an informal variation may be relied on as a defence to an action on the contract.[19]

[7-12] Of course, where no formalities are required for the formation of a contract, none are required for its variation.[20]

[7-13] The parties themselves will sometimes agree that no variation to their contract may be made unless some formality, such as writing, is observed. Until recently, terms prescribing formalities in order to vary a contract were widely thought to be ineffective to prevent an informal variation. Parties were free to agree to terms regulating a contract's variation. The English Court of Appeal said of the parties that, 'just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties', and this position was said to be analogous to the principle that Parliament cannot bind its successors.[21]

[7-14] The United Kingdom Supreme Court has, however, more recently decided that: (1) parties may agree that any variation of contract will be invalid unless the variation agreement is in writing and signed by the parties; and (2) a failure to conform to those formalities will deny a variation agreement of validity.

Rock Advertising Ltd v MWB Business Exchange Centres Ltd

Supreme Court (United Kingdom)
[2018] UKSC 24, [2019] AC 119, [2018] 4 All ER 21

For the facts, see **[6-81]**.

MWB appealed to the United Kingdom Supreme Court.

Lord Sumption:

...

7. At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other

16 *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38 (CA, Eng).

17 For example, section 3 of the Conveyancing and Property Ordinance (Cap 219) (contracts for the sale or other disposition of land, including leases of land for periods of at least three years); section 18 of the Money Lenders Ordinance (Cap 163) (agreements to repay loans or pay interest to money lenders). As to formalities generally, see **Chapter 2**.

18 *Wellfit Investments Ltd v Poly Commence Ltd* [1996] 4 HKC 174 (CA) at 178 (appeal dismissed, *Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 236 at 241, [1997] HKLRD 857 (PC) at 860–861 (on appeal from Hong Kong); *Goss v Lord Nugent* (1833) 5 B & Ad 58, (1833) 110 ER 713 (KB).

19 *Re a Debtor (No 517 of 1991)* (1991) TLR 25 November.

20 For example, *David Lynn & Co v Lien Foo Co* [1952] 36 HKLR 381, [1952] HKCU 43 (SC) (written contract for the sale of goods varied by letter), citing *Goss v Lord Nugent* (1833) 5 B & Ad 58, (1833) 110 ER 713 (KB).

21 *Globe Motors Inc (a corporation incorporated in Delaware, USA) v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396, [2016] All ER (D) 171 (Apr), (2016) 168 Con LR 59 at para 119, per Moore-Bick LJ; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604, [2016] 3 WLR 1519 at para 31, per Kitchin LJ.

exceptions are all statutory, and none of them applies to the variation in issue here. The reasons which are almost invariably given for treating No Oral Modification clauses [ie, clauses requiring contract variation agreements to be recorded in writing and signed by the parties] as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing. ...

...

10. In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.

11. The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties' intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so. In the Court of Appeal, Kitchin LJ observed that the most powerful consideration in favour of this view is 'party autonomy': para 34. I think that this is a fallacy. Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by contract.

12. The advantages of the common law's flexibility about formal validity are that it enables agreements to be made quickly, informally and without the intervention of lawyers or legally drafted documents. Nevertheless, No Oral Modification clauses like clause 7.6 are very commonly included in written agreements. This suggests that the common law's flexibility has been found a mixed blessing by businessmen and is not always welcome. There are at least three reasons for including such clauses. The first is that it prevents attempts to undermine written agreements by informal means, a possibility which is open to abuse, for example in raising defences to summary judgment. Secondly, in circumstances where oral discussions can easily give rise to misunderstandings and crossed purposes, it avoids disputes not just about whether a variation was intended but also about its exact terms. Thirdly, a measure of formality in recording variations makes it easier for corporations to police internal rules restricting the authority to agree them. These are all legitimate commercial reasons for agreeing a clause like clause 7.6. I make these points because the law of contract does not normally obstruct the legitimate intentions of businessmen, except for overriding reasons of public policy. Yet there is no mischief in No Oral Modification clauses, nor do they frustrate or contravene any policy of the law.

13. The reasons advanced in the case law for disregarding them are entirely conceptual. The argument is that it is conceptually impossible for the parties to agree not to vary their contract by word of mouth because any such agreement would automatically be destroyed upon their doing so. The difficulty about this is that if it is conceptually impossible, then it cannot be done, short of an overriding rule of law (presumably statutory) requiring writing as a condition of formal validity. Yet it is plain that it can. There are legal systems which have squared this particular circle. They impose no formal requirements for the validity of a commercial contract, and yet give effect to No Oral Modification clauses. The Vienna Convention on Contracts for the International Sale of Goods (1980) has been ratified by 89 states, not including the United Kingdom. It provides by article 11 that a contract of sale 'need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.' Nonetheless, article 29(2) provides:

> A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

Similarly, article 1.2 of the UNIDROIT Principles of International Commercial Contracts, 4th ed (2016), provides that 'nothing in these Principles requires a contract, statement or any other act to be made in or evidenced by a particular form.' Yet article 2.1.18 provides that:

> A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated. However, a party may be precluded by its conduct from asserting such a clause to the extent that the other party has reasonably acted in reliance on that conduct.

These widely used codes suggest that there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation.

14. The same point may be made in a purely English context by reference to the treatment of entire agreement clauses, which give rise to very similar issues. Entire agreement clauses generally provide that they 'set out the entire agreement between the parties and supersede all proposals and prior agreements, arrangements and understandings between the parties.' An abbreviated form of the clause is contained in the first two sentences of clause 7.6 of the agreement in issue in this case. Such clauses are commonly coupled (as they are here) with No Oral Modification clauses addressing the position after the contract is made. Both are intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter. … Outside the domain, in some ways rather special, of contracts for the sale of land, in *Deepak Fertilisers and Petrochemical Corpn v ICI Chemicals & Polymers Ltd* [1998] 2 Lloyd's Rep 139, 168 (Rix J) and (1999) 1 Lloyd's Rep 387, para 34 (CA), both Rix J and the Court of Appeal treated the question as one of construction and gave effect to the clause according to its terms. Lightman J did the same in [*Inntrepreneur Pub Co (GL) v East Crown Ltd* [2000] 2 Lloyd's Rep 611]. Since then, entire agreement clauses have been routinely applied …

15. If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

16. The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see *Actionstrength Ltd v International Glass Engineering In Gl En SpA* [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).

> 17. I conclude that the oral variation which Judge Moloney [at trial] found to have been agreed in the present case was invalid for the reason that he gave, namely want of the writing and signatures prescribed by clause 7.6 of the licence agreement.
>
> …
>
> 19. I would allow the present appeal and restore the order of Judge Moloney.
>
> *Lady Hale, Lord Wilson, and Lord Lloyd-Jones agreed with Lord Sumption. Lord Briggs agreed with Lord Sumption that the appeal should be allowed on the basis that clause 7.6 prevented an oral agreement from validly varying the written agreement, although he proffered narrower reasons as to why clause 7.6 had this effect.*

[7-15] It thus appears that the English common law rule has now been recast. A contract term stipulating that a variation of the contract must be recorded in writing and signed will be effective to deprive a non-conforming variation of validity. This remains true even if the parties had the stipulation in mind when they made the non-conforming variation; in such circumstances, they are 'courting invalidity with their eyes open'.[22]

[7-16] Lord Sumption drew on an analogy with entire agreement (or entire contract) clauses[23] to support the view that clauses precluding oral variation are effective, because both are 'intended to achieve contractual certainty about the terms agreed, in the case of entire agreement clauses by nullifying prior collateral agreements relating to the same subject-matter'. As Lord Briggs observed, however, the analogy does not work well because entire agreement clauses 'do not purport to bind the parties as to their future conduct', and they 'leave the scope and the procedure for subsequent variation entirely unaffected'.[24] Lord Briggs correctly took the view that 'subject to contract' stipulations provide a better analogy;[25] such stipulations address future conduct, and preclude contractual intention unless the parties expressly or by necessary implication agree to expunge it.

[7-17] Perhaps the strongest foundation for the Supreme Court's approach is to be found in Lord Sumption's observation that the previous rule's 'flexibility has been found a mixed blessing by businessmen and is not always welcome', and that this explains why stipulations against oral variation 'are very commonly included in written agreements'.[26] It seems likely, therefore, that in the interests of legal certainty, businessmen were themselves attempting to formulate a device that would make the common law in some cases *less flexible* on the modes by which a contract might be varied. The common law is an essentially customary system. Its rules evolve, by a process of induction, to reflect where necessary the customs, traditions, and reasonable expectations of the various communities whose common good the common law exists to preserve and advance. Viewed in this light, the Supreme Court's decision in *Rock Advertising* is true to the common law's essential character.

22 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, [2018] 4 All ER 21 at para 15; see also, *NHS Commissioning Board v Vasant* [2019] EWCA Civ 1245, [2020] 1 All ER (Comm) 799, [2019] All ER (D) 190 (Jul).

23 As to entire contract clauses, see **[9-86]** et seq.

24 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, [2018] 4 All ER 21 at para 28.

25 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, [2018] 4 All ER 21 at paras 24 and 29; as to 'subject to contract', see **[5-58]** et seq.

26 *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24, [2019] AC 119, [2018] 4 All ER 21 at para 12.

7. Unilateral Variation

[7-18] Unless the contract confers on one of the parties a power unilaterally to vary the contract, a unilateral decision or notification to vary it will not be effective.[27] A contract may confer a unilateral power of variation, but only if it is clearly expressed to do so.[28] Where the contract does clearly give one of the parties a power unilaterally to vary the contract, that power must not be exercised 'dishonestly, for an improper purpose, capriciously or arbitrarily',[29] or 'irrationally or perversely'.[30]

8. Variation or Termination

[7-19] It is sometimes difficult to ascertain whether an agreement concerning a subsisting contract is a variation or a termination of that contract. The distinction will be important where one party denies that he is still subject to obligations under the putatively subsisting contract. The issue is ultimately one of the parties' intention.

[7-20] In order to amount to a termination, 'there should have been made manifest the intention … of a complete extinction of the first contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting'.[31] An intention to vary may be disclosed where 'there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist'.[32] An intention to rescind may be disclosed where 'you could sue on the second arrangement alone, and the first contract is got rid of either by express words to that effect, or because, the second dealing with the same subject-matter as the first but in a different way, it is impossible that the two should be performed'.[33] In another formulation Lord Sumner said that, in order to amount to a termination, the agreement must go to 'the very root' of the subsisting contract.[34]

[7-21] In *Wong Bei-nei v A-G*,[35] the Hong Kong government in 1931 auctioned land around Braga Circuit in Mong Kok. The transaction was subject to conditions of sale

27 *Jebsen & Co Ltd v Asia Furniture* [1982] HKC 218 (HC) at 223; *Cowey v Liberian Operations Ltd* [1966] 2 Lloyd's Rep 45; *T Comedy (UK) Ltd v Easy Managed Transport Ltd* [2007] EWHC 611 (Comm), [2007] 2 All ER (Comm) 242, [2007] 2 Lloyd's Rep 397 (QB) at para 29.

28 *Kwan Ka Man Blanche v Esprit Retail (Hong Kong)* Ltd [2004] 4 HKC 378 (CFI) at para 33 (bonus payments under employment contract); *Lombard Tricity Finance Ltd v Paton* [1989] 1 All ER 918 (CA, Eng) (interest rate under consumer credit contract); *Wandsworth London Borough Council v D'Silva* [1998] IRLR 193 (CA, Eng) at 197 (sickness provisions under employment contract); *Amberley (UK) Ltd v West Sussex County Council* [2011] EWCA Civ 11, (2011) 14 CCL Rep 178 (fees charged under contract for residential care).

29 *Paragon Finance plc v Staunton, Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685 at 700.

30 *Chan Kam Yau v Hong Kong University of Science & Technology* [2007] HKCU 2129 (unreported, DCCJ 4016/2002, 21 December 2007) (DC).

31 *Morris v Baron & Co* [1918] AC 1 at 19, [1916–17] All ER Rep Ext 1146 (HL) at 1156, Viscount Haldane.

32 *Morris v Baron & Co* [1918] AC 1 at 26, [1916–17] All ER Rep Ext 1146 (HL) at 1160, Lord Dunedin.

33 *Morris v Baron & Co* [1918] AC 1 at 26, [1916–17] All ER Rep Ext 1146 (HL).

34 *British & Beningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48 at 68, [1922] All ER Rep 224 (HL) at 230.

35 *Wong Bei-nei v A-G* [1973] HKLR 582, [1973] HKCU 50 (SC).

requiring that buildings to be erected be 'detached or semi-detached residential premises of European type or such other buildings of European type as the Director of Public Works may approve of'. In 1952, the government told the owner of one lot that it had no objection to the construction of flats on the lot, subject to certain height restrictions. In 1972, the government gave permission to erect flats that conformed to the 1952 height restrictions on the same lot. In 1973, the government refused an application to construct flats on an adjacent lot and simultaneously revoked its permission on the earlier application. The owners of the lots argued that the original contract containing the conditions of sale had been terminated by agreement in 1952 when the government gave permission to erect flats on part of the land, and that those conditions were no longer binding. The Hong Kong Supreme Court rejected the owners' argument on the basis that the government's permissions did not amount to a 'manifest intention to depart from the original agreement nor do they go to the very root of the original agreement', but rather manifested a clear intention that 'the original agreement should continue in force with the variation that … a house consisting of flats might be built'.[36]

9. Contractual Intention to Vary

[7-22] The parties must also have possessed an intention to be legally bound by their agreement to vary. The principles of intention that apply to contract formation will likewise apply to contract variation. Thus, an agreement to vary an agreement of a domestic or social character will be subject to a presumption against contractual intention, while an agreement to vary an agreement of a commercial character will be subject to a presumption in favour of contractual intention.[37]

[7-23] In practical terms, the issue of contractual intention to vary an agreement will typically follow the parties' intentions in making the original agreement. Consequently, if the agreement was originally made without an intention to be legally bound, it will be very unlikely that a variation of that agreement was made with contractual intention. Conversely, if the agreement was originally made with an intention to be legally bound, it will be very likely that a variation of that agreement was made with contractual intention.

[7-24] Each agreement to vary must, however, be assessed objectively on its own facts and subject to the same principles that apply to intention in contract formation. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)*,[38] for instance, a variation of a subsisting agreement that was itself 'subject to contract'[39] (thereby putatively negating contractual intention), was nevertheless legally binding. This was because:

(1) all terms by which the parties intended to be bound were agreed;
(2) the terms were varied without reiterating the 'subject to contract' stipulation; and

36 *Wong Bei-nei v A-G* [1973] HKLR 582 at 600, [1973] HKCU 50 (SC), per Trainor J.

37 See **Chapter 5**.

38 *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG (UK Production)* [2010] UKSC 14, [2010] 3 All ER 1, [2010] 1 WLR 753.

39 As to 'subject to contract' stipulations, see **[5-58]** et seq.

(3) the agreement as varied was substantially performed. In these circumstances, the parties were taken to have unambiguously waived the 'subject to contract' stipulation.

10. Consideration to Vary

10.1 Consideration required

[7-25] As with contract formation, an agreement to vary a subsisting contract must be supported by consideration. This reflects the common law's 800-year tradition that only bargains—and not mere promises or agreements—are legally enforced as contracts. In order to be contractually enforceable, an agreement to vary a bargain must also be a bargain.

[7-26] For the purpose of contract formation, four substantially overlapping elements or conditions must be present or satisfied. Consideration must:

(1) be either a new benefit to the promisor or a new detriment to the promisee;
(2) be sufficient, but need not be adequate;
(3) not be in the past; and
(4) move from the promisee at the promisor's request as the price of the promise.[40]

Where these four elements or conditions are all present or satisfied, there will be valid consideration not only for contract formation, but also for contract variation.

10.2 Variation and formation compared

[7-27] In the context of contract variation, consideration is less likely to take the form of a more-or-less transparent bargain than it does in contract formation. Thus, when forming a new contract, the typical commercial dynamic is that one party more-or-less explicitly requests a benefit for himself (eg, a money price) in exchange for a benefit to the counterparty (eg, the sale of goods or the supply of a service). When agreeing a variation of contract, however, the dynamic is often somewhat different and the bargain aspect less apparent. This is because a contract variation is an attempt to readjust legal relations within an established contractual framework, typically as the result of changed expectations or external circumstances.

10.3 Full legal consideration

[7-28] Nevertheless, commercial contract variations are generally agreed because both parties see some benefit to themselves in making the adjustment. More often than not, consideration for a variation consists of a mutual abandonment of existing rights and/or the conferment of new benefits by each of the parties on each other.[41] Where this occurs, the contract variation is supported by full legal consideration. The first requirement of consideration is that it be either a new benefit to the promisor or a new

40 See **[6-16]**.
41 *Re William Porter & Co Ltd* [1937] 2 All ER 361 (Ch).

detriment to the promisee.[42] In order for something to be a 'benefit' in the full legal sense it must be something new, ie, something to which the promisor is not already entitled at the time he makes his promise.[43]

[7-29] For instance, an agreement to vary the currency of account in a subsisting contract is good consideration because both parties may benefit as a result of currency fluctuations.[44] Conversely, a party that secured the promise of an increased payment for building a ship probably incurred a new obligation or detriment by agreeing to arrange an enhanced form of security for non-performance of its obligations.[45] In each case, one can point to the promisor receiving something of value to which he was not entitled or which was not likely to accrue to him before agreeing to the variation. In other words, there is full legal consideration for the agreement to vary the subsisting contract.

10.4 Classical requirement of consideration

[7-30] The performance of, or undertaking to perform, a subsisting contractual or other private law obligation or duty *owed to a third party* is justified as consideration for a promise on the basis that the promisor obtains the new benefit of a direct obligation which he can enforce.[46]

[7-31] More difficulty arises where the variation results in a party making a concession—either by promising to give more or accept less than the contract stipulates—in exchange for the other party's promise to do no more (or perhaps even less) than the subsisting contract requires. For instance, P promises to pay V a higher price if V honours a subsisting contract with P to sell goods; or V promises to accept a lesser sum in payment for goods the price of which is agreed in a subsisting contract. In neither case does the conceding party acquire any benefit to which he was not already entitled before the agreement was varied. In other words, the conceding party does not receive full legal consideration in exchange for his concession.

42 See **[6-16]**.
43 For example, in *Collins v Godefroy* (1831) 1 B & Ad 950, (1831) 109 ER 1040 (KB), the plaintiff was an attorney who had been called as a witness under subpoena in legal proceedings commenced by the defendant against his previous attorney. Although the plaintiff remained in attendance in the vicinity of the court for six days, he was not called to give evidence. The plaintiff thereupon rendered a bill for six guineas on the defendant, in accordance with his professional daily rate. The defendant refused to make payment, and the plaintiff commenced proceedings to recover. The action was unsuccessful because the plaintiff's attendance at court was a duty imposed by law and his promise to perform that duty could not constitute consideration. The defendant received nothing more than that to which he was already entitled. Similarly, in *Pinnel's Case* (1602) Co Rep 117a, (1601) 77 ER 237 (CP), a promise to discharge a debt in return for payment of a lesser sum was void for lack of consideration because the promisor received nothing more than that to which he was already entitled.
44 *Woodhouse AC Israel Cocoa SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, [1972] 2 WLR 1090 (HL); *W J Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, [1972] 2 WLR 800 (CA, Eng).
45 *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705 at 713–714, [1978] 3 All ER 1170 at 1178, [1979] 3 WLR 419 (QB).
46 *Pao On v Lau Yiu Long* [1980] AC 614, [1979] 3 All ER 65, [1979] 3 HKLR 225 (PC) (on appeal from Hong Kong); *Fong Huen v Anthony Wong* [1975] HKLR 21, [1975] HKCU 4 (SC); *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] AC 154, [1974] 1 All ER 1015, [1974] 2 WLR 865 (PC) (on appeal from New Zealand); *Scotson v Pegg* (1861) 6 H & N 295, (1861) 158 ER 121. See **[6-46]** et seq.

[7-32] In the classical conception of consideration, a concession thus made is *nudum pactum* and contractually void with the result that the subsisting contract is not varied.

Stilk v Myrick

Court of King's Bench
(1809) 2 Camp 317, (1809) 170 ER 1168, (1809) 6 Esp 129,
(1809) 170 ER 851

The plaintiff agreed to serve as a seaman aboard a vessel on a return voyage from London to the Baltic Sea. The agreed remuneration was £5 per month. There was a total of 11 seamen aboard the vessel, but two of them deserted during the voyage. The ship's captain was unable to replace the deserters in the Russian port of Cronstadt and he promised the remaining nine crew members that, if he was unable to replace the deserters in the Swedish port of Gottenborg, he would divide the deserters' wages among them. The deserters could not be replaced at Gottenborg, and the vessel returned to England with the help of the nine remaining crew members. The plaintiff then sought his promised share of the deserters' wages, but his employer refused to pay more than the originally-promised rate. The plaintiff commenced proceedings to recover the promised additional sum. An understanding of this case is complicated by the existence of two different reported versions; a report according to Isaac Espinasse and a report according to John Campbell. Although both versions record that the plaintiff was unsuccessful, contradictory sets of reasons are reported. Extracts from both reported versions are set out below.

(*Stilk v Myrick* (1809) 6 Esp 129, 170 ER 851) '**Lord Ellenborough** ruled, That the plaintiff could not recover this part of his demand. His Lordship said, That he recognised the principle of the case of *Harris v Watson* as founded on just and proper policy. When the defendant [sic, should be "plaintiff"] entered on board the ship, he stipulated to do all the work his situation called upon him to do. Here, the voyage was to the Baltick and back, not to Cronstadt only; if the voyage had then terminated, the sailors might have made what terms they pleased. If any part of the crew had died, would not the remainder have been forced to work the ship home? If that accident would have left them liable to do the whole work without any extraordinary remuneration, why should not desertion or casualty equally demand it?'

(*Stilk v Myrick* (1809) 2 Campbell 317, 170 ER 1168) '**Lord Ellenborough**: I think *Harris v Watson* was rightly decided; but I doubt whether the ground of public policy upon which Lord Kenyon is stated to have proceeded, be the true principle upon which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all that they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compellable to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death; and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 per month.'

[7-33] The two reports of *Stilk v Myrick* give contradictory accounts of Lord Ellenborough's use of, and attitude towards, the earlier decision in *Harris v Watson*.[47] In that case the court ruled that a promise to pay a seaman a sum larger than the amount originally agreed, in order to induce him to exert himself during a time of danger to the vessel, was void for violation of public policy. Lord Kenyon CJ stressed that success for the plaintiff 'would materially affect the navigation of this kingdom'

47 *Harris v Watson* (1791) Peake 102, (1791) 170 ER 94 (KB).

by encouraging seamen to make extravagant demands in order to perform their work during times of danger to their ships. Of course, the United Kingdom's prosperity was heavily dependent on marine navigation. Espinasse's report indicates that this was the rather narrow policy basis upon which the plaintiff in *Stilk v Myrick* was unsuccessful.

[7-34] Campbell's report puts the plaintiff's failure in *Stilk v Myrick* on an entirely different basis. In this version of the decision, Lord Ellenborough approved of the result in *Harris v Watson*, but rejected the reasoning of Lord Kenyon CJ. Lord Ellenborough preferred to decide *Stilk v Myrick*, and would have decided *Harris v Watson*, on the broader basis that the plaintiff had not provided any fresh consideration for the defendant's promise to pay more than that which was originally agreed.[48]

[7-35] Campbell's version is generally regarded as the more authoritative and accurate. Campbell enjoyed a good reputation as a law reporter and eventually became Lord Chancellor of Ireland, Chief Justice of the Court of Queen's Bench, and Lord Chancellor of the United Kingdom. His version of the case has also been authoritatively characterised as enshrining a 'corner-stone of the law of contract'.[49] Espinasse, in contrast, was not a highly regarded law reporter and his hearing was thought to be suspect.[50]

[7-36] The New Zealand case of *Cook Islands Shipping Co Ltd v Colson Builders*[51] followed Campbell's version of *Stilk v Myrick*. A shipping company contracted to carry goods at a set rate. On encountering difficulties, the shipping company indicated it would be prepared to proceed only if the other party varied the agreement and paid an additional sum above the agreed rate. The other party agreed, but the promise was held be non-binding because the shipping company did nothing more than it was already obliged to do under the subsisting agreement.

[7-37] *Stilk v Myrick* is conventionally interpreted to mean that consideration is always required for an agreement to vary a contract. Until relatively recently, this was understood to mean full legal consideration.

10.5 Practical benefit: substitute for full legal consideration

[7-38] For the purposes of contract variation, however, something less than full legal consideration can now also serve as consideration to support the agreement to vary. As a result of doctrinal developments over the last three decades, a concessionary promise can vary the terms of a subsisting contract where: (1) the promisor receives consideration in the form of a practical benefit; and (2) the promise was not made as a

48 cf Peter Luther, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law' (1999) 19 Legal Studies 526, in which it is argued that the differences between the two reported versions of the case are more apparent than real.

49 *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 at 20, [1990] 1 All ER 512 at 525, [1990] 2 WLR 1153 (CA, Eng), per Purchas LJ. See also *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (*The Atlantic Baron*) [1979] QB 705 at 712, [1978] 3 All ER 1170 (QB) at 1177, per Mocatta J.

50 Ewan McKendrick, *Contract Law: Text, Cases and Materials* (9th edn, Oxford University Press 2020) at 165.

51 *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422 (SC, NZ).

certainly the position in Hong Kong when it was last authoritatively considered.[2] Since then, however, it is possible that errors of law can now give rise to mistake in the English law of contract.

[15-6] In *Kleinwort Benson Ltd v Lincoln City Council*,[3] the House of Lords removed the bar preventing restitution of monies paid under a mistake of law[4] (payments were made pursuant to certain arrangements that were void as being beyond the powers of a public authority). Some six years later, in *Brennan v Bolt Burdon*,[5] the English Court of Appeal upheld an agreement compromising a legal action that rested on an understanding of the law that was subsequently overturned on appeal, but expressed the view that the House of Lords decision 'now permeates the law of contract'.[6] Although generally supportive of extending mistake to cover errors of law, Treitel postulates that the 'likely impact of the decision in *Brennan v Bolt Burdon* for contracts generally is a little difficult to assess because the observations made by the Court of Appeal were so obviously made in the context of a contract of compromise'.[7] Nevertheless, the Court of Final Appeal has remarked that rectification for unilateral mistake may be available where a party is mistaken as to the meaning of a term in a contractual document.[8] This suggests that the barrier excluding mistakes of law in the interpretation and effects of contracts has now collapsed in Hong Kong.

1.4 Forecasts and predictions

[15-7] Whatever may be the current position in Hong Kong concerning mistakes of law, it is clear that an error in the making of a forecast or prediction is incapable of founding an operative mistake. In *Patel's Wall Street Exchange Ltd v SK International*,[9] the plaintiff was a registered remittance agent and money changer who paid $2.2 million to the defendants. The payment was made pursuant to an agreement with another remittance agent who had promised to provide an intermediary with 15 million Philippine Pesos in cash for delivery to the plaintiff in exchange for the plaintiff's payment to the defendants. The other remittance agent delivered the Philippine cash to the intermediary, but no delivery was ever made to the plaintiff. There had never previously been any problems in the transmission of cash from the other remittance agent to the plaintiff. In its claim for the return of the $2.2 million the plaintiff argued that the money had been paid under a mistake of fact, ie, that the delivery from the other remittance agent would occur. Barma J held that the plaintiff 'was not acting under any mistake of fact, but on what turned out to be his misprediction that what

2 *Citilite Properties Ltd v Innovative Development Co Ltd* [1998] 4 HKC 62, [1998] 2 HKLRD 705 (CA).

3 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, [1998] 4 All ER 513, [1998] 3 WLR 1095 (HL).

4 This development had already occurred in Australia as a result of the High Court of Australia's decision in *David Securities Ltd v Commonwealth Bank of Australia* [1992] HCA 48, (1992) 175 CLR 353 (HC, Aust).

5 *Brennan v Bolt Burdon (a Firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] All ER (D) 551 (Jul).

6 *Brennan v Bolt Burdon (a Firm)* [2004] EWCA Civ 1017, [2005] QB 303, [2004] All ER (D) 551 (Jul) at para 10, per Maurice Kay LJ, Sedley LJ and Bodey J sharing this view.

7 Edwin Peel, *Treitel: The Law of Contract* (15th dn, Sweet & Maxwell 2020) at 369.

8 *Kowloon Development Finance Ltd v Pendex Industries Ltd* [2013] 6 HKC 443, (2013) 16 HKCFAR 336 (CFA) at para 20.

9 *Patel's Wall Street Exchange Ltd v SK International* [2005] 2 HKLRD 551, [2005] HKCU 30 (CFI).

had always happened in the past (that is, that the banknotes would arrive safely) would happen again on this occasion'.[10]

1.5 Varieties of mistake

[15-8] There are four varieties of mistake:

(1) *Common mistake* at common law occurs when each party makes the *same error* about some fact or circumstance fundamental to the contract such that achievement of the contractual adventure is rendered impossible. There are five conditions that must be satisfied in order to establish a common mistake:

(a) there must be a common assumption as to the existence of a state of affairs;
(b) there must be no warranty by either party that the state of affairs exists;
(c) the non-existence of the state of affairs must not be attributable to the fault of either party;
(d) the non-existence of the state of affairs must render performance of the contract impossible;
(e) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

An example of common mistake is where L negotiates to hire his theatre to T to be used as a venue for a concert but, reasonably unbeknownst to either of them, the theatre is destroyed by fire before the contract is concluded. Common mistake renders the contract void.[11] An equitable doctrine of common mistake no longer exists in England or, probably, Hong Kong.

(2) *Mutual mistake* occurs when the parties are *at cross-purposes* with each other about some matter fundamental to their agreement. This situation often arises where an offer is affected by a fatal ambiguity or vagueness. The meaning of the offer is to be determined objectively and reasonably. For instance, V offers to sell 'my shares' for $100; P accepts the offer but understands it to refer to shares in X Ltd, whereas V intended to sell his shares in Y Ltd. There appears to be an offer and acceptance, but the evidence provides no basis upon which a reasonable person could objectively determine which shares were being offered. In these circumstances, there is no *consensus ad idem* and the contract is void. Many expositions of contract law deal with mutual mistake as engaging issues of contract formation under the overlapping rubrics of certainty of terms, and offer and acceptance.

(3) *Unilateral mistake* occurs when *one party makes an error* concerning the existence or meaning of a contractual term and enters into the agreement while *the other party has knowledge* of the first party's error *or is responsible* for inducing it. V might be negotiating to sell his flat to P at a price in the

10 *Patel's Wall Street Exchange Ltd v SK International* [2005] 2 HKLRD 551 at 569, [2005] HKCU 30 (CFI) at para 37.

11 If the theatre is destroyed after the contract's conclusion but before the concert, the issue would be one of frustration: *Taylor v Caldwell* [1861–73] All ER Rep 24, (1863) 3 B & S 826, (1863) 122 ER 309 (QB); see **Chapter 19**.

both parties entered into this contract upon the basis of a common affirmative belief that the assured was alive; but as it turned out that this was a common mistake, the contract was one which cannot be enforced.

[15-16] Similar to *res extincta* is the situation where the subject matter of the agreement never existed. Common mistake may, in principle, defeat the contractual status of such an agreement. Where, however, one party is asserting the subject matter's existence, he may be taken to have warranted as much. This may be so either because he is in a better position to know the truth of the matter and the other party is justified in placing reliance on the assertion or because he has failed to take such steps as are reasonable to verify the accuracy of his assertion.

McRae v Commonwealth Disposals Commission

High Court of Australia
(1951) 84 CLR 377, [1951] Argus LR 771

The Commonwealth Disposals Commission was an instrumentality of the Australian government charged with responsibility for disposing of government assets in the wake of the Second World War. The Commission called for tenders 'for the purchase of an oil tanker lying on Jourmaund Reef' off the coast of the Australian-administered territory of Papua New Guinea. The tender documents also stated that the vessel 'is said to contain oil'. The Commission accepted McRae's tender of £285. He then spent some £3,000 on the salvage expedition. It transpired, however, that there was no oil tanker near the map co-ordinates specified by the Commission. Nor, indeed, was there any place named 'Jourmaund Reef'. McRae brought a claim for damages based on, inter alia, breach of contract. Among the Commission's defences was an argument that the contract was void for common mistake; both parties incorrectly assumed the existence of the contract's subject matter.

Dixon J and Fullager J:

...

... A finding of actual knowledge that they [the Commission] had nothing to sell does not seem justified by the evidence, though it is difficult to credit them at the time of the publication of the advertisements with any honest affirmative belief that a tanker existed. The confusion as to locality in the description advertised is almost enough to exclude the inference of any such affirmative belief. But, even if they be credited with a real belief in the existence of a tanker, they were guilty of the grossest negligence. It is impossible to say that they had any reasonable ground for such a belief. Having no reasonable grounds for such a belief, they asserted by their advertisement to the world at large, and by their later specification of locality to the plaintiffs, that they had a tanker to sell. They must have known that any tenderer would rely implicitly on their assertion of the existence of a tanker, and they must have known that the plaintiffs would rely implicitly on their later assertion of the existence of a tanker in the latitude and longitude given. They took no steps to verify what they were asserting, and any 'mistake' that existed was induced by their own culpable conduct. In these circumstances it seems out of the question that they should be able to assert that no contract was concluded. It is not unfair or inaccurate to say that the only 'mistake' the plaintiffs made was that they believed what the Commission told them.

... The buyers relied upon, and acted upon, the assertion of the seller that there was a tanker in existence. It is not a case in which the parties can be seen to have proceeded on the basis of a common assumption of fact so as to justify the conclusion that the correctness of the assumption was intended by both parties to be a condition precedent to the creation of contractual obligations. The officers of the Commission made an assumption, but the plaintiffs did not make an assumption in the same sense. They knew nothing except what the Commission had told them. If they had been asked, they would certainly not have said: 'Of course, if there is no tanker, there is no contract'. They would have said: 'We shall have to go and take possession of the tanker. We simply accept the Commission's assurance that there is a tanker and the Commission's promise to give us that tanker.' The only proper construction

of the contract is that it included a promise by the Commission that there was a tanker in the position specified. The Commission contracted that there was a tanker there. 'The sale in this case of a ship implies a contract that the subject of the transfer did exist in the character of a ship.'[15] If, on the other hand ... this case ought to be treated as cases raising a question of 'mistake', then the Commission cannot in this case rely on any mistake as avoiding the contract, because any mistake was induced by the serious fault of their own servants, who asserted the existence of a tanker recklessly and without any reasonable ground. There was a contract, and the Commission contracted that a tanker existed in the position specified. Since there was no such tanker, there has been a breach of contract, and the plaintiffs are entitled to damages for that breach.

... The contract was made in Melbourne, and it would seem that its proper law is Victorian law. Section 11 of the Victorian Goods Act 1928 corresponds to s 6 of the English Sale of Goods Act 1893, and provides that 'where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made the contract is void'.[16] ... it seems clear that the section has no application to the facts of the present case. Here the goods never existed, and the seller ought to have known that they did not exist.

McTiernan J concurred with Dixon J and Fullager J.

[15-17] A reasonable person in McRae's position was justified, in all the circumstances, in interpreting his agreement with the Commission as including a contractual term warranting the existence of a submerged tanker at the advertised location. The Commission was in a far better position than McRae to know the truth of its assertions concerning the tanker, and it had exhibited the 'grossest negligence' in failing to take reasonable steps to verify those assertions before making them. Indeed, on this analysis, the parties did not truly make the same mistake at all: 'It is not unfair or inaccurate to say that the only "mistake" the plaintiffs made was that they believed what the Commission told them'.

2.1.2 Mistake as to attainability of agreement's object

[15-18] A common mistake as to the attainability of the agreement's object is closely akin to frustration. Where the impossibility occurs after the making of the contract, the case is one of frustration rather than mistake.[17] In *Krell v Henry*,[18] for instance, a contract made on 20 June 1902 to hire a room with views of the coronation processions for King Edward VII on 26 and 27 June was frustrated when, on 24 June, it was announced that the King was ill and the processions were cancelled. In *Griffith v Brymer*,[19] a contract was made to hire a room with views of the same coronation processions *after* they had been cancelled, neither party being aware of the cancellation at the time the contract was concluded: The agreement was void as having been made on a common mis-supposition of facts that went to the whole root of the matter.

15 *Barr v Gibson* (1838) M & W 390 at 399–400.
16 cf Sale of Goods Ordinance (Cap 26), section 8.
17 See **Chapter 19**.
18 *Krell v Henry* [1903] 2 KB 740, [1900–03] All ER Rep 20, (1903) 72 LJKB 794 (CA, Eng). See **[19-24]**.
19 *Griffith v Brymer* (1903) 19 TLR 434 (KB).

2.1.3 Mistake as to quality of subject matter

[15-19] Prior to the decision of the House of Lords in *Bell v Lever Brothers Ltd*,[20] it was generally accepted that an error would not be sufficiently fundamental to constitute a mistake unless it concerned the very existence of the subject matter of the agreement, and that an error as to the subject matter's quality was not sufficient.[21] In *Bell*, the defendants had been employed by the plaintiffs. The parties agreed to terminate the contracts of service upon payment of a lump sum settlement by the plaintiffs to each of the defendants. The plaintiffs and the defendants all assumed that the contracts of service were fully enforceable, but the truth was that both defendants had engaged in conduct which would have entitled the plaintiffs to terminate the contracts of service without compensation. When the plaintiffs discovered the truth, they claimed recovery of the lump sum payouts made under the termination agreement. At the time of concluding the termination agreement, the defendants were also unaware that their contracts of service were voidable at the election of the plaintiffs. A majority of the House of Lords[22] found for the defendants on the basis that the mistake was not sufficiently fundamental to constitute an operative mistake. The result of the litigation is consistent with the view that nothing short of *res extincta* will be sufficient to establish common mistake. It is the influential speech of Lord Atkin, however, which raised the possibility that a mistake as to the quality of the subject matter might also ground a mistake:[23]

> Mistake as to quality of the thing contracted for raises more difficult questions. In such a case a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially differ from the thing as it was believed to be. Of course it may appear that the parties contract that the article should possess the quality which one or other or both mistakenly believe it to possess. But in such a case there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law.

[15-20] Lord Atkin's idea that a shared error as to quality may found an operative common mistake if it renders the subject matter of the contract 'essentially different from the thing as it was believed to be' depends upon objectively divining the parties' intentions from the terms of the agreement and the matrix of facts surrounding its conclusion. There is a strong parallel here with frustration. In each situation, the task is to establish whether the prior incorrect shared assumption (common mistake) or the subsequent event (frustration) operates to transform the bargain into something radically different from that to which the parties consented. This in turn requires that careful attention be given to the task of construing the terms of the agreement in order to establish objectively and reasonably the true scope of the parties' intentions. Although there is nothing inherently unworkable about Lord Atkins' test, and although

20 *Bell v Lever Brothers Ltd* [1932] AC 161, [1931] All ER Rep 1, (1932) 101 LJKB 129 (HL).

21 eg, *Jendwine v Slade* (1797) 2 Esp 571, (1797) 170 ER 459; *Kennedy v Panama, New Zealand and Australian Royal Mail Co Ltd* (1867) LR 2 QB 580, [1861–73] All ER Rep Ext 2094 (QB), per Blackburn J.

22 Lord Atkin and Lord Thankerton (ratio), Lord Blanesburgh (obiter), Lord Warrington and Viscount Hailsham dissenting.

23 *Bell v Lever Brothers Ltd* [1932] AC 161 at 218, [1931] All ER Rep 1 (HL) at 28.

it has found support in subsequent decisions,[24] it introduced an increased element of uncertainty as to the circumstances in which a contract might be vitiated for mistake.

2.1.4 Five elements of common mistake

[15-21] The English Court of Appeal has since revised and tightened the test for establishing common mistake.

Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd

Court of Appeal (England and Wales)
[2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689

The 'Cape Providence' was a vessel that had suffered serious structural damage in the southern Indian Ocean. The defendant offered salvage services to the owners of the 'Cape Providence'. Once that offer was accepted, the defendant approached its brokers in London for a tug. This idea was abandoned once it was realised that the nearest tug would take five or six days to reach the 'Cape Providence', and that the stricken vessel might in the meantime sink with loss of life among the crew. The defendant then asked its brokers to find a merchant vessel in the vicinity of the 'Cape Providence' and which would be willing to assist with the rescue of her crew. The brokers were informed by a reputable source that the 'Great Peace', owned by the claimant, was only about 12 hours sailing time from the 'Cape Providence'. The [illegible], its brokers, the defendant then entered into a contract with the claimant to charter the 'Great Peace' for at least five days for the purpose of escorting and standing by the 'Cape Providence' with a view to saving life. The contract included a cancellation clause permitting the defendant to cancel the agreement on payment of five days' hire. Had the information given to the brokers been correct, the 'Cape Providence' and the 'Great Peace' would have been only some 35 miles apart when the contract was concluded. In fact, and unbeknownst to either claimant or defendant, the vessels were about 410 miles apart and the sailing time to reach the 'Cape Providence' was about 39 hours. About two hours after entering into the contract, the defendant discovered the truth about the distance between the vessels. It thereupon contacted its brokers and informed them that it was contemplating cancellation of the contract with the claimant, but first wished to establish whether there was another vessel closer to the 'Cape Providence' which would be willing and able to render assistance. After a few hours, the brokers found such a vessel (the 'Nordfarer') and the defendant cancelled its contract with the claimant. The defendant refused, however, to pay any amount to the claimant notwithstanding the terms of the cancellation clause. The claimant commenced proceedings for US$82,500 payable under the cancellation clause or as damages for wrongful repudiation. The defendant resisted the claim on the basis that the contract had been concluded under a common mistake as to a fundamentally important fact, i.e. that the two vessels were in close proximity when the truth was different. According to the defendant, the contract was void for common mistake at common law or, at the very least, voidable and subject to rescission in equity. The claimant succeeded at trial and the defendant appealed.

Lord Phillips MR:

...

73. ... The avoidance of a contract on the ground of common mistake results from a rule of law under which, if it transpires that one or both of the parties have agreed to do something which it is impossible to perform, no obligation arises out of that agreement.

74. In considering whether performance of the contract is impossible, it is necessary to identify what it is that the parties agreed would be performed. This involves looking not only at the express terms, but at any implications that may arise out of the surrounding circumstances.

24 For example, *Associated Japanese Bank Ltd v Credit du Nord SA* [1988] 3 All ER 902, [1989] 1 WLR 255 (QB); *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd* [1989] 2 HKC 156, [1990] 1 HKLR 317 (CA).

In some cases it will be possible to identify details of the 'contractual adventure' which go beyond the terms that are expressly spelt out, in others it will not.

75. Just as the doctrine of frustration only applies if the contract contains no provision that covers the situation, the same should be true of common mistake. If, on true construction of the contract, a party warrants that the subject matter of the contract exists, or that it will be possible to perform the contract, there will be no scope to hold the contract void on the ground of common mistake.

76. ... [T]he following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the existence of a state of affairs; (ii) there must be no warranty by either party that that state of affairs exists; (iii) the non-existence of the state of affairs must not be attributable to the fault of either party; (iv) the non-existence of the state of affairs must render performance of the contract impossible; (v) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

...

82. ... [W]hile we do not consider that the doctrine of common mistake can be satisfactorily explained by an implied term, an allegation that a contract is void for common mistake will often raise important issues of construction. Where it is possible to perform the letter of the contract, but it is alleged that there was a common mistake in relation to a fundamental assumption which renders performance of the essence of the obligation impossible, it will be necessary, by construing the contract in the light of all the material circumstances, to decide whether this is indeed the case.

...

94. ... [O]n the facts of the present case, the issue in relation to common mistake turns on the question of whether the mistake as to the distance apart of the two vessels had the effect that the services that the *Great Peace* was in a position to provide were something essentially different from that to which the parties had agreed. ...

...

162. We revert to the question that we left unanswered at paragraph 94. It was unquestionably a common assumption of both parties when the contract was concluded that the two vessels were in sufficiently close proximity to enable the *Great Peace* to carry out the service that she was engaged to perform. Was the distance between the two vessels so great as to confound that assumption and to render the contractual adventure impossible of performance? If so, the defendants would have an arguable case that the contract was void under the principle in *Bell v Lever Bros Ltd* [1932] AC 161.

163. Toulson J addressed this issue, at para 56 [of the trial judgment]:

> "Was the *Great Peace* so far away from the *Cape Providence* at the time of the contract as to defeat the contractual purpose - or in other words to turn it into something essentially different from that for which the parties bargained? This is a question of fact and degree, but in my view the answer is No. If it had been thought really necessary, the *Cape Providence* could have altered course so that both vessels were heading toward each other. At a closing speed of 19 knots, it would have taken them about 22 hours to meet. A telling point is the reaction of the defendants on learning the true positions of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once."

164. Mr Reeder [counsel for the defendants] has attacked this paragraph on a number of grounds. He has submitted that the suggestion that the *Cape Providence* should have turned and steamed towards the *Great Peace* is unreal. We agree. The defendants were sending a tug from Singapore in an attempt to salve the *Cape Providence*. The *Great Peace* was engaged by the defendants to act as a stand-by vessel to save human life, should this prove necessary, as an ancillary aspect of the salvage service. The suggestion that the *Cape Providence* should have turned and steamed away from the salvage tug which was on its way towards her in order to reduce the interval before the *Great Peace* was in attendance is unrealistic.

165. Next Mr Reeder submitted that it was not legitimate for the judge to have regard to the fact that the defendants did not want to cancel the agreement with the *Great Peace* until they knew whether they could get a nearer vessel to assist. We do not agree. This reaction was a telling indication that the fact that the vessels were considerably further apart than the defendants had believed did not mean that the services that the *Great Peace* was in a position to provide were essentially different from those which the parties had envisaged when the contract was concluded. The *Great Peace* would arrive in time to provide several days of escort service. The defendants would have wished the contract to be performed but for the adventitious arrival on the scene of a vessel prepared to perform the same services. The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure.

166. The parties entered into a binding contract for the hire of the *Great Peace*. That contract gave the defendants an express right to cancel the contract subject to the obligation to pay the 'cancellation fee' of five days' hire. When they engaged the *Nordfarer* they cancelled the *Great Peace*. They became liable in consequence to pay the cancellation fee. There is no injustice in this result.

167. For the reasons that we have given, we would dismiss this appeal.

Lord Phillips MR handed down the judgment of the court, the other members of which were May LJ and Laws LJ.

[15-22] There is, therefore, a five-part test that must be satisfied before a contract is void for common mistake:[25]

(1) there must be a common assumption as to the existence of a state of affairs;
(2) there must be no warranty by either party that that state of affairs exists;
(3) the non-existence of the state of affairs must not be attributable to the fault of either party;
(4) the non-existence of the state of affairs must render performance of the contract impossible;
(5) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.

[15-23] The test in *Great Peace* requires that the shared error under which the contracting parties laboured should render the adventure to which the parties consented actually *impossible* to perform.[26] What, precisely, that adventure comprises is a matter of objectively establishing the parties' intention by reference to the terms (both express and implied) and 'in the light of all the material circumstances'. The requirement that the surrounding material circumstances of the agreement be taken into account in objectively determining the parties' intentions is in accord with the more modern approach of interpreting a contract in the context of the agreement's surrounding 'matrix of fact'.[27] The English Court of Appeal decided that the incorrect

25 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689 at para 76.

26 In *Triple Seven MSN 27251 Ltd v Azman Air Services Ltd* [2018] EWHC 1348 (Comm), [2018] All ER (D) 64 (Jun), [2018] 4 WLR 97 at para 66, DHCJ Eggers QC considered *Great Peace* and other authorities before concluding that 'the test determining the application of the doctrine of common mistake is best applied by (a) assessing the fundamental nature of the shared assumption to the contract, and (b) comparing the disparity between the assumed state of affairs and the actual state of affairs and analysing whether that disparity is sufficiently fundamental or essential or radical'.

27 See *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 All ER 98 at 114–115, [1998] 1 WLR 896 (HL) at 912–913, per Lord Hoffmann. See **[12-7]**.

shared assumption in *Great Peace* was not such as to render performance of the agreed obligations impossible and that the contract was therefore not tainted by common mistake; the defendant had, after all, decided not to cancel the contract with the claimant pending the conclusion of an alternative contract.

[15-24] The *Great Peace* test has found favour in Hong Kong.

Tony Investments Ltd v Fung Sun Kwan

Court of First Instance
[2006] 1 HKLRD 835, [2006] HKCU 119

In 2004, Fung agreed to sell a property to Tony Investments Ltd for $110m. The lot consisted of two portions; a land portion consisting of about two thirds of the property, with the remainder consisting of a reclaimed former slipway which had been used for launching vessels into the harbor, and part of which consisted of seabed. The whole of the slipway had been acquired by the Hong Kong government in 1990 pursuant to s 10(1)(a) of the Foreshore and Sea-Bed (Reclamations) Ordinance (Cap 127), whereafter the reclamation work was carried out. Fung possessed a personal contractual right to have the land constituting the former slipway re-granted to him upon application and payment of a nominal premium. Although he had erected a building on the reclaimed slipway, he had never applied for title to be re-granted. This was made known to Tony Investments in response to their requisitions. Fung's title to the former slipway portion was therefore defective, and Tony Investments sought an undertaking that Fung would take the steps necessary in order to take title to that portion. Fung refused, and Tony Investments commenced proceedings for a declaration that the former slipway formed part of the property to be sold and for specific performance. Part of Fung's defence was a submission that the agreement with Tony Investments was void for common mistake; both parties laboured under the false belief that Fung had good title to the entire lot which was the subject of the agreement.

Deputy Judge To:

...

31. Though common mistake was raised as a ground for resisting the Purchaser's claim for specific performance, in his submission, Mr Fung SC [counsel for Fung, the Vendor] has elevated its importance to that of a defence, such that not only was the Purchaser not entitled to specific performance but that there was no contract at all. However, this defence is inconsistent with the stance of the Vendor's solicitors in answering the Purchaser's requisition that the re-grant is unnecessary. Nevertheless, I shall now consider common mistake as a complete defence.

32. According to the Vendor's affirmation, it was all along his belief and understanding that the 1990 Reclamation only affected the [seabed] portion of the Property and he acted on such belief and understanding by occupying the Property and [paying] rates and Government rent in respect of the Property including the Former Slipway. For the purpose of these proceedings, I assume this to be his genuine belief.

33. Mr Fung SC submitted that the Vendor can in no way be blamed for the mistake as his belief and understanding was evidently shared by the Government who never objected or complained to the Vendor for his continued occupation of the Former Slipway and collected rates and Government rent in respect of the Property including the Former Slipway. I have already expressed my contrary view that collection of rates and Government rent does not constitute an acknowledgement of title. There is no evidence at all that the Vendor's belief was shared by the Government. I am not prepared to assume the Vendor was blameless as he must have known that he only had a personal right to re-grant of the Former Slipway at a nominal premium at the time he entered into the Final Compensation Agreement, but he either deliberately chose not to or negligently failed to seek the re-grant. But whether he was blameless or otherwise has no bearing on the conclusion which I am going to reach.

34. The thrust of Mr Fung SC's submission is that where the parties to a contract were under a common misapprehension either as to the facts or their respective rights and where the

misapprehension was fundamental, there was no contract and there could be no damages and no specific performance. He quoted the following passage from paras 15–32 of *Snell's Equity*, 31st ed, (2005) at p 361:

> Mistake in the formation of a contract has historically been regarded (in appropriate cases) as being good reason for refusing specific performance, so that the claimant is only entitled to damages at common law. Thus, specific performance has been refused where the parties to a contract were under a common misapprehension (either as to the facts or their relative rights) provided that the misapprehension is fundamental and the party seeking to resist enforcement is not blameworthy.

35. That passage was written in the context of refusal to a claim for specific performance and does not deal with how the court should approach a common mistake relied on in avoiding a contract. Ms Yu SC [counsel for Tony Investments, the Purchaser] helpfully referred me to the following passage in pp 399–400 para 5–052 in *Chitty on Contracts*, 29th ed, (2004) Vol 1, which summarised the law of common mistake and the latest approach of the courts as follows:

> In cases in which there is some other common mistake as [to] the surrounding facts, or perhaps the law, the contract may be void but only if the mistake means that performance of the contract would be impossible, or would be essentially or fundamentally different to what was contemplated by the parties. There are rival formulations of the principle. One is Lord Atkin's,[28] that a common mistake as to the quality of the subject matter may render a contract void if it makes the thing without the quality essentially different from the thing as it was believed to be. The other is the Court of Appeal's in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2003] QB 679, that a common mistake may render a contract void if it makes the contractual adventure impossible. The newer formulation is, with respect, easier to apply if only because it enables us to draw directly on analogous cases of frustration, of which there are considerable numbers. It is submitted, however, that these two formulations reflect differences in opinion over the origin or underlying nature of the doctrine — Lord Atkin's seemingly reflecting Roman or continental notions of mistake, the Court of Appeal's based on parallels to frustration and ultimately, the construction of the contract — than differences over when the doctrine will apply. Both make it clear that it will only be in exceptional circumstances, when the mistake makes the contract completely different to what the parties both thought they were about, that the contract will be void for common mistake.

36. It would be convenient to turn now to the Court of Appeal decision in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd*.[29] In that case, the defendant negotiated with the claimant to salvage a damaged vessel which the defendant thought was about 35 miles from the claimant's vessel. A contract of hire for a minimum of five days to escort and stand by the damaged vessel for the purpose of saving life was made. When it was later discovered that the claimant's vessel and the damaged vessel was 410 miles apart and not 35 miles, the defendant did not immediately cancel the contract but sought a nearer vessel to assist while hanging onto the contract with the claimant. After securing the assistance from the other vessel, the defendant cancelled the contract with the claimant. The claimant claimed for damages. The defendant disputed liability by reason of a fundamental mistake of fact in that both parties had proceeded on the fundamental assumption that the two vessels were in close proximity but they were not. The court found in favour of the claimant. The defendant appealed to the Court of Appeal. It would be sufficient to refer to the headnote which contained a succinct statement of the law and the test for common mistake. In dismissing the appeal, the Court of Appeal held:

> (1) that common (or mutual) mistake was a common mistaken assumption of fact which rendered the service that would be provided if the contract were performed in accordance with its terms essentially different from the performance that the parties contemplated, with the result that the contract was not merely liable to be set aside but was void at common law; that the avoidance of a contract on the ground of common mistake resulted not from

28 In *Bell v Lever Brothers Ltd* [1932] AC 161, [1931] All ER Rep 1, (1932) 101 LJKB 129 (HL).
29 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689.

> an implied term but from a rule of law under which, if it transpired that one or both of the parties had agreed to do something which it was impossible to perform, no obligation arose out of that agreement; that the test for common mistake was narrow, and if a contract were to be avoided for common mistake there had to be a common assumption as to the existence of a state of affairs, no warranty by either party that that state of affairs existed and the non-existence of the state of affairs had not to be attributable to the fault of either party; and that, where it was possible to perform the letter of the contract but it was alleged that there was a common mistake in relation to a fundamental assumption which rendered performance of the essence of the obligation impossible, it was necessary to construe the contract in the light of all the material circumstances in order to determine whether the contract could be avoided for common mistake.
>
> In the eventual analysis, the Court of Appeal held the fact that the defendant did not cancel the contract when they discovered the mistake until they secured the services of a nearer vessel showed that the mistake did not have the effect of rendering the contract essentially different from what the parties had agreed.
>
> 37. As with the author of *Chitty on Contracts,* 29th ed, (2004), I prefer the Court of Appeal's approach. It is easier to apply. But I think in most cases, either approach would lead to the same conclusion because under either approach, it will only be in exceptional circumstances that the mistake could have the effect of making the contract completely different to what the parties both thought they were such that the contract will be avoided. The test for a common mistake is a very narrow one. On the formulation of the Court of Appeal, a common mistake may render a contract void if it makes the performance of the contract to the letter impossible: it makes its performance essentially different from what the parties contemplated; there was a common assumption as to the existence of a state of affairs; there was no warranty by either party that the state of affairs existed and the non-existence of the state of affairs had not to be attributable to the fault of either party. All the material circumstances must be taken into account in order to determine whether the contract should be avoided.
>
> 38. On the facts of the present case, there was no mistake about the subject matter of the sale and purchase. The mistake alleged is the common misapprehension as to the Vendor's rights over the Former Slipway. I think such argument is disingenuous and purely semantic. When someone offers his land for sale, he must be offering to sell some beneficial interests or rights which he has over the land. This inference is so strong that the law of conveyancing has developed to the extent that it has become an implied term in any sale and purchase agreement involving land that the vendor shall prove and show good title. Likewise, the inference is so strong that there must be implied into any sale and purchase agreement that the vendor warrants he has title to sell, unless such warranty or intention is expressly or impliedly excluded. Thus, when there was no mistake about the subject matter of the sale, it is only semantic to argue that there was a mistaken apprehension about one's rights over the land to be sold. In a sale and purchase agreement, in the absence of express exclusion, there must be an implied warranty that the vendor has good title and shall show and pass a good title. This alone would defeat the Vendor's defence of common mistake.
>
> 39. Furthermore, the parties had contracted to sell and purchase the Property including the Former Slipway. The sale and purchase of the Property including the Former Slipway was not anything which had not been contemplated by the parties. The performance by the Vendor is not impossible. He has a contractual right against the Government to seek a re-grant of the Former Slipway at nominal premium. There is nothing to suggest that the Government is not good for its promises. There is no evidence to suggest that the Government had revoked its promise of re-grant. The re-grant is just a matter as of right and as of course. What the Vendor has to do is to apply for a re-grant to perfect his title. That could not be an onerous or impossible obligation. Even if the Vendor does not have a right to the re-grant, that could not render the contract void. This is not a case where the subject matter of the sale and purchase did not exist at all. The contract is valid if the sale and purchase including the Former Slipway was what the parties have bargained for. Specific performance may not be available in that case but the Vendor may not walk out of the contract as if there was no contract at all and without having to pay damages for failing to honour his obligation under the contract. This defence must fail. …
>
> 57. …. I grant the declaration and specific performance sought by the plaintiff …

[15-25] As the *Tony Investments* court correctly observed, the *Great Peace* 'test for a common mistake is a very narrow one'. Fung's defence failed because it could not satisfy this narrow test. In particular, it failed two of the test's conditions. First, all contracts for the sale and purchase of land in Hong Kong contain an implied term warranting that the vendor has title to sell (or, more precisely, that he will have title to sell on the agreed date of settlement). This meant that Fung could not satisfy the second of the *Great Peace* conditions: 'there must be no warranty by either party that that state of affairs exists'.[30] Second, it was a simple matter for Fung to cure his defect in title, by the expedient of making an application and paying the nominal premium. This meant that he could not satisfy the fourth of the *Great Peace* conditions: 'the non-existence of the state of affairs must render performance of the contract impossible'.[31]

2.1.5 Assumption of risk

[15-26] A plea of common mistake will also be defeated where, notwithstanding a shared misunderstanding about a state of affairs essential to the agreement, one party has assumed the risk of that error. This requirement may be understood as a manifestation of, or variation on, the third *Great Peace* condition, 'the non-existence of the state of affairs must not be attributable to the fault of either party'. Indeed, the *Great Peace* court quoted[32] with approval the following words of Steyn J:[33]

> Logically, before one can turn to the rules as to mistake […] one must first determine whether the contract itself, by express or implied condition precedent or otherwise, provides who bears the risk of the relevant mistake. It is at this hurdle that many pleas of mistake will either fail or prove to have been unnecessary. Only if the contract is silent on the point is there scope for invoking mistake.

[15-27] Whether a party has assumed the risk of any error will depend on a proper construction of the agreement in the context of the material circumstances surrounding its conclusion. In *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd*,[34] the parties agreed to arrange for the manufacture of a quantity of garments in mainland China and their subsequent export to Germany. The plaintiff was to arrange the necessary licences for import into Germany, and the defendant was to arrange the necessary licences for export from mainland China. Unbeknownst to either party at the time the agreement was concluded, the mainland authorities were no longer issuing licences for export of the relevant class of garments to Germany (the export quota under international agreements for that class of garments being full). The result was that the goods were not exported to Germany and the plaintiff claimed damages for breach of contract. The defendant argued that the contract was void for common mistake; both parties erred

30 cf *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377, [1951] Argus LR 771 (HC, Aust). See **[15-16]**.

31 Had the *Tony Investments* court not been prepared to accept that the error was not Fung's fault (and the court expressed considerable doubt on this point), it would have been able to find that the third *Great Peace* condition was not satisfied: 'the non-existence of the state of affairs must not be attributable to the fault of either party'.

32 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689 at para 80.

33 *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1988] 3 All ER 902 at 912, [1989] 1 WLR 255 (QB) at 268.

34 *Jan Albert (HK) Ltd v Shu Kong Garment Factory Ltd* [1989] 2 HKC 156, [1990] 1 HKLR 317 (CA).

2.2.2 Fall of common mistake in equity

[15-35] Although the new approach by Denning LJ found approval in some subsequent authorities,[42] it also met with a certain amount of resistance or scepticism as having ventured beyond that which a fair reading of the authorities supported.[43] The English Court of Appeal has since performed a counter-revolution by burying the Denning doctrine on equitable common mistake.

Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd

Court of Appeal (England and Wales)
[2002] EWCA Civ 1407, [2003] QB 679, [2002] 4 All ER 689, [2002] 3 WLR 1617

For the facts, see **[15-21]**. The defendants submitted that even if the contract was not tainted by common mistake at common law, the facts of the case made it appropriate for rescission in equity. The following passages from the decision address the question as to whether a contract might ever be rescinded for common mistake subject to conditions in equity (ie, terminated subject to equitable conditions).

Lord Phillips MR:

...

Mistake in equity

95. In *Solle v Butcher*[44] Denning LJ held that a court has an equitable power to set aside a contract that is binding in law on the ground of common mistake. Subsequently, as Lord Denning MR, in *Magee v Pennine Insurance Co Ltd*,[45] he said of *Bell v Lever Bros Ltd*:

> I do not propose today to go through the speeches in that case. They have given enough trouble to commentators already. I would say simply this: A common mistake, even on a most fundamental matter, does not make a contract void at law; but it makes it voidable in equity. I analysed the cases in *Solle v Butcher*,[46] and I would repeat what I said there: 'A contract is also liable in equity to be set aside 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.'

96. Neither of the other two members of the court in *Magee's* case cast doubt on *Bell v Lever Bros Ltd*. Each purported to follow it, although reaching different conclusions on the facts. It is axiomatic that there is no room for rescission in equity of a contract which is void. Either Lord Denning MR was purporting to usurp the common law principle in *Bell v Lever Bros Ltd* and replace it with a more flexible principle of equity, or the equitable remedy of rescission that he identified is one that operates in a situation where the mistake is not of such a nature as to avoid the contract. Decisions have, hitherto, proceeded on the basis that the latter is the true position. ...

97. Toulson J [in the court below] has taken a different view. He has concluded that it is not possible to differentiate between the test of mistake identified in *Bell v Lever Bros Ltd* and that advanced by Denning LJ as giving rise to the equitable jurisdiction to rescind. He has examined the foundations upon which Denning LJ founded his decision in *Solle v Butcher* and found them defective. These are conclusions that we must review. If we agree with them the question will then arise of whether it was open to him, or is open to this court, to rule that the doctrine of common mistake leaves no room for the intervention of equity.

98. The following issues fall to be considered in relation to the effect of common mistake in equity. (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*? ...

Common mistake in equity prior to Bell v Lever Bros Ltd

99. The doctrine of common mistake at common law which we have identified cannot be said to have been firmly established prior to *Bell v Lever Bros Ltd* — see the comments of the High Court [of Australia] in *McRae's* case and of the authors of *Meagher, Gummow and Lehanne, Equity: Doctrines and Remedies*, 3rd ed, (1992) p 372, para 1413. Little wonder if litigants, confronted with what appeared to them to be agreements binding in law should invoke the equitable jurisdiction of the Court of Chancery in an attempt to be released from their obligations, when they considered justice so demanded. Nor is it surprising if the Chancery Court granted the relief sought on the basis upon which it was claimed. It is not realistic to infer that when such relief was granted, the court implicitly determined that the contract was binding in law.

100. The precise circumstances in which the Court of Chancery would permit rescission of a contract were not clearly established in the latter half of the nineteenth century. Thus, not until after the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) did the judgment of Sir George Jessel MR in *Redgrave v Hurd*[47] make it clear that equity would order rescission of a contract induced by innocent, as opposed to fraudulent, misrepresentation. In such circumstances both parties would normally be labouring under a common mistake when the contract was concluded, but a significant further step was needed if equity was to grant rescission where a contract was based on a common mistake that was not induced by one of the parties. While a number of eighteenth and nineteenth century cases prior to the decision in *Cooper v Phibbs*[48] lend some support to the thesis that equity had taken that step, 'no coherent equitable doctrine of mistake can be spelt from them'—see the discussion in Goff and Jones, *The Law of Restitution*, 5th ed, (1998) pp 288–289 and Meagher, pp 375–376, para 1420. *Cooper v Phibbs* was however the decision primarily relied upon by Denning LJ in *Solle v Butcher* — he described it as 'the great case', and it is necessary to consider it with care. In this task we have been assisted by the analysis in 'A Note on *Cooper v Phibbs*' (1989) 105 LQR 599 by Paul Matthews ...

101. At the heart of the case was a dispute as to title to a fishery in Ireland. The fishery, together with a cottage, was the subject of an agreement for a three-year lease entered into by Phibbs, the respondent, with Cooper, the appellant. Phibbs was acting as agent for five sisters, who believed that they had inherited the fishery from their father. He, in the belief that he was the owner of the fishery in fee simple, had expended much money in improving it. Cooper contended that, after entering into the lease, he had discovered that the fishery had at all material times been trust property and that, in consequence of a series of events of very great complexity, he was entitled to an equitable life interest. It was ultimately not disputed, however, that the head lease of the cottage was vested in the sisters.

102. Cooper petitioned the Court of Chancery in Ireland[49] seeking an order that the agreement be delivered up to be cancelled and that Phibbs be restrained from suing upon it. Cooper at all times made it plain that he was prepared to submit to any terms which the court might impose. The Lord Chancellor of Ireland dismissed the petition, without prejudice to the question as to ownership of the fishery, holding that no ground for the grant of relief had been made out. Cooper appealed, contending that the agreement ought to be set aside as made under mistake of fact and that he should be declared to have title to the fishery.

42 For example, *Grist v Bailey* [1967] Ch 532, [1966] 2 All ER 875, [1966] 3 WLR 618 (Ch); *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507, [1969] 2 All ER 891, [1969] 2 WLR 1278 (CA, Eng).

43 For example, *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1988] 2 All ER 902, [1989] 1 WLR 255 (QB).

44 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107 (CA, Eng).

45 *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 at 514, [1969] 2 All ER 891, [1969] 2 WLR 1278 (CA, Eng) at 893–894.

46 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107 at 1120 (CA, Eng) at 693.

47 *Redgrave v Hurd* (1881) 20 Ch D 1 at 12, [1881–85] All ER Rep 77 (CA, Eng) at 79.

48 *Cooper v Phibbs* (1867) LR 2 HL 149, [1861–73] All ER Rep Ext 2109 (HL).

49 *Cooper v Phibbs* (1865) 17 Ir Ch Rep 73 (Ch, Ireland).

contention that the contract had been concluded under a common mistake of fact, holding that the mistake was one of law.

120. The Court of Appeal, by a majority, reversed this decision. …

…

122. Denning LJ[56] first identified the effect of common mistake under principles of common law:

> Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of *Bell v Lever Bros Ltd* [1932] AC 161, 222, 224, 225–227, 236. The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. A fortiori, if the other party did not know of the mistake, but shared it. The cases where goods have perished at the time of sale, or belong to the buyer, are really contracts which are not void for mistake but are void by reason of an implied condition precedent, because the contract proceeded on the basic assumption that it was possible of performance.

123. Applying those principles he held that it was clear that there was a contract. The parties had agreed in the same terms on the same subject matter. True it was that there was a fundamental mistake as to the rent which could be charged, but that did not render the lease a nullity. … He continued:[57]

> A contract is also liable in equity to be set aside 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.

124. For this proposition Denning LJ relied primarily on *Cooper v Phibbs*. … He added:[58] '*Cooper v Phibbs* affords ample authority for saying that, by reason of the common misapprehension, this lease can be set aside on such terms as the court thinks fit.' …

…

126. Toulson J described this decision by Denning LJ as one which 'sought to outflank *Bell v Lever Bros Ltd*'. We think that this was fair comment. It was not realistic to treat the House of Lords in *Bell v Lever Bros Ltd* as oblivious to principles of equity, nor to suggest that 'if it had been considered on equitable grounds the result might have been different'. For the reasons that we have given, we do not consider that *Cooper v Phibbs* demonstrated or established an equitable jurisdiction to grant rescission for common mistake in circumstances that fell short of those in which the common law held a contract void. In so far as this was in doubt, the House of Lords in *Bell v Lever Bros Ltd* delimited the ambit of operation of *Cooper v Phibbs* by holding, rightly or wrongly, that on the facts of that case the agreement in question was void at law and by holding that, on the facts in *Bell v Lever Bros Ltd*, the mistake had not had the effect of rendering the contract void.

127. It was not correct to state that *Cooper v Phibbs*, as interpreted by Denning LJ, was 'in no way impaired by *Bell v Lever Bros Ltd*', …

…

129. Nor was it accurate to state that *Cooper v Phibbs* afforded ample authority for saying that the lease could be set aside 'on such terms as the court thinks fit'. As we have demonstrated,

56 *Solle v Butcher* [1950] 1 KB 671 at 691, [1949] 2 All ER 1107 (CA, Eng).
57 *Solle v Butcher* [1950] 1 KB 671 at 693, [1949] 2 All ER 1107 (CA, Eng) at 1120.
58 *Solle v Butcher* [1950] 1 KB 671 at 695, [1949] 2 All ER 1107 (CA, Eng) at 1121.

the terms imposed by the House of Lords in *Cooper v Phibbs* were no more than necessary to give effect to the rights and interests of those involved.

130. In *Bell v Lever Bros Ltd* the House of Lords equated the circumstances which rendered a contract void for common mistake with those which discharged the obligations of the parties under the doctrine of frustration. Denning LJ rightly concluded that the facts of *Solle v Butcher* did not amount to such circumstances. The equitable jurisdiction that he then asserted was a significant extension of any jurisdiction exercised up to that point and one that was not readily reconcilable with the result in *Bell v Lever Bros Ltd*.

131. If the result in *Solle v Butcher* extended beyond any previous decision the scope of the equitable jurisdiction to rescind a contract for common mistake, the terms of Denning LJ's judgment left unclear the precise parameters of the jurisdiction. The mistake had to be 'fundamental', but how far did this extend beyond Lord Atkin's test of a mistake 'as to some quality which makes the thing without the quality essentially different from the thing as it was believed to be'? The difficulty in answering this question was one of the factors that led Toulson J to conclude that there was no equitable jurisdiction to rescind on the ground of common mistake a contract that was valid in law. …

…

Summary

153. 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 contract 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. It is possible to reconcile *Solle v Butcher* and *Magee's* case with *Bell v Lever Bros Ltd* only by postulating that there are two categories of mistake, one that renders a contract void at law and one that renders it voidable in equity. Although later cases have proceeded on this basis, it is not possible to identify that proposition in the judgment of any of the three Lords Justices, Denning, Bucknill or Fenton Atkinson, who participated in the majority decisions in the former two cases. Nor, over 50 years, has it proved possible to define satisfactorily two different qualities of mistake, one operating in law and one in equity.

154. In *Solle v Butcher* Denning LJ identified the requirement of a common misapprehension that was 'fundamental', and that adjective has been used to describe the mistake in those cases which have followed *Solle v Butcher*. We do not find it possible to distinguish, by a process of definition, a mistake which is 'fundamental' from Lord Atkin's mistake as to quality which 'makes the thing contracted for essentially different from the thing that it was believed to be'.[59]

155. *A common factor in Solle v Butcher* and the cases which have followed it can be identified. The effect of the mistake has been to make the contract a particularly bad bargain for one of the parties. Is there a principle of equity which justifies the court in rescinding a contract where a common mistake has produced this result?

> Equity is … a body of rules or principles which form an appendage to the general rules of law, or a gloss upon them. In origin at least, it represents the attempt of the English legal system to meet a problem which confronts all legal systems reaching a certain stage of development. In order to ensure the smooth running of society it is necessary to formulate general rules which work well enough in the majority of cases. Sooner or later, however, cases arise in which, in some unforeseen set of facts, the general rules produce substantial unfairness. (See *Snell's Equity*, 30th ed, (2000) p 4, para 1-03.)

156. Thus the premise of equity's intrusion into the effects of the common law is that the common law rule in question is seen in the particular case to work injustice, and for some reason the common law cannot cure itself. But it is difficult to see how that can apply here. Cases of fraud and misrepresentation, and undue influence, are all catered for under other existing and uncontentious equitable rules. We are only concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in

59 See *Bell v Lever Bros Ltd* [1932] AC 161 at 218, [1931] All ER Rep 1 (HL) at 28.

[15-42] Consequently, it must now be regarded as unlikely that *Cooper* can any longer serve as authority in England or Hong Kong for the proposition that a contract tainted by common mistake at common law is subject to rescission in equity.[69]

3. Mutual Mistake

[15-43] Vagueness or ambiguity in an offer will be fatal to the establishment of a *consensus ad idem* if there is no reasonable and objective basis upon which to ascertain the offeror's true meaning and if the vagueness or ambiguity is fundamental to the agreement.

[15-44] In *Raffles v Wichelhaus*,[70] the parties entered into an arrangement by which the defendant was to purchase a quantity of cotton from the plaintiff. The cotton was located in India and the defendant required it to be shipped to England 'to arrive ex Peerless from Bombay' and to be paid for after arrival in England. There were two vessels named *Peerless*; one departed Bombay in October and the other in December. The defendant intended the October *Peerless*, while the plaintiff intended the December *Peerless*. When the cotton arrived in England aboard the December *Peerless*, the defendant refused to take possession of or pay for the goods. In an action for breach of contract, the defendant submitted that there was no basis upon which the ambiguity could be resolved, no *consensus ad idem*, and therefore no contract. The Court of Exchequer unanimously[71] gave judgment for the defendants.

[15-45] The onus is on the party asserting a contract to prove, on the balance of probabilities, that a reasonably certain agreement was concluded. Where a fundamental term is so ambiguous that a reasonable person could not ascertain its meaning, it will be void for mutual mistake (and uncertainty).

Falck v Williams

Privy Council
[1900] AC 176, (1900) 69 LJPC 17

Lord MacNaghten:

Mr Falck, who was plaintiff in the action and is now the appellant, was a shipowner residing in Norway; Williams, the respondent, was a shipbroker in Sydney, New South Wales.

Through one Buch, who was a shipbroker and chartering agent at Stavanger, in Norway, Falck did a good deal of business with Williams. Buch and Williams corresponded by means of a telegraphic code, or rather a combination of two codes arranged between them. It was owing to a misunderstanding of a code message relating to one of Falck's vessels called the *Semiramis* that the difficulty arose which led to the present litigation. Falck sued Williams for breach of a contract of affreightment to load the *Semiramis* with a cargo of copra in Fiji for delivery in the United Kingdom or some port in Europe. Williams understood the proposal made to him to be a proposal for carriage of a cargo of shale to be loaded at Sydney and delivered at Barcelona, and he accepted the proposal under this impression. It was conceded that both parties acted in good faith, and that the mistake was unintentional, whoever might be to blame for the misunderstanding. The case came on for trial before Owen J and a jury. A verdict was taken by consent for the defendant. The amount of damages, if damages were recoverable, was fixed by agreement. All other questions were reserved for the Full Court. The Full Court dismissed the action with costs.

The first question is, Was there a contract? If there was no contract in fact, Was the proposal made on Falck's behalf so clear and unambiguous that Williams cannot be heard to say that he misunderstood it? If that question be answered in the negative, all other questions become immaterial. …

… the whole controversy when the matter is threshed out seems to be narrowed down to this question — Is the word 'estcorte' to be read with what has gone before or with what follows? In their Lordships' opinion there is no conclusive reason pointing one way or the other. The fault lay with the appellant's agent. If he had spent a few more shillings on his message, if he had even arranged the words he used more carefully, if he had only put the word 'estcorte' before the word 'begloom' instead of after it, there would have been no difficulty. It is not for their Lordships to determine what is the true construction of Buch's telegram. It was the duty of the appellant as plaintiff to make out that the construction which he put upon it was the true one. In that he must fail if the message was ambiguous, as their Lordships hold it to be. If the respondent had been maintaining his construction as plaintiff he would equally have failed.

Their Lordships will therefore humbly advise Her Majesty that this appeal must be dismissed.

69 Indeed, it is perhaps more correct to not regard *Cooper v Phibbs* as ever having been a case of mistake at all. The 'mistake' under which the plaintiff laboured was induced by certain statements made to him by his uncle who was represented in the proceedings by the defendants. In modern legal parlance, *Cooper v Phibbs* is a case not of mistake, but of misrepresentation. At the time of the judgment, the only remedy available for what we now refer to as a non-fraudulent misrepresentation was rescission in equity.

70 *Raffles v Wichelhaus* (1864) 2 H & C 906, (1864) 159 ER 375.

71 Pollock CB, Martin and Pigott BB.

[15-46] Because of the code they used in their communications, the parties in *Falck* were at cross purposes with each other about several matters fundamental to the agreement, and there was simply no 'conclusive reason pointing one way or the other' to resolve the matter reasonably and objectively. Consequently, the agreement between the parties was void for mutual mistake.

[15-47] Where, however, there is a reasonable basis on which the apparent vagueness or ambiguity can be objectively resolved, there will be no operative mutual mistake. In *Tang Wai Kuen Raymond v Asia Landscaping Ltd*,[72] for instance, following a tendering process, the defendant was engaged by a third party under a 'Trade Contract' to perform certain landscaping work at 'Zones A, B, and C' of the Venetian hotel in Macau for a payment of almost MOP 14 million. The defendant then entered into a 'Consultancy Agreement' with the plaintiff, according to which the plaintiff was to be paid specified sums under the headings of 'Consultants Fee' and 'Traffic Allowance'. The Consultancy Agreement further provided that the plaintiff was to be paid '5% Bonus for all the variation amount'. The Trade Contract was then supplemented by agreements extending the scope of the landscaping project to Zones D and E for a revised total payment of almost MOP 31 million. The parties to the Consultancy Agreement disputed over the meaning of 'variation amount' in that agreement. The plaintiff contended that the effect of the supplementary agreements was to vary the Trade Contract, so that he became entitled under the Consultancy Agreement to a 5% bonus on the whole of the payment increase. The defendant countered that, although the Trade Agreement expressly applied only to Zones A, B and C, it was always understood by the plaintiff and defendant to encompass Zones D and E. Consequently, the increased scope of the works under the supplemental agreements did not amount

72 *Tang Wai Kuen Raymond v Asia Landscaping Ltd* [2010] HKCU 1988 (unreported, HCCT 11 & 11A/2008, 16 September 2010) (CFI).

to a 'variation' within the meaning of the Consultancy Agreement. At the very least, according to the defendant, the variation clause in the Consultancy Agreement was fatally ambiguous, and the onus was on the plaintiff to prove otherwise. Reyes J accepted that 'the terms "variation" and "variation amount" are not terms of art bearing only one meaning' and that 'different people may use the terms to mean different things'.[73] Nevertheless, the court rejected the defendant's submission that the terms were tainted by a fatal ambiguity. On the contrary, having regard to the tender documents that the defendant provided to the plaintiff at the time the Consultancy Agreement was being prepared, and a verbal assurance given to the plaintiff by the defendant that he would be 'earning a bonus on works over $13 million', it was 'natural and reasonable' to interpret the variation clause in the way asserted by the plaintiff. Accordingly, the case was 'miles away from the *Raffles v Wichelhaus* situation'[74] and the clause was not tainted by mutual mistake.

4. Unilateral Mistake

4.1 Elements of unilateral mistake

[15-48] A unilateral mistake will exist where, at the time the agreement was made, one of the parties made a sufficiently important or fundamental mistake as to the existence or meaning of a term of the proposed contract and the other party either: (1) had knowledge of the first party's error; or (2) induced the first party's error. Conversely, there will be no operative unilateral mistake where one party made an error but the other party lacked either knowledge of the mistaken party's misapprehension or responsibility for inducing it.[75]

4.2 Term of the agreement

[15-49] In order for an error to constitute an operative unilateral mistake, it must concern a term of the agreement. In contrast to common mistake, it is not enough that the unilateral mistake concerns a fact fundamental to the achievement of the contractual adventure but which finds no embodiment in a term of the agreement.[76] With unilateral mistake, a misunderstanding concerning a matter which is not a contractual term (such as some quality of the subject matter where that matter is not itself the subject of an express or implied term) will not operate to vitiate the contract.

[15-50] Unilateral mistake frequently manifests itself in the form of an offer that does not represent the offeror's true contractual intention, and the offeree has knowledge of

73 *Tang Wai Kuen Raymond v Asia Landscaping Ltd* [2010] HKCU 1988 (unreported, HCCT 11 & 11A/2008, 16 September 2010) (CFI) at para 10.

74 *Tang Wai Kuen Raymond v Asia Landscaping Ltd* [2010] HKCU 1988 (unreported, HCCT 11 & 11A/2008, 16 September 2010) (CFI) at paras 34, 36 and 37.

75 eg, *Long Ford Garment Ltd v JAS Forwarding (Hong Kong) Ltd* [2005] 4 HKC 136 (CA); *Tamplin v James* (1880) 15 Ch D 215, [1874–80] All ER Rep 560 (CA, Eng); *Riverlate Properties Ltd v Paul* [1975] Ch 133, [1974] 2 All ER 656, [1974] 3 WLR 564 (CA, Eng); *The Unique Mariner* [1978] 1 Lloyd's Rep 438 (QB) (unilateral mistake as to counterparty's identity).

76 This traditional view was reaffirmed by Aikens J in *Statoil ASA v Louis Dreyfus Energy Services LP (The 'Harriette N')* [2008] EWHC 2257 (Comm), [2009] 1 All ER (Comm) 1035, [2008] 2 Lloyd's Rep 685.

the offeror's error. A mere misunderstanding or misinterpretation of the offer by the offeree will not, however, constitute a unilateral mistake on which the offeree may rely in order to avoid the contract.

Smith v Hughes

Court of Queen's Bench
(1871) LR 6 QB 597, [1861–73] All ER Rep 632, 40 LJQB 221

Cockburn CJ:

This was an action brought in the county court of Surrey, upon a contract for the sale of a quantity of oats by plaintiff to defendant, which contract the defendant had refused to complete, on the ground that the contract had been for the sale and purchase of *old* oats, whereas the oats tendered by the plaintiff had been oats of the last crop, and therefore not in accordance with the contract.

The plaintiff was a farmer, the defendant a trainer of racehorses. And it appeared that the plaintiff, having some good winter oats to sell, had applied to the defendant's manager to know if he wanted to buy oats, and having received for answer that he (the manager) was always ready to buy good oats, exhibited to him a sample, saying at the same time that he had forty or fifty quarters of the same oats for sale, at the price of 35s. per quarter. The manager took the sample, and on the following day wrote to say he would take the whole quantity at the price of 34s. a quarter.

So far the parties were agreed; but there was a conflict of evidence between them as to whether anything passed at the interview between the plaintiff and defendant's manager on the subject of the oats being *old* oats, the defendant asserting that he had expressly said that he was ready to buy old oats, and that the plaintiff had replied that the oats were old oats, while the plaintiff denied that any reference had been made to the oats being old or new.

The plaintiff having sent in a portion of the oats, the defendant, on meeting him afterwards, said, 'Why, those were new oats you sent me;' to which the plaintiff having answered, 'I knew they were; I had none other.' The defendant replied, 'I thought I was buying old oats: new oats are useless to me; you must take them back.' This the plaintiff refused to do, and brought this action. ...

The learned judge of the county court left two questions to the jury: first, whether the word 'old' had been used with reference to the oats in the conversation between the plaintiff and the defendant's manager; secondly, whether the plaintiff had believed that the defendant believed, or was under the impression, that he was contracting for old oats; in either of which cases he directed the jury to find for the defendant.

It is to be regretted that the jury were not required to give specific answers to the questions so left to them. For, it is quite possible that their verdict may have been given for the defendant on the first ground; in which case there could, I think, be no doubt as to the propriety of the judge's direction; whereas now, as it is possible that the verdict of the jury—or at all events of some of them—may have proceeded on the second ground, we are called upon to consider and decide whether the ruling of the learned judge with reference to the second question was right.

For this purpose we must assume that nothing was said on the subject of the defendant's manager desiring to buy *old* oats, nor of the oats having been said to be old; while, on the other hand, we must assume that the defendant's manager believed the oats to be old oats, and that the plaintiff was conscious of the existence of such belief, but did nothing, directly or indirectly, to bring it about, simply offering his oats and exhibiting his sample, remaining perfectly passive as to what was passing in the mind of the other party. The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not.

... It cannot be said that, if he had gone and personally inspected the oats in bulk, and then, believing—but without anything being said or done by the seller to bring about such a belief—that the oats were old, had offered a price for them, he would have been justified in repudiating the contract, because the seller, from the known habits of the buyer, or other circumstances,