

MAKING MISTAKES

P.S. Davies*

ABSTRACT

This article discusses the legal impact of mistakes made by parties in contractual transactions in common law. It begins by highlighting the difficulty in defining mistakes, and goes on to discuss situations in which courts allow parties to escape performance of contracts concluded on the basis of a mistake. The author has discussed the effect of a mistake in varied circumstances, such as unilateral mistake (mistaken identity), deeds, unjust enrichment and proprietary restitution. The author argues that a claimant should be entitled to relief only in the event of a fundamental mistake. This restricts the situations in which parties can avoid a contract, thereby increasing commercial certainty. The author has analysed separately transactions under contracts and deeds and those which are gratuitous. He concludes by opining that when parties plead mistake as a ground for avoidance, the courts must be cautious in upholding such claims and must allow it in rare circumstances. The author suggests that parties should bear the consequences of their mistakes, as holding otherwise would unfairly prejudice innocent third parties.

I	INTRODUCTION.....
II.	CONTRACT
	A. Common Mistake.....
	B. Unilateral Mistake.....
III.	DEEDS
IV.	UNJUST ENRICHMENT.....
V.	PROPRIETARY RESTITUTION
VI.	CONCLUSION.....

* Newton Trust Lecturer and Fellow in Law, University of Cambridge.

I. INTRODUCTION

"The mistakes are all there waiting to be made."

– Chess Grandmaster Savielly Tartakower

"Mistakes are almost always of a sacred nature. Never try to correct them. On the contrary: rationalise them, understand them thoroughly. After that, it will be possible for you to sublimate them."

– Salvador Dali, journal entry, 30 June 1952 in
"Diary of a Genius" (1966)

Mistakes are common. It is difficult to survive an entire day without making a mistake. We are taught from childhood to "*learn from our mistakes*". This is coupled with a realisation that we have to live with the consequences of our mistakes. It is because of this that we learn – or, at least, hope to learn – not to repeat our mistakes.

Given the frequency with which mistakes occur, it is unsurprising to find the courts regularly grappling with cases involving mistakes. The vast array of possible mistakes, and the very different contexts and consequences of such mistakes, have made it difficult for the courts to establish clear guidelines about what the effect, if any, of a mistake should be. This article will focus upon mistaken transactions¹ in English law. This area of the law is complex and fraught with difficulties and fine distinctions. It will be argued that the law should, generally, not intervene to correct a mistake. This should protect the important principles of security of receipt and finality of transactions; certainty and the ability to rely upon completed transactions are particularly important in the commercial sphere. But there are, of course, exceptions to the principle that parties should have to live with their mistakes. One exception that seems to pervade private law is that relief may be available if the mistake was "*fundamental*". However, the notion of a fundamental mistake has been described as "*notoriously uncertain*".² This article will seek to examine what is meant by "*fundamental mistake*", and explain why only a very limited class of mistakes should ever assist a claimant. Yet it should be noted at the outset that insisting upon the need for a fundamental mistake means that a claimant seeking relief needs to establish and rely upon the fact that he made a massive, fundamental mistake, rather than any "*lesser*", and perhaps more understandable, mistake.

Transactions effected under contracts, deeds, and entirely freely and gratuitously will be distinguished and examined separately. The controversies in

1 This term is defined broadly in this article to cover gifts as well.

2 G. VIRGO, *THE PRINCIPLES OF THE LAW OF RESTITUTION* 585 (2nd edn., 2006).

Making Mistakes

each area will be outlined and some assessment made. A common difficulty within this topic is that the very term 'mistake' is not easy to define. In *Barrow v. Isaacs*, Kay L.J. expressed the view that, "very wisely ... the Courts have abstained from giving any general definition of what amounts to a mistake".³ Yet such an approach may only serve to increase the uncertainties inherent in this area. More recently, in *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd*, Lord Phillips MR stated, "a mistake can be defined simply as an erroneous belief".⁴ But does such a belief have to be consciously held? Views legitimately differ.⁵ However, it is suggested that a wide view of mistake may be employed for present purposes, such that tacitly held beliefs can be mistaken.⁶ The definition of mistake may not need to be restricted, provided that only a limited class of 'fundamental' mistakes may ground relief. This will be elaborated below.

II. CONTRACT

A party to a contract may seek to escape the consequences of the transaction by pleading mistake. However, English law generally takes a sceptical view of such claims.⁷ A party may claim that the written document itself is mistaken, but the courts will not easily accept that a mistake has been made,⁸ or that it should be corrected.⁹ More fundamentally, a party may contend that it is mistaken as to the substance of the bargain. Although it is well-established that a non-mistaken party cannot 'snap up' an offer where he knows the other party is mistaken,¹⁰

3 *Barrow v. Isaacs*, (1891) 1 QB 417, 425 [Court of Appeal].

4 *Great Peace Shipping Ltd v. Tsavlis Salvage (International) Ltd*, [2002] EWCA Civ 1407, [2003] QB 679, [28] [Court of Appeal].

5 Sheehan, *What is a Mistake?*, 20 LEGAL STUDIES 538 (2000), argues that a conscious belief is required, whereas FARNSWORTH, *ALLEVIATING MISTAKES: REVERSAL AND FORGIVENESS FOR FLAWED PERCEPTIONS* (2004) is prepared to take a wider view.

6 See *Pitt v. Holt*, [2011] EWCA Civ 197; [2011] 3 WLR 19 [Court of Appeal], considered below. [Hereinafter, "Pitt"]

7 Parties should not be able to escape a bad bargain that results from their own volition: e.g. A claimant will not be able to claim his reliance loss instead of expectation loss in order to escape a losing contract (*C & P Haulage (a firm) v. Middleton*, [1983] 1 WLR 1461) [Court of Appeal].

8 See Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society*, [1998] 1 WLR 896, 912-3 [House of Lords]; *Chartbrook Ltd v. Persimmon Homes Ltd*, [2009] UKHL 38; [2009] 1 AC 1101, [14] [House of Lords].

9 Correction might occur either through interpretation or rectification. See R. Buxton, "Construction" and Rectification After *Chartbrook*, 69 CAMBRIDGE LAW JOURNAL 253 (2010).

10 See *Hartog v. Colin & Shields*, [1939] 3 All ER 566 [King's Bench Division]. See also, *Smith v. Hughes*, (1871) LR 6 QB 597 [Queen's Bench].

generally the law insists that autonomous parties can fend for themselves and that the court should not interfere in the bargain reached.¹¹ But controversial instances of mistake arise where a party claims that a contract is void for a “*common mistake*” or “*unilateral mistake*”, and these areas will now be considered in turn.

A. Common Mistake

Where both parties share a common mistake, it might be thought logical that a contract be declared void. However, such an approach would undermine the stability of contracts. After all, the role of the courts is, generally, simply to give effect to the bargain which the parties have entered, rather than disturb, alter, or invalidate that agreement. If the parties want to set aside the contract, then they can mutually agree to do this. But there is no need for the court to interfere. This is particularly important because contracts may not solely concern the original parties to the agreement; contractual rights might have been assigned to third parties, for example.

Nevertheless, if the parties share a ‘fundamental’ mistake, then the agreement may be said to be void. The leading decision remains that of the House of Lords in *Bell v. Lever Brothers*.¹² The case concerned Bell and Snelling, who were directors of a company operating in West Africa. They were paid large severance payments by the controlling parent company, Lever Brothers. Lever Brothers later discovered that the directors had already been dismissed without compensation because of their breach of fiduciary duties. Lever Brothers sought to recover the severance payments on the ground of mistake.

The House of Lords examined the disparate authorities on the issue of mistake. A bare majority held that the payments could not be recovered. This was because the mistake was not sufficiently serious, or fundamental. Lord Thankerton insisted that mistake has to, “*relate to something which both must necessarily have accepted in their minds as an essential and integral element of the subject-matter*”.¹³

Emphasising that mistake would rarely operate to vitiate an agreement, Lord Atkin said:

“It is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts

11 After all, the courts will not examine the “adequacy” of consideration as long as it is “sufficient” (See *Thomas v. Thomas*, (1842) 2 QB 851).

12 *Bell v. Lever Brothers*, [1932] AC 161 [House of Lords]. [Hereinafter, “*Bell*”]

13 *Bell*, 235.

Making Mistakes

– i.e., they agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.”¹⁴

As a result of the decision in *Bell*, very few mistakes will have the effect that parties can escape the transaction. This restrictive approach protects the finality of transactions, and enables all concerned – and third parties – to rely upon concluded contracts. It is worth highlighting how little scope remains for arguing that a contract is void on the basis of a shared mistake. On the facts of *Bell* itself, Lever Brothers already had the right to terminate the employment of the directors; in effect, they were paying for something they already owned. Moreover, the directors were selling their right to continue in employment, even though this was a right they no longer possessed.¹⁵ The minority’s insistence that this contract was void for mistake was therefore far from outrageous. Yet the decision in *Bell* has consistently been supported, and if the mistake was insufficiently fundamental in *Bell*, then it will be very difficult to establish a fundamental mistake in any future case.¹⁶

The limited scope of relief for mistake was supported more recently by the Court of Appeal in *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.*¹⁷ A salvage company hired the claimant’s ship for five days to escort a ship which was in danger of sinking in the Indian Ocean. The salvage company had thought the claimant’s ship was much closer than it actually was; in fact, another ship was nearer and better-placed to provide assistance. The salvage company sought to argue that the contract was void on the basis of a fundamental mistake. This argument was rightly rejected. The Court of Appeal emphasised that the mistake was not fundamental: the claimants could still provide the assistance envisaged and escort the ship under the agreement reached.

Lord Phillips MR took the opportunity to formulate the requirements of common mistake:

“The following elements must be present if common mistake is to avoid a contract: (i) there must be a common assumption as to the

14 *Bell*, 224.

15 See J.C. Smith, *Contracts—Mistake, Frustration and Implied Terms*, 110 LAW QUARTERLY REVIEW 400, 414-415 (1994). [Hereinafter, “SMITH”]

16 Beyond mistake as to subject matter, further instances may include “commercial impossibility” (e.g. *Griffith v. Brymer*, (1903) 19 TLR 434.) [King’s Bench Division], “physical impossibility” (e.g. *Sheikh Bros Ltd v. Ochsner*, [1957] AC 136.) and “legal impossibility”; See E. PEEL, *TREITEL: THE LAW OF CONTRACT* 317-318 (13thedn., 2011).

17 *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.*, [2002] EWCA Civ 1407; [2002] 3 W.L.R. 1617. [Hereinafter, “*The Great Peace*”]

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."¹⁸

These requirements must be read consistently with *Bell*, which is the higher authority. The requirement of "impossibility" might not be interpreted too literally;¹⁹ the thrust of the reasoning is that the mistake must be fundamental. In addition, this passage emphasises that a party who is at fault in making a mistake will not be aided by the courts. This is particularly important: why should the court assist someone who was at fault in making a mistake?²⁰

The other major effect of *The Great Peace* is to rid the law of the doctrine of "mistake in equity". The origins of that doctrine are commonly thought to be found in the judgment of Lord Denning MR in *Solle v. Butcher*.²¹ Lord Denning essentially recognised that some mistakes were sufficiently fundamental to render a contract voidable in equity. This was thought to supplement the common law doctrine of mistake emanating from *Bell*.²² In effect, it was possible to rationalise the law

18 *The Great Peace*, 1693.

19 *Brennan v. Bolt Burden*, [2004] EWCA Civ 1017; [2005] QB 303. [Hereinafter, "*Brennan*"]

20 And in seeming contrast to the approach taken by the law of unjust enrichment: *See, Kelly v. Solari*, (1841) 11 LJ Ex 10; 9 M&W 54, considered at text to nn97-103, below [Hereinafter, "*Kelly*"]. However, the fact that one party will commonly be at fault for not being aware of the true state of affairs perhaps enables mistake to be distinguished from frustration. Frustration concerns a *future* frustrating event, whereas mistake concerns an error regarding an *existing* fact or law. Whereas the future is unknowable, an existing state of affairs is not, and often one of the concerned parties will be at fault for making the mistake. However, in *The Great Peace* Lord Phillips MR discussed mistake and frustration together, and, given that the difference between mistake and frustration may simply be a slight difference in the timing of the conclusion of the agreement, it might not be wise to pursue a rigid distinction between the two doctrines. But the consequences of the two doctrines differ: mistake renders the contract void *ab initio*, whereas frustration discharges obligations which would have been due to be performed after the frustrating event.

21 [1950] 1 KB 671. [Hereinafter, "*Solle*"] *See C. MACMILLAN, MISTAKES IN CONTRACT LAW* (2010), particularly chapters 3 and 9.

22 *See Associated Japanese Bank (International) Ltd v. Credit du Nord S.A.*, [1989] 1 WLR 255.

Making Mistakes

of mistake as consisting of two concentric circles: if the mistake was absolutely fundamental, then it might render the contract void at common law, whereas if the mistake was fundamental but a little less so, it might render the contract voidable in equity. Clearly, this was a confusing doctrine: it was not clear whether the mistake was such that the common law or equitable jurisdiction should be invoked. Moreover, no allusion to this equitable jurisdiction was made in *Bell*, when surely it would have been relevant to the decision in that case. As a result of such problems, it was always difficult to square *Solle* with *Bell*, and in *The Great Peace* Lord Phillips MR stated that, “we can see no way that *Solle v. Butcher* can stand with *Bell v. Lever Brothers*”.²³

Rejecting *Solle* further limits the scope of common mistake in English law. This increases commercial certainty. More contracts will be upheld. But it very much restricts the remedies available to a court. For example, under the doctrine of *Solle*, Lord Denning MR found that it was possible for the court to rescind the contract on terms.²⁴ Such remedial flexibility was favoured by many, and provides one reason why *Solle* has been maintained and *The Great Peace* not followed in other jurisdictions.²⁵ Indeed, Lord Phillips MR suggested that legislative reform for the consequences of mistake might be desirable.²⁶ However, given the very limited scope of relief for mistake, it seems unlikely that legislative time will be devoted to this topic. Parties realise that entering into a contract allocates risk between them. Mistakes will inevitably be made, and their consequences need to be borne. This is part of the risk assumed by entering into an agreement. Only fundamental error should allow a party to escape the consequences of a mistake. Such a mistake should concern an essential or basic element of the transaction, so that the contract cannot sensibly be performed. This is a tremendously high threshold to satisfy; in the vast majority of cases, the contract can still be carried out. Nevertheless, the fact that a contract is rendered void, and there is no scope for holding a contract to be voidable, may have deleterious effects upon third parties. This is, perhaps, particularly noticeable in the context of unilateral mistake, and will be further explained in the next section.

23 *The Great Peace*, 1777.

24 *Solle*, 695.

25 *Miller Paving Ltd v. B. Gottardo Construction Ltd.*, (2007) 86 O.R. (3d) 161 at [26] [(Ontario Court of Appeal)]: “The loss of the flexibility needed to correct unjust results in widely diverse circumstances that would come from eliminating the equitable doctrine of common mistake would, I think, be a step backward”. See *Phang* (2009) LS 534, 542-546.

26 *The Great Peace*, 1778.

B. Unilateral Mistake

It may be that only one party is labouring under a mistake, but that mistake is not shared by the other side. In general, this will be the fault of the mistaken party, and as a result the court will not award relief on the basis of mistake.²⁷ But the courts have sometimes granted relief on the basis of a unilateral mistake, finding that it renders the contract void. Again, it is clear that the mistake must be fundamental.

Non Est Factum

A party may be able to escape a contract on the basis of *non est factum*. This enables a party to claim that his signing the contract was “not his act”. The scope of this doctrine is very limited; it is a narrow exception to the commercially important principle that a party is bound by what he signs.²⁸ For a plea of *non est factum* to succeed, the person must have been labouring under a “disability” or impairment, not at fault, and fundamentally mistaken. The leading decision is *Saunders v. Anglia Building Society*,²⁹ in which Lord Wilberforce stated:

“... a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, i.e. more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives [sic], could be used — ‘basically’ or ‘radically’ or ‘fundamentally’”.³⁰

This strengthens the stability of concluded contracts by restricting the types of mistake which may render a contract void. In *Saunders*, an elderly woman signed a deed which she thought assigned the lease of her house to her nephew, when in fact the deed assigned the lease to her nephew’s business associate. Even this mistake was insufficiently fundamental: the essence of the deed was to assign the lease of the house, and there was no mistake about this. In so defining the essential, or basic, substance of the transaction, the identity of the assignee was excluded. It is entirely appropriate that the scope of *non est factum* be so restricted. For example, if the claimant had succeeded in *Saunders*, this would have prejudiced the building society which had innocently relied upon the existence of the contract by advancing a mortgage in the expectation that the contract was valid. If the contract had been

27 That is not to say that other grounds of relief are not available; for example, if the mistake has been induced by another party, then an action in misrepresentation may lie.

28 *L’Estrange v. Graucob Ltd*, [1934] 2 KB 394.

29 *Saunders v. Anglia Building Society*, [1971] AC 1004. [Hereinafter, “*Saunders*”]

30 *Saunders*, 1026.

Making Mistakes

void *ab initio*, the building society would have had no protection at all. Rendering a contract void can have a profound and negative impact upon third parties to the transaction.

Mistaken Identity

Generally, a mistake as to the identity of the other contracting party should not provide a reason for the mistaken party to escape the transaction. For example, if I contract to sell my book to a person, the crucial question for me is whether that party can pay, rather than who in fact that person is. The risk of the other side not being able to pay – regardless of his identity – is a normal incident of contractual relationships.

In some situations, though, it would seem that the identity of the other party is crucial. For example, the other party may have a right to set-off *vis-à-vis* the claimant, and therefore the claimant may only wish to contract with him. If the offer is expressed to be to X, who enjoys the set-off, but D purports to accept the offer, there will be no contract. There is no correspondence of offer and acceptance. This analysis is supported by the decision in *Boulton v. Jones*.³¹ But in *Boulton* it was crucial that a reasonable person in D's position would have realised that the offer was intended to be made to X. If D reasonably believed that he was the recipient of the offer, and then accepted the offer, a binding contract would be concluded.³²

The law in this area is complicated and has drawn a number of fine distinctions. *Cundy v. Lindsay*³³ remains a leading decision regarding written contracts. A defendant called Blenkarn ordered handkerchiefs from the claimants. Blenkarn signed his name such that it looked like Blenkiron & Co., a respectable firm known to the claimants. The claimants therefore entered into the contract and sent the handkerchiefs to Blenkarn's address, which was different from the address of Blenkiron. The House of Lords held that the contract was void for mistake. Crucial to the decision was the fact that the claimants were aware of Blenkiron, and intended to deal with Blenkiron only. *Cundy* can be contrasted with *King's Norton Metal Co. Ltd v. Edridge, Merrett & Co. Ltd*.³⁴ The claimants sent goods on credit to Hallam & Co, which purported to be a reputable firm but was in fact a

31 *Boulton v. Jones*, (1857) 2 H & N 564 [Hereinafter, "*Boulton*"], supported by the House of Lords in *Shogun Finance Ltd. v. Hudson*, [2003] UKHL 62. See SMITH, 400.

32 *Cf Upton-on-Severn RDC v. Powell* [1942] 1 All ER 220.

33 *Cundy v. Lindsay*, (1878) 3 App. Car. 459. [Hereinafter, "*Cundy*"]

34 *King's Norton Metal Co. Ltd v. Edridge, Merrett & Co. Ltd*, (1897) 14 TLR 98. [Hereinafter, "*King's Norton*"]

fraudster named Wallis. When Wallis failed to pay for the goods, the claimants sought to escape the contract on the ground of mistake. The claim failed. Unlike *Cundy*, the claimants did not know of Hallam & Co, and simply intended to deal with the person who had written to them. Thus the claimants were mistaken as to the attributes of the other party – his creditworthiness – rather than making the more fundamental mistake of identity which was essential to the transaction.

Such a distinction is just about possible. However, drawing a distinction between identity and attributes is fraught with difficulty.³⁵ As Lord Denning MR pointed out in *Lewis v. Averay*:

“Again it has been suggested that a mistake as to the identity of a person is one thing; and a mistake as to his attributes is another. A mistake as to identity, it is said, avoids a contract: whereas a mistake as to attributes does not. But this is a distinction without a difference. A man’s very name is one of his attributes. It is also a key to his identity. If then, he gives a false name, is it a mistake as to his identity? Or a mistake as to his attributes? These fine distinctions do no good to the law”.³⁶

Moreover, the distinction between *Cundy* and *King’s Norton* is flimsy. Both situations concerned a claimant disappointed not to receive the money promised under a contract. The crucial mistake related to the other contracting party’s ability to pay.

Finding a contract to be void for mistake can have seriously harmful effects upon third parties. A good illustration of this can be found more recently in *Shogun Finance Ltd v. Hudson*.³⁷ The claimant finance company entered into a contract to give a car on hire-purchase terms to a fraudster who said that he was Mr Durlabh Patel. The claimant and the fraudster never met; the transaction was carried out through a car dealer who forwarded the information to the finance company, who ran a credit check against Mr Patel from a distance. On the basis that Mr Patel was creditworthy, the finance company agreed to enter into the contract. Inevitably, the fraudster defaulted on the payments, but not before he had sold the car to the defendant, who had purchased the car for value and in good faith.

Whether or not the claimants could succeed in establishing a mistake had a

35 And it might be noted that it has seemingly been rejected in the context of *non est factum*.

36 *Lewis v. Averay*, [1972] 1 QB 198, 206.

37 *Shogun Finance Ltd v. Hudson*, [2003] UKHL 62. [Hereinafter, “*Shogun*”]

Making Mistakes

significant impact upon the result of the case. If a mistake could be established, then the contract would be void *ab initio*, and therefore the fraudster would never have obtained title to the car in the first place. Under the principle of *nemo dat quod non habet*— a person cannot pass on a better title than that which he himself had — the fraudster would not have been able to give the defendant good title to the car. Thus, despite acting innocently and providing value when purchasing the car, the defendant would have to give up the car to the claimant: the claimant would still have good title to the car, and would therefore be able to sue the defendant in conversion, a tort of strict liability.

By contrast, if the claimant failed to establish a mistake, then the claimant would have to rely upon the rogue's fraudulent misrepresentation rather than mistake. But the effect of misrepresentation is to render a contract voidable, not void. Title to the car could pass to the rogue under a voidable contract, and the claimant would have to rescind the contract in order to regain title to the car. However, if a third party innocently acquires rights for value in the subject-matter of the voidable contract, rescission is barred. The fact that the defendant was a *bona fide* purchaser for value without notice would mean that it would be inequitable to allow the claimant to rescind the contract once the rogue had sold the car to the defendant. In such a scenario, the defendant does gain title to the car, and would be able to keep the property.

Set out in this way, it may seem odd that the claimant is better protected if he relies on his own mistake, rather than another person's fraud. As Lord Millett observed in *Shogun*:

"It seems anomalous that a mistake which is induced by fraud should have a less vitiating effect than one which is not; and it is difficult to see why a mistake induced by fraud should make a contract altogether void if it is a mistake as to the offeror's identity (whatever that may mean) and not if it is a mistake as to some other attribute of his such as his creditworthiness which may be equally or more material."³⁸

Lord Millett concluded that there was no mistake in *Shogun*, and that the finance company should have to rely upon the fraud instead. Lord Nicholls took a similar view. Both judges would have overruled *Cundy*. Lord Millett insisted that the reasoning in *Cundy* was "unsound"³⁹ and that it "stands in the way of a coherent

38 *Shogun*, 59.

39 *Shogun*, 108.

development of this branch of the law".⁴⁰ Such an approach would have left very little room indeed for mistake to operate. This may well be desirable; after all, the claimant – in *Shogun*, the finance company – could invariably carry out further checks in order to ensure that no mistake was made.⁴¹ More importantly, the effect of a mistake is to render the contract void, and the deleterious effect this has upon innocent third parties makes this an unattractive option.⁴²

However, Lord Millett and Lord Nicholls were in the minority in *Shogun*. The majority held that the decision in *Cundy* was still good law: a mistake as to identity had been made and the contract was void. Surprisingly, perhaps, Lord Hobhouse held that the principles in this area of law were "*clear and sound and need no revision*".⁴³ Whilst it may be that the consequence of the majority decision is to make it clear that *Cundy* still applies where a contract is concluded in writing and at a distance, in part because there is still some life in the parol evidence rule,⁴⁴ it is much less obvious that the principles of law in this area are sound and need no revision. On the facts of *Shogun*, it might be thought that the finance company should be insured and better able to bear the risks of fraud than the innocent defendant who had bought the car and should not be left short-changed (of course, the fraudster in these cases has inevitably disappeared or is not worth suing). The harsh effect of relief for mistake should make the courts very reticent about finding that a fundamental mistake has been made.

Indeed, where contracts are concluded face-to-face, rather than in writing and at a distance, there is a strong presumption that the person intends to deal with whoever is opposite him, thus leaving very little scope for argument regarding mistake of identity. This is sensible: the contract is properly concluded between the parties present, and both parties should have to bear the ordinary risks about each other's ability to fulfil the contract. However, the presumption that parties

40 *Shogun*, 83.

41 C. Macmillan, *Mistake as to Identity Clarified*, 120 *LAW QUARTERLY REVIEW* 369, 373 (2004); C. Hare, *Identity Mistakes: A Missed Opportunity?*, 67 *MODERN LAW REVIEW* 993, 1003 (2004). Admittedly, it might be argued that this may be a somewhat uncommercial approach and slow down the pace of transactions. See N. ANDREWS, *CONTRACT LAW* 298-300 (2011).

42 Cf Law Reform Committee, *Twelfth Report: Transfer of Title to Chattels* (Cmnd. 2958, 1966).

43 *Shogun*, 55. Compare Sedley LJ in the Court of Appeal: "*it may be remarkable that the law governing the consequences of a fraud as common as this is still in doubt, but it is*": [2001] EWCA Civ 1000.

44 See *Shogun*, 49 (Lord Hobhouse).

intend to deal with each other is rebuttable;⁴⁵ surprisingly, in *Ingram v. Little* the Court of Appeal held that a contract was void for mistake of identity, even when the parties were dealing face-to-face.⁴⁶ This seems overly generous to mistaken claimants at the expense of innocent subsequent purchasers. Indeed, the minority in *Shogun* would have overruled *Ingram*, and suggested that the presumption would be better viewed as a rule of law.⁴⁷

The more restrictive approach generally taken in face-to-face transactions is appropriate and should be expanded to all situations. In particular, it should extend to contracts made over the telephone, or by video-link, for example.⁴⁸ The fact that mistake of identity can render a contract void is a result of the old decision of *Cundy*. Where there is no correspondence of offer and acceptance as a result of a mistake, as in *Boulton*, for example, it is possible to say that there was no concluded contract. But in cases such as *Cundy*, the claimant entered into a contract with the person writing the letter, and there is much force in the contention of the dissenting judges in *Shogun* that the claimant should not be allowed to escape the contract on the ground of mistake.

III. DEEDS

It is clear that the scope for escaping a contract on the basis of mistake is very limited indeed. But under a contract, the promises exchanged are not gratuitous: both parties provide consideration for their promises. This is not necessarily the case if property is transferred under a deed. A deed might be used as a substitute for consideration. If a party wishes to unwind the transaction and regain the property transferred, then it is incumbent upon the party to rescind the deed. The jurisdiction here is equitable, and the principles which apply to the rescission of deeds also apply to the rescission of powers of appointment exercised by trustees, for example.⁴⁹

The appropriate role for mistake in this context has been controversial. It has been argued that a deed should be rescinded if it can be proved that “but

45 *Ingram v. Little*, [1961] 1 QB 31, 66 (Devlin LJ). [Hereinafter, “*Ingram*”]

46 *Ingram*, although note the strong dissent from Devlin LJ.

47 See *Shogun*, 71-76 (Lord Millett), 37 (Lord Nicholls).

48 See *Shogun*, 188 (Lord Walker).

49 For general discussion, see C. MITCHELL, P. MITCHELL AND S. WATTERSON (eds), *GOFF & JONES: THE LAW OF UNJUST ENRICHMENT* para 9-101-9112 (8thedn., 2011). [Hereinafter, “MITCHELL”]

for" the mistake, the party would not have transferred the property under the deed, regardless of whether or not the mistake was fundamental.⁵⁰ This is a very wide test of mistake, which mirrors that commonly thought to be employed in the realm of unjust enrichment.⁵¹ However, a higher threshold has recently been insisted upon before unwinding a disposition for mistake.⁵² It is suggested that this is much more satisfactory; after all, regret alone should not provide a reason for unwinding a disposition.⁵³

The equitable jurisdiction to set aside a transaction on the ground of mistake is of long-standing. In *Ogilvie v. Littleboy*, Lindley LJ stated that:

"...a donor can only obtain back property which he has given away by showing that he was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him."⁵⁴

A more recent formulation of the test is that expressed by Millett J in *Gibbon v. Mitchell*:

"... a voluntary disposition ... will be set aside ... so long as the mistake is as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it."⁵⁵

These tests for mistake have often been viewed as alternatives.⁵⁶ *Ogilvie* has generally been thought to be more generous as it avoids any consideration of the difference between effects and consequences. Moreover, it has been suggested that a serious mistake is simply one that *caused* the trustee to act as he did. Thus

50 *Clarkson v. Barclays Private Bank and Trust (Isle of Man) Ltd*, [2007] WTLR 1703 at [41] [Hereinafter, "*Clarkson*"]. See, *Re Betsam Trust*, [2009] WTLR 1489 (Isle of Man); *In re the A Trust*, [2009] JLR 447 (Jersey); *Re Griffiths deceased*, [2008] EWHC 118 (Ch), [2009] Ch 162.

51 This will be considered in the following section.

52 *Pitt*, 19.

53 See *Breadner v. Granville-Grossman*, [2001] Ch 523 at [61] (Park J.).

54 *Ogilvie v. Littleboy*, (1897) 13 TLR 399; this decision was not departed from by the House of Lords: (1899) 15 TLR 294. [Hereinafter, "*Ogilvie*"]

55 *Gibbon v. Mitchell*, [1990] 1 WLR 1304, 1309. [Hereinafter, "*Gibbon*"]

56 For example, Professor Hayton has contrasted "the generous *Ogilvie* approach" with "the restrictive *Gibbon* approach": D. HAYTON, P. MATTHEWS AND C. MITCHELL, *UNDERHILL AND HAYTON'S LAW OF TRUSTS AND TRUSTEES* viii (18thedn., 2010). See the Royal Court of Jersey in *Re Mr and Mrs P Capital Asset Protection Plan Trust*, [2008] JRC 159 and *In the matter of B and C*, [2009] JRC 245.

Making Mistakes

in *Clarkson v. Barclays Private Bank and Trust (Isle of Man) Ltd*, Deemster Kerruish stated that:

“The best measure as to whether the mistake was so serious as to render it unjust for the volunteer donee to retain the moneys is if the payment would not have been made “but for” the mistake. In other words the mistake is the cause of the payment.”⁵⁷

However, it is suggested that such a test is too wide.⁵⁸ Not every mistake that causes a person to part with his property is sufficiently serious to warrant relief. The mistake may only concern ancillary or subsidiary matters. Indeed, the approach in *Clarkson* appears to conflate two separate issues: i) the seriousness of the mistake; and ii) whether the mistake caused the disposition.

The Court of Appeal has recently considered this issue in *Pitt*.⁵⁹ Lloyd LJ rightly rejected a “liberal” approach, such as that advocated in *Clarkson*, emphasising that it would be “a great deal too relaxed for the donor who seeks to recover his gift”.⁶⁰ His Lordship went on to reconcile *Ogilvie* and *Gibbon*: the mistake must be of sufficient gravity, and also concern the legal effect of the disposition or an existing fact which is basic to the transaction.⁶¹

In *Pitt*, Mr Derek Pitt was badly injured in a road accident, and received compensation in the form of a lump sum and monthly payments. His wife became his receiver, and was advised to put the money into a trust. Discretionary trusts of income and capital were created for the benefit of Mr Pitt and his family. Mr Pitt later died, and Mrs Pitt was the sole beneficiary of the estate. Prior to Mr Pitt’s death, the trustees realised that inheritance tax applied to the trust in the same manner as any ordinary discretionary trust. It would have been “easy”⁶² to avoid such onerous tax liabilities, by simply adding a provision for at least half of the fund applied during Mr Pitt’s lifetime to be used for his benefit.⁶³ Indeed, the actual distribution of the fund was consistent with such a provision. But because there

57 *Clarkson*, 41.

58 Compare the view of the Jersey courts: *Re S Trust*, [2011] JRC 117. See MITCHELL, para 9-106.

59 *Pitt*.

60 *Pitt*, 208.

61 *Pitt*, 210.

62 Lloyd LJ in *Pitt*, 10.

63 Thus benefiting from § 89 of the Inheritance Tax Act 1984, which makes allowances for some discretionary trusts for disabled persons.

was no such clause, on Mr Pitt's death a substantial liability to pay inheritance tax arose. Mrs Pitt sought relief, partly in reliance on a mistake.⁶⁴ She argued that the money would not have been advanced, nor the trust set up, in the same manner had the mistake concerning the fiscal consequences not been made.

On these facts, Lloyd LJ held that although the mistake regarding the fiscal consequences of setting up the trust was sufficiently serious, it did not go to the legal effect of the disposition, only to the consequences. The claim in mistake therefore failed. Such a test leaves little scope for mistake: by insisting both that it be "serious" or "basic" to the transaction, *and* that the mistake concern the effect of the disposition, the Court of Appeal in *Pitt* was essentially limiting relief to instances of fundamental mistake. However, drawing a distinction between effects and consequences remains controversial.⁶⁵ After all, "people tend to view the legal effects in terms of the consequences they produce".⁶⁶ In *Wolff v. Wolff*, Mann J. admitted that the distinction is "not always easy to grasp",⁶⁷ and in *Anker-Petersen v. Christensen*, Davis J. noted that "in the *Shorter Oxford English Dictionary* one of the definitions of 'effect' is given as 'consequence'",⁶⁸ although he did also state that "one can see what is behind the distinction" drawn in *Gibbon*.⁶⁹ As Lawrence Collins J observed in *AMP (UK) Ltd v. Barker*:

"If anything, it is simply a formula designed to ensure that the policy involved in equitable relief is effectuated to keep it within reasonable bounds and to ensure that it is not used simply when parties are mistaken about the commercial effects of their transactions or have second thoughts about them."⁷⁰

64 Partly under the "principle in *Re Hasting-Bass*", which the Court of Appeal rightly rejected. For further discussion of this aspect of the decision, see Conaglen [2011] CLJ 301, Nolan and Cloherty [2011] LQR 499.

65 *Re S. Trust* [2011] JRC 117. See, MITCHELL, ¶ 9-106.

66 J. Hilliard, *Gibbon v Mitchell Reconsidered: Mistakes as to Effects and Mistakes as to Consequences: Part 1*, PCB 357, 365 (2004). See J. Hilliard, *Limiting Re Hasting-Bass?*, THE CONVEYANCER 208, 216-219 (2004); Langlois and Cloherty, *Playing the 'Get Out of Jail Free' Card: Mistake in the Law of Trusts*, JERSEY & GUERNSEY LAW REVIEW 10 (2010). [Hereinafter, "LANGLOIS"]

67 *Wolff v. Wolff*, [2004] EWHC 2110 (Ch). The same comment was made by Lewison J in *Re Griffiths* [2008] EWHC 118 (Ch).

68 *Anker-Peterson v. Christensen*, [2001] EWHC B3 (Ch). [Hereinafter, "*Anker-Peterson*"]

69 See *Anker-Peterson*.

70 *AMP (UK) Ltd v. Barker*, [2000] EWHC 42 (Ch) (Lawrence Collins J), cited in *Pitt* [193].

Making Mistakes

This seems eminently sensible. It is important that dispositions made are not readily set aside, and that a high threshold be set before equity will disturb what are *prima facie* valid dispositions. If the effect of the disposition is to benefit a beneficiary and this is achieved, the disposition should not be set aside simply because of a mistake regarding ancillary matters, such as tax consequences. It must be emphasised that regret is no reason to unwind a transaction. The important principle of security of receipt should be taken seriously. Parties should be encouraged to take responsibility for their actions. The scope of the law's intervening on the basis of a party's mistake should be restricted. Although Millett J's choice of language regarding "effects" and "consequences" may be unfortunate, given the similarity of meaning of those terms, the intended distinction is tolerably clear: the mistake should relate to the "primary" legal effect sought, rather than "secondary" matters which flow from that act. This goes some way to ensuring that relief is only granted if the mistake is "fundamental".

The test used in *Pitt* is more restrictive than a simple "causative" test, under which the claimant in *Pitt* may have succeeded. The Supreme Court has granted permission to appeal the decision of the Court of Appeal in *Pitt*, but it is to be hoped that the restrictive approach to mistake is maintained. Finality of transactions is an important principle which should be protected.⁷¹ Litigation should not be encouraged. The person who has made the mistake should have to live with the consequences of the mistake. This may seem harsh, particularly in the context of a case such as *Pitt*, since the regime of taxation is very complicated and mistakes are not difficult to make.⁷² However, it should be remembered that often the party actually making a mistake is a professional adviser acting for the party transferring the property. In such circumstances, the appropriate course of action is to sue the adviser,⁷³ rather than try to undo the transaction, which may prejudice innocent third parties. For example, if the claimant in *Pitt* had succeeded, then the Revenue would have had to give back the tax it had legitimately collected. Since the Revenue does not give value for the tax received, it cannot be considered to be "Equity's Darling" such that rescission is barred.⁷⁴ But given that the Revenue has received money entirely innocently, properly and in its usual course of business, whereas the claimant parted with property having made a (non-fundamental) mistake, it

71 See N. ANDREWS, *MISTAKEN SETTLEMENTS OF DISPUTABLE CLAIMS* 431 (1989).

72 J. Howard, *Hastings-Bass – Oceans Apart?*, PCB 23, 29 (2011).

73 This was clearly the view of Lloyd LJ in *Pitt*: see eg. [2011] EWCA Civ 197; [2011] 3 WLR 19, 142, 162, 220.

74 Re Slocock [1979] 1 All ER 358. Cf the discussion of *Shogun*: text to nn. 37-48, above.

may well be thought that the merits lie with the Revenue. It is appropriate and consistent to restrict the types of mistake which might ground recovery.

IV. UNJUST ENRICHMENT

The claimant might transfer property to the defendant despite there being nothing comparable to a contract or a deed. For such a claimant to obtain relief, he will likely have to bring a claim in unjust enrichment, relying upon mistake as the unjust factor. The law of unjust enrichment seems to have become increasingly generous in its approach to mistaken claimants. Unlike the areas of law considered above, relief does not appear to be limited to the types of mistake which might be described as "*fundamental*". This is not clearly desirable.

Initially, a restrictive approach to mistake was adopted. In *Aiken v. Short*, Bramwell B insisted that a "*liability mistake*" needed to be established:

"[The] mistake must be as to a fact which, if true, would make the person paying liable to pay the money...[there is to be no restitution regarding a mistake as to a] fact which would merely have made it desirable for the person paying it to pay the money."⁷⁵

Subsequently, relief on the basis of mistake was extended beyond "*liability mistakes*" to gifts and instances of future liability. A test of "*fundamental mistake*" developed. For example, in *Norwich Union v. Price*, Lord Wright said that it was

"essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic."⁷⁶

This theme was pursued in *Morgan v. Ashcroft*,⁷⁷ in which the Court of Appeal identified two types of fundamental mistake: first, a mistake regarding the nature of the transfer (such as where the claimant mistakenly believed he was under an obligation to pay the defendant); secondly, where the claimant pays money to the defendant, mistakenly thinking that he is paying the money to somebody else. Such mistakes are fundamental: if I give money to a person, it is basic to that gift that I give the correct amount to the correct person.

75 *Aiken v. Short*, (1856) 1 H&N 210; 156 ER 1180.

76 *Norwich Union v. Price*, [1934] AC 455 (PC), p 463.

77 *Morgan v. Ashcroft*, [1935] 1 KB 49.

Making Mistakes

Using a test of fundamental mistake in the context of unjust enrichment has been criticised.⁷⁸ The view has often been expressed that gifts should be easier to unwind than contracts.⁷⁹ But *why* such a different approach should be taken is not entirely clear. It may even be argued that the claimant is in fact *less* deserving of protection in the gratuitous, rather than the contractual context. At least in the contractual context, the claimant should receive something from the defendant, and there is therefore a readily understandable reason for making the payment.⁸⁰ But where the claimant has paid money without a contract being in place, and the claimant therefore has no right to expect something in return, it might be presumed that the claimant must be aware of his actions, and must be confident that he is doing the right thing in parting with his money for nothing in return. Moreover, recipients of gifts should be entitled to assume that they are able to keep those gifts, and allowing claims for mistake disturbs the finality of completed transactions. There needs to be a strong reason for interference. A restrictive approach to mistake would send a message to gift-givers that they should ensure that they are satisfied with the consequences of their actions; if a given factor is of particular importance, that factor should be made known to the recipient: this would allow a claim in unjust enrichment to be grounded on failure of consideration rather than mistake.⁸¹ Otherwise, the claimant may, objectively, be taken to run the risk of making a mistake.

Of course, not all cases where unjust enrichment on the ground of mistake is pleaded will involve a gift. Sometimes a payment is made by mistake, although the payer did not intend a gift to the recipient. But even in such circumstances, it might be best to maintain that the payer cannot recover the payment unless he was mistaken regarding a fundamental matter, in particular the amount transferred or the identity of the recipient. Such a test would correspond with well-known examples of when restitution on the ground of mistake should be available, highlighted by Robert Goff J. in *Barclays Bank Ltd v. WJ Simms & Cooke*:

“(1) A man, forgetting that he has already paid his subscription to the National Trust, pays it a second time. (2) A substantial charity uses a computer for the purpose of distributing small benefactions.

78 See BURROWS, *THE LAW OF RESTITUTION* 218-219 (3rdedn., 2010) [Hereinafter, “BURROWS”]; VIRGO, 151-154.

79 BIRKS, *UNJUST ENRICHMENT* 149 (2ndedn., 2005). [Hereinafter, “BIRKS 1”]

80 Of course, consideration need only be sufficient, but not adequate: e.g. *Thomas v. Thomas*, (1842) 2 QB 851.

81 Cf A. TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND* ch 3 (3rdedn., 2001).

The computer runs mad, and pays one beneficiary the same gift one hundred times over. (3) A shipowner and a charterer enter into a sterling charterparty for a period of years. Sterling depreciates against other currencies; and the charterer decides, to maintain the goodwill of the shipowner but without obligation, to increase the monthly hire payments. Owing to a mistake in his office, the increase in one monthly hire payment is paid twice over. (4) A Lloyd's syndicate gets into financial difficulties. To maintain the reputation of Lloyd's, other underwriting syndicates decide to make gifts of money to assist the syndicate in difficulties. Due to a mistake, one syndicate makes its gift twice over."⁸²

In all these examples, the relevant mistake might be said to be fundamental. However, the judgment in *Simms* is generally taken as authority for the proposition that English law adopts a "causative" approach to mistake.⁸³ Thus as long as the claimant can show that he would not have paid the money "but for" the mistake, then restitution will be awarded,⁸⁴ regardless of the type of mistake. But although the "causative mistake" test appears to have been largely accepted,⁸⁵ some doubts have been raised, particularly in the context of gifts.⁸⁶ Moreover, it might even be suggested that, in the context of gifts, the "causative mistake" test is perhaps not as solidly grounded in authority as may often be thought; for example, *Ogilvie* is often cited in support of a causative approach, but this appears to be unconvincing for the reasons given above.⁸⁷ The causative approach appears to be based on the premise that if the donor has made a disposition under a causative mistake, then his donative intention is vitiated, and therefore the recipient's enrichment is unjust. But this is unduly claimant-friendly: it is not clear that *any* causative mistake really leads to a vitiation of intention,⁸⁸ nor that it is unjust for the recipient to retain the

82 *Barclays Bank Ltd v. WJ Simms & Cooke*, [1980] QB 677, 697. [Hereinafter, "*Simms*"]

83 See *Dextra Bank & Trust Co Ltd v. Bank of Jamaica*, [2002] 1 All ER (Comm) 193 at [28]; *Deutsche Morgan Grenfell v. Inland Revenue*, [2006] UKHL 49 [Hereinafter, "*Deutsche Morgan Grenfell*"].

84 Subject to defences, notably that of change of position.

85 At least in so far as how the test has been articulated; none of the major cases have had to deal with anything other than a serious mistake.

86 See Lord Scott in *Deutsche Morgan Grenfell*, [87], cited in *Pitt*, [200]; Tang Hang Wu, *Restitution for Mistaken Gifts*, 20 JOURNAL OF CONTRACT LAW 1 (2004) [Hereinafter, "Wu"]; A. TETTENBORN, *THE LAW OF RESTITUTION IN ENGLAND AND IRELAND*, ch 3 (2002); S. HEDLEY, *A CRITICAL INTRODUCTION TO RESTITUTION* 111 (2001): "In the absence of any misrepresentation, it is not obvious that any remedy is desirable".

87 See text to note 54, above.

88 Wu points out that donors give away property for a variety of reasons.

Making Mistakes

gift when that recipient was unaware of any “vitiation”; the law should strive to uphold completed transactions.⁸⁹

Indeed, in the context of gifts, doubts about whether or not a purely “causative” approach is desirable have been voiced at the highest level. For example, Lord Scott in *Deutsche Morgan Grenfell* has remarked:

“There are, I think, some problems about voluntary payments made as gifts but that would not have been made but for some causative mistake, whether of fact or law, e.g. a gift of £1,000 by A to B where B is believed by A to be impecunious but is in fact a person of substantial wealth and where A would not have made the gift if he had known that to be so. My present opinion is that unless there were some other reason, such as a misrepresentation by B, to enable the gift to be set aside, the mistake made by A would not suffice, notwithstanding that the payment had not been made pursuant to any legal obligation and that but for the mistake it would not have been made. But the availability of a restitutionary remedy to recover gifts which would not have been made but for some mistake of fact or of law does not need to be pursued on this appeal and can be left for another day.”⁹⁰

Although criticised by some,⁹¹ it is suggested that Lord Scott is right to be reluctant to unwind gifts for mistake. This might be explained on the basis of risk. If the claimant gave money as a gift to the defendant, intended that the money go to the defendant, and the correct sum was transferred, then the gift has taken effect as intended and should not be unwound. So, for example, if a claimant intentionally gives £100 to a charity, but later discovers, to his horror, that the charity spends 20% of its income on administration, then no claim in unjust enrichment founded upon mistake should lie. Although the claimant may be able to show that he was mistaken about how much of his money would be spent on administration, he should be taken to run a risk concerning such non-fundamental matters.

89 LANGLOIS suggest that “if the donor can show that, but for the mistake he would not have entered into the disposition in question, it is difficult to see on what basis his mistake could ever reasonably be regarded as insufficiently “serious” to justify an order for rescission”. But some examples might be suggested: for example, if a person donates money to a charity, but contends that he would not have done so had he known that the charity pays fundraisers rather than rely upon volunteers, the “mistake” in question is causative, but it is suggested that it is insufficiently serious to justify relief for the mistake. Similarly, it is surely unsatisfactory for mistakes concerning racist factors to ground a claim for recovery, even if “but for” such a mistake, a disposition would not have been made.

90 *Deutsche Morgan Grenfell*, 87.

91 See BURROWS, 214-217.

It is suggested that the doubts raised by Lord Scott fit well with the decision of *Pitt*. In *Pitt*, Lloyd LJ, explicitly recognised that “there is scope for an interesting discussion as to whether the principles relevant at common law and in equity are, or ought to be, more or less closely aligned”, but did not wish to “add to an already lengthy judgment by entering on the debate as to the correct principles at common law and the comparison between the two bases of claim”.⁹² However, his Lordship did go on to consider common law cases in his discussion,⁹³ and it is difficult to explain why a gift should be protected differently at law and in equity.

It is therefore suggested that the law of unjust enrichment might be well served by adopting the more stringent test of mistake outlined in the equitable context in *Pitt*. In *Deutsche Morgan Grenfell*, Lord Hoffmann made it clear that risk is to be assessed objectively,⁹⁴ and it seems reasonable to refuse relief where the claimant has made a mistake regarding a non-fundamental matter: the claimant runs the risk of making such a mistake when transferring the property, and should bear the consequences of that mistake. Other areas of the law require a “serious”, “fundamental” or “basic” mistake to be made, and it is unsatisfactory that unjust enrichment does not clearly operate within similar confines.

Another difference with relief in other areas of the law is that the law of unjust enrichment appears to allow a mistaken claimant to obtain restitution, even when the mistake made was the claimant’s own fault.⁹⁵ For example, in *Kelly*,⁹⁶ the claimant insurance company paid money to the executrix of the assured because it believed that was required under a life insurance policy. This was a mistake: the policy had lapsed since the assured did not pay the premiums on the policy. Even though the claimant could have discovered that the policy had lapsed, and might be considered to be careless not to have done so, the court held that restitution grounded upon the mistake would be awarded. This seems very generous to the claimant. It may be that the decision should be departed from and the payer be said, objectively, to be a risk-taker.⁹⁷ Of course, one of the best ways of trumping

92 *Pitt*, 106.

93 Notably *University of Canterbury v. Attorney-General*, [1995] NZLR 78; *Morgan v. Ashcroft*, [1938] 1 KB 49.

94 *Deutsche Morgan Grenfell v. IRC*, [2006] UKHL 49.

95 Compare Lord Phillips in *The Great Peace*, n 18, above.

96 See *Kelly*; P. Birks, *The Recovery of Carelessly Mistaken Payments*, 25 CURRENT LEGAL PROBLEMS 179 (1972).

97 As Hedley has remarked, with some incredulity, “The payer may reclaim the whole amount lost, no matter how gross their carelessness in losing it”: S. HEDLEY, A CRITICAL INTRODUCTION TO RESTITUTION 106 (2001).

Making Mistakes

the risk argument in this context is by making it clear to the defendant that the intention to benefit the defendant is conditional upon something, and making sure the defendant realises this. But then the more appropriate unjust factor may well not be mistake but rather failure of consideration. It is important to note that just because a claim based upon mistake might fail, that does not preclude a claim in unjust enrichment based upon a different unjust factor.⁹⁸

Moreover, it might be argued that departing from *Kelly* would be consistent with the approach adopted by the Court of Appeal in *Brennan v. Bolt Burden*.⁹⁹ In the latter case, it was held that if a party *ought* to have known that an issue was about to be reconsidered on appeal, then any mistaken belief about the law on that point would be insufficient for restitution to be awarded. Virgo has noted that “*this comes very close to saying that negligence on the part of the claimant will prevent reliance on the mistake*”.¹⁰⁰ This may well be desirable: why should claimants not simply accept the consequences of their own carelessness? There is some merit in the law’s adopting a hard stance in order to make it clear that individuals should bear responsibility for their own errors.

To any extent that *Kelly* and *Brennan* are inconsistent, it is suggested that the latter decision is to be preferred.¹⁰¹ It should also be noted that in *Kelly* a “*liability mistake*” was at issue. In such instances it is clear that the claimant expects some sort of *quid pro quo* in return for the payment. When that *quid pro quo* is absent, it is easier to understand why restitution is granted.¹⁰² But this harks back to the idea that the mistake must be fundamental. This is the crucial issue, which the law of unjust enrichment might do well to bring back to the fore.

98 See similarly Lord Brown in *Deutsche Morgan Grenfell*, 175.

99 *Brennan*, 303.

100 VIRGO, 163.

101 The two cases concerned very different facts. Indeed, a reconciliation might be attempted (albeit at a stretch) through appreciating that the nature of risk is flexible and responds to the particular circumstances in question. In *Brennan*, it was not reasonable to proceed despite it being known that a reconsideration of the law was pending, so the claimant was, objectively, a risk-taker. By contrast, in *Kelly*, it is, perhaps, arguable that it is reasonable for insurers to pay out promptly, since the law might not want to encourage insurers to delay pay-outs for a long period of time in order to verify whether payment is indeed due. Prompt and early payment might be sought in return for the ability to recover in unjust enrichment – either for mistake or failure of consideration – if it later transpires that the payment was not in fact due (subject, of course, to the defence of change of position). Thus, objectively, it might be arguable that the insurer in *Kelly* was not taking a risk. Risk is context-specific.

102 See S. HEDLEY, *RESTITUTION: ITS DIVISION AND ORDERING* (2001).

V. PROPRIETARY RESTITUTION

A claimant who transfers property to the defendant by mistake may desire a proprietary remedy, rather than merely the personal remedy commonly available in unjust enrichment. It has been argued, most notably by Chambers¹⁰³ and Birks,¹⁰⁴ that restitution may best be effected by imposing a resulting trust upon the defendant. Such a proprietary remedy allows the claimant to enjoy an equitable property right, which might be desirable for many reasons. For example, a proprietary remedy would afford the claimant protection in the event of the defendant's insolvency, and would allow the claimant to trace in Equity into any eventual proceeds realised as a result of the property. However, English law has not accepted that a resulting trust responds to an absence of intention to benefit the recipient, which may arise due to the claimant's intention being vitiated by mistake.¹⁰⁵ Instead, only personal remedies lie as a result of the claimant's mistake. This is satisfactory: providing proprietary protection would be unduly generous to a party who made a mistake. For instance, if a claimant mistakenly transferred property to a defendant who later became insolvent, it seems inappropriate for the claimant to be protected in full due to his enjoying a property right, whereas other innocent creditors, who provided value for their rights but obtained no proprietary protection, would correspondingly lose out. In this area, too, awarding relief on the basis of a mistake will impact upon other third parties. Relief for mistake should be limited; proprietary relief would be going too far.

In some circumstances, however, the claimant may be mistaken such that title never passes to the defendant but remains with the claimant.¹⁰⁶ But such mistakes must be fundamental. For title to personal property to pass, an intention to transfer the property is crucial. So if the transferor is mistaken regarding the identity of the recipient,¹⁰⁷ or the identity of the property,¹⁰⁸ that might be sufficiently fundamental for title not to pass. Such circumstances are very rare, but mean that the defendant does not get title to the property.

103 See R. CHAMBERS, *RESULTING TRUSTS* (1997).

104 P. BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 60-64, 377-379 (1989) [Hereinafter, "BIRKS 2"]; BIRKS 1, 304-307.

105 *Westdeutsche Landesbank Girozentrale v. Islington LBC*, [1996] AC 669. [Hereinafter, "*Westdeutsche Landesbank Girozentrale*"]

106 See *VIRGO*, 586-588.

107 *Middleton*, (1873) LR 2 CCR 38.

108 *Ashwell*, (1885) 16 QBD 190.

Making Mistakes

Whether a mistake as to the quantity of the property being transferred should also be considered to be fundamental is more controversial. Contrary views have been expressed in the English courts.¹⁰⁹ In Australia, the mere fact of overpayment has been held to be a fundamental mistake such that title may not pass.¹¹⁰ But this is not clearly desirable. When paying the money, the claimant intends that money should pass to the defendant. On that basis, it seems artificial to find that title to the money does not pass at all.¹¹¹ If a claimant has overpaid, he should be able to recover in unjust enrichment.

The difficult case of *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd*¹¹² is instructive. The claimant bank mistakenly paid \$2million to the defendant bank, believing that it was liable to make the payment, but forgetting that it had already discharged the liability to pay. In effect, the claimant bank paid twice. Clearly, a claim in unjust enrichment on the ground of a fundamental, liability mistake should succeed. But the defendant bank had entered into liquidation, so the claimant bank sought to rely upon a proprietary interest in order to achieve priority over general creditors. The court proceeded on the basis that title to the money had passed to the defendant bank. But this point was not explicitly addressed; it appears arguable that there was a fundamental mistake, such that title to the money did not pass. However, because the defendant had mixed the claimant's money with his own, and legal title cannot survive in a mixture, the defendant necessarily obtained legal title to the money.¹¹³

In *Chase Manhattan*, Goulding J. said that

“a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right.”¹¹⁴

This is very broadly stated and may be liable to mislead. It has been suggested that Goulding J. envisaged a situation in which the defendant held the property on

109 For example, compare *Eldan Services Ltd v. Chandag Motors Ltd*, [1990] 4 All ER 459 with *Moynes v. Cooper*, [1956] 1 QB 439.

110 *Ilich*, (1987) 69 ALR 231.

111 See Lord Millett, *Restitution and Constructive Trusts*, 114 LAW QUARTERLY REVIEW 399, 412-413 (1998).

112 *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd*, [1981] Ch 105. [Hereinafter, “*Chase Manhattan*”]

113 *VIRGO*, 587-588.

114 *Chase Manhattan*, 119.

a resulting trust for the claimant. This is supported by the notion that a resulting trust arises in response to an absence of intent to benefit the recipient of the property in question.¹¹⁵ This analysis is consistent with a number of cases,¹¹⁶ but does not represent English law. In *Wesdeutsche Landesbank Girozentrale v. Islington London Borough Council*,¹¹⁷ Lord Browne-Wilkinson insisted that a resulting trust would give claimants excessive proprietary protection:

“Those concerned with developing the law of restitution are anxious to ensure that, in certain circumstances, the plaintiff should have the right to recover property which he has unjustly lost. For that purpose they have sought to develop the law of resulting trusts so as to give the plaintiff a proprietary interest....[I]n my view such development is not based on sound principle and in the name of unjust enrichment is capable of producing most unjust results. The law of resulting trusts would confer on the plaintiff a right to recover property from, or at the expense of, those who have not been unjustly enriched at his expense at all, e.g. the lender whose debt is secured by a floating charge and all other third parties who have purchased an equitable interest only, albeit in all innocence and for value.”¹¹⁸

Moreover, his Lordship held that *Chase Manhattan* did not concern a resulting trust at all, but rather a constructive trust.¹¹⁹ As Lord Browne-Wilkinson explained,

“although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust”.

This is entirely orthodox. Once the defendant bank *knew* of the claimant's mistake, it would be unconscionable for the defendant to deny that the claimant should have the money transferred. Constructive trusts respond to unconscionable conduct, and as such a constructive trust can legitimately be imposed. But it is important to appreciate that this trust does not respond to the claimant's mistake, but rather the defendant's knowledge of the mistake and the effect this has upon his conscience.

115 See R. CHAMBERS, *RESULTING TRUSTS* 125-132(1997).

116 Notably *Vandervell v. IRC*, [1967] 2 AC 291. See, *Air Jamaica v. Charlton*, [1999] 1 WLR 1399.

117 See *Wesdeutsche Landesbank Girozentrale*.

118 *Wesdeutsche Landesbank Girozentrale*, 716. See W. Swadling, *A New Role for Resulting Trusts?*, 16 *LEGAL STUDIES* 110 (1996).

119 *Wesdeutsche Landesbank Girozentrale*, 714-715.

Making Mistakes

The law therefore seems to deny proprietary relief under a resulting trust for a claimant who transfers title to the defendant on the ground of mistake. This is satisfactory. But even if the law does develop such that a resulting trust is recognised to respond to an absence of intention, then this does not necessarily mean that all mistakes should give rise to a resulting trust. Otherwise commercial certainty would be undermined, particularly because the only person aware of the mistake may be the claimant himself. It would be imperative to circumscribe what sort of mistakes would vitiate the claimant's intention such that a resulting trust would be appropriate. Again, one returns to the conclusion that a fundamental mistake should be required.

VI. CONCLUSION

Mistakes are sure to continue to trouble the courts. This article has been able to provide only an outline of some of the myriad of ways mistake might be invoked by a claimant in an attempt to escape an arrangement between individuals. But there is a common theme: mistake should be the basis of relief only in very rare circumstances. The responsibility for not making mistakes should be placed squarely on the shoulders of the parties themselves. When mistakes are made, it is generally better for the consequences to lie where they fall, rather than seek to award a remedy which may well unfairly prejudice innocent third parties. Thus only certain types of mistake should influence the court. In essence, the mistake must be fundamental, or basic to the transaction or gift. This is not easy to define, but seems to include instances where the claimant mistakenly transfers property to the wrong recipient, or transfers the wrong property.

English law has restricted the availability of relief for mistake in contract (*The Great Peace*) and in Equity (*Pitt*), as well as dismissing the possibility of proprietary relief under a resulting trust (*Wesdeutsche Landesbank Girozentrale*). The area of law which differs is that of unjust enrichment. Unjust enrichment has burgeoned in recent times, but there is a danger of it expanding too far and unduly interfering with key principles such as that of security of receipt.¹²⁰ It is suggested that it should not be the case that *any* causative mistake should ground a claim in unjust enrichment. For example, if an uncle gives a gift to his nephew, but later realises his nephew is homosexual, it seems inappropriate for the uncle to be able to obtain restitution on the basis that he would not have given the gift had he not

120 For example, Birks wrote, prior to *Simms*, "the insistence on fundamentality, as a quality additional to causality, is a measure against "floodgates of litigation" and consequent insecurity of receipts." See BIRKS 2,159.

been mistaken about his nephew's sexuality. It is not obvious that such mistakes truly vitiate the giver's intention, and even less clear that that should lead to the conclusion that the defendant's enrichment is unjust. Why should the defendant not be able to rely upon the apparent validity of such a gift? The situation might be different when the mistake in question was fundamental; in such circumstances, the defendant's retention of the benefit may well be said to be unjust. Otherwise, the claimant should bear the risk of his giving away the property by mistake.

This article has only been able to deal with mistake relatively briefly. In not developing the rationales of each area to the full, there is the risk that some might think mistakes have been made. But an overview of this area places the law of unjust enrichment in stark contrast to the other areas which have been examined. The intuition of Lord Scott in *Deutsche Morgan Grenfell* is correct, and it should not be the case that any causative mistake should lead to restitution for unjust enrichment. In this area, as with all others, a fundamental mistake should be required.