

## ANSWERS - SELF TEST – AGREEMENT MISTAKES

1. Explain what is meant by stating that a contract is void for agreement mistake. (2)  
Void means that the apparent agreement is in fact *automatically* (1) of no effect from the very beginning because of the agreement mistake (1). Performance cannot therefore be demanded and there can be no breach.

2. How can *Hartog v Colin & Shields* and *Smith v Hughes* be distinguished? (3)  
In Hartog v Colin & Shields there was a true fundamental unilateral mistake as to a term, i.e. Ps knew that the D had mistakenly offered to sell at a price per pound instead of price per piece (1). In Smith v Hughes the mistake did not relate to a term as such but to the quality of the subject matter being sold (1). Mistakes as to a quality which the goods are thought to possess are not regarded as fundamental mistakes and do not affect the fact that an agreement has been reached (1). See also the different treatment of common mistake as to quality – Bell v Lever Bros, Leaf v International Galleries.

3. What is the essential difference between a mutual mistake and a unilateral mistake? (2)

Mutual mistakes mean that BOTH parties made the mistake (1), whereas in cases of unilateral mistakes only one party is mistaken but the other either knows of this mistake or ought to have known of it. (1)

4. Why is it important to determine whether a contract is void for mistake as to identity or voidable for fraudulent misrepresentation as to identity? (3)

This is important where the goods acquired under the agreement, alleged to have been entered into under the mistake, have since been purchased by an innocent third party (1).

If a contract is void for mistake as to identity then it is automatically void (of no effect) and the third party cannot acquire any rights in the goods. They have to be returned to the mistaken party (1).

However, if the contract is not void for mistake as to identity, but is merely voidable for the fraudulent misrepresentation as to identity, then the mistaken party must act to rescind the contract. It is not possible to rescind once an innocent third party

purchaser has acquired the goods. In these circumstances the innocent third party purchaser can keep the goods and it is the mistaken party who loses out (1).

5. What does a mistaken party need to show in order for a contract to be void for mistake as to identity? (6)

The decision of the majority of the House of Lords in Shogun Finance v Hudson means that a distinction exists between instances where the contract is entered into face-to-face and those where it is made by written correspondence (1). However, in both instances it is a question of with whom did the mistaken party intend to contract? To whom was the offer intended to be made? Only that person can accept the offer. (1)

(i) **Face-to-face:** There is a presumption that the mistaken party intended to contract with the person physically present, i.e. offer made to that person and that person can accept it. There is no mistake as to identity and the contract is merely voidable for fraudulent misrepresentation. Phillips v Brooks Ltd, Lewis v Averay (2). Ingram v Little is now regarded as wrong. This position protects the innocent third party purchaser.

The exception (Hardman v Booth) will occur where there is an intention to contract with a company and the contract purports to be made with the person present who claims to be acting on behalf of that company but there is an absence of authority to do so.

(ii) **Written Correspondence:** The mistaken party will intend to deal or contract with the person named in that written correspondence (Cundy v Lindsay), i.e. the real person rather than the rogue. The offer is made only to that real person named in the document and only the person named can accept it. (Shogun Finance v Hudson) (2). It is said to follow that where the rogue contracts via forged written documents such a contract will be a nullity as it is made by the rogue without that person's authority.

It may not always be obvious which type of contract exists on a particular set of facts. It was a contentious issue in Shogun.

What if there is no real person in existence ? Can there be a mistake ? King's Norton v Edridge, Merrett & Co Ltd would suggest that in such instances there is no mistake of identity and that the intention will be to deal with the writer of the document. It is arguable that in such an instance the mistaken party is at fault in failing to make the necessary enquiries to ascertain that there is such a person in existence so that the contract should be voidable rather than void/ a nullity. However, this matter is far

from clear following comments in *Shogun*. It may be an issue which relates only to the fraud question rather than to the separate issue of correlation of the offer and acceptance (assuming the minority view that these matters are indeed separate).

6. What is the consequence if the contract is in fact void? (1)

The mistaken party can recover the goods in question from an innocent third party purchaser (1). *On the facts in Shogun this meant that the car dealer was protected against the consequences of fraud.*

7. In *Ingram v Little* what did Devlin LJ propose as an alternative to the void or voidable solution? (3)

Devlin LJ suggested that the loss should be divided between the innocent parties (the mistaken party and the innocent third party purchaser) in such proportion as considered just in all the circumstances. (Apportionment of loss) (2). If one of these parties had contributed to the loss (i.e. not as innocent as the other), that person should bear a greater part of the loss (1).

Points scored [maximum of 20] =