

***Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2003] QB 679.**

(a) What happened on the facts and what did each party claim? [See page 603]

The “Cape Providence” had suffered serious structural damage and the “Great Peace” had been hired to reach the vessel and stand by for the purposes of saving life. The respondents (who had hired out the “Great Peace”) sought the minimum 5 day hire charge when the appellants cancelled the contract after securing the services of another vessel. The appellants alleged that the contract was void at law or voidable in equity for mistake since both parties had mistakenly believed that the two vessels were “in close proximity” when the “Great Peace” had been engaged. In fact, they were 410 miles apart and it took 39 hours for the Great Peace to rendezvous.

(b) What did Lord Phillips say concerning the contractual allocation of the risk of impossibility? What effect does this have in terms of the legal treatment of the impossibility? [Paragraph numbers [75]–[85], extracted at 593-4]

The doctrine of frustration (subsequent impossibility) and common mistake (initial impossibility) would only be relevant where the parties themselves had not provided for what was to happen in the event that it was impossible to perform the contract. Therefore, it may be the case that one of the parties has taken contractual responsibility for the existence of a state of affairs or the non-existence of the state of affairs is attributable to the fault of one of the parties. Lord Phillips cited the decision in *McRae v Commonwealth Disposals Commission* as an illustration since the Commission had impliedly promised that there was a tanker at the position specified and had therefore assumed responsibility for its non-existence. Alternatively, the Commission could not rely on any alleged mistake to avoid the contract since the mistake had been induced by the Commission and its servants in recklessly asserting that the tanker was at the position specified when there were no reasonable grounds for such a belief. Where a party has taken responsibility for the impossibility, or the event is his fault, that party will not be excused on the basis that the contract is void for mistake or discharged by frustration. Instead, the party who has made a

promise as to the existence of the subject-matter will find himself in breach if that subject matter does not exist, and will be liable to pay damages to the other party.

Lord Phillips notes at [85] that where the impossibility is initial, it is more likely that one of the parties will have assumed responsibility for the mistaken state of affairs and that this may explain why there are relatively few cases of common mistake.

(c) What did Lord Phillips claim was the legal or theoretical basis for the decision of the House of Lords in *Bell v Lever Brothers*? On what basis did he reach this conclusion and how does this relate to previous case law? [Paragraph numbers [61]–[74] and [82]–[83], extracted at 596-8] Is did he reach this conclusion and how does this relate to previous case law?

Lord Phillips claimed that the basis for the decision was the theory of the implied term (the accepted basis at the time for the application of the frustration doctrine; *Taylor v Caldwell*) and not the two case authorities relied upon by Lord Atkin, *Kennedy v Panama* and *Smith v Hughes*, which did not appear to offer the support traditionally ascribed.

Lord Phillips reached this conclusion on the basis that the development of the two doctrines at that time had been closely aligned and that subsequent frustration case law (which he traced [62] to [73]) could therefore be relied upon to assist in identifying the theoretical basis for the doctrine of common mistake. This meant that the subsequent frustration case law, accepting the artificiality of the implied term approach and amending the theoretical basis to a construction approach, was equally applicable in the context of common mistake.

(d) Is it possible to secure a remedy at common law where it is still technically possible to perform in accordance with the contractual terms? What did Lord Phillips identify as the test to determine whether a common mistaken assumption renders performance of the contract, as originally agreed, impossible? [Paragraph number [55], extracted at 604]

Mistakes as to quality do not prevent performance of the contract in accordance with its terms. As Denning LJ stated in *Leaf v International Galleries*, the parties are still agreed in the same terms on the same subject-matter. In *Bell v Lever Brothers* Lord Atkin had accepted that a contract might nevertheless be void for mistake as to quality where the

mistake meant that “the thing without the quality [was] essentially different from the thing as it was believed to be”. Lord Phillips in *Great Peace* accepted this as a **test of impossibility**. In other words, **the test is whether the mistake (as a matter of construction) renders the agreed performance (or contractual adventure) impossible?** In the context of these facts, it was necessary to decide whether the contractual adventure was rendered impossible by the mistaken assumption that the vessels were in close proximity. (Note that in *Champion Investments Ltd v Ahmed* [2004] EWHC 1956 (QB) the judge applied both tests separately, i.e. Lord Atkin’s “essentially different” test and the *Great Peace* test of impossibility, thereby suggesting that there are two separate hurdles when it would appear that the Court of Appeal in *Great Peace* was advocating impossibility as a reformulation to replace the earlier test).

(e) How likely is it that this test will be satisfied? [Paragraph number [86], extracted at 605]

It is unlikely that the test will be satisfied. In *Bell v Lever Brothers* Lord Atkin gave a number of examples of mistakes which would not satisfy the test, including the purchase of a painting in the mistaken belief that it is painted by a famous artist. The test was not satisfied on the facts of *Bell*, or on the facts in *Great Peace Shipping*.

(f) What did Lord Phillips say on the question of the relationship between the decision of the House of Lords in *Bell v Lever Brothers* and the decision of the Court of Appeal in *Solle v Butcher*? [Paragraph numbers [153]–[160], extracted at 611–2]

Solle v Butcher and a number of decisions (Court of Appeal and below) had purported to recognise an equitable jurisdiction to rescind on terms for a common mistake as to quality which was not sufficiently fundamental at law. Lord Phillips noted that none of these decisions had been able to satisfactorily explain the relationship between the test at law and the test in equity, i.e. how a mistake could be insufficiently fundamental at law but sufficiently fundamental in equity. The conclusion (on the basis of *Bell*) was that if a mistake was not sufficiently fundamental at law, the contract remained valid. Recognition of an equitable jurisdiction in *Solle v Butcher* amounted to saying that *Bell* was wrongly decided so that the two decisions could not stand.

(g) Most significantly, what is the effect of this decision in terms of the availability of remedies for common mistake? What practical consequences might follow? [Paragraph numbers [157] and [161], extracted at 612-3, and see discussion at pages 613–5]

The decision in *Great Peace Shipping* has removed the ability to grant rescission on terms for common mistake as to quality. The result is that the previous remedial flexibility has been removed. The only remedy for common mistake (assuming it is sufficiently fundamental) is that the contract is void. In all other instances the contract will remain valid (subject to the ability to utilise other doctrines of law such as duress, misrepresentation, undue influence etc).

Lord Phillips suggests [161] that a solution might need to be found in the form of legislation and cites the Law Reform (Frustrated Contracts) Act 1943 as providing a legislative adjustment of the parties' positions to mitigate the harsh effects of the common law in instances where the contract is frustrated. This 1943 Act is not the best piece of drafting and it is to be hoped that any potential legislation will consider the more radical model provided by the New Zealand Contractual Mistakes Act 1977. [See Chandler, Devenney and Poole "Common Mistake: Theoretical Justification and Remedial Flexibility" [2004] JBL 34].

(h) What was the effect of this decision on previous case law authority, i.e., which case(s) were applied and which case was not followed? [Examine the headnote]

Bell v Lever Brothers was applied and the test expounded by Lord Atkin (treated as the ratio by Steyn J in *Associated Japanese Bank v Credit du Nord*) was expressly adopted as the test to determine whether a mistake was sufficiently fundamental to render the contract void.

Solle v Butcher was disapproved and not followed by the later Court of Appeal in *Great Peace Shipping*.