

Chapter 23

'The Great Peace case has restored coherence to the law of common mistake.'

Discuss. What, if any, reforms of the law do you consider to be desirable in relation to common mistake?

The statement to be considered rightly implies that there was a *lack* of coherence to the doctrine of common mistake before the case of *The Great Peace*. This can be seen in two regards: first, as to a common mistake regarding the existence of subject matter, where lack of coherence was created by the confusion surrounding the case of *Couturier v Hastie*. Secondly, as to a common mistake regarding the quality of subject matter, where it is Lord Denning's misguided efforts in trying to make a contract voidable in *Solle v Butcher* which makes the notion of a *lack* of coherence before *The Great Peace* case seem, in essence, indisputable. It is submitted, however, that it is debatable whether *The Great Peace* case itself 'restores coherence' as to the first regard, but undoubtedly does so as to the second regard in a way which makes reform in this narrow area of law unnecessary.

Comment [A1]: But wasn't coherence here restored long before *The Great Peace*?

Comment [A2]: Unpack this sentence more clearly.

Comment [A3]: I agree, so the start seems a bit odd and perhaps inconsistent.

A common mistake occurs where an event was unforeseen by the parties and destroys the basis upon which they entered into the contract. In such a case the courts will decide who bears the risk of this unforeseen event, and where the courts intervene to grant relief they do so on the ground that it is no longer fair or just to hold the parties to their agreement in such radically different and unforeseen circumstances. A contract cannot be void due to a common mistake where the risk of an assumption failing has been allocated to a party (as seen in *McRae* where the defendants promised existence of a tanker), where the failure is attributable to the fault of a party, or where the common mistake relates to the quality of the thing in question, with *The Great Peace* reasserting that it cannot be rendered voidable.

Comment [A4]: Explain this.

A lack of coherence emerges in the House of Lords decision of *Couturier v Hastie*, as it was held to lay down the general proposition that a contract was void where the subject matter, without the knowledge or fault of the parties, did not exist. However, the Australian High Court in *McRae* demonstrated cogently that this is not in fact what was decided at all, since the question of whether a contract was void did not even arise in that case, and thus cannot be authority on it. As such, one manner in which the law turned a wrong corner was to state that *Couturier* was *authority* for the proposition that a contract was void when the subject matter, without knowledge or fault of the parties, did not exist. The proposition *itself*, however would seem to be an accurate one. After all, if the parties have *equal knowledge* about the existence of the subject matter and contract on the basis of that basic common assumption, then the contract *ought to be* declared void if the thing does not actually exist. For instance, if the purchaser of the cargo of corn in *Couturier* had in fact sued for failure to deliver the cargo, it is right that the answer to that action would be that the contract is void, since both parties were acting on the basic common assumption that the cargo was in existence and at sea. As such, it would seem that the draftsman of the Sale of Goods Act 1893 legislated section 6 so that this general proposition was reflected in statutory law.

Comment [A5]: So s6 is the key here?

However, the difficulty of section 6 is that it interpreted *Couturier* to mean that a mistake as to the existence of the subject matter of a contract renders a contract void *inevitably*, and as such the draftsman had sought to reflect this interpretation in the Act. The concern regarding this interpretation is that the word 'mistake' was not used in any of the judgments in that case, as the court was principally concerned with the construction of the contract and the question of whether

consideration had failed. Yet, as seen above, the facts of the case did not consider the question of whether a contract was void and as such could not possibly have wished to establish such an all-embracing proposition. Thus, the law was put on the wrong path through the enactment of the seemingly embracive section 6, which reflected the misunderstood authority taken from *Couturier*. This is the reason why *McRae* preferred to interpret *Couturier* in a way that allows the question of whether or not a contract is void to depend upon the construction of the contract, hence bypassing section 6 (or its equivalent) altogether. As regards restoring coherence, the only way that *The Great Peace* case can be said to have 'restored coherence' in this respect is on the technical ground that an Australian case cannot act as binding precedent on courts in England and Wales. Approved by the Court of Appeal in *The Great Peace*, it was in fact *McRae* that actually helped to 'restore coherence' to the doctrine of mistake, since it was that case that came up with the cogent explanation as to what *Couturier* actually decided, rather than the general proposition in which it was misunderstood to be authority for; *The Great Peace* simply approved the work of Australian judges.

A third interpretation, adopted by Denning LJ in *Solle v Butcher*, is that the contract in *Couturier* was void because there was an implied condition precedent that the contract was capable of performance. He thought that the parties proceeded upon the assumption that the goods were capable of being sold when, in fact, they were not and the effect of the implied condition precedent was to render the contract void. The difficulty with this interpretation is that it does not tell us when the courts will imply such a condition precedent. A further controversy of this case was that Lord Denning tried to establish that a mistake as to the quality of subject matter could render a contract voidable. This is problematic on two grounds: firstly in the context of the facts of the case itself. This was a case where both parties were making a common assumption (that the contract was not subject to the Rent Restriction Acts) which was a mistake for which neither party was more responsible than the other, and as such should have been held to be a contract which was void. Secondly, in the context of the case of *Bell v Lever Bros*, since this House of Lords case made no mention of the possibility of a contract being voidable, even though there was a much bigger amount of money at stake and thus one would think the mistake would be deemed far more fundamental. So the only way in which Denning LJ's equity principle could stand is to say that *Bell v Lever Bros* was an incomplete statement of the state of the law, which is unconvincing. Thus, it was heavily criticised in *The Great Peace*, which rejected the notion that the House of Lords was unaware of any such equitable doctrine, and as such restored coherence in terms of precedent, since the authority was no longer undermined by a court below it, and also in terms of reconciliation with fundamental principles of common law, including caveat emptor.

As well as restoring coherence by rejecting Denning LJ's view that rescission could be granted on the basis of equity, *The Great Peace* case rids the doctrine of common mistake of the element of remedial flexibility which Denning LJ introduced in a way which demonstrates that statutory reform in this area would be a waste of time. Although the case suggested legislative reform might be needed, the fact that the case itself sensibly removed the attempted remedial flexibility is evidence of the contrary. This area of law is very narrow in its margins, and thus it will be very rare that a contract will be deemed void for the failure of a basic common assumption, and as such it is sensible that a coherent, albeit less flexible, rule for such failures will be enforced.

Overall essay feedback: The substance of what you write is fine. But I think this answer is a little off-beam. You spend a lot of time on *Couturier v Hastie*, but this isn't the strongest point and I don't think the best place to start. Surely it would be better to develop an analysis of *Bell*, *Solle*, and *Great Peace* and how those cases inter-relate. It is a shame that you don't explain those cases

Comment [A6]: In what sense are you discussing 'failure of consideration'?

Comment [A7]: ?!

Comment [A8]: So this is a bit weak when considering the impact of *The Great Peace*. Given that, it seems a bit of an odd point with which to start your answer. Surely it would be better to focus on *The Great Peace* itself, and, as you go on to do, *Solle v Butcher*?

Comment [A9]: Can principles be found?

Comment [A10]: This sentence needs developing.

Comment [A11]: If it satisfies the test under *Bell v Lever Bros*.

Comment [A12]: This could be expressed more clearly.

Comment [A13]: Explain.

Comment [A14]: What?

Comment [A15]: This is a long sentence.

Comment [A16]: And on terms.

Comment [A17]: Really? I don't quite follow this, and of course the CA in *The Great Peace* thought differently. Worth making a link to frustration here?

clearly, and that some of your sentences can be long and a little hard to follow. If your answer was re-focussed slightly I'm sure it could be much better. As it is, I think it hovers around the 2.i/2.ii boundary and probably slips just the wrong side, especially because the material you rely upon in support is very limited.