11 The Authenticity of Agreement

In the previous chapter it was explained that agreement is one of the vital elements in the formation of a contract. The contract may, however, be vitiated if the element of agreement is affected by mistake, by misrepresentation or by coercion. Agreement must be a true consensus – it must be authentic.

1.1 Mistake

It sometimes happens that, at the time of contracting, there is some misapprehension or mistake in the mind of one of the parties, or perhaps in the minds of both parties. Mistake may affect the validity of the contract by rendering it void or voidable, according to the circumstances, or the mistake may not affect the contract at all.

Mistake may be initially classified as follows:

(a) Common mistake, i.e. both parties have suffered from the same misapprehension. In terms of offer and acceptance this means that a consensus was reached when acceptance took place. In other words, common mistake does not prevent the formation of an agreement.

(b) Mutual mistake, i.e. the parties are at cross-purposes; the acceptance does not correspond with the offer although the parties, at the time of contracting, think that it does.

(c) Unilateral mistake, i.e. only one party is mistaken.

This section deals with mistake at law, which may render a contract void, and mistake in equity, which may render a contract voidable and, finally, mistake of identity caused by fraud.

(a) Mistake at law

(i) Common mistake as to a fundamental fact

Where both parties have suffered in common from the same mistake of fact, the validity of the contract is unlikely to be affected. Only if it can be shown that the mistake was such as to prevent the formation of the contract will it be operative, i.e. will the mistake render the contract void. In *Bell v. Lever Brothers* (1932) the House of Lords made it clear that this kind of mistake will not be operative unless the common mistake of the parties is as to the existence of a fact or quality which makes the
subject-matter of the contract essentially different from what the parties believed it to be. In that case the common mistake was as to the validity of a contract of employment. Both parties thought (mistakenly) that it was valid when, in fact, it was voidable at the option of one of the parties. The House of Lords decided that this mistake was not sufficiently fundamental to render void an agreement between the same parties to determine the contract of employment. An example of operative common mistake may be found in *Galloway v. Galloway* (1914) in which a marriage separation agreement was declared void because the parties had entered into it in the belief that they were lawfully married; in fact they were not. The fact that the parties were not married was considered to be fundamental to the separation agreement. See also *Sybron Corporation v. Rochem* (1983).

(ii) *Res extincta*
A special aspect of this kind of mistake is where, unknown to the parties to a sale of goods contract, the goods are not in existence (*res extincta*). This is now covered by the Sale of Goods Act 1979, s.6 which provides that: ‘Where there is a contract for the sale of specific good, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void’.

(iii) *Mistake as to the identity of the subject-matter*
Where the sense of the offer is different from the sense in which it was accepted there can be no real agreement. The parties are at cross-purposes and the mistake is thus mutual. The court will declare the apparent contract void. Mutual mistake is illustrated by the case of *Raffles v. Wichelhaus* (1864) in which there was a contract for the sale of a consignment of cotton ‘to arrive ex Peerless from Bombay’. There were at the time two ships calls Peerless in Bombay; the buyer meant one and the seller the other. It was held that the contract was void.

(iv) *Mistake in expressing the offer*
Where an offer is accepted by an offeree who knows (or is deemed to know) of a material mistake in the expression of the offeror’s intention, the contract may be void. In *Hartog v. Colin & Shields* (1939) an offer to sell hare skins was accepted by an offeree who knew that the offeror had mistakenly stated his price as being price per pound weight when he meant a price per piece. It was held that the contract was void.

(v) *Non est factum*
The ancient defence of *non est factum* (it is not his deed) is now regarded as part of the law of unilateral mistake at common law. This defence allows an exception to the general rule that persons are bound by the terms of any document which they execute. The cases show that a person who is mistaken as to the nature of a document which he has signed or sealed as a result of blindness, illiteracy or fraudulent misrepresentation,