MISTAKE OF IDENTITY IN CONTRACT

Ingram v. *Little*

When does a mistake of identity of one of the contracting parties invalidate a contract? This topic has given rise, and will no doubt continue to give rise, to intensive controversy among judges and jurists alike. A very neat "puzzle" was recently faced by the Court of Appeal in the case of *Ingram* v. *Little.*[1]

The plaintiffs, who were joint owners of a car, advertised it for sale. A rogue, introducing himself as one Hutchinson, offered to buy it. The price was agreed upon, but when the rogue produced his cheque book he was told that on no account would the plaintiffs accept payment by cheque and that the deal was finished. The rogue, however, persuaded the plaintiffs that he was P. G. M. Hutchinson, a reputable businessman, living at Stanstead House, Stanstead Road, Caterham. On hearing the name and address one of the plaintiffs went to a nearby post office and ascertained from the telephone directory that there was such a person as P. G. M. Hutchinson living at the given address. On the strength of this information the plaintiffs decided to let the rogue have the car in exchange for the cheque. The rogue had nothing to do with the real P. G. M. Hutchinson and his cheque was, on presentation, dishonoured. Meanwhile the car had been sold to the defendant who bought it in good faith. The rogue disappeared and remained untraced. The plaintiffs then brought an action against the defendant for the return of the car or, alternatively, for damages for its conversion.

To succeed in their claim the plaintiffs had to show that their contract with the rogue was void and that the defendant could not therefore obtain a good title to the car. The issue which the court was asked to decide was therefore whether the plaintiffs intended to contract with the physical person present in the room *(i.e.,* the rogue), or whether they intended to contract with another individual *(i.e.,* P. G. M. Hutchinson) believing that he was the person before them. In the former case the contract would remain valid but voidable for fraud. In the latter case it would be void *ab initio* and no title could pass under it. Sellers and Pearce L.JJ. adopted the latter solution, but Devlin L.J. preferred the former.

Before dealing with their lordships' reasoning, it must be observed that there were in fact two stages in the transaction between the plaintiffs and the rogue. The first stage related to the fixing of the price of the car by the parties, before the rogue produced his cheque book. Could it be said that as soon as the price was agreed upon there was a concluded contract between the parties, and that the subsequent misrepresentation by the rogue that he was P. G. M. Hutchinson did not prevent the formation of the contract? Devlin L.J. was silent on this point. However, both Sellers and Pearce L.JJ. were of the opinion that there was no concluded contract at that stage. Indeed, Pearce L.J. admitted that the view that there was a concluded contract as soon as the parties agreed upon the price was "theoretically arguable," but his lordship preferred the "more realistic approach" of the learned trial judge in holding that no contract had yet been created. Payment and delivery still needed to be discussed and immediately the parties did discuss them it became plain that they were not *ad idem.* But even if there had been a concluded contract at that stage both Sellers and Pearce L.JJ. held that it was repudiated as soon as the plaintiffs informed the rogue that they would not under any circumstances accept payment by cheque.

The second stage of the transaction was initiated by the rogue when he persuaded the plaintiffs that he was P. G. M. Hutchinson. It was with this stage of the transaction that their lordships was mainly concerned. Hence if there was any

1. [I960] 3 W.L.R. 505.

contract between the plaintiffs and the rogue it must have been concluded at the time when the plaintiffs agreed to accept the rogue's cheque on discovering that there was a P. G. M. Hutchinson living at the given address from the telephone directory. Could it be said that the rogue's misrepresentation that he was P. G. M. Hutchinson amount to such a mistake as to prevent the formation of a contract with the plaintiffs?

All their lordships agreed that where the parties are negotiating *inter praesentes* there is a presumption that they intend to contract with each other. As Devlin L.J. puts it[2]: "The presumption that a person is intending to contract with the person to whom he is actually addressing the words of contract seems to me to be a simple and sensible one and supported by some good authority." This presumption is not, however, conclusive. *Hardman* v. *Booth*[3] is a case where the presumption has been successfully rebutted. The question therefore which their lordships had to decide was whether this presumption could be rebutted by the particular circumstances of the case before them. Sellers and Pearce L.JJ. held that in the instant case the presumption was successfully rebutted. But Devlin L.J., in a strong dissenting judgment, held otherwise.

The majority regarded the question as one of fact. Thus Pearce L.J. said: [4] "Each case must be decided on its own facts. The question in such cases is this. Has it been sufficiently shown in the particular circumstances that, contrary to the *prima facie* presumption, a party was not contracting with the physical person to whom he uttered the offer, but with another individual whom (to the other party's knowledge) he believed to be the physical person present. The answer to that question is a finding of fact." Devlin L.J., on the other hand, thought the question was one of mixed fact and law, which the trial judge could not be better equipped to answer than their lordships were.[5] In his view the question whether the plaintiffs intended to contract with the man in the room *(i.e.,* the rogue) or with P. G. M. Hutchinson could have no meaning for them since they believed that the rogue and P. G. M. Hutchinson were one and the same. The reasonable man of the law could not give any better answer.

In holding that the contract in the instant case was void the majority applied the test, "How ought the promisee to have interpreted the promise." They agreed with the trial judge that the plaintiffs intended to deal solely with P. G. M. Hutchinson and that their offers could not be accepted by the rogue. In other words they held that there was in fact no offer and acceptance between the plaintiffs and the rogue. The test of intention is always a difficult one. In the present case what the majority of the court did was in fact to ascribe an intention on the part of the plaintiffs which, as Devlin L.J. pointed out, they could not possibly have. The test of intention, therefore, appears to be a fictitious device which enables the court to reach a conclusion it desires. It is also interesting to note that the majority decision appears to fall within the test of the "third identifiable person" as propounded by Dr. Glanville Williams[6] although no reference was made by their lordships to such a test. According to Dr. Glanville Williams, a mistake as to identity consists of any material confusion by A, to B's knowledge, of B's actual attributes with those of some other identifiable person, C, of whose existence A has independent knowledge. The majority regarded the mistake in the instant case as material because, in the words of Pearce L.J., the parties "were concerned with a credit sale in which both parties knew that the identity of the purchaser was of the utmost importance." [7] It

2. *Ibid.* at p. 525.

S. (1863) 1 H. & C. 803; 158 E.R. 1107.

4. [1960] 3 W.L.R. 504 at p. 521.

5. *Ibid.* at p. 524.

6. (1945) 23 *Can. Bar. Rev.* 271.

7. [1960] 3 W.L.R. 504 at p. 518.

is also implicit in the majority decision that the plaintiffs need not *personally* know the third identifiable person. Further, it is not necessary that they should have prior knowledge of his existence before the making of the misrepresentation by the rogue. So long as there was an independent source of information regarding the existence of the third identifiable person, apart from the rogue's statement, that ought to be sufficient. Of course, the plaintiffs' knowledge of the existence of the third identifiable person must be prior to the formation of the contract; otherwise their mistake would be irrelevant. For this reason it is important to determine whether there was a concluded contract before the rogue made the misrepresentation that he was P. G. M. Hutchinson. It has already been noted that their lordships were of the opinion that there was no concluded contract prior to the misrepresentation by the rogue.

An interesting problem would arise if the third identifiable person happened to be dead immediately before the contract was made. On the one hand it may be argued that there is in fact no third existing person, and that the case is analogous to that of a confusion with a fictitious person which has not been regarded as an error of identity: see *King's Norton Metal Co.* v. *Edridge.* [8] On the other hand the distinction between the case where the third identifiable person is dead and the case where he is alive appears to be arbitrary and fortuitous.

Devlin L.J., as we have seen, held that the presumption that the plaintiffs intended to contract with the person before them was not rebutted by the circumstances of the case. He was of the opinion that the evidence in the case did not show anything more than that the plaintiffs were the victims of fraud. There was, at any rate, offer and acceptance between the parties in form. His lordship then went on to consider whether there was such a mistake in this case as to vitiate the consent of the parties. He held that the plaintiffs' mistake was really immaterial. They were not really concerned with the identity of the rogue, but with his credit worthiness; but credit worthiness in relation to a contract was not a basic fact and hence a mistake about it could not vitiate a contract. The fact that the rogue gave P. G. M. Hutchinson's name and address in the directory was no proof that he was P. G. M. Hutchinson; and if he had been, that fact alone was no proof that his cheque would be met.[9]

It would appear that the case of *Phillips* v. *Brooks* [10] might stand in the way of the majority decision. However, both Sellers and Pearce L.JJ. adopted the view expressed by Viscount Haldane (in *Lake* v. *Simmons* [11]) that *Phillips* v. *Brooks* could be explained on the ground that the fraudulent misrepresentation was not made until

8. (1897) 14 T.L.R. 98.

9. [1960] 3 W.L.R. 504 at p. 526. It is interesting to note that both Sellers and Pearce L.JJ. followed the trial judge in treating the plaintiffs as the offerors and the rogue as the acceptor, whereas Devlin L.J. treated the rogue as the offeror and the plaintiffs as the acceptors. Technically Devlin L.J. was probably correct since it was the rogue who initiated the second stage of the transaction by counter-offering his cheque for the car. Should these two different ways of looking at the transaction have any effect on the conclusions reached by their lordships? Or is it purely coincidental that the trial judge and the majority of the Court of Appeal in looking at the transaction from one angle arrived at one conclusion, while Devlin L.J. in looking at it from another angle came to a different conclusion? Whichever way the problem is looked at, it is submitted that the principle remains the same. A person cannot accept an offer which he knows is not intended for him. Similarly, a person cannot allege a contract when he knows that the acceptance was made with the intention of accepting an offer, not made by him but by some third party. See *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459, where it was the rogue Blankarn who made the offer.

10. [1919] 2 K.B. 243.

11. [1927] A.C. 487 at p. 501.

after the parties had agreed upon a sale. Devlin L.J., on the other hand, was of the opinion that the *ratio decidendi* of *Lake* v. *Simmons* turned on the construction of the insurance policy and that there was no support for the opinion of Viscount Haldane in any of the other speeches.[12] Leave to appeal to the House of Lords has already been given to the defendant in this case. The success of the appeal will depend on whether the House of Lords regard the mistake of the plaintiffs as inducing the formation of the contract, or merely inducing the delivery of the car.

It is clear that both the majority and the minority views as to the effect of the mistake in this case are equally tenable. The case serves to illustrate the vast possibilities of judicial divergence in this field of law. But while we cannot reproach the law for being uncertain in this respect, we can criticise it for being unnecessarily artificial. Both Pearce and Devlin L.JJ. were aware of the unsatisfactory state of the law on this matter. Thus Pearce L.J. regretted that "when the contract is void at common law, the court cannot by its equitable powers impose terms that would produce a fairer result."[13] Devlin L.J. reproached the law for resting on "theoretical distinctions" between voidness and voidability, instead of "looking for a principle that is simple and just."[14] He asked: "Why should the question whether the defendant should or should not pay the plaintiff damages for conversion depend upon voidness or voidability, and upon inferences to be drawn from a conversation in which the defendant took no part?..... For the doing of justice, the relevant question in this sort of case is not whether the contract was void or voidable, but which of two innocent parties shall suffer for the fraud of a third. The plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances."[15] It is respectfully submitted that Devlin L.J.'s criticism of the law is timely and justified, and that as the law stands, the real issues before the court in such cases tend to remain obscure.

Another reason why the law on this subject is somewhat unsatisfactory was observed by Pearce L.J. when he said: "The regrettable case with which a dishonest person can accomplish such a fraud is partially due to the unfortunate fact that registration books are not documents to title and that registration and legal ownership are so loosely connected."[16]

One aspect of Devlin L.J.'s judgment appears, however, in my submission, rather unfortunate. His lordship appears to take the view that there is an independent doctrine of mistake, distinct from the rules relating to offer and acceptance.[17] Whether there is or is not an independent doctrine of mistake is, however, too big an issue to be discussed in a note of this nature.[18]

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12. [1960] 3 W.L.R. 504 at p. 530.
13. *Ibid.* at p. 521.
14. *Ibid.* at p. 531.
15. *Ibid.* at p. 531.
16. *Ibid.* at p. 521.
17. *Ibid.* at p. 526.
18. For a stimulating discussion see C.J. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 *L.Q.R.* 385. See also Atiyah, *An Introduction to the Law of Contract,* (1961) at pp. 41-49.