

PROBLEM QUESTIONS ON MISTAKE

A common examinable area under the mistake in contract law is in the area of mistaken identity.

This can happen where one party makes a contract with a second party, believing him or her to be someone else.

If you encounter such a question, be on your guard right from the start. The law makes a distinction between contracts where the parties are not face to face, or to use the Latin, *inter absentes* and where the parties are face to face, that is, *inter praesentes*.

Where the parties are not physically in each other's presence, for example they may be dealing by correspondence, and one party is mistaken as to the identity, not the attributes, of the other and intends instead to deal with some identifiable third party, and the other knows this, the contract will be void for mistake. This was amply illustrated in the case of *Cundy v Lindsay*.

However, if the innocent party believes that he is dealing with a reputable firm, not a rogue, then the contract will not be void for mistake. The leading case on this principle is *King's Norton Metal Co Ltd v Edridge Merrett Co*. Make sure that you understand the reasoning for the different outcome in each of these cases.

Putting it simply, two conclusions can be drawn in cases where the parties are not in each other's presence. Firstly there must be an identifiable third party with whom the claimant intended to contract; and secondly, the mistake must be as to identity and not the attributes of the third party.

Where the parties are *inter praesentes*, that is, face to face, there is a presumption that the mistaken party intends to deal with the other person who is physically present and identifiable by sight and sound, irrespective of the identity which one or other may assume. For such a mistake to be an operative mistake and to make the agreement void the mistaken party must show that:

- (i) they intended to deal with someone else;
- (ii) the party they dealt with knew of this intention;
- (iii) they regarded identity as of crucial importance; and
- (iv) they took reasonable steps to check the identity of the other person

Even where the contract is not void, it may be voidable for fraudulent misrepresentation. The difficulty here though is that if the goods which are the subject-matter have passed to an innocent third party before the contract is avoided, that third party may acquire a good title as it is too late to rescind at this point. The main cases on mistake in face to face contracts are: *Phillips v Brooks*, *Lewis v Averay* and *Shogun Finance Ltd v Hudson*.

Still with reference to face to face contracts, the exception to the rule is that if a party intended to contract only with the person in front of him and has sought clarification of their identity, the contract may be rendered the contract void as was the case in *Ingram v Little*. In this case the court was satisfied that the mistake was to identity rather than attributes. *Ingram* was however a controversial decision and the exception is not applied lightly, as face to face contracts will not normally be held void for mistaken identity.

Some tips for answering a problem question in this area.

First of all you need to ascertain if the contract in question is face to face or non-face to face. Then ensure that you apply the correct rules. It is not necessary to explain both sets of rules, just concentrate on the rules that are relevant to the facts presented.

Explain the rules and support your explanation fully with relevant cases. Finally do not forget to explain the effect upon the contract, which, if the necessary criteria are fulfilled, will be void. Also point out the effect of a finding that the contract is void upon third parties who may have acquired the goods in good faith.