

INTERNATIONAL TRADE LAW AND COMMON MISTAKE: HAS THERE REALLY BEEN A SATISFACTORY CLARIFICATION OF WHAT FUNDAMENTAL LEGAL PRINCIPLES APPLY?

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1. INTRODUCTION

Law students learn at an early stage in their legal studies, that a person cannot easily avoid contractual arrangements merely by subsequently alleging that they made a ‘mistake’ at the time when they entered into such arrangements. It is only in certain specific circumstances that the courts will hold that a contractual obligation is void or voidable because of ‘mistake’ – and there are various fundamental legal principles which enable lawyers to establish what are those specific circumstances. Many of these ‘fundamental legal principles’ were laid down by the courts many years ago¹ and most lawyers, in their everyday business lives, usually proceed confidently in the belief that, provided they know the fundamental legal principles and apply them precisely to the problem at hand, they will be advising their client correctly as to the legal position. However, from time to time, the courts hand down a further judgment which then raises the possibility that either the relevant law is in fact not what most lawyers have assumed it to be (from the earlier judgment or judgments) *or* that the enunciation of the applicable ‘fundamental legal principles’ given in the earlier judgment lacked clarity requiring yet further clarification of the fundamental legal principles from the court..

This article examines a judgment handed down in the area of international trade law, regarding common mistake – and endeavours to determine whether such judgment has really been a satisfactory clarification of what fundamental legal principles apply. The relevant judgment is that of the English Court of Appeal in *Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd*² (the ‘*Great Peace* decision’).

Since Australian law has its origins in English law, this article considers some international trade law aspects associated with the *Great Peace* decision by outlining the

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¹ The two leading English cases dealing with common mistake are *Bell v Lever Brothers Ltd.* [1932] AC 161 and *Solle v Butcher* [1950] 1 KB 671. In Australia, cases such as *Taylor v Johnson* (1983) 151 CLR 422, *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 and *Svanosio v McNamara* (1956) 96 CLR 186 have adopted and followed (at least to some extent) the principles laid down by English courts.

² [2002] EWCA Civ 1407.

English and Australian law concerning common mistake prior to the English Court of Appeal's *Great Peace* decision. The nature and significance of the *Great Peace* decision and its effect on English and Australian jurisprudence are fully discussed with conclusions given as to whether *there really has been a satisfactory clarification of what fundamental legal principles apply?*

2. THE INTERNATIONAL TRADE LAW ASPECTS

The (English) Court of Appeal's *Great Peace* decision arose out of an international trade law contractual arrangement.

Often the relevance of landmark decisions which arise in the context of international trade law is confined to the arena of international trade law.³ However, it is interesting and heartening for international trade lawyers that the *Great Peace* decision has wider relevance beyond just the international trade law arena. The *Great Peace* decision lays out (supposedly)⁴ the fundamental legal principles that apply for an important area of the law generally, namely that relating to common mistake. Nevertheless, even apart from its landmark importance in the law generally (concerning common mistake), the *Great Peace* decision is also important, at a lower level, in the general area of international trade law. If a similar situation were again to arise in international shipping, the parties (and their legal advisers) would know that, as a result of the *Great Peace decision*, a salvage company like Tsavliris would not be able to avoid liability for hire charges in respect of a vessel which it had called on to go to the assistance of another vessel merely because, at the time the contractual arrangements had been made, the hired vessel was, because of mistaken information given by a third party, not in the location that the parties believed it to be. In fact, this is the reason Tsavliris took the matter on appeal to the (English) Court of Appeal even though a comparatively small amount of money was involved, namely the outcome would be a precedent when similar situations subsequently arose. As indicated by Tsavliris' lawyers:

Tsavliris is the premier worldwide emergency salvage response company. The majority of its work is undertaken on the basis of Lloyd's Open Form Salvage Agreements on a "No Cure No Pay" basis. It commonly exposes itself to considerable financial risk in undertaking salvage operations, especially where it is necessary to charter in tugs, vessels or equipment to assist in a particular operation ... For Tsavliris, although the outcome was disappointing, this adds to a series of important legal cases in which it has been involved, and in which decisions of substantial importance to the salvage industry have been made including Choko Star, Pa Mar, Herdentor, Tesaba and Toisa Puma.⁵

³ See e.g. *Pyrene Co. Ltd. v Scindia Navigation Co. Ltd.* [1954] 2 QB 402, *Kwei Tek Chao v British Traders & Shippers* [1954] 2 QB 459 and *United City Merchants (Investments) Ltd. v Royal Bank of Canada* [1982] 2 WLR 1039.

⁴ The purpose of this article is, inter alia, to make a determination as to whether or not the *Great Peace* decision has, in reality, satisfactorily clarified what fundamental legal principles apply when the issue of 'common mistake' is raised.

⁵ See the letter from Roland Jackson of Shaw and Croft, Solicitors, London entitled 'Why the Great Shipping case incurred 69 pages of judgment' in *Lloyd's List International* of 23 October 2003.

3. THE ENGLISH AND AUSTRALIAN POSITIONS REGARDING COMMON MISTAKE - PRIOR TO THE 'GREAT PEACE' DECISION

3.1 English position

Australian case law on common mistake is based on English judicial interpretative approaches. This paper considers two aspects:

- (a) common mistake at common law
- (b) common mistake in equity.

3.1.1 Common mistake at common law

In very limited circumstances, the common law will grant relief to a mistaken party. The common law does recognize three types of mistake. These are *common mistakes*, *mutual mistakes* and *unilateral mistakes*. A common mistake occurs when each party makes exactly the same mistake; a mutual mistake occurs when the parties misunderstand each other and are, therefore, at cross-purposes; a unilateral mistake occurs when one party is mistaken and the other party knows or ought to be aware of the mistake made. This article focuses only on the law concerning the first type of mistake recognised by the courts, namely common mistake.

Common mistake can be put into three categories:

- (a) common mistake as to the existence of the subject matter;
- (b) common mistake as to title;
- (c) common mistake as to the quality of the subject matter.

At common law, in order to have the courts declare a contract void because of common mistake, more is required than just establishing the making of *any* sort of common mistake. Khoury and Yamouni, when speaking of common mistake at common law, summarize the position in the following terms:

The courts will not render a contract void on the ground of common mistake *unless* the common mistake involves a matter which is *so fundamental* to the contract that both parties regard it as a condition precedent to the existence of a binding contract. Whether a common mistake is of that nature will, of course, depend upon the facts of the case. However, the decided cases, suggest that to be fundamental, the common mistake must either:

- relate to the very existence of the subject matter of the contract or
- involve the sale of property to a person who already owns it.

By way of contrast, a common mistake as to the quality, nature or value of the subject matter is not sufficient.⁶

A case which is often quoted to illustrate the first 'res extincta' situation (i.e. a common mistake as to the very existence of the subject matter of the contract) is *Scott v Coulson*.⁷ In that case, Scott entered into a contract to assign a life insurance policy to Coulson. However, unknown to both the assignor and the assignee of the policy, the assured had already died. It was held by the English Court of Appeal that the contract of

⁶ D. Khoury and Y.S. Yamouni, *Understanding Contract Law* (6th edition. Chatswood, Australia: LexisNexis Butterworths, 2003) at 268. Emphasis added.

⁷ [1903] 2 Ch 249.

assignment was void for common mistake.⁸ The second 'res sua' situation (i.e. a common mistake involving the 'sale'⁹ of property to a person who already owns it) can be seen in such cases as *Cooper v Phibbs*.¹⁰ In that case, when his uncle died, the nephew contracted with his cousins (the uncle's daughters) to lease a fishery, which all parties believed had been the uncle's property and which had passed to the cousins on his death. However, in actual fact, the nephew was already the true owner of the fishery. The House of Lords held that the mistake made the contract liable to be set aside - and it was so set aside. As regards the third situation (which is normally *not* sufficient for the courts at common law to intervene, i.e. a common mistake as to the quality, nature or value of the subject matter), a case which is often mentioned by way of illustration is *Leaf v International Galleries*.¹¹ In that case, Leaf purchased a painting entitled 'Salisbury Cathedral' from International Galleries which both parties honestly believed was painted by Constable. When it was later revealed that the painting was not by Constable, Leaf sought to have the contract declared void for common mistake. The English Court of Appeal held that there was no operative common mistake (i.e. it was not one that allows any resulting contract to be set aside). Denning LJ in his judgment stated the legal position in the following terms:

This was a contract for the sale of goods. There was a mistake about the *quality* of the subject-matter, because both parties believed the picture to be a Constable; and that mistake was in one sense essential or fundamental. But such a mistake does not avoid the contract: there was no mistake at all about the *subject-matter* of the sale. It was a specific picture, "Salisbury Cathedral". The parties were agreed in the same terms on the same subject-matter, and that is sufficient to make a contract...¹²

The leading case (in English law) regarding common mistake at common law - especially common mistake as to the quality of the subject matter - is *Bell v Lever Brothers Ltd*.¹³ The facts of that case were as follows. Bell (along with Snelling) had been appointed managing director of a Lever Brothers subsidiary in Africa. He was employed for a five-year period at a salary of £8000 per annum. After serving three years of that term, Bell was made redundant and his employer agreed to pay him £30,000 for the premature termination of his contract. Soon after the payment had been made, Lever Brothers became aware that during his period as managing director, Bell had breached his duty to the company by trading on his own account. It was also advised that such a breach would render Bell liable to dismissal without any compensation. Consequently, Lever Brothers brought an action to recover the £30,000. It alleged that the termination contract was void for common mistake - namely, that the contract was negotiated on the basis that both parties believed that some payment was obligatory. However, it was held by the House of Lords that the mistake was not such as to render the contract void. The majority of the judges took the view that, irrespective of what the parties thought about the need for payment, the subject matter of the contract was the same - the termination of Bell's employment. It was immaterial that the same result could have been achieved by other means. Atkin LJ in dismissing the claim,

⁸ Another case is *Couturier v Hastie* (1852) 8 Ex 40; 155 ER 1250 (where specific goods had ceased to exist in a commercial sense before the time of the contract). That legal position has been given statutory force in the various Sale of Goods Acts, e.g. Section 11 of the Sale of Goods Act 1923 (NSW).

⁹ For present purposes, 'sale' can be regarded as also covering 'leasing'.

¹⁰ (1867) LR 2 HL 149.

¹¹ [1950] 2 KB 86.

¹² *Id.* 89. Emphasis added.

¹³ [1932] AC 161. Hereinafter this case will generally be referred to as *Bell v Lever Brothers*.

indicated the reluctance of the courts to grant relief on the ground of mistake.¹⁴ He also laid down, in the following passage, the fundamental principle the court would use when considering whether a contract is void for common mistake (as to the quality of the subject matter):

Mistake as to quality of the thing contracted for raises more difficult questions. *In such a case a mistake will not affect assent unless it is the mistake of both parties, and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.*¹⁵

This test for common mistake is very narrow¹⁶ and extremely difficult to satisfy.¹⁷ It has subsequently been interpreted to mean that ‘the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist’ at the time the contract was made.¹⁸

3.1.2 Common mistake in equity

Since equity follows the common law, contracts which are at common law regarded as being void for common mistake in the first and second abovementioned situations (i.e. where there is common mistake as to the existence of the subject matter¹⁹ or where there is common mistake involving an owner purchasing his or her own property²⁰) will likewise be considered by equity as being void.²¹ However – at least until the time of the handing down of the *Great Peace* decision²² – it has been considered that equity can intervene in two situations involving common mistake. Firstly, it can order the rectification of an agreement which has been inaccurately expressed in written form. Secondly, it may - in certain circumstances - set aside a contract concluded on the basis of a common mistake even though that common mistake does not relate to a ‘res extincta’ situation²³ or to a ‘res sua’ situation.²⁴ The first situation (‘rectification’) is relatively straight forward. As Graw indicates, if the parties to a contract reach agreement and then draw up a written document which, by mistake, fails to record that agreement accurately, the court may rectify the document by ordering that the mistaken portion be struck out and replaced with the words that do reflect what they actually agreed.²⁵ It is considered that this is still the position, i.e. the capability of the court to do this has not been affected by the *Great Peace* decision - and it is not proposed to examine this first situation further. The second situation is, however, directly relevant to the focus of this article.

¹⁴ Id. 224. There are normally two reasons given for the reluctance of the courts to grant relief for mistake, namely (a) there is the fear that a liberal attitude by the courts (to the allowing of contracts to be set aside for mistake) would encourage persons to resort to fraudulent claims of mistake in order to avoid their contractual obligations and (b) the setting aside of contracts on the ground of mistake could have unjust effects on innocent third parties.

¹⁵ Id. 218. Emphasis added.

¹⁶ In this regard, see e.g. the comment of Lord Phillips in *Great Peace Shipping Limited v Tsavliris (International) Limited* [2002] EWCA Civ 1407 at paragraph 86.

¹⁷ Hence it is often considered that the only instances, at common law, where a contract will be held to be void for common mistake are where the common mistake is as to the existence of the subject matter or where the common mistake is as to title.

¹⁸ *Associated Japanese Bank (International) Ltd. v Credit Du Nord S.A.* [1989] 1 WLR 255 at 268.

¹⁹ i.e. a ‘res extincta’ situation.

²⁰ i.e. a ‘res sua’ situation.

²¹ Equity will thus refuse to grant specific performance of such contracts.

²² *Great Peace Shipping Limited v Tsavliris Salvage (International) Ltd.* [2002] EWCA Civ 1407.

²³ i.e. a common mistake as to the very existence of the subject matter of the contract.

²⁴ i.e. a common mistake involving the sale of property to a person who already owns same.

²⁵ Stephen Graw, *An Introduction to the Law of Contract* (4th edition. Sydney: LBC Information Services, 2002) at 255.

It was mentioned earlier that a common mistake merely as to the *quality* of the subject matter is not sufficient to enable the *common law* to set aside a contract unless '*it is the mistake of both parties, and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.*'²⁶ As indicated above, this very narrow test laid down by Atkin LJ in ***Bell v Lever Brothers*** is extremely difficult to satisfy. However, despite this common law position, it has also (for many years) been the general belief that, in some of the scenarios where the common law would not allow common mistake to make a contract *void*, a court - exercising its *equitable jurisdiction* - could nevertheless hold the contract to be *voidable* and, if appropriate, set it aside on such terms as the court thinks fit. The basis for this belief is the English Court of Appeal's decision in ***Solle v Butcher***.²⁷

The facts in ***Solle v Butcher*** were as follows. Butcher leased a flat to Solle for seven years at a fixed annual rental of £250 per annum. After occupying the flat for two years, it was discovered that the maximum rent payable for the flat under the rent restrictions legislation in force at the time was £140 per annum. The only way Butcher could have increased that amount was if he had served a notice of increase prior to Solle's signing the lease. He did not serve such a notice because both he and Solle believed that, due to certain structural alterations carried out on the flat, the flat was not subject to the legislation. In fact, Solle, who was also Butcher's letting agent for other flats that he owned, had obtained legal opinion to that effect. He also advised Butcher that £250 per annum was a reasonable rent for the flat. Notwithstanding that advice, Solle brought an action against Butcher claiming the excess paid over the previous two years and a declaration that he could remain in the flat for the remainder of the lease for £140 per annum. Butcher counterclaimed, seeking a declaration that the lease was void for common mistake.

Early in his judgment in ***Solle v Butcher***, Lord Denning stated:

[It] is necessary to remember that mistake is of two kinds: first, mistake which renders the contract *void*, that is, a nullity from the beginning, which is the kind of mistake that was dealt with by the courts of common law; and, secondly, mistake which renders the contract not void, but *voidable*, that is, liable to be set aside on such terms as the court thinks fit, which is the type of mistake which was dealt with by the courts of equity. Much of the difficulty which has attended this subject has arisen because, before the fusion of law and equity, the courts at common law, in order to do justice in the case in hand, extended this doctrine of mistake beyond its proper limits and held contracts to be void which were really only voidable, a process which was capable of being attended with much injustice to third persons who had bought goods or otherwise committed themselves on the faith that there was a contract ... Since the fusion of law and equity, there is no reason to continue this process...²⁸

After indicating that ***Bell v Lever Brothers*** is the starting point for any consideration of the law concerning common mistake, Lord Denning said:

The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the

²⁶ *Bell v Lever Brothers Ltd* [1932] 1 AC 161 at 218. Emphasis added.

²⁷ [1950] 1 KB 671.

²⁸ *Id.* 690-691. Emphasis added.

contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground.²⁹

According to Lord Denning, the contract in *Solle v Butcher* was not void at *common law* for common mistake. In this regard, he commented:

[I]t is clear that here there was a contract. The parties agreed in the same terms on the same subject matter. It is true that the landlord was under a mistake which was to him fundamental: he would not for one moment have considered letting the flat for seven years if it meant that he could only charge £140 a year for it. He made the fundamental mistake of believing that the rent he could charge was not tied down to a controlled rent; but, whether it was his own mistake or a mistake common to both him and the tenant, it is not a ground for saying that the lease was from the beginning a nullity.³⁰

Lord Denning then went on to consider mistakes which render a contract *voidable* (i.e. liable to be set aside on some *equitable* ground). As to when *equity* will intervene to set aside a contract if the parties were under a common mistake, Lord Denning said:

Whilst presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. ... *A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.*³¹

The last sentence is Lord Denning's formulation of the test as to when equity will intervene to set aside a contract for common mistake. According to such test, equity will intervene to set aside a contract for common mistake *if* the following conditions are met:

- (a) there is a common misapprehension;
- (b) that misapprehension is of a 'fundamental' nature;
- (c) the party seeking to have the contract set aside is not at fault.

In *Solle v Butcher*, the (English) Court of Appeal - exercising its *equitable* jurisdiction and on the basis that the conditions required by the aforementioned test had been satisfied - was prepared to set aside the contract (and did) upon terms which it considered just to both parties. Basically, those terms gave the tenant the right to choose either to stay on for what he agreed was a fair rent (£250) or to vacate the premises.

To this point - i.e. up to and just prior to the *Great Peace* decision, the position concerning common mistake in English law has been considered to be as follows:

- (a) a common mistake would normally only render a contract *void* if it related to the actual existence of the subject matter of the contract³² or if the object of a purported sale already belonged to the buyer;³³

²⁹ Id. 691.

³⁰ Id. 692.

³¹ Id. 692-693. Emphasis added.

³² i.e. a 'res extincta' situation.

³³ i.e. a 'res sua' situation.

- (b) in all other cases, the contract would stand as is, unless the court - exercising its *equitable jurisdiction* (after being satisfied as to the fulfilment of the conditions laid down by Lord Denning in his abovementioned test in *Solle v Butcher*) - set the contract aside on whatever terms it considered fair in the circumstances.

However, despite this seemingly straightforward position, the courts and lawyers generally over the last 50 years have experienced substantial difficulties in trying to reconcile *Solle v Butcher* with *Bell v Lever Brothers*. It has been very difficult for them to identify, with precision, exactly what compatible principles regarding common mistake such cases have laid down.³⁴

3.2 Australian position

An examination of the Australian caselaw shows that the Australian courts have (to the time of the *Great Peace* decision) followed at least to some extent the English caselaw (of *Bell v Lever Brothers* and *Solle v Butcher*) regarding common mistake at common law and in equity.

As regards common mistake at common law in Australia, Carter and Harland state:³⁵

In *Taylor v Johnson*,³⁶ the High Court of Australia recognized the authority of Lord Atkin's speech³⁷ in *Bell v Lever Brothers*, for the proposition that the *formation* of contracts is to be determined objectively, with the consequence that, until the objective approach is displaced, there is a contract which remains binding unless and until it is set aside for fraud, failure of an agreed condition precedent or on some equitable ground. The theme of the Australian cases, beginning with *McRae v Commonwealth Disposals Commission*,³⁸ is that although the speech of Lord Atkin in *Bell v Lever Brothers* is a correct statement of the law, the test is so rarely satisfied as to be of marginal significance.

and later (as regards common mistake in equity in Australia),

The equitable doctrine of common mistake, broadly as formulated by Denning LJ ... has also received some measure of support in Australia.³⁹

The High Court of Australia decisions in which *Solle v Butcher* has been cited with approval (or at least passages of Lord Denning's judgment therein) include *McRae v Commonwealth Disposals Commission*,⁴⁰ *Svanosio v McNamara*⁴¹ and *Taylor v Johnson*.⁴²

³⁴ See e.g. J.C. Smith, 'Contracts - Mistake, Frustration and Implied Terms' (1994) 110 LQR 400, John Cartwright, 'Solle v Butcher and the Doctrine of Mistake in Contract' (1987) 103 LQR 594 and C.J. Slade, 'The Myth of Mistake in the English Law of Contract' (1954) 70 LQR 385.

³⁵ J.W. Carter and D.J. Harland, *Contract Law in Australia* (4th edition. Butterworths: Sydney, 2002) at [1224] and [1229].

³⁶ (1983) 151 CLR 422.

³⁷ [1932] AC 161 at 217-27.

³⁸ (1951) 84 CLR 377.

³⁹ The footnote reference here in the original wording is a direction to other commentary (elsewhere in the same book) concerning the Australian case of *Taylor v Johnson* (1983) 151 CLR 422.

⁴⁰ (1951) 84 CLR 377 at 402, 407.

⁴¹ (1956) 96 CLR 186 at 195-6.

⁴² (1983) 151 CLR 422 at 429-431.

4. THE 'GREAT PEACE' DECISION

The Court of Appeal's decision in *Great Peace Shipping Limited v Tsavlis (International) Limited* was handed down on 14 October 2002 in the form of a single judgment.⁴³ Its particular importance lies in the fact that it is a recent statement on the part of the (English) Court of Appeal as to the current state of the (English) law of common mistake. In its judgment, the Court of Appeal commenced by mentioning that:

- (a) In the judgment of the House of Lords in 1932 in *Bell v Lever Brothers*,⁴⁴ Lord Atkin made a speech which has been treated as the definitive exposition of the rules of law governing the effect of mistake on contract;
- (b) In 1950, in *Solle v Butcher*,⁴⁵ Denning LJ (in the Court of Appeal) identified an equitable jurisdiction which permits the court to intervene where the parties have concluded an agreement that was binding in law under a common misapprehension of a fundamental nature as to the material facts or their respective rights;
- (c) Over the last fifty years, judges and jurists have wrestled with the problem of reconciling these two decisions and identifying with precision the principles that they lay down.⁴⁶

4.1 The facts

In September 1999, the 'Cape Providence' was on its way from Brazil to China with a cargo of iron ore when it suffered serious structural damage in the South Indian Ocean. Tsavlis (the defendant) learned that the vessel was in difficulties and offered its salvage services (which were accepted). To find a tug, Tsavlis approached a firm of London brokers, Marint. A tug was found, but it was going to take five or six days for the tug to reach the 'Cape Providence' from Singapore. As there was serious concern that in the meantime the vessel might go down with the loss of her crew, Marint was asked by Tsavlis to try to find a merchant vessel in the vicinity of the 'Cape Providence' which would be willing to assist, if necessary, with the evacuation of the crew. Marint contacted Ocean Routes (a respected organisation which provides weather forecasting services to the shipping industry and receives reports about vessels at sea). Ocean Routes advised Marint that the 'Great Peace' (a vessel owned by the plaintiffs, Great Peace Shipping Limited) was the nearest to the 'Cape Providence' and should be close to a rendezvous position within about twelve hours. A contract was duly entered into between the Great Peace Shipping Limited and Tsavlis. The hire was to be for a minimum of 5 days and the purpose of the charter was to escort and stand-by the 'Cape Providence' for the purpose of saving life. After the contract had been concluded, the parties discovered that the information supplied by Ocean Routes was wrong and the vessels were in fact 410 miles away from each other. If the information previously given to Marint by Ocean Routes had been accurate, the vessels should have been only about 35 miles apart when the contract was concluded. In the meantime, the 'Cape Providence' was passed by a vessel called the 'Nordfarer'. Tsavlis thereupon contracted with the owners of the 'Nordfarer' directly and at the same time instructed Marint to cancel the 'Great Peace' contract (which was done). The plaintiff (Great Peace Shipping Limited) claimed US\$82,500 as being the minimum 5 days hire due under the contract entered into by it with Tsavlis (or, alternatively, the same sum as damages for the defendants' alleged wrongful repudiation of the charter). However, the

⁴³ [2002] EWCA Civ No. 1407.

⁴⁴ [1932] AC 161.

⁴⁵ [1950] 1 KB 671.

⁴⁶ *Great Peace Shipping Limited v Tsavlis (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 1.

defendant (Tsavlis) was not prepared to pay any monies to Great Peace Shipping Limited. The defence of Tsavlis to the plaintiff's claim was that:

- (a) the charter contract had been rendered *void* by a *common mistake at common law* since, unknown to both parties, the vessels were not in close proximity to each other (and this turned the contract into something essentially different from that for which the parties bargained);

or alternatively,

- (b) the charter contract was *voidable* for *common mistake in equity* (since the parties had entered into the contract under a common mistake as to a matter 'fundamental' to the agreement in question) and they were therefore entitled to rescind the contract.

4.2 The "common mistake at common law" defence

In the *Great Peace* case the parties were agreed as to the express terms of the contract (i.e. that the 'Cape Providence' would deviate towards the 'Great Peace' and, on reaching her, escort her so as to be on hand to save the lives of her crew, should she founder). The common mistake relied upon by the defendant (Tsavlis) - as being the basis for its non-liability to make payment to the plaintiff (Great Peace Shipping Limited) - was as to an assumption that it claimed underlay the agreed contract. This assumption was that the 'Cape Providence' was within a few hours sailing of the 'Great Peace'. Tsavlis argued that performance of the contract, in the circumstances as they turned out to be, would have been fundamentally different from the performance contemplated by the parties, so much so that the effect of the mistake was to deprive the agreement of the consideration underlying it and, under common law, the effect of such a mistake was to render the contract void. The foundation for this submission was *Bell v Lever Brothers* and the test for common mistake at common law laid down therein by Lord Atkin.⁴⁷

The Court of Appeal (in *Great Peace*) said that it was unquestionably a common assumption of both parties when the contract was concluded that the two vessels were in sufficiently close proximity to enable the "Great Peace" to carry out the service that it was engaged to perform. The Court of Appeal then asked the question: *Was the distance between the two vessels so great as to confound that assumption and to render the contractual adventure impossible of performance?*⁴⁸ In the lower court, Toulson J had addressed this issue in the following paragraph of his judgment:

Was the "Great Peace" so far away from the "Cape Providence" at the time of the contract as to defeat the contractual purpose - or in other words to turn it into something essentially different from that for which the parties bargained? This is a question of fact and degree, but in my view the answer is no ... A telling point is the reaction of the defendants on learning the true positions of the vessels. They did not want to cancel the agreement until they knew if they could find a nearer vessel to assist. Evidently the defendants did not regard the contract as devoid of purpose, or they would have cancelled at once.⁴⁹

⁴⁷ *Bell v Lever Brothers Ltd.* [1932] AC 161 at 218.

⁴⁸ *Great Peace Shipping Limited v Tsavlis (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 162. Emphasis added.

⁴⁹ *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* (2001) 151 NLJ Law Reports 1696 at paragraph 56.

and the Court of Appeal agreed with such conclusion.⁵⁰ The Court of Appeal felt that it was legitimate for Toulson J to have regard to the fact that the appellants did not want to cancel the agreement with the ‘Great Peace’ until they knew whether they could get a nearer vessel to assist. In the view of the Court of Appeal, this reaction was a telling indication that the fact that the vessels were considerably further apart than the appellants had believed did not mean that the services that the ‘Great Peace’ was in a position to provide were essentially different from those which the parties had envisaged when the contract was concluded. The ‘Great Peace’ would arrive in time to provide several days of escort service. The appellants would have wished the contract to be performed but for the adventitious arrival on the scene of a vessel prepared to perform the same services. The fact that the vessels were further apart than both parties had appreciated did not mean that it was impossible to perform the contractual adventure. The parties entered into a binding contract for the hire of the ‘Great Peace’. That contract gave the appellants an express right to cancel the contract subject to the obligation to pay the ‘cancellation fee’ of 5 days hire. When they engaged the ‘Nordfarer’ they cancelled the ‘Great Peace’. According to the Court of Appeal, they thus became liable, in consequence, to pay the cancellation fee and there was no injustice in that result.⁵¹ Thus the defence of common mistake at common law failed.

4.3 The “common mistake in equity” defence

Tsavliris argued in the alternative that the facts gave rise to a right of rescission in equity, such a right arising whenever the parties contracted under a common mistake as to a matter that could be described as fundamental or material to the agreement in question. The foundation for that submission was *Solle v Butcher*.⁵²

According to the (English) Court of Appeal, a small number of cases in the last 50 years have purported to follow *Solle v Butcher*, yet none of them have defined the test of mistake that gives rise to the equitable jurisdiction to rescind in a manner that distinguishes this from the test of a mistake that renders a contract void in law, as identified in *Bell v Lever Brothers*.⁵³ Nor, over 50 years, has it proved possible to define satisfactorily two different qualities of mistake, one operating in law and one in equity.⁵⁴ The Court of Appeal said that, in *Solle v Butcher*, Denning LJ identified the requirement of a common misapprehension that was ‘fundamental’, and that adjective has been used to describe the mistake in those cases which have followed *Solle v Butcher* - but the Court of Appeal did not find it possible to distinguish, by a process of definition, a mistake which is ‘fundamental’ from Lord Atkin’s mistake as to quality which ‘makes the thing contracted for essentially different from the thing that it was believed to be’.⁵⁵ The Court stated that it was only concerned with the question whether relief might be given for common mistake in circumstances wider than those stipulated in *Bell v Lever Brothers*. But that, according to the Court of Appeal, is a question as to where the common law should draw the line; not whether, given the common law rule, it needs to be mitigated by application of some other doctrine.⁵⁶ The common law has drawn the line in *Bell v Lever Brothers*.⁵⁷ The effect of *Solle v Butcher* is not to supplement or mitigate the common law; it is to say that *Bell v Lever Brothers* was

⁵⁰ Great Peace Shipping Limited v Tsavliris (International) Limited [2002] EWCA Civ No. 1407 at paragraph 162. Emphasis added.

⁵¹ Id. paragraphs 165-166.

⁵² Id. paragraph 34.

⁵³ Id. paragraph 153.

⁵⁴ Ibid.

⁵⁵ Id. paragraph 154.

⁵⁶ Id. paragraph 156.

⁵⁷ Ibid.

wrongly decided.⁵⁸ The Court of Appeal's conclusion was that it is impossible to reconcile *Solle v Butcher* with *Bell v Lever Brothers*.⁵⁹ In his judgment,⁶⁰ Toulson J. had demonstrated the extent of the confusion in this area of the law and the Court of Appeal concluded that, if coherence is to be restored to this area of the law, it can only be by declaring that there is no jurisdiction to grant rescission of a contract on the ground of common mistake where that contract is valid and enforceable on ordinary principles of contract law.⁶¹ That was the conclusion of Toulson J. in the lower court and that conclusion was now endorsed by the Court of Appeal.

The Court of Appeal towards the end of its judgment stated that, in *Great Peace*, the Court of Appeal had been provided with the first opportunity for a full and mature consideration of the relation between *Bell v Lever Brothers* and *Solle v Butcher* and, in the light of that consideration, the Court of Appeal could see no way that *Solle v Butcher* can stand with *Bell v Lever Brothers*.⁶² Accordingly the defence on the ground of common mistake in equity was also dismissed because - as stated by Lord Phillips in his judgment (which was unanimously accepted by the entire Court of Appeal) - 'there is no jurisdiction to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of contract law'.⁶³

5. THE ENGLISH AND AUSTRALIAN POSITIONS REGARDING COMMON MISTAKE - SINCE THE 'GREAT PEACE' DECISION

5.1 English position

At the present time, pursuant to the (English) Court of Appeal's judgment in *Great Peace Shipping* and the House of Lords' earlier decision in *Bell v Lever Brothers*, the English position regarding common mistake is as follows.

The issue of common mistake will only arise where the contract itself does not deal with the question of which party should bear the risk of a particular set of circumstances occurring or does not deal with sufficient certainty with the situation that has arisen. The fundamental principle concerning common mistake (and test for same) is that laid down in *Bell v Lever Brothers*. That fundamental principle is that a mistake will not affect assent unless it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.⁶⁴ Lord Atkin's test has subsequently been interpreted to mean that 'the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist' at the time the contract was made.⁶⁵ In *Great Peace*, the Court of Appeal has also indicated that the following five elements must be present if common mistake is to avoid a contract:

⁵⁸ Ibid.

⁵⁹ Id. paragraph 157.

⁶⁰ *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* (2001) 151 NLJ 1696 at paragraphs 110 to 121 inclusive.

⁶¹ *Great Peace Shipping Limited v Tsavliris (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 157.

⁶² Id. paragraph 160.

⁶³ Id. paragraph 157.

⁶⁴ *Bell v Lever Brothers Ltd* [1932] 1 AC 161 at 218.

⁶⁵ *Associated Japanese Bank (International) Ltd. v Credit Du Nord S.A.* [1989] 1 WLR 255 at 268.

- (1) there must be a common assumption as to the existence of a state of affairs;
- (2) there must be no warranty by either party that that state of affairs exists;
- (3) the non-existence of the state of affairs must not be attributable to the fault of either party;
- (4) the non-existence of the state of affairs must render performance of the contract impossible;
- (5) the state of affairs may be the existence, or a vital attribute, of the consideration to be provided or circumstances which must subsist if performance of the contractual adventure is to be possible.⁶⁶

Because the *Bell v Lever Brothers* test for common mistake, is so narrow and difficult to satisfy, it seems that, almost always, the only situations where the court will intervene to declare the contract void for common mistake will be where there was a common mistake as to the existence of the subject matter (“res extincta”) or where there was a common mistake involving an owner purchasing his or her own property (“res sua”). There is no jurisdiction in equity to grant rescission of a contract on the ground of common mistake where the contract is valid and enforceable on ordinary principles of common law. The Court of Appeal’s judgment in *Solle v. Butcher* is inconsistent with the House of Lord’s decision in *Bell v Lever Brothers* and hence (in view of the *Great Peace* decision) is no longer good authority.

To date, there has been no indication that the *Great Peace* case will be taken on appeal to the House of Lords. Obviously a decision by the House of Lords confirming the Court of Appeal’s decision in *Great Peace* would put beyond doubt any questioning of the Court of Appeal decision. However, in *Great Peace*, the Court of Appeal, after coming to the conclusion that it was impossible to reconcile *Solle v Butcher* with *Bell v Lever Brothers*, did then turn its attention to the question as to what, according to the principles of case precedent, is the correct approach where the Court of Appeal concludes that a decision of the Court of Appeal cannot stand with an earlier decision of the House of Lords. First of all, it noted that there was *Noble v Southern Railway Company*⁶⁷ where the Court of Appeal held itself bound to follow a previous decision of the Court of Appeal that was on all fours – *Clarke’s case*⁶⁸ – notwithstanding that this was in conflict with an earlier decision of the House of Lords – *McFerrin’s case*.⁶⁹ However, as the Court of Appeal pointed out, in *Noble* Lord Wright had made the following comment on this situation:

I can understand the difficulty in which both the county court judge and the Court of Appeal were placed in the present case. What a court should do when faced with a decision of the Court of Appeal manifestly inconsistent with the decisions of this House is a problem of some difficulty in the doctrine of precedent. I incline to think it should apply the law laid down by the House and refuse to follow the erroneous decision.⁷⁰

The Court of Appeal in *Great Peace* also noted that Lord Lane CJ, when delivering the judgment of the Court of Appeal, invoked this statement of opinion in *Holden & Co v Crown Prosecution Service*.⁷¹ At issue there was the scope of the jurisdiction of the court to order a solicitor to pay personally costs thrown away in criminal proceedings.

⁶⁶ *Great Peace Shipping Limited v Tsavliris (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 76.

⁶⁷ [1940] AC 583.

⁶⁸ (20) BWCC 309.

⁶⁹ [1926] AC 377.

⁷⁰ *Noble v Southern Railway Company* [1940] AC 583 at 598.

⁷¹ [1990] 2 QB 261.

The court was faced with reasoning on the point in a previous decision of the Court of Appeal which was at odds with an earlier decision of the House of Lords. Lord Lane, having referred to the opinion of Lord Wright, went on to hold that the court regarded itself as free to disregard the previous decision of the Court of Appeal.

Then, after also mentioning that whilst:

- (a) it was in some doubt as to whether this line of authority goes far enough to permit it to hold that *Solle v Butcher* is not good law;
- (b) it was very conscious that it was not only scrutinising the reasoning of Lord Denning in *Solle v Butcher* and in *Magee v Pennine Insurance*,⁷² but it was also faced with a number of later decisions in which Lord Denning's approach has been approved and followed;
- (c) a Division of the Court of Appeal had recently made it clear in *West Sussex Properties Ltd v Chichester DC* that they felt bound by *Solle's case*,

the Court of Appeal went on to state that, in this case (*Great Peace*), it had heard full argument, which had provided what it believed to have been the first opportunity in the Court of Appeal for a full and mature consideration of the relation between *Bell v Lever Brothers* and *Solle v Butcher*. In the light of that consideration, the Court of Appeal could see no way that *Solle v Butcher* could stand with *Bell v Lever Brothers* and, accordingly, in these circumstances, it would so hold. Thus, it is submitted, the Court of Appeal's action in over-ruling *Solle v Butcher* does have a valid basis.

To date, there have been at least two English cases where the (English) Court of Appeal's decision in *Great Peace* has been mentioned and followed. These cases are:

- (a) *Huyton S. A. v Distribuidora Internacional De Productos Agricolas S.A.*⁷³
- (b) *Beximco Pharmaceuticals Ltd & Ors v Shamil Bank of Bahrain E.C.*⁷⁴

The first is a decision of the (English) High Court and the second is a decision of the (English) Court of Appeal.

5.2 Australian position

At the time of the writing of this article, the *Great Peace* decision has been mentioned in at least two Australian cases, namely *Donkin v Official Trustee in Bankruptcy*⁷⁵ and *Harris v Digital Pulse Pty. Ltd.*⁷⁶ In *Donkin v Official Trustee in Bankruptcy* (which was a decision of the Queensland Supreme Court on 26 November 2003), the *Great Peace* decision was *applied* by Chesterman J. in the following terms:

A recent decision of the Court of Appeal, *Great Peace Shipping Ltd v Tsavlis Salvage (International) Ltd* [2002] 3 WLR 1617 appears to have reinstated the law concerning common mistake and concluded that where parties contract on the basis of a common mistake as to the subject matter of their contract the contract is void. The mistake must be shared by both parties and must relate to facts as they existed at the time the contract was made. If the mistake renders the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist the contract will be void.⁷⁷

⁷² [1969] 2 QB 507.

⁷³ [2002] EWHC 2088 (Comm) (25 October 2002).

⁷⁴ [2004] EWCA Civ 19 (28 January 2004).

⁷⁵ [2003] QSC 401.

⁷⁶ [2003] NSWCA 10.

⁷⁷ *Donkin v Official Trustee in Bankruptcy* [2003] QSC 401 at paragraph 52.

In *Harris v Digital Pulse Pty. Ltd.* (which was a decision of the New South Wales Court of Appeal on 7 February 2003), the *Great Peace Shipping* decision was merely cited in paragraph 455 (as having overruled *Solle v Butcher*).

As well as this 'applying' in one instance and 'citing' in another of the *Great Peace* decision, there appears to be no reported Australian case - since the *Great Peace* decision - where *Solle v Butcher* has been applied or followed.

Obviously, until there is a ruling by the High Court of Australia, it cannot definitely be said that *Solle v Butcher* is no longer good law in Australia. However, as Carter has stated, 'Australian approval of *Solle* has always been somewhat guarded'.⁷⁸ Thus it may be that eventually the (Australian) High Court will decide that Australian law concerning common mistake should go the same way as it has in the United Kingdom (following the *Great Peace* decision). In the meantime, there is already available as a precedent at least one judgment of the Queensland Supreme Court⁷⁹ applying the *Great Peace* decision. There is also the Australian case precedent situation that, whilst the Australian courts are no longer bound by decisions of the English Courts, decisions of such English Courts as the Court of Appeal can be highly persuasive authority in those areas of Australian law where the law is to some extent unclear.

6. REFLECTIONS ON THE QUESTION POSED

The question posed in the title of this article is: *Has there really been a satisfactory clarification (by the Court of Appeal's Great Peace decision) of what fundamental legal principles apply (when an issue of common mistake is raised)?* It is proposed to examine this question in two segments - firstly, has there been 'a clarification' of what fundamental legal principles apply and, secondly (provided of course there is a positive answer to the first question), has this clarification been 'satisfactory'. This examination is conducted in the context of the law concerning common mistake as it now is in the United Kingdom.

6.1 Has there been 'a clarification'?

The answer is clearly yes. The *Great Peace* decision has brought clarity to an area of the law that has been debated for over 50 years. Because of the (English) Court of Appeal's decision in *Great Peace*, there is a now solely a doctrine of common mistake at common law (which is quite narrow and which is based on the House of Lords' decision in *Bell v Lever Brothers*). This new clarity of the law is assisted by the Court of Appeal's enunciation of a new five-stage test for common mistake, details of which have been given above.⁸⁰ There is no longer any separate doctrine of common mistake in equity, the Court of Appeal's earlier decision in *Solle v Butcher* - which has caused so much anguish for courts and lawyers over the last 50 years in trying to reconcile same with the House of Lords' decision in *Bell v Lever Brothers* - has been over-ruled. No longer is there the very difficult problem of trying to distinguish Lord Denning's 'fundamental' common mistake from Lord Atkin's common mistake as to quality which makes the thing contracted for essentially different from the thing that it was believed to be.

⁷⁸ Carter on Contract at paragraph [22-260] in LexisNexis Butterworths Online at <<http://www.lexisnexis.com.au/aus/default.asp>> (28 April 2004).

⁷⁹ Donkin v Official Trustee in Bankruptcy [2003] QSC 401.

⁸⁰ See also Section 5.1 above as well as *Great Peace Shipping Limited v Tsavlis (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 76.

Henceforth, when common mistake is raised as an issue, the courts will, firstly, examine the express and implied terms of the contract in order to see if the parties can be regarded as having allocated the risk of the pre-contractual mistake. Where the contract is silent - expressly or impliedly - on the aspect of risk allocation, the court will then apply the doctrine of common mistake at common law (as laid down in ***Bell v Lever Brothers***). Apart from those situations where there has been a common mistake as to the existence of the subject matter (“res extincta”) or a common mistake involving an owner purchasing his or her own property (“res sua”), a party alleging common mistake will only succeed if he or she can satisfy the very narrow and restrictive test for common mistake adopted by the House of Lords in ***Bell v Lever Brothers*** which is that a common mistake merely as to the *quality* of the subject matter is not sufficient to enable the *common law* to set aside a contract unless ‘*it is the mistake of both parties, and is to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be.*’⁸¹ As indicated above, Lord Atkin’s very narrow test laid down in ***Bell v Lever Brothers*** is extremely difficult to satisfy.

There has indeed been a ‘clarification’ of what fundamental legal principles apply when an issue of common mistake is raised.

6.2 Has the clarification been ‘satisfactory’?

Since the overriding approach of the courts will now be generally to uphold the sanctity of contracts (especially commercial contracts) and to imply an assumption of risk (by a particular party) from the circumstances, it is reasonable to assume that there will in future be even less scope for the application of the common law doctrine of common mistake and hence even less likelihood of contracts being held to be void. All this is very good for legal certainty. However it is acknowledged that the complete removal of the remedial flexibility previously enjoyed by the courts (such flexibility having arisen as a result of ***Solle v Butcher***) may cause difficulties in that the court no longer has the discretion, in deserving individual cases, to impose a just and equitable solution in lieu of the strict legal position that applies at common law.

Lord Phillips was not unaware of this aspect and did address it in his judgment in the following terms:

We can understand why the decision in ***Bell v Lever Brothers Ltd*** did not find favour with Lord Denning. An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances. Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to give greater flexibility to our law of mistake than the common law allows.⁸²

Whilst it cannot be denied that the ‘flexibility’ which accompanies the court’s equitable jurisdiction has enabled justice to be done in some deserving individual cases in the past, the proper way to allow a court to again have an element of discretion and flexibility for such deserving individual cases is (as indicated by Lord Phillips in the

⁸¹ *Bell v Lever Brothers Ltd* [1932] 1 AC 161 at 218. Emphasis added.

⁸² *Great Peace Shipping Limited v Tsavliris (International) Limited* [2002] EWCA Civ No. 1407 at paragraph 161.

above passage) by way of legislation, not by some legally untenable extension of the law of equity as was done in *Solle v Butcher*. Such legislation could, for example, be in the form of a codified doctrine of common mistake which allows for an appropriate element of discretion on the part of the court when determining the terms of an order in a matter in which common mistake has been raised as an issue. Such code could also provide some sort of protection for innocent third parties.

The ‘clarification’ of what fundamental legal principles apply when an issue of common mistake is raised has indeed been ‘satisfactory’. Thus, the overall answer to the question posed in the title of this article - *Has there really been a satisfactory clarification (by the Court of Appeal’s **Great Peace** decision) of what fundamental legal principles apply (when an issue of common mistake is raised)?* - is yes.

7. CONCLUSION

The significance of the *Great Peace* decision is that it has provided a much-needed and satisfactory clarification of the law concerning common mistake. A decision of the (English) Court of Appeal that was inconsistent with a House of Lord’s decision (and which accordingly has caused legal uncertainty for over 50 years) has been overruled by the Court of Appeal itself. In the English court hierarchy, the House of Lords is the final court of appeal for both criminal and civil cases and hence superior (in the court hierarchy) to the Court of Appeal. Legal certainty has been maintained in that not only is it now easier to know what fundamental legal principles apply when an issue of common mistake is raised but also henceforth the approach of the House of Lords to common mistake - as laid down in *Bell v Lever Brothers* - will apply even to cases brought in the Court of Appeal.

Obviously, if a similar situation again arose, Tsavlis (or a party in a similar situation) would protect itself by insisting that, in its hire contract with the other party, there be an express ‘condition’ that the ship to render assistance is in fact at the location understood by the contracting parties, otherwise Tsavlis has the right to rescind the contract without penalty. Unfortunately, in the *Great Peace* scenario, this was not done and the reason why (namely that the contractual arrangements were made by non-lawyers with insufficient time available to cover all bases) is indicated by the lawyers for Tsavlis in the following comment:

It was, of course, fairly unusual for a salvor to be contracting in a merchant vessel to provide stand-by services, and it was also unfortunate, to say the least, that the negotiations between the broker and the manager of *Great Peace* took place on the assumption that the *Great Peace* was in fact in close proximity to the Cape Providence and her true position was not established before the contract was concluded. While from the legal perspective it is very useful to have such a comprehensive and thorough review of the law of mistake undertaken by the Court of Appeal, it is very doubtful if any of the active participants involved in Greece, London and Hong Kong during the night of September 24/25 1999 would have thought that three years later the Court of Appeal, led by the Master of the Rolls, would deliver a 69-page judgment analysing the consequences of their actions.⁸³

⁸³ See the letter from Roland Jackson of Shaw and Croft, Solicitors, London entitled ‘Why the *Great Shipping* case incurred 69 pages of judgment’ in *Lloyd’s List International* of 23 October 2003.

Nevertheless, one consolation for parties seeking redress as a result of some contractual situation is that the *Great Peace* decision only concerns ‘common mistake’. Just as ‘common mistake’ was only one of the issues in *Bell v Lever Brothers*,⁸⁴ so might parties in other situations similarly find that, even though in their particular scenario common mistake is an issue but which cannot be established, nevertheless they might still be able to obtain relief from the courts because there are some other grounds (such as frustration, misrepresentation or unconscionability) that can be established.

Whilst the House of Lords’ decision in *Bell v Lever Brothers* and the Court of Appeal’s decision in *Solle v Butcher* are arguably the most significant ‘common mistake’ cases of the twentieth century, the (English) Court of Appeal’s decision in *Great Peace* is now (at least to date) arguably the most significant ‘common mistake’ case of the twenty-first century – and it has arisen out of an international trade law situation.

POSTSCRIPT

Since the preparation of this article, there has been an important Australian judgment concerning common mistake, following the English Court of Appeal’s judgment in *Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd.*⁸⁵ This has been the judgment of the Queensland Court of Appeal in *Australia Estates Pty. Ltd. v Cairns City Council.*⁸⁶ This judgment was handed down on 2 September 2005, with:

- (a) *Great Peace Shipping Ltd. v Tsavliris Salvage (International) Ltd.*⁸⁷ being followed and applied;
- (b) *Bell v Lever Brothers Ltd.*⁸⁸ being cited;
- (c) *Solle v Butcher*⁸⁹ not being followed.

⁸⁴ See e.g. Catharine MacMillan, “How temptation led to mistake: an explanation of *Bell v Lever Brothers, Ltd*” (2003) 19 LQR 625.

⁸⁵ [2002] EWCA Civ. 1407.

⁸⁶ [2005] QCA 328.

⁸⁷ [2002] EWCA Civ. 1407.

⁸⁸ [1932] AC 161.

⁸⁹ [1950] 1 KB 671.