# CASE COMMENTARY
## TAYLOR v. JOHNSON: UNILATERAL MISTAKE IN AUSTRALIAN CONTRACT LAW

*Introduction*

Claims by a contracting party for relief from the consequences of a mistake which induced him to enter into a contract have often presented the courts with difficult choices to make. Whereas misrepresentation which affects the formation of a contract generally only renders the contract voidable[1] in appropriate circumstances, there are many instances in the common law where mistake has had the effect of rendering the resulting contract not merely voidable at the option of the mistaken party, but completely void *ab initio*[2]. The distinction will be crucial when an innocent third party has entered the picture prior to the mistake being discovered. If the mistake makes the contract a complete nullity, no rights can pass under it, and the innocent third party suffers an injustice.[3] However, if the contract is regarded as merely voidable, the intervention of innocent third party rights can act as a bar to rescission by the original mistaken party,[4] who then must bear the loss unless he can obtain redress from the other party to the contract. As a result of the decision of the High Court of Australia in *Taylor* v. *Johnson*,[5] the instances in which a contract is found to be void for what is known as unilateral mistake[6] could be significantly curtailed.

The facts of the case are quite straightforward. Johnson granted Taylor (or his nominee) an option to purchase approximately ten acres of land for $15,000. He exercised the option in favour of his children, and a contract of sale was entered into. The purchase price was again expressed to be $15,000. However, Johnson claimed that at all material times, she thought that the consideration expressed in the documents was $15,000 *per acre*. The trial judge

[1] See, generally, G.H. Treitel, *The Law of Contract* (6th ed. 1983), pp. 280 *et. seq.*

[2] Examples relating to common mistake include *Bingham* v. *Bingham* (1748) 1 Ves.Sen.126, 27 E.R. 934; *Griffith* v. *Brymer* (1903) 19 T.L.R. 434; *Galloway* v. *Galloway* (1914) 30 T.L.R. 531. Examples involving unilateral mistake include *Falck* v. *Williams* [1900] A.C. 176 (P.C.) and the classic case of *Cundy* v. *Lindsay* (1878) 3 App. Cas. 459.

[3] E.g. *Cundy* v. *Lindsay, supra* fn.2.

[4] E.g. *Lewis* v. *Averay* [1972] 1 Q.B. 198 (C.A.).

[5] (1983) 57 A.L.J.R. 197.

[6] The writer uses this label to refer to any mistake situation where the two contracting parties do *not* share the same mistaken assumption. Thus, it includes the case where only one party is mistaken, the other knowing, or taken to know, of the mistake, as well as the case where "the parties misunderstand each other and are at cross-purposes." (Termed "mutual mistake" in G.C. Cheshire and C.H.S. Fifoot, *The Law of Contract* (4th Australian ed. by J.G. Starke and P.F.P. Higgins, 1981), pp. 206-207). Classification of mistakes is far from uniform: compare the Cheshire and Fifoot classifications with those used in *Anson's Law of Contract* (25th ed., 1979), p. 285 and in Treitel, *supra*, fn.1, pp. 210-251, *passim.*

accepted that she was so mistaken, but found that Taylor was unaware of this mistake. Specific performance was ordered. The New South Wales Court of Appeal reversed this latter finding of fact, holding that Taylor did indeed know of Johnson's mistake. They upheld Johnson's appeal and set aside the contract of sale. The High Court, by a majority,[7] dismissed the Taylors' subsequent appeal.

For reasons which need not be delved into for present purposes, the High Court majority held, over the vigorous dissent of Dawson J., that it was open to the New South Wales Court of Appeal to come to a different conclusion on the crucial fact of Taylor's knowledge of the mistake from that reached by the trial judge. Then, drawing their own inferences from the facts, they found that Taylor believed that Johnson was acting under a mistake, either as to price or value, in agreeing to a sale of $15,000.[8] In addition, Taylor was seen to have deliberately set out to ensure that Johnson was not disabused of her mistake. If one accepts these facts and inferences,[9] then it can be seen that the case involved a unilateral mistake as to a term (namely the price term) of the contract. The majority held that this contract was nevertheless valid (i.e. not void) at common law, but then went on to conclude that Johnson was entitled to have it set aside on equitable grounds.[10] It is the common law aspect that will be explored in this case note.

*Background to the Decision*

Before looking more closely at the majority decision, it would be instructive to briefly consider the state of the law which existed prior to *Taylor* v. *Johnson.* Essentially, the Court thought itself faced with two choices.

The Court referred to the well-known case of *Smith* v. *Hughes*[11] as expressing the first possibility. The defendant there agreed to buy from the plaintiff a quantity of oats according to sample. The oats were new oats. However, the defendant had believed them to be old oats and, on that ground, refused to accept the shipment when delivered, new oats being worth considerably less than old oats. The Court accepted the jury finding that the plaintiff must have known of the defendant's mistake when the contract was made,[12] but held that the trial judge had erred in directing that the jury find for the defendant on that

[7] Mason, A.C.J., Murphy and Deanne JJ. (in a joint judgment), Dawson J. dissenting. Brennan J. withdrew during the course of the hearing and took no part in the decision.

[8] They also drew the inference that Johnson believed that Taylor was acting under a mistake of the same type in agreeing to buy at the price of $15,000 per acre (as Johnson believed it to be). In other words, both parties thought that they were getting the good end of the bargain.

[9] Which was the point of division between majority and minority.

[10] *Supra*, fn.5, pp. 200-201. Dawson J. (dissenting) believed that the trial judge's finding as to Taylor's lack of knowledge of the mistake should have been upheld; on that basis, it would naturally follow that the contract was both valid at law and unimpeachable in equity. He did not deal with what the position at law would be on the facts as found by the majority.

[11] (1871) L.R. 6 Q.B. 597.

[12] The contract price was extremely high for new oats.

basis. The contract was not void merely because the defendant had been mistaken as to the age of the oats.[13]

However, there are dicta from both Blackburn and Hannen JJ. to the effect that the result would have been different if the defendant's mistake had gone not merely to the age of the oats, but to the question of whether they had been warranted to be old oats. Blackburn J. referred to:

> ". . . the distinction between agreeing to take the oats under the belief that they were old, and agreeing to take the oats under the belief that the plaintiff contracted that they were old."[14]

In such a situation, if the plaintiff was (or would be taken to be) aware of the defendant's error, the contract would be regarded as void at common law. The distinction is between one party being mistaken merely about a quality of the subject matter of the contract and a unilateral mistake concerning the actual contractual terms to which the parties were supposedly agreeing. It is the latter situation which the majority of the High Court found existed in *Taylor* v. *Johnson.*

Although it is not mentioned in this context in the High Court judgments, another authority to the same effect is the judgment of Singleton J. in *Hartog* v. *Colin & Shields.*[15] The defendants allegedly broke a contract for the sale of Argentine hare skins. In all of the numerous prior discussions and negotiations, the price had always been expressed "per piece." Then the defendants made an offer quoting a price "per pound", which, if truly intended, was inordinately low.[16] The plaintiff accepted this last offer and sued for breach of contract when the defendants refused to deliver. The defence, of course, was that by mistake, the wrong unit of quantity had been inserted into the offer purportedly accepted by the plaintiff.

On these facts, Singleton J. found for the defendants. In view of the fact that Argentine hare skins were generally sold per piece, and especially in view of the previous discussions between the parties, the judge's opinion was that the plaintiff must have known of the defendant's mistake — they "could not reasonably have supposed that the offer contained the offerors' real intention[17], hence, the facts of this case instance a unilateral mistake as to a term of the contract. The defendants, to the plaintiff's knowledge, were operating under the mistaken impression that the price term of their contract was expressed in one way (*i.e.* at a price per *piece*) when in fact it was expressed in a significantly different way (i.e. as a price per *pound*). This mistake, therefore, rendered the contract void.

These cases[18] therefore are representative of the view that if one party (A)

[13] *Cf. Kaur (Dip.)* v. *Chief Constable for Hampshire* [1981] 1 W.L.R. 578 (Div.Ct.), 583, disapproved on other grounds in *R.* V. *Morris* [1983] Q.B. 587 (C.A.).
[14] *Supra*, fn.11, p. 608; see also Hannen J.'s remarks p. 610.
[15] [1939] 3 All E.R. 566.
[16] There were approximately three pieces to the pound.
[17] *Supra*, fn.15, p. 568.
[18] See also *London Holeproof Hosiery Co. Ltd.* v. *Padmore* (1928) 44 T.L.R. 499 (C.A.).

knows or should know that, due to a mistake, the other party (B) intends to enter into a contract upon terms which are fundamentally different from the terms of the contract as they appear to be, the contract is void. More succinctly, a unilateral mistake as to terms avoids the contract.

There is, however, a second view. There are those who have suggested that mistake does not exist at all as an independent doctrine of the common law relating to contract. Rather, the real issue is one of formation, that is, whether the parties' offer and acceptance outwardly correspond so as to create an agreement between them.[19] While this view has been subjected to criticism,[20] it does appear to find support in a number of leading cases.

In *Bell* v. *Lever Brothers Ltd.*,[21] the leading English case on common mistake, Lord Atkin makes the point:

> ". . . that if *parties* honestly comply with the *essentials* of the formation of contracts — i.e., agree in the same *terms* on the same *subject-matter* — they are bound . . ."[22]

Denning L.J. (as he then was), in the important[23] case of *Solle* v. *Butcher*,[24] referred to *Bell* v. *Lever Brothers Ltd.*[25] and said:

> ". . . 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 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. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake . . ."[26]

Reference can also be made to Lord Denning M.R.'s decision in *Lewis* v. *Averay*.[27]

In summary, this second view has it that if the intentions of the parties, determined objectively, correspond upon the essentials of contract formation, that establishes the validity of the contract at law. A mistake will not be sufficient to render the contract void, though there may be scope for equitable relief.[28] From the cases, the essential ingredients of contract formation can be said to be (i) subject matter; (ii) identity of the parties; and (iii) terms.[29]

[19] See C.J. Slade, "The Myth of Mistake in the English Law of Contract" (1954) 70 *L.Q.R.* 385; K.O. Shatwell, "The Supposed Doctrine of Mistake in Contract: A Comedy of Errors" (1955) 33 *Can.Bar.Rev.* 164.

[20] See Treitel, *supra*, n.1, at 232-233.

[21] [1932] A.C. 161 (H.L.).

[22] *Id.*, p. 224 (the emphasis has been added).

[23] Particularly with regard to its establishment of an *equitable* doctrine of mistake which can render a contract voidable in appropriate cases.

[24] [1950] 1 K.B. 671 (C.A.).

[25] *Supra*, fn.21.

[26] *Supra*, fn.24, p. 691.

[27] *Supra*, fn.4, p. 207.

[28] *E.g. Solle* v. *Butcher*, *supra*, fn.24; *Lewis* v. *Averay*, *supra*, fn.4.

[29] See Treitel, *supra*, fn.1, pp. 220-221.

*Decision in Taylor v. Johnson*

Faced with these competing views, Mason A.C. J., Murphy and Deane JJ. indicated a preference for the second approach. Their Honours were of the opinion that the clear trend was in favour of the view expressed by Denning L.J. in *Solle* v. *Butcher*, which has been extracted above,[30] to the effect that once the parties have outwardly agreed in the same terms on the same subject matter, neither can rely on his own mistake, however fundamental and even if known to the other, in order to claim that their contract was void from the beginning. After saying that this proposition had been referred to with approval by Dixon C.J. and Fullagar J. in *McRae* v. *Commonwealth Disposals Commission*[31] and in *Svanosio* v. *McNamara,*[32] the majority, in a crucial passage, continued:

> ". . . Whether that proposition should properly be accepted as applying in the case of an informal contract or in the case where there is a mistake as to the identity of the other party are questions which can be left to another day. It would seem that it does not apply in a case where the mistake is as to the nature of the contract. For the present, but not without hesitation . . .[33] we are prepared to accept it as applicable to a case, such as the present, where the mistake is as to the existence or content of an actual term in a formal written contract . . ."[34]

As a result, even if one knows or should know that a contractual document mistakenly contains terms which the other party does not intend to be bound by, acceptance creates a valid contract, and the mistaken party must look solely to equity for relief. This is clearly not in accord with the *dicta* in *Smith* v. *Hughes*[35] (and the majority recognized this), nor with the other case discussed above which dealt specifically with a unilateral mistake as to terms, namely *Hartog* v. *Colin & Shields.*[36]

*Analysis of Taylor v. Johnson*

This ruling by the majority is, in the writer's opinion, most significant, for its effect should spread beyond unilateral mistakes as to terms to the whole area of unilateral mistake in general. However, in this respect, several notes of caution must be struck.

In the first place, the authorities relied on were all cases involving common, not unilateral, mistake. The one unilateral mistake case[37] mentioned by the majority in the part of the judgment dealing with the validity issue was not followed. Their Honours classified it as an exemplification of the "subjective

[30] At fn.26.
[31] (1951) 84 C.L.R. 377, 407-408.
[32] (1956) 96 C.L.R. 186, 195-196.
[33] Three references are omitted; these are discussed *infra.*
[34] *Supra,* fn.5, p. 200.
[35] *Supra,* fn.11, p. 607-608 (per Blackburn J.) and pp. 609-610 (per Hannen J.).
[36] *Supra,* fn.15 and text following.
[37] *Smith* v. *Hughes, supra,* fn.11.

theory of the nature of the assent necessary to constitute a valid contract "[38] and, relying on the common mistake cases, regarded that view as having been overtaken by the objective theory which looked only at outward manifestations of intention. This reasoning can be viewed as merely accentuating the fact that the Court was breaking new ground in the area of unilateral mistake. However, the Court did not consider any of the numerous authorities that exist dealing with unilateral mistakes going either to the identity of the parties[39] or to the subject matter of the contract.[40] It is unfortunate that the Court preferred to treat unilateral mistakes as to contractual terms as a distinct and unconnected problem — more so, when one considers that the common mistake cases relied upon did not involve mistakes as to contractual terms.

Second, in two places, the majority refers to the mistake as being either as to price *or value*.[41] Although in its actual ruling, the Court is clearly only referring to mistakes as to the "existence or content of an actual term", the references to value (i.e. a quality of the subject matter) are initially confusing. It is well established that contracts will not be set aside on the ground that one party was, to the other's knowledge, mistaken as to the real value of the thing involved.[42] It appears, however, that the Court made these references in the context of discussions about the non-mistaken party's belief or awareness, and about a court's equitable jurisdiction to grant relief. Thus, the actual mistake must be as to the contractual terms for such equitable relief to be granted, but it is sufficient for the other party to believe that the mistake goes to value only.[43] In any event, the Court's view on the contract's validity at common law remains unaffected.

A third *caveat* concerns the fact that the parties to the litigation consisted of the original parties to the contracts in question. No innocent third parties were involved, as in the paradigm mistaken identity case.[44] One might argue therefore that the declaration of the contract's validity at common law was not strictly necessary to the Court's decision, since the same practical effect of setting the contract aside could be, and was, achieved by the granting of the remedy in equity. On the other hand, the Court may have felt constrained by the traditional view that possible relief in equity could only be considered after a determination had been made on the position of the parties under the com-

[38] *Supra,* fn.5, p. 199.

[39] *E.g. Cundy* v. *Lindsay* (1878) 3 App. Cas. 459; *King's Norton Metal Co. Ltd.* v. *Edridge, Merrett & Co. Ltd.* (1897) 14 T.L.R. 98; *Phillips* v. *Brooks* [1919] 2 K.B. 243; *Ingram* v. *Little* [19] 1 Q.B. 31; *Lewis* v. *Averay* [1972] 1 Q.B. 198; and the Australian cases *Roache* v. *Australian Mercantile Fund & Finance Co. Ltd.* [1964-65] N.S.W.R. 1015 and *Porter* v. *Latec Finance (Qld.) Pty. Ltd.* (1964) 111 C.L.R. 177, 194-195 (Kitto J.) and 200-201 (Windeyer J.).

[40] *E.g. Raffles* v. *Wichelhaus* (1864) 2 H. & C. 906; *Falck* v. *Williams* [1900] A.C. 176; *Hickman* v. *Berens* [1895] 2 Ch.638.

[41] *Supra,* fn.5, p. 199 and 201.

[42] *C.f. Smith* v. *Hughes, supra,* fn.11; *Kaur (Dip.)* v. *Chief Constable for Hampshire, supra,* fn.13.

[43] For a discussion of the potential problems this may cause to a court exercising equitable jurisdiction, see K.E. Lindgren & K.G. Nicholson, "Unilateral Mistake as to the Contents of a Contract in Writing" (1983) 11 *A.B.L.R.* 255, pp. 258-259.

[44] See the cases listed at fn.39.

mon law.[45] In addition, the majority judgment does specify certain limits[46] on the grant of equitable relief in situations such as the present, indicating that the judges were aware to the possibility that the decision on the common law issue could well be critical to the ultimate resolution of a similar dispute.

The fourth consideration is the majority's express "hesitation" in making its ruling on the common law issue. In this context, they cite, without explanation, three sources.[47] Certain *obiter* remarks in the *Munro* case indicate that Wright J. contemplated that some contracts might be void for mistake. These comments caused Mason A.C.J., Murphy and Deane JJ. some "hesitation" presumably because they were made in relatively modern times, yet accepted the viability of the "subjective theory" of assent[48] and were made in a case involving a formal written contractual document.[49] But they were made during the course of a general discussion of the effect of common, not unilateral, mistake, and the situation of a mistake as to the terms of a contract was not addressed. The judges' caution is perhaps understandable, but Wright J.'s remarks certainly are not troubling under the circumstances.

Much the same can be said about the reference to *Joscelyne* v. *Nissen*, where the Court of Appeal discussed a court's ability to rectify a written contract on the ground that, due to a common mistake,[50] the document does not represent the parties' agreed common intention. It may be that a failure to enforce according to its terms an apparently complete formal contract was regarded by the majority in *Taylor* v. *Johnson* as, in essence, a declaration that the written contract was void, with equity then stepping in to give effect to the parties' true agreement.

But that is not the mechanism through which the rectification remedy works. This can be seen from the decision of *Joscelyne* v. *Nissen* itself, which holds that a concluded and binding antecedent oral contract is not a prerequisite to the granting of relief, so long as an outwardly expressed common intention continued down to the execution of the formal agreement. If rectification involved an avoidance of the written contract in circumstances where no antecedent contract existed, then there would be no contract at all between the parties to which a court could give effect. The same point is evident from the principle which permits rectification even where Statute of Frauds-type legislation requires a contract to be in or evidenced by writing in

[45] See *Chitty on Contracts* (24th ed., 1977) Vol. 1, para 337.

[46] The non-mistaken party must not have materially altered his position and the rights of strangers must not have intervened: *supra,* fn.5, p. 201.

[47] *Robert A. Munro & Co. Ltd.* v. *Meyer* [1930] 2 K.B. 312, at 333-334; *Chitty on Contracts* (24th ed., 1977), Vol. 1, para 337; *Joscelyne* v. *Nissen* [1970] 2 Q.B. 86, at 95-97. These are the references which were omitted at fn.33.

[48] And thus were inconsistent with the "clear trend" in favour of the objective theory.

[49] Note how the High Court majority explicitly confines its ruling to such instances: see the concluding words of the passage quoted at fn.34.

[50] In such cases, the mistake necessarily must go on to the "existence or content of an actual term in a formal written contract."

order to be enforceable.[51] In truth, the rectification remedy appears to accept the validity of the written contract, yet also permits the parties to prove that their agreement includes an additional term or a term which should prevail over a part of the writing.[52]

The third reference, to *Chitty on Contracts*, merely acknowledges that there is a view which holds that contracts may be void for mistake. It can be seen now that none of the three sources referred to by the majority prevents them from taking the position which they did, although they do serve to emphasize the judges' boldness in clearly treading on new ground from the unilateral mistake point of view.

*Implications of Taylor v. Johnson*

Nevertheless, this boldness had its limits. Mason A.C.J., Murphy and Deane JJ. were exceedingly careful to confine their ruling to the facts of the case before them. They left to another day the question of how far their ruling would extend.

In this writer's opinion, it would be logically impossible to stop the law's advance at the point reached by Their Honours. The exclusion (for the time being) of informal contracts likely resulted from their reluctance to place their decision in direct conflict with the facts of *Smith* v. *Hughes*[53] where the agreement, though apparently partly formed by correspondence, was not contained in a formal document.

Certainly a court would feel safe in pursuing the objective theory of contractual intention and thus validating a contract despite a mistake in circumstances where a formal document attests to the union of the parties' intentions. But the objective theory does not require such a document. Rather, it directs courts to look at the outward manifestations of intention. If, despite the absence of a formal contract, these are strong enough to convince the court of agreement, the mistake should have the same effect at common law as it does when the parties have followed more formal steps.[54] The rectification cases offer a ready example of the courts' ability to rely on less formal outward indicators of intention.

For present purposes, the more important point concerns the Court's limitation of the principle to mistakes going to the terms of the contract. As discussed in the earlier portion of this note, the contractual terms form but one of three essential ingredients upon which the parties must appear to be in agreement for there to be a contract between them, on the traditional analysis. The others, one will recall, are subject matter and parties.

No one of these is more or less important than the others. There is no justification in principle for the common law to treat a mistake as to one any

[51] *Craddock Bros.* v. *Hunt* [1923] 2 Ch. 136 (C.A.); *U.S.A.* v. *Motor Trucks Ltd.* [1924] A.C. 196 (P.C.).

[52] Thereby avoiding the parol evidence rule.

[53] And, one would say, *Hartog* v. *Colin & Shields, supra,* fn. 15.

[54] Which, after *Taylor* v. *Johnson*, should be none at all.

differently than a mistake as to the others. Each is intricately tied up in the offer/acceptance analysis of agreement. To suggest, as the High Court does, that a contract exists even though the parties have not actually agreed on the terms that will govern them, but that there might be no valid contract where they are in agreement on terms but not on who is really the contract-maker, nor on what they are contracting about, makes, with all due respect, no sense. Yet that would be the result of a narrow interpretation of this case.

Hence, if one accepts the decison in *Taylor* v. *Johnson*, it must follow that the other types of unilateral mistake will similarly have no effect on a contract's common law validity. In that event, *Taylor* v. *Johnson* can be regarded as sounding the death knell in Australia for the common law doctrine of unilateral mistake.

*Conclusion*

Of course, the question remains whether the ruling in *Taylor* v. *Johnson* should be accepted. There is no doubt that it, and extensions of it, upset long-established notions of contract formation. If applied to the typical mistaken identity case or other cases where innocent third parties intervene, the decision will create conflict with general concepts of property law governing transfer of title.[55]

On the other hand, the decision seems eminently practical and sensible. More than one judge has raised the point that it does the law no good that the rights of an innocent third party should depend on fine theoretical distinctions derived from an analysis of a conversation or meeting or correspondence in which he took no part and over which he had no control.[56] Where the dispute is between the original parties, their rights *inter se* can be worked out in a fair way through resort to equitable principles. This would, in fact, only be in accord with the early mistake cases, which were often concerned with whether one person had "snapped at an offer which he must have perfectly well known to be made by mistake."[57] As for the much-vaunted claim that certainty of contract is necessary, that argument has no place where the person making it knew or should have known that the other party was seriously mistaken about an essential element of the contract-making process.

It, therefore, becomes incumbent upon the courts to develop a sound set of principles to guide them in deciding when mistaken parties should be permitted by equity to be relieved of the consequences of their contracts. The High Court has made a start of this in the second half of *Taylor* v. *Johnson*,[58] but further elaboration and development remains to be done.

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[55] The maxim *nemo dat quod non habet* readily springs to mind.

[56] *Ingram* v. *Little, supra,* fn.39, p.73 (per Devlin L.J. dissenting); *Lewis* v. *Averay, supra,* fn.39, p. 206-307 (per Lord Denning M.R.).

[57] *Tamplin* v. *James* (1880) 15Ch.D. 215, at 221 (per James L.J.); *Webster* v. *Cecil* (1861) 30 Beav. 62, 54 E.R. 812; *Wood* v. *Scarth* (1855) 2 K. & J. 33, 69 E.R. 682.

[58] *Supra,* fn.5, p. 200-201.

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