MISTAKE THE VITIATING ELEMENT OF A CONTRACT

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CHAPTER ONE

Introduction

Mistake is possibly the most obscure part of the law of contract. The textbook writers for instance Cheshire Fifoot and Anson suggest that mistake is a magic doctrine in English law which may avoid a contract even where an offer has been accepted in its identical terms. Judges frequently use the word mistake but it is submitted that mistake itself is irrelevent at law. It may only be a ground for affording a party some relief in Equity. A contract can only be void in law if there are elements which would prevent the parties to it from being ad idem.

It could be therefore be said that the meaning of mistake at law is very restrictive. This restrictive scope is adopted by the English Legal System. At law mistake as understood by a layman is not relevant. A layman might well believe that where a person enters into a contract under a misapprehension of certain, facts the contract should not be enforced. But, falling to the restrictive meaning, this cannot be so. The law does not declare a contract void merely because one or both parties would not have made it had the true facts been known.

Different attitudes are taken by the Common Law and Equity as

regards to mistake. At Common Law where a contract is founded on misapprenhension of facts material to the contract, it is void ab initio. It follows that both parties are restored back to their original position. But the right of a third party is affected (if there is a third party) when a contract is declared void ab initio because no right can arise. If A makes a contract to sell certain property to B and that contract is later declared void for mistake, B has obtained no valid title. If he had already sold the property to C, C will be liable to return the property to A because the principle of nemo dat quo non habit applies. C may have acted innocently but that is immaterial.

The rigidity of the law above is mitigated by Equity. The Courts of Equity may grant specific relief against the consequences of mistake without nullifying the contract. This way they not only protect the innocent strangers but also one of the original parties if the demand of substantial justice are to be satisfied.

The English Legal System recognises three possible types of mistake, common, mutual and unilateral mistake. This classification is derived from different terminology employed by writers of English textbook on the subject. Atiyah describes a mistake made by both parties in which the parties though genuinely agreed,have both contracted in the mistaken belief that some facts which lies at the root of the contract is true as a ' mutual mistake '. Chitty describes unilateral mistake as cases where although to all outward

where although to all outward appearance the parties are agreed, there is infact no genuine agreement between them and the law does not regard a contract as having come into existence.[2]

Treital adopts Lord Atkins classification in Bell v. Lever Brothers Ltd i.e. a) mistake nullifying consent and b) mistake negativing consent.[3] Cheshire and Fifoot however classify mistake into three categories: where both parties make the same mistake, they call it a common mistake, where the parties misunderstand each other at cross purposes, they describe it as mutual mistake, where the mistake is made by one of the parties only they classify it as unilateral mistake. However, they conclude that in effect there are only two legal categories of mistake.[4]

The rule relating to mistake in the law of contract in Malaysia is prescribed in the Contracts Act 1950 under Sections 21 to 23. Though none of these sections define the word mistake, they however discuss the effect of mistake on an agreement. Except to a certain extent especially in cases of unilateral mistake, basically the Common Law and Equitable principles on mistake are followed in Malaysia. See Lim Hong Shin v. Leong Fong Yew.[5] See also Chop Ngoh Seng v. Esmail & Ahmad Bros.[6]

Thus it should be pointed out that the English decisions in case of unilateral mistake must be treated with caution. Section 23 of the Contracts Act does not render a contract voidable merely because it was caused by one of the parties to it being