Chapter 4
Mistake in Contract Law and in Unjust Enrichment

Kate Bracegirdle

The theme of this paper is that mistake in contract and mistake in unjust enrichment are fundamentally different and should be retained as quite distinct and separate areas of the law. Over recent times, unjust enrichment has managed, to a large degree, to break free of contract law on this issue and to develop relatively coherently. However contract law has failed to achieve a similar clarity over the same period. With the move of Canadian law to a more civilian approach to unjust enrichment, there is the possibility that we may see a return to a greater convergence of contract law and unjust enrichment in this area. This will inevitably have implications for English Law if it moves towards a civilian approach also.

The law on mistake is notoriously complicated. As regards contract law, the courts have been concerned with balancing the general policy in favour of upholding apparent contracts1 and the principle that contract is based on

1 Lord Atkin in Bell v. Lever Bros. [1932] AC 161, 224: ‘…it is of paramount importance that contracts should be observed, and that if parties honestly comply with the
the consent of the parties to it. Whilst in terms of restitution there is a general policy in favour of maintaining security of receipts, it is not necessary to balance those two particularly competitive interests. It is therefore vital to maintain a clear distinction between mistake as it affects contracts and mistake which may justify restitution in the absence of a contract. Mistakes which are not necessarily sufficient to render a contract void (or voidable) may well be sufficient to found a claim in unjust enrichment and this has been recognised by the courts. Waller J., as he then was, observed in *Midland Bank Plc v. Brown Shipley & Co. Ltd.*:  

...the type of mistake necessary to give rise to a right to recover under the restitutionary remedy of money paid under a mistake of fact, need not necessarily be of the same fundamental character that makes a contract totally void.

However the separation between mistake in contract law and mistake in unjust enrichment has not always been maintained, with the effect that an overly restrictive approach to restitution of mistaken payments was taken until relatively recently. This resulted in the jurisprudence on restitution on the grounds of mistake becoming as confused and contradictory as that on the effectiveness or otherwise of contracts where one or both parties has acted under a mistake. Mistake in the English law of restitution eventually came to be clarified in the decision of *Barclays Bank v. Simms* whereas the law of contract continues to have difficulty in finding a truly principled approach to the question of what effect mistakes have on an apparent contract.

**MISTAKE IN CONTRACT LAW**

The law relating to which mistakes will prevent a contract from coming into being and which mistakes will make a contract void has developed in a confusing manner over a long period of time. Cases which appear to have very similar fact situations have been distinguished from each other on seemingly insignificant details. For example, in *Ingram v. Little* the fraudster gave the name essentials of the formation of contracts – *i.e.*, agree in the same terms on the same subject-matter – they are bound, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.’

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