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UNILATERAL MISTAKE IN THE ENGLISH COURTS: REASSERTING THE TRADITIONAL APPROACH

Statoil A.S.A. v. Louis Dreyfus Energy Services L.P. (The "Harriette N")[1]

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In the case of *Statoil A.S.A. v. Louis Dreyfus Energy Services L.P.,* Aikens J. has reasserted the traditional principles of English law governing unilateral mistake. On one level, it is an unexceptional decision. It applies the well-settled law relating to unilateral mistake, based on long-established authority and as a reflection of the approach taken recently by the Court of Appeal to the significance of mistake in contract. On the other hand, the issues raised by the case prompt a re-examination of the approach of English law to unilateral mistake.

I. THE CASE

The disputed contract was one by which the parties settled the sum payable as demurrage under their prior contract of sale, on cost, insurance and freight terms, of a cargo of liquefied petroleum gas. The discharge of the cargo was completed on 24 October 2006. However, the seller, Statoil, submitted a demurrage claim to the buyer, Dreyfus, calculated on the assumption that the cargo had been discharged on 13 October. The mistake arose because Mr. Rostrup, Statoil's senior demurrage analyst who entered the details into the calculation, failed to read sufficiently carefully the information provided by the shipowners about the discharge of the cargo. Indeed, in cross-examination, Mr. Rostrup admitted freely that if he had looked properly through all the documentation that he had received from the owners, he would not have made the mistake.[2] But the consequence was that the demurrage claim was significantly understated, and was settled at a little over $100,000. After further discussions once Statoil had discovered the mistake, the parties later agreed (as the Judge held) to a second settlement of the demurrage claim in the sum of nearly $540,000.

The significant issue in the case relates to the first settlement agreement—the contract by which Statoil and Dreyfus agreed the demurrage payable at $100,000, on

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1 [2008] EWHC 2257 (Comm.), [2008] 2 Lloyd's Rep. 685 [*Statoil*].

2 *Ibid.* at para. 42.

the basis of a mistake about the date of discharge of the cargo. Statoil argued that this mistake rendered the settlement agreement not binding, *viz.*, either void or voidable. It is important to realise that Mr. Hodge, who negotiated the demurrage issues on behalf of Dreyfus with Mr. Rostrup, realised the mistake. He discussed it with his colleagues in Dreyfus, and it was decided that Mr. Hodge would not tell Mr. Rostrup of his mistake, but rather, leave things to see whether he realised it.[3] The mistake was therefore not only unilateral but one which the other party actually knew about and consciously decided not to draw to the attention of the mistaken party. It was a deliberate failure to disclose information which was relevant to the other party's decision to contract, in the knowledge that the other party was making a mistake. But Aikens J. held that Statoil could not challenge the validity of the contract.[4] In the first place, such a mistake is not sufficient to render the contract void at common law. Secondly, there is no equitable jurisdiction to rescind a contract for a mistake of this kind—but, even if there were, this was not a case in which such a jurisdiction should be exercised.

II. Reasserting the Traditional Approach: The Distinction Between Mistake as to Terms, and Mistake as to Facts

Discussing the approach taken by the common law to this kind of mistake, Aikens J. applied the well-established authority of *Smith v. Hughes*.[5] He said:

> 87. ... The general rule at common law is that if one party has made a mistake *as to the terms of the contract* and that mistake is known to the other party, then the contract is not binding. The reasoning is that although the parties appear, objectively, to have agreed terms, it is clear that they are not in agreement. Therefore the normal rule of looking only at the objective agreement of the parties is displaced and the court admits evidence to show what each side subjectively intended to agree by way of terms. If it is clear from such evidence that there was not consensus, then there can be no contract, because the parties have not truly agreed on the terms. Some of the cases talk of such a contract being "void", but I think it is clearer to say that there was never a contract at all.
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> 88. However, if one party has made a mistake about a fact on which he bases his decision to enter into the contract, but that fact does not form a term of the contract itself, then, even if the other party knows that the first is mistaken as to this fact, the contract will be binding. That was the effect of the decision of the Court of Queen's Bench, on appeal from the County Court, in *Smith v. Hughes* (1871) L.R. 6 Q.B. 597, see particularly at 603 per Cockburn C.J., and 607 per

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3 *Ibid*. at para. 47.

4 The *second* settlement agreement (increasing the demurrage to $540,000) was, however, held by the Judge to be binding, and therefore superseded the first agreement and, from Statoil's point of view, solved the problem. The Judge also rejected an argument by Dreyfus that the contract contained a demurrage time bar clause which barred Statoil from bringing the later (revised) demurrage claim.

5 (1871) L.R. 6 Q.B. 597 [*Smith*].

> Blackburn J. The correctness of that decision and the analysis in it has never been doubted.[6]

This correctly identifies the fundamental distinction, drawn in *Smith*, between a mistake as to the terms of the contract, and a mistake as to the facts on which the decision to contract was based. If the mistake was as to the terms—that is, the parties were not (in the eyes of the law) in agreement about what the terms of the contract were to be—then in principle there was no contract. One can disagree about how to describe the law here: whether this is really a "mistake" at all; whether the effect is that the contract is "void", or (as Aikens J. said) there is simply no contract through failure of an essential condition for its existence; how the objective and subjective approaches for the formation of a contract interlink, and the basis on which a party can be held to contract terms which he did not (subjectively) intend, by reason of his (objective) conduct.[7] But the Judge did not need to go further in this analysis because he went on to hold that, on the facts, there was no mistake here as to the terms of the contract. The contract was one of compromise to settle Dreyfus's liability for demurrage, but it was not a term of the contract that the compromise was reached on the understanding that the discharge of the cargo was completed on 13 October. The mistake as to the date was, of course, very significant for the calculation of Statoil's claim which was then subject to the negotiation and settlement. But that was a mistake as to the facts (within the distinction drawn in *Smith*) rather than as to the terms. So there was no basis on which it could be argued that the contract was void (or inexistent) by reason of a mistake of terms; and on the authority of *Smith*[8] a unilateral mistake as to facts, even if the mistake is actually known by the other party, does not make the contract void.

In coming to this decision, Aikens J. considered the approach of the Singapore Court of Appeal in *Chwee Kin Keong v. Digilandmall.com Pte. Ltd.*[9] but distinguished that case on the basis that it involved a unilateral mistake as to a fundamental term of the contract:

> 94 ... In that case the unilateral mistake of the sellers was in accidentally putting on its website a much lower price for laser printers than was correct. The wrong price was the result of an error by one of the seller's employees, whose work on the seller's website accidentally altered the price of the printers from S$3,854 to S$66 per printer. The finding of the trial judge was that buyers had actual knowledge that the price was a mistake, but went ahead and ordered large quantities at the advertised low price. (See para. 38 of the judgment of Chao Hick Tin J.A. on

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6 Indeed, the Judge could have gone further and pointed out that this distinction was implicitly accepted and acted upon by Lord Atkin, approving *Smith* in *Bell v. Lever Bros Ltd.* [1932] A.C. 161 (H.L.) at 220-222 [*Bell*].

7 For a more detailed discussion, see John Cartwright, *Misrepresentation, Mistake and Non-Disclosure,* 2nd ed. (London: Sweet and Maxwell, 2007) at Chapter 13. The account given by Aikens J. in para. 87 is perhaps too brief and could give the impression that a subjective failure to agree the same terms leads to "no contract". However, if A knows of B's mistake as to terms, although A cannot hold B to the contract on A's terms it is not necessarily the case that B cannot hold A to a contract on the basis of the terms which B believed them to be. *Cf. Bell*, *ibid.* at 222, *per* Lord Atkin ("It is not quite clear [in *Smith*] whether [the Jury] considered that if the defendant's contention was correct, the parties were not ad idem or there was a contractual condition that the oats sold were old oats").

8 See para. 88 of Aikens J.'s judgment, set out in text accompanying *supra* note 6.

9 [2005] 1 S.L.R. 502 (C.A.) [*Chwee Kin Keong*].

> appeal). The sellers refused to deliver the printers at that price. The judge declared the contracts void under the common law doctrine of unilateral mistake. The Court of Appeal, after an exhaustive judgment which examined both the common law and equitable doctrine on mistake, upheld the judgment.[10]
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> 95. To my mind this decision falls squarely within the classic rule. There was a unilateral mistake by the seller about the price of the printers. The buyers knew that the mistake had been made, but went ahead and "snapped up the offer" (*Tamplin v. James* (1880) 15 Ch. D. 215 at page 221 *per* James L.J.). Plainly, when the subjective evidence was examined, the parties were not agreed as to the most fundamental term of the contract: the price.
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> 96. So this case does not assist [Statoil]. The common law rule on the circumstances when a unilateral mistake will mean a *prima facie* agreement is not binding is well settled. It only applies when there is a unilateral mistake as to a contract term. There was no such mistake by Mr. Rostrup in this case.

III. Rejecting the Intervention of Equity

The second argument put by counsel for Statoil was that, even if the mistake was not sufficient to render the contract void at common law, it was still sufficient to enable the court in its equitable discretion to rescind the contract. The argument was that "if there is a unilateral mistake by one party as to a fundamental assumption he has made, which mistake is known to the other party as being the basis for concluding the contract then, even if that assumption does not become a term of the contract, this unilateral mistake will give rise to a jurisdiction of the court, in equity, to grant rescission of the contract."[11] Aikens J. gave this argument short shrift. In so far as it appeared to have the support of statements of Andrew Smith J. in the earlier case of *Huyton S.A. v. Distribuidora Internacional de Productos Agricolos S.A.*,[12] those statements were wrong, and there was no authority for the existence of an equitable jurisdiction in this context—and the approach taken by the Court of Appeal in *Great Peace Shipping Ltd. v. Tsavliris Salvage (International) Ltd.* ("*The Great Peace*")[13] indicated that there should be no such jurisdiction.

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[10] *Chwee Kin Keong* took an approach to mistake which is in many respects quite different from the established approach in England—and in particular as regards the relative roles of common law and equity in relation to mistakes, including mistakes as to the terms of a contract, holding that the contract would be void only if the claimants actually knew of the defendants' mistake, but that there is a wider jurisdiction to render the contract voidable in equity where the non-mistaken party had constructive knowledge of the mistake as long as it is *unconscionable* for the non-mistaken party to insist that the contract be performed: *supra* note 9 at para. 80. The reliance on equity was championed in England by Denning L.J. in *Solle v. Butcher* [1950] 1 K.B. 671 which was followed in relation to formal written contracts by the High Court of Australia in *Taylor v. Johnson* (1983) 151 C.L.R. 422 at 430-31 (H.C.A.). But the established approach in England is to include both actual and constructive knowledge within the common law test relating to mistake as to terms of the contract: *cf. Hartog v. Colin & Shields* [1939] 3 All E.R. 566 at 568; Cartwright, *supra* note 7 at para. 13.22. Aikens J.'s approach to the question in *Statoil*, distinguishing between mistakes as to terms and mistakes as to fact, meant that in his view none of the discussion in *Chwee Kin Keong* became relevant for his decision.

[11] *Statoil, supra* note 1 at para. 97.

[12] [2003] 2 Lloyd's Rep. 780 [*Huyton*].

[13] [2003] Q.B. 679 [*The Great Peace*].

The argument that the court may consider exercising a broader equitable jurisdiction in order to provide a just solution where the common law is not satisfactory has, of course, a long historical pedigree and is the basis of many equitable doctrines in the modern law. Setting aside any more general questions about whether this continued division between associated common law and equitable doctrines is the right way for a modern law of contract to be organised,[14] we can note that the tension between the common law and equity in the particular context of mistake has a history of its own—although the history here is not so ancient. It was Denning L.J. in *Solle v. Butcher*[15] who sought to develop a general approach for equity in the case of mistakes which induced a contract—a discretionary jurisdiction, supplemental to and corrective of the narrow common law doctrines relating to mistake in contract:

> Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. 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. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. ...
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> The court had, of course, to define what it considered to be unconscientious, but in this respect equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake. ...
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> 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.

The approach taken here by Denning L.J. would not support the argument that there is an equitable jurisdiction relating to unilateral mistakes of fact. His general approach (based on "unconscientiousness"—or, as one might say, "unconscionability" or just "fairness") was to give an equitable remedy where the mistake is (a) induced by misrepresentation; or (b) a known unilateral mistake as to the terms or the other party's identity;[16] or (c) a common (shared) fundamental mistake of fact. That is, it appears that even Lord Denning did not propose that a known unilateral mistake *of*

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[14] *Cf.* Andrew Burrows, "We Do This At Common Law But That In Equity" (2002) 22 Oxford J. Legal Stud. 1; Andrew Phang, "Common mistake in English Law: the proposed merger of common law and equity" (1989) 9 L.S. 291.

[15] [1950] 1 K.B. 671 at 692-93 [*Solle*].

[16] This point, which was *obiter* and has not been subject to further general development in the English cases, appears to give no greater protection than the common law does under *Smith v. Hughes*, and to be based on an assumption that the common law does not (or, perhaps, should not) render a contract void even for a known mistake as to terms, if the parties appear on an entirely objective analysis of the facts to have formed a *consensus ad idem. Cf.* Cartwright, *supra* note 7 at para. 13.07. See also *Chwee Kin Keong, supra* note 9 at para. 58; and generally, *supra* note 10.

fact would be remedied by equity—although it may not be safe to assume that, had he addressed this issue, he would have rejected an equitable jurisdiction for such a case!

In *Huyton*[17] Andrew Smith J. assumed that there may be an equitable jurisdiction for unilateral mistake of fact, although, as Aikens J. demonstrated in *Statoil*, it was not based on authority. Moreover, the judgment in *Huyton* was given after the Court of Appeal had handed down its decision in *The Great Peace*, although on the basis of argument which had been completed before that decision, and Andrew Smith J. decided that he did not need to re-examine his reasoning in the light of *The Great Peace* since his decision on the facts was that, even if there were an equitable jurisdiction, it should not be exercised there in any event.[18] However, a major plank in the reasoning of Aikens J. in rejecting any general equitable jurisdiction for unilateral mistakes of fact was the approach taken by the Court of Appeal in *The Great Peace*. That case disapproved expressly the decision in *Solle* not only on the basis that Denning L.J.'s assertion that there was an equitable jurisdiction to rescind a contract for a common fundamental mistake of fact was contrary to authority (and, in particular, contrary to the decision of the House of Lords in *Bell*),[19] but also that there *should* be no such jurisdiction because it undermined the policy of the common law which is reluctant to allow mistakes to invalidate a contract. As Aikens J. said,[20] "If there is no such jurisdiction in the case of a common mistake, I fear I am unable to see how, in logic, one can devise a rationale for an equitable jurisdiction in the case of a unilateral mistake, at least where there has been no misrepresentation by the other party".

IV. Unilateral Mistake of Fact: What Should the Law Be?

So far we can say that the decision in *Statoil* is relatively straightforward, and follows the approach which is well established by the English authorities. It is also in tune with the recent approach of the Court of Appeal in *The Great Peace*—and therefore with the traditional approach of English law in rejecting remedies for mistake of fact except in very limited circumstances. This was articulated most clearly by Lord Atkin in *Bell*:[21]

> 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, and must rely on the stipulations of the contract for protection from the effect of facts unknown to them.

This fits with other aspects of the approach taken by English law to the formation of a contract.[22] A clear line is drawn between mistakes which have been induced

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17 *Supra* note 12 at paras. 452-466.

18 *Ibid*. at paras. 454-455.

19 *Supra* note 6.

20 *Statoil, supra* note 1 at para. 105. The Judge went on at para. 106 to say that, even if this were wrong, it would not be proper to exercise the jurisdiction in Statoil's favour because the mistake was entirely the result of Mr. Rostrup's carelessness.

21 *Bell, supra* note 6 at 224. This follows a passage where Lord Atkin gave examples of both unilateral and common mistakes of fact.

22 For further discussion, see Cartwright, *supra* note 7 at paras. 1.03-1.04, 12.12-12.15 and 16.02-16.04.

by the defendant's words or conduct—*i.e.*, misrepresentations—and those which are not attributable to him. If the defendant caused the claimant's mistake, then the law has little difficulty in finding a remedy—including giving him a right to rescind the contract, which does not depend on whether the defendant was fraudulent: in equity, even an innocent misrepresentation justifies rescission.[23] But a mistake by itself does not justify rescission—it does so only if the mistake is shared and fundamental:[24] a unilateral mistake of fact, according to the approach of Lord Atkin set out above, is the responsibility of the party who makes it. If he wishes to be sure of a remedy, he should ask for a contractual warranty. Linked to this, the courts do not generally impose duties of disclosure: non-disclosure is not assimilated to misrepresentation—the non-disclosure does not cause the claimant to make a mistake: at most it fails to correct a mistake. But to impose a duty of disclosure would impose a duty of positive action: and English law is reluctant to impose such a duty except where there is a good reason for the particular duty in question.[25] According to *Smith*, even a party who knew that the other was making a mistake of fact which was so serious that he would not have entered into the contract had he known the truth, has no duty to disclose it: "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor."[26]

But surely, one might say, it is simply not fair to allow a party knowingly to take advantage of the other's mistake in such a case. Can it really be right that, in *Statoil*, the law apparently allows Mr. Hodge and his colleagues not to tell Mr. Rostrup of the mistake which they knew he had made, but to leave things to see whether he realised it and in the mean time hope to get a better settlement as a result of the mistake?[27] Such conduct is not in good faith. Of course, the strict answer given by English law is that there is no general duty of good faith in negotiations; each party is entitled to act in his own interest as long as he does not positively mislead the other.[28] English law is able in many situations to find ways round the absence of a doctrine (as such) of good faith—by finding pragmatic, particular solutions to what Lord Steyn has called the need to give effect to the "reasonable expectations of honest men".[29] There are circumstances in which the law does indeed prevent a party from taking advantage of the other's mistakes of which he has knowledge (or ought to have know about it), but only where the mistake is as to the terms of the contract, as made clear both in *Smith* and in *Statoil* itself. The remedy of rectification, which was not in issue in *Statoil*, is also available in the case of a unilateral mistake where the party in whose favour the document is drawn knows of the other's mistake; and this is justified on the basis that it would be unfair, inequitable or unconscionable for

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23 *Redgrave v. Hurd* (1881) L.R. 20 Ch.D. 1 [*Redgrave*].

24 *Bell*, *supra* note 6 at 218.

25 For particular duties of disclosure, see Cartwright, *supra* note 7 at Chapter 17.

26 *Smith*, *supra* note 5 at 607 *per* Blackburn J. See also Cockburn C.J. at 603 ("The question is whether, under such circumstances, the passive acquiescence of the seller in the self-deception of the buyer will entitle the latter to avoid the contract. I am of opinion that it will not").

27 *Supra* note 3.

28 *Cf. Walford v. Miles* [1992] 2 A.C. 128 at 138 (H.L.) *per* Lord Ackner.

29 Lord Johan Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 L.Q.R. 433 at 439. See also *Interfoto Picture Library Ltd. v. Stiletto Visual Programmes Ltd.* [1989] Q.B. 433 at 439 (C.A.) *per* Bingham L.J.

the non-mistaken party to take advantage of the mistake.[30] But again this remedy applies only where the mistake relates to the terms of the contract as expressed in the document. Should we, though, maintain such a firm distinction between mistakes as to the terms of a contract, and mistakes as to facts even if the facts are fundamental to the mistaken party's decision to enter into the contract?[31] An alternative approach could be to say that a *known* mistake which was *fundamental* to the mistaken party's decision to contract should in principle be remedied—even if the mistake is of fact rather than as to the terms of the contract—as long as the way is left open for some suitable counterbalancing exclusions, such as where the mistake was inexcusable, or within the mistaken party's risk.[32] That might protect more fully the "reasonable expectations of honest men"—if the party who makes such a significant mistake can reasonably expect the other party not deliberately to take advantage of him.

Before one accepts the objection that to develop English law in this way would be to undermine established fundamentals, one ought to ask whether the courts of equity might (had cases arisen at the appropriate time) have reached this point anyway. *Smith* was a decision at common law before the fusion of the courts of equity and common law into a single jurisdiction by the *Supreme Court of Judicature Act 1873*. There was no question in that case of whether a broader equitable jurisdiction could or should exist to provide a remedy. Certainly, to impose general duties of disclosure in equity would be contrary to the underlying principles of the common law.[33] But the more limited question is whether a party should be entitled deliberately to take advantage of the fact that the other party is making a mistake which he knows to be fundamental. In the case of misrepresentation, the old common law limited its remedies to the situation where the defendant was fraudulent. An innocent misrepresentation was not seen as sufficiently serious to warrant a remedy for the party who was misled by it. On the other hand, the courts of equity extended their remedies to cover innocent misrepresentations—on grounds which were (not, perhaps, very convincingly) explained by Jessel M.R. in *Redgrave*:[34]

> According to the decisions of Courts of Equity it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way of putting the case was, "A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it." The other way of putting it was this: "Even

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30 *E.g.*, *Agip S.p.A. v. Navigazione Alta Italia S.p.A.* [1984] 1 Lloyd's Rep. 353 (C.A.); *Commission for the New Towns v. Cooper (Great Britain) Ltd. (formerly Coopind UK)* [1995] Ch. 259 (C.A.).

31 For similar criticism, see Edwin Peel, *Treitel on the Law of Contract,* 12th ed. (London: Sweet & Maxwell, 2007) at para. 8-044.

32 This is the approach taken by the Ole Lando & Hugh Beale, eds., *Principles of European Contract Law* (The Hague: Kluwer Law International, 2000) at art. 4:103 and C. von Bar, E. Clive & H. Schulte-Nölke, eds., *Draft Common Frame of Reference* (Munich: Sellier, 2009) at art. II.-7:201. These documents result from a comparative analysis of other European legal systems—and civil law systems generally admit broader duties of disclosure and would sanction deliberate non-disclosure.

33 Lord Mansfield, a century before *Smith*, would not, however, have agreed: *Carter v. Bohm* (1766) 3 Burr. 1905 at 1909-1910; Cartwright, *supra* note 7 at para. 16.07.

34 *Supra* note 23 at 12-13.

> assuming that moral fraud must be shewn in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements."

It is still a significant step to move from an innocent misrepresentation (where the misrepresentation caused the mistake) to a deliberate non-disclosure (where the fault lies not in causing the mistake but in not correcting it). But one might think that an old court of equity could have thought that the "moral fraud" involved in the latter was no less significant than in the former.

As things stand, however, the decision in *Statoil* is based on an orthodox reading of the authorities. It should also be remembered that the two cases in which the English courts have recently reaffirmed the strictness of the doctrine of mistake in relation to mistakes of fact—*The Great Peace* (common mistake) and now *Statoil* (unilateral mistake)—were both commercial cases, before the commercial courts. In *Statoil* Aikens J. clearly did not regret the outcome of his reasoning, since he thought that the mistake was entirely the result of carelessness by Mr. Rostrup.[35] Commercial parties can be expected to take responsibility for the basis on which they contract. But whether we should be so willing to allow in every case a party knowingly to take advantage of the other's mistake as to fundamental facts, on the model of what commercial parties can be expected to do in their arm's length dealings, is not so obvious.

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[35] *Supra* notes 2 and 20.