In the Supreme Court
On appeal from the
Court of Appeal, Civil Division

Between:
Agnes Gilbert

Appellant

- and -

William d'Aubigny

Respondent

William d'Aubigny is an antique dealer. In March 2011, he was asked by Roger Bigod, a solicitor, whether he was interested in buying the contents of a flat in Mayfair, which belonged to Clare Gilbert, a lady who was then in a care home. William viewed the flat, in the company of Roger Bigod, and identified a number of valuable antiques. He offered Roger £10,000 for the contents. Roger accepted the offer and gave William a receipt for the sale of 'furnishings and other contents'.

William removed all the valuable items from the flat, including a box of old books and manuscripts. As these were outside his area of expertise, he left them in a corner of his storeroom, intending to show them to another dealer who would be able to value them. Over the next six months, he sold all the other items from the flat, realising a total of £22,000.

In 2012, Clare Gilbert died, leaving her entire estate to Agnes Gilbert, her only daughter, and appointing her as executor.

In April 2014, William came across the box of books and manuscripts in his storeroom and decided to show them to a specialist dealer. The dealer became very excited when he saw that one of the manuscripts looked very much like an original Magna Carta, sealed by King John in 1215. He said that it needed to be authenticated, but if it was genuine, it would be worth at least £25mn.

Further research confirmed that the document was not a 1215 Magna Carta, but a later issue by Edward II in 1297. It was, however, still worth a great deal of money and its discovery led to extensive publicity. When she heard about the discovery, Agnes Gilbert realised that the document was found in her mother's flat.

She brings an action against William d'Aubigny, claiming that the Magna Carta was not included in the terms of contract under which he acquired the contents of the flat; that there was an implied term that anything of exceptional value would not be included in the contract of sale; and that the contract was void for mistake.

In the High Court, Queens Bench Division, Hardel J held that:

i. On its true construction, the term 'furnishings and other contents' included all the contents of the flat at the time of the contract. This would include the box of old books and manuscripts. Spenser v Franses [2011] EWHC 1269 (QB) considered;
ii. A term could not be implied into the contract to give business efficacy to the contract (The Moorcock (1889) 14 PD 64 applied); nor would such a term be included by custom and usage. Furthermore, it was unlikely that such a term would meet the 'officious bystander' test: Shirlaw v Southern Foundries [1939] 2 KB 206; Luxor (Eastbourne) Ltd v Cooper [1941] AC 108 considered;
iii. There was no mistake as to the chattels included in the sale: the evidence at trial showed that both d'Aubigny and Bigod had seen the box of old books and manuscripts when they visited the flat together. The contested document was not of such a nature as to make it essentially different from the thing it was believed to be: the rarity or importance of a particular manuscript did not differentiate it from similar manuscripts so as to make a contract for its sale a mistake. Bell v Lever Brothers [1932] AC 161 applied.

The Court of Appeal dismissed Gilbert's appeal, but gave permission to appeal to the Supreme Court. Gilbert does not appeal the first finding (on the construction of the contract), but does appeal on the grounds of implied terms and mistake.

In the Supreme Court
On appeal from the
Court of Appeal (Civil Division)

BETWEEN:-

AGNES GILBERT

Appellant

-and-

WILLIAM d'AUBIGNY

Respondent

Before Lord Waterworth and Lord Neligan

JUDGMENT

Given on 11th June 2015

Lord Waterworth:-

1. We have decided that the judgment in this appeal should be delivered in two parts. I shall give the judgment of the court in relation to the law followed by this court's judgment in relation to the other aspects which have occupied the court during the hearing of this appeal.
2. This has been the hearing of an appeal by the appellant, Agnes Gilbert, from the dismissal by the Court of Appeal of her appeal against the decision at first instance of Mr. Justice Hardel of her claim against the Respondent, William d'Aubigny.
3. The facts of this claim have been adequately set out in the case summaries of each party: I do not need, for the purposes of this judgment, to repeat them, except as may be necessary for emphasis during the course of this judgment. There is in any event little, if any, dispute between the parties in relation to the facts. The issues to be determined relate to the applicable law and how that law should be applied in this case.
4. At first instance, the judge held that:-
    (i) On its true construction, the term "furnishings and other contents" included all the contents of the flat at the time of the contract. This would include the box of old books and manuscripts.
    (ii) A term could not be implied into the contract to give business efficacy to the contract and nor would such a term be included by custom and usage. Furthermore, it was unlikely that such a term would meet the so-called "officious bystander" test.
    (iii) There was no mistake as to the chattels included in the sale: the evidence at trial showed that both the Respondent to this appeal

and Mr.Roger Bigod, the solicitor to the Appellant's mother, who was, it is agreed, the other party to the transaction, had seen the contents of the box of old books and manuscripts when they visited the deceased's flat together. The contested document was not of such a nature as to make it essentially different from the thing it was believed to be: the rarity or importance of a particular manuscript did not differentiate it from similar manuscripts so as to make a contract for its sale a mistake.

5. The Court of Appeal did not demur from the decision of the judge but had nothing useful to add to the legal reasoning applied to that decision. In her grounds of appeal to this court, the Appellant submits that that reasoning, limited to the decision of the judge on the three points referred to above, was misplaced in the manner which I explain. Although the Appellant has indicated before us that she does not pursue her appeal against the construction placed on those words by the trial judge, we have decided that, for reasons which will become apparent and which are relevant to our decisions in relation to those parts of this appeal which remain live, the matter must be the subject of this court's comments.
6. It is not argued that the parties had no intention to enter into a legally binding arrangement. It is apparent to us that they did. There was nothing in writing specifying the terms of the contract save for the receipt given to the Respondent by Mr Bigod. That receipt stated specifically that the sale was of "furnishings and other contents" of the flat of the deceased.
7. The New Oxford Dictionary defines "furnishings" as:-

"furniture, fittings and other decorative accessories such as curtains

and carpets for a house or room".

The reference in that definition to *"other decorative items"* indicates that *"furniture and fittings"* are to be regarded as "decorative"

8. Whether or not this court would limit the definition only to those items of a decorative nature, does not assist in the resolution of this appeal. Clearly, whilst they may be "decorative", the main purpose of "manuscripts" is not primarily decorative, but rather prosaic, such as to regulate or declare particular circumstances. To use a topical example, the function of Magna Carta was not to "decorate" but to regulate the functioning of society and the workings of a developing state. We are satisfied, therefore, that the manuscripts included in the property of the deceased removed from the flat by the Respondent to this appeal were not "furnishings" as described in the receipt provided by Mr Bogod.
9. That, however, is not the end of the matter, for, as indicated above, the receipt also referred to "other contents". The same reference work defines "content", (which, it says, is usually a reference to "contents") as

"the things that are held or included in something".

10. It is an agreed fact that the manuscript which has given rise to this litigation was included within a box of old books and manuscripts which was included in the items removed from the flat by the Respondent. In our judgment, the judge was justified in concluding, as he did, that the items within the box were indeed "contents" (as described on the receipt). Further, the use on that receipt of the description "contents", without any restriction, must have been intended to include the books and manuscripts within the box. Those items were indeed, in our judgment, "things.. ….held or included in something" (as

per the definition of that word).

11. We turn next to the issue of whether or not a term can and should be implied into the contract so that the manuscript in question would be excluded in order to give business efficacy to the arrangement. The argument advanced on behalf of the Appellant is that, even if the manuscript was included within the trem “contents”, this item should be excluded because, had the parties realised the significance and value of it, during the ordinary course of their business, they would not have expected that such a valuable item would be sold as part of a comparatively small consideration.
12. On this issue, it is helpful to refer to the decision of the Court of Appeal in Luxor (Eastbourne) ltd. v Cooper (1941) AC 108. In his judgment in that case, Lord Wright said:-

    "The expression 'implied term' is used in different senses. Sometimes it denotes some term which does not depend on the actual intention of the parties but on a rule of law, such as the terms, warranties or conditions which, if not expressly excluded, the law imports, as for instance under the Sale of Goods Act and the Marine Insurance Act. . . .

    But a case like the present is different because what it is sought to imply is based on an intention imputed to the parties from their actual circumstances."

13. Applying the principle of when a term should be *“imputed”* into a contract, Lord Steyn said in his judgment in Equitable Life Assurance Society v Hyman [2000] UKHL 39

    “The process "is one of construction of the agreement as a whole in its

commercial setting" (per Lord Hoffmann in Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd. [1997] A.C. 191, 212E). This principle is sparingly and cautiously used and may never be employed to imply a term in conflict with the express terms of the text. The legal test for the implication of such a term is a standard of strict necessity".

We respectfully agree.

14. We do not accede to the submission of the Appellant that it is "strictly necessary" for there to be imputed into the contract a term excluding from a transfer of ownership by the deceased to the Respondent, either the manuscript in question or a specific category of items taken by the Respondent. Both the contracting parties were aware of the general nature of the contents taken by the Respondent, even if the particular value or identity of the manuscript was not known to either party. The terms of the contract can be construed without much difficulty, as we have already indicated. Mr Bigod did not seek to exclude any item in the event that, for example, it was found to be worth over a certain value and nor, apparently, did he obtain any expert evidence as to the value of any of the items, a course which would have been open to him.

15. Finally, the Appellant contends that the parties to the contract had been under a mistake as to the true identity and value of at least the manuscript. As such, so it is argued, the Appellant should not be disadvantaged by that albeit genuine and mutual error, which would deprive her of a very large sum of money.

16. In contract law, a common mistake is one which is shared by both parties to the contract. The mistake must relate to a matter of fact or law existing at the

time the contract is made. Such can potentially affect the contract in one of two ways:-

(i) It can prevent agreement being reached through the failure of the parties to produce a matching offer and acceptance on a matter essential for an agreement or

(ii) The parties may have reached agreement but in doing so have shared an error relating to some important contextual circumstance.

In the first instance, no contract is formed because one of the conditions for making a valid and enforceable contract have not been met. In the latter case, there are the makings of a contract but there is an issue as to whether that contract has been vitiated.

It is clear that in the instant case, there was a contract. The issue, therefore, is whether the contract can and should be vitiated by virtue of a common mistake.

17. English law recognises that a contract can only be vitiated if:

(1) The mistake totally undermines the contract to the extent that the contract becomes void. A contract that is void is the same in effect as a contract which is not formed but

(2) Although one or both parties might not have made the contract had they been aware of the true position, the court will not declare that the contract can or has been vitiated if the mistake is not sufficiently serious to merit any legal intervention.

18. Prior to the decision of the Court of Appeal in Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd, (2003) QB 679, the law sometimes applied a doctrine of mistake in equity, which rendered a

contract voidable at the instance of an affected party. Today, however, the law

adopts an all or nothing approach.

19. The Appellant in the instant case has submitted that although there was a contract, the contract has been so tainted by a fundamental mistake that the court should invoke its discretion to set the contract aside. The Appellant places reliance on Bell v Lever Brothers (1932) AC 161 and argues that this provides authority for the assertion that a common mistake about the quality of the subject matter of the contract will undermine the apparent consent of the parties. It is said that this principle would apply where the mistake is such that the quality of the subject matter of the contract is found to be very different from that which was believed by the parties to be the case when the contract was formed.

20. In The Great Peace case (supra) Lord Phillips (MR) stated that before the contract could be rendered void, there had to be a common assumption of the existence of a state of affairs and that the subsequent discovery that that state of affairs did not in fact exist must render performance of the contract impossible. It is necessary to emphasise the contextual significance of the word “performance”

21. In recent years, there has been considerable jurisprudence and discussion on the subject of the legal consequences and the available remedies if it is found by the court that the parties have entered into a contract in respect of which it is later discovered that there has been a mistake, either unilateral or common to the parties.. Of particular relevance have been the cases of Chartbrook Ltd. v Persimmon Homes Ltd. (2009) UKHL 38 and Daventry District Council v

Daventry & District Housing Ltd. (2011) EWCA Civ 1153 together with a lucid analysis of the current state of the law by the Chancellor of the High Court of England and Wales, The Right Honourable Sir Terence Etherton as recently as March 2015.

In that paper, The Chancellor referred to a judgment by Lord Justice Gibson in Swainland Builders Ltd v Freehold Properties Ltd (2002) EGLR 71 where he said:-

> *"The party seeking rectification must show that (i) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (ii) there was an outward expression of accord; (iii) the intention continued at the time of the execution of the instrument sought to be rectified and (iv) by mistake, the instrument did not reflect that common intention".*

We respectfully agree with that analysis. Further, in our view the same approach should be taken to an oral contract which one party subsequently claims was formed when that party was labouring under a mistaken impression. That being so, it is necessary for the court to examine the circumstances in which the contract was formed and establish, as a first consideration, whether there was indeed a mistake.

22. In the instant case, the judge found as a fact that there was a contract between the parties and in our view, was right to do so. Further, it is agreed that the contract provided for the purchase by the Respondent of the "furnishings and other contents" (of the deceased's flat), which, as indicated earlier, included the box of books and manuscripts. There was no mistake between the parties as to

their mutual understanding of those terms. There is no indication that the judge made a finding as to whether or not either party, before the contract was made, had investigated the contents of the box, but it can properly be assumed that they both had the opportunity of doing so. No reservation was included in the contract as to the consequences if an article was subsequently found to be of great value, as could have been insisted upon by the estate of the deceased had that been thought necessary. The fact that, at a much later date, it was discovered that one of the contents of the box was of great historical interest and pecuniary value did not prevent the contract being formed and implemented. The estate of the deceased contracted to sell and the Respondent contracted to purchase the “contents” of the flat and that is what occurred. We are satisfied that the transaction reflected the common intention of the parties at the time the contract was made.

23. It is no part of our function in this case to consider whether or not Mr Bigod could or should have obtained advice as to the provenance or value of the “contents” before taking it upon himself, as agent for the estate, to enter into the arrangement with the Respondent. The fact is that he did not and neither party would have said at the time or immediately afterwards that either of them had contracted to do something under a mistake.

24. In our judgment, the circumstances in this case do not bring it within the “exceptionality” category referred to above that would entitle the Appellant to claim that the contract should be set aside. The contract was capable of being performed and was. Accordingly, on the law, this appeal must be dismissed.

25. However, under the particular circumstances in which we judge this appeal, we are obliged to take into account certain other factors which are of great

importance.

I now turn to those other factors which relate to the skills displayed by those who have appeared before us today in the various techniques required of a good court advocate.

1. It is particularly poignant that, in the year in which we commemorate the sealing of Magna Carta, there should come before us a case involving that great document, which has played such a significant part in the development of the law and civil rights of the citizens not only of this country but of countries all over the world.
2. It is generally recognised that Magna Carta was the foundation stone upon which was built our concept of the rule of law. Everyone, including the king, became subject to the law, which was to be dispensed by those with legal knowledge. Within 100 years of 1215, there had been established a legal profession, which included those with a practice in the courts: they were the first legally trained advocates, as we would now understand them to be.
3. Over succeeding generations, the role of lawyers has increased. The function of lawyers came to include those who are responsible for the preparation of cases and the advocates who present the cases in court. Furthermore, the judges became more professional and the requirement in Magna Carta “to no one will we sell or deny justice” increasingly became a reality.
4. As the requirement for the law to prevail became the norm, so the roles played by judges and lawyers also increased in importance. For many years now, lawyers have been subject to strict ethical and professional codes of

conduct and practice. Breach of these professional requirements can cost a lawyer his career. Lawyers take seriously their duty to put before the court the case which their client wishes to advance. In doing so, advocates must comply with their professional duties, including such vital matters as the requirement to act within the law, not to mislead the court and to bring to the attention of the court that part of the law that may be against their case as much as that which is for it.

5. At the same time, most lawyers practice in a competitive environment. Success depends on a variety of factors, none more so than barristers and solicitors who practise as advocates in court. There they are judged, in terms of their professional reputation, on many factors including

    a. command of the law
    b. presentational skills
    c. observance of courtroom etiquette and
    d. the ability to respond to court intervention.

    These are factors which we take into account when deciding the outcome of this case today.

6.. We congratulate all who have been part of this appeal. The relevant law in this area is not easy. Indeed, it would not be unfair to say that even some of the most senior judges in the country have been unable to agree precisely where the law stands. For example, Lord Hoffman gave the leading judgment (or opinion as it was then called) in the House of Lords (the very last case before that tribunal morphed into the newly created Supreme Court) in the Chartwell case to which I referred earlier, a case in which the proprietor of the Respondent company was and still is resident in the County of Devon.

Subsequently, there has been considerable judicial and academic criticism of the

judgment in that case, but the case remains binding and, of course, all of you are very familiar to academics enjoying the freedom to level criticism at not only students but also the judges.

7. It has been very difficult to separate the achievements so as to identify the advocates for one side or the other as outright winners.

   (The court then dealt with the performance of the advocates appearing today and made certain recommendations as to technique).

8. Our unanimous decision is that

   a. The appeal must be dismissed

   b. The winner of the award for the best advocacy iis Leading Counsel for the Appellant with Leading Counsel for the Respondent being the runner up.