

THE NARROW DOCTRINE OF *NON EST FACTUM* UNDER ENGLISH COMMON LAW: A DECLINING, BUT NOT DEFUNCT, DEFENCE FOR MISTAKENLY SIGNED DOCUMENTS

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This article attempts to briefly examine this doctrine, which once served as an important defence in cases of mistakenly signed documents, by outlining the criteria for, and limitations to, its invocation as well as noting alternative doctrines which may afford the same protection. Through this, the article will attempt to demonstrate the reasons why the doctrine of non est factum is a narrow one and that, although it has, in modern times, become increasingly limited in its suitability and applicability as a defence, it nevertheless continues as a useful instrument of justice in rare situations.

L'intégrité du consentement des cocontractants reste tant dans le droit français que dans la Common law, un élément déterminant de la validité des engagements souscrits. La Common law sanctionne l'absence de validité des contrats notamment par la mise en œuvre du principe 'non est factum' lequel n'est pas sans rappeler la notion d'erreur pour vices du consentement en droit français (art.1110 du Code civil). Dans cette brève présentation, l'auteur indique aux lecteurs les fondamentaux qui régissent le principe 'non est factum' et son domaine d'application. Il souligne également les raisons pour lesquelles en pratique, ce moyen de défense reste peu utilisé et ce en dépit de l'intérêt réel qu'elle présente dans certaines situations.

I INTRODUCTION

Non est factum ("it is not my deed") is an English common law doctrine that can be pleaded as a defence to a claim brought in reliance upon a signed written

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contract where the party who signed the document was unaware of the true nature of the document at the time of signing.¹ Ordinarily, a signature on a document will bind the signatory to the contents of that written contract,² but the defence of *non est factum* provides a very narrow exception. The effect of a successful plea of *non est factum* is to void the contractual document; however, successful pleas are rare.

This article attempts to briefly examine this doctrine, which once served as an important defence in cases of mistakenly signed documents, by outlining the criteria for, and limitations to, its invocation as well as noting alternative doctrines which may afford the same protection. Through this, the article will attempt to demonstrate the reasons why the doctrine of *non est factum* is a narrow one and that, although it has, in modern times, become increasingly limited in its suitability and applicability as a defence, it nevertheless continues as a useful instrument of justice in rare situations.

A classic example of the defence being successfully pleaded is found in the case of *Lewis v Clay* (1897) 67 LJ QB 224 where a plaintiff tricked the defendant into signing promissory notes, made out to the plaintiff. The plaintiff had asked the defendant to witness some deeds for him, though claimed that the contents must remain confidential and so held a piece of paper over the deeds, with holes cut out to reveal the spaces where the signature was to appear. When the plaintiff sought to enforce the promissory notes, the defendant successfully pleaded *non est factum*.

II CRITERIA FOR INVOKING THE DEFENCE

A Persons Eligible to Plead the Defence

The defence of *non est factum* originated from *Thoroughgood's Case* (1584) 2 Co Rep 9a for persons who were illiterate and had signed a deed after it had been incorrectly read over to them. However, the defence was later extended beyond the illiterate to other situations which affected the *consensus ad idem*, essentially where "the mind of the signer did not accompany the signature".³ Indeed, according to Lord Reid in the oft-cited UK House of Lords case of *Saunders v Anglia Building Society* (sub nom *Gallie v Lee*) the defence may apply to "those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity" and,

1 Such a mistake is, effectively, the equivalent of *Inhaltsirrtum* in German law (ie mistake as to the content of the declaration) and *erreur sur la nature du contrat* in French law (ie mistake as to the nature of the contract).

2 See *L'Estrange v E Graucob Ltd* [1934] 2 KB 394.

3 See *Foster v Mackinnon* (1869) LR 4 CP 704 at 711.

according to Lord Wilberforce, also includes those who have been "tricked" into signing the document.⁴

B Requisite Degree of the Mistake

In the *Saunders* case, the House of Lords refused to accept the plea of *non est factum* because the document signed was not sufficiently different in substance to the transaction intended.

In this case, an elderly aunt intended to convey her house to her nephew in order for him to obtain a loan from the building society, by him using the house as security, on condition that she would remain living in the house. The nephew's friend, who was known to be helping the nephew in obtaining the loan, asked the aunt to sign a document which he told her was a deed of gift of the house to the nephew. The aunt signed the document, despite not having read it due to her broken glasses. The document actually conveyed the house to the nephew's friend who then mortgaged the property to the building society. After the nephew's friend defaulted on his mortgage repayments, the building society sought possession of the house. The aunt's plea of *non est factum* was unsuccessful.

According to the House of Lords, the difference between what the aunt *thought* she was signing and what she *actually* signed was not sufficient to establish that she did not consent to it: she thought she was signing a deed conveying ownership of the house and that is precisely what she did (albeit to a different person). According to Lord Wilberforce:⁵

... the transaction which the document purports to effect must be *essentially different* in substance or in kind from the transaction intended.

Accordingly, the burden of proof is a "heavy" one and it requires "clear and positive evidence" before *non est factum* can be established.⁶

Such essential difference also includes a difference in the capacity in which the signer thought he was signing. For example, in *Lewis v Clay* the defendant did not know what he was signing (or supposed to be signing, since he was told it was "confidential") and therefore it could not be said that what he did sign was

4 [1971] AC 1004. At 1016 and 1025, respectively.

5 At 1026 (emphasis added). Lord Pearson added that other adjectives may also be used to describe the requisite degree of difference, including: "fundamentally different", "radically different" and "totally different" at 1039.

6 See Lord Reid at 1016 and Lord Hodson at 1019.

"essentially different" to what he thought he was signing. However, the rationale for the finding of *non est factum* in that case was based on the fact that he was mistaken as to the *capacity* in which he was signing, i.e. he thought he was signing merely as a witness.⁷

III LIMITATIONS ON INVOKING THE DEFENCE

A *Not for the Lazy, too Busy or those who do not Understand the Legal Effect*

The plea of *non est factum* is not available for those who are too lazy or too busy to read through the document before signing it. According to Lord Reid in the *Saunders* case (above):⁸

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document.

Further, the defence is not available for those who sign a document and later claim that they did not understand the legal effect of the terms. As explained by Donovan LJ in the English Court of Appeal case of *Muskham Finance Ltd v Howard* [1963] 1 QB 904:⁹

Much confusion and uncertainty would result in the field of contract and elsewhere if a man were permitted to try to disown his signature simply by asserting that he did not understand that which he signed.

B *Carelessness in Signing*

1 Third party situation

In the *Saunders* case, it was also held that even if the document signed is "essentially different" from the transaction intended, the party who signed the document will not be able to succeed with the defence of *non est factum* against a third party unless he can show that he exercised reasonable care when signing the

7 See also, *Chiswick Investments v Pevats* [1990] 1 NZLR 169 where the High Court of New Zealand allowed a plea of *non est factum* where the signer signed a guarantee for a loan as an attestation to the placing of the company seal, ie in his capacity as company secretary and *not* in his capacity as an individual shareholder who intended to give a personal guarantee.

8 At 1016. However, see Viscount Dilhorne, at 1023, suggesting that the defence may be available if, although not having read the document, such a reading would not have revealed the true character of that document to a person of the disadvantaged capacity as that of the signer; his Lordship gave the example of an elderly spinster who might, even if she *had* read the document, be "none the wiser" as to its nature.

9 At 914. See, for example, *Gillman v Gillman* (1946) 174 LT 272, where a wife was held to be bound to a separation deed which she signed, despite having no definite idea about what she was signing.

document. Indeed, this was the second ground for rejecting the plea in the *Saunders* case: the aunt's failure to simply check the name of the person to whom she was conveying her house. Therefore, if a person carelessly fails to read the document he is signing, he will not be able to rely on the defence of *non est factum*.

However, it does not seem justifiable to assess such carelessness by the standard of a reasonable person (as in the tort of negligence), given that such a person is unlikely to fall within the class of persons which could claim *non est factum* in the first place, ie those persons being incapacitated in some form. Therefore, presumably, in such circumstances, the standard would be that which such a person so disadvantaged could have been expected to take. Indeed, according to the High Court of Australia case of *Petelin v Cullen* (1975) 132 CLR 355:¹⁰

It is now settled beyond any shadow of doubt that when we speak of negligence or carelessness in connexion with *non est factum* we are not referring to the tort of negligence but to a mere *failure to take reasonable precautions* in ascertaining the character of the document before signing it.

Accordingly, it seems that carelessness is to be assessed by reference to the reasonable precautions which a person so incapacitated as the one pleading *non est factum* could have taken.

Nevertheless, according to Lord Wilberforce in the *Saunders* case (above), even where the signers are illiterate, blind or simply lack understanding, the law must have regard to innocent third parties who cannot be expected to know the condition or status of the signer. Therefore, according to his Lordship, the law will require even illiterate or blind people, or those lacking in understanding, to "act responsibly and carefully according to their circumstances in putting their signature to legal documents".¹¹

The law may even afford protection to innocent third parties where the signer was *not* negligent or careless, ie where he did take reasonable precautions. As stated by Scott LJ in the English Court of Appeal case of *Norwich and Peterborough Building Society v Steed (No 2)* [1993] Ch 116, where a fraudster has tricked someone into signing a document and then tricked a third party to rely on the signed document, the law will favour the third party. Although both the signer and the third party are victims, Scott LJ thought that "[t]he signer of the document

10 At 360 (emphasis added).

11 At 1027.

has, by signing, enabled the fraud to be carried out, enabled the false document to go into circulation"¹² and so the signer should bear the loss.

With respect, this is both sensible and just reasoning, striking a fair balance between the victims. For example, in the context of a guarantee procured by a fraudster, the protection of the wholly innocent third party – whom had no part in the transaction between the fraudster and the guarantor – arguably trumps the unfairness of holding the guarantor to the contract which he signed, albeit not intended.

Further, it would seem that the burden of proof lies on the party pleading *non est factum* to show that they were not careless, ie that they took reasonable precautions to ascertain the character of the document before signing it. For example, in the *Petelin* case, the High Court of Australia believed that it is of "fundamental importance" that proof of reasonable precautions having been taken should be a "condition of making out the defence".¹³ Support for this view can also be found in the English Court of Appeal case of *Lloyds Bank plc v Waterhouse* [1993] 2 FLR 97 which emphasised the importance of guarantors being able to prove that they took all reasonable precautions to find out the nature of the document if they are to successfully establish *non est factum* as a defence. As such, it seems clear that, rather than carelessness being a limitation, proof of the taking of reasonable precautions is to be regarded as part of the *criteria* for invoking the defence.

2 Two party situation

In two party situations, the signer's carelessness will be irrelevant where the other party is fraudulent:¹⁴ a fraudster cannot argue that the other party should have been more careful, ie he will not be able to profit from his own wrong. However, the signer's carelessness *is* relevant to rejecting the plea where the other party is innocent. For example, the Hong Kong case of *Kincheng Banking Corp v Kao Yu Kuei* [1986] 1 HKC 212 illustrates an unsuccessful attempt to raise the defence of *non est factum* where the document signed was written in a language that the signer did not understand.

In this case, the plaintiff bank sought the enforcement of a guarantee but the defendant tried to rely on the *non est factum* defence, arguing that the bank officer

¹² At 125.

¹³ At 360.

¹⁴ See *Petelin v Cullen* (above) at 360 and *Bradley West Solicitors Nominee Co Ltd v Keeman* [1994] 2 NZLR 111 at 118.

explained the contents of the document in Cantonese, a language which the defendant guarantor did not understand. The defence was rejected by the Hong Kong Court of Appeal. According to Huggins VP:¹⁵

Whether the...defendant understood all the contents of the document is not relevant: the burden was on him to show that he thought he was signing a document of a different nature: it was not for the plaintiff to establish that the...defendant did know the contents of the document.

The judge continued:¹⁶

[The defendant's] ignorance of the precise effect of the document is a very different thing from *non est factum*: it does not constitute a defence to the action... .

And, further, that:¹⁷

Anyone who signs a document [which is written] in a language he does not understand is necessarily negligent *unless* he has been actively misled as to its nature.

C Documents Signed in Blank

Where a person signs a blank document, leaving it to another person to insert the terms of their orally agreed contract, they may, theoretically, be able to rely on the defence of *non est factum* if those written terms make the transaction essentially different from that intended. However, in the absence of exceptional circumstances where it could be said that the signer did not act carelessly, the signer of a blank document takes responsibility for it and bears the risk of fraud or error when the terms are later inserted. Indeed, this was the view taken by the English Court of Appeal in *United Dominions Trust Ltd v Western* [1976] QB 513:¹⁸

... I can see no conceivable basis, in sense, in reason or in principle, for distinguishing between a situation, on the one hand, of a man signing a complete document which is put before him, unread, and, on the other hand, a man trusting his amanuensis to complete a document which he has signed in blank... .

15 At [5].

16 At [5].

17 At [6] (emphasis added).

18 At 524, *per* Bridge LJ.

As such, a defence of *non est factum* is very unlikely to succeed in such a situation.

IV NON EST FACTUM v OTHER DEFENCES

In light of the strict criteria for establishing *non est factum*, and the resulting rarity of success when pleaded, it might seem more usual to simply base a defence argument on misrepresentation (ie X having been induced to sign a contract by Y's misrepresentation as to what the document contained) or unilateral mistake (ie Y knew that the document did not reflect X's intention.¹⁹ However, this may not always be possible. For example, if the party seeking to enforce the contract is a party other than the party who was responsible for the misrepresentation, an argument based on misrepresentation would be of no use since the misrepresenter was a third party. Also, even if the misrepresenter *is* the party seeking to enforce the contract, the remedy of rescission may be barred by any bona fide third party interests, given that misrepresentation only renders a contract voidable, not void per se.

Further, with regard to unilateral mistake, this cannot be raised if the document signed is not a contract with the fraudulent party but, instead, a conveyance in his favour since such conveyances do not involve offer and acceptance and so cannot be said to be void for mistake; rather, the conveyance can only be voidable for fraud. In such circumstances, the only means of redress open to the mistaken party (or, perhaps, the best, tactically) is by pleading *non est factum* which, if successful, will render the contract (or conveyance) void.²⁰

V CONCLUSION

The defence of *non est factum* originated in England at a time when illiteracy was common. In modern times, with vastly increased levels of education throughout the common law world, its original basis as a defence seems to have waned, as reflected, in part, by the rarity of successful pleas in recent years.

19 Indeed, in *Lloyds Bank plc v Waterhouse* (above), the English Court of Appeal noted the close relationship between the doctrines of *non est factum*, misrepresentation, undue influence and unilateral mistake.

20 Certainly, at least in Hong Kong and Australia, if the other party knew or should have known that the signer was suffering a "special disadvantage" and took advantage of that, then the contract could be set aside on the grounds of unconscionability (see *Commercial Bank of Australia Ltd v Amadio* (1982-1983) 151 CLR 447 (High Court of Australia), endorsed by the Hong Kong Court of Final Appeal in *Ming Shiu Chung v Ming Shiu Sum* (2006) 9 HKCFAR 334). However, such a general doctrine is not formally recognised, as yet, in England; the English courts, instead, preferring to rely on more established doctrines such as undue influence.

However, the doctrine still survives as an instrument to do justice in such rare cases. Indeed, in the words of Lord Wilberforce in the *Saunders* case:²¹

Accepting all that has been said by learned judges as to the necessity of confining the plea within narrow limits, to eliminate it altogether would, in my opinion, deprive the courts of what may be, doubtless on sufficiently rare occasions, an instrument of justice.

21 Above n 4 at 1025.