MISREPRESENTATION

Clef Acquitaine Case Brief

FACTS:

- Claimants were French companies controlled by G, and wholly or mainly owned by G and his wife.
- In 1979 Clef Acquitaine entered into a 20 yr distribution agreement with Sovereign (sued as Laporte) to purchase from Sovereign and distribute in France their products.
- D, on behalf of Sovereign, falsely represented to G that the discounts negotiated by G were discounts from the lowers prices available to Sovereign's trade customers.
- In reliance on such representation the prices and price increase formula were fixed.
- Claimants made a profit but nevertheless sued sovereign for the misrepresentation, claiming damages for the difference between the prices to which they were committed under the agreement and the prices they would probably have been able to negotiate had the misrepresentation not been made.

PRIOR PROCEEDINGS:

Trial:

- Bell J gave judgment for the claimants for damages to be assessed, having held that the claimants could and would have entered into the same distribution agreement but on more favourable terms as to price, and that there loss was therefore the difference between the lower prices which they would have paid and the prices actually paid.
- Trial judge found that the particular representation made - Dent represented that the discounts negotiated by the claimants were discounts from the lowest unit prices available to Sovereign's trade customers.
    - This is a false representation that was known to be false.

ISSUE:

Whether or not a contracting party can recover damages for the tort of deceit from the other party in respect of a fraudulent misrepresentation that induced entry into the contract in circumstances where the contract turns out to be profitable but not as profitable as it would have been if the truth had been told.

PLAINTIFF'S ARGUMENT:

- Two heads of loss claimed - concerned with the second one: the difference between the prices to which the claimants were committed under the agreement and the prices which they probably would have been able to negotiate had the misrepresentation not been made - concerned with this.

HELD - Dismissing the appeal:

- Claimants had become locked into a long term agreement and a commitment to pay prices and price increases larger than otherwise would have been the case.
- Judge had done nothing more than compensate them for having thereby worsened their position.

- Not made the mistake of awarding damages by reference to the contractual measure.
- **No absolute rule requiring the person deceived to prove that the actual transaction into which he had been induced to enter was itself loss-making.**
- Possible to prove that a different and more favourable transaction (either with the D or some third party) would have been entered into but for the fraud, and to measure and recover the claimants' consequential loss on that bases.
- Once it was recognised that the claimants did not need to prove each purchase, and more than the agreements as a whole, to be loss-making, it became unnecessary to force the case into the straightjacket of value/price comparison.

LORD JUSTICE SIMON BROWN:

- Principal contention on appeal is that the deceit caused the claimants no loss.
- There was a "price list" that had been previous supplied to G and discussed between him and Sovereign's managing director D.
    - Contained a minimum scale of prices and it was with regard to this that the fraudulent misrepresentation was made.
    - D told him that Sovereign salesmen did not and could not sell to customers at prices below those indicated on the minimum scale.
- Represented that the discounts negotiated by the claimants were discounts from the lowest unit prices available to Sovereign's trade customers.
- It was in reliance upon the truth of this representation that G negotiated a price increase formula.
- Judge found that D's representations were false and he knew them to be false.
    - At the material times, Sovereign sold to its trade customers by reference to other price lists which had lower prices.
    - Certain customers were given big discounts even from those lower prices.
    - The lower price lists were not published, they were for Sovereign's internal use only.
- Claim two heads of loss for the fraudulent misrepresentation:
    - The loss of the opportunity to make profits by re-selling in France at lower prices… would have reduced his prices in France by a margin sufficient to stimulate sales.
    - The difference between the prices to which the claimants were committed under the agreement and the prices which they would probably have been able to negotiate had the misrepresentation not been made.
- Found for the claimants on the second head.

Damages for deceit

- Soveriegn arguing that you cannot get damages for loss of a bargain for the tort of deceit because damages for deceit are only to compensate the person deceived for the loss suffered.
    - Here there was no loss, just that they could have made more money.
- The judge concluded on the balance of probabilities that, but for D's deceit, the claimants could and would have entered into the same distribution agreements but on more favourable terms as to price, and that their loss was therefore the

difference between the lower prices which in those circumstances they would have paid and the prices actually paid.

- Turn directly to examine the judge's conclusions upon the legal argument arising, the recoverability of damages on this basis for the tort of deceit.
- Judge analysed some authorities and then said:
    - Can reconstruct a deal that would have occurred if the fraudulent misrepresentations had not been made in order to recover P's recoverable loss.
    - The result may be the same as a loss of bargain claim but that does not mean it is a loss of bargain claim.
    - It establishes the loss, if any, which the Ps have suffered with a *view to putting them in the position they would have been in if no representations had been made.* (tort measure).
    - P's have established a direct loss, revoerable as damages, in the sum of the difference between (a) what they would have paid had the price of Sovereign's product… been the lowest bulk price list…. And (b) what they actually paid in accordance with the agreements.
    - Actual value to P was what they would have paid for it, bulk price less 17.5%, had they not been induced to pay more by the misrepresentation.
        - D said that customers who were aware of the market pressures paid below bulk list prices, which was tantamount to saying that the prices which they paid, below bulk list, were the market value to large customers like the claimaints.
    - The plaintiffs are entitled to recover by way of damages the full price paid by them (or rather, since the claim for over-charging has been formulated as a separate claim for breach of contract, the full price as fixed by the agreements), but they must give credit for the benefit they have received as a result of the transaction, and in my judgment that benefit is the real value to them.
- D arguing that in contract, the party making the representation is bound by it: he is selling his promise and it is enforceable against him. In tort, however, whether the claim be for negligent misrepresentation or for the deceit, no claim arises unless actual loss results. Here none did.
- *Smith New Court* - Lord Browne-Wilkinson:
    - "(1) the defendant is bound to make reparation for all the damage directly flowing from the transaction; (2) although such damage need not have been foreseeable, it must have been directly caused by the transaction; (3) in assessing such damage, the plaintiff is entitled to recover by way of damages the full price paid by him, but he must give credit for any benefits which he has received as a result of the transaction...."
- Lord Steyn assessing *Doyle v Olby*:
    - The P in an action for deceit is not entitled to be compensated in accordance with the contractual measure of damage i.e the benefit of the bargain measure. He is not entitled to be protected in respect of his positive interest in the bargain.

    - … entitled to be compensated in respect of his negative interest. The aim is to put the P into the position he would have been in if no false representation had been made…
    - If the plaintiff's bargain would have been a bad one, even on the assumption that the representation was true, he will do best under the tortious measure. If, on the assumption that the representation was true, his bargain would have been a good one, he will do best under the first contractual measure.
    - … the victim of the fraud is entitled to compensation for all the actual loss directly flowing from the transaction and induced by the wrongdoer. That includes heads of consequential loss.
- Lord Steyn considered *Downs v Chappell:*
    - it is not necessary in an action for deceit for the judge, after he has ascertained the loss directly flowing from the victim having entered into the transaction, to embark on a hypothetical reconstruction of what the parties would have agreed had the deceit not occurred.
    - There is in truth only one legal measure of assessing damages in an action for deceit: the plaintiff is entitled to recover as damages a sum representing the financial loss flowing directly from his alteration of position under the inducement of the fraudulent representations of the defendant
- Difficulty in the present case is in deciding whether "all the damage (actual loss) directly flowing from the transaction" (Lord Browne-Wilkinson's first principle and Lord Steyn's fifth proposition can encompass, in a case like the present where the actual transaction entered into has been profitable rather than loss-making, the loss occasioned through the party deceived having entered into that particular transaction rather than a different transaction which would have been yet more profitable.
- Looking at *East v Maurer:*
    - ***East v Maurer*** the plaintiffs bought a hairdressing salon from the defendant who falsely represented that he would not be working at another of his salons in the area.
    - They were unable to sell the salon for three years. They were held entitled to recover damages

  most importantly for present purposes, damages representing the loss of profit the plaintiffs could reasonably have anticipated had they bought not the salon they were induced to buy by the defendant's deceit but rather a different hairdressing business bought for a similar sum.
- Bedlam LJ said: plaintiffs did establish that they had suffered a loss due to the defendant's misrepresentation which arose from their inability to earn the profits in the business
- Mustin LJ said: the best course in a case of this kind is to begin by comparing the position of the plaintiff as it would have been if the act complained of had not taken place with the position of the plaintiff as it actually became.
- *East v Maurer* was approved by Lord Steyn in *Smith v New Court:* ***East v Maurer*** shows that an award based on the hypothetical profitable business in which the plaintiff would have engaged but for deceit is permissible: it is classic consequential loss."

- This case is kind of distinguishable in there was no loss save only having entered into the transaction rather than a more profitable one.
- Correct to say that the judge below did no more and no less than compensate them for having thereby worsened their position. This accorded with the overriding principle.
- The "exercise" Steyn rejected T was not to reject the possibility that the ascertainment of loss in the first place might itself require a “hypothetical reconstruction of what the parties would have agreed had the deceit not occurred." It was in relation to the case they were talking about and using the contractual measure of damages as a hypothetical.

EXTRA STUFF:

- Why we doing this? Because you cannot sue the vendor under tort because they did not make a misrepresentation.
- Also equally applicable to the FTA damages where court has said that the damages are to be calculated under the tort measure.

CA:

- Sovereign's council argued that Clef's claim was an illegitimate claim to recover loss of bargain damages available for an action of breach of contract.
    - Damages for deceit only supposed to compensate the person deceived for the loss suffered.
    - Judge said that the argument was completely wrong.
- Argument is wrong because it rests on a false assumption - assumes that where a person has more money after the wrong than they did before the wrong that there is no loss.
    - A claim for damages in tort measured by reference to the lost opportunity to secure the subject matter at lower price is theoretically distinct from loss of bargain claim
    - Lost opportunity - object of damages is restoration of status quo prior to the wrongful conduct
        - You misled me and that cost me. Lost an opportunity to conclude this other contract.
        - In the case of proven lost opportunity P shows that there is a loss in being worse off than if misleading claim had not been made
        - Insofar as this has benefits it might appear to resemble loss of bargain claim there is no necessary co--relation between the two.
    - Loss of bargain - P seeks benefits of the particular contract entered into
        - Made these promises and failed to deliver on them.
        - Have to pay me what I would've received if you had honoured your promises.

CONTRACTUAL MISTAKES

Conlon v Ozolins

COURT AND DATE

High Court [1982]

- Grieg J

Court of Appeal [1982]

- Woodhouse P and McMullin J majority.
- Somers J dissenting.

FACTS

- The defendant (Ms Ozlins) owned about an acre of land.
- Certificate of title had been issued for the section on which D's house was built. Another certificate had been issued for the rest of the land.
    - The backland had been divided into four sections - lots 1, 2, 3 and 4.
- Lot 4 was physically divided from lots 1, 2 and 3 by a fence and was used by D as a garden.
- The D was elderly who had some difficulty expressing herself in English which was not her native language.
- P and D entered into a contract for the sale and purchase of some of the land. The written agreement, recorded that the land being sold and purchased were lots 1, 2, 3 and 4.
- When the D's solicitor called her to sign the transfer she refused to do so on the grounds that all she was willing to do was to sell lots 1, 2 and 3.
    - The solicitor had ordered a valuation of those three sections and also knew she wanted to sell only those three. Argument that it was negligence on the part of her lawyer. When asked what she wanted to sell she said "not my land"
- Lot 4 was part of her garden and she had no intention of selling that land.
- P brought an action for specific performance.

RELIEF SOUGHT

- Specific performance.

PRIOR PROCEEDINGS - GRIEG J IN THE HIGH COURT.

- P said he was unaware that D only wanted to sell lots 1-3.
    - P completely innocent of any mistake or any knowledge or idea that the defendant herself was mistaken.
- Found that Ozlins is not, by reason of her age or any other defect, deficient in understanding, and in understanding, at least in a general way, the transactions upon which she was entering.
- First ground of defence was non est factum: not upheld because it cannot be said that the document signed by the D was so entirely or fundamentally different from what it was thought to be that it could be said that it was never her intention to sign the document at all.

    - D was forced to concede that the D was not able to allege that the document for sale and purchase signed by her was not a document in relation to the sale of land, she intending to enter into such a document.
    - D was negligent in signing the document so cannot uphold non est factum.
- On the facts of this case and on the objective test which is required by the rule I have no doubt that the defendant is bound to the terms of the document which she signed.
    - Applying *Smith v Hughes.*
- In the circumstances it was inevitable that the plaintiff would believe that the D was agreeing to the sale of the four lots, there being nothing express or implicit which could affect his view in that respect.
    - Whatever was in her mind, the defendant's conduct and that of her solicitor could leave no other conclusion but that all four lots were to be sold.
- In *McCullough v McGrath* Mahon J decided that they could apply the OP in a CMA case and that although the Act created a code it did not include in that code the principle exemplified by *Smith v Hughes* since that only operated upon the question that a mistake in fact existed, which is not included in the statutory code.
    - Didn't say anything ab how to prove the existence of a mistake.
    - The weird thing - OP operates as a method of estoppel - Ozlins estopped from saying that she was mistaken so cannot say that there was a mistake.
- Still wouldn't grant relief if this was wrong - no substantial inequality of exchange to satisfy s 6(1)(b).
- Also have to look at discretion under s 7.
    - Subs (2) requires consideration of the extent to which the D caused the mistake.
    - Also proper to take into account *S v H* which is intended to provide justice and maintain the general security of contractual relationships.
    - Mistake created and supported by D and she was careless and negligent in signing the agreement.
- Mistake may be a ground for refusing SP.
    - Unreasonable to hold the person to it because it would cause injustice - *Slee v Warke.*
- Any hardship to P must also be taken into account.
    - Refusal of SP would not cause hardship to D but it would to P because he invested so much money in buying that other house and stuff lol.

RESULT

- Appeal by Ms Ozlins allowed
- Somers J dissenting.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

- No real correspondence of offer and acceptance between the parties and so the transaction should be treated as void.

ISSUE(S)

- Framing of the q is important - does the court have jurisdiction in terms of the act to grant relief in the factual situation of the kind outlined
    - Does the court have jurisdiction to grant relief under the act in a situation where the claimant is prima facie bound in contract through the application of the objective principle.
    - Highlighting this because in *Butler Industries* they held that *Conlon* was a decision on its own facts w Dmac does not like because this is an issue of principle.

JUDGE'S REASONING

WOODHOUSE P:

- Framing of the issue important
    - Does the court have jurisdiction to grant relief under the act in a situation where the claimant is prima facie bound in contract through the application of the objective principle.
- Highlighting this because in *Butler Industries* they held that *Conlon* was a decision on its own facts w Dmac does not like because this is an issue of principle.
- Automatically accepts that the argument is to be based on whether the facts fall within s 6(1)(a)(iii).
- Throughout the period of negotiation and during the actual time of execution the parties were at cross purposes.
    - No correspondence of verbal offer and acceptance regardless of CL position on the written agreement.
- Each mistakenly believed that the written document correctly represented a mutual intention that did not exist.
    - Conlon though Ozlins was consciously selling all of the land at the rear of her house incl the garden; she mistakenly thought he was buying merely the land beyond the high fence.
- Each had a mistaken impression about the boundaries of land being bought and sold.
    - Conlon mistaken about Ozlin's intention to sell all four lots. She believed he intended to buy the three.
- So respective decisions to proceed and enter into the written contract were based on a mistaken belief that was different from the mistaken belief on the other side and also that each mistake was about the size of land to be bought and sold.
- Once carried into the contract it cannot be undone at common law.
    - "Classic example" of a situation intended by s 6(1)(a)(iii)
- Satisfied that the object of the CMA is promoted by construing it to include the present case.
- Necessary for the court to make an assessment in terms of s 7 as to what if any damages or compensation should be awarded to the P should his claim of SP fail.
    - Inevitable that the judge will reach the conclusion that there should be no order for specific performance.
    - This was not Ozlin's fault.
- Remitted to High Court.

[Issues w this reasoning:

- Reference to the mistake being boundaries being bought and sold and then said the size of the land.
    - Not mistaken about these things - knew about the boundaries and the size of the land. They were mistaken about the number of sections to be bought and sold or simply the LAND to be bought and sold.
- Seems that the judge was saying each was mistaken as to the other's intention. Essence of his reasoning is
    - P mistakenly thought D wanted to sell lots 1-4
    - D mistakenly thought that P wanted to buy lots 1-3
    - Different mistakes as to the same matter of fact.
    - Seems to make sense but it doesn't make sense apparently: lets assume tht the parties did make the mistakes, are they up to the same matter of fact?

        How can the land to be bought and sold be a matter of fact, it is a matter of intention - the issue is that there is no common intention. A matter of fact is something that can be verified but there was no verification here UNLESS the written contract governed, which would mean that Conlon made no mistake at all or they made mistakes as to different matters of fact (their respective intentions).

        Plain meaning of the words in category 3 means that there is first a true position (or a position contrary to the party's assumptions) and different false assumptions by the parties.

        There wouldn't be any problem if the vendor intended to sell lots 1-2 and Conlon wanted to buy 2-3 and the contract was for 1-3. This is a mutual mistake of the same matter of fact - what was contained in the contract.

        This is not a classic example of what legislature intended to cover in category three. Much more likely that they had in mind traditional perceptions of what actually is a mistake and what is a mistaken party. Likely drafted under background of OP.

        - This principle says that in the absence of actual intention is irrelevant if promisee was led reasonably to believe in mutual intention.
        - Where principle applies the promisee is not mistaken - as far as law is concerned the promisor has assented.
        - Law reform committee would have said could likely only get relief if he knew of the mistake - not a mistaken party himself.
    - Mistaken as to intention rather than necessarily to the terms ("respective decisions as to proceed").

        Conlon Mistaken about Ozlin's intention is one fact
        Ozlin Mistaken about Conlon's intention is a different fact]

MCMULLIN J:

- Only became aware that the back four lots were subdivided when he went to the lawyer.
    - Argument that he should have asked for some more info. More due diligence vibes.

- Also bought some other property that backed onto the lots - had a vision of shifting the house from that property onto lot 4 and developing them all.
    - Entered an unconditional agreement for the sale and purchase of that lot/house.
- *Non est factum:* principle set out in the HL case of *Gallie v Lee* - House rejected the supposed distinction between the character of a document and its contents as determining whether or not the plea was available.
    - "Essence of the plea non est factum is that the person signing believed that the document he signed had one character or effect whereas in fact its character or effect was quite different… taken steps or been given information which gave him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case… plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document." - Lord Reid.
    - "Transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended." - Lord Wilberforce.
    - Carelessness on the part of a person seeking to avoid the consequences of the transaction was fatal to the plea.
- Right to hold that non est factum was not made out. Didn't agree w HC part that she couldn't invoke this because she was at fault - held that she was not at fault.
- *Mutual mistake:* just talks about *Smith v Hughes.* In terms of *Freeman v Cooke* and *Smith v Hughes* the appellant would be bound at common law by the bargain as expressed in the agreement for sale and purchase.
    - Mistaken belief would not be a ground at CL for resisting SP. Uphold the judgment under this head.
- *Contractual Mistakes Act 1977:*
    - Wrong to say that the commission/report adopted substantially a paper prepared by Professor R J Sutton (see lecture notes)
    - In *McCullough* Mahon J held that while the CMA codified the circumstances in which relief might be given for mistake, it did not touch on the manner of proving the existence of mistake or the circumstances from which the existence of mistake in any of its forms might be inferred, either factually or as a matter of law.
        - Principle of estoppel that *S v H* was supposedly an authority for was not excluded by anything contained in s 5 of the CMA.
    - Nothing in the CMA nor the report of the committee to support the view taken by Mahon J which, if adopted, would severely restrict the operation of the act itself.
        - Again wrong *assuming S v* H shit would be covered.
    - To hold that the *S v H* principle still operates to defeat the application of the Act would be to deprive the statute of much of its force; it would ignore the very wording of s 5(1) which expressly says that the Act shall have effect in place of the rules of the common law and of equity governing the circs in which relief may be granted on the grounds of mistake.
        - Mistakenly assumes that something governed by *S v H* would fall under one of the mistake categories - Dmac.

Also Dmac: this is because w a *S v H* analysis we wouldn't say that Conlon had made a mistake - there was a contract formed to his understanding.
    - Insofar as it holds that the operation of estoppel by representation is not excluded by the CMA, *McCullough* was wrongly decided.
- 'No reason' to go back to CL categories of mistake but that's what the act essentially replicates lol.
- Finds substantial inequality of exchange.
    - "The conferment of a benefit which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration thereof."
- S 6 of the Act applies.
- Unsure what the compensation should be.
    - Appellant's conduct is relevant to the grant of relief but not necessarily a disqualifying factor.

SOMERS J:

- Again fucked up by saying they took on board what Sutton was talking about.
- Basically says he is not willing to find that Conlon made a mistake: not easy to envisage the case of a party estopped from disputing his assent to a contract yet successfully able to urge some mistake about that inferred assent to which the Act can apply and in respect of which relief should be give.
- The contract displays no ambiguity of any description.
    - Vendor in the instance case could have no relief in mistake. Her intention is discoverable from the words of the contract.
    - Her error was unilateral - it was unknown to the purchaser.
- It would be a mistake to approach the provision of the CMA and s 6(1)(a) influenced by the rules of law which operated before its enactment.
- Unfortunate that no one argued whether this even fell under s (6)(1)(a).
    - 6(1)(a) didn't provide for relief where the party ought to have known of the mistake, so doesn't cover all the common law categories where relief would be offered.
        - So there is a little gap if this was parliament's assumption
    - Case law has confirmed that when category 1 refers to mistaken known to the other party this does not include constructive knowledge
- Vendor was mistakenly thinking the land described in the contract did not include the rear portion of what she called her home. In substance, her mistake concerned the subject-matter of the contract.
    - What different mistake as to the same matter of fact - the subject-matter of the contract - did the purchaser make?
- However the mistake is put it is in the end a suggested mistake about the vendor's state of mind. That is no doubt a matter of fact but it can hardly be described as the same matter of fact about which the vendor was mistaken. Her mistake was as to the subject-matter of the sale.
- Do not consider that Conlon made any mistake at all. Intended to buy all four lots and according to the agreement that is what he did.
- "If it were… superfluous"

- Suggesting that majorities interpretation of subpara iii would make (i) superfluous - Dmac says not correct
- Point overlooks possibility of cases arising where it is proved that P knew of D's mistake.
- In the absence of subpara (i) the act could not be invoked on this basis of known mistake
    - (Although could still argue no contract under OP but still beneficial to have the statutory net).
- Also fails to take into account that many mistake cases will involve mistaken assumptions not mistakes as to the terms of the contract
    - Aware of the terms/agreement is reached but one or both party makes a false assumption concerning some matter relevant to the transaction.
    - E.g no mistake in understanding in this case but both parties assumed that the subdivision of the land to include lots 1-3 had been approved by the council but it hadn't, or the land would support a number of dwellings but in fact there was a limitation on the number of houses that could be put on the land.

        Mistake in assumptions - mistakes ab benefits or consequences of the contract

        Majority's interpretation of the Act will be of no assistance to the party seeking relief here. Party seeking relief usually has to show that the assumption was known to or shared by the other party.
- Possible that Somers had in mind another point: if it were intended that all cases where there is no tru consensus ad idem where there is mistake should fall within category three than one would not enact a separate category of unilateral mistake known to the other party - why would you enact this when you would fall within this other category?
- Upon majority view would have just had two categories.
    - common mistake
    - unilateral mistake, whether or not known to the other party

- Doesn't fall within s 6(1)(a) at all.
- Relief to be ordered:
    - About balancing interests
    - Haven't been shown that ordering SP was wrong.

RATIO DECIDENDI

POLICIES

LECCY NOTES

	Mr Conlon's mistake	Ms Ozlin's Mistake
McMullin J	She intended to sell lots 1-4	She was selling lots 1-3
Woodhouse P	She intended to sell lots 1-	He intended to buy lots

	4	1-3

- Dmac thinks that there were various mechanisms for achieving a just result w/o compromising security and sanctity of contract.
    - Not necessary to distort requirements for operative mistakes under s 6
    - 2 solutions
        - Yes there is a contract, she is bound under the objective principle but entirely different q about whether SP should be ordered. It is discretionary remedy and it can be declined where there is a hardship to the vendor as a result of the order. Could've said just damages
            Grieg thought it was all her fault and although there was hardship for her there would have been hardship for Mr Conlon.
            Dmac doesn't like dis because the hardship (Conlon buying the other house) was before he even signed contract w Ozlins.
            Took risk that contract would not take effect.
            Somers J at CA who dissented went along w the judge (Dmac does not think that this is necessary).
        - All the judges held that there was a prima facie binding contract under the objective principle. Basis for this was the finding that Mr Conlon was entirely unaware/innocent that Ozlins didn't intend to sell her garden. Could say that no binding contract had been formed. Although Mr Conlon didn't know he ought to have known - could not have reasonably believed that she wanted to sell all 4 lots.
            He had been approaching her and asking whether she was prepared to sell the land at the back. She had said no a couple times but changed her mind. Surely he understood land at the back was 1-3 (beyond the fence).
            Once she indicated she was prepared to sell he immediately went to her solicitor. Didn't even know it was subdivided.
            Should've made some further enquiries. Knew she kept part as a garden so should have asked about it.
- What Mahon actually said in *McCullogh:* s 5 is a code but doesn't say anything about how to prove a mistake.

PROBLEM W MAHON AND GRIEG ANALYSIS:

- Characterises the principle in S v H as a principle of estoppel by representation.
    - Principle precluded Mrs O from asserting she was influenced to enter into the contract because of mistake.
    - No mistake in the eyes of the law.
    - Although the objective principle and the principle of estoppel by representation are similar, they are not the same. *Estoppel only operates in favour of a person who acts on a representation to his or her detriment.* Person can invoke objective principle even if they have not acted in any detrimental reliance.

    - S v H governs contract formation. Provides that although there may not be consensus ad idem, the mistaken party who leads the other reasonably to believe that there was an agreement cannot rely on the mistake to say there is no contract.
    - Mistaken party not precluded from saying that there was a mistake that influenced their decision, but precluded from denying the existence of the contract. Bound despite the mistake.
    - Objective principle says to the mistaken party that you may have made a mistake but that is legally irelevant - bound in contract if the party was led by you reasonably to believe that you agreed.
- So can't accept reasons of Mahon and Grieg that s 5 of the act does not operate to exclude principle in S v H.
    - This is not to say that the general conclusion is wrong (general jurisdiction to grant relief where OP is satisfied). Might be another reason why it was intended to be retained by the legislature.
        - Argument it was retained because it is not covered by any categories of relief in the act - where there is a contract governed by OP it does not fall within anything in s 6 (1)(a). This is because, in the eyes of the law, the promisee e.g Mr Conlon is not a mistaken party).
- McMullin: pg 504 lines 15-19 - assuming that something governed by S v H would fall under one of the categories of mistake.

The shit about professor sutton or whatever:

- Focussing on the claim that the law reform committee report adopted substantially a paper prepared by Richard Sutton.
    - Interesting that the judge would use the article as illustration of parliament's intention because the article was not the research paper submitted to the committee but an article based on it.
    - The article just examined alternatives if legislative reform was contemplated.
    - Important: In many ways they did not accept Sutton's ideas.
        - E.g emphasised the importance of giving the court's guidance on how to exercise remedial powers in mistakes law. Should state objectives of judicial intervention as clearly and exhaustively as possible. Even outlined them. But the committee did not act on this. Gave courts unlimited powers on granting just relief without providing any info on how to do it.
        - Didn't act on the proposal for redefining operative mistake that was in the research paper - the proposal was that the courts should have the power to review any contract made by any party under what he called a fundamental mistake, court to determine what a fundamental mistake was when taking into account certain factors.

            I.e no specific requirements to be satisfied before a mistake claim could be made. Jurisdiction and relief should be within the decisions of the court. Obv the committee didn't agree with this - they enacted the traditional CL distinctions between the different types of mistake.

- **S 6(1)(a) codified rather than reformed operative mistake. The reform was wide powers to grant relief under s 7.**
    Replacing 'all or nothing' solutions at CL - contract either wholly void or wholly valid.
- Committee had CL conceptions of what a mistake is and who a mistaken party is in mind.
    Would not have regarded Mr Conlon as a mistaken party.

Engineering Plastics

COURT AND DATE

High Court

Tompkins J

FACTS

- The P (Engineering Plastics) manufactured stainless tell tanks called post-mix tanks and used an O-ring as the seal for each tank.
- The D sent the P a sample of the O-ring and asked if it could supply 4000.
- The P advised by a letter dated 20 July 1982 that it could supply 4000 O-rings, price was stated to be $644.96/c.
- On Sept 16 1982 the D ordered 4000 O-rings: the order referred to the P's letter of 20 july but did not repeat the price.
- The P delivered in all 4075 rings and then invoiced it for $644.96 per hundred plus a tooling and freight charge.
    - Total of 27k
    - Each ring cost about $6.67
- The D thought that each O-ring was going to cose 43 cents because it had not realised that the 644 was the price per hundred. (Thought this was the price for all 4000).
    - D refused to pay.

RELIEF SOUGHT

- Enforcement of the contract

PRIOR PROCEEDINGS

RESULT

- Finding for the plaintiff.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

1. Contract as per the defendant's understanding formed where the 644 was for all 4000 rings.
2. No binding contract because there was no consensus ad idem

3. This was a sale by sample. The P breached a condition of the contract by supplying rings that did not correspond with the sample in quality. Entitled to a remedy under the Contractual Remedies Act.
4. There had been a mistake under the CMA.

ISSUE(S)

JUDGE'S REASONING

First defence: the meaning of the contract

- The defendant contended that the symbols "/c" had no generally recognised meaning.
- True that he placed no significance on the /c,
- Contended on behalf of the P that the symbols /c were well understood to mean per hundred. Maintained that it was a generally accepted practice.
    - Mr Green produced a significant amount of orders where the price quoted was per hundred.
- P was able to point to an account from Mytton Rodd (D's old suppliers) for the supply of O-rings of the kind in question where the price was quoted per hundred.
- No custom or usage will be considered by the Court on the construction of a contract unless it is notorious, certain and reasonable (*Chitty on Contracts).* This is a matter of fact to be proved in evidence.
- / usually means per and c usually means a hundred.
- Satisfied that the P had established that there is a custom or usage in the trade of those involved in dealing with O-rings and like goods to use the symbols "/c" when quoting prices to mean per hundred. Therefore I do not accept the D's contention that the contract should be interpreted disregarding these symbols.

The second defence: no consensus ad idem.

- Submitted that P's letter was capable of two valid constructions
    - P believing that the method of expressing the price meant per hundred.
    - D believed that it was the price for 4000 rings.
    - If both constructions are properly open, contended the parties did not reach agreement.
- Do not consider that this contention can succeed. Well settled that an apparent meeting of the minds of the parties will suffice for a binding contract. (*Smith v Hughes*).
- The D, by making out its purchase order of 16 Sept, purported to accept the offer contained in the P's letter of 20 July 1982. This acceptance is in unequivocal terms.
- By accepting the P's offer in the manner which it did, the D so conducted itself that the P could reasonably believe that it was assenting to the terms contained in the letter of 20 July.
    - D is bound as if he hand intended to agree to the P's terms.
- Even if this is incorrect, there would still be a contract for the purposes of the CMA as per s 2(3)
    - If there were not a contract it would only be because there was a mistake of the kind described in s 6(1)(a)(iii)

- Saying no contract is formed doesn't preclude the application of the act - but contract only for the purposes of the act.
    - Act trumps common law when applicable

Third defence: sale by sample

- D relied on the supply by the D to the P of the two Mytton Rodd rings as samples. Contended that it is an implied term of the contract that it be a sale by sample.
- The Mytton ring was a natural rubber. The P's ring was a nitrile rubber type.
    - Two rings can be quite different.
    - But nitrile rubbers have greater resistance to petroleum - they were of a superior quality to the sample.
- The fact that a sample was shown to the P does not, of itself, without more, make the resulting sale into sale by sample.
- To be a sale by sample there must not only be a sample produced, but the evidence must also establish that the parties, as a term of the contract, intended that the goods to be supplied were to be supplied in accordance with that sample.
    - If they had referred to the sample instead of the price in the purchase order it might be different.
    - No implied term that it was a sale by sample.
- D's real issue is not the quality but the price of the rings.
- Does not follow that because there is a difference in chemical composition between the bulk and the sample that the former does not correspond with the latter in quality.
    - For the function they are required to perform there is no difference.
- S 37 of Sale of Goods Act - could have purported to reject them???
    - Never any question at the time of rejecting them based on their quality - literally sold them on with no issue.
    - S37 bars rejection where the buyer is deemed to have accepted the goods - when they did something inconsistent with ownership of the seller e.g onselling the rings.
- The rings where delivered to the D.
    - Had ample opportunity to inspect them and reject them. But it didn't so seemed as if they were accepting them. Lost any right to reject the rings in this way.

The fourth defence: mistake

- Analysis in *Conlon* applies to the present case. Each party had a mistaken belief about their intentions concerning the price. That mistaken belief influenced their respective decisions to enter into the contract.
- Different mistakes as to the same matter of fact; the price thought was payable under the contract.
    - Dmac thinks this is actually a mistake as to the other's intention.
- Also found substantial inequality of exchange/ s 6(2) fulfilled.
    - The 583 rings that had been sold by the D before the misapprehension concerning the price was discovered, had been sold at the D's normal retail price of 90 cents a ring.

    - To the D the benefit from the contract (the rings) was substantially disproportionate to the consideration (the price that the D would be bound to pay).
- Under s 6(2)(a) a mistake in interpretation to be excluded by that subsection must be in relation to the contract in respect of which relief is sought.
    - So the question is whether the mistake that occurred in the present case was a mistake in the interpretation of the contract.
- It could be considered that the mistake made by D was a mistake as to the interpretation of the contract, but it my view that is not the mistake that gives rise to the right to relief.
    - Mistaken belief as to the intention of each concerning price is not a matter of interpretation - it relates to what the parties thought the other intended when they entered into the contract.
- This accords with the purpose of s 6(2)(a).
    - Intended to exclude relief where the words adopted by common consent are then given, by the normal process of the construction of contracts, a meaning different from that which a party thought they had.
        - Party is not entitled to relief only because he has interpreted the words in a sense different from that adopted by a Court of construction.
    - Conclude that s 6(2)(a) does not preclude the granting of relief.
    - Intention of the law reform committee was that when a party to an interpretation dispute loses we should not allow them to then claim they had made a mistake for the purposes of CMA.
        - Did not intend s 6(2)(a) did not intend to bar relief when ppl were at cross purposes.

            Only intended to govern cases where the words were adopted by common consent - agreement on the use of the language, yet the court gives words meaning different to that which one of the party's intended.
- No reason for cancelling the contract. Just vary it. Now $4 per ring payable.
    - Arbitrary assessment intended to take into account the various and conflicting factors to which I have referred.
- Dmac has no doubt that the result in this case is one that the law reform committee would not have intended.
    - LRC would not have regarded Engineering plastics as a mistaken party once the court found that there was a contract formed on their understanding of the price.

Shotter v Westpac
High Court Auckland.

FACTS
- Mr Shotter (P) signed a guarantee of the indebtedness of the company Unicorn Holdings Ltd to the defendant bank.
- Did so mistakenly believing it covered up to a limit of 100k the company's liability for a particular advance.

    - Guarantee actually covered the whole indebtedness for the company up to 100k.
    - This is important because most of the particular advance had been paid off. So if the guarantee was limited as Mr Shotter understood it his liability was only around 25k. But it was a lot more according to the bank's understanding and what the guarantee provided for.
- Bank unaware of Mr Shotter's misunderstanding.
- Counsel's first argument was that this was a case of common mistake under category 2.
    - The bank and Mr Shotter apparently made the same mistake in saying that the guarantee was limited to the particular advance.
    - This argument was rejected: judge essentially said there was no basis for concluding that the bank did not realise the guarantee extended to all indebtedness.
- Counsel initially pleaded that the mistake was known to the bank (under category 1) but this was not pursued by the hearing.
- So relief hinged on whether category 3 applied.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT
- Application dismissed.

PLAINTIFF'S THEORY

DEFENDANT'S THEORY

ISSUE(S)

JUDGE'S REASONING
WYLIE J:
- Alleged that in entering the guarantee, Mr Shotter was influenced by a material mistake - namely that the guarantee related only to indebtedness of Unicorn Holdings Ltd arising from the Makerau Vallet advance.
- Further alleged that the mistake was shared by or known to the bank or alternatively that the bank took the guarantee under the influence of a different mistake - namely that Mr Shotter was knowingly and willingly guaranteeing all of the indebtedness in Unicorn Holdings Ltd.
- Claimed that the mistakes resulted in the imposition of an obligation on Mr Shotter substantially disproportionate to the consideration provided to him by the bank.
- Counsel argued under (ii) that the parties were influenced by the same mistake that the guarantee related only to the Makerau Valley advance.
    - Prepared to find that Shotter did think the guarantee was limited as he claims.

- Must assume that some responsible officer of the bank was aware of the liabilities, actual and contingent, of Unicorn Holdings Ltd to the bank.
    - Any responsible bank officer must have known that the standard bank guarantee form goes far beyond the particular sum outstanding at the time the guarantee is given.
    - Do not think this case falls within (ii).
- Re (iii) - arguing it was "the extent of the indebtedness of the guarantee and Mr Shotter's understanding of it. [this is actually two different facts].
- If not constrained by authority would not put this under (iii). Do not think it is permissible to bring two quite separate facts as to both of which neither party is mistaken, but each party is mistaken as to a different one, and to present them in combination as a single matter of fact about which both parties are then mistaken.
    - From the Bank's POV it was not mistaken as to the extent of the indebtedness under the guarantee but it can be assumed that the bank was mistaken as to Mr Shotter's understanding of the extent of the indebtedness.
    - From Shotter's POV, while he was mistaken as to the extent of the indebtedness under the guarantee, it cannot be said that he was mistaken as to his own understanding of it.
    - If it were not for authority would not have perceived any one fact about which the parties made different mistakes.
- *Conlon* forces him to a different conclusion.
- Apparently adapts Woodhouse' stuff to say that the facts are not distinguishable but then goes on to distinguish them by applying s 6(2)(a).
    - According to the adaptation Mr Shotter's mistake is to the contents of the document. This means it is not similar to Woodhouse's reasoning but more like McMullin's reasoning.
    - Would've referred to the bank if they wanted to adapt Woodhouse's reasoning - in talking about Shotter himself this indicates that the issue is with the contents of the document.
- This mistake effects all of the latter discussion.
- Would say that it fell under s 6(1)(a)(iii) were it not for s 6(2)(a) [makes no sense because he literally just said it wouldn't fall under cat 3]
    - Mistake of shotter was in misunderstanding what the guarantee document said as to the extent of his liability in the sense of what debts of Unicorn Holdings Ltd were being guaranteed.
        - But previously held that it was a mistake as to the intention/understanding of the parties - this misstatement in saying it was a misunderstanding as to the document is what allows him to then hold mistaken interpretation.
    - Thinks this is a mistake in interpretation.
    - Interpretation does not take on a lawyer's meaning.
    - A signatory in a situation who assumes, because it is a guarantee and that it is for a particular purpose his liability thereunder must therefore be limited to that specific loan, is placing his own interpretation on the document however ill-informed and baseless it may be.
        - He knew it was a document of guarantee.

- Says the emphasis in this case is on the content of the document of guarantee rather than the intention but this is because of his interpretation of it/how he adapted it.
    - Also gave two different expressions of *Conlon.*
- So the mistake falls into s 6(2)(a)
    - [if this is a mistake in interpretation, so is *Conlon.*
- But if he's wrong it is substantially disproportionate.
    - Substantial disproportion - "matter of weighing up the advantages and disadvantages on the scales."

RATIO DECIDENDI

POLICIES

- In *Conlon* there was no mistake as to the physical area of land - mistake was to understanding in the sense that parties were at cross purposes
    - No correspondence of offer and acceptance
    - No actual consensus
    - This means there was a mistake as to the contractual terms which comes under the first factual category of mistake.
        - Not a mistake in underlying assumptions as Wylie suggests.
- *Conlon* was not a case where the parties were agreed on the subject matter and expressed the agreement correctly yet one or more of them made a mistake as to the physical attributes of the subject matter.
    - Mrs Ozolin's was mistaken as to what she was selling - not the physical extent of the land she intended to sell.
    - Never any suggestion that she did intend to sell lots 1-4 on the mistaken assumption that this didn't include the garden.
        - This would be like saying that the oats were old - mistake as to the nature or quality of the goods not the terms (what 1-4 is, what the oats are).
        - In this situation her application for relief would have faced even greater difficulties.

            Such mistake not known to Mr Conlon and it was not shared by him.

            Neither did he make a mistake as to the physical extent of the lots.

<u>Paulger v Butland Industries</u>

COURT AND DATE

Court of Appeal 1989

Somers, Hardie Boys and Wylie JJ

FACTS

- Paulger was an officer of a company named Dingwall & Paulger Ltd.

- In 1988 the company was in financial difficulties. Entered into a contract for the sale of its business and Paulger expected the sale to realise enough money to pay the company's unsecured creditors.
- Sent a letter to creditors on the company's letterhead advising them of the sale and assuring them that they would be paid within 90 days. Said that "the writer [Paulger] personally guarantees that all due payments will be made."
- Company was put into receivership before the sale was completed and the unsecured creditors were not paid.
- Butland Industries Ltd was a creditor of the company.
    - Butland made demand upon Paulger and subsequently brought summary judgment proceedings - claiming that the letter was a personal guarantee by Paulger of the company's debts.
- Paulger contended that the letter was a gratuitous promise without legal effect and that he had not intended to provide a binding guarantee.
- Trial found for Butland so Paulger is trying to appeal on the basis that there were some factual issues that could not be properly analysed in a summary judgment.

RELIEF SOUGHT

PRIOR PROCEEDINGS

RESULT
Appeal dismissed.

HELD:

- A guarantee is a contract and requires offer, acceptance and consideration. Whether these elements are present is a question of fact. The letter send by Paulger must be construed from the POV of the reasonable man in the shoes of the recipient.
    - The plainly personal nature of the crucial sentence amounted to an offer of a personal guarantee by Paulger, upon which he became bound to every creditor who in response to the letter forbore from pursuing his debt for the requested period of 90 days.
    - The surrounding circs provided sufficient evidence that Butland had accepted Paulger's offer when it responded by providing the consideration requested, which was a forbearance to enforce payment for 90 days.
- In enacting s 6(2)(a) parliament clearly intended to maintain the well- established principle that contracts are to be construed objectively.
    - The mistakes claimed by Paulger - that he did not intend his letter to mean what it clearly did mean and that there was a common mistake as to the effect of the letter, were mistakes only in the interpretation of the contract.
    - Case did not fall within (ii) or (iii).
    - Butland had not made a mistake: its alleged mistake was that the contract meant what it said and that was no mistake at all.

APPELLANT'S THEORY

- Paulger is trying to appeal on the basis that there were some factual issues that could not be properly analysed in a summary judgment.

- Document could not be properly construed without fuller evidence of the surrounding circumstances being given.
- Reasonable man on reading the letter would realise that Paulger was not undertaking to pay the creditors from his own funds.
- Submitted that the partis had made a common mistake under s 6(1)(a)(ii)
- Also different mistakes as to the source of the funds for the payment of the creditors - Butland believing that they would come from Paulger if necessary and Paulger believing that they would come solely from the proceeds of sale so s 6(1)(a)(iii) applied.

RESPONDENT'S THEORY

ISSUE(S)

JUDGE'S REASONING

HARDIE BOYS J:

- Many guarantees are of a kind where acceptance and consideration are inseparable.
- Whilst there may well be cases where it is inappropriate for the Court to construe a document on a summary judgment application, it is plain, that in this case the only further evidence that could have been given was as to Paulger's intention in preparing and sending the letter; and evidence of that kind is clearly inadmissible as an aid to its construction.
    - [Actually could've brought witnesses as evidence that P ought to have known not to take it literally]
- The letter, sent as it was without further explanation, must be construed "for the point of view of the reasonable man in the shoes of the recipient."
- The sentence can be read only as an assurance over and above those that preceded it. The sentence cannot in our opinion be read as anything other than an undertaking that if for some reason the debt were not paid from those funds, Mr Paulger would himself see that it was paid.
    - The plainly personal nature of the crucial sentence amounted to an offer of a personal guarantee by Paulger, upon which he became bound to every creditor who in response to the letter forbore from pursuing his debt for the requested period of 90 days.
- Entitled to a summary judgment didn't really absorb why.
- Do not think that the case falls within (ii).
    - The mistake each made may have been as to the same subject-matter, but it was not the same mistake: the respondent thought Mr Paulger was giving an unconditional personal guarantee; Mr Paulger thought he was giving something less than that.
- Formation issue would have actually resolved this.
    - If the creditor was reasonably entitled to infer that Paulger was promising to pay the debts himself then the creditor did not make any mistake.
- If it were correct to say that the mistake they both made was as to the effect of the letter, then this was a mistake in its interpretation, and so subs (2)(a) applies to it.
- Not a case of common mistake at all - only Paulger was mistaken.
- To support the argument on (iii) they relied on *Conlon v Ozolins.*

- Saying *Conlon v Ozolins* is a decision on its particular facts. It is not authority for invoking the Act, where one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of the words. For then the mistake is one in the interpretation of the contract, and the party cannot avail himself of the act.
    - Wrong because this is literally exactly what happened.
- Paulger said he did not intend his letter to mean what it clearly did mean. That is a mistake in the interpretation of the contract and it cannot be relied upon. Butland had not made a mistake: its alleged mistake was that the contract meant what it said and that was no mistake at all.
- In light of s 6(2)(a) parliament clearly intended to maintain the objective principle.
    - [McMullin said the opposite in *Conlon* - because he said that holding *Smith v Hughes* operates to defeat the application of the act would deprive the statute of much of its force.]
    - This is true not because of the enactment of s 6(2)(a), real intention is shown in its formulation of the categories of operative mistake in 1(a).
    - None of the categories cover - nor where they intended to cover - cases where at CL a mistaken party was bound pursuant to the objective principle.
    - Under the OP where a mistaken promisor leads a promisee reasonably to believe that he/she is assenting to the terms proposed the promisee is not mistaken.

RATIO DECIDENDI

POLICIES

LECTURE NOTES

- Kind of fucked himself because he should have called evidence that they ought to have known that he wasn't purporting to be personally liable but cannot call witnesses in a summary judgment.

Another aspect: what was the consideration?

- According to the court it was the creditor's forebearing to take action to enforce the debt.
    - Unilateral contract.
- Would need to be satisfied that Butland, in response to the promise, did forebear to sue for 90 days/did not take action it otherwise would have.
    - Court may too readily have inferred that this consideration was provided.
        - Says that it wasn't until after the promise was made that they tried to recover the debt.
        - No overdue payments when the letter was received. There was stuff due but not overdue.

            There was nothing to sue for.
        - It could be said that they abstained but arguable but they didn't.

- In Paulger they said that the contracting party cannot claim mistake if they thought the words meant something other than their plain and ordinary meaning, otherwise this is a mistake in interpretation.
    - This would mean that the act could not be invoked in some situations where it was clearly intended that relief would be available.
    - E.g where the mistake was known to the other party - category 1 being prima facie satisfied. E.g O knows P wants to buy lot 3 but signs for sale of lot 1 and tries to enforce it.
    - Would pretty much always be barred by s 6(2)(a) if you had an intention that was different to what was stipulated in the written contract.
- Clear that the overall effect of the various statements in Paulger is to deny the reasoning of both majority judges in *Conlon.*
- Notes that the same matter of fact is the boundaries of land being bought and sold.
- This together with the approval of Wylie in *Shotter* shows that the court regarded the msitakes in *Conlon* to be about the physical extent of the land.
    - This undermines their discussion of *Conlon.*
    - The case is one about cross-purposes.
- We see the veiled suggesting that *Conlon* was not a cross-purposes case at all (not a case where each has mistaken the intention of the other).
    - Court assumes that *Conlon* is a situation where the agreement was expressed correctly.
- This leads us to the conclusion that the statement that *Conlon* is a decision on its own facts cannot be justified.
    - Suggesting that *Conlon* is a decision on special facts that does not put down any general principle.
    - Don't tell us what the factual distinction could be.
- The point to be made here were that the judgments in *Conlon* were fully reasoned and the outcome did not hinge on the resolution of peculiar and highly unusual factual difficulties.
    - Relevant facts were not in dispute.

- Decision in *Paulger* is enshrined in s 25 of the CCLA. They put an example of mistaken interpretation in there which, according to Dmac, is not a situation of mistaken interpretation.

- What is the true scope of s 6(2)(a)
    - Justice Tompkins was correct in *Engineering Plastics* in his comments about the provision. Around line 30.
    - By implication he is saying that it is not intended to exclude relief where the facts disclose a misunderstanding ab an important term at the time of the contract. In situations where parties at cross-purposes so that there is no consensus, issue of CL contract formation in the first place.
        - These were called 'mistaken apparent contracts' by the law reform committee.
    - Such cases would not fall under s 6(1)(a) anyway