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Introduction

Broad inquiry: in what circumstances can a party be relieved from his or her apparent contractual obligations on the ground of mistake.

What is a mistake

- Mistake is a false belief to a matter of existing fact or law at the time of the contract
    - There must be a true position, and a false belief
    - A belief about some future belief which turns out poorly is not a mistake

E.g. enter into K of land, on assumption council will grant resource consent for the unusual development I have in mind

- 'Mistake in expectations' , but not really a mistake at all
    - Don't have a wrong belief
    - Can contract for this risk, make it a contingent condition - conditional offer. Just like a subject to finance clause.

Alt e.g. if entered into that K on the false belief that land already has resource consent

- This is a mistake
- Whether can get relief is entirely another matter altogether

Factual categories

Mistake as to contractual terms = formation

Did not intend what the contract said: an issue of formation

- E.g. vendor believes selling 1-3 of her property, not 1-4: *Colon Ozolins*
- E.g. Purchaser of property believes the price in the K is inclusive of GST, but document provides GST is not included.

- Assuming the purchaser is unaware of the true intention of vendor, then mistaken to true intention of each other "at cross purposes" (no consensus ad idem). *Contractual formation can't occur.*
    - **Is there consensus in the general sense? The objective principle**
    - Was promisee lead reasonably to believe that promisor understood terms? *Smith v Hughes*

- *Leighton v Parton*: Vendor mistaken believed selling lot 4 in subdivision, not lot 5 as provided in contract. This was unknown to plaintiff purchaser. Found fact: vendor intended to sell lot 5. Specific performance as no hardship to confine purchaser to damages
    - Alt facts: What if purchaser had known of mistake? Issue: can't have belief in intention, can't even reasonably believe?
    - This is actually remarkably contentious - voidable in equity in Aus
    - Dmac: true position is no K even formed.
    - Alt facts: what if purchaser only ought to have known?

Mistake in underlying assumptions = no formation issue

No mistake as to what K provides, but might be for attributes or benefits of bargain/subject matter.

- E.g. buyer of painting may make false assumption that it is the original and pay a high price accordingly. Buyer intends to buy *that* painting at *that* price, but is mistake to the attributes of the painting.
- Mistake is **about** the K

If false assumption shared by both parties: common mistake

- Sometimes mutual mistake: But mutual mistake was historical reserved for when parties were at cross purposes re the terms of the K
- Pre-CMA, this whole area was extraordinarily difficult. Was to get rid of arbitrary distinctions.
    - At common law a mistake that was common to both parties, was only sufficient to avoid a K if the mistake rendered the subject matter of the K 'different in kind (went to the very nature of the subject matter)', as opposed to 'merely affecting the quality'
    - Lord Denning didn't like that, thought too harsh. Invented equitable doctrine of common mistake, sufficient if it was 'fundamental'
    - That view was rejected by English courts in early 2000s, but we had a CMA for over 20 years.
    - Some say CMA was designed to give courts jurisdiction what would have fallen within area of equitable doctrine of common mistake

If false assumption of <u>one of the parties: unilateral mistake</u>

- Basic rule of common law of K: unilateral mistake means that party is bound even if the other party knows of the mistake.
- Established also by *Smith v Hughes*
- *Smith* said that a party to an alleged K, is entitled to take advantage of their superior knowledge: cavaet emptor (venditor)
    - In law you are not obliged to correct other party's false assumption.
- Suppose garage sale, see painting for sale $20, scruffy but you realise this is long lost painting of early NZ painter. You knew they were mistaken.
- CMA gives possibility for court to have jurisdiction to give relief to vendor in this case.

Smith v Hughes

- Agreement to sell/buy specific parcel of oats
- The oats are "new" oats.
- Buyer wants "old" oats
- Seller knows B is mistaken in thinking that the oats being sold are "old", but does not disabuse the Buyer.
- There is a K.
- Alt facts: what if Buyer thinks Seller is promising to sell "old" oats? But Seller has not so promised.
    - We know if Seller if aware of this kind of mistake, then no K, bc no actual or constructive consesus ad idem.
- Distinction knowing of mistaken assumption vs knowing of mistaken promise: new trial ordered

Comparing mistake to terms vs mistake to underlying assumptions: Dresden china e.g.

	Mistake as to thing sold	Mistake as to offer
No knowledge by other party	Alpha, **K**	Gamma, **K**, objectively reasonable belief
Yes knowledge by other party	Beta, **K**, no duty to dissuade	Omega, **no K**, no actual knowledge so can't have objective K

<u>Difference of CMA?</u>

Mistake as to thing and knowledge

- Fits within category (i), assuming substantial inequality
- Material mistake known to other party

Mistake in expression of terms = possibility of rectification, subcat of terms

Really a sub-category of the first category: Relates to terms of K and formation

When parties reach agreement they intend to put in writing but by mistake the writing fails to express the agreement correctly.

Leighton v Parton: lot 5, but Buyer intended lot 4

- Alt facts: both parties intended lot 4 but slip of the computer, document says lot 5.
- Common mistake in recording of the K
- You can get **equitable remedy of rectification**
- Court of Equity: Can't enforce K against the actual mutual intention of the parties.

Law relating to rectification preserved by CMA. So can get it. Don't have to comply with requirements of the act.

- Requirements for granting relief contained in the act are not applicable at equity.

Sometimes line between 2nd and 3rd categories is thin

- Mistake in writing might look like mistaken in underlying assumption
- Court stressed they won't rectify agreement, only rectifying mistakes in recording . Even said that, line difficult to draw
- Old american case
    - Parties reached consensus on sale of 27.5 acres from a block of land. Price: $100 per acre. But recorded K described subject matter as 'one half' of a particular lot of land. They did this bc they thought the entire block was 55 acres. But actually 83 acres so buyer gets 41.5 acres.
    - Seller claimed rectification
    - From one point of view: mistake in assumption of 55 acre of land vs 83
    - Decision is right, bc want justified rectification was the overriding intention of the parties for the sale of 27.5 acres @ $100 an acre. That was there intention. The document failed to record it.
    - Explanation: mistaken assumption just went to explain *why* the particular words were included. The real mistake was expression of terms.
    - Would be mistaken assumption if previous negotiations were framed around 1/2 block of land - can't get rectification.
- Case falling other side of the line: *Pukallus v Cameron* (1982) HCA
    - Vendor owned two subdivisions of land. Description: subdivision 1 & 2 of Portion 1154 Parish of Cumcillenbar.
    - Vendor signed to sell subdivision 1
        - Didn't intend to sell any part of subdivision 2
    - Precise dividing line of subdivision not known of time of K
    - Both believed subdivision 1 included 27 acres of cultivated land
        - But that was in fact in subdivision 2 land
    - Buyers sought rectification – we thought that was in the K!
    - Held intention was to sell cultivated area
    - HCA with some regret felt obliged to disagree, rectification not available, on the grounds that mistake was one of assumption. Why? Overriding intention in this case, was just for the sale of subdivision 1. Parties had not agreed for sale of additional area of land. Not a case where parties failed to expression terms, instead mistake of assumption - mistake of what feature were included in the land sold.
    - Reason purchasers lost, they failed to overcome the problem that the land was describe as subdivision 1 only. Unable to demonstrate what particular land beyond sub division land was intended to be sold, how far would the sale extend?

Historically, if mistake in expression of terms, rectification only extended to wrongly included/omitted.

- Nowadays, courts take wider view when rectification is available. Can be ordered where words are deliberately include but parties make mistake to their meaning of legal effect.

Rectification available here

Mistake in performance

- Party to K confers benefit on other party, in the mistaken belief that it is required by terms of K
- Usual scenario is where sum of money paid which was either not due or already paid
- Law responds usually by ordering *restitution*
- No breach of K, no tort, what there is an *unjust enrichment*
    - Law doesn't like people being unjustly enriched at expense of others
- Law of restitution not relevant for us. Although in broad sense, mistaken payment involves contractual mistake. We are concerned with *entry into contract*s. This falls outside ambit of the legislation.
    - CMA doesn't apply, concerns mistaken contracts. Ks entered into due to mistake.
    - Generally enough to be aware of its existence

Rectification

Implicit so far, that rectification only available by common mistake

- Must be pre-existing common intention that was misstated in the K
- BUT very curious and difficult line of cases which establish that rectification may also be available where there is mere unilateral mistake, particularly where other party know of mistake
- Normal legal response to this is to say 'no deal', but can press a K onto someone who didn't want it.

Line of difficult cases for *unilateral* mistake (drastic remedy)

Held rectification is available in such cases where

- the mistake is either known to other party, or
- that other party's conduct involves an element of 'sharp practice'

Unconscionable for party to insist on performance of K as written

Seems odd: rectification for putting written K in line with true agreement. So how do we reconcile this extension with this purpose?

- In what circumstances is it justified to foist on a non-mistaken party obligation that weren't in the writing and which it didn't intend to accept?

<u>If Buyer knows of mistake but not to actual intention</u>

If Vendor is mistaken to terms (price), and the Buyer knows that (but doesn't know what price she actually intended).

- can set aside K, as no assent from Vendor
- but would be unfair to foist on Buyer the Vendors intended terms .

To go ahead with K on Vendors's actual intention requires something else, something further.
Consistently with ordinary principles of K formation, rectification should only be available in two broad situations.

1. Where common intention, but reason M is unilateral, there is a mistake in writing the K.
    - Buyer tries to take advantage of this
    - BUT if actual previous common intention was for sale of $8k and B notices mistake and change his mind, then it can be said B failure to draw intention to mistake leads A reasonably to believe that deal that was always on the table remained on the table and had been accepted. A is lead reasonably to believe price earlier was to apply. You could say document fails to record objective consensus between parties.
    - Not too different from common mistake

2. Vendor is lead reasonably to believe that terms she intends are agreed to by Buyer
    - E.g. although price hadn't been settled, B may have lead A reas to believe that her price is being accepted
    - But if that is all, if just mere awareness of mistake, that is basis for normally saying 'no contract'
    - Rectification - making the document correspond with the true objective bargain

NZ case where correct award of rectification: *Eldamos Investments v Force Location*

Facts

- Parties for agreement for sale and purchase of land
- Exchanged several drafts
- Drafts made clear: 'plus GST', '*exclusive* of GST'
- When final version of K prepared, and forwards to Purchasers for execution, minor error made price *inclusive* of GST
- *Purchasers noticed mistake*, thought they don't have to pay GST, and claim that element back. More favorable deal for them
- Purchasers decided not to draw attention to it
    - Also motivated by certain aspects of Vendor's treatment of them
- K eventually signed by both parties

Holding

- Rectification awarded to Vendors: ‘a Classic case’
- Objective agreement not recorded in written document. But at all stages, parties held common intention that price exclusive of GST, but purchasers knowing of it didn't bring to attention
- Vendors say: lead reasonably to believe, that after several drafts that this known error wasn't brought up.

Dmac: normally the response to unconscionable behaviour would just be to say: no deal.

- Holding promisee to promisor's intention may be punitive.
- March, may have intended 200K more than anyone else. Should we force CHCH city council
- Answer is no: rectification isn't about punishment, it is about making it correspond to the true agreement.
    - Would have to show that they knew/ought to know of my mistake, *and* they lead me reas to believe that K on my terms
    - E.g. *Hartog v Colin & Shields* case, Dmac thinkgs that a K on the promisor's terms is feasible.
    - But mere knowledge of the mistake shouldn't suffice.
- Known unilateral mistake is quite a drastic remedy: was claimant lead reas to believe that was the deal?

The Objective Principle

On its face looks like an objective test. It is, but there is a subjective element. "The other party *upon that belief*"

No enough reasonable lead to believe, you have to enter *on that belief*. Actual knowledge is relevant - how is it manifested? (e.g. emails, facts).

Two scenarios
Enforcement: Either go to court that K on your terms exists.

- Party B must actually believe that A intended to contract.
- AND
    - A actually agreed
    - OR
    - A reasonably led B to believe that they agreed (reas person in B's shoes with knowledge)

Deny: Or deny K on the other parties set of terms.
Alternative arguments

- A didn't actually believe there is a K
- A didn't reasonably believe there was a K
- Both parties interpretation are equally reasonable.

Actual knowledge is sufficient but not necessary

- Objective principle *Smith v Hughes* "And that other party on the belief enters into it with them"
    - If promisee knows promisor don't consent to the stated terms then can't reasonably believe they are!

Objective knowledge necessary
If purchaser ought to have known, then purchaser could not reasonably believe that accept the stated term. Ought to have known = reasonable person would have known.

Scriven v Hindley [1913] 3 KB 564

- Sale of goods at auction
- D bid for wrong lot - thought mistakenly bidding on other lot
- Bid was accepted: K was prima facie formed
- Auctioneer realised too much was being paid for the particular lot, but thought the defendant just made a mistake on the *value* of the goods. Was unaware that mistaken lot bided on.
- Held no K. Modern version: auctioneer had contributed to the mistake (form of catalogue, the way the lots were arranged were confusing). So the plaintiffs couldn't reasonably believe that they were buying the good he had actually offered to buy

***Smith v Hughes* principle the touchstone for contract law, cf Australia**
Great deal of misunderstanding in Australia

Taylor v Johnson (1983)

- Written K for 10 acres of land. Price $15k. Vendor intended to sell for 15k per acre, which is closer to the value of the land. Purchaser *knew that* - tried to distract from the price.
- Held that K, but voidable in equity.
- Held that parties accepted to the same principle
- They subscribe to 'detached objectivity theory' - What would the reasonable fly on the wall think the parties intended?
- HCA held that passage in *Smith v Hughes* was subjective theory. Bc looking at state of mind and knowledge of promisee
    - Not at all! Bc subjective approach would be actually looking at what the promisor intended!
    - *Smith:* what would a RP in the shoes of the promisee think the promisor intended?
- Left open question of whether detached objectivity approach applies in the case of an informal K - e.g. oral.
    - No reason why approach to formation should differ if agreement is informal! Bc completely signed document is just a piece of paper - a K is offer/acceptance/consideration
- Have they been lead reasonably to believe that the promisor intended to agree to the terms of the K?

Hartog v Colin & Shields
Facts

- D contracted to sell to the plaintiff 3,000 argentine hare skins
- But by a mistake they offered them at $x per *pound*
- Wanted to sell $x per *piece*
- Plaintiff sought to enforce the agreement

Three solutions

a) K in accordance with plaintiff's understanding
b) No K
c) K in accordance with defendant's understanding

Held

- Rejected a.
- Held b. no K
- Plaintiff knew a mistake had occurred, or the plaintiff "could not reasonably have supposed that the offer contained the offeror's real intention"

Better approach?

- That defendant's could have establish in accordance with their understanding - for $x per piece
- Alt facts: sellers after delivering the skins, they claimed the quoted the price from the buyer at a per piece rate?
- **On basis of judges findings of fact, strong arg that judge would have been justified on those facts on upholding the claim**. (option c.)
- *Why? This was not simply a case where the buyer knew or ought to have known of a mistake in the terms of the seller's offer. Rather, Facts supported the further conclusion that the buyer lead the sellers reasonably to believe, that he had assented the terms intended by the sellers.*

- What are these facts that support this?
    - Practice in the trade to buy skins per piece
    - In prior negotiations and correspondence, finds the matter was always discussed at the price per piece
    - And never discussed at price per pound
- Consequence: buyer was aware of mistake made, but also actual intended asking price.
- Arg: buyers by knowing this and not drawing attention to mistake, lead the seller reasonably to believe that per piece was assented to.
    - Not a matter of punishing a 'naughty' buyer. You would set aside in those circumstances. Here it is giving effect to the objective bargain.

Importance of previous dealings

- Computer dealing consultant
- Enter into apparent K whereby A intends to buy $x per day to the consultant (B). When work is done realise at cross purposes - A thought paying in NZD, B thought paying in AUD
    - If interpretations both equally reasonable
    - Prima facie if contract in NZ and work done in NZ, should prob done in $NZD
- Alt facts: previous dealings involved paying B in AUD
    - Then B have strong arg to say - I was lead reasonably to believe they way we dealt previous would also apply.

Offer and acceptance don't truly correspond.

Raffles v Wichelhaus (1864) 2 H & C 906

-
- Parties had agreed on the sale of cotton to be sent from india
- K prima facie said the cotton were "ex Peerles from Bombay". By chance two ships sailing from Bombay (same name). Buyer refused to accept December ship
- October ship is what they wanted
- Fall in price of cotton at that time
- Seller claim buyers in breach for not accepting
- Suffices to adopt orthodox view of the case:
    - Seller intended the December ship, buyer intended October ship
    - Neither knew or had reason to know they meant different ships
    - In view of that, no consensus ad idem = no K
    - *Nowadays, even that would be so with an objective principle. Bc each understanding was equally reasonable*

The scheme of the CMA

Background

Act has its origins in a **1976 report of the Contract and Commercial Law Reform Committee**.

- Premise: The law must strike a balance between, *on the one hand*, avoiding the unfairness of holding a party to an inappropriate transaction that was not fully assented to (unfairness). *On the other hand*, protecting other parties to the K who have a legitimate interest in having the K performed (sanctity of K).
- Partly referred to in s 4:
- "(1) appropriate powers to grant relief in the circumstances mentioned in s 6"
- "(2) these power not to be exercised in such a way as to prejudice the general security of contractual relationships"

What the act does

- **Gives the court wide powers to grant relief (s 7)** in respect of mistaken Ks where the requirements for operative mistake in s 6 are satisfied

Section 5: Act to be a Code & s 2(3)

Section 5(1)

"except as otherwise expressly provided in this Act, this Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party"

(3) there is a contract for the purpose of this Act

- Does it mean there is a contract, where one of the categories of mistake is fulfilled
- *What it means:* there is a contract for the purpose of the *relief* for the act
    - Intended to stop technical arguments: 'there was never a K'
    - If u come within s 6, if there isn't technically a K doesn't necessarily preclude relief

DMac: Only a partial code

- From relief from Ks on the ground of mistake, in particular, common law principles of formation which have the effect of allocating the risk of mistake (seen in cases). Still important in considering whether there was an underlying K between the parties.
- Why? It is important bc if the requirements of s 6 (jurisdiction) or not giving relief per s 7. Then the common law position applies!
- Thus common law rules which determine what happens when Act doesn't apply
- Usually: if not within the Act, they are bound to complete the K BUT sometimes the party still has an ***alternative*** **argument** that there never was a binding K bc there was never any actual or objective consensus.
- Have to determine whether underlying contract!! *Smith v Hughes*

Act would lead to absurdities/unworkable.

- Act talks about *relief.* That is about releasing party from conseuqences that would follow if K ordered in normal manner. Relief has to be from something. Parliament enacted in the context of the objective principle.
- Constructive knowledge for objective principle, but actual knowledge for (i)
- Bizzare if u could argue no K at common law if no constructive knowledge, but not if actual knowledge (cos in the Code).

Leighton v Parton

- Alt facts: when purchaser knows of mistake (i), but lot 5 not heaps more valuable than lot 4
    - No relief under the act! No substantial unequal exchange of value
    - Can purchaser still argue that no K? Because no actual or objective consensus
    - Those who argue act is complete code would say purchaser can hold Vendor to K as written, despite knowledge of mistake
    - Dmac: that can't be right!
    - In cases we look at, courts consider if there was a binding K at common law. First issue: was this a contract?
    - Then given yes to that, is there relief under the Act?
- Alt facts: suppose Vendor intends. Purchaser intended lot 6!
    - Category 3 in the Act.
    - Court would have no jurisdiction to give relief if value of lot 5 was not that much diff from what the other sections were worth
    - So can enforce contract that neither party intends? That's nuts

Section 5(2): certain areas survive the Act

- Proves that certain areas of the common law & equity relating to effects of M's on K's survive the Act
- it also provides that certain independent grounds for getting relief from Ks, which commonly arise in M cases, are unaffected
    - Some of these notably - (c) to (e) were unnecessary and put in out of excess caution

(2)(a) the doctrine of non est factum

- A deed or written K may be complete void at common law bc person signing was induced by other party to believe it was of a different character or had a substantially different effect
    - E.g. Sale K, but actually deed of gift
    - E.g. insurance slip, but actually a cheque
- Decided to preserve this doctrine, covering serious execution mistakes
    - Baring (2)(a), would have been gone by virtue of (1)

(2)(b) law of rectification

- Already covered this
- Reminder: party might have alternative basis of relief - law of rectification or statute
- Rectification limit to mistake in expression of terms, but doesn't have advantages of not have to satisfy strigent requirements of s 6

(d)

- Don't worry about Illegal Contracts Act
- Ss 74A and 74B of the Property Law Act 2007
    - Concern M in performance - made modification to common law. Relating to money paid under M. used to be s 94(a) and (b) of the Judiciature Act
    - BUT the JA, governing structure of the courts, has been repeal - Parl had to decide where to put these provisions

(e) Frustrated Contracts Act 1944

- Excess caution: wouldn't have affected
    - Modified the common law consequences of a finding that a K was discharged under the doctrine of frustration

- Frustration: A K will be discharged (both parties released) if after its formation events occur which makes its performance impossible, illegal or which destroy the commercial purpose/foundation of the K. Event must be one that occurred without the fault of either party. Contract must not have allocated the risk of its occurrence to one or other of the parties.
- Suppose I hire piano concerto, but arsonist burns the building down. Can't say the owner is in BoK, event frustrated the K
- Suppose enter development K in historic site, but building on the land is designated as a historic site, court would say that frustrates the K (illegal to carry out).
- If those examples occurred prior to the K, that would be a case of mistake.
- *Planet Kids Ltd v Auckland City Council*
    - Childcare facility, had to be closed down bc the council compulsorily acquired leasehold
    - Paid them compensation
    - Subsequent event gave council basis for saying compensation
    - Facility burnt down anyway because of arsonist

Section 5(3): specific performance discretion
Nothing in this Act shall deprive a court of the power to exercise its discretion to withhold a decree of specific performance in any case

- Excess caution, bc specific performance is always a discretionary remedy

Section 6: operative mistake

Sets out the gateway for obtaining relief.

Experience with the act has shown that we shouldn't really try to have tight definitions for what does and what does not constitute operative mistake, this would make the law unsatisfactory.

S 6(1): THREE LEGAL CATEGORIES

(i) Unilateral mistake known to other party
(ii) Common mistake, each party influenced by same mistake
(iii) 'mutual' mistake. Each party influenced by different mistake about the same matter of fact or law

S 6(b): SUBSTANTIAL UNEQUAL EXCHANGE OF VALUE

- Fair enough requirement when mistaken assumption to value or attributes of subject matter.
- Out of place entirely when the parties are at cross purposes, cases where claimant's essential argument is 'we were never in agreement, no consensus ad idem'

S 6(c): RISK ALREADY ALLOCATED

- Mistake must not relate to a matter in respect of which a *term* of K (expressly or impliedly) allocates the risk to the party seeking relief

    - E.g. express promise.
        - Suppose painting for $100k, promised by seller to be an original. Actually an excellent forgery. RV: $150k. Buyer sues for damages.
        - Seller might say 'we are both mistaken', we should get rescission
        - Seller will fail, because risk of mistake is expressly allocated to seller as a result of her contractual promise

- E.g. *McRae v Commonwealth Disposals Commission* (1951)
    - CDC sold oil tanker to McRae, said to be stranded on the reef. K said tanker is sold 'as is, where it is. And not warranty to its condition'. Tanker was believed to contain a large quantity of oil.
    - There was no reef, there was no tanker.
    - Seller couldn't plead mistake, bc there was a promise a tanker did exist
    - Buyer couldn't be awarded lost profits, just wasted expenditure
    - Alt facts; assume tanker did exist but in poor condition. Buyer couldn't plead M bc expressly allocated in K.
- E.g. 3 *Earthmovers*
    - 'Contractor must satisfy himself as to the nature of the subsoil.'
    - Hard rock, adds several months to the duration of the K and cost to contract
    - No relief - term of the contract - you must satisfy yourself

- Only barred if allocated by a <u>term</u> of the K
    - This is important bc sometimes we can say risk is allocated although not subject of a term
    - Such situations are likely to mean the court refusing to exercise its discretion in favour of party seeking relief
    - E.g. A agrees to sell farm to B. Later discovered land contains valuable mineral deposits. A seeks to avoid K or get variation for higher price. Contract negotiated just on basis
        - Reasonable to allocate the risk of mistake to the seller, A. Court might do this by refusing to exercise its discretion
        - It would refer to s 4 - powers not exercise to prejudice general security of contractual relationships
        - Court might apply *analogous* reasoning to s 6(1)(c)

- *March Construction* and dmac's critique of (c), shouldn't be so black and white (isn't that what they wanted to get away from in the common law?), Prof Sutton had it right with fundamental mistake being the touchstone of broad relief.

Section 6(1)(a) categories and the OP

S 6 drafted against background of objective principle - didn't think of cross purpose cases. They didn't think C was a mistaken party.

None of these categories apply to cross-purposes cases. **This is the source of their intention to maintain the OP**

- Law reform committee would have taken the view, when obj principle applies in favour of people like Conlon, he is not mistaken in any relevant legal sense. So neither category (ii) or (iii) could apply. Category (i) couldn't apply, cos objective principle is inapplicable if promisee knows of mistake to terms.

Professor Sutton's suggested reform of operative mistake

Richard Sutton: only give relief for **fundamental mistake**, it depends on a list of factors, rejected by Parl, but mentioned as intent by the NZCA!?

- Give courts *guidance* to how discretion should be exercised. Not enough just to give it to the courts. Stated clear objectives, exhaustive list.
- Fundamental mistake should be left to be determined by the court, after taking into account a number of listed factors

- Substantial unequal exchange, shared, mistake as to terms? Or consequences?
- Probably not wise, as Parliament wouldn't give discretion to jurisdiction and relief. Sutton wasn't proposing any specific prerequisites.

The main reform the act wanted to carry out was in s 7 relief. The common law gave 'all or nothing' solutions, no flexibility. But didn't want to alter s 6.

Section 6(2)(a): Mistake in interpretation

"For the purpose of an application for relief under s 7 in respect of any contract (a)a mistake, in relation to that contract, does not include a mistake in its interpretation"

- Ignored in early cases, but has problematically risen in prominence

Paulger: Mistake when one intends something different from what is written down

Law reform committee did not have in mind what it now means

- "it is 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." (*Engineering plastics* 83)
    - Words not adopted by common consent in x-purposes cases, **this provision only meant for when there *is* a contract.**
- "Thus party is not entitled relief only because he has interpreted the words in a sense different from that adopted by a court of construction"(*Engineering plastics*)
- Essentially: If a party loses an interpretation dispute, he or she should not be able to turn around and say I will be able to seek relief under CMA. Interpretation disputes are the most frequently litigated in common law countries.

Would've been better to leave out of the Act

- In that scenario, allegedly mistaken party probably won't be able to come within the Act!
    - Would have to show mistake at the *time* of the K
    - Usually mistake would be unilateral and *not known* by other party.
- Even if parties recognised ambiguity, can't agree on the words, then they just settle on a form of words and effectively just leave it to courts to decide. 'Studied ambiguity'. No element of mistake here.
- Majority of interpretation disputes that come before the courts is where the parties never turned their mind to the issue - included out of excess caution.

Only example discussed by the LRC assumed a situation prior to entering into the K, one party communicated to the other, certain words are to be understood in a particular sense.

- Yet, the example goes on, this understanding doesn't prevail in a court of construction
- The example is somewhat flawed because the communicated meaning *is* the true meaning if objectively or actually accepted. So that is what court of construction will find.
- In principle, the example discussed by the committee, where the interpretation would prevail, there is no M, it is the true interpretation

It is clear that the LRC didn't have in mind s 6(2)(a) - excluding relief in cases of misunderstanding between parties (cross purpose). Not that they didn't want relief at all, would depend if rest of s 6 was satisfied

Section 2(3): Interpretation

Mistake means a mistake, whether of law or of fact.

Section 4: purpose

Background

- During hearing of submissions for select committee
    - Grave concerns from business organisations that this would bring undesirable uncertainty
- Parliament included separate section outlining the purpose of the act (unusual at the time)
    - "don't prejudice general security of contracts"

Section 7: relief

When s 6 is satisfied, the court can do what it thinks is just

(3)-(5)

- Can validate, invalidate, vary it, restitution, compensation, vest property in any party, etc

Factor

- Who caused the mistake? Subsection (2)

Section 8: rights of third parties

- Shouldn't upset transfers to parties
- This provision designed with a serious of difficult cases concerning the problem of mistaken identity. These cases at the forefront at the committee's deliberation. LRC thought this showed arbitrary nature of common law.
    - Many cases where people have impersonated
    - Suppose impersonated John Prebble, hatched plan to get cash before leaving country, have his business cards, cheque books, visited a jewer and say prof john prebble, write out cheque for 100k, go to pawnbroker, and leave country.
    - If a K formed between jewer and Dmac? If no, then apparent K is void, property in the ring remains in the jewer. Accordingly pawnbroker doesn't own it. Whose objective communication do we take? Original K void? Or valid and voidable?
- LRC wanted to sort this out, they didn't really

Conlon v Ozolins

Facts (NZCA)

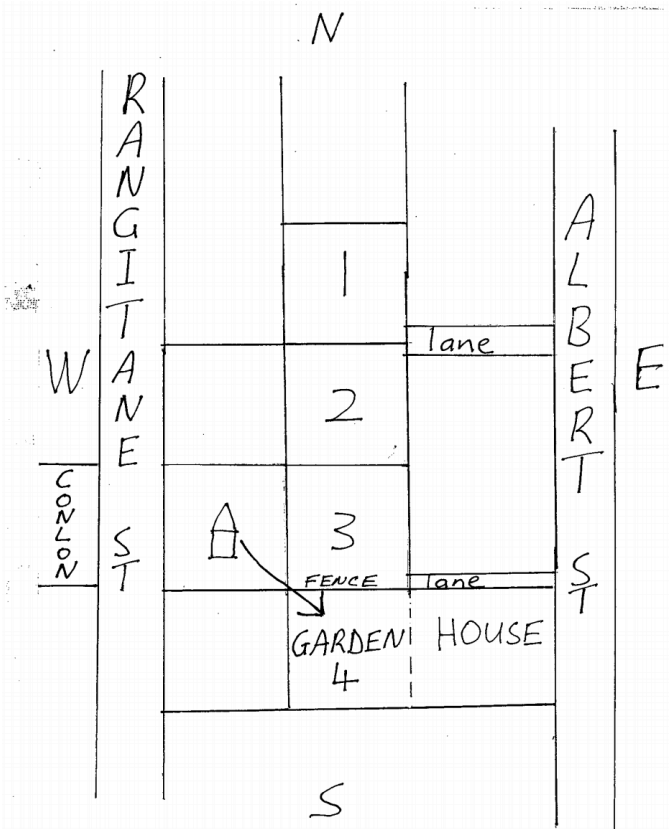
Mrs Ozolins

- Ozolins emigrated from Latvia, English not great.
- Old widow - 73

Mr Conlon

- Local milkman
- Bought a property on Rangitane St *before* the sale of Ozolins land was complete.

The land

- In two separate titles. Makes an L shape
- House has frontage to Albert street
- Back land: Title 2 are lots 1 to 4.
- Garden: lot 4 which back onto the house. At all times used as a garden, grown fruit and veges. Defendant lives off this land.
- Remaining 3 lots are mowed grass, obvious separation between lots 4 and other back land a substantial corrugated iron fence with a gate.
- 

The sale

- Conlon was aware of vacant land some years ago. Made inquiries for sale but defendant's answer on those occasions was in the negative.
- 1981 – Ozolins said she would sell, referred Conlon to her lawyer and mentioned price of $45k.
- Conlon went to lawyer's office and
- ***Ozolins wanted to lots 1-3. Written K provided for lots 1-4.***
- Entered into written agreement with Conlon, provided for sale of all 4 lots. Price $42,000
- Solicitor previously asked her wanted to sell – 'not my home'
    - As he understood, everything except the house section

    - Solicitor probably negligent
- Conlon found *entirely unaware* that O only intended to sell lots 1-3 (factual finding)
    - Presently surprised when lawyer presented all four lots to him
    - Prior to this, he decided to buy a neighbouring house, wanted to move that house to lot 4, and not use the small lanes to get access to them
- Ozolins eventually discovered she had contracted to sell all four lots, she refused to sign the transfer
- ***HC/Somers J:*** Ozolins was at fault.
- ***NZCA Majority:*** Ozolins was not at all at fault.

Dmac's preferred application of the OP to the facts

The buyer ought to have known, the buyer could not have reasonably believed. *At least plausible argument.*

- Judge thought bc he was unaware (take factual finding for granted here), that meant that *Smith v Hughes* principle was satisfied.
- Might need more evidence, but perhaps he ought to have known
- Facts: C had inquired years before for land at the back, did he think this included her garden? Prob just her undeveloped land. He knew the layout of the land. He didn't make any further inquiries after solicitors.

Dmac's preferred view of S.P. relief

Unjust to grant specific performance (hardship), just damages

- He bought the other house before the K, not relevant as Judge makes it to be
- Speculated that she didn't have long to live lol
- *This is a reasonable solution that doesn't do harm to the statute*
- Difference between K price and the promised value of the land, value of the four lots was about 49-50k. Damages might be 7-8k. Might have to sell one of her back lots to get the cash, but much less hardship than losing her garden.

High Court – Greig J

Mrs O's Defences

1. Non est factum
2. CMA didn't apply as no K at common law, *Smith v Hughes* didn't apply. 'Mutual mistake at common law.' 'no offer and acceptance'
3. CMA relief.
4. Implicit fourth arg: no specific performance under s 7 CMA, damages only

Non est factum

- Document signed was not so fundamentally difference than what she thought she was signing
- It was not 'never her intention' to sign the document
- Still intended to enter into a SPA for land at the back.
- Not available as Mrs O was negligent

***Smith v Hughes* applies – binding K**

- Primarily focusing on fact that C was entirely innocent - he was unaware she did not intend to sell all 4 lots
    - See critique above.

As objective K, CMA cannot apply
McCullough per Mahon J

- HC: When *Smith v Hughes* applies, the likes of Mrs O has not made a mistake.
    - "since that operated only upon the question that a mistake in fact existed, which is not included in the code"
    - Prevents when there is objectively a K, for arguing there is a mistake
- Mahon J said *Smith v Hughes* was estoppel by representation. Estopped when represented fact can't go back on it. Held that this principle precluded mrs O from asserting influenced in signing this doc by a mistake
    - Issue: though similar, objective principle goes to the *formation* of contract. Not an estoppel. Only get an estoppel where someone acts on representation to their detriment When person can invoke objective principle even though haven't suffered any detriment.
- What she is precluded from denying: Is the existence of a K
    - OP says, she is bound *despite* her mistake. Her mistake is legally inoperative. But then can go to the statutory overlay and get relief there. Just not at common law.
    - Greig J said s 5 operated to exclude existence of any mistake. That's not to say overall effect of conclusion is wrong. It is a separate q whether for other reasons the objective principle was retained, whether they fall within ambit of s 6.

Goes on to consider CMA in the alternative
Assumed (iii) mistake. Bad error.

- Somers J: "it was unfortunate that there was no argument directed towards (iii), the most critical point in the case"
- McMullin: "it was only briefly touched, then only by a question by the Bench."

Inequality – no (opaque reasoning)

- 42,000 price paid,
- Valuation said 1-4 were worth 58k. But he didn't like this
- He though value of 4 lots mid to late 40s.
- NZCA disagrees, thinks there was substantial inequality

No relief under s 7

- Focuses on subs (2) factor, her mistake, not his mistake at all.
- Also notes that it is proper to take account *Smith v Hughes*, maintain general security of contractual relationships

Remedy – specific performance ordered
Specific performance is discretionary, but no hardship here

- Ozolins has some hardship, but she will die soon lol
- But was her mistake
- And hardship to Conlon, he incurred burden of the purchase of the other property on Rangitane St (see critique above)

Court of Appeal

There is jurisdiction for relief, referred back to NZHC.

Different view on the facts

That Mrs O wasn't negligent

- Woodhouse: “which could not be attributed to any carelessness or fault on her part”
- Her alleged fault persuaded Greig that if the act applied it wouldn't be just for relief (s 7), or refusing s.p.
- The discretionary aspects of the case differ

Woodhouse P

Was there a binding K? Yes

Woodhouse P said no mutual mistake, no mistake by anybody. But OP applies.

- "I agree with McMullin J"
- But said no ad idem consensus between the parties, at cross purposes, but said no mutual mistake which is what you would normally say in that scenario.
- But McMullin J said (inferred) yes there was a mutual mistake, but OP applies.

Explanation: the OP applies, therefore no mistake. In a loose sense you say there is a mutual mistake because a cross purpose, but in eyes of the law, Mr C is not a mistaken party as lead reasonably to believe.

Gives a strong nod to not give specific performance

- “inevitable that if the matter is sent back for further attention in the HC, the Judge will reach the conclusion that there should be no order for s.p.”
- No fault on her behalf

Category (iii): Table comparing McMullin and Woodhouse

	Conlon’ M	**Ozolins’ M**	**Matter of fact**
Woodhouse P	O intended to sell lots 1 to 4	C intended to buy lots 1-3	The boundaries/size of the tract of land being bought and sold.
McMullin	O intended to sell lots 1 to 4	She was selling only lots 1 to 3	Doesn't even say.

Woodhouse’s further comments

- Classic case for (iii), not.
- The provision being remedial does not deserve to be construed narrowly or by reference to any of the rather mixed judicial conclusion based upon the common law
- Give a wide interpretation (Acts Interpretation Act 1924)

Critique of Woodhouse

- No, really about each other’s intention, different matters of fact.
- No, the land to be bought and sold is itself dependent on the existence of a common intention, but the parties have different intentions.
  A matter of fact surely something that is capable of verification. No *true* position that they are differently mistaken on.
- No mistake: contract provided exactly what he thought

McMullin’s further comments

- Problem with common law was in its definition and classification of mistake
- CMA is a remedial measure, to reform this law

- Don't construe in reference to common law classifications
- Mistake in s 2 defined widely

McMullin critique
- Ozolin's mistake: Mistaken to her own intention - lol no u can't be
- Can't be the same matter of fact, about the written k vs about Mrs O's intention.

McMullin J

Non est factum
Agrees with HC, not made out.
And anyway, the plaintiff was perfectly innocent.

Mutual mistake
Smith v Hughes applies, no operative mutual mistake. Bound at common law, can't argue never was a contract.

"The report substantially adopted Professor Sutton's paper"
Not true, Sutton critiqued the law reform committee. CCLRC in effect rejected Sutton's proposal.

Wither *Smith v Hughes?*
McCullough: said Smith v Hughes estops people like Mrs O from saying there is a mistake.
- But disagreed that the operation of that principle was unaffected by the Act.
    - *Smith v Hughes* doesn't operate
    - McMullin:
        - "Would be to deprive the the Act of much of its force"
        - *Overlooks many Ks which have mistakes don't have formation issues: mistakes in underlying assumptions. Act would still apply many cases not covered by the objective principle.*
        - *More fundamentally: Conlon was not a mistaken party, he was right, the Act never intended for him to be covered. Law reform committee never thought the Act was supposed to cover these situations.*
        - 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 on mistake (not formation)
- *McCullough* wrongly decided
    - Says that the CMA is a code
    - "Thus a person who is a party to a contract" - but how do we determine what is a contract? At common law? Contradiction in that sentence itself. Common law must survive in determining whether there ever was an underlying K between the parties.
- Does the act turn non-contracts into contracts?
    - NO, if requirements of act satisfied, then the court has jurisdiction for relief. If not, then left to their common law position.

But do they really discard *Smith v Hughes?*
Not really.
- Majority held that the principle does not defeat the application of the Act

- Best view: A contracting party, despite the existence of a contract under the obj principle, may seek relief *if he can bring himself within the criteria in s 6*
- Obj principle obvs curtailed in effect, but not dead
- If Majority thought it was dead, why did they apply in the judgment? Upheld Greig J that prima facie binding K
- Maj clearly though that unless the def could satisfy all the s 6 criteria *and* s 7 relief, she must perform the K

Alt facts: purchase price near market value

- Majoirty would have held that, since not a ll the s 6 criteria were met, there was a binding K under the objective principle! If not then the parties are not *ad idem* and no binding K? I think not.

(b) substantial inequality of exchange

- There was a windfall for Conlon
- Numbers don't add up
    - Conlon's valuer: Mr Nichols
    - 4 lots 43k, lot 4 on its own at 16k, gross realisable values for lots 1-3 53k

(c) no argument on this paragraph

Court has jurisdiction for relief

Direction back to HC, like Woodhouse.

Minority – Somers J

Mostly right, but some issues

Intent of the CMA

Made same mistake as McMullin J: Prof Sutton's report actually rejected by committee.

***Smith v Hughes* and the CMA**

"Section 2(3) intended to exclude arguments that by reason of mistake there never was a K to which ss 6 and 7 could apply. "

- Correct.
- Can't bar resort to the act, as def, by saying there never was a K bc objective principle doesn't apply

"The declaration in s 5 and s 2(3) suggest that Parliament has assumed that s 6(1)(a) includes all cases in which common law mistake would prevent a contract from coming into existence"

- No
- Because (i) is only knowledge (NZCA says actual knowledge). So doesn't cover everything
- If they did assume that, they assumed wrong, doesn't cover all cases

"Normal principles are not affected by the Act"

- Yes that is right, CMA doesn't abolish law of formations

"Estoppel"

- No Smith v Hughes is about formation

"it is not easy to envisage the case of a party estopped from disputing his assent to a K yet successful able to urge some mistake about that inferred assent to which the Act can apply"

- Rephrase that: not easy to envisage cases of a binding objective contract, where mistaken party can successfully invoke the act

- He's right
    - Like O, since she lead C reasonably to believe, is going to find it hard to bring within categories, because other party isn't mistaken and doesn't know.

  Next para kinda contradicts himself:
- Says some silly stuff about written K
    - It is the objective agreement which matters, not the written one. Her intention was not what the words of the K
    - Maybe he means her *objective* intention is discoverable from the words of the K
- It would be mistake to approach the CMA with old tools of the common law and equity
    - But hang on, he said before, it is not easy to envisage a case. He is contradicting himself.

Mrs O made a unilateral mistake, not known to the purchaser, therefore objective binding K

Section 6 – it doesn't apply
Takes aim at McMullin's approach. Prob still would have rebutted Woodhouse J's analysis.

Not about the same matter of fact! And even so, Conlon not a mistaken party.
- If one party is mistaken then the other party will be considered relevantly mistaken about the other party's real intention!!
- This case: Parliament only intended to be met if the purchaser *knew of the vendor's mistake*: s 6(1)(a)(i)

Majority's approach makes "Superfluous"
On majority's approach, (i) is not superfluous, still need that for the case where Mr Conlon knew of O's mistake.
- Wrong to say superfluous, still serves a practical purpose
- In the absence of (i), the Act could not be invoked in such cases.

Probably what he meant to say is
- Why enact (i) with its knowledge requirement if, in the great majority of cases where it will not be established that the plaintiff knew of the mistake, the def can succeed anyway by bringing itself under (iii)? That is without establishing knowledge
- If it were intended that *all* cases where there is no true consensus ad idem due to mistake should fall within (iii), then one would not enact a separate category of unilateral mistaken known to the other party.
    - One would simply provide for two categories: unilateral mistake (whether or not known to the other party) and common mistake.

Repeats view of other judges that non est factum is available.

Is of the view, with Grieg, that O was careless, she was at fault.

She was bound. Specific performance, yes
- No hardship for O compared to hardship for C
- Acknowledged it was more a borderline case, he did not say it was the appropriate remedy but that it had not been shown the trial judge had exercised discretion wrong.

Principles out of *Conlon*

1. Don't lose sight that *Conlon v Ozolins*, was about mistake as contractual terms (understanding). There was no true consensus between the parties. An issue of formation arose.
    - The whole approach to the case would be different if they had agreed for lots 1-3, but mistaken about its attribute: zoning, soil quality, boundaries
    - There would be a mistake in underlying assumptions
2. There was undoubtedly a contract at common law, if Conlon neither knew nor ought to have known that O was mistaken.
3. Because there was a K, didn't necessarily mean that Mrs O should lose her garden: specific performance is a discretionary remedy.
    - Substantial justice could be done, if Conlon was confined to a remedy in damages.
4. NZCA was right to reject the approach of the trial judge (Grieg J) re *Smith v Hughes*; but only right in the sense that if you can bring yourself within s 6, the court has jurisdiction to grant relief. *Smith v Hughes* never said Mrs O never made any mistake, or never intended to sell all 4 lots. Just that she was bound *despite* her mistake.
5. Entirely different matter whether any of those categories did apply, esp when binding objective contract. Strong arg that category (iii) didn't apply: see Somers J.
6. Decision in *Conlon* was controversial and widely debated. The case was seen as doing was the act said not to do; prejudicing the general security of Kual relationships. Essentially pleading unknown unilateral mistake to get out of a bad bargain
    - Once one party mistaken to the terms, the other party will be deemed to be relevantly mistaken too: Somers J.
7. Yet to be considered, s 6(2)(a): *Engineering plastics; Paulger*
8. Section 2(3): contract for purpose of the act, when requirements of… and s 5(1) replacing common law and equity.
    - See code vs partial code arguments
    - Vary the facts: code argument if known her intention but (b) doesn't apply.
        - He wouldn't get specific performance, but gets loss of bargain damages, that result is unacceptable.
        - Correct position: she can argue that no K was formed. The advantages of her going under the Act, is that she could get a variation under s 7. Could get de facto rectification
    - Dmac's arg still accepted in substance by Conlon majority

Application of *Conlon* in *Engineering Plastics*

In the High Court, 3 Months after Conlon. No longer the sympathetic facts of Mrs Ozolins, rather an arm's-length business transaction.

Facts (HC, Tompkins J)

- K for sale of goods
- The Def (light engineering company, Mercer) asked the Plaintiff (manufacturer and wholesalers, Engineering plastics) if it could supply 4000 O-rings, seals used by the Def in the course of its light engineering business.
- The Plain obtained a price from its American suppliers, converted it into NZD, and calculated the price it would charge the Def by adding its normal mark-up
- The result was a figure of $644-96 *per hundred* plus $1072-50 for a tooling charge.
- The Plain then sent a quote to the Def which included the following statement:
    - "Price $644-96/c
    - Part cost tool charges $1072-50"
- Def took this as 644.96 for *all* of the 4000 rings. $0.429 cents per ring. Cf they were getting 53 cents from Australian suppliers
- Def shocked to be invoiced not $1700 by $27,000
    - In effect $6.44 per ring.
- Def refused to pay

We have a *Conlon v Ozolins* situations - but here concerning the price.

Four defences

1. Contract according to our understanding, plaintiff is bound
2. No K, no consensus ad idem, two reasonable constructions of this quotations
3. We supplied samples, the O-rings were not the same as the sample we supplied, this entitled under SGA breach of a condition
4. Relief under the CMA

(1) Offensive defence - contract on our understanding. No

- Argument: 644.96/c meant the total price, meaning they attached to K
- Commonly understood trade usage in particular trade, that /c means per 100.
- The usage in the trade *was the meaning*
    - Depends on the context of the trade

(2) No consensus ad idem? No

- Ruling on first defence, answered the second one. Not two reasonable interpretations, trade practice is what we take.
- By accepting the offer (unequivocally) the Plaintiff could reasonably believe that it was assenting to the terms contained in the letter of 20 July 1982. Thus defendant is as bound as if it had intended to agree to the plaintiff's terms.
- Objective principle applies

(3) Sample sale

- Argued that by doing that it became a term of the K
- That the orings supplied had to be the same
- Sale of Goods Act - provided that it is a condition of the K if it is a term. That the goods comply with the sample, if breached goods can be rejected.
- Argument failed for three reasons

- Court not satisfied that sale was agreed to be by sample, not a term.
- Even if, condition not breached. Orings supplied of superior quality. Delivering better quality def according to sample
- Even if, you are precluded by s 37 SGA from rejecting goods because 580 odd had been on-sold, which is an act of acceptance. Claim for damages, but no right to reject goods.

(4) CMA, category (iii)
Conlon v Ozolins binding on this High Court judge

Tompkins J followed Conlon (follows specifically Woodhouse J): **s 6, (iii)**

- Here it was the buyer's mistake, not sellers. And to price.
- (iii) was satisfied
- Each party had a mistaken belief about their intentions concerning the price.
- Plaintiff: thought the Def was intending to agree to buy the 400 rings for $644-96 per hundred, plus the tooling charge.
- Def: thought the Plain was intending to agree to sell the 4000 rings for $644-96, plus the tooling charge.
    - *Those mistaken beliefs were different, but they were about the same matter of fact, namely, the price each thought was payable under the K*

Broader issue: not realistic to treat Engineering plastics as making a mistake at all.

Different mistakes about different matters of fact.

- "each thought" added these words in from Woodhouse J. But this gives the show away that the analysis is artificial.

Objective test of intention:

- There was an apparent consensus ad idem and thus a prima facie binding K had been formed.
- Thus *Smith v Hughes* must still operate!

S 6(b) satisfied

- Because def called upon to pay 6.50 per ring for rings that could be from Aus that were at 50c each.

Section 6(2)(a) - so no operative mistake?

- First time this provision is used
- "A mistake, in relation to that contract, does not include a mistake in its interpretation"
- Not considered by *Conlon*, if there was one in this case then there was one in *Conlon*
- Did this negative jurisdiction to grant relief?

Prima facie mistake in interpretation. But Judge said that was not the mistake, it was about intentions of the other concerning the price.

- Mistaken in respect in which buyer is claiming relief, not just for misreading of words, they are to each other's intention, not strictly mistake in interpretation.

- Textbook says mistake was even before the K was formed, by prob too technical an argument.

- normal process of the construction of contracts, a meaning different from that which a party thought they had." (*Engineering plastics,* p. 83 line 27)
- "Thus party is not entitled relief only because he has interpreted the words in a sense different from that adopted by a court of construction"(*Engineering plastics,* p. 83 line 27)
    - Not there to preclude claim under act for formation mistakes. Relief might be precluded bc none of the categories of para (a) apply, but not because of s 6(2)(a)
    - Essentially: If a party loses an interpretation dispute, he or she should not be able to turn around and say I will be able to seek relief under CMA. Interpretation disputes are the most frequently litigated in common law countries
        - Claimant lose anyway bc has to show influenced at time of K, most are when parties never thought about a matter.
        - Parliament did this out of excess caution.

Relief s 7

- It is just to grant relief
- Not okay to cancell the K, I will vary the K
- Thought recognising that it was "a somewhat arbitrary assessment", his Honour decided to vary the K by provided a price of $4 per ring. Thus plaintiff recovered 16k of the 27k it originally claimed.
- He split the difference.
    - Plaintiff lost more due to legal costs

Factors used: most not relevant or useful. Except for (1)

- (1) Wood should have been put on his guard, bc if left out tool charge he would get ring for 16 cents. So def caused the mistake.

Critique

What about the fact Parl said don't use powers to prejudice the general security of contractual relationships? This is shown how *Conlon* is incorrect. In this context especially, arm's length business relationship.

Reasoning in *Shotter* and *Paulger*: the tide turns against *Conlon*

Shotter v Westpac (HC, Wylie J)

Facts

Facts seem complicated, but essentially are simple for CMA issue

- Plaintiff, Mr Shotter signed guarantee in favour of Westpac bank of the indebtedness of a company he was involved with called Unicorn Holdings
- He did so mistakenly believing it only covered a particular advance used to purchase a particular property, and even then, only up to a limit of 100k.
- In facts, the document clearly provided that the guarantee covered the *whole* indebtedness of the company up to limit of 100k.
- He found liability wasn't 25k (shortfall on property), he was liable for whole indebtedness (100k).
- He claimed he didn't intend that

Really no material difference between facts of this and *Conlon* or *Enginerring Plastics*

- They have in common: objectively a K provided exactly for what bank intended, on surface only one party mistake.
- But under *Conlon*, can construct mistake on both sides.

First argument: common mistake (ii)

- Both parties believed guarantee only covered one of the bank's loans (up to 100k)
- That argument rejected. No basis for finding that bank didn't realise what its own guarantee meant

Initially pleaded: known unilateral mistake (i)

- Not pursued at pleading

Pleaded (iii), per *Conlon v Ozolins, Engineering plastics*

Facts in Shotter not materially different to those cases

- At cross purposes, no consensus ad idem, but objective K
- Document had a plain meaning, which the party seeking relief was mistaken

How would he have preferred to have reasoned his decision?

- That (iii) didn't apply. Either no mistake, or mistakes on different matters of fact
- Reluctant to follow those cases.
    - "if not constrained by authority, I would find great difficult in bringing the circumstances within s 6(1)(a)(iii)"
    - Not about the same matter of fact
    - "the somewhat controversial majority decision of the Court of Appeal in *Conlon v Ozolins* … that forces me to a different conclusion"
    - "I confess that such an analysis gives me some difficulty for the reasons so cogently, if I may say so, expressed by Somers J"

Applying Woodhouse's analysis.

- "Mr Shotter mistakenly thought *he* was guaranteeing merely one of those liabities"
    - That is similar to Mc Mullin's analysis, but not correctly applying Woodhouse's analysis.

        - This quote means he is mistaken to the subject matter, to what the guarantee provides for
    - Correction: mistaken to the bank's intention: Mr Shotter's mistake was in thinking the ***bank*** was taking guarantee of merely one of those liability
    - Important: This error flows into his analysis for **s 6(2)(a).** Allows him to distinguish *Conlon v Ozolins* on the mistake in interpretation issue

Section 6(2)(a): Mistake in Interpretation

- "it is clear on *any analysis*" … that this is a mistake in interpretaiton
    - BUT it isn't on Woodhouse P's analysis
- Interpretation: conclusion as to meaning via statutory/contract analysis
- But he says: must have a broader meaning
    - So a person who reads a document, and forms a wrong interpretation has made a mistake in interpretation
    - Also makes no difference if you didn't read it at all.
- *Mr Shotter has made a mistake in interpretation*

Critique

- He said: I am forced to follow *Conlon*, but decision reached cannot possibility be reconciled with decision in *Conlon*
    - He said early that the cases are indistinguishable
    - He says no category (iii), as no mistake at all.
    - If Shotter didn't make mistake, then neither did Ms Ozolins

He goes on to look at Tomkins J in *Engineering Plastics*

- Tomkins J said matter of fact: "a mistaken belief by each party about the intention of the other concerning the price"
    - About each other's intention, not about the document
    - Also said: purpose of 6(2)(a) only applies when words adopted by common consent, are given different meaning by court of construction. I.e. the provision never intended to deal with issue of formation, just when court give words unintended interpretation
- Wylie J: this seems to be about different facts [from *Conlon*], not the same
    - But didn't follow Woodhouse's analysis properly!
    - "Focus here is on content of guarantee rather than on intention, [where] as Woodhouse P referred to the boundaries or the size of the land to be bought and sold."
        - "In the present case, however, the mistake is one of interpretation of the document, not one of the physical *extent* of an area of land." (**big whopper**)
- Massive whopper
    - Takes different view of Conlon, the *extent of area of land*, supposes Mrs Ozolins didn't realise how far the lots went. But this would be a mistake *about* the contract, not *in* the contract. A mistake of underlying assumption (factual category 2). Just plainly not the facts of the case.
    - Distinguished twice, didn't adapt reasoning correctly, then said Conlon said alleged mistakes to the extent of the subject matter (changed the facts).
        - Mistakes in fact were to what was being sold.
        - If Shotter made mistake in interpretation, then so too did Mrs Ozolins, and so too did Mercer, the buyer of the O-rings

Paulger v Butland Industries

Court of Appeal approve of *Shotter v Westpac*. 'Two wrongs make a right'

Extenuating circumstances that make this a mess.

- Argument to CMA only raised to NZCA, no notice had even been raised before the NZCA hearing. Counsel for respondent, hadn't come prepared to deal with submission based on the Act. Thus, NZCA said you have time to prepare some submissions on the Act. Can't throw it out altogether, because CMA doesn't have to be pleaded, can be raised by the Court.
    - Consequence of this: there was probably no opportunity to assemble a full bench for NZCA, where they would have reconsidered *Conlon v Ozolins*. That is if NZCA was invited to depart from that decision.
- Composition of the Court
    - Somers J wrote the *Conlon* dissent
    - Wylie J who was up from Christchurch
    - Hardieboys had to write the judgment.

Facts (NZCA, Somers Hardie Boy and Wylie JJ)

- Paulger was the appellant guarantor/debtor
- Butland Industries Ltd was the respondent creditor

- Mr Paulger founding direction of a long-established company
- Company got into serious financial difficulties.
- Company entered into a contract for the sale of its business and it was Paulger's expectation that the sale would realise sufficient to pay off its creditors - owed $7 million

The letter

- Paulger sent letter to all creditors, Paulger signed as CE, advising them of the sale of the business, seeking their tolerance until the sale was executed, and undertaking to pay off the debts within 90 days
    - "The writer personally guarantees that all due payments will be made"

What happened after

- Before the sale was completed, company put into receivership.
- The respondent company, owed $11,000, obtained a summary judgment against Paulger.
    - Held plainly 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 its debt for the requested period of 90 days
    - Court applied objective test: could be reasonably inferred by recipient of letter that Paulger was undertaking to pay from his own funds if the company did not pay.
    - Dismissed his arguments under the CMA

Was there a contract?

- Plain meaning of words: personal guarantee
- Offer: forebear for suing for 90 days, and I personally guarantee this debt
- Acceptance by conduct: forbearing to sue for 90 days
- Unilateral K
- Bound to every creditor that forebore for 90 days
    - Butland satisfied that requirement

Court said evidence of his intention is inadmissible to aid for construction. But this was not about contracts (once formed), this was about binding offers. Intention was entirely relevant if plaintiff knew or ought to have known.

What about the consideration? The court said 'well not much evidence they did forebear from suing' but they did make a claim just after 90 days over. The delay was sufficient evidence

- 8 August letter sent. At that time, there was no outstanding debts owed to Butland Industries, they were paid up to date. Invoice to be paid 20th of the month. Even apart from that, creditors don't sue within a few months of a debt being overdue
- You could claim discount after 16 days
- Dmac doesn't believe they forebore from suing.

Paulger not completely without fault, and not a way of making him liable.

- All his counsel said, he didn't intend to be bound, they didn't argue that what this *really* means is 'he would give his best endeavors'
- Butland could have argued in alternative, what P was implicitly saying was that money coming in from sale would be sufficient to cover all known debts. Implicitly promising those proceeds would be sufficient to cover all known creditors at the time.
    - Entirely peculiar that he didn't know extent of debts, so implied offer/promise might mean liable but not for entire 7 million.

Objective test
Applied: Court said "that sentence can be read only as an assurance over and above those that preceded it". Plain meaning of the words in the letter prevail – he is bound to his guarantee.

Surely couldn't be right.

- Paulger surely couldn't have wanted to make himself liable for the company's debts to the extent of $7 million.
- Plain meaning yes, but did reasonable person in creditor's shoes?
- Wouldn't they just think he was doing his best to ensure they were paid from the proceeds of the sale?
    - Surely trade creditors wouldn't reasonably take it as such?
    - Could look at common practice in the industry, cross-examine all the creditors,
    - $7 Mil from his *own* pocket????

Section 6(2)(a)
Basically says cannot invoke the Act when "he understood the K to mean something different from its plain and ordinary meaning". For then the M is one in the interpretation of the K and according to the section this is not a mistake fro the purpose of the Act.

- <u>Court: Parl plainly intended to maintain the objective principle (big whopper)</u>

McMullin *Conlon* CM34: the Act is a code. *Smith v Hughes* is gone - to deprive the Act of much of its force.

- Exactly opposite of what Court said in *Paulger*. There is a contradiction.

BUT s 6(2)(a) not the source of Parl's intention to maintain objective principle.

- See below for consequences of this
- Law reform committee would have taken the view, when obj principle applies in favour of people like Conlon, he is not mistaken in any relevant legal sense. So neither category (ii) or (iii) could apply. Category (i) couldn't apply, cos objective principle is inapplicable if promisee knows of mistake to terms.

Back to the case: was this a common mistake (category (ii))

- No, only Mr P mistaken

Category (iii)

Conlon v Ozolins relied on.

- "Here the common subject mater was the source of the funds for payment of the creditors, Mr P thinking that it would be only from the proceeds of sale, the respondent that it would, if need be, come from Mr Paulger's own resources"

"these words of McMullin J are not to be read as referring to what each party believe the other intended"

- That was what Woodhouse P said! Not McMullin J!

"***Conlon v Ozolins*** **is a decision on its particular facts"**

- Commonly this means: it is wrongly decided and overrulling.
- One explanation: that court views *Conlon v Ozolins* as a case about *extent to the physical boundaries* (a factual category, underlying assumption to subject-matter, boundary issue), when it was really a cross-purposes case (formation, offer and acceptance, *what* was being sold/bought). They then approve of *Shotter*.
    - Dmac: to say was a mistaken assumption case, is just not true. That is changing the facts.
- Another explanation: *Conlon* involved any special facts, or weird policy considerations, or disputed facts. Problem is the decision in *Conlon v Ozolins didn't* hinge on factual difficulties or factual disputes.
    - The facts were a common scenario throughout these cases.
    - Had a mistake by party A to an important term, where party B was justified in inferring that party B had agreed. I.e. a case where despite the mistake there is a binding contract under the objective principle.

"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 his own words"

- Isn't that what happened in *Conlon v Ozolins*?
- This is against what Woodhouse and McMullin said in *Conlon v Ozolins* .
    - "has the court jurisdiction … in a factual situation of the kind outlined?" p. 497 line 50
        - What kind of case: "Considered objectively the document is perfectly unambiguous and reflects no kind of mistake by anybody." p. 497 line 37
        - "once carried into the written agreement the contract could not be undone at common law" p. 499 line 5

Implication of the use of s 6(2)(a)

NZCA in *Shotter*: cannot invoke the Act when "he understood the K to mean something different from its plain and ordinary meaning". For then the M is one in the interpretation of the K and according to the section this is not a mistake for the purpose of the Act.

This precludes claim under category (i), when it shouldn't

- *Dmac's E.g. O owns three lots of land. She signs a written agreement providing for the sale of lot 1 to P. P actually intends to buy lot 3 and thinks the K so provides. O is aware that P does not intend to buy lot 1 but argues that P must perform the agreement.*

- *Under their reasoning, this is a mistake in interpretation, so no relief.*
    - But Parliament intended this case to come within the act - category (i)
    - Could argue that doesn't matter because OP doesn't apply, as knew of mistake.
        - But, assuming there is a substantial inequality of bargain, Parliament didn't intend the all or nothing solutions of the common law, s 7 allows discretion. So there is an apparent K for the purposes of the Act.
- If O was aware of section that P actually intended to buy, knew P intended to buy lot 3, P would have an argument for rectification on the ground of known unilateral mistake.
    - O unconsciously takes advantage of this known mistake. Can have contract on P's terms.

It also precludes claim under category (iii), when it shouldn't

Suppose now that the written agreement provides for the sale of lots 2 and 3 to P. O actually intends to sell lots 1 and 3 and thinks the contract so provides. P actually intends to buy lots 1 and 2 and thinks the contract so provides. P later insists on performance of the agreement as written because lot 3 has a harbour view and therefore is more valuable than lot 1.

- On the surface, category (iii) applies, and Parliament would intend that
- But according to NZCA, O could not apply for relief, because O misunderstands the plain meaning of the apparent K.
- O could argue no K formed! Because could not have reas believed O was selling lots 2 and 3 as written, because P actually intended to buy lots 1 and 2. SO can't have believed let alone reasonably believed that O intended lots 2 and 3.
    - But, assuming there is a substantial inequality of bargain, Parliament didn't intend the all or nothing solutions of the common law, s 7 allows discretion. So there is an apparent K for the purposes of the Act.

Mechenex Pacific v TCA Air conditioning

Paulger was applied by the NZCA
Two of the same judges that applied *Paulger* (Hardie Boys, Somers)

Facts (NZCA, Richardson, Somers and Hardie Boys JJ)

- Respondent seller TCA had obtained summary judgment against the buyer, Mechenex for the price of cooling coils supplied
- Buyer had rejected those coils because they didn't meet the requirements of their specifications
- But NZCA found seller accepted buyers offer reasonably believing the buyer wanted to take coils set out in the seller's quotation, not the significantly different coils in the buyer's initial specification
- Subject to CMA, there was a prima facie binding K
- CMA
    - No basis for relief to the buyer
    - Not under (iii)
    - Was accepted that parties were under x-purposes: buyers actual intention was to buy different coils
    - However, CMA did not help buyer
        - Seller hadn't made a mistake: Seller intended to sell coils in its quotation and objectively that what it conveyed
        - Secondly, any mistake by the buyer was a mistake in interpretation: "the mistake was therefore of the same character as that of the unfortunate appellant in *Paulger*. It was a mistake as to the interpretation of the K, and cannot be availed of."
    - Cited: *Scriven v Hindley*
        - Bidder at auction bid for wrong goods, for goods buyer did not intend to buy, the making of the wrong big was the making of the auctioneer, confusingly displayed, therefore the auctioneer could not reasonably believe the bidder was intending to buy the goods in question. No K. Promisee ought to have known.
        - Having set out principle in that case, NZCA @ line 26, they went on to say: *assume a K for the purposes of s 6, but except for that purpose, there is no K.*
        - That supports Dmac's view of the CMA, that CMA does not prevent the application of the OP if you miss out on the act apply, from there can still argue there was never a K no objective contract. But might want still to go under CMA as they might want variation, damages: s 7 relief.

March Construction

Background matters

First paragraph of the case

- "was silent when it ***knew*** of a mistake made by the Plaintiff and consequently secured a golden enrichment of $300k."

Facts (HC, Williamson J)

- Council calling for tenders for road works
- March submitted a tender for the works (an offer) 297k
- Unfortunately, March made a mistake in calcs, this resulted in the total unit rate per metre for a unit being $250 per unit vs instead of $968 per unit
- About half of the other tenders. Way under par.
- Dmac's inference: council ought to have known that mistake had occurred
- Tender had been accepted, signed a written K
- Plaintiff completed work at a substantial loss, and sought to recover loss from Council

Claims were all struck out by Master Hansen (upheld by Williamson J)

- Untenable on any view of the facts
- Even if it were proved, officers of Council *knew* March made serious mistake, they had no chance of succeeding, claim was untenable.
- Possibly that is right, but anyway shows bad conduct by Council, and maybe deficiencies with the law.

Causes of action

1. Rectification
    - Argued that their mistake should be corrected, in effect writing in a substantially higher price.
    - Not about common intention of the parties, was unilateral
    - They sought it for a unilateral mistake, new branch of the law.
    - Court said no: no mistake to the terms of the agreement, they intended the *terms* of the K. The mistake had been made in the process of calculated the intended price. This was a mistake *about* the K, not *in* the K. Like a mistake that the oats were old in Smith v Hughes
    - Rectification is about making the written K correspond to the intended terms.
    - Even if it falls within the unusual requirements for unilateral mistake, this was not a mistake to the terms.
2. Misrep under the CRA
    - Silence
    - No duty to speak, not even because of past behaviour
    - Like no duty on seller in *Smith v Hughes* to say they were new oats
3. Misleading conduct under the FTA
    - Essentially same as CRA
4. CMA

No contract argument under *Smith v Hughes*?

- No mistake to the terms of the K
- Second element of *Smith v Hughes*
- If Conlon had known she only wanted to sell 1-3, then no K
- BUT if he had known she didn't know how valuable the land was

- Is the underlying assumption just that? Or was it made a promise via a condition
    - Mistake in the K? Or about the K (or consequences)?
    - Whether that should be the law is addressed next class.

Mistake under the CMA – risk allocated (c)

- But they abandoned that before it got to Williamson J, but he still went onto talk about it
- This is category (i) known unilateral mistake,
    - NOTE the CMA can be mistakes to the K and *about* the K
- (b) satisfied
- (c) risk allocated, yes by a term
    - Should this be a complete defence? Dmac thinks no.

Alt facts: What if mistake was to terms? And CHCH council knew

Formation

- No K and even if they ought to have known still no K
- Irrelevant that a term said tender must oblige itself to correctness
    - That only comes into force once the K is formed, here we wouldn't have a K at all
- If no K, March would have recovery for a *reasonable sum*: unjust entrichment. Because council accepted the value of the work and must pay reasonable sum.

Rectification

- March could argue there was a K at our intended price, and courts should rectify the stated K to intended terms.
- *March* at CM 85: requirements for known unilateral mistake
    1. An erroneous belief by A that the document sought to be rectified contained a particular term or provision
    2. An awareness or knowledge by B that the document did not contain the particular term or provision and that this was due to a M by A
    3. Failure by B to draw the mistake to A's attention
    4. The mistake is one calculated to benefit B

Dmac pointed out that normally the response to unconscionable behaviour would just be to say: no deal.

- Holding promisee to promisor's intention may be punitive.
- March, may have intended 200K more than anyone else. Should we force CHCH city council
- Answer is no: rectification isn't about punishment, it is about making it correspond to the true agreement.
    - Would have to show that they knew/ought to know of my mistake, and they lead me reas to believe that K on my terms
    - E.g. *Hartog v Colin & Shields* case, Dmac thinkgs that a K on the promisor's terms is feasible.
    - But mere knowledge of the mistake shouldn't suffice.
- Known unilateral mistake is quite a drastic remedy: was claimant lead reas to believe that was the deal?

CMA critique re (c)

- Arguably abursd that (c) completely bars reliefs
- Why should there be operative mistake when add a 0, but not when I make an equally important mistake in my private mistake
- CHCH council can snap up the offer in latter case, but not first.

- Surely what is important is the existence of a fundamental mistake, terms or not, known to the other mistakes
    - Dmac: Prof Sutton had it right in his paper: he proposed a fundamental mistake for operative mistake, not the strict categories of common law
    - What is fundamental is defined by a series of factors.
    - March made a mistake that had fundamental consequences, existence (not precise) mistake was known. Court should at least have jurisdiction.
    - Distinction could be difficult to draw. Mistake could be on the front of the offer, with obvious error in a colomn, or adding up. In such a case, court might say they intended that price *and also* the correct sum of the various components.
    - Sutton's point: that technicality shouldn't matter, enough they know that bid is seriously undershot. Still bearing in mind the security of K.
    - Giving courts that jurisdiction doesn't mean relief granted, would consider the circumstances
        - Might be offoree reasonably relied on the bid before the, so relief would result in hardship.

Magee v Mason

Facts (NZCA, Miller J)

- Magees
  - Mrs Magee is an interior designer and Mr Magee a plumber. They are not said to have claimed to possess knowledge about leaky buildings, although the Masons say they assumed the Magees would know whether the house leaked.
  - The Magees have bought and sold homes regularly, decorating and reselling them
- Masons
  - Mrs Mason is a Bowen massage therapist and Mr Mason an IT service delivery manager.
  - They were sensitive to the risk that the property might be leaky.
- The House
  - She and her husband, Andrew Magee, had purchased the house in 2009, some six years after it was built, in their two years of ownership it had not revealed weathertightness defects, and she had no reason to believe that its design and construction made it prone to leak.
  - But 'Its monolithic cladding and eaveless design suggest that possibility'
  - Magees in the house for 2 years
- Masons found out that leaky home, defect cost 940k to repair
- Conditional purchase on building inspection
- Building inspector, said allg. But wrong, but damages limited (limited liability) to 68k
- Asked Magee about leaky home
  - **"Absolutely not, we have never had any issues with the property"**
  - Context: Wine, causal, not formal but still can be bound.

The High Court

In the High Court the Magees were found liable for a pre-contractual misrepresentation (similar approach to Minority)

Three different meanings

1. the house had not leaked while the Magees owned it (meaning 1); *Not a misrep, true.*
2. Mrs Magee knew of no facts establishing that it was through design or construction prone to leak (meaning 2); *No misrep, no true, no specific building expertise.*
3. that it was not through design or construction leaking or prone to leak (meaning 3). *False, misrep, bc was prone to leak.*

Only meaning 3 is a misrep.

<u>Majority: Miller J (and Gendall J)</u>

- Wasn't a distinct representation, formed a response to question as a whole
  - Not two distinct representations. **Qualifying the first words.**
- Context
  - Asked: does the house leak
- Mason assumed that Magee had knowledge, but Magee did nothing to ender that assumption
  - Only in there for two years
  - No special knowledge
  - No reason to believe that holding out as expert

- [39] We conclude that with the qualification given by Mrs Magee the statement did not reasonably bear meaning 3: that the house was not through design or construction leaking or prone to leak. It meant only that the Magees had not experienced weathertightness problems, and further that they had no reason to believe the house suffered defects that would cause such problems (meaning 1 and meaning 2 respectively). The evidence confirms that that is how Mrs Mason understood the statement.

Minority: Courtney J

- Second part of the statement conveys *reassurance* of first part of answer from personal experience, not qualifying the previous words
    - Backs up the first part of the statement
- Should have qualified them, made it an opinion, shouldn't have used "absolutely not", that is an unequivocal statement.

Is it just?

- Magees did everything right
    - Got building report
    - Sad that they had a bad experience with leaky homes before
- Masons did everything right
    - Were flipping properties, but no reason to believe that home was leaky
- Both parties innocent. Was it ever going to be fair?

Dmac's critique

- Generally thinks majority is right.
- But doesn't like they said statement of opinion was meaning 3, need more analysis. He thought it was more at issue. Seems like a statement of fact
    - Even if a statement of opinion, there only two ways of misrepping an opinion. Reasonable grounds and dishonesty. Weird majority never looked at that, and just looked at as if it was a statement of fact.
    - Did she have reasonable grounds? Two years is enough, experienced two winters. Or not enough time to experience leaks that come thru. Dmac think two years is enough for the lower std of reas grounds.
    - Result same either way.
- Biggest issue: never intended to be sued on.
    - Didn't expect a comment at a casual dinner to be sued on.

Any other claim?

Mistake?

Common mistake (ii) to nature of subject matter
Def substantial inequality
No allocation of risk of mistake - condition building report clause not enough.

Falls within s 6

Relief under s 7

- The court can come out with a more just outcome
- Share the cost of cure, spread the loss, over both parties (minus builder's report damages)

Summaries

Cases

Leighton v Parton

Hartog v Colin & Shields

Raffels v Wichlehaus

Smith v Hughes

Old American case

Pukallus v Cameron

Eldamos Investments

Conlon v Ozolins

McCullough

Engineering Plastics

Shotter

Paulger

Mechenex

March Construction

Magee v Mason

Scriven Bros v Hindley

7 Key Areas

Factual categories

- Terms = formation
- Underlying assumption = ordinarly no formation issue
- Expression = possibility of rectification, sub category of mistake of terms

Application and scope of objective principle

- When isn't there a K?
- When will there be a K? (according to mistaken parties understanding)

The scheme of the CMA

- Arguments in support of view that Act cannot be a complete code (confirmed in *Mechenex* case, implicit in all the main cases)
    - And those against

Reasoning of majority judges in *Conlon v Ozolins*

- Why within (iii)?
- Technical difficulties and differences between McMullin and Woodhouse
    - And the minority of Somers
- Application in *Engineering plastics*

Reasoning in *Shotter* and *Paulger*

- Prominece of s 6(2)(a) - mistake in interpretation
- And holding that 6(2)(a) upholds the objective principle
    - But that is absurd

Why cases to the objective principle applies, do not fit within the legal categories of operative mistake in s 6(1)(a)

- Why parliament (Law reform committee) didn't intend that
    - They were thinking in traditional conceptions of mistake per common law
    - *Leighton v Parton*
- Section 7 was the real reform

Circumstances in which rectification is available

- Ordinarily that both parties are mistaken as to terms of the K, or meaning of the K: for common mistake
- Peculiar line of cases of unlateral mistake