Contractual Mistake

Intro to Mistake

The broad question that we ask in this moment is: In what circumstances can a party be relieved from his or her contractual obligation on the grounds of mistake?

Statutory Framework

Since the CCLA was come into being, this area of law is governed by Part 2, Subpart 2, of the CCLA. Those sections preserve/reproduce the Contractual Mistakes Act and are (largely) identical.

> In this, when we consider the CMA, we are actually talking about the CCLA (albeit with different provision numbers), but where the cases all relate to the CMA, we will just discuss that.

What is a mistake?

Starting Point: A false belief as to a matter of existing fact or law.

> There must be a "true" position as to a matter of existing fact or law, about which there is a false belief.
>
> A false belief about a future event is not a mistake in the eyes of the law.
>
> > e.g. *Entering into agreement to purchase land on the assumption that the council will grant consent to building, but they do not - there is no operative mistake. Instead, he took a risk as to the fact that the event would occur but it did not. In that, he should have protected himself with a condition in the contract saying that the agreement is conditional.*
> >
> > *It would be different if he entered into the contract believing that the land is zoned as industrial, and so he would not require consent. This is a mistake - as he had a belief about a question of current fact that was false - so the question is, when can he get relief from that?*

Categories and Types of Mistake

This ought to be the starting point. We should first of all question what exactly it is that the parties are (or are not) mistaken about, and only from there, should we turn to the legislation.

As part of this, we are just concerned with the first three categories:

a. Mistake as to a contractual term
b. Mistake in underlying assumption
c. Mistake in the expression of the contract.

We are not concerned with a mistake in performance.

Mistake as to Contractual Terms (Mistake in Understanding)

Where one or both parties are mistaken as to what the terms of the contract are.

This gives rise to relief either at common law (no contract formed) or ostensibly under the CMA (but consider *Paulger* and whether this can stand).

> - *Smith v Hughes* - where Hughes believes that Smith has made it one of the terms of the contract that the oats are old.
> - *Hartog v Colin & Shields* - where the seller of the hare skins believed that he was selling at a price per piece, when he had written down the price per pound on the contract that had actually been signed.
> - *Conlon v Ozonlins* - the seller believes that she is selling lots 1-3, not 1-4, but the document she signed (and the terms of the contract) were for lots 1-4.

This gives rise to an issue of formation in the sense that the parties misunderstand one another as to their intention, and so there is no subjective consensus ad idem.
Whether there is a contract must then be assessed according to the Objective Principle.

Even if one was mistaken as to what they were doing, the other party may be able to argue that their behaviour reasonably led them to believe that they were assenting to those terms, at which point, there would be a contract by the Objective Principle.

> *Leighton v Parton [1976] 1 NZLR 165 is an example of where the objective principle finds a contract despite this mistake as the contractual term.*
> *The defendant was the vendor who believed that they were selling Lot 4 of a subdivision, when in fact the contract stipulated Lot 5. The plaintiff was unaware of the vendor's mistake, and genuinely believed that the vendor was intending to sell Lot 5, according to the terms of the contract.*
>
> *The Court held that the behaviour of the defendant had led the purchaser to genuinely believe that there was a contract for the sale of Lot 5.*
> *As there were no special circumstances that would cause hardship, specific performance was ordered.*

Similarly, the situation is different if the party "knew" or "ought to have known" of the mistake (*Smith v Hughes*) is important. The party that knew or ought to have known could not have been reasonably led to believe that the other party intended to form a contract on those terms.

> *"Ought to have known"* - Scriven v Hindley [1913] 3 KB 564 - *the defendant bid for one lot of goods at an auction, believing that he was bidding for another lot of goods.*
>
> *Bid was accepted by the auctioneer, who simply thought the defendant had made a mistake as to the value of the goods. He was unaware that he did not intend to buy the goods he actually bid for. However, it was held that no contract had been formed as the auctioneer had engaged in conduct that contributed to the mistake in that the form of the catalogue, the way the goods had been laid out in the auction room, and the price meant that the auctioneer could not reasonably believe that he intended to buy the goods that he had bid on.*

There will also be no contract at common law if there is some "latent ambiguity" meaning that there is no consensus ad idem either objectively or subjectively; meaning that the offer or acceptance don't correspond by either standard, and then neither can persuade that there is a contract according to their terms. Neither party was reasonably led to believe that there was a contract according to the terms of the other party, nor ought they have been.

> *Raffles v Wichelhaus (1964) - the parties had agreed on the sale of cotton to be sent on a ship, Peerless, from Bombay. There happened to be two ships called Peerless in Bombay, with one sailing in October and the other December. The seller sued for the buyer's refusal to accept the cotton that arrived on the ship in December, while the buyer argued that it was meant to be on the October ship.*
> *Though no reasons were stated, the orthodox view is that there was no consensus ad idem as the facts indicated that the seller genuinely meant the December, the buyer genuinely meant the October, and there was no reason that they knew or ought to have known that there were different ships.*

Mistake in Underlying Assumptions

When forming that contract, one or more parties make a false assumption about the subject matter or some other related circumstance.

> **If it is shared by all parties, it is referred to as a "common mistake".**
> **If it is only made by one party, then it is a "unilateral mistake".**

This is where there is an agreement that is reached and is expressed correctly. The offer and acceptance coincide, and there is definitely a contract that is formed.

Basic rule of common law of contract, established by *Smith v Hughes* - if you enter into a contract under a unilateral mistaken assumption, you are bound even if the other party knows of that mistake.

> However, the CMA may change that basic rule, and so we must consider what relief it might offer.

Mistake in expression of terms

Where they reach an agreement, they intend to put in writing, but due to a mistake common to them both, the writing fails to express the agreement correctly.

> This can give rise to the equitable remedy of rectification.

It is important to bear in mind that the law around rectification is preserved by the CMA - there is an express saving of that defence. It is not necessary to satisfy the requirements contained in the Act as to an operative mistake – it stands to one side.

Rectification must be for a common mistake in the recording of the terms. It must be that the written terms fail to accurately record the parties' true intention. Instead, there must be a pre-existing common intention that is not accurately stated in the document.

There is a more difficult line of cases that shows rectification might be available for a known unilateral mistake, where that mistake is known to the other party, and they unconscientiously sought to take advantage of it. Though, we won't really work through that too much (brought up again at 25/9)

It is also important to make a distinction where there can be a fine line between the second and third categories: that is, 'rectifying the agreement' and 'rectifying a mistake in recording the agreement'.

> Mistake in Expression of Terms

Two parties reached an agreement on the sale of a black of land of 27.5 acres for a price of $100 an acre, so total $2750.
The written contract, however described as "one half of the particular block of land". The words were put in because the parties thought that the land contained only 55 acres, but it actually contained 83 acres. The purchaser wanted all 41.5 acres, but the vendor claimed rectification.

The thing that justified rectification was that this was NOT an agreement for "half of the land", under the mistaken assumption that it was a block of 55 acres. Instead, it WAS that there was an agreement for the sale of 27.5 acres specifically, where the words "half block" were just chosen as a way to express it that was, as it happens, not an accurate way of expressing it. In their minds, they thought they were buying and selling 27.5 acres, they simply had not expressed it that way.

This is not to say that there wouldn't have been any relief if the agreement had been for half the land, on the mistaken assumption of it being 55 acres, but just not on these grounds.

Mistake in Underlying Assumption

Pukallus v Cameron (1982) 43 ALR 243 - *the vendor owned a large area of land in Queensland. The legal description of this land was that it was split into Subdivision 1 and Subdivision 2, of Portion 1154 Parish of Cumcillenbar.*

The vendor intended to sell Subdivision 1, and the purchaser agreed to buy Subdivision 1, comprising more than 1900 acres. The exact boundary was not, however, known at the time the contract was entered into. Both, however, believed that it included an area of cultivated land. As it happens, the cultivated land was all in Subdivision 2. The purchaser, at this point, asked for rectification.

The Trial Judge granted rectification.

The High Court disagreed with the Trial Judge - they said that the overriding intention was always just to sell Subdivision 1, and there was simply a mistaken assumption that it included the cultivated area. There was no intention to extend the sale beyond Subdivision 1, it was never meant to include Subdivision 2 - it was Subdivision 1 with an understanding that part of the benefit of that would be the cultivated area. If you had asked them what the term of the contract was for, they would have said – "I am buying/selling Subdivision One" NOT *"I am buying a block of land that extends to the cultivated areas, which happens to be expressed as Subdivision One"*.

The mistake was not a mistake as to embodying their written intent - it was a mistake as to what was within the boundaries of the land sold. The difficulties for purchaser was that they were unable to demonstrate what particular land beyond that legally described was intended to be sold. There was no indication how far beyond the cultivated area was intended to be sold. There was no reference to various survey pegs or topographical features - this was not an agreement to sell all land between point A and point B, with the mistake that they thought this was readily expressed by the label subdivision 1 - they had agreed to sell subdivision 1 on the mistaken belief that it included the area.

Rectification for Known Unilateral Mistake

e.g. Of that line of cases

A written contract is signed which provides that A agrees to sell her car to B for $20 000. A is mistaken as to the terms of the contract. She actually intends to sell for $30 000. B is aware that A does not intend to sell for $20 000.

On the surface of those cases, A might be able to get rectification for this.

This feels a bit problematic. B might be unaware of what the main asking price was, or he might have done nothing to indicate to A that he intends to purchase for $30 000 and so she isn't really reasonably led to believe that he intended to do that.

In principle, we should only allow rectification where the document fails to record that actual intention (or objective intention). Usually, knowledge of the mistake would just be a basis to set aside the contract. 7

e.g. Eldamos Investments v Force Location (1995) - *there was an agreement for a sale and purchase of land. The parties exchanged several versions that made it clear the price was meant to be exclusive of GST. The typing error meant that the price did not require additional payment of GST.*

The purchaser noticed this mistake but chose not to draw it to the attention of the other party, because he was disgruntled about other things too.

The Judge held that this was a classic case involving rectification on the grounds of a unilateral mistake - it was clear at all points that this was meant to be exclusive of GST, but instead, they stood back and took advantage of it.

Mistake in Performance

A party to a contract confers a benefit onto another party in the mistaken belief that it was required by the terms of the contract.

We don't really deal with this.

The payment is due periodically, with regular sums of money, but by mistake, a party makes a payment that was not due, or had already been paid. In a broad sense, this involves a mistake relating to a contract - as the party is mistaken about their obligation under the contract.

This is, however, addressed by the law of restitution or "unjust enrichment".

The Act doesn't apply to these because the act is concerned with "mistaken contracts" - where a contract was entered into under the influence of a mistake.
A mistake in performance is not a question of whether a binding contract was entered into, it is about performance that was not due, and whether that action should be reversed as, otherwise, the party would be "unjustly enriched at their own expense".

Wider Statutory Scheme

Contractual Mistakes Act 1977 - Background

This was a very contentious statute that reformed the general doctrines of contract. It was part of a suite of five of them:

a. Minors' Contract Act 1969: regulates the enforceability of contracts entered into by those not yet at age of majority.
b. Illegal Contracts Act 1970: not studying, as quite a tricky area - but it is one where, at the time entered into, is contrary to a statute or involves the carrying out acts that are illegal, as part of performance. The Courts are given broad discretion to regulate.
c. Contractual Mistakes Act 1977
d. Contractual Remedies Act 1979 - already studied.
e. Contracts (Privity) Act 1982 - already studied.

They are all now repealed and enacted in identical terms in the CCLA.

It was widely criticised, starting from the debates in parliament onwards.

Richard Prebble called it a "mickey mouse statute" and said he would make it an election issue (not that anyone cared about it, or really believed him).
The criticism levied was largely that it gave too wide of a scope to questions of mistakes, which in turn, would bring too much uncertainty to the Law of Concrete and the sanctity of contract.

This was, in many instances, because of a misunderstanding of the Bill.

Section 4 - Purpose of the Act

1. Purpose is to mitigate the arbitrary effects of mistakes on contracts by conferring on Courts appropriate powers to grant relief in the circumstances mentioned in section 6.
2. These powers are in addition to and not in substitution for existing powers to grant relief in respect of matters other than mistakes and are not to be exercised in such a way as to prejudice the general security of contractual mistakes.

Background

It basically laid out that this wouldn't be exercised all the time or used to prejudice the security of contracts.
Interestingly, different views have also been expressed about what the "general security of contractual relationships" means, and so, what precisely it is intended to protect.

The Act originates in a 1976 Report from Contracts and Commercial Law Reform Committee: the Courts must strike a balance between holding to an inappropriate transaction that was not fully assented to, and on the other hand, protecting the interests of other parties with legitimate interests in seeing the contract performed.

Generally

It gives the Courts wide powers to grant relief in terms of contractual mistakes, where the operative parts of s 6 are satisfied.

Section 5 - Act to be a Code

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.
(2) Nothing in this Act shall affect—
(a) the doctrine of non est factum:
(b) the law relating to the rectification of contracts:

(c) the law relating to undue influence, fraud, breach of fiduciary duty, or misrepresentation, whether fraudulent or innocent:
(d) the provisions of the Illegal Contracts Act 1970 or of sections 74A and 74B of the Property Law Act 2007:
(e) the Frustrated Contracts Act 1944.
(3) 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.

Note:

A "code" is usually understood to be an "entire body of law" on the particular subject - however, the Act is only a partial code, governing the law granting relief to contracts on the grounds of mistake.

All of the common law in regards to the principles of contract formation, offer, and acceptance, which allocate the risk of a mistake, may be very relevant to determine whether there was ever an underlying contract and what the contents of that contract was.

The law of formation remains very relevant to whether there was a contract in the first instance that can be enforced.

Example

The vendor believed that they were selling Lot 4 of the subdivision, when in fact, they were selling Lot 5 (according to the contract). Let's vary the previous facts though and, instead, the purchaser knew of the mistake and knew that the seller intended to sell Lot 4, not Lot 5 that the contract stipulated.

The seller may seek relief under the CMA and may seek an order that the agreement may be varied by substituting Lot 4 for Lot 5.
However, if not all of the requirements in s 6 are satisfied, then the Court would decline the application.

Despite that, it does not then follow that the vendor has an enforceable contract that they are bound to. Instead, they could seek relief on alternative grounds of formation - according to the Objective Principle there would be no contract. If they know that it was a mistake, they cannot be reasonably led to believe that the other party intended to contract to sell Lot 5.

Note:

If the requirements of s 6 are satisfied and the Court varied the contract, the purchaser cannot then argue that there was never a contract because s 2(3) deems there to be a contract for the purposes of the Act.

That is, the defendant cannot then defeat the plaintiff's successful claim under the CMA by saying, as he knew of the others mistake, there was no contract.

If he defends the claim by saying "yes, there is a contract, and yes, it was in these particular terms", he cannot later turn around and say that actually there was never a contract in the outset.

Section 5(2) - Savings

This subsection provides that certain areas of Common Law and Equity survive the Act, and in their own right, provide certain grounds for relief, that are independent of the Act. These are often grounds that common arise in mistake situations and are left unaffected.

Doctrine of non est factum

Literally: "this is not my deed".

It is quite a limited doctrine in scope *(see Conlon v Ozalins)*, but it means that a deed or written contract may be void at common law because the party signing it was induced by the other party to believe that it was of a different kind or character, or had substantially different effects.

e.g.

Induced to sign a document on the understanding that it is a document of sale, but in fact, it is a deed of gift.

This is preserved for situations where there were very serious mistakes in provisions because, in the absence of this saving under s 5(2)(a), it would be abolished by s 5(1).

This only relates to mistakes as to the kind or character of the document in question. It does not relate to situations where there is just a mistake as to what the document contains.

e.g.
Conlon v Ozalins - an old lady signed a contract to sell four sections including her garden, despite only intending to sell three sections, excluding her garden. In this situation, non es factum didn't apply to void the contract as, what she intended to sign was a contract for the sale and purchase of land and what she did actually sign was a an agreement for sale and purchase of land - albeit a slightly different land.

Rectification

There is avenue for rectification both through the Act and outside of the act.
It is limited to mistakes in the expression of terms, however, it does have the advantage that not all requirements of s 6 need to be met to gain relief.

Undue influence, fraud, breach of fiduciary duty, or misrepresentation, whether fraudulent or innocent.

Just a comment on the misrepresentation part.
Cases involving relief on grounds of mistake also often raise a cause of action in misrepresentation. Or rather, misrepresentation is often the primary cause of action with mistake as a latter.

Note:
At times, relief under the CMA has been overlooked, especially in cases of sales of leaky homes where the purchaser has alleged that it was induced by a misrepresentation made on behalf of the vendor. Some of those failed and the purchaser was left with a useless home.
Counsel did not argue the alternative claim for relief under the CMA - they were situations where both parties assumed that there was not a leaky home, which was an issue.
Injustice was done as a result of this not being argued.

Frustrated Contracts Act 1944

This act modifies the common law where a contract was discharged by or through the application of the common law doctrine of frustration.
It saves the law around frustrated contracts.

On Frustrated Contracts:
A contract will be discharged under the doctrine of frustration if, after its formation, events occur which make its performance impossible or illegal, or which destroy the commercial purpose of the contract.

Those events must occur without the default of another party.
The contract must not have allocated the risk to one party or another.

If a pianist hires a concert hall for a series of recitals, but before the recitals commence, the concert hall is destroyed by a fire, the contract would be frustrated.
Neither party would be liable (as long as it was not their fault).
The contractual obligations would be discharged - neither can sue or be sued in relation.
The pianist, as a person effected, ma be able to recover all or most of a deposit from the owner.

By contrast, if for some unexplained reason the concert hall had already been destroyed before the contract had been entered into (for example, they were unaware of it being destroyed in that moment), then there would have been a mistake as to the facts at the time of contract formation. The parties could seek relief on the ground of common mistake.

Note: there have been lots of frustrated contracts as a result of COVID-19, because performance such as travel were impossible or illegal, but were required to perform the contracts.
It means that frustration has been in the news quite a lot.

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

This was included, largely out of an excess of caution.

It makes it clear that relief on the grounds of mistake is a discretionary remedy, where serious hardship would be caused to the defendant, the Court may consider that it is unjust to order something such as specific performance, they are allowed to do this.

At this point, the plaintiff would be left to ordinary, Common Law, remedies, rather than the equitable specific performance.

Section 2 - Interpretation

1) Mistake- a mistake, whether of fact or of law.

3) There is a contract for the purposes of this Act where a contract would have come into existence but for circumstances of the kind described in section 6(1)(a).

This was intended to prevent any technical arguments to the effect that a defendant was never in a contractual relationship to which the Act's provisions could be invoked because, as a matter of the mistake, the offer and acceptance did not correspond.

Section 7 - Nature of Relief

(1) Where by virtue of the provisions of section 6 the court has power to grant relief to a party to a contract, it may grant relief not only to that party but also to any person claiming through or under that party.
(2) The extent to which the party seeking relief, or the party through or under whom relief is sought, as the case may require, caused the mistake shall be one of the considerations to be taken into account by the court in deciding whether to grant relief under this section.
(3) The court shall have a discretion to make such order as it thinks just and in particular, but not in limitation, it may do 1 or more of the following things:
(a) declare the contract to be valid and subsisting in whole or in part or for any particular purpose:
(b) cancel the contract:
(c) grant relief by way of variation of the contract:
(d) grant relief by way of restitution or compensation.
(4) An application for relief under this section may be made by—
(a) any person to whom the court may grant that relief; or
(b) any other person where it is material for that person to know whether relief under this section will be granted.
(5) The court may by any order made under this section vest any property that was the subject of the contract, or the whole or part of the consideration for the contract, in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.
(6) Any order made under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the court thinks fit.

Sets out the powers of the Court to grant relief.
The discretion of the Court is virtually limitless - the only factor to take into account is that in s 7(2) - "extent to which the party seeking the relief caused the mistake, shall be taken into account".

The Court can exercise their discretion to make orders as it thinks "just" -

a. Declare the contract valid, or subsisting, in whole or in part
b. Cancel the contract
c. Vary the contract
d. Restitution or compensation

Section 6 – Operative Mistakes

Background

The parties must satisfy all of the requirements of s 6 to be granted relief under the CMA - it is the crux of it.

There are three main requirements before the Court can consider granting relief.

Provisions

Relief may be granted where mistake by one party is known to opposing party or is common or mutual

1. A court may in the course of any proceedings or on application made for the purpose grant relief under section 7 to any party to a contract—
    a. if in entering into that contract—
        i. that party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or 1 or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or
        ii. all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
        iii. that party and at least 1 other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
    b. the mistake or mistakes, as the case may be, resulted at the time of the contract—
        i. in a substantially unequal exchange of values; or
        ii. in the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
    c. where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.
2. For the purposes of an application for relief under section 7 in respect of any contract,—
    a. a mistake, in relation to that contract, does not include a mistake in its interpretation:
    b. the decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake.

Breakdown of Provisions

1. **It must fall within legal categories - Section 6(1)(a)**
   The mistake must be one that falls into one of these legal categories.

    i. Unilateral Mistake: where there is a unilateral mistake (made by one party), known to the other party.
    ii. Common Mistake: where both parties make the same mistake and are influenced by it.
    iii. Mutual Mistake: where each party is influenced by a different mistake about the same matter of fact or of law.

    Mutual Mistake
    Suppose there is a contract for the charter of a ship to carry cargo.

One party believes that the ship is at a particular port - Wellington, X - but the other party believes that the ship is at a different port - Auckland, Y.
In fact, the ship is in fact in Whanganui, Z.

Mutual Mistake - based on Leighton v Carter

Suppose the vendor intends to sell Lot 4, but the written agreement specifies Lot 5.
The purchaser intends to purchase Lot 6, but again, the written agreement specifies Lot 5.
Both are mistaken, however, the purchaser seeks to enforce the contract as written, as a sale and purchase for Lot 5.

There are two points:

1. *There is no contract at common law - the Objective Principle simply cannot find a contract. The purchaser cannot say "I intended a contract for Lot 5, and the vendor and I had an (objective) consensus ad idem". It was both not a consensus ad idem from their end, and simultaneously, they were not objectively led to believe by the other's behaviour that the other party intended to sell Lot 5 (when they thought Lot 6).*
2. *There might also be a jurisdiction to grant relief under this final "mutual mistake" limb, however - because both parties made different mistakes as to the same matter of fact (what land was actually being discussed under the written agreement).*

2. The mistakes resulted in a "substantial inequality of exchange" or "disproportion of benefit" - s 6(1)(b)

This means that the mistake must have had serious consequences for the party seeking relief. The mistake itself must have had "substantial effects".
It is not sufficient to show that the defendant simply made a better bargain.

The need to show the "substantial effects" has been a bit controversial and is highly problematic.

In terms of situations where the contract is based on a mistaken assumption as to the value or attribute of the subject matter, then it seems within the scope of what they need, and logically sound.

However, where the mistake was such that the parties were totally at cross purposes (such as a mutual mistake - where the complaint is that there is no agreement at all rather than just that one is not happy with the exchange), then it is more problematic, because it could well be that there was not a "substantial inequality of exchange" but both are lumped with the contract they don't really want.

3. Where the contract expressly or by implication makes a provision for the risk of the mistakes to the party seeking relief, then the relief cannot be granted.

If the mistake relates to a matter where risk is allocated to the plaintiff, the plaintiff cannot then claim relief.

Express allocation based on promise:

Where there is a sale of a painting for $100 000, where the seller promised that the painting was in fact an authentic work of Charles Goldie.
In fact, it was an excellent forgery, worth just $5 000.
If it had been genuine, then it would have been worth $150 000.

The buyer sues for $145 000 (the position he would have been in, had the promise been true).

Here, the seller CANNOT argue that "the claim cannot succeed as there was a common mistake" which means that there was no contract, and just grant a refund. This is because, when the seller made that promise, it expressly allocated the risk of it not being an accurate representation to them - that is, the risk of it being a fake painting.

Based on McRae v Commonwealth Disposals (1951) (HCA)

There was the sale of an oil tanker stranded on a reef in the South Pacific. The term says that "the tanker is sold as and where it lies, with all faults, and no warrantee is given as to condition or content".

Suppose:
Buyer believes that there is a substantial chance that it contains a large quantity of oil. However, there is actually no tanker there whatsoever and the reef which it is alleged to be stranded on does not exist.

The seller cannot argue that they are not liable for damage based on mistake as, on the construction adopted by the Courts, there was at least a promise that the tanker existed in the specific place ("as is where is").

Suppose instead:
The tanker does exist, but it is in very poor condition without any oil.

Here, there is no relief on the grounds of mistake because it was taken "without warrantee as to condition or content". In this, the risk of there being no oil or poor condition is allocated to the buyer (implicitly – at the point where the seller eschews it).

Based on a New Zealand case
Suppose the contract for a construction of earthworks required the contractor to satisfy themselves as to the nature of ground and subsoil conditions, as well as the nature and quantities of work necessary. This information would be used to negotiate costs and timelines.

However, shortly after work begins, the contractor strikes hard rock, meaning that the work takes months longer and increases cost substantially.

No relief is available to the contractor, as when the contractor was meant to satisfy themselves, it allocated such a risk to them.

Section 6(1)(c) only covers where the risk is allocated by a term of the contract. If the allocation of risk is not governed by a term of the contract, and instead by something else, then there will be grounds for relief, but it is likely that the Court will refuse to exercise their discretion and grant relief.

A agrees to sell a farm to B. It is later discovered that the land contains valuable mineral deposits, and so A seeks to avoid the contract.

It is likely that the Court could readily be persuaded that the contract was negotiated under a common mistake that the land was only suitable for farming.
In this, though, it would be likely that we would allocate the risk to the seller and simply say "you should have been aware, this is your loss".
However, that allocation is not done by a term of the contract and so grounds may be for relief

Though s 4, where the grounds of relief are not to be exercised in such a way as to prejudice the general contractual security - it is likely relief would be denied (according to David).

Section 6(2)(a) - For the purposes of relief, a mistake in relation to a contract does not include a mistake in relation to interpretation

Engineering Plastics - "Section 2(a) is intended to exclude relief where the words adopted by common consent are then give, by the normal process of the construction of contracts, a meaning different from what a party thought that they had. Thus, a 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. In reaching this conclusion, I have been assisted by the report of the Contract and Commercial Law Reform Committee that led to the passing of the Act".

This section was for the purpose of making it very clear that, if a party loses an interpretation dispute, they cannot then invoke the law of mistake.

The party cannot turn around and say "Given that is what the construction actually meant, I was mistaken as to the meaning in a fundamental way, and so should be entitled to relief under the Contractual Mistakes Act".

It is likely that it would not be covered anyway, because the plaintiff then seeking relief would have difficulty showing that it was a mistake at the time the contract were entered into, and that it was a mistake that influenced their decision to enter into the contract.

That is, the committee did not intend to exclude relief where the facts can demonstrate a misunderstanding at the time of the apparent contract.

> Where they are at cross purposes and there is an issue of contract formation or whether they were ad idem.
> These were still meant to be able to give relief.
> However, in some very poorly reasoned decisions recently, it has been held that s 6(2)(a) bars relief whenever one party misunderstands the plain meaning of the contract.

The meaning of s 6(2)(a) has been misinterpreted and bastardised by cases like *Paulger* that means its effect in law is significantly different than either the general meaning or intention of the contract.

Conlon v Ozolins -
Background

David's thoughts on factual findings:

- David is highly sceptical that this is a case where the objective principle does apply, given alternative findings of facts that were quite plausible.

- "Mr Conlon was reasonably led to believe that Mrs Ozolins intended to sell all four lots, and had no reason to suspect that this was not the case"

  Mr Conlon had been approaching Mrs Ozolins for some time, asking whether she was prepared to sell the "land at the back".
  Through those approaches, he understood that the "land at the back" meant Lots 1-3, that is, the land beyond the high fence that formed the contiguous block and was distinct from the garden.

  It was only after Mrs Ozolins indicated that she was prepared to sell that Mr Conlon actually found that the land was subdivided into four lots, with the garden being included in that, with two access ways. This technical knowledge only arose after there had been an indication of that.

  It was the first time he realised he could potentially buy all four lots.

  When he realised this, he didn't make any further inquiries. A reasonable person in his position would have. They would have had doubts that Mrs Ozolins actually intended to sell her garden, especially given he was familiar with her and her lifestyle, as the milkman. It would have been highly surprising (if not totally implausible) that she would intend to sell her garden.

David's thoughts on the conclusions and alternative pathways to the CMA:

a. Based on that factual finding that David feels was open (and preferable), the case could be resolved without any requirement for discussion of the Contractual Mistakes Act.
   It would have meant that the judges would not find that there was a prima facie binding contract, as he would not have been *reasonably* led to believe that Mrs Ozolins intended to sell.

   Simply put, he ought to have known that she did not intend to, or at least, ought to have been hesitant and unsure, and therefore, would not have been reasonably led to believe to any degree of certainty that she intended to sell.

b. Starting from the premise that finding there is a contract is an entirely different matter to whether specific performance ought to be ordered, we can separate those decisions out.

   Even if, notwithstanding the above, there was a contract found according to the objective principle, it does not then follow that there must be specific performance ordered.

   Specific performance is a discretionary remedy and it can be declined where there would be hardship to either party.

   While Greig J (HC) felt that it was Mrs Ozolins' fault, and so there would be no unjust hardship to her, at the point where the CA disagreed with that finding of fault, it would be open for them to disagree with him on the order of specific performance.

   The relevant hardship to Mr Conlon was that he had bought the house he intended to move onto one of the lots, but he had also done that before he had a contract with Mrs Ozolins at all. He took that risk on the understanding that the contract mightn't go ahead. It is not really a hardship as a result of the contract.

   However, her hardship is losing her garden and all of her source of livelihood.

   If there was a breach found, it could well be that damages are the appropriate order. This is not to say that she wouldn't need to sell some of the land to pay for that, but it would be more just.

This still requires no discussion of the CMA.

To the extent that Somers J agrees that specific performance is the appropriate remedy, David disagrees with his otherwise better judgment.

Is this a just result?

The decision from the CA provoked controversy about whether it was just or not.

On Certainty
There was a school of thought that felt a binding contract was a binding contract, and as such, especially in light of the provisions of the Act and the Objective Principle, a contract had been formed.
Though it might be a bit harsh to deprive her of her garden, that was not sufficient to outweigh the importance of sanctity.

This felt that the CA's decision was "tantamount to abolishing the objective principle" because you could no longer rely on a contract as written. All it would take would be for one party to allege that they had never actually intended that, and as such, the other party would have been mistaken as to the others state of mind, and therefore, this case would apply.

On Justness
The other view as that this was simply just.

It was not Mrs Ozolins' fault that there had been a misunderstanding, and it could be said that Mr Conlon really ought to have done better due diligence.

AS such, to deprive her of her source of livelihood would be wholly unfair.

On the Solicitor
It could be said that the "real culprit" was the solicitor who should have checked more thoroughly the land that Mrs Ozolins was intending to sell, or at least, should have been more careful and thorough about ensuring that the correct land was in fact being sold when the agreement was being formalised.

It could be a case of "professional negligence".

Comparing McMullin and Woodhouse P

	Mr Conlon's Mistake	*Mrs Ozolins' Mistake*
McMullin J	She intended to sell lots 1-4. ***Her intent.***	She was selling lots 1-3. ***The contractual obligations/contents.***
Woodhouse P	She intended to sell lots 1-4. ***Her intent.***	He intended to buy lots 1-3. ***His intent.***

Neither stand up to scrutiny, but Woodhouse P's is better. It at least has the pretence of being a mistake about the same thing.

Several Points based on this:

1. It is important to remember that *Conlon* was a mistake as to the contractual terms, not the underlying assumptions. It meant that this involved the issues of formation.
   It would be quite a different case if there had been a mistake as to some underlying assumption like an attribute of the land, or something like this - but had agreed on the price etc.

2. There was undoubtedly a contract at common law, on the findings that Conlon knew or ought to have known that Mrs Ozolins was mistaken.

3. Just because there was a contract, doesn't mean that he would definitely have gotten specific performance.
   Specific performance is a discretionary remedy and there is a strong case would have been that it would not be just to award it.

4. The Court of Appeals in *Conlon* was right to reject Greig J's reasoning around *Smith v Hughes* (That Mrs Ozolins couldn't try to show mistake because she was estopped from doing so.)
   Regardless of what the common law said, if you can bring yourself within the legal categories of mistake, the Court will have jurisdiction to grant relief.

5. It is a different matter where those legal categories do apply, but there was a binding contract as to *Smith v Hughes*
   That is, in mistakes such as this - it really can't apply.

6. The decision of *Conlon* was met with concern by the legal profession.
   Regardless of the merits of the decision as a question of justice, it did exactly what s 4 said it ought not do and undermined the general security of contracts.
   On the surface, it allows the defendant to plead their own mistake that was unknown to the other side, and get relief.
   This is because there will be few, if any, circumstances where one party was mistaken as to the terms of a clearly outlined contract (clear for whatever reason) and the other party thought that the mistake party was assenting to them, that do not fall within the Act.

7. In the background is s 6(2)(a) - a mistake in interpretation of the contract is not a mistake for the purposes of the Act.
   In the view of some, Mrs Ozolins made a mistake in interpretation.

Conlon v Ozolins -
High Court

Facts (as found by the High Court):

- Mrs Ozolins was an elderly widow, who had some difficulty expressing herself in the English language.
- She owned a large area of land, which was contained in two certificates of title:
    - One title pertained the section on which her house was built.
    - The other title pertained to four allotments at the back of her house, and that ran in an L-shape around the house section.

  Of those four allotments, Lot 4 shared a common boundary was the house and had been developed as a garden that served as Mrs Ozolins' source of food and livelihood. It was a visual continuation of the section on which the house was situated.
  The other three allotments (Lot 1-3) were separated from the house and the garden by a large fence, were undeveloped, and appeared separate.

- Mr Conlon owned a property on a street the other side of the allotments and was aware of the empty lots (Lots 1-3).

- He had previously unsuccessfully approached Mrs Ozolins in respect to purchasing that vacant land. He approached her again, and this time, she said that she did want to sell and referred him to her solicitor.

- He then went to the solicitor where he found that the sections were not just the vacant sections (Lots 1-3), but included Lot 4 (the garden). This was the first time that he had become aware of that, but he continued with the process of this purchase in relation to all four allotments.

- In the interim, he became aware of the ability of purchasing another house and did so with the intention of moving that house onto Lot 4, so it there was still access to the house, but he could more easily develop the vacant lot due to the access that this would provide. He undertook that sale before the sale with Mrs Ozolins was finalised.

- Mrs Ozolins and Mr Conlon entered into an agreement for the sale of all four lots (Lots 1-4, including the garden) for the price of $42 000.
- When it came to actually effecting the transfer of that land, she realised that she had contracted to sell all of the land including her garden, and she refused to do so.

<u>This was where Mr Conlon sued</u>.

- At any given moment, Mrs Ozolins only ever intended to sell "the land at the back" - Lots 1-3. She thought that she was retaining her garden and had never meant to sell it.

- Mr Conlon was entirely unaware of her intention to sell just the vacant lots "at the back" - that is Lots 1-3 - and thought she intended to sell all of the lots.
  "He was entirely unaware of that limitation on the defendant's intention and that having regard to his knowledge of the land and his discussions with the solicitor (in particular giving him the copy of the certificate of title) he was completely innocent of any mistake or any knowledge or idea that the defendant herself was mistaken".

- Evidence was led as to several different possible valuations of the land.
    - It was generally accepted that Lot 1-3 would be worth $33 000.
    - Lot 4 would be worth $16 000.
    - A total value of $49 000.

High Court Reasoning - Greig J

There were four grounds of defence advanced:

1. Non est factum
2. No contract was formed due to mutual mistake -
   There was no binding, corresponding offer and acceptance as there was no contract formed under the objective principle, as the parties were at cross purposes.
3. Relief under the Contractual Mistakes Act 1977
   Section 6(1)(a)(iii) applied - there were different mistakes as to the same matter of fact.
4. There ought not be specific performance -
   The Court can and should exercise their discretion to not award specific performance.

Non Est Factum

(494 || 1-11)

This defence failed.

The High Court drew on *Gallie v Lee* [1971] AC 1004 for the principles. Based on that, the defence had to fail because:

- It could not be said "that the document signed by the defendant 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".

  That is, she intended to sign a document for the sale and purchase of land, and a document of that nature was precisely what she signed.

  The difference was not in the fundamental character of the document, it was of the specific details.

- In any event, the defendant was negligent in signing the document, and as such, this precluded her from the plea of non est factum.

  The Court of Appeal rejected this second ground. They said that there had been no fault on Mrs Ozolins' part.

Mutual Mistake - No Contract at Common Law

(494 || 12 - onwards)

The defence failed.

The High Court drew on *Smith v Hughes* and Blackburn's objective principle as set out.

> Including: *"if, whatever a man's real intention may be, he conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms"*.

On these facts, applying the objective test:

> "I have no doubt that the defendant is bound to the terms of the document which she signed".
>
> Because:
> - Conlon was fully innocent as to any knowledge of the existence of the mistake.
> - Based on all of the interactions Mr Conlon had had with Mrs Ozolins' solicitor, "everything tended towards the conclusion that the defendant meant to sell all four lots".
> - Whatever her intention, her conduct and that of her solicitor made it inevitable that all four Lots were to be sold.

Contractual Mistakes Act - Section 6

(494 || 12 - onwards)

Based on *McCullough v McGrath*

Drawing on *McCullough v McGrath*, Mahon J decided that, although the act created a code, it did not include the principle of *Smith v Hughes* within that code.

Since that principle only operated on the question that a mistake in fact existed, which is not a part of the code.

As such, in agreeing with Mahon J, Greig J is saying that Mrs Ozolins is "estopped" from claiming the she made a mistake, because of the objective principle.

The Court is basically saying that the effect of *Smith v Hughes* is that Mrs Ozolins is estopped from saying she was mistaken, and in the eyes of the law, she cannot claim to have made a mistake at all.

They say that the CMA does not alter that effect of *Smith v Hughes* because there is nothing said in the Act about proving the existence of a mistake.

On this reasoning, given that she cannot allege that she made a mistake, there is no way for the CMA to apply.

So, it is saying that the Objective Principle can only be used to figure out whether a mistake actually existed. That is - it is used to determine what the "true state of affairs" is, which is then compared to the beliefs of each party to see whether they were mistaken?

Step to one side - what was actually said in *McCullough*?

Mahon J said "I find that the purchaser was estopped, as from the time he signed the contract of sale, from asserting that he was influenced in his decision to enter into the contract by a mistake. Even if the purchaser was in fact mistaken, his mistake is not available to him because he is estopped from relying on it".

He said that the CMA has "codified the grounds of mistake, but has not touched on the question as to the manner of proving the existence of the mistake, or the circumstances from which the existence of a mistake may be inferred either factually or as a matter of law".

The "estoppel by representation" is not excluded as there was nothing operating on the question of whether a mistake existed (only the relief that may be granted) meaning that where was nothing excluding the objective principle operating in s 5.

David feels that both Mahon and Greg JJ misunderstood the effect of the objective principle.
If the *Smith v Hughes* principle did in fact mean that she was estopped from saying she was mistaken, then it would be unaffected by the Act. However, that wasn't what the principle meant in the first instance.

The objective principle is not an example of estoppel - it simple says that Mrs Ozolins would be bound despite her mistake, because of the objective appearance.
It is not saying that she cannot claim she made a mistake - only that even if she managed to prove that claim, there is not going to be any relief available.

The judgments wrongly conflated the idea of "estoppel by representation" with the "objective principle". They are similar, but they are <u>not</u> the same.

Estoppel operates in favour of the person who acts on a representation made by another, to his or her detriment.
The Objective principle does not require another party to have suffered detriment by acting on the appearance of agreement created by the other's conduct.

The Objective Principle from *Smith v Hughes,* instead, governs the formation of contracts. It means that there can be a contract, even in the presence of a mistake, and that mistake.
To the extent that anything is estopped, the party:

- is NOT estopped from saying "I made a mistake" and adducing evidence to that extent.

- IS ESTOPPED from saying "there is no contract as a result of my mistake".

It simply means that the mistake made is legally inoperative for the purposes of contract formation, as you are bound by what you led the other party reasonably to believe.

It becomes impossible to follow the reasons given by Mahon J and followed in *Conlon* based on s 5 not excluding the objective principle.

It does not mean that their actual conclusion is wrong - the conclusion that there are no grounds to grant relief where the objective principle is satisfied does still hold, but their reasoning is absolutely wrong.

There is no relief because, where the objective principle is satisfied, none of the categories for operative mistake will apply.

CMA more generally

"Even if that conclusion (based on *McCullough v McGrath*) is wrong, then this is not a case where [Greig J] would grant relief under the Act to the defendant."

Greig J starts with "it can be assumed that there was a mistake in terms of s 6(1)(a)(iii) of the Act.

Note: this is a HUGE assumption. Even though the parties agreed that this was the case, it does not follow that they were actually correct.
Somers J in the CA correctly points out that there was no argument about this point, which was "unfortunate" as it is the most critical point of the case.

Greig J goes on to say, even though there is a mistake as required, there must be a "substantial inequality or benefit or obligation substantially disproportionate to the consideration" under s 6(1)(b).

He holds that this requirement is not met.

Looking at as a whole, he is simply not convinced that there was a substantial inequality as required.

David - The reasoning within this is really not great.
There is no reason that it could not have been a substantial inequality, having regard to the difference in value (which was fudged a bit) and the different positions of each part with respect to what they were actually gaining or losing from the bargain.

Even if there had been substantial inequality, he finally goes on to say that "it was not just to grant relief under s 7, particularly in view of the defendant's carelessness".

Note: the Court of Appeals rejected this on the grounds that they did not hold she was negligent at all.

In the exercise of that discretion, they needed to take into account the "general security of contractual relationships" and provide "justice" - based on the *Smith v Hughes* principle.

Withholding Specific Performance

(495 || 29 - onwards)

Draws on *Slee v Warke* -

- Whether an order of specific performance is made must be decided on the circumstances of each case.
- To withhold, there really needs to be some hardship caused to the defendant.

They added that, in considering hardship, the Court must consider the hardship that would be to the plaintiff if specific performance was withheld.

Given that he had entered into the other transaction based on this reliance on his ability to purchase all of the lots, there would be quite a significant hardship to him.

David - Remember that the transaction was made before he had actually secured a contract with the defendant, so it wasn't that the hardship would have stemmed from specific performance not being offered. He had not substantially altered his position in reliance of the already formed contract.

Instead, he had taken the risk on himself.

Greig J also noted that ordering specific performance would also cause hardship to Ozolins, but commented that it was unclear just how extreme that hardship would be.

David - Feels that the comment on the extent of the hardship, based on her not being able to support herself in that way for much longer, was patronising and unjustified.

Conlon v Ozolins -
Court of Appeal

David's Assessment of the Judgments

- Woodhouse P and McMullin J were absolutely incorrect in their assessment of the mistakes and whether the mistake in this judgment fits within the s 6(1)(a)(iii) of the CMA. He said any scrutiny of their judgment shows the reasoning doesn't hold up.
- Somers J, as it relates to the CMA, made a powerful dissent - he correctly pointed out the issues with that reasoning in ways that were not responded to.

Woodhouse P

Sets out facts.
One key difference to the HC:

- The situation "could not be attributed to any carelessness or fault on her part" and the parties began their negotiations at cross purposes.

Initial Defences are not made out:
Finds that her mistake does not allow her to make out:

- Non est factum
- That there was no binding contract based on mutual mistake.

In this, he agrees with McMullin J and acknowledges that the written agreement is a bar to these.
In particular, the document was perfectly unambiguous and reflects no mistake by anybody.

"The matter does not end there. The critical question in this case is whether the facts bring it within the ambit of the [Contractual Mistakes Act]".

Issue: "Does the Court have jurisdiction in terms of s 6(1)(a) in a factual situation such as the one outlined to examine the question of discretionary relief?"

> **David** - the way that this is framed, as a general question of jurisdiction, flies in the face of what is said later in *Paulger v Butland Industries* relating to this being a decision on its own facts. It is clearly a question of law, interpreting the Act.
>
> That is, "Does the Court have jurisdiction under the Act in a situation where the party seeking relief is prima facie bound by the objective principle?"
>
> The High Court:
> "Apparently both sides accepted that on the facts, the Court would have discretion to grant relief. The attention was then focussed on s 6(1)(b)."
>
> Rejects Estoppel:
>
> > Acknowledges that the HC made their decision based on *McCullough v McGrath* that Mrs Ozolins would be estopped from invoking the provisions of the CMA.
> > "As to that last point I would simply remark that I agree with McMullin J that the McCullough case was wrongly decided."

(498 || 39)
His reasoning for bringing the mistake within s 6(1)(a)(iii):

> "Earlier in this judgment I have said that throughout the period of negotiation and at the time of the execution, the parties were at cross purposes (the focus on the period leading up to the signing of the contract). There was no correspondence of verbal offer and acceptance whatever may be the common law situation in terms of the written agreement.
>
> There can be no doubt that each then mistakenly believed that the written document correctly represented a mutual intention which did not exist.

Mr Conlon's Mistake	He though that her intention was to sell Lots 1-4. "He mistakenly thought she was selling all of the land at the rear f her house, including the garden". He "believed that from the outset the vendor had been willing to complete a sale of all four lots".
Mrs Ozolin's Mistake	She thought that his intention was to buy Lots 1-3. "She mistakenly thought he was buying merely the land beyond the high fence". "She believed he had limited his purchase to the land north of the fence"

"It is an analysis which shows that their respective decisions to proceed and finally to enter into the written contract were influenced by their mistaken belief on the one side that was different to the mistake on the other, and each as about the size of the land to be bought and sold".

The issues in this reasoning:

- There is a semantic issue about articulating the mistake as being about "the boundaries of the land to be bought and sold" and then later "the size of the land to be bought and sold".
    - The parties were never mistaken as to the boundaries of the land.
      Neither were they mistaken about the size of each section.

    - The parties, instead, were mistaken as to "what land" was actually being bought and sold. It was not about the physical properties of the land.

- The judge is functionally saying that "each party is mistaken as to the other's intention".
    - Her mistake was that she thought his intention was to purchase Lots 1-3; His mistake was that he thought her intention was to sell Lots 1-4.

    - Note: this means that there are further semantic issues with saying the mistake that they were operating under to enter into the contract was "the size of the land to be bought and sold". It was not a mistake as to the contents of the contract, it was a mistake as to the others intention.

      This is clarified when he says "once carried into the written contract" as it is necessarily the intentions that exist before the written contract that are carried into it.

- This framing does not stand up to scrutiny. In particular, it cannot be said that they made mistakes as to the same matter of fact.

    - The "size of the land to be bought and sold" is itself dependent on the existence of a common intention that sets the size of the land.

      Note: this cannot be a mistake as to the matter of fact.
      A matter of fact must be capable of verification, but here, without an actual common intention, there was no true position.

      It might be that we say, based on the objective principle, there was actually a "true position" as it was governed by the objective principle.
      If we operate under that premise, then it cannot be said that Mr Conlon made a mistake. He understood the "size of the land" as he was reasonably led to believe, and that would have been the true position.

      It might be that we articulate this as being "a mistake as to one another's intention"
      In this instance, there are two distinct facts.

One fact would be her actual state of mind.
The other fact would be his actual state of mind.

It cannot be said that those are the same fact. Even if they were both mistaken, they is no common fact.

What would fall within s 6(1)(a)(iii)?

If Mr Conlon intended to purchase Lots 2 and 3. If Mrs Ozolins intended to sell Lots 1 and 2. If the written contract (and objective contract) was a contract for Lots 1-3. They would both be mistaken as to what the contract provided for.

- In any sense, this falls a long way short from being "a classical example" of what was intended to fall within Category (iii).

What was the actual intention of Parliament?

- Based on the shoulder note, it is more likely that Parliament had in mind the three traditional concepts of mistake that had been developed at common law:
  a. Known unilateral mistake
  b. Common mistake
  c. Mutual mistake

- It was drafted against the backdrop of the Objective Principle that is sued to govern what the actual terms of the contract are in the sense that we have always understood it to.

  Where the principle applies, Conlon was simply not mistaken. As far as the law is concerned he was correct as to the terms.

McMullin J

Non est factum

"The essence of the plea of non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different" - Lord Reid, *Gallie v Lee*

The plea will be allowed "only when the element of consent to it is totally lacking, that is, more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. This could also mean "basically" or "radically" or "fundamentally" - Lord Wilberforce, *Gallie v Lee*.

In addition, "carelessness is fatal to the plea of non est factum".

There might be room where the other party induced that misunderstanding, also.

Here - "Greig J was right in holding that the plea of non est factum was not made out".

Mutual Mistake

"A principle of the common law on mistake is that it was not what the parties had in their minds that was important, but what reasonable third parties would infer from their words and conduct" - *Freeman v Cooke* and *Smith v Hughes*.

Here, based on the objective principle, Mr Conlon was reasonably led to believe that Mrs Ozolins intended to sell all four lots.

This meant that Mrs Ozolins a contract would have formed on those terms, and Mrs Ozolins would be bound to fulfil it - notwithstanding her own mistaken belief.

Therefore, would uphold that this ground failed, and would not resist specific performance.

Contractual Mistakes Act

McMullin J begins by setting out the backdrop of the Act as where the Contracts and Commercial Law Reform Committee substantially adopted Professor Sutton's paper.

David - this gets the judgment off to a terrible start.

The CCL Reform Committee barely adopted it at all - "it is surprising that Sutton's work is treated as a reliable guide to the legislators intention".

First: the article that McMullin cites was NOT the research paper presented to the committee but instead, was an article based on it. The article, unlike the research paper, contained examination of the alternatives if legislative reform were contemplated and discussed those various alternatives to the Act, but did not actually make suggestions in it.

Second: the Law Reform Committee didn't actually accept Professor Sutton's recommendations or ideas.

- He emphasised the importance of giving the Courts guidance on how they should exercise those "wide remedial grounds". He thought that instructions such as "JUST" or "FAIR" were unhelpful, and instead, there should be efforts made to state the objectives of judicial intervention "as clearly and exhaustively as possible".

  The Committee did not act on that advice and instead granted basically unlimited powers without any worthwhile guidance at all about how those powers ought to be exercised.

- He also emphasised that there should be reforms in relation to redefining operative mistake.
  - He felt that Courts should have power to review any contract with any fundamental mistake made by either party.
  - What constitutes a fundamental mistake ought to be determined by the Court, after taking into account a set of listed factors. He proposed no specific requirements or pre-requisites before a claim could be made, and the question of jurisdiction should be at the discretion of the Court.

  The Committee did not accept that - they defined the requirements before the Court could grant relief quite closely. They decided that the requirements should employ the orthodox distinctions between unilateral, common, and mutual mistake. They essentially codified the common law in s 6(1)(a).

  Sutton was scathing of this, and said they "hardly provide a rational basis for statutory reform of law of mistake".

- The main reform of the Contractual Mistakes Act was s 7 - giving very broad powers to grant relief according to the justice of the case.
  - The primary objective was to replace the drastic "all or nothing" approach of the common law where contracts were either wholly void or wholly valid, and instead allow courts to have more discretion with a more flexible range of solutions.

  - The further conclusion we can draw as the Law Reform Committee's intent is that they would have clearly had in mind the common law conceptions of what precisely is a mistake and who is a mistaken party.

  According to that, Mrs Ozolins would clearly have been a mistaken party but Mr Conlon would clearly not have been. Therefore, relief should only have been allowed had Mr Conlon known.

This is just a fundamental flaw that undermines our confidence in him from the very outset of his judgment.

He then goes on to set our s 5 and the *McCullough v McGrath* ruling that *Freeman v Coke* and *Smith v Hughes* were authority for "estoppel by representation". Further, even though the Act codified parts of the law, given that it did not touch on the question of proving the existence of a mistake, that estoppel by representation stands.

Mahon J considered s 5 of the Act - where the CMA was purported to be a "code".
He said that the CMA codified the circumstances where relief can be given for a mistake, but said nothing about the process of actually proving a mistake, or the circumstances in which the existence of a mistake in any form can be inferred - either factually or as a matter of law.

It held that the common law principle of "estoppel by representation" that *Smith v Hughes* stood for was not excluded under s 5.

However, McMullin J goes on to hold that Mahon J's view should not be followed - to follow it would be to hold that *Smith v Hughes* operates and would defeat the Act, which would severely restrict the application of the Act and deprive the statute of much of its force.

He reasons that s 5 holds that *Smith v Hughes* should be overridden - as with other common law and equity - as s 5 governs the situations where relief is granted on the grounds of mistake.

David - this is a really bad mistake, that makes assumptions that he should not and cannot make. The assumptions go to the heart of the question to be decided - are the categories of operative mistake in s 6(1)(a) such that, where they apply, *Smith v Hughes* will also apply. He made the assumption that it is possible for *Smith v Hughes* to apply at the same time as the operative categories of s 6(1)(a).

Note: none of the categories are ones where the objective principle would apply - walk through each of them carefully and demonstrate why.

Operative Mistake
(505 || 1-12) :

Says that he ought not go back to common law to decide the grounds of operative mistake, and instead should stay with the statutory elements.
To return to the common law to decide would be to return to something "deliberately discarded because they were unsatisfactory".

Instead, mistake is now defined as "a mistake, whether of fact or law".

David -

- It is simply not true to say that the Committee disregarded the common law classification. They essentially codified them in s 6.
- It is totally irrelevant to point to the definition with s 2 - that just doesn't help us.

He says that it comes within s 6(1)(a)(iii) - because...

Mr Conlon's Mistake	"The respondent's [mistake] was in thinking that the appellant intended to sell Lots 1-4".
Mrs Ozonlin's Mistake	"The appellants mistake was in thinking that she was selling only Lots 1-3".

David -

- This reasoning is entirely unsatisfactory.
- The judge is COMPLETELY wrong.
    - Yes, there are different mistakes.
    - However - they are about totally different matters of fact.

Mr Conlon's mistake was about Mrs Ozolins' intention.

Mrs Ozolins' mistake was about the contents of the contract and what she was actually selling under it.

- At least Woodhouse P had the decency to fudge the issue a little bit.

Inequality of Values
(505 || 13-onwards)
"On the facts, I am unable to see why s 6(1)(b) does not apply to this case".

He disagrees with Greig J and holds that there *was* a substantial inequality of exchange.

He works through the valuation evidence and holds that there was a substantial inequality of exchange as the contract price is around $54 000 and the asking price of $58 000 was significantly more than the actual value sold for $42 000.

Based on that, the evidence resulted in a "windfall" for the non-mistaken party, or in terms of the Act, a substantially unequal exchange of values.

Relief

There was no sufficient evidence to decide what the relief should be, and so the case is remitted back to the HC with instructions that the CMA should be applied.

Somers J - Dissenting

Somers J disagreed with the others - he argued that the requirements from s 6(1)(a) were not satisfied.

He was of the view that Mr Conlon had made no mistake at all, and even if he had made a mistake, it would not have been about the same matter of fact.

David - feels that this is a far more persuasive as a set of reasoning.

On Facts
- Broadly accepts the factual finding from the High Court.
- Emphasises that the mistake was brought about at no fault of Mr Conlon, and instead was the fault of Mrs Ozolins.

Despite this, she is not particularly blameworthy:
"The vendor had ample opportunity to discuss the matter with solicitors and advisors. It is not difficult to see how hew error arose, but it is impossible to attribute any responsibility to him".

Background to CMA
- Acknowledges the state of the law as it was referred to in Professor Sutton's report to the CCL Reform Committee.

David - Somers J makes the same mistake as McMullin J, that the paper of Professor Sutton's was the same as the report, and that it was accepted by the Committee.

(507 || 3-onwards)

This part is rather difficult to understand - some of it is accurate, but not all of it is.
In essence, Somers J agreed with the majority that there was a binding contract in this case and that Mrs Ozalins was bound to perform it unless relief could be granted under the CMA.

- Section 2(3) provides that there is a contract for the purposes of the Act "where a contract would have come into existence but for the circumstances described in s 6(1)(a). This intended to exclude arguments that by reason of a mistake, there is no contract that ss 6 and 7 could apply to".

  Correct.

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

  David - this may have been Parliament's assumption, but it is not actually quite correct.

  Section 6(1)(a) did not provide where a "mistake ought to have been known to the party against whom relief is sought".

  This means that the Act will hold that there is a contract where there is ACTUALLY a known unilateral mistake.
  It does not include situations where the party OUGHT to have known that there was a mistake - there is a line of cases that holds constructive knowledge is not sufficient and constructive knowledge does not fall within s 6(1)(a).

  This means that there is no relief under s 6(1)(a) where the unilateral mistake OUGHT to have been known, but in fact was not known.

  This means that s 2(3) holds:
  If there is no contract, but
  There is only no contract because of an operative mistake, then
  There will be a contract for the purposes of granting relief.

- But the effect of s 6(1)(a) and s 2(3) holding that there will be contracts in certain circumstances that the common law would hold there were no contracts, the normal principles of contract existence apply.

  One of those normal common law doctrines is that a party will not be allowed, by reason of his own conduct, deny his apparent assent to a contract or a term therefor. That is, if his contract indicated his assent, then he cannot deny this.

  He is estopped from denying the objective phenomenon of the agreement. This is what *Smith v Hughes* stood for, as far as Somers J is concerned

  "It is not easy to envisage a case from 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 given".

  This basically means that it is not easy to imagine a world where a party is bound by the objective principle - that is, the other party was reasonably led to believe that there was a contract formed on those grounds - and that same party could demonstrate that the other had made a mistake about something. By virtue of the objective principle, the others' belief does need to be reasonable.

  I think that he is saying: "Where a plaintiff was objectively led to believe something, but another party was mistaken, the plaintiff cannot say "look, there was a mistake that stopped this forming" we need relief under the Act."

  This is quite a clear indication that he will not find Conlon made a mistake.

However, there is no need to resort to the "court of negotiation" in the present case, for it resulted in a written contract in which the agreement is apparent from the words used.

That is saying, there is no need to refer to the parties' conduct through negotiations to establish that there are terms of the contract. It is clearly articulated in the written documents.
Note: he had never indicated in express terms that he may refer to the conduct from that moment.

Because of that clarity - that is the unambiguous words of the contract - there is an a clear set of contractual terms. It means that she will get no relief. Her intent is apparent from the contract.
Even if she was mistaken, it was unknown to the purchaser.
Her error really was unilateral.

However, "that circumstance can provide no guide to the construction of an act intended to reform the law". A new start is called for.

> Where the Act was meant to reform the law, and we are deciding a case on whether the objective principle operates, that previous common law will not provide great guidance.
>
> **David -** at least we can see that he agrees that the normal principles on whether a contract is to be determined and how that is to be determined apply. If there is no binding contract for a particular reason, such as the awareness of a mistake, the Act will not turn it into one.
>
> I think that he is saying: "Where a plaintiff was objectively led to believe something, but another party was mistaken, the plaintiff cannot say "look, there was a mistake that stopped this forming" we need relief under the Act."

However, that there is no binding contract formed at common law does not necessarily mean that there can be no reliance on the Act.

Considering CMA Provisions

"In the instance case, the vendor relies on subpara (iii). It is unfortunate that virtually no argument was directed to this, the most critical point in the case".

Simply, there cannot be a situation that falls under s 6(1)(a)(iii).

There is no mistake as to the same fact:

Mrs Ozolins' Mistake	She mistakenly thought that the land described in the contract did not include the rear section of her home. Her mistake concerned the subject matter of the contract - either she mistook the legal description in the agreement, or she mistakenly sold four lots instead of three - but it was about the subject matter of the contract.
Mr Conlon's Mistake	Either: "he mistakenly supposed the vendor intended what was put in the written contract; he mistakenly supposed her intending to be selling four lots". Either way - he was mistaken as to her state of mind.

His mistake was to her state of mind. Her mistake was as to the subject matter of the contract.

They may have been mistakes as to facts, but it is NOT the same matter of fact.

> **David -** in this paragraph, he effectively demolishes McMullin's arguments. It is about as clear as it comes that his reasoning cannot stand.

Mr Conlon was not mistaken at all.

"It cannot be said, in ordinary meaning, that the purchaser made any mistake at all."
> The purchaser intended to purchase 4 lots, and according to the agreement and the objective terms, that is precisely what the contract held.

Based on this lack of mistake on Mr Conlon's part, there will only be relief if Mr Conlon knew of Mrs Ozolins' mistake, to bring it within s 6(1)(a)(i).

Issues with the Majority

If the purchaser's postulated mistake - namely, a mistake as to the vendors intention (that she intended to sell him all four lots) - is sufficient to bring the case within subpara (iii), there will be few if any cases of mistaken intent not falling within the Act". As often as one party is mistaken

as to intent, the other party will be taken to be relevantly differently mistaken about that, as required by (iii)."

That is to say - anywhere that the objective belief of one party did not align with their actual belief, then there would be a mistake as to the contractual terms, and a corresponding mistake as to that party's intent, and therefore, there would be a mistake falling within s 6(1)(a)(iii).

Somers J added that, if this were the case, the knowledge requirement/general provision within s 6(1)(a)(i) would be superfluous.

David - this is not correct.

Unscrupulous Dealings

It overlooks the possibility that the plaintiff knew of the defendant's mistake. Where Conlon was unscrupulous, knew of the mistake, and so was not mistaken as the defendant's intention - but the objective principle (aside from that knowledge) - there would be no mutual mistake, and therefore, no ability to gain relief.

In a case such as this, admittedly, there would be an argument based on the Objective Principle that no binding contract existed - in knowing of the mistake, they were not reasonably led to believe as to the terms - however, the Act intended that there would be a wider range of remedies available to them that would be precluded.

Mistake as to Assumptions

It also overlooks the fact that (i) includes cases where there was a known mistake as to the underlying assumption or a factual matter that was not a term of the contract. They are aware of terms and have an agreement, but one or both have a false assumption.

Those known unilateral mistakes as to facts that bring a substantial inequality, without the risk being allocated, are intended to be covered - however, it would not be were there no (i) OR if there were no knowledge requirement, then every mistake as to fact would be an actionable mistake.

Consider what would happen in a situation where each party intended to sell and buy Lots 1-3 at the stated price. However, both parties assumed that the subdivision had been formally approved by the Council, but it had not been.
Or, alternatively, that it could support a set number of dwellings but it actually couldn't, but there was a limitation.
In those cases of mistaken assumptions (about the benefits), the majority's interpretation would be of no assistance to the party seeking relief.

The party seeking relief would usually be obliged to establish that the mistaken assumption was known to or shared by the other party.

The majority interpretation would not render the (i) superfluous, because in a situation such as this, the party not mistaken would not be influenced by a mistake to enter into the contract. They would (or wouldn't) be aware of the other's mistake as to the benefit, but that would not have induced them to enter, and it would not be a mistake that would lead to no contract at common law.

Possible Point: It might be that Somers J had another point in mind - simply that if they intended all cases where there is no true consensus ad idem to fall within category three, then parliament would not have provided for all three categories.

It would not be required, as you would not need to plead "known unilateral mistake" when this sort of "not known" unilateral mistake would also be actionable. He is making the point that, if this had been the case, then just two categories would be enacted:

a. Unilateral mistake, known or otherwise.
b. Common mistake.

Engineering Plastics v Mercer

This shows the effect of *Conlon v Ozolins* on the development of the law, and in the subsequent cases.
This case was decided three months after *Conlon* and was decided based on the reasoning of the majority, but was also very clearly wrong.

Facts

- There was a sale of goods between two business concerns.
- The Plaintiff: Engineering Plastics
  The Seller, in this context, was a manufacturer and wholesaler of plastic parts.
- The Defendant: Mercer
  The Buyer, in this context, was a light engineering company.
- The sale concerned the purchase of "O-Rings" - small circular rubber things that are used as seals in goods for hydraulic or pneumatic machines, or taps.
  The defendant asked the plaintiff if he could supply 4000 of a special type of o-ring. The plaintiff could not manufacture them, so got in touch with his American supplier, who sent its price.

  The Plaintiff then converted that price to New Zealand Dollars, calculated its own charge and added that mark-up (which was, admittedly, quite large), and passed on that final price.

- The final price was quoted by the plaintiff at: $644.96 per hundred + $1072.50 for "tooling charge"
- It was expressed as $644.96/c + the tool charge.
- The defendant took this to mean that there was a total $1717.46, at about 43c per ring.
  - They were acting through an agent - Mr Wood - and were delighted by this price as previously, they had been paying just over 50c per ring.

  They accepted this price.

  - **David -** Quite how Mr Wood thought that they would get a part so cheaply from overseas is totally unknown. If the tooling charge was left to one side, it would functionally mean that the plaintiffs were supplying the rings for 16 c per ring, getting them from American.

  Did the defendant know they were from overseas? David thinks so. It means that they really should have been put on their guard. Where it felt too good to be true, it probably was.

  However, human nature is to look a gift horse in the mouth but not inquire any further, even where they really ought to.

- There was eventually a meeting where the defendants found out that the price was not $1700, but instead was $27000. It was only then that he realised what the price actually was.
  "On or about 27th January, Mr Heaney (plaintiff's sales rep) called on Mr Wood (defendant's industrial sales engineer) asking if it would be possible to make prompt payment given the large amount. Mr Wood was a bit surprised - he didn't think $1700 was a large order. The comments to that effect were followed by "a minute or two of stunned silence".

  In that moment, each realised the other had a very different idea as to the price.

  This meant the rings were being supplied at a price of $6.67 per ring - there was no way he would want to pay this, given he could only expect to sell them on to his own customers for 90c.

  The moment he realised, Mr Wood immediately said that they could not accept the price. He rang the plaintiffs officers saying that the price sought was totally different from what they thought would be paid.

- The plaintiffs issued proceedings.

Material Facts
Though different contexts, they are functionally the same.

- The parties were entering into an agreement for sale, but were at cross purposes in relation to the price of goods.
- The Court found that a binding contract had been formed, but according to the seller's understanding, as the objective principle had been satisfied. That is, the seller had been reasonably led to believe that the buyer had intended/agreed to buy the goods at the price the seller intended.

The buyer sought relief under the CMA and invoked *Conlon v Ozolins*.

Tomkins J was bound to follow *Conlon* and so granted relief. That is, though a prima facie contract had been formed, the Court ordered a variation of that contract to a different price.

The Defence advanced Four Defences

1. There was a contract, but according to their understanding of it
   (An affirmative/offensive defence) - the communications resulted in a contract where the plaintiff was bound to supply the 4000 o-rings for a price of 43c each, as this was what the defendants had been reasonably led to believe the contract would be.

2. There was no binding contract
   The different understandings of the letter quoting the price meant that there was no meeting of the minds/consensus ad idem, and therefore, there was no binding contract that could be enforced.

3. Even if a contract was formed, it was a sale by sample.
   The defendant had sent a few samples of their previous o-rings to the manufacturer, and the defendant argued that they were no in accordance/did not correspond with them.
   This allowed them to reject the goods.

4. There was a mistake that they could seek relief for under the CMA.

Contract, according to the defendant's understanding
(77 || 12-onwards).

The defendant was arguing that the true meaning of the contract was such that the plaintiffs were obliged to deliver the o-rings at the lower price.

They contended that, written with a "/c" did not clearly demonstrate that it was a "price per hundred" and that ought to be ignored.

However, on the evidence before the Court, the judge concluded that there as a custom in the trade of o-rings (and other smaller plastic parts) to use "/c" as a representation of "per hundred" (the solidus used to mean "per").

This was the reasonable meaning that was borne out by those symbols and that contract.

As such, the High Court rejected that those symbols ought to be ignored, or read as "cents" or anything else.

The true meaning of the contract was quoting that price "per hundred".

David -
It is well established at common law to show that, by virtue of a particular custom in a locality or usage in trade, words are used in a sense different from that meaning which they would ordinarily bear.

There are several quite famous examples, for example: the bakers' dozen of 13; a "thousand" would actually mean 1200 in the local rabbit trade; "white" could be interpreted as "black" because in trade usage a part of that fabric meant that it was dark; and "a week" has been interpreted in some instances to mean "8 days".

No consensus ad idem means no binding contract formed
(78 || 25-onwards).

Once the ordinary meaning, based on trade usage, was found - this was inevitably going to be rejected.

Based on the objective principle in *Smith v Hughes*, it is settled law that "an apparent meeting of the minds will suffice for a binding contract".

The "acceptance was in unequivocal terms". It accurately set out the description of the rings to be supplied in a manner precisely conforming to the offer. It made no reference to the price.

Given that there was an ordinary meaning in trade, "by accepting the plaintiffs' offer in the manner that it did, the defendant conducted itself that the plaintiff could reasonable believe that it was assenting to the terms contained in the letter. Thus the defendant is bound as if it had intended to agree to the plaintiffs terms".

David - this is a really good demonstration of the objective principle at play. It is well used and completely accurate.

On s 2(3) Contractual Mistakes Act -

"Even if, contrary to the view, the consequence resulted in their being no enforceable contract, that would for the reasons examines later, would be as a result of the mistake. There would then be a contract for the purposes of the CMA 1977."

That is, if there were no contract, it would be as a result of a mistake falling into s 6(1)(a)(iii) and therefore, there would actually be a contract.

This means that relief would be able to be granted in accordance with s 7.

David - this passage can be misunderstood. There is nothing technically wrong, but the positioning of this comment in relation to broader questions of common law formation may lead it to be misunderstood.

He feels that this passage could be understood as saying that if the Court had decided that it was not "just" or "fair" to give relief under s 7, even though they would have been able to because the jurisdiction of operative mistake is found, then the defendant would also be precluded from saying "maybe we cannot get relief under the Act, but in any sense there was no contract from the outset".

However, importantly, that understanding would be wrong. If the Court decided that there WAS JURISDICTION, but also decided that it was NOT JUST to give relief to the defendant, then the defendant could still turn around and claim that no contract had formed.
Finding of jurisdiction but no relief under the Act would not preclude that.

The function of s 2(3) - it would operate in circumstances where the plaintiff is seeking relief under the Act (that involves recognising the existence of the contract), but there is no enforceable contract as it stands.

It would be no defence to that claim to say that there was no contract formed because of the mistake.

In situations such as this, the Act trumps the common law formation doctrines.

Sale by Sample?

It was simply not shown that this was or had intended to be a sale by sample.

To be a sale by sample, a sample must have been produced, and it must be a term of the contract that showed the goods were intended to be supplied in accordance to the sample (even an implied term).
The defendants simply could not show that this was the case.

"I do not consider that this, without more, is sufficient to indicate an intention by the parties that the contract was to be a sale by sample rather than a sale by description" therefore, there is no implied terms.

The evidence in question that failed was that in the offer to supply, there was a detailed and accurate description of the rings being supplied, with specific details as required. When it was being accepted with a purchase order, similarly detailed and precise descriptions were included.

If it had been a sale by sample, then it would have referred to a sample, or something like that. It would have accepted by reference to the sample, not the description.

There are more issues with this:

- To the extent that they were different (and close analysis showed that they were in fact quite different), the rings supplied were actually of a superior quality.

There is not authority, and really no reason, that the rings being different to the sample shown (even had it actually been a sale by sample with the implied term of correspondence) that those rings being different, but better quality, would give rise to the right to cancel the contract or reject them.

- Even to the extent that they are different in some regards, the plaintiff's rings have performed as satisfactorily as the ones that would have come with the sample. There is no readily apparent difference.

- Section 37 of the Sale of Goods Act 1908 also bars the defendant from rejecting the goods.

This holds that when, after receiving the goods, the buyer is deemed to have accepted the goods when he does an act inconsistent with the ownership of the seller.
In this instance, a good number of the rings had been onsold by the defendants to their customers. This constituted an "act of acceptance inconsistent with the ownership of the seller" and as such, bars the rejection of the goods.

Contractual Mistakes Act

There were four issues here:

a. Did the mistake or mistakes fall within a relevant category of the CMA?
b. If yes, was there a substantial inequality of exchange?
c. Was the application for relief barred for s 6(2)(a) - mistake in interpretation is not a mistake for purposes of the Act? (first time s 6(2)(a) raised its ugly head)
d. Assuming jurisdiction, was it just to grant relief?

Did the mistakes fall within a relevant category of the Contractual Mistakes Act?

Tompkins J sets out the facts and the law from *Conlon v Ozolins* and the passages from Woodhouse P, that outlined the analysis about the respective mistakes as to intention.

(82 || 32-onwards)

"This analysis [of Woodhouse P] 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. The plaintiff mistakenly thought the defendant was intending to agree to buy the 4000 rings for $644.96 per hundred, plus the tooling charge. The defendant mistakenly thought that the plaintiff 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 contract.

That is:

Matter of Fact: "The price each thought was payable under the contract"
(or - "the mistaken belief as to the intention of each party as to the price")
Plaintiff's Mistake: "Defendant was intending to agree at the higher price"
Defendant's Mistake: "Plaintiff was intending to sell at the lower price"

David -
This analysis suffers for exactly the same weakness as the reasoning in *Conlon* - they are different mistakes about different matters of fact.
Simply put, the plaintiff's intention is one matter of fact - only the defendant is mistaken about it, as the plaintiff themselves are clearly not mistaken about their own intention.
The defendant's intention is a different matter of fact - the same reasoning is true in reverse.

Note: there is an issue with that last line saying that the mistake about "the price each thought was payable under the contract". If it were a mistake as to one matter of fact, it would not be about "the price *each thought* was payable" - it would just be "the price payable".

It is important to note that the mistake is to their intention and not as to the price. If it were a mistake as to the price, then Engineering Plastics would not be mistaken at all.

Despite that, and fudging that it is an operative mistake as held in *Conlon v Ozolins* and as they are bound to do, this part is satisfied.

Was there a substantial disproportion of benefit?

The price of the rings would be $6.67.
Compare this to the maximum price defendant could charge of 90c a ring.

This means the benefit (the ability to sell them) was substantially disproportionate to the consideration being conferred (the price they would need to pay themselves).

David - this is actually quite well reasoned.

Was this a mistake in interpretation, and thus, barred from being operative by s 6(2)(a)?

Judge discussed s 6(2)(a) - about mistakes as to interpretation being excluded.

(83 | 18) - "It could be considered that the defendant, in attaching the meaning that it did, made a mistake in interpretation."
That is to say, a mistake in interpretation did occur.

However - that was not the mistake that gave rise to relief. The mistake that did give rise to relief was, as stated, a mistaken belief as to the intention of the other party when entering into the contract, not a mistake as to the meaning of a term of the contract.

The judge goes on: "this accords with the purpose of s 6(2)(a). It is intended to exclude relief where words adopted are given, by the normal process of construction of contracts, a meaning different from that which a party thought they had".

David - this is just not correct. It is not what the committee intended and is not aligned with the general doctrine of contract.

The intention of the Law Reform Committee was to bar claims when a party to an interpretation dispute loses. That is, where they make a claim about the correct interpretation and they lose that claim, it means that they were mistaken as to the meaning of that term (interpretation). Section 6(2)(a) was intended to bar them from turning around and saying "given that I lost, I must have made a mistake as to the meaning, and therefore, should be entitled to relief under the Act".

It was not intended to bar relief where the parties were genuinely at cross purposes.

It is only intended to exclude where the words where adopted by common consent, but the two parties had different understandings of what was meant by the phrase adopted by common consent, and the Court has then chosen which of those is the actual meaning.

Whether it was actually necessary is unclear - it is more of an "excess of caution" - as they would struggle to show that the mistaken belief induced entry, or that the other was aware of it.

The judge finds that this was not a mistaken in interpretation.
It may appear to be on the surface, but it is not really.

Is it just to grant relief? If so, what relief should be granted?
(83 || 37-onwards)

The judge then turned to s 7 and granting relief.

(83 | 47) - the judge did not feel that there was reason to cancel the contract.
The rings have a use to the defendant, they do not to the plaintiff, and so, contract ought to be declared valid and subsisting.

Therefore, the question turns to variation.
They decide that the contract should be varied, with a price reduced due to a set of factors as outlined.

David - most of the factors considered have no bearing whatsoever on the case, or no bearing on the exercise of this discretion.

It is eventually varied by providing a price of $4 per ring.
This was no arithmetical process of this, "it was a somewhat arbitrary assessment intended to take into account the various and conflicting factors to which I have referred"
Therefore, a total price of $16 300 was substituted in.

David's Overall Comments:

- Remember that the plaintiff had paid its American suppliers $15 900, and though it later got a 10% discount trying to remedy this, by the time it added expenses, overheads, and the legal costs, it would have been substantially out of pocket.

  Where the discretion under the Act was meant to be exercised such that it would "not prejudice the security of financial relationships" - the way that it was could leave the plaintiff justifiably feeling like this was a bit of a "sick joke".

- David has no doubt that the result is not one that would have been intended by the Law Reform Committee.
  The Law Reform Committee would not have regarded Engineering Plastics as mistaken at all. There was objective a contract for the same price that they intended to pay.

- This demonstrates the state of the law after *Conlon v Ozolins*. There were a number of cases where *Conlon* was followed and led to decisions like this.

  Despite that, in more recent times, judges and lawyers have seen the weaknesses of the reasoning and have sought ways around the decision.

  At times, though, the s 6(2)(a) has been used as an avenue around it, which has relied on reasoning even more spurious than that in *Conlon* itself and has made the law even messier.

Clarifying s 6(1)(a)(iii)

Given that it has been bastardised by the Courts, it is worth asking - what precisely was the intended scope of s 6(1)(a)(iii)?

Somers J correctly pointed on in *Conlon v Ozolins* that the issues of the reasoning within the cases we have looked at simply do not work, and cannot bring the sort of situations here within the framework of the s 6(1)(a)(iii).

What was intended to be covered?

- Where parties had made false and different assumptions about the subject matter of the contract.

  These are situations such as where:
  A buyer believes a painting is by Goldie
  A seller believes a painting is by Lindaeur.
  In fact, the painting was by another artist entirely.

  It is clear that the mistake is about the same fact: who painted the painting.
  It is clear from their different beliefs, they did not make the same mistake.
  Given that they were both wrong, they made different mistakes.

  Note: there is a true position, and neither of them were correct about it.

- Cross Purposes Cases, where the Objective Principle in *Smith v Hughes* does not apply.

  That is:

  Vendor owns four neighbouring lots of land.
  Vendor signs a written agreement for the sale of Lot 1 to Purchaser.

  Vendor was confused about the numbering, actually intends to sell Lot 3, but simply thought it was called Lot 1, and thinks that the contract provides for the sale of Lot 3.
  Purchaser is also confused about the numbering of the lots actually intends to buy Lot 2, and thinks that this is what the written contract provides for.

  Purchaser later insists on the performance of the agreement as written, purchasing Lot 1, because it turns out to be more valuable than Lot 2 which they initially intended to purchase.

  <u>This is a different mistake as to the same matter of fact:</u>
  The matter of fact is the land that the written contract provides for.

  <u>Not governed by the objective principle -</u> there is no contract because there was never any actual or objective consensus as to that each party would reasonably have been led to believe that they were buying or selling the Lot that is in fact Lot 1.

  You cannot be reasonably be led to believe that you have a contract for something if you intend to have a contract for something else, and genuinely believe that the contract is for something else. If they subjectively believed that there was a contract for Lot 2, they cannot have been reasonably led to believe that they had a contract for Lot 1, because they never actually believed it.

  <u>This would be a category (iii) case.</u>

  The reason you would try and bring this case within the CMA is that you have different remedies available to you.

- Intended - in cases of latent or patent ambiguity in terms of the agreement that meant there was never a consensus.

However, note that the wording of the Act doesn't really work to bring these within it.

Latent Ambiguity - *Raffles v Wichelhaus* (the ship, Peerless).

In this, there was no consensus reached as each intended the different *Peerless* and neither knew, nor had any reason to know, that the other intended different ships.

It was a latent ambiguity as it was not clear, there was no consensus, and both were equally reasonable.

Patent Ambiguity - *Montgomery v Continental Bags*

The plaintiffs intended to buy 23 McElvie Street.
The defendants intended by buy 29 McElvie Street.

The apparent written contract referred to the property as No 23, but gave the legal description of No 29 (which was Lot 23).

There was no actual or apparent consensus, and both interpretations were conceivably the best one, or rather, neither was the best.

The Law Reform Committee explicitly referred to *Raffles*, as a case where there were different beliefs as to the same subject.

However: there would be issues with this.

Section 6(1)(a)(iii) - it is unclear that it would fit within here.
It cannot be a mistake as to terms, because the objective principle means no contract has formed, so there were no terms for the parties to be mistaken about, or if it were that there was a true position, one of them would not be mistaken.

You would need to invoke Conlon-esque reasoning anyway.
It is that each was mistaken as to the ship that the other intended the cotton to be carried on.

Section 6(1)(b) - it is unclear what the inequality was.
To the extent that there was an inequality, it was also not really because of the mistakes, and it was also just not really unequal.

In *Montgomery* it was never suggested that there was a difference in market value.
In *Raffles* at the time the contract was entered into, the cotton would be the same. It was only in the subsequent points (in relation to performance) that the inequality arose. Or otherwise, the time of delivery was not something that affected the value - it was the surrounding circumstances unrelated the to the contract.

What scope is there for arguments that "no contract was formed between parties in the first place?"

Act creator's argued -
Whenever a party seeks to escape from what appears to be a contract, which due to a mistake they did not actually intend to make, then they can only do so pursuant to the provisions of the CMA.

The "code" provisions.

They say in a case like *Conlon v Ozolins,* Mrs Ozolins can only escape the contract by bringing it under the Act, unless one of the savings applies.

Rectification or Non Est Factum.

They say, if the Act doesn't apply, or if the Court declines to grant relief in the exercise of its discretion, the mistaken party is bound. There is no room for common law contract formation arguments in these circumstances.

They argue that the Code means all other common law does not apply.

David's Arguments -

- If those arguments are correct then the Act is completely unworkable.

- Considering *Conlon* -
  - Most would accept (now, at least) that it was not intended to fall within any of the categories of s 6, and therefore, there would be no jurisdiction to grant relief under the Act.

    Therefore, regardless of the merits of the claim and whether the act *ought* to apply, it was wrongly decided in the sense that the Act doesn't actually apply.

- The fact that she needed relief from a contract at all is predicated on the assumption that a contract formed at common law.

  If no other common law rules operate, why did she need relief at all?
  Even those advocating for the Act as a code must acknowledge that the common law rules of formation operate, because that is how the contract formed that she needed relief from.

  Merely signing the agreement does not mean that the contract has been formed. There is only a contract if the parties intend to be bound by the stated terms, and only Mr Conlon intended to be bound.
  However, the common law objective principle operates to also bind Mrs Ozolins.

  The issue with calling the Act a Code is that the objective principle would have been displaced - which it clearly was not. It would have left a legal vacuum.
  If someone was denied relief, then we must then revert back to the common law principles of formation.

- To have the Act operating as a Code that does away with common law doctrines would lead to super unjust results where some other elements of the Act happen to not be met.

  Consider a situation where Section 6 DOES apply -
  Mr Conlon knew that Mrs Ozolins' didn't intend to sell her garden, so Category 1 would readily apply.

  There would be no contract at common law.

  Code Advocates - would argue "there is a contract for the purposes of the Act under s 2(3)"
  This means that s 2(3) would displace the common law that would mean no contract formed to be enforceable.

  They would say that the CMA is, therefore, the only avenue for relief.

  David is concerned by this:
  In this situation, let's say that *Mr Conlon offered a fair price and there was no substantial inequality of exchange.*

  If the Act provides the only avenue for relief, then Mrs Ozolins is bound to a contract that she didn't intend to make and that Mr Conlon knew she didn't intend to make.

  While it is true that Mr Conlon would likely not get specific performance, we could still recover damages.

  This would be a totally unacceptable result.

  Instead of this, it should be that where the CMA does not provide relief, the alternative ground of finding no contract at common law.

  The reason that she might seek an order under CMA is that she might argue to make Mr Conlon purchase the three sections at the agreed upon price, with an order varying the contract.

If she tried to argue that, then Mr Conlon would NOT be able to argue that there was never any contract, because of the operation of s 3(2).

Note: in a situation like this, Mrs Ozolins could also have something like rectification available to her.

This would require looking at all of the circumstances to shape the understanding and decide whether or not a contract had formed according to the objective principle and what the terms of that contract was.

It would then require an examination of the written expression of the terms and decide whether the written terms accurately represented the objective agreement that had been formed.
It may be the case that, with that known unilateral mistake, Mr Conlon's behaviour would have led Mrs Ozolins reasonably to believe that the agreement was for the sale of the three properties at the back, at which point, the Court could make that the contract.

<u>The Court would be putting the written document in line with what the true bargain was.</u>

There is a line of cases that would allow this rectification for a known unilateral mistake.

- The Authorities support the idea that the common law doctrines of formation still exist

  The common law principle remain relevant for determining whether there was a prima facie binding contract that must be escaped from.

  This is true for all of the cases we have looked at.

  The first step of all of the reasoning is whether there was a contract under the objective principle.

- On the drafting of this, we can see it was intended to remain.

  It is unlikely that s 5 was intended to read with "all common law out the window when one of the categories of satisfied". Instead, it was meant to be read as "we put the common law to one side when the categories of operative mistake are met, and we are providing a remedy under this Act".

  The idea of "relief" is meant to replace the common law grounds on which you could grant relief. It is about releasing the party from the consequences of their ordinary common law position.

  Section 2(3) was not intended to turn "non-contracts into contracts" - instead, it was just intended to prevent technical arguments tat there was no contract if a party lost a dispute on whether there was an actionable mistake.

- **So when can what be invoked?**
  - Mrs Ozolins could claim the defence of "no contract" in an alternative ground to invoking the Act.
  - Equally, when Mrs Ozolins is aiming to invoke the Act (perhaps it was for a remedy that Conlon didn't want), Mr Conlon cannot make a defence on the grounds of "no contract" because the reason there would not be a contract is, due to their analysis, because of an operative mistake.
  - The reason that she can invoke the defence of no contract but he cannot is because when he is seeking specific performance of the Act and he is doing so on common law grounds, and s 2(3) on precludes the "no contract" defence for the purposes of relief under the Act.

- **Finally: Not All Situations where there is no contract at common law are covered by the Act**

  There is a line of cases that makes it very clear that the "known" unilateral mistake does not include operative knowledge where he "ought to have known".

  This means any situations where the other party "ought to have known" of a mistake as to terms - that is, a lack of consensus ad idem - don't fall within s 6(1)(a)(i).

  Instead, those situations are left to the point of "there is no contract formed at common law".

Shotter v Westpac

Facts

- Mr Shotter (the plaintiff) signed a guarantee of indebtedness for a company, Unicorn Holdings.
- Westpac (the defendant) took this guarantee and loaned money to Unicorn Holdings.

- The money loaned was a sum of $100 000 for which Mr Shotter and Unicorn Holdings were going to use in a joint venture.
- The guarantee was for "all liabilities of Unicorn Holdings" up to a total of $100 000 + interest.

- Mr Shotter believed that the guarantee related only to that sum that was loaned of $100 000.
- In fact, based on the wording of the documents signed and the understanding/intention of the bank, the guarantee plainly provided that the whole indebtedness of the company was secured by the guarantee, up to that $100 000.
  Unicorn Holdings had significant other indebtedness to Westpac, and that guarantee extended to all of them, to a sum of $100 000 + interest.

- The bank did not know of this mistake.

- Over time, about $75 000 of that initial $100 000 had been paid off.

- Unicorn Holdings defaulted on their payments and, despite the $75 000 having been paid off the loan he thought he was guaranteeing, Westpac claimed the full $100 000 from Mr Shotter, given that he had guaranteed up to that much of the other debts.

Reasoning

Arguments on s 6(1)(a)(ii) - Common Mistake

The first line or argument relied on s 6(2)(a)(ii) - that Mr Shotter and Westpac had made the same mistake.

The fact in question: the extent of the guarantee.
The mistake: that the guarantee related only to the Makerau Valley advance.

- It was accepted that Mr Shotter was mistaken as to the extent of the guarantee.

- However, it was rejected that Westpac was mistaken about the extent of the guarantee.
  It was argued that, as the person who had administered the loan had no knowledge of more extensive indebtedness, it cannot be said that the bank knew of it.

  However, the person in question "had nothing to do with the guarantee".

  "So far as the bank's knowledge is concerned, I think I must assume that some responsible officer of the bank was aware of the liabilities, actual and contingent, of Unicorn Holdings Ltd to the bank."
  The assessment is not confined to "only the knowledge of the person or persons who dealt with Mr Shotter".

  Moreover, any responsible bank officer would have known that the standard bank guarantee form goes far beyond the particular sum outstanding at the time it is given.

Therefore, Westpac was not mistaken and the claim under s 6(1)(a)(ii) fails.

Pleading on s 6(1)(a)(i) - Known, Unilateral Mistake

Mr Shotter pleaded that his mistake was known to the bank so as to bring it within s 6(1)(a)(i).

Arguments were - rightly - not advanced on that point.

Arguments on s 6(1)(a)(iii) - Mutual Mistake
This drew on the authority in *Conlon v Ozolins* and *Engineering Plastics v Mercer*.

David - the facts in *Shotter* were not materially different.

Despite the wildly different circumstances, the parties seeking relief were seeking relief from a contract that they were bound to under the objective principle.

Mr Conlon had been reasonably led to believe he had a contract for the purchase of four sections.
Engineering Plastics had a reasonable belief that they had a contract for supply of those rings at a higher price.
Westpac reasonably and plainly believed that they had a guarantee of indebtedness/indebtedness liability up to the limit of $100 000.

In all cases, the other party was bound in that contract despite their own misunderstanding. They were seeking relief.

If they had "applied" *Conlon*, then Mr Shotter would have won. There was clearly a disproportion of benefit.

However, it was held that this mistake (apparently, unlike the others) was a mistake in interpretation for the purposes of s 6(2)(a).

Had he not been constrained by authority

General Doubts (329 || 21)
Mr Shotter had articulated the matter of fact as "the extent of the indebtedness under the guarantee and Mr Shotter's understanding of it".

"If not constrained by authority, I would find great difficulty in bringing the circumstances within s 6(1)(a)(iii). I do not think it is permissible to bring together 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".

Basically, you cannot just list two facts in a sentence and call it a single fact about which the parties are mistaken.

Instead:

- "It can be assumed that the bank was mistaken as to Mr Shotter's understanding of the extent of the indebtedness".
- "However, while Mr Shotter 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."

"Were it not for authority, I would not have perceived any one fact about which the parties made different mistakes".

Considering Woodhouse P's analysis (330 || 40):
When he goes on to consider Richmond P's reasoning, he says "such an analysis gives me some difficult for the reasons so cogently, if I may say so, expressed by Somers J in his dissenting judgment".

Considering Engineering Plastics (332 || 19):

"With respect, that appears to me to be a itsake about different facts, not the same fact- the differing intentions pf two parties I should ahve thought were two facts not one, but I am not concerned with that and Tompkins J puts the matter a little differently in his earlier analysis".

As it is, the reasoning that he does undertake:

Discussing *Conlon v Ozolins* - he works through Woodhouse P's reasoning and McMullin's reasoning.

He takes Woodhouse P's reasoning, and replaces key words:

> "[The Bank] mistakenly thought [Mr Shotter] was consciously [guaranteeing all liabilities of Unicorn Holdings Ltd; Mr Shotter] mistakenly thought he was [guaranteeing merely one of those liabilities]. To put the matter in another way, each has a mistaken impression about the [extent of the guarantee being given and taken. The bank] believed that from the outset [Mr Shotter] had been willing to complete a [guarantee of all liabilities]: about that [it] was mistaken. On the other hand, [Mr Shotter] believed that [the bank] had limited [its required guarantee to only one liability: about that [he] was mistaken. It is an analysis which shows that their respective decisions to proceed and finally to enter into the written contract were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other and also that each mistake was about the [extent of the guarantee to be given].

Note, in this, the replacements should be:

Mr Shotter - Mrs Ozolins
Mr Shotters' mistake about the guarantee the bank was taking/intended - Mrs Ozolins' mistake about Mr Conlon's intention.
Westpac - Mr Conlon
Westpac's mistake about Mr Shotter's intention - Mr Conlon's mistake about Mrs Ozolins' intention.

David - this is a poorly reasoned analysis (or it is a really good ploy on Wylie J's part).

The highlighted part was not properly substituted. In the original passage, this read as "buying merely the land beyond the high fence" - that is, Mr Conlon's state of mind.

As such, it should have been replaced with "the guarantee the bank was taking/intended", not a mistake as to what he intended.
This means, with this interpretation by Wylie J, Mr Shotter's mistake is not as to what Westpac intended (as it would be in Woodhouse P's analysis), but a mistake as to the guarantee that he was giving

To use this replacement, it is to adopt McMullin's two matters (mistake as to what she intended to sell, and mistake as to what she was actually selling according to the agreement) - which is even worse than Woodhouse P's reasoning.

That is, it becomes (mistake was to what he intended to guarantee, and mistake as to what he was guaranteeing). That's not Woodhouse P's reasoning.

The difference between the two matters of fact:

- The extent of the guarantee that Mr Shotter intended to give AND the extent of the guarantee that Westpac intended to take is more apparent in this case than it was in the other cases.

Wylie J concludes... "I have difficulty with this analysis" and continues ...

Section 6(2)(a) - Comes into Play

Due to *Conlon,* "I would therefore feel constrained to conclude that the present case falls within s 6(1)(a)(iii) were it not for the provisions of s 6(2)(a) which was raised by counsel for the bank".

It was argued that the mistake Mr Shotter made was a "mistake in interpretation".

"I think it clear, on any analysis of the facts and no matter how one plays with words to describe the mistake differently, that the mistake of Mr 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 Lt d were being guaranteed".

David - "It is not clearly a mistake as to what the guarantee document said" according to *Conlon v Ozolins'.* According to *Conlon* (Woodhouse P) the mistake was NOT as to the content, at least.

This was only considered the mistake by McMullin J - which was just patently wrong.

Interpretation

Can cover situations even where the document was not fully read through and "interpreted" but can include situations where he only reads part of the document because he thinks he need not trouble with some of the more wordy clauses or the "fine print".

This is a matter of logic and of principle.

"I think a signatory in that situation, who assumes, because it is a guarantee and that it is for a particular purpose - in this case the raising of a specific loan - his liability thereunder must therefore be limited to that specific loan, is placing his own interpretation on the document, however ill-formed and baseless it may be".

It might be otherwise if a document is signed without any knowledge of the general nature or reason of the document and signed blindly - but this is not that situation.

David -
In essence, this is saying "If a document plainly provides for one thing, and you mistakenly believe that it means another thing, then that will be a mistake in interpretation, even if you didn't read the document carefully in arriving at that conclusion".

Wylie J is saying that, even though this falls within s 6(1)(a)(iii), he is not bound to follow *Conlon v Ozolins* because, unlike in that case, this mistake is one of interpretation.

Note: It is impossible to accept that this is consistent with *Conlon*. The judge has just plucked s 6(2)(a) - which was not mentioned by *Conlon* at all - and used it to deprive Mr Shotter of relief. There is really nothing to distinguish the cases - but that is what he is doing here. It's quite clear that if Mr Shotter's mistake was one in interpretation, the so was Mrs Ozolins'.

She signed a guarantee mistakenly believing that it was for the sale for three lots, not four, just as Mr Shotter signed a guarantee thinking it secured one liability, not all liabilities of the company.

On the factual finding of the Courts, there was no ambiguity in the terms of either contract - they very clearly provided for the actual contract as the other party intended. The plain meaning is clear.
As such, there is no reason that a misinterpretation as to one would be any different to the other.

Yes - you could phrase both mistakes (and fudge the details such) that they could sound like they were a mistake in interpretation or not a mistake in interpretation (unlike what Wylie J alleged) but at their core, they are the same and ought to be treated as such.

Discussing *Engineering Plastics*

Acknowledged that the mistake in *Engineering Plastics* was one that arose because of a misreading of the "/c" in the contract in the correspondence which constituted a contract.

However - he characterises the mistake in *Engineering Plastics* as "a mistaken belief by each party about the intention of the other concerning the price" (with the issues that comes with that phrasing acknowledged).

Similarly, in considering Woodhouse P in *Conlon v Ozolins*, he characterises the mistake "as an emphasis on the content of the document of guarantee rather than on intention, whereas 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.

David - this is horrifically bad reasoning. The entire passage is quite difficult to follow.

First - he totally changes his view about what the mistake in *Conlon* concerns.

Earlier, he said that the mistake concerned "different understanding a to what land was being sold".

Now, he is saying "different mistakes as to the physical extent of the land".

The reason for this confusion is Woodhouse P's judgment where he discusses the "boundaries" of the land. He should have just said "what land was being sold".

On s 6(2)(a) - he says that the mistake in *Conlon* could not be a mistake in interpretation because the relevant mistake was as to the physical extent of the area of land. However, Mr Shotter's mistake was as to interpretation.

<u>The issue: there is absolutely no reason that the mistake in *Conlon* can be characterised as a mistake as to the physical extent of the land.</u>

It was held to be a mistake, as in *Shotter*, in the sense that they were at cross purposes - there was no actual correspondence of offer and acceptance.

It means that there was a mistake as to the contractual terms and each parties' understanding of those terms, not the underlying assumptions.

It is NOT that they were agreed as to the subject matter of the sale, and expressed that correctly, but there was simply a mistake as the physical attributes of the land (which is what it sounds like it is being described as). Mrs Ozolins was mistaken as to what Lots she was selling, not mistaken as to the physical extent of the Lots that she knew she was selling.

Compare, this would be the case if she DID intend to sell all four lots, but just thought that the lots did not include her garden and Lots 1-4 were beyond the fence. That is a mistake as to the physical extent of the four lots, not the mistake as to the fact she didn't even realise she was selling all four lots.

In this situation, it would be a different fact situation. If she has said "I do want to sell Lots 1-4" on the understanding that Lots 1-4 began and ended behind the fence, it would be the same as saying "I want to by those oats" on the understanding that they were old.

It would be that she faced even greater difficulties:

- *The mistake was not known to Mr Conlon, nor was it shared by him.*
- *He didn't make some other mistake about the physical extent of the Lots 1-4 - he knew exactly where they began and finished.*

Despite these issues, the Judge uses his characterisation of the facts as a way to sidestep *Conlon*.

Note: it is not that he actually distinguishes the true facts in *Conlon v Ozolins* from this, but instead, constructs a fiction about what the facts in *Conlon* were such that he was able to then distinguish this case from those (not quite) facts.

Shotter v Westpac
Discussion

What does this case do?

It shows how the tide starts to turn against *Conlon v Ozolins*, and the way that they do that by employing s 6(2)(a).

The Approach that Ought to have been Taken

- Only one party made a mistake - Mr Shotter - as Westpac was fully aware of the extent of the guarantee provided for in the agreement.

  This means that there will only be liability if the bank knew of that mistake.

  In this, applying the ordinary meaning of mistake - that it was intended to bear in the passage of the Act - the Bank would not be considered mistaken. They understood what the guarantee was for and the extent of it.

OR

- If the bank was assumed to have made a mistake in assuming that Mr Shotter intended that all liabilities be guaranteed, then Mr Shotter's mistake was not about the same matter of fact - Somers J's reasoning.

Relationship to *Conlon v Ozolins*

The headnote says that *Conlon v Ozolins* was "applied" - that means the principle in the earlier cases was applied to this set of facts.

David - It would have been applied, had it not been for the fact that it was held to be a "mistake in interpretation", which is not a mistake for the act due to s 6(2)(a).

Note that, in material terms, the facts were indistinguishable from *Conlon v Ozolins*, but he doesn't apply them in that way.

Summary of Issue

- <u>The factual findings are at least questionable.</u>
  It is questionable that Mr Paulger's offer did actually mean an offer to pay the company debts from his own funds.
  It is questionable that the creditor actually provided consideration by refraining from taking action for the period of 90 days in question.

- <u>Once those findings about the meaning and formation of the contract were made, it effectively answered the questions on the CMA.</u>
  Where the creditor was reasonably led to believe that Paulger was offering to pay the company's debts personally, the terms of the contract were such that Paulger was obliged to pay the debts personally, and so the creditor was NOT mistaken.
  OR
  If it is a mistake as to one another's intention then they are mistakes as to different facts.

  This meant that none of the s 6 categories apply.

- <u>The Court was wrong that Parliament's intention to maintain the objective principle can be found in s 6(2)(a).</u>
  While the Court was not wrong about that intention existing, their reasoning as to finding it in s 6(2)(a) is fraught with difficulties.

  They could not do away with it - the principle in *Smith v Hughes* is as close as you get to a fundamental, philosophical statement in the law of contract. It was never going to be overruled or done away with quietly, to the side.

It is reflected in the drafting of the categories of operative mistake, where the Objective Principle will not apply in factual situations that give rise to an operative mistake in s 6(1)(a).

- The view in *Paulger* leads to situations where relief is not accessible where it was plainly intended to by available - e.g *where Mr Conlon knows that Mrs Ozolins did not intend what was plainly said in the document.*

Section 6(2)(a) had the much more limited purposes to exclude cases being brought after a party fails in an interpretation dispute.

- The discussion of *Conlon v Ozolins* is undermined by the suggestion that the parties were mistaken as to the physical extent of the subject matter, and by attributing Woodhouse's reasoning to McMullin.

  It doesn't inspire confidence when they don't even get the judges right.
  It's almost like they haven't actually read the case.

- It is nonsensical to suggest that *Conlon v Ozolins* is a decision on its own facts and not authority for invoking the Act where one party means something different from the plain meaning of his or her own words.

  The case was plainly, and incontrovertibly, authority for that as a general principle.

Paulger v Butland Industries
Case

Background to this Case:
The judgment is quite unsatisfactory, however, there are some circumstances that explain how this came about:

- Mr Paulger's argument based on the Act were raised for the first time in the Court of Appeal. This meant that there was no HC reasoning to consider or draw on.
  In fact, there was no notice of this ground of appeal before the hearing itself - it came out of the blue at the last minute.
    In the High Court, they ran a formation argument. However, it was at the last minute that Counsel raised the CMA.
  Counsel were not prepared to deal with this argument (551 || 44).

- Based on this short notice, there was no chance to assemble a full bench to consider *Conlon v Ozolins* as is practice when it comes to dealing with previous Court of Appeal cases that may be overruled. The previous decision will be overruled only if a full court of five judges is sitting.

- The membership of the Court also would not have contributed to a better decision being made.
    Somers J was, of course, the dissent in *Conlon v Ozolins*.
    Wylie J was, of course, the judge from *Shotter v Westpac* and was a High Court judge temporarily sitting as part of this divisional court (and there is some opinion that these are less binding than regular CAs).
    Hardie Boys J was a relatively new member of the Court of Appeal.

Facts

- Mr Paulger was the founding director of a company, Dingwall and Paulger, that got into serious financial difficulties.
  There was some $7 000 000 owing.

- To resolve those difficulties, the Company entered into a contract for the sale of business.
- Mr Paulger expected that the sale of business wold realise enough to pay off all of the creditors fully.
  He was a "good old-fashioned kiwi businessperson who wanted to ensure that everyone was cleared up and square".

- He sent a letter to the company's creditors assuring them that payment would be made within 90 days, and asking that they do not take any actions towards the recovery of costs.

    That letter is important. It included...
    "We ask your tolerance whilst we execute this matter and advise we will make good all outstanding matters within 90 days.
    The writer personally guarantees that all due payments will be made".

- Before that sale was completed, the Company was put into receivership. This meant that the disbursement of the proceeds for the sale of business were taken out of Mr Paulger's hands and the unsecured creditors went unpaid.

- The Creditors sought summary judgment against Paulger for the sum of their debt.

Defence on Formation

- Paulger's defence was that the contract "did not amount to personal guarantee to pay all debts himself and it ought not have been interpreted that way".

- The Court of Appeal held that this was plainly an offer of a personal guarantee of Mr Paulger to pay the debts himself.
  He became bound by this promise to everyone in the letter who forebore from pursuing their debts for the requested period.

According to the objective principle, they held, it could reasonably be inferred by the recipients of the letter that Paulger was undertaking to pay from his own funds if the company did not pay.

Defence on CMA

- Was rejected.

Procedurally:

Summary Judgment

This was a summary judgment application - where the plaintiff is aiming to receive full judgment without the trial.

It means that the Plaintiff must satisfy the Court that the defendant has "no arguable defence" - that is, even if all of the facts that the Plaintiff point to are held, then there will still be no defence available.

It is all done by way of affidavit, without any dispute as to credibility - if there is any dispute as to credibility or the fact, then the plaintiff cannot discharge the onus of showing that there is no arguable defence.

However, if the plaintiff makes out the prima facie case, and the facts are undisputed, and the law is clear, then the defendant must put sufficient details to the Court to satisfy that there is a sufficiently arguable defence.

Formation Issue

David - has a lot to say on this formation issue.

Note: this would be a unilateral contract. It was the promise to do a thing (pay the debts/guarantee the debts) in return for the act (of not suing or pursuing the debts).

Ruling: "On the ordinary meaning, this was a promise to pay from his own pocket".

David - this feels like it was a bit of a stretch as a factual finding.

Rather than meaning that he was liable to pay the money personally out of his own pocket, it is more likely that he meant he was staking his reputation on it.

It is likely that not many trade creditors would feel justified in inferring (or would be reasonably entitled to infer) that Mr Paulger was promising to pay the debts out of his own pocket.

Though it COULD be interpreted as meaning that it was a promise to pay himself, a reasonable person would likely not take that as what it meant. Especially given that undertaking would amount to such a large sum of money.

It especially feels inappropriate to make this finding on a summary judgment without a chance to consider what any of the other creditors thought of the letter, or cross examine whether Butland Industries ACTUALLY thought that. It was far from an open and shut case.

It would be correct to question whether a reasonable person in the position of a trade creditor of Paulger would actually have inferred from that he was undertaking to pay the debts out of his own pocket.

Ruling: that a unilateral contract was actually formed

David - notwithstanding whether the offer was clear, was there actually consideration and acceptance?

The offer meant that they would have had to forebear from suing for the full 90 days for the consideration to manifest.

While it is true that they didn't make a claim for the 90 day period, it is unclear that this meant they actually forebore from suing or taking steps for that period.

Notably: the respondent received the letter on the 8th August, and on the 6th November the 90 days expired. On the 9th November, Butland Industries' solicitors wrote making demand. The debt in question, though, only became due on the 20 August, and so by the 30 September, it was only 60 days overdue.

In reality, no one sues if the debt is just over a month old, and a the time of the letter, Butland Industries actually had no debt owing on which to forebear from pursuing. It is arguable that they did not forebear from suing at all, given that it was barely overdue.

On this, it would be arguable that the Courts were too willing to find that Butland Industries were actually forebearing from suing. Again, it is not that they did not, but it is not as open and shut as a summary judgment ought to be.

It is at least questionable that they did indeed forebear from suing such that there would be consideration that would allow them enforce the contract.

Contractual Mistakes Issue

Given the result of the formation issue, on what the ordinary, plain, and reasonable meaning of the contract was, then the answer to the question of mistake is also basically answered.

Submitted: this was a mistake that should fall under either ss 6(1)(a)(ii) or (iii)

The ruling was that the creditor was reasonably entitled to infer, and did infer, that Paulger was promising to pay the debts himself.

Given that this was the reasonable belief, according to the objective principle, it is also the meaning of the contract.

As this was both the meaning of the contract, and what Butland Industries believed, at which point, they were correct and not mistaken as to anything.

The Alleged Mistake - the source of the funds from which the debts were to be paid.

Mr Paulger believed that the source of the funds was still the sale, and he was never guaranteeing an alternative.
Butland Industries believed that the source of the funds was Mr Paulger's own pocket.

The answer to the formation issue meant that the source was in fact Mr Paulger's own pocket, and therefore, it cannot be said that Butland Industries were mistaken.

David - this was good reasoning, and just about the only thing that they go right within the judgment.
He thinks that this is not just his opinion, but is "self evident in light of everything else that we know".

However, the judgment continues -

"These submissions must be considered in light of s 6(2)(a) which states that a mistake for relevant purposes does not include a mistake in the interpretation of the contract. Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively and to avoid the great uncertainty that would arise were a party to be permitted to please as a mistake that he understood the contract to mean something different from its plain and ordinary meaning".

David - this is precisely the opposite of what McMullin J said in *Conlon v Ozolins*. At (504)he is saying that the objective principle in *Smith v Hughes* cannot be said to defeat the Act, as to do this would be to deprive the Act of much of its force, and would ignore the wording of s 5(1).

Also note that Hardie Boys J writes - "*Conlon* 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."

David - this statement is absolutely not true.
Conlon v Ozolins is absolutely authority for letting a mistaken party get relief when they misunderstood or meant something different from the plain meaning of the words that they used.

<u>The argument from this case that s 6(2)(a) shows Parliament intended to maintain the objective principle -</u>
It comes from the idea that by saying a subject mistake cannot get relief, we infer that the objective meaning of the words is intended to be preserved, at which point, the meaning gained from the objective principle trumps the subjective mistake.

We can infer that Hardie Boys J felt that, by not allowing a subject mistake in interpretation to defeat the operation of the objective contract, Parliament intended to preserve that objective meaning come to.

David - while it is *true* that Parliament intended to maintain the objective principle, it is wrong to say that s 6(2)(a) is the part of the Act that demonstrates that.

Note: it was not necessary WHATSOEVER to discuss s 6(2)(a).

It was added as a relatively innocuous afterthought that was intended to have a much more limited purpose than defeating mistakes where the party had not understood the meaning of one of the terms.

The <u>real</u> indication is from the formulation of the different categories in s 6(1)(a). None of those categories operate to at the same time that the objective principle does. That is, a situation that fulfils the categories of operative mistake will NOT be a situation there the objective principle holds there is a contract.

> Under the objective principle, where a (mistaken) promisor leads a promisee reasonably to believe that they are assenting to the terms proposed, the promisee is not mistaken as to the terms.
> The objective principle would hold that whatever the promisee was reasonably led to believe are in fact the terms of the contract.
> As far as the law is concerned, there is only one mistaken party in that situation - meaning that neither (ii) nor (iii) can apply.
>
> Further, subpara (i) cannot apply because, if it is a known mistake on the party of the promisor, then the promisee will not reasonably be led to believe that they intended to form a contract otherwise. As such, the objective principle would NOT hold that there was a contract according to those terms.

It is because of this that both *Conlon v Ozolins* and *Engineering Plastics v Mercer* were wrongly decided. The second party simply was not mistaken as to what the terms of the contract were.

Perhaps it is the case that Parliament OUGHT to have given jurisdiction to grant relief for mistake as to terms in situations such as that, but it is simply not what they did. That is neither here nor there for the purposes of the law.

They say the reform in the "broad powers to give relief" where one category of common law was meant to apply.
The reason there were constraints on the type of mistake that they were under when entering into the contract is that those broader powers would not pass through Parliament.

David - isn't it quibbling to fixate on the fact that the intention is not shown be s 6(2)(a), when the actual conclusion is correct?

YES - to allow the situation where it was s 6(2)(a) that indicated the intention to maintain the objective principle would preclude Parliament from invoking relief where they really wanted to.

The reasoning in *Paulger* means that where there is a clear meaning of the document on the face of it, any mistake as to the meaning/thought the meaning was something different to what it was of that will be a mistake in interpretation. You cannot invoke the act where one party misunderstands the plain meaning of the contract because of s 6(2)(a).

As such, we can consider the situation: *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 contract so provides. O is aware that P does not intend to buy lot 1 but argues that P must perform the agreement as written.*

This is the situation that was plainly meant to fall within s 6(1)(a)(i).

However, on the reading of *Paulger*, this would be a mistake as to interpretation.
There are words in the contract with a clear meaning and one party thought that the clear meaning was something other than what it was.

Paulger's reasoning would say that this was a mistake as to interpretation which would mean there was no relief under the CMA.

> Within this, the Purchaser would still have a strong argument on formation - there was no contract formed, so O couldn't hold them to a contract that they never intended to make, and they knew they didn't intend them to make (that is, they weren't reasonably led to believe that they intended to make it).
>
> There might also be an argument for rectification here IF O knew that P wanted to Purchase 3 - (not just knowledge that they didn't want to purchase 1). This rectification argument is obscure and a bit controversial as a matter of case law.

The main point on this is that they should be able to rely on the Act, however, under the reasoning in *Paulger*, there would be no relief under the CMA.

Otherwise - *Suppose now that the written agreement provides for the sale of lot 3 to P. O actually intends to sell lot 1 and thinks the contract so provides. P actually intends to buy lot 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 2.*

In this, if the Owner seeks relief she will be faced b the obstacle of s 6(2)(a) because the plainly so provides plainly for Lot 3. As such, *Paulger* would argue it is a mistake in interpretation of the plain meaning.

This is, however, a textbook case where s 6(1)(a)(iii) was intended to apply.

Under *Paulger*, the CMA would not be available. It would no longer come under (iii) because the contract plainly provides for the sale of Lot 3.

> This has quite significant effects - farm sale case where price was meant to exclude GST but the written contract said the price included GST - it was held that even if the vendor was aware of this, then there was no mistake for the purposes of the Act as it was a mistake in interpretation of what the contract provided for.

Despite this, O would be required to rely on issues of formation. They would be able to argue that there was no contract formed, because P was not led reasonably to believe that there was a contract for Lot 3. They will not be able to prove that they reasonably believed that it was for Lot 3 when in fact they believed that it was for Lot 2.

> This would be alright because the objective principle will not hold that there is a contract when the party knew or ought to know that the other party intended another term.
> Similarly, it cannot apply where they themselves intend a different term to the one provided for.

Mistaken Quotation - (554)

Quoted McMullin J.

Went on to say "These words of McMullin J are not to be read as referring to what each party believed the other intended, because then the parties' respective mistakes would have been about different things: his about her intention, hers about his; yet McMullin J held that it was a case for para (iii)."

Hardie Boys J quotes McMullin J but goes on to discuss the analysis provided by Woodhouse P about the mistake as to one another's intentions.

It is important to note that, with this reasoning, *Paulger* totally denies the validity of the majority judgments in *Conlon*. It points out the fatal flaw to the argument that they fall under (iii).

> It means that McMullin's analysis must be wrong, because if Butland Industries did not make a mistake as to the contract here, then Mr Conlon cannot have either.
> It means that Woodhouse P is wrong, because their respective mindsets are different matters of fact.

Addressing Woodhouse P's judgment and *Shotter v Westpac*'s analysis of that

Hardie Boys J writes that "It is apparent from those judgments that the 'same matter of fact' about which the parties made different mistakes was the extent of the subject matter of the contract which they had negotiated".

This is that the "same matter of fact" is the mistaken impression as to the boundaries of each land being sold - which is an approval of what is being said in *Shotter v Westpac*. It suggests that the Courts regarded the relevant mistake as being to the physical extent of the land subject to the contract.

David - it is odd what Woodhouse P has said about the "boundaries" - it unnecessarily complicates the matter.

Wylie J in *Butland Industries* used this as the basis for getting around *Conlon v Ozolins*. It is really just a veiled suggestion that this is not a case involving "cross purposes" - a case relating to the misunderstanding as to the intention of the others - but instead, is a case relating to the fact.

However, even if we are charitable (though it does not really appear that the CA actually read the case) - and they assume that it was an agreement where the agreement was expressed correctly, but there was a mistake in understanding as to what Lots 1-4 included.

> *First - this is totally inconsistent with the findings of fact that the Trial Judge made and that were accepted by the Court of Appeal. The case proceeded on the basis that Mrs Ozolins was well aware that the land at the back of her home comprised four lots, and that she only intended to sell Lots 1-3. This was the basis on which Counsel proceeded.*

Second - this means that the case could not possibly be under (iii) because Mr Conlon was DEFINITELY not mistaken as to the physical extent of Lots 1-4. He had seen the certificate of title.

A case on its particular facts?

Hardie Boys J deals with *Conlon*:

"It is an important distinction. For *Conlon v Ozolins* is a decision on its particular facts."

David - this is just impossible to justify.

The Court of Appeal is treating *Conlon*, a landmark case that shaped the law significantly, in a hugely cavalier fashion.

One option is that they genuinely just misunderstood the facts.

The other is that the Court of Appeal is suggesting that they were "special facts and it was not laying down a general principle" - which means the reasoning is patently spurious.

Issues:
"Important Distinction" - this sounds lawyerly, but there is no distinction that they are pointing to.

The judgments in *Conlon* were fully reasoned (albeit poorly) and the outcome did not hinge n the resolution of peculiar and highly unusual factual difficulties at all.

It as not a case with a bizarre and unusual fact pattern or situation that we should relegate it as such.

The facts were not disputed.
Those facts are a very common scenario that has occupied the intention of the Courts many times.

(and has since - *Shotter v Westpac* and *Engineering Plastics v Mercer* for example were considered nearly indistinguishable).

The pattern is simply one where there was a mistake by a contracting party as to an important term of the contract in circumstances where the other party was unaware of the mistake and were reasonably entitled to believe that the terms had been assented to (or at least, that is what the findings were).

It is true that the majority might have been influenced by the tugs on the heartstrings of an elderly widow about to lose her garden - but that was not how the approached it.

It was a case that was approached as a question of general legal principle -

The Court explicitly said that this was a question of when they had jurisdiction under s 6(1)(a) of the CMA in relation to the Objective Principle.
Woodhouse P specifically referred to "cases of the *kind* outlined in this case" and "this *kind* of case".

There is no question that Tomkins J in *Engineering Plastics* were correct in the understanding that *Conlon v Ozolins* (with all its mistakes) was deciding a general principle to later be applied. If they had tried to distinguish it as a matter of fact - whether that it was just a mistake as to the subject matter, or to the physical extent of the land - and not a mistake as to price (*Engineering Plastics*) or said it was a mistake as to interpretation - it would have been incorrect, or been too fine a distinction to draw.

Somers J's criticisms of the majority would also have drawn their attention to the significance of this as a legal principle.

With all of this in mind, it is CLEAR that they intended to resolve this as a principle of law and consider the possibility of relief in cases where, despite the Objective Principle operating, the parties were seriously at cross purposes.

What is it not authority for?

"*Conlon* 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."

However, when we actually look at *Conlon v Ozolins* -

> "Considered objectively, the document is perfectly unambiguous and reflects no kind of mistake by anybody" (497 || 37)
>
> "Once carried into the written agreement, the contract could not be undone at common law but in my view, the case provides a classical example of one of those situations which is intended to fall within the remedial words of s 6(1)(a)(iii)" (499 || 6).

David - together, these passages show that the judges deliberately held *exactly* what the Court in *Paulger* decided that the case was not authority for.

You CAN get relief where you mean something different to the plain meaning of your words,)or the words you have indicated your assent to).

Did the Court in *Paulger* know that they were telling a lie?

> If they were aware that they were telling a lie - they've gotten away with it so far. The Courts have taken it at face value.
>
> The situation has subsequently been enshrined in the re-enactment of CMA in the CCLA. The example given uses the example from *Paulger* and incorporates this patently reviewable decision into Act, put in by people who know nothing.

David is convinced that the Courts won't follow *Paulger*, given the chance, and so will undo the prominence of the mistake in interpretation.

Clarifying s 6(2)(a) –

What was the true scope of s 6(2)(a)?

Tomkins J, in *Engineering Plastics*, was essentially correct about s 6(2)(a).

"It is intended to exclude relief where the words adopted by common consent are then given, by the normal process of construction of contracts, a meaning different from that which a party thought they had" (83 || 27).

It was NOT intended to exclude relief where the facts disclose a misunderstanding between the two parties concerning and important term at the time of the "apparent" contract.

These are the cases where parties are at cross purposes - each think that the term means something different - and so there was never concurrence of offer and acceptance, and therefore, no contract formed.

The TYPICAL CASE -

There is no issue of formation. The terms were agreed on by both parties, and they both understood what they were signing up to. However, there was a later disagreement about what one of the terms actually obliges them to do (often because of an unforeseen circumstance).

These sorts of cases wouldn't fall within s 6(1)(a) - because the mistake must influence the decision to enter into the contract. The committee likely knew that, but they included s 6(2)(a) out of an excess of caution - to make it extra clear that the parties who lost an interpretation dispute could not then claim a mistake that would allow them to take a second bite, and try and escape the contract.

This is because the vast majority of contract cases are simply cases concerned with the meaning/interpretation of contracts or specific terms.

They tend to arise in situations the parties did not contemplate - some unforeseen event arises and the question is how the terms of the contract then govern it.
It is then the Court's role to ask - what do these words mean?

It is NOT a question of "what is the plain meaning" (that's an old-fashioned approach that has been left behind) but instead it asks "what would a reasonable person with the knowledge and background of these parties have meant or understood?" This is the way that contracts are saved that would otherwise fail because, technically and subjectively, the parties had not reached an agreement about what should occur in that given situation.

At the end of it, given that they are often finely balanced and have a lot of money at stake, it will be likely that a party will feel quite aggrieved. The Law Reform Committee wanted to stop them saying "we will have a claim under the CMA". Even though it would be likely that there was no relief anyway (it's hard to make a mistake about a situation you never contemplated), this was included.

Mechanex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd

This was a case applying *Paulger* - having determined objectively that there was an agreement according to the respondent's understanding.

Facts

- The TCA had obtained a summary judgment against the buyer, Mechanex, for the suppply of cooling coils for an air-conditioning system.
- The Buyer had rejected the coils supplied, as they did not meet the requirements of its specifications.

- The Court of Appeal held (perhaps wrongly - according to David) that the seller had accepted the buyer's offer reasonably intended to buy the coils according to the type described in the quotation from the seller, and not the significantly different coils described in the buyer's initial offer/inquiry.

    This meant that a contract was formed for those coils, at that price.

- It was held that the TCA was entitled to recover the substantial price for the coils (which Mechanex could not use).
- Mechanex had applied for relief, and that was also upheld.

High Court

- It was accepted, for the purpose of the summary judgment, that the Mechanex's actual intention was to purchase the coils that met its own specifications (and not the sellers).
- It was accepted that the sellers intended to sell the coils that met its own specifications (and not the buyers).

    Therefore, it was accepted that the parties were at cross purposes.

- The Court went on to hold that s 6(1)(a)(iii) did not apply because:
    - The seller had not made a mistake - it was correct as to the terms of the contract, and was reasonably entitled to infer that the purchaser was agreeing to buy the coils in accordance to seller's description.
    - To the extent that there was any mistake it all, it was the Buyer's mistake into interpretation - they misinterpreted the type of coils that were being purchased.

Court of Appeals

"The quotation, objectively read, plainly provided for the seller to deliver coils that complied with its own specifications."

> This meant that the mistake was the same character as the "unfortunate appellant in *Paulger*".

That is, it is a mistake as to what that particular term means - in imposing their own meaning on the contract, that was different to the objective meaning of the contract, they made a mistake as to interpretation.

On "Code" -

> The Court applied the objective principle in determining whether there was a binding contract that obliged the defendant to take the coils that the seller intended to supply (as in all other cases). It was held that there was a binding underlying contract, due to this, unless the claim was made out under the Contractual Mistakes Act.
> They expressly said that the fundamental requirement of consensus ad idem is not affected by the Act.
>
> **David -** asserts that this means those code advocates, who say that the CMA is exhaustive where there is a mistake, have been squarely put in their place.

March Construction v Christchurch City Council

Facts

- Christchurch City Council called for tenders for the construction of roadworks.
- March Construction submitted a tender for $290 000.
    - One of the officers had made a fundamental mistake in that.
    - They had carried a cost at $72.75 per unit, instead of the intended $727.50 per unit, meaning that they had tendered at a cost of $250 per unit instead of $968 per unit.
    - This means that the tender was less than half of the average of the other four tenders - in other words, it was alarmingly undershot.

- The Christchurch City Council accepted that tender and a formal written contract was signed a couple of weeks later.
    Note: the acceptance of the tender gave rise to the contract. The more formal written contract was just the finer details being hammered out to clarify the obligations that were already in existence.

- The case proceeded on the assumption that the Council knew or ought to have known that a mistake of some description had occurred, but not what the actual mistake was.

- March Construction completed the work required of them, but did so at significant loss.
- They sought to recoup that loss from the Council.

- The claims they made were all struck out as untenable by the Master at the High Court - it was held that all of them were so untenable that they could not possibly succeed.

- March Construction applied for a review of the decision before Williamson J.

Four Claims

1. Rectification
2. Misrepresentation (under the Contractual Remedies Act)
3. Misleading or Deceptive Conduct (Fair Trading Act).
4. Mistake (Under the Contractual Mistakes Act)

All of the claims failed.

Note: there was no claim that no contract had been formed

David says that it may be that this claim should have been made.
    If it could be shown that no contract had been formed, then the remedy would have been for "restitution" - that is, being charged at "reasonable remuneration" for the work that had been done, or the benefit that had been received.

Consider that the case proceeded on the grounds that the Council did not know of the actual mistake that had been made, but that they either did know or ought to have known that a serious mistake had been made.
    Though there was no allegation that Council knew of the price that was intended, or would have been had the calculation been correct.

Going back to *Smith v Hughes*:
    In that, for their to be no contract, Smith needed to know that Hughes thought Smith was making it a term of the contract that the oats were old - or that Hughes intended it to be a term of the contract that the oats were old.

    However, if it were simply that Hughes was mistaken as to a fact that he were buying old oats, then there was a mere mistaken assumption and no mistake/lack of correspondence as to terms. In this instance, it would be simply that caveat emptor apples.

This is a *Smith v Hughes* case.

There is a distinction that must be drawn between the mistake as to terms and the mistaken assumptions.

Here, Christchurch City Council were broadly aware that a mistake had been made, but there was no indication that they knew it was a mistake as to the terms (as far as they are concerned, it could be that March Construction had simply made a mistake in their understanding of how much that material would cost).

Moreover, had you asked March Construction if the price they had submitted was intended to be the price, they absolutely would have said yes. As far as their calculations were concerned, that is the price that they needed. Yes, those calculations were mistaken, but that just meant that there was a mistake in sum that they would need to make the tender feasible (that shaped what they proposed as terms) - it was not a mistake as to an actual term, or whether there was a term.

Given that there was no mistake about terms, this would just be caveat tenderer.

There was also no way of knowing that they intended a different price, or what that price might be.

In *Hartog v Colin and Shields,* the buyer of the skins knew that they seller intended the quote as a price per piece and not a price per pound.

There was nothing to point to what that mistake was that ought to have put them on edge.

Rectification

The same reason that *Hartog v Colins and Shields* doesn't apply underpins the failure of rectification.

March Construction made this the central pillar of their argument. The tried to get the contract rectified to represent the price that it would have been had the error in calculation not been made.

There is a curious line of cases that say it is possible to get rectification for a "known unilateral mistake".

It requires that there be:

a. An antecedent agreement/contract/common intention between the parties;
b. An error in the representation of that antecedent agreement when it comes to formalising it as a document;
c. Knowledge of that error on the part of the defendant;
d. A failure to warn against that error,
e. Such that the defendant benefits from it or the plaintiff suffers detriment.

That is, if the defendant knows of mistake in the expression/terms of the contract and unconscientiously seeks to take advantage of it, then the Court will rectify the contract.

<u>It (rightly) failed because:</u>

- Rectification is only available where there was a mistake as to the terms or in recording the true bargain.

  As the Court found - this was not a mistake as to terms. March Construction were not mistaken as to the contents of the tender - they had intended to tender that price - it was a mistake as to the fact of the price required.

  "It seems to me that the argument for rectification made by the plaintiff fails to have regard to the nature of the mistake relied upon by March. "The mistake is one made in the calculation of the tender price. It is not a mistake in the contract between March and the Council because the contract correctly embodies the antedecent agreements made by the tender documents.

  "The essential mistake is that of March's employee in preparing the unit price for inclusion in the tender".

It is not a mistake *in* the contract, it is a mistake *about* the contract.

This is in contrast to something like the McMaster University case (where a page was left out of the tender) - "it is to be noted in this case, that the mistake is one that related to the contents of the document itself".

Note: Rectification is about putting it in accordance with the true (objective) bargain that was made - but for the same reason that a no-contract formed would have failed - there was no mistake as to the terms of the contract.

Rectification is about putting it in accordance with the bargain, not rectifying the bargain itself or changing the bargain itself.

The issue with this argument is that, even if it had been a mistake as to terms, there is nothing to indicate that the Council knew what price March intended. There was no allegation that they were aware or could have been aware of that actual mistake.

David - to get rectification, you would expect some awareness of what that mistake was. You would expect that the defendant would need to know what the mistake was, so they would know what the intended price would be.

It is one thing to set aside the contract, but it is another entirely to impose on them the undisclosed intention of the claimant.
What if the evidence showed that the plaintiff intended to quote a very high price? That would be entirely unjust.

The appropriate response here would just be to set it aside.

Misrepresentation
March Construction alleged that by remaining silent, the Council had misled them as to the fact that they had submitted their tender correctly.

However...

Silence is not misrepresentation, except for in quite specific circumstances.

It will only be a misrepresentation if there had been some half-truth or there was a legal duty to speak or disclose.

Here, there was no half-truth, nor was there a legal duty.

March argued that a duty existed because, in the past, they had disclosed when mistakes had been made. However, the Court rejected that there was a legal duty to disclose, and so, silence was allowed and acceptable.

Fair Trading Act

There was no misleading or deceptive conduct on the part of the council that breached s 9 of the FTA.
There was no misrepresentation. The Council was entitled to remain silent.

Claim under the CMA

March Construction initially led with this as a grounds on which to argue for relief. However, they subsequently abandoned the claim.

Note, the case was proceeding on the basis that:
- March had made an important mistake; and
- The Council was aware of that important mistake.

On this basis, it clearly would have come within s 6(1)(a)(i).

However, a term of the tender document was such that held "the tenderer must accept responsibility for any mistakes and satisfy themselves as to the correctness of the tender".

In this way, it was expressly allocating the risk of a mistake in that tender document to March.

This meant that s 6(1)(a) came into play and relief could not be granted as the risk was allocated to the mistaken party.

David - if there had been no such term, the Court would almost certainly have had jurisdiction to grant relief, despite the fact that the mistake was not as to the terms.

This is an aspect of Mistakes Act that people often overlook - if you can bring yourself within the Act, it doesn't matter if the mistake is not to the terms. It may be that the mistake is to an fundamental assumption, which is totally acceptable. Remember "fact or law".

It is worth noting, in this way, that *Smith v Hughes* as a decision may not have survived the Act. If it arose today, it could likely fall within the Act, assuming that the substantial inequality limb was met.

It would, of course, be up to the discretion of the Court whether relief is granted, but the situation is one that would come under.

Another example of mistake as to assumptions: *suppose you are clearing out your deceased parents' attic and having a garage sale. You are selling a painting. An art connoisseur comes along, recognises that it is a very valuable painting, and buys it very cheaply.*

You would be able to argue either that they knew you were mistaken OR you were both mistaken.

(Note: "ought to know" is not sufficient to bring them within).

This would fall within the CMA - and we don't know what the answer would be because the case where this arose settled. It might be that s 4 comes into play about preserving the certainty of contracts, or it might be that they would apply some remedy.

When this arose, there was a massive division of opinion. "What's just is like beauty - it's in the eye of the beholder".

What would happen if the mistake HAD occurred as to the terms of the contract? That is, what if there was just a clerical error in filling it out, or the step of miscalculation had been included in the tender documents such that it was clear the tenderer did not intend to quote that particular price.

This still wouldn't bring it within the scope of CMA - for the purposes of the act, we would assume the contract formed, and therefore the allocation of risk would be an issue.

<u>Alternative -</u> the answer in principle would be no contract formed (if the Council knew).

This goes all the way back to *Smith v Hughes* and *Hartog v Colin and Shields*.

This would be the same even if it was an "ought to have known" that March did not intend to quote the stated price.

It would be irrelevant that the tender conditions said they must satisfy themselves as to the accuracy - because that is only binding when the contract is formed and no contract is formed here.

<u>Alternative -</u> Rectification

This faces the difficult that the Council cannot be taken to have known what the actual intended price was.

It might not have been clear to the (though it could have been) what the actual intended price was to be - at which point, it would be unfair to foist that contract on the Council.

Some would argue that it is ridiculous that so much should depend on whether the fundamental mistake is IN the offer or ABOUT the offer - under our "reformed law"

That is, as to terms or a mistake in assumption.

Why should their be an operative mistake due to a clerical error in completing the form, but not when there is an equally significant error in the private calculations leading to the tender price?

It is a fundamental distinction - but should it matter?

Surely what is important is that there was a fundamental mistake, whether it be in the contract or about it, and that mistake is known to the other party.

There is no rhyme nor reason as to the merits of this.

Many would say that March Construction ought to have had the possibility of relief - it shouldn't have mattered if it were to the terms or about the terms. The only thing that mattered is something really went awry.

Distinction between the mistake as to terms or mistake as to assumptions can be difficult to draw.

What if mistaken calculation was contained in the tender itself?
So there was a price for the various components of the work, but there was just a clear arithmetical error in one of the columns or in adding up of the totals.

David imagines that the Court would now say that this is a mistake as to terms.
Yes - the tender intends to bid at the stated price, but also intends to bid at the correct total of the list of components.
Looking at the state of the law here - it really shouldn't matter. It should not have mattered.

David would have avoided a tight definition, too. He also would have avoided just saying to the Courts "you do what you think is just" - he would set out a set of factors as to what would be considered just and unjust. We really should give the Courts less discretion.

A modern and flexible law of mistake would afford to the tenderer an opportunity to get relief on these facts - whether it was actually given would depend on the evaluation of all of the circumstances.

Professor Sutton's Proposal

In his report to the committee, he said that we should just have a "provision for the relief of fundamental mistake".
The court should be empowered to come to a conclusion one way or another, having regard to a list of relevant factors about that mistake: how serious, was their knowledge, what were the consequences, was there assumption of risk. However, there would not be a strict criteria as to what the mistake must be.

This would give too much discretion to judges - however - so the Committee said they would stick with the "tried and true" unilateral, common, and mutual mistake. Embedded within those is the common law conceptions of what a mistake is and who is a mistaken party for the law of contract.

The committee did, however, give broad powers to grant relief under s 7. The reform was not in "what was a mistake" it was about how the Courts were able to deal with it.
This was not what *Conlon* said (they said it was a completely new start).

Professor Sutton said, "a tight definition of what does or does not constitute operative mistake is neither possible nor desirable".
He criticised the committee that rejected his report - s 6 contains those very tight definitions of what needs to be satisfied to grant relief.