MISREPRESENTATION

- **Actionable misrepresentation: a false statement of past or existing fact *that was relied upon or induced entry into the contract.***
- A promise is a statement of intention that amounts to an undertaking to do or refrain from doing something.
- If a misrep is a term of the contract, it is a **warranty.**
- In order to succeed for breach of promise, the promisee must establish that it is a binding term of the contract → obj. assessment w *S v H.*
- Parol Evidence Rule: evidence is inadmissible to add, vary or contradict terms of the contract. Tools to circumvent:
  - Equity – Rectification: parties meant to include the extrinsic promise but by mistake.
  - CL – collateral contract: consideration for the making of one contract is the making of another. In NZ relaxed ab whether the two clash → circumvent rule by saying different contract.
  - CL – partly written/partly oral: show extrinsic promise was intended to be binding so written one deemed incomplete.
- s 50 CCLA 2017: Only treat as conclusive where fair and reasonable to treat as such.

(Assuming REA has made a misrepresentation to purchaser on behalf of V).

COURSE OF ACTION	PURCHASER v VENDOR	PURCHASER v RE AGENT
S 35 CCLA 2017 (Contract Measure)	- V is the party to the contract so PF can come under s 35. - V is liable for misrep made by the V or on the V's behalf →although V did not say anything, liability extends. - **S 35(1)(b) bars action in the tort of deceit.** - S 37(2)(a) allows parties to cancel a contract if they agreed (express or implied) that its truth was essential	- Not party to the contract so cannot be sued under CCLA. o Can say breach of statutory duty not to make a misrep which – damages to be assessed under contract measure.
S 9 FTA 1986 (Tort Measure – *Cox & Coxon v Leipst*)	- **Are they acting in trade?** - If property sold as business (or part of business) then yes. - Liable if V was indirectly or knowingly concerned in misleading consequences/passed on info known to be false and aware it would be passed on (s 43(1)(a)).	- Will usually be in trade. - Liable w/o fault. - If V supplied misinformation can be indemnified against them.
TORT – Negligent/Fraudulent misrepresentation (*Hedley-Byrne*) (Tort Measure)	- Barred by s 35(1)(b) of CCLA.	- REA made statement carelessly against the DOC. - Assumed responsibility for making the statements.
BREACH OF TERM/ COLLATERAL CONTRACT	- Promise to do or refrain from doing something. o Need to show this is part of collateral contract intended to be binding. - Where REA makes misrep, no liability because REA cannot bind the vendor/give contractually binding warranties.	- REA not a party. - Cannot bind a vendor. - S 24 Property Law Act: all terms for the contract of the sale and purchase of land must be written down so an oral term cannot be enforced.

- Claimant can only get one set of damages.

CALCULATING DAMAGES

1. *Is there an actionable misrepresentation?*

- Market value 'is' = AV / 'would be' = RV

Contract or expectation measure of damages: entitled to damages same manner extent as if misrepresentation were a term of the contract that was broken. Put plaintiff in position they would have been in if representation been true. Compensate P for their compensation loss or loss of bargain

- Lost opportunity not a consideration – contract not concnered w alternative situations if misrep not made.

General formula – difference between actual position and promised position: K = RV - AV

Tort measure of damages: the measure of damages aims to place the P in the position they would have occupied had the representation never been made at all. Generally be the position the plaintiff would have been in had they never entered the contract. Tort damages seeks to compensate the P for the harm done.

- Can get lost opportunity damages in tort – s 9 or deceit (*Clef Acquitane*)

General formula – difference between price paid and actual value:

T = PP – AV

Lost opportunity damages: PP – PWP under alternative bargain

Alternative losing bargain – *Yam Seng:* actual position vs position if alternative losing contract entered into.

(Tort damages of actual bargain) - (PP – AV of the alternative losing bargain)

Clef Aquitaine v Laporte Materials (2000): no rule requiring the person deceived to prove that actual transaction which had induced was loss-making.

- Lost opportunity ≠ loss of bargaine
- Lost opportunity = object is restoration of status quo prior to wrongful conduct.
- Loss of bargain = P seeks benefit of particular contract entered into.

East v Maurer: got damages 4 hairdressing business.

CONTRACTUAL MISTAKES

- Obj. Prin from *S v H – Freeman v Cooke* (1848)*:* 'if whatever a man's real intention may be, he so 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 the contract** with him.'

Mistake: a false belief about a matter of existing fact or law.

- There must be a true position about which there is a false belief.

Situations where OP not satisfied:

- Promisee knows promisor does not agree or intend to be bound by the stated terms.
- Where the promisee ought to know that the promisor does not agree to or intend to be bound by the stated terms.
- Where both understandings are equally reasonable e.g in *Raffles.*
- At the time of the alleged contract, the promisee intended a different term to the one they know allege/argue for.

Non est factum – *Gaillie v Lee:* transaction which the document purports to effect is essentially different in substance and kind from the transaction intended. (carelessness fatal to the pleading).

Factual categories of mistake:

1. Mistake as to contractual terms: mistake about what the contract provides for/what the bargain was. E.g the contracting for oats being old in *S v H. - MISTAKE IN THE CONTRACT*

(tbh j apply *S v H* OP here). Sometimes both interpretations equally as reasonable (*Raffles*)

2. Mistake in underlying assumptions – *MISTAKE AB THE CONTRACT*

- One or more of the parties makes a false assumption on the subject matter or other material aspect of the bargain, assumption as to nature/quality/character of the goods e.g the oats being old.
- Assumption shared by all = common mistake
- Made by one = unilateral mistake (usually bound by this at CL – caveat emptor).
- Mistake in underlying assumptions w substantial effect come under CMA. This element of *S v H* not saved by the statute.

3. Mistake in expression of terms: mistake in expressing or recording the contract – writing fails to express the agreement correctly.

- Rectification available in equity (preserved in CMA s 5(2))
  - USUALLY need common mistake but may be available where there is known unilateral mistake and the other party unconscientiously takes advantage of this.
  - Knowledge of a mistake usually sets aside a contract.

4. Mistake in performance: conferring benefit thinking it was in contract.

CONTRACTUAL MISTAKES ACT 1977

A D cannot argue no contract formed against CMA claim (s 2(3)) but P can argue no contract formed if CMA claim fails.

- Assess: is mistake known? Mistake as to terms or mistake in asssump?

SCHEME:

S 2(3) – contract for the purposes of this act.

S 4 – Purpose: mitigating the arbitrary effects of mistakes on contracts by giving court power to grant relief. Cannot act in such a way as to prejudice the general security of contractual relationships.

S 5 – Act to be a code: not rly – CL principles for offer, acceptance/formation apply. *If court doesn't grant relief CL applies.*

- **S 5(2):** saves non est factum; rectification; undue influence/fraud/breach of fiduciary duty/misrep; frustrated contracts.
- **S 5(3):** court can withhold SP as discretionary remedy.

Section 6 – LEGAL CAT – must satisfy all 3 main requirements:

6(1)(a) – Must fall within one of the legal categories of mistake:

(i) Unilateral mistake known to the other party (incl. mistaken assumptions)
(ii) Common mistake – each party influenced by the same mistake
(iii) Mutual mistake – different mistakes ab the same matter of fact (*Raffles*)
[NB: s6(1) doesn't cover where other ought to have known of mistake – not as wide as CL in this respect].

6(1)(b) – Must result in a substantial inequality of exchange or disproportion of benefit – 11%

6(1)(c) – mistake must not relate to a matter in respect of which a term of the contract allocates a risk of mistake to the party seeking relief.
6(2)(a) – mistake does not include mistakes in its interpretation.
- *Engineering Plastics:* "exclude relief where words adopted by common consent are then given, by the normal process of the construction of contracts, a meaning different from that which a party thought they had."
- Committee preventing ppl from failed interpretation cases using CMA.

S7 – Powers to grant relief
(2) take into account extent to which party seeking relief caused mistake.
(3) can order – void or subsisting, whole or in part; cancel contract; variation of the contract; restitution or compensation.

***Conlon v Ozolins* [1984]**
TRIAL DECISION + ISSUE w *MCCULLOUGH:*
- Categorised the OP as principle of estoppel by representation – incorrect.
  - OP = contract formation – if OP applies promisor makes no mistake.
  - Estoppel only be used w detrimental reliance but OP always applies.
  - OP holds you bound *despite* the mistake.

	Conlon's Mistake	Ozolin's Mistake
McMullin J	She intended to sell lots 1-4	Selling lots 1-3
Woodhouse P	She intended to sell lots 1-4	He intended buy 1-3

Problems w Woodhouse P's Judgment:
- Discussed mistakes re boundaries/size of land. Not mistaken ab this.
- Land to be bought and sold is a *matter of intention* – two MOF.
- LRC would not see Conlon as mistaken party where OP applies.
  - LRC prob thinking of situations where Conlon knew of mistake/false assumptions by both parties under legal cat 3.
- ***Effect of Conlon is that whenever there is mistaken intention can come under legal cat. 3 mistake. Fks up sanctity of contract.***

McMullin:
- Says OP restricts act: mistakenly assumes OP situations covered in CMA.

Somers J: correct in saying Conlon made no mistake.
- Wrong in saying interpretation of (iii) would make (i) superfluous.
  - In the absence of (i) would not be able to use CMA for known unilateral
  - Maj. Don't help mistaken assumptions (which come under (i)).
  - Prob meant if we intend all cases were no consensus ad idem go under category 3 why enact known unilateral mistake.

Professor Sutton: didn't adopt most of his shit.
- Didn't give court guidance on remedies. Asked for broad mistake defin.
- S 6(1)(a) codified rather than reformed CL forms of operative mistake. The reform was powers to grant relief under s 7.

Correct Dmac analysis:
- *Conlon* was a case of cross-purposes; no correspondence of offer + acceptance, no real consensus.
- In cases where parties are at x purposes, there is no contract at CL and not covered by s 6(1)(a) anyway.
- This would mean mistake as to contractual terms (what each party contracting for) would come under first factual category of mistake.

***Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985]** (o-rings, price /c)
Meaning of the contract: Contract found on P's meaning.
- Custom or usage considered by the court for /c – notorious, certain and reasonable.

No consensus ad idem: apparent meeting of minds will suffice (*S v H*).
- S 2(3) anyway – contract for purposes of the act.

Sale by sample: need something more e.g an express or implied term.
- Goods supplied better quality than sample.
- S 37 Sale of Goods Act: on-selling inconsistent w P's ownership.

Mistake: mistake as to price payable (actually mistaken intentions)
  - Substantial inequality of exchange found.
  - This is NOT a mistake in interpretation – intention is a matter of fact.
  - Purpose of s 6(2)(a) is to stop ppl losing interp. and claiming CMA.

[LRC would not have seen Engineering Plastics as a mistaken party once court found contract to their understanding of the price].

***Shotter v Westpac Banking Corporation* [1988]** (indebtedness)
- Tried to argue common mistake (legal cat 2) but court found bank would have known the extent of the indebtedness as beyond specific guarantee.
- Said were not for *Conlon,* would not say cat 3.
- Mistake as "extent of the indebtedness… and Shotter's understanding"
  - [Two separate facts] ab which neither is mistaken. Can't put them together to find mutual mistake under (iii).
- Says *Conlon* not distinguishable but distinguished in applying 6(2)(a).
  - Adaptation to do w document, more like McMullin's reasons.
- In holding Shotter's mistake was as to the document in extent of liability (vs. mistaken intention) Wylie can go on to say mistake as to interpretation → focus on the document.
- If this is 6(2)(a) *Conlon* should be too.
- Substantial disproportion of benefits = "a matter of weighing up advantages and disadvantages on the scales."
- *Conlon* not ab mistaken assumptions as Wylie suggests.

***Paulger v Butland Industries Ltd* [1989]** (personal guarantee)
HARDIE BOYS J:
- Sentence is assurance that Paulger was undertaking to pay finds if ppl forebear from pursuing the debt.
- No common mistake under (ii) – formation would resolve this, if creditor reasonably entitled to believe Paulger was promising to pay debts himself then not mistaken.
  - If correct to say that the mistake was as to the effect of the letter then this is mistake re interpretation and s 6(2)(a) applies.
- *Conlon* is a decision on its particular facts – WRONG.
  - Intended to represent that class of cases.
  - It was a principled, fully reasoned judgement asking whether CMA can apply where promisee prima facie bound because of OP.
  - Court regarded *Conlon* as being ab physical extent of land, not x-purposes (as it is). Undermines discussion.
- S 6(2)(a) shows intention to retain OP – WRONG
  - This shown in retaining CL categories of operative mistake in 6(1)
  - *None of the categories cover, nor were intended to cover, cases at CL where a mistaken party bound pursuant to the OP.*

Further issues in the decision:
- *Consideration issue:* wasn't anything to sue for, didn't try till after promise made.
- ***Under Paulger, would always be barred by 6(2)(a) where you thought words had meaning different than plain + ordinary meaning/when you have intention diff. to prima facie on written contract.***
  - Severely restricts (i) known unilateral mistakes.
  - Prevents act being applied where LRC intended it to be.
- *Paulger* enshrined in s 25 of the CCLA.

Mechenex: Buyer rejected air conditioning coils on the basis that they did not meet specifications.
- Court found seller reasonably believed B intended to buy coils described in seller's quotation.
- Held (iii) did not apply because:
  - Seller did not make a mistake
  - Would've been mistake in interpretation (applying *Paulger*).
- Court expressly said that act does not affect *S v H.*

***March Construction v Christchurch City Council* (1995)** -undershot tender
[Couldn't claim no contract bc no suggestion CCC knew or ought to have known of actual price; March intended to quote what they did].
Rectification (as below): didn't know the actual intention.
- Even if there was mistake, mistaken assumption not terms of the contract.

Misrepresentation: silence in not telling March ab mistake is not a misrep
FTA: no deceptive or misleading conduct, no misrep.
CMA: couldn't satisfy 6(1)(c) – term of contract specified that March must accept responsibility for mistakes.
- ***Does not matter if mistake is not to terms as long as you bring yourself within the act – this aspect of S v H did not survive the CMA.***
  - Just has to be known mistake w substantial effects.
- Situation would be different where it was apparent in the contract/clerical error that mistake was made, could be said P did not intended quoted price. This would be a mistake as to terms.

REMEDIES
- **Rectification (in equity):**
  - Where there is known unilateral mistake and the non-mistaken party takes unconscientious advantage of the mistake. OR
  - Where the written agreement is contrary to the known intentions of the parties.
    - MUST know the actual intentions e.g in *March Construction.*
- **No contract at CL:** in situation like *March,* reasonable renumeration.
- If court refuses to grant relief, CL position applies.

OTHER INFO
Intended scope of legal category 3 mistake:
- LRC had in mind false but diff assumptions ab subject matter of contract.
- X-purposes cases other than those where OP satisfied e.g where V wants to sell 1, P wants to buy 2 but contract for 3 and P tries to enforce it.
- Situations where because of latent or patent ambiguity in the expression of essential terms there is no consensus ad idem in its true (actual) or technical (objective) sense.
  - Latent ambiguity = *Raffles.*
  - Patent = *Montgomery v Continental Bags* – P intended sale for 23, D intended to sell 29. Written agreement for 23 but described 29. (no contract under OP anyway).
- Issue is satisfying s 6(2)(b):
  - In *Raffles* issue is not w the inequality of exchange, in *Montgomery* nothing wrong w the price so why is this a requirement.

When and who can argue no contract formed?
- Some ppl argue if u wanna escape a contract they can only do so under CMA; Dmac says this would be fully unworkable.
- Problem w code advocates is that OP is determinative in some CMA cases, how would we determine a contract? Legal vacuum.
  - Loophole where there is known mistake but no inequality of exchange.
  - Would displace principle saying offeree cannot accept an offer he knows offeror does not intend to make.
- Ozolins should have been able to argue no contract formed if no other basis of relief and reject act as code.
- OP retained in s 6(1)(a) but also in act specifically only making things contract for purposes of the act.
  - Also use the word 'relief' which means relief from normal consequences of CL.
  - s 2(3) just to prevent technical arguments that no contract was formed.
    - Some ppl claim interplay btwn s 5 and s 2(3) overrides CL by making non-contracts into contracts but no, only for purposes of the act.