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THE CONTRACTUAL MISTAKES ACT 1977-  
THE EXPERIENCE WITH A PARTIAL  
CODIFICATION OF THE CONTRACT LAW

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## ABSTRACT

In 1977 New Zealand enacted the Contractual Law of Mistake and departed in this context from the traditional Common Law.

The legislature decided not to codify the whole contract law, but only a part of it: the law of contractual mistakes. After more than 25 years this research paper will examine the experiences in New Zealand with such a codification and evaluate whether a partial codification can be recommended. For this purpose the aims and intentions of the Reform Committee will be examined and it will be shown where problems in the adjudication arose.

The experiences that were made in New Zealand with a partial codification has recently gained even more importance, after the EWCA in the UK abolished the equitable doctrine of mistake and asked for a codification to achieve more flexibility in the law of mistake.

This paper will show, that the Contractual Mistakes Act was only a half-hearted approach to codify the contract law and to achieve the aims set out by the Law Reform committee.

The reason for this evaluation is, that the Act is in itself incoherent, because it offers the courts on the one hand a very wide scope in relation to the definition of mistake and possible remedies on the discretion-side and on the other hand constrains the possibility for the courts to grant relief by enacting the prerequisites in section 6 of the Act.

Because of this half-heartedness the Act caused great problems for the judges to achieve a "just" result. This problem became apparent in the decision of *Conlon v Ozolins* where the Court of Appeal was forced to subsume a unilateral mistake, against the intention of the legislature, under the Act in order to achieve a "just" result. The Act took away from the judges the flexibility to achieve this "just result" under the traditional solution of Common Law and Equity.

Eventually, the Act has shown that the only way to codify the law of mistake is to codify the whole contract law and not only extracts of it. The reason for this assessment is that the law of mistake is related to different parts of the Contract Law, like contract formation and rescission of contract. It is not possible to codify one part without the other or distraction will be caused.

Instead of such a partial codification it is better to stay with the traditional Common Law/ Equity solution.



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## I INTRODUCTION

One of the most important principles in Contract Law is that agreements must be kept. On the other hand there might be circumstances in which it would be unjust to hold the parties to a bargain, arising from the fact that the parties have entered in consequence of mistake. Neither principle is paramount.<sup>1</sup> Therefore, the Law of Contractual Mistakes sets up rules, which regulates these two conflicting principles.

In New Zealand the Law of Contractual Mistakes was purely a creation of the judge-made Common Law and Equity until 1977. However, in recent years legislative change has been the most important influence on New Zealand contract law.<sup>2</sup> A series of statutes reformed and replaced much of the Common Law in the 1960s, 1970s and 1980s.<sup>3</sup> In the field of Contract Law that were the Illegal Contracts Act 1970, the Contractual Mistake Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1980. So, in 1977 the New Zealand Legislature departed from the Common Law and chose to enact mistakes in the Contractual Mistakes Act.<sup>4,5</sup> An interesting question that occurs, in this situation, is whether the old Common Law rules<sup>6</sup> are abolished or whether they still exist beside the Act. The result seems to be clear: Statute law is made by Parliament. Its legislation cannot - because of the supremacy of Parliament- be declared invalid by the Courts. So, the legislation prevails over all other types of law<sup>7</sup> and hence also prevails over the Common Law. This apparently clear result does not consider the intention of the Parliament, which is an important factor for construing a code. Sometimes the intention of the legislation is not to abolish the Common Law in a particular area completely. This is only the intention of the Parliament in cases where the act is a code. In this case the Common Law in a particular area is replaced with a set of statutory rules that are the exhaustive

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<sup>1</sup> Richard Sutton "Keeping it simple: New Zealand's Code of Contractual Mistake" in E.J.H. Schrage(ed.) *Unjust Enrichment and the Law of Contract* 381, 386.

<sup>2</sup> John F Burrows, Jeremy Finn and Stephen Todd *S Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 9.

<sup>3</sup> John F Burrows, Jeremy Finn and Stephen Todd *S Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 9.

<sup>4</sup> In the following : "the Act".

<sup>5</sup> John F Burrows, Jeremy Finn and Stephen Todd *S Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 287.

<sup>6</sup> (on which the statute is virtually build)

<sup>7</sup> John F Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 13.



and exclusive source of the law.<sup>8</sup> Only if this had occurred, then the Common Law rules regarding mistakes would have been abolished totally. Although pursuant to the title of section 5 the Act is an “Act to be a Code”, this question is still vividly debated after more than 25 years since the enactment. The adversaries of this debate are, on the one side, Professor McLauchlan who contents that the Common Law principles still have to be applied. On the other side Mr Dugdale (a former member of the Committee for the Act), Professor Sutton and Professor Coote, who all see the Act as a code and therefore as exclusive in terms of contracts which fails because of mistakes. At this point it should only be stated that the adversaries appear to have different understandings of what exactly a code is and that there is also no final conclusion, as to whether the Act is a code or not. Therefore, it can be questioned whether the aim of the Act, which was to define and simplify the law of contractual mistake, has been achieved.<sup>9</sup> So far the courts in New Zealand appear to regard the Act as a Code and try to subsume every possible case under the Act.<sup>10</sup>

This research paper will not focus on the question whether the Act is a Code or not, because all arguments relating to this question have been exchanged several times and explored in detail. That is why this research paper will take a different, maybe more practical approach: What are the experiences with a “codification” in a Common Law country? That this question has gained a lot of importance can be seen if we take a look at the recent developments in the United Kingdom: In the *Great Peace* the Court of Appeal abolished the equitable doctrine of common mistake.<sup>11</sup> Lord Philipps MR, who delivered the decision of the court, recognised that the “equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances.”<sup>12</sup> The aim of “greater flexibility” should no longer be achieved by the equitable doctrine but by a legislative intervention: “Just as the Law Reform (Frustrated Contracts) Act 1943 was needed to temper the effect of the common law doctrine of frustration, so there is scope for legislation to

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<sup>8</sup> John F Burrows *Statute Law in New Zealand* (3 ed, LexisNexis, Wellington, 2003) 375.

<sup>9</sup> Richard Sutton “The Code of Contractual Mistake: What went wrong?”(2003) 9 NZBLQ 234,234.

<sup>10</sup> It will be shown later that these endeavours of the judges reveal a lot of the flaws in the Act.

<sup>11</sup> Andrew Phang “Controversy in common mistake” (2003) Conv & Prop Law 247,247.

<sup>12</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679 at [161].



give greater flexibility to our law of mistake than the common law allows.”<sup>13</sup> In this context it will be questioned how this case would have been resolved in New Zealand and whether the legislative intervention gave greater flexibility than the Common Law.

This research paper will argue that the Act was<sup>14</sup> a half-hearted approach in many ways. It could therefore not be recommended to other Common Law countries as a “good example of statute law”. This evaluation is based on different reasons, which will be identified in this research paper. Firstly, the legislature seems unable to know whether the courts should determine whether a case of remediable mistake is given or not. On the one hand the definition of mistake in the Act is extraordinary broad and general<sup>15</sup>, so that the Courts have to determine when exactly a mistake is given. On the other hand the possible cases in which relief may be granted are strikingly narrow<sup>16</sup>, so that the courts do not have much space to vary from these prerequisites. In this context one great problem of the Act will be revealed:

In some cases, like cases of unilateral mistake and constructive knowledge, under the Act relief should not be available, but the only “just” solution, because of the “particular facts” of the case would be to grant relief. Because of this the courts were forced to transform these cases by verbal skill under the Act in order to achieve a “just” result.

Prior to the Act the courts had in these cases the opportunity to grant relief under Equity. But this possibility to achieve a “just” result was also taken away from the court, because of the abolition of the equitable doctrine of mistake, which was a major aim of the act. The flexibility that is taken away from the courts with this abolition contrasts sharply with the new flexibility that was given to the courts on the discretion side with the enactment of more flexible remedies. Strikingly these flexible remedies could only come into force when the obstacles of the narrow prerequisites, which were imposed on the courts, are overcome.

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<sup>13</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679 at [161].

<sup>14</sup> (although it was in 1977 a quite progressive attempt)

<sup>15</sup> Pursuant section 2(1). Mistake means a mistake, whether of law or of fact.

<sup>16</sup> Pursuant section 6(1)(a)-(c).



Therefore, it will be concluded that the Act took a lot of flexibility away from the courts and imposed on them<sup>17</sup> a "justice" problem.

Eventually the major intention of the legislature of the "amalgamation of fragmented doctrines of mistakes into a single body of law" was only implemented in a half-hearted way. This aim could not have been achieved by such a "partial Codification of the Contract Law", because the contractual law of mistake touches not only questions of the rescission of a contract but also principles of contract formation. Consequently, a "partial codification" which does not enact these principals of contract formation could not achieve this aim.

Therefore, it will be appreciated that the New Zealand approach not to enact the Contract Law in one big Code, but to pass a number of "mini-codes" over the years<sup>18</sup> dealing with aspects of the law of contracts, was not a successful approach. This paper will argue that either you stick to a pure Common Law solution or you codify the whole contract law in one code. Something in between can only result in a half-hearted solution. To show that the Act was half-hearted the most important prerequisites of the Act and the intentions behind them will be examined.

Furthermore, the named major intentions will be examined. It will be shown that those intentions were often only converted in a half-hearted way.

## **II BACKGROUND**

The Act goes back to a report of the Contracts and Commercial Law Reform Committee in 1976, which worked under the aegis of the Justice Department. The Committee was made up with practising lawyers, legal academics and departmental officials.<sup>19</sup>

### **A Intentions of the Legislature**

According to the Justice Department and the Committee there were many different reasons for the Codification. First the Common Law Rules, which dealt with "mistakes" were said to be a "fragmented series of doctrines some of which are overtly announced as rules relating to mistake, and others of which are based upon

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<sup>17</sup> (at least in some cases)

<sup>18</sup> Richard Sutton "Keeping it simple: New Zealand's Code of Contractual Mistake" in EJH Schrage (ed.) *Unjust Enrichment and the Law of Contract* 381, 383.

<sup>19</sup> The committee consisted of: Mr C I Patterson (Chairman), Mr B J Cameron, Professor B Coote, Mr D F Dugdale, Professor E P Ellinger, Mr J R Fox, Mr JS Henry, Mr W Illes, Mr J H Wallace, Mr A E Wright (Secretary).



different concepts, such as "offer and acceptance to correspond".<sup>20</sup> Therefore, the Act represented, according to the Minister of Justice Hon. David Thomson, "the first attempt in a Common Law country to codify what is readily acknowledged to be a highly complex and fragmented area of commercial law".<sup>21</sup> Hence, one of the major aims of the Act was identified by the Commercial Law Reform Committee as "the amalgamation of the present fragmented doctrines, some based upon mistake some based upon different legal devices, into a single body of law dealing with "mistake":<sup>22</sup> Furthermore, the old Common Law relied on "tests for mistakes that are inherently meaningless."<sup>23</sup> These tests would make it difficult for courts to explain their decisions rationally, or achieve consistency in similar cases.<sup>24</sup>

A main reason for the codification was -according to the Committee- the existence of a "double standard" for mistake in English and New Zealand law.<sup>25</sup> On the one hand there is the mistake-standard laid down in cases decided under the Common Law, on the other hand there is the mistake-standard laid down in Equity.

The operation of Common Law mistake is very narrowly confined<sup>26</sup>: Both parties must make a fundamental mistake of fact.<sup>27</sup> Equity may give relief to a person who has made a mistake, which is not fundamental in the narrow Common Law sense.<sup>28</sup> Furthermore, the traditional view has been that a mistake of law<sup>29</sup> can only in Equity sometimes give ground for relief.<sup>30</sup> Eventually the contract is under a mistake in Common Law void. Contrary to this in Equity the contract is only voidable.<sup>31</sup> So there were cases in which the contract was valid under the Common Law, but voidable under the equitable doctrine of mistake.

In the view of the Committee this means that statements made in relation to the Common Law-mistake were qualified or contradicted when the equitable mistake

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<sup>20</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 3.

<sup>21</sup> Hon David Thomson (20 May 1977) 410 NZPD 7.

<sup>22</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 10.

<sup>23</sup> Hon Jim McLay (29 July) 412 NZPD 1743.

<sup>24</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 4.

<sup>25</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 7.

<sup>26</sup> *Chitty on Contracts* (27 ed, Sweet & Maxwell, London, 1994) 294.

<sup>27</sup> Guenter Treitel *The Law of Contract* (11<sup>th</sup> ed, Sweet & Maxwell, London, 2003) 286.

<sup>28</sup> Guenter Treitel *The Law of Contract* (11<sup>th</sup> ed, Sweet & Maxwell, London, 2003) 312.

<sup>29</sup> (opposed to one of fact)

<sup>30</sup> *Chitty on Contracts* (27 ed, Sweet & Maxwell, London, 1994) 318.

<sup>31</sup> *Chitty on Contracts* (27 ed, Sweet & Maxwell, London, 1994) 295.



rules were applied.<sup>32</sup> The Committee appreciated the distinction between mistake in Common Law and Equity as an unnecessary complexity and artificiality in the law of mistake.<sup>33</sup> Furthermore, the equitable doctrine of mistake was "not altogether free from uncertainty".<sup>34</sup>

Finally, one of the main reasons for the enactment was that the legal remedies available as a result of a mistake were "drastic and inflexible"<sup>35</sup>, resulting basically in no contract.<sup>36</sup> Therefore, the courts had been reluctant to commit themselves to a clear policy in defining mistake, thereby avoiding a substantial injustice to one party.<sup>37</sup> Eventually, the overall aim of the Act was to define and simplify the law of mistake and to achieve judicial certainty.

### ***B Criticisms during the Codification***

It has to be clarified that the "codification" did not pass without criticism but criticised as being unnecessary.<sup>38</sup>

It was purported that, no one had asked for it because the present law at that point of time was contended to work well, because persons who make mistakes –the incompetent- were driven out of the business.<sup>39</sup> In contrast to this the new codification would in its result protect the incompetent businessmen, who made a mistake. Moreover, it would create uncertainty because nobody knew at that point what the Contractual Mistakes Bill mean, particularly what mistake means. The definition that mistake according to the Bill means a mistake whether of law or of fact<sup>40</sup> actually means that "the Supreme Court will determine what is or is not a mistake under the Contractual Mistake Act".<sup>41</sup>

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<sup>32</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 7.

<sup>33</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 7.

<sup>34</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 7.

<sup>35</sup> Hon David Thomson (20 May 1977) 410 NZPD 7.

<sup>36</sup> Hon Jim McLay (29 July) 412 NZPD 1743.

<sup>37</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 8.

<sup>38</sup> Hon Richard Prebble (8 September 1977) 413 NZPD 2805.

<sup>39</sup> Hon Richard Prebble (8 September 1977) 413 NZPD 2805: "The sooner the incompetent stops building the better".

<sup>40</sup> Hon Richard Prebble (8 November 1977) 415 NZPD 4288: "That is a great definition!"



### *III THE DIFFERENCES OF THE ACT IN COMPARISON TO THE OLD COMMON LAW*

After these controversies the Act was finally codified, but the criticism has not stopped ever since then. Now it will be examined whether this criticism is justified or whether the aims, which the Legislature had in mind by passing the Act were achieved. For this purpose the differences and similarities to the previous Common Law will be shown and what exactly the intention of the legislature was. The experiences with the new law will show that the Act was not the optimal way to achieve the aims, which were formulated by the Reform Committee. Therefore, criteria will be proposed which would have helped to achieve the objectives.

#### *A The Prerequisites for the Grant of Relief*

Relief under the Act can only be granted if the prerequisites of section 6(1) are satisfied. In any case under this section the parties have to be influenced by a mistake in entering into the contract. Furthermore, the result of this mistake must be that there is a substantial inequality of values and the applicant has to show that he is not obliged by the terms of the contract to shoulder any burden of risk<sup>42</sup>.

##### *1 Mistake*

Obviously, the main term in a Act should be the term "mistake". In the Act is only stated that a "mistake means a mistake, whether of law or fact".<sup>43</sup>

Originally, the Committee proposed another more detailed definition.<sup>44</sup> The proposal additionally stated that mistake included an erroneous opinion and calculation as well as an error in the manner in which a document is expressed. It furthermore stated that it does not include any matter of expectation, which concerns, or is dependent on, an event occurring or failing to occur after a particular contract is entered into.<sup>45</sup>

But this was believed to be a too wide definition and therefore the Statutes Revision Committee deleted these subsections.<sup>46</sup> As a reason for the amendment it was purported that the provision originally proposed was entirely unnecessary, since<sup>47</sup> the

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<sup>42</sup> section(6)(b) and (c)

<sup>43</sup> section(2)(1)

<sup>44</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 15.

<sup>45</sup> *ibid.*

<sup>46</sup> John F Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 292.

<sup>47</sup> (contrary to the view of the Reform Committee)



purported that the provision originally proposed was entirely unnecessary, since<sup>47</sup> the Common Law saw no difficulty in giving relief for errors about matters of opinion.<sup>48</sup> According to Hon Jim McLay MP the Committee deleted the reference to erroneous opinion, erroneous calculations, and errors in the manner in which a document is expressed, because it was concerned that such a definition of mistake "could lead to a much greater number of actions based on contractual mistakes than has previously been the case."<sup>49</sup>

The chosen definition in section 2 (1) of the Act is not what is expected from an approach of jurisdiction, because it is by far too general. It does not provide the answer for what a mistake is. To define what a mistake actually is, is left totally to the courts. For such a result a codification is not necessary.

Certainly, a specific definition of what exactly a mistake is would also not be the right approach. In this case the Act would have been totally unworkable. The reason for this would be that the flexibility of the courts would be constricted because of the definition. The judges would have in the cases of such a very specific definition no chance to react on the special circumstances of the individual case to achieve a just result. Thus, neither a very specific definition nor a broad definition like in the Act can be recommended. At this point it is helpful to take a look at a civil law country, where a middle course has been enacted. In the German Civil Code (BGB) three different kinds of mistake are codified. Firstly, a person can challenge the contract if the person made a mistake about the subject matter of a declaration (where a person declares A and thinks that A means B)<sup>50</sup>. Secondly, a challengeable mistake is given where the mistake is about the declaration itself (where a person declares A but wanted to declare B)<sup>51</sup>. Finally, a declaration can be challenged if his will is communicated inaccurately as an "error in communication"<sup>52, 53</sup>.

Thus, here only basic cases of mistake have been codified by the legislature. But the codification is not so wide that it is absolutely unclear when a mistake is given or not.

<sup>47</sup> (contrary to the view of the Reform Committee)

<sup>48</sup> Donald J Lange "Statutory Reform of the Law of Mistake" (1980) 80 Osg HLJ 429, 437-440.

<sup>49</sup> Hon Jim McLay (8. September 1977) 413 NZPD 2804.

<sup>50</sup> § 119 I 1. Alt. BGB (*Inhaltsirrtum*)

<sup>51</sup> § 119 I 1. Alt. BGB (*Erklaerungsirrtum*)

<sup>52</sup> § 120 BGB (*Uebermittlungsfehler*)

<sup>53</sup> Gerhard Robbers *An Introduction to German Law* (3 ed, Nomos, Baden-Baden, 2003) 214.



On the other hand<sup>54</sup> there is still enough room for the judges within the scope of these cases to achieve a just result in the individual cases.

(a) The intention behind the definition

Although, section 2(1) does not provide a “real” substantial definition, this short sentence includes a big departure from the previous Common Law.

At Common Law, the traditional view is that a mistake can affect the validity of a contract only if it is one of “fact” as opposed to one of “law”.<sup>55</sup> The reason<sup>56</sup> for this distinction was that everyone was presumed to know the law: ignorance of the law was neither excuse nor defence.<sup>57</sup> But the distinction between these two categories was not always easy to draw or to justify.<sup>58</sup> The problems that existed with this distinction should be avoided by the new broad definition, which treats mistakes of fact and of law equally.

Apparently the Statutes Revision Committee<sup>59</sup> wanted to leave it to the court to define whether a mistake is given or not. Therefore, this Act did not change anything in comparison to the Common Law, because the courts should be the one to define the mistakes. It seems like the Statute Revision Committee was afraid to define key elements into a statute and did not want to constrain the flexibility of the courts. As already stated above the Committee viewed the “drastic and inflexible legal remedies<sup>60</sup>”, as the main reason why the courts were so reluctant to commit themselves to a clear policy in defining mistake. Thereby, the Courts tried to avoid a substantial injustice to one party.<sup>61</sup> Now with the new section 7 those flexible remedies were given and it appears that the Statutory Revision Committee expected that therefore the courts would commit themselves to a clear policy in defining mistake. That is why the Revision Committee held that “it would be unwise to extend the definition of mistake

<sup>54</sup> In contrast to a very specific definition of mistake.

<sup>55</sup> Guenter Treitel *The Law of Contract* (10<sup>th</sup> ed, Sweet & Maxwell, London, 1999) 288.

<sup>56</sup> (usually given)

<sup>57</sup> Gerald Henry Louis Fridman *The Law of Contract in Canada* (3<sup>rd</sup> ed Carswell Thomson, Ontario 1994) 265.

<sup>58</sup> Guenter Treitel *The Law of Contract* (11<sup>th</sup> ed, Sweet & Maxwell, London, 2003) 313.

<sup>59</sup> ,by amending the original proposed definition of mistake,

<sup>60</sup> Hon David Thomson (20 May 1977) 410 NZPD 7.

<sup>61</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 8.



beyond a fairly limited category at this early stage of development of a new category of legal remedies".<sup>62</sup>

(b) Experience with the new definition

Therefore, it has to be questioned whether this expectation that the courts would now commit themselves to a clear policy in defining mistake has become real. This would only be true if in cases where it was uncertain whether a mistake was given or not, after the enactment this was clear.

In this context only one example should be given that reveals that in a clear policy whether mistake is given is not recognisable. One well-known problem in the law of mistake is the question whether ignorance of a matter can be defined as a mistake or not. In *New Zealand Refining Company Ltd v Attorney-General*<sup>63</sup> both parties failed to consider whether a payment made pursuant to a contract was inclusive or exclusive of certain taxes. In this case the Court of Appeal decided that this did not amount to a mistake. Contrary to this decision was the judgment of the Court of Appeal two years earlier in *Slater Wilmshurst Ltd. v Crown Group Custodian Ltd*<sup>64</sup> Here the parties were contracting for a building and both had forgotten that another party held a right of pre-emption over the property.

Here it was held that the failure to think about this right could be regarded as a mistake. So, although in both cases the Court of Appeal was confronted with the same decisive question, the decisions of the court were conflicting. In the first case it was held that ignorance of a matter could not amount to a mistake. In the second the addressed question was answered in an affirmative way by the court. By this example it can be seen that it is doubtful whether the hope of the legislature that the courts would commit themselves to a clear policy of defining mistake<sup>65</sup> would be achieved. This problem could have been avoided for example by a clarification in the Act that in cases of failure of consideration a mistake is given or not.

(c) Assessment

The enactment of the broad "declaration" that mistakes means mistake of fact and law was just a half-hearted approach:

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<sup>62</sup> Hon Jim McLay (8. September 1977) 413 NZPD 2804.

<sup>63</sup> *New Zealand Refining Company Ltd v Attorney-General* (1993)15 TC 10,038(CA).

<sup>64</sup> *Slater Wilmshurst Ltd v Crown Group Custodian Ltd*. [1990] 1 NZLR 518, 539 (HC) Gallen J.

<sup>65</sup> (because of the new flexible remedies)



On the one hand the legislature enacted an Act in order to abolish the "tests for mistakes that are inherently meaningless"<sup>66</sup> which made it difficult for courts to explain their decisions rationally, or achieve consistency in similar cases.<sup>67</sup>

On the other hand the definition of mistake, the key element of the Act, was not defined by the legislature itself, but left to the courts and therefore to the ones that were responsible for the development of the "inherently meaningless tests". Evidently it has to be doubted whether the legislature was serious with their aim to abolish these tests.

With the enactment of a more substantial definition of mistake instead, the legislature could have created more effective guidelines, which were binding to the courts so that there would be no room for "inherently meaningless tests". As mentioned earlier that does not mean that the legislature should have enacted specific and detailed tests, but the legislature could have at least decided in the Act some of the well-known problems that existed in the Common Law<sup>68</sup>. This chance was missed, apparently because there was not very much confidence in a statutory mistake of law. This lack of confidence was expressed in the amendment of the Statute Revision Committee of the original proposal<sup>69</sup>, which was at least a more precise definition. Instead the definition of mistake was left to the court. This approach could have worked out, but here again the whole act was incoherent and therefore just a half-hearted approach. That is because the legislature lacked not only the confidence in a statutory law of mistake it also did not support a solution which enabled the courts to develop the law of mistake in a coherent way. Instead it was decided to enact specific prerequisites<sup>70</sup> which had to be fulfilled in addition to a "mistake".<sup>71</sup> The contrast between the wide definition of mistake on the one hand and these narrow cases is eye-catching and expresses the half-heartedness of the approach

The result of this half-hearted approach was that the flexibility that was given to the judges on the one side by the enactment of the wide definition of mistake was not worth much, because of the very narrow prerequisites that were chosen in section 6.

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<sup>66</sup> Hon Jim McLay (29. July 1977) 412 NZPD 1743.

<sup>67</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 4.

<sup>68</sup> Like ignorance to a matter.

<sup>69</sup> By deleting the subsections (b) and (c)

<sup>70</sup> enacted in section 6

<sup>71</sup> although the mistake was not defined!



Eventually, the expectation that was expressed by the Statute Revision Committee, that the creation of the new flexible remedies in section 7 was sufficient for the courts to commit themselves to a clear policy in defining mistake appears to be very starry-eyed and half-hearted. With the enactment of the narrow prerequisites<sup>72</sup> it was foreseeable that the courts would often have no opportunity to exercise their discretion and use the flexible remedies. Therefore, the development of a "clear policy of mistake" could have been only achieved if this development would have been left totally to the court, especially without the restriction of section 6.

## 2 Knowledge according to section 6(1)(a)(i)

In section 6 (1)(a)(i) the only possibility is codified, where a unilateral mistake may grant relief under the Act. Pursuant to this section relief may be granted if "the mistake was known" to the not mistaken party. The knowledge of the other party is the reason why it is not a purely unilateral mistake and why relief can be granted in this case.

But what exactly is "knowledge" in this context? Undoubtedly the case is contained when the not-mistaken party knows that the other party is acting on an erroneous belief. Questionable is whether cases of constructive knowledge also should be comprised. Constructive knowledge means that the not-mistaken party ought to have known that the other party is mistaken.

### (a) Intention for the enactment

The Reform Committee intended that relief should not be available, "where the evidence falls short of establishing actual knowledge".<sup>73</sup> The Committee stated that, "the law of contract is concerned with the enforcement of agreements independently of the question whether such agreements were prudently or imprudently made."<sup>74</sup> The only exception from this principle is when "the other party knew of this mistake."<sup>75</sup> Therefore, the Legislation decided not to enact constructive knowledge. The Court of Appeal applied and confirmed this intention of the Legislation in *Tri-Star Customs*

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<sup>72</sup> of section 6

<sup>73</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 17.

<sup>74</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 17.

<sup>75</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 17.



*and Forwarding Ltd v Denning*<sup>76</sup>, by overruling the High Court decision that held that constructive knowledge suffices.<sup>77</sup>

(b) Discussion: A legal gap in the Act?

In this context Professor MacLauchlan raised the argument, that there is a legal gap in the Act in comparison to the old Common Law. In the situation of constructive knowledge no contract would have been formed under the old Common Law rule of *Smith v Hughes* (the objective principle). This old Common Law rule could be applied with the Act. Whether this objective rule is still applicable will be discussed in another context. Pursuant the objective principle of contract formation you are bound despite lack of intention, if you lead another person to reasonably believe in the terms you are offering.<sup>78</sup> According to Professor MacLauchlan no contract would have been formed at Common Law if one party has constructive knowledge of the mistake: If one party ought to have known that the other party is mistaken he could not reasonably have believed in the offer of the mistaken party.<sup>79</sup>

It is questionable if the "legal gap" between the former Common Law and the Act really exists. This would only exist if the Common Law acknowledged that constructive knowledge prevents the formation of a contract.

But it is not clear whether for the mistake to be operative it must be actually known to the other party or whether it is enough that it ought to have been apparent to any reasonable man.<sup>80</sup> Therefore, it can be doubted whether a legal gap between the Common Law and the Act really exists.

<sup>76</sup> *Tri-Star Customs and Forwarding Ltd v Denning* (1999) 1 NZLR 33 (CA).

<sup>77</sup> *Denning v Tri-Star Customs and Forwarding Ltd* (1996) 7 TCLR 256; 17 NZTC 12,618(HC).

<sup>78</sup> *Smith v Hughes* [1871] LR 6 QB 597,607.

<sup>79</sup> D W MacLauchlan "The Contractual Mistakes "Code": A Polite Response to Mr Dugdale" (2002) NZBLQ 132, 137.

<sup>80</sup> *Chitty on Contracts*(29 ed, Sweet & Maxwell, London, 2004) 409

In *Olympia Sauna Shipping Co SA v Shinwa Kaiun Kaisha Ltd (The Ypatia Halcoussi)*[1985] 2 Lloyd's Rep 364, 371 QB (Comm C) Bingham J argues that constructive knowledge is not enough: "... He may even have thought that they had (been mistaken). But he cannot be shown to have had actual knowledge of their mistake, even if a mistake be assumed, the less so since the telexes represented no departure from anything which had previously been agreed or even assumed."

In contrast to this decision it was held in *McMaster University v Wilcher Construction Ltd* (1971) 22 DLR(3d) that constructive knowledge was sufficient.



Furthermore, there are good reasons why constructive knowledge should not prevent the formation of a contract. First you can argue it is an objective principle, so that the personal knowledge<sup>81</sup> of the not-mistaken party is not decisive. Therefore, even if the other party ought to have known from the mistake, a contract can be formed. This is the case, because this other party should not have a duty to investigate whether the offer of the other party is flawless:

“Each Party has to look after its own interests and neither owes a duty of care to the other.”<sup>82</sup> Therefore constructive knowledge of one party of the mistake of the other party does not prevent the formation of a contract.

Moreover, you can see by the comments of the Law Committee that it wanted to decide this question and achieve judicial security in this question by the deliberate omission of constructive knowledge.<sup>83</sup> A legal gap is therefore not given, because in New Zealand the debated question is decided in the code in a negative way.

#### (c) Experience

The legislature showed through the omission of the words “ought to have known” that constructive knowledge should not be enough for the grant of relief. So the legislature enacted a very narrow meaning of knowledge.

Despite this there were tendencies in New Zealand to grant relief in such cases. A recent case in this context was *Tri-Star Customs and Forwarding Ltd v Denning*<sup>84</sup>:

An agreement to lease conferred on the lessee (Tri-Star Customs) an option to purchase the premises for \$720,000, with no mention of GST. The lessee, who had earlier proposed figures of \$600,000 and \$700,000, was induced to agree to this price when informed by its solicitor that the transaction was subject to GST and that he would be able to claim a refund of 80,000. When the lessee later purported to exercise the option, the Denning maintained that they understood GST would be added.

Salmon J awarded Denning relief under the Act finding there was a qualifying unilateral mistake.<sup>85</sup> Though Tri-Star had no actual knowledge of the mistake it should have been aware of the existence of the mistake. Although the Court of Appeal

<sup>81</sup> (other than actual knowledge)

<sup>82</sup> *Clarion Ltd v National Provident Institution* (2000) 2 All ER 265, 281(HC).

<sup>83</sup> Brian Coote “The Contractual Mistakes Act as a Code: Some Further Thoughts” (2002) 8 NZBLQ 223, 225.

<sup>84</sup> *Tri-Star Customs and Forwarding Ltd v Denning* (1999)1 NZLR 33(CA).

<sup>85</sup> *Denning v Tri-Star Customs and Forwarding Ltd* (1996) 7 TCLR 256;17 NZTC 12,618 (HC).



corrected this decision and held that actual knowledge was necessary, the High Court showed that the wordings of the Act are not unequivocal. In its ordinary meaning the word "known" connotes possession of information, or a state of awareness.<sup>86</sup> But the word "known" does not clarify how much information is necessary and what kind of state of awareness must be achieved.

Another tendency in how the courts dealt with the enactment was that they construed a very wide understanding of actual knowledge. In *King v Wilkinson*<sup>87</sup> the purchasers believed they were purchasing the property as fenced, but in reality that did not include a strip of land within the fence line 3.5 m wide extending along the entire southern boundary. Here Holland J held that the vendors "must have known" of the existence of the mistake because "it was only four years since the vendor had subdivided the property and knew that the fence was 3.5 m within the boundaries of the property" that he sold.<sup>88</sup>

In this case it seems like the court followed the intention of the legislature, but in reality it transformed by verbal skill a case of constructive knowledge into a case of actual knowledge. You can see this if you look at the formulation "must have known". This is a classical formulation of constructive knowledge<sup>89</sup> and not actual knowledge.

#### (d) Assessment

The requirement of "knowledge" was also "codified" in a half-hearted way. Here you can reproach the legislature that they missed a chance to clarify that knowledge is actual knowledge. Although they must have known of the discussion that existed in the Common Law World, whether constructive knowledge is sufficient or not, a clarification was not enacted.<sup>90</sup> Only the omission of the codification of the words "ought to have known" was not enough to clarify the intention of the legislature.

The High Court-decision of *Tri-Star* also reveals that the Act seems to have in this context a "justice problem".

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<sup>86</sup> *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33,37(CA) Henry J.

<sup>87</sup> *King v Wilkinson* (1994) 2 NZ ConvC 828 (HC).

<sup>88</sup> *King v Wilkinson* [1994] 2 NZ ConvC 828,834 (HC) Holland J.

<sup>89</sup> (=ought to have known)

<sup>90</sup> Same reproach like in the case of ignorance of a matter, see above page 9.

<sup>90</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.



This can be stated because there were not only endeavours in the legal science, but also in the jurisdiction of the courts (like in *Tri-Star*) to subsume constructive knowledge under the Act. So, it seems there might be cases in which this should be sufficient for the grant of relief as well. Apparently judges cannot grant relief in situations when it appears for them to be just to grant relief, because the prerequisites of the Act are not satisfied. Therefore, it seems like the Act took from the judges the flexibility to achieve a just result.

This assumption is confirmed by the other tendency, which was shown in the wide application of actual knowledge in cases like *King v Wilkinson*.<sup>91</sup> In these cases it appears that the desire to grant relief led the judges to findings of actual knowledge where in fact there has only been constructive knowledge.<sup>92</sup> These tendencies reveal that the judges see the exclusion of constructive knowledge in some cases as not just and try to find a way to achieve the proper result.

This is not surprising if you make yourself clear that the exclusion of constructive knowledge is contrary to the stated policy and purpose of the Act.<sup>93</sup> The purpose of the Act is to mitigate the arbitrary effects of mistakes on contracts.<sup>94</sup> But the party that has been mistaken will suffer the same harsh consequences regardless of whether or not the other party has knowledge of the mistake.<sup>95</sup> To grant relief in the one case and not in the other is to make an arbitrary distinction.<sup>96</sup>

Therefore, at this point a widening of the understanding of mistake should be recommended. A unilateral mistake should be remediable, independent whether knowledge of the non-mistaken party is given. This will be explained in detail in the next assessment of the next section.

### 3 *Enactment of unilateral mistakes in section 6(a)(iii)?*

In the law prior to the Act in general a contract was only void if both parties were mistaken. One major exception is when the other party knew of the mistake. A purely unilateral mistake, cases in which only one party was mistaken, was not sufficient.

The reason for this narrow understanding of mistake is the judicial certainty. A party should be bound by what he said or wrote and cannot escape by simply saying that he

<sup>91</sup> *King v Wilkinson* (1994) 2 NZ ConvC 828(HC).

<sup>92</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.

<sup>93</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.

<sup>94</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.

<sup>95</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.

<sup>96</sup> G L Lang "The Contractual Mistake Act 1977"(1978) 4 Otago LR 245, 251.



did not mean what the other reasonably understood, in the circumstances by the words used<sup>97</sup>.<sup>98</sup> As it is essential for the formation of a contract that both parties agree about the conditions, the contract should only have the harsh consequence of being void if both parties share the mistake.

(a) Intention

Accordingly to this, different remediable kinds of mistakes were codified in section 6. Consequently, in subsection 6(1)(a)(i) the only remediable unilateral mistake is enacted. And even in the section (i) there is a relation to the other party, because the other party knows of the mistake.

The Reform Committee stated in the Report: "Where only one of the parties has been mistaken, we do not think that relief should be available to him unless the evidence is sufficient to show that the other parties knew of his mistake."<sup>99</sup> Evidently the Committee intended that only in the case of a unilateral mistake pursuant section 6(1)(a)(i) relief should be available. All other cases of unilateral mistake were intended not to be remediable.

(b) Experience

Against the intention of the Reform Committee the courts granted in some cases relief of unilateral mistake relief, without admitting that they were doing this. The crucial case in which this conduct became obvious is the famous Court of Appeal decision of *Conlon v Ozolins*.

(i) *Conlon v Ozolins*<sup>100</sup>

Mr Conlon, the plaintiff, intended to buy the four lots of land mentioned in a written agreement with Mrs Ozolins. Mrs Ozolins, an elderly widow (aged 73) who had some difficulty expressing her in the English language, only intended to sell three of those four sections because she wanted to keep the garden-section. Her solicitor has drawn up the written agreement. He had previously asked her what she intended to sell. She answered "not my home" which the solicitor understood to mean that Mr Conlon

<sup>97</sup> (=objective principle)

<sup>98</sup> *Chitty on Contracts* (29 ed, Sweet & Maxwell, London, 2004) 401.

<sup>99</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 17.

<sup>100</sup> *Conlon v Ozolins* (1984) 1 NZLR 489 (CA).



wanted to sell all lots. Mrs Ozolins was held to have been entirely unaware of her misapprehension. When Mrs Ozolins refused to transfer all four lots, Mr Conlon sued for specific performance.

The Court of Appeal held by a majority (2 to 1) that she qualified for relief under section 6(1) (a)(iii) of the Act. The parties were "each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or law."

McMullin J agreed with the High Court Judge Greig J and found that the defendant's mistake was in thinking that she was only selling lots 1 to 3. The plaintiff's mistake was that the defendant intended to sell lots 1 to 4.<sup>101</sup>

More detailed was the reasoning of Woodhouse P.<sup>102</sup> :

"He<sup>103</sup> mistakenly thought she was consciously selling all of the land at the rear of her house including the garden; she<sup>104</sup> mistakenly thought he was buying merely the land beyond the high fence. To put the matter another way, each had a mistaken impression about the boundaries of the tract of land being bought and sold. Mr Conlon believed that from the outset the vendor had been willing to complete a sale of all four lots: about that he was mistaken. On the other hand she believed he had limited his purchase to the land north of the fence: about that she was mistaken. It is an analysis, which shows that their respective 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 size of land to be bought and sold."

This analysis of the Court of Appeal was strongly criticised by Professor David MacLauchlan. Firstly, he argued that there is no mistake about the same matter of fact pursuant section 6 (1) (a)(iii). If Mrs Ozolins was mistaken about the intention of Mr Conlon and Mr Conlon about her intention then these are mistakes about different matters of fact.<sup>105</sup>

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<sup>101</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 505 (CA) McMullin J.

<sup>102</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 499(CA) Woodhouse P.

<sup>103</sup> (=Mr Conlon)

<sup>104</sup> (=Mrs Ozolins)

<sup>105</sup> D W MacLauchlan "The Demise of *Conlon v Ozolins*: 'Mistake in Interpretation' or Another Case of Mistaken Interpretation?"(1991) 14 NZULR 229, 231.



Secondly, even the cited more detailed reasoning of Woodhouse only "sought to mask this difficulty by saying that that the common matter of fact about which the parties were mistaken was 'the size of the land to be bought and sold'."<sup>106</sup> This meets not the requirements of a matter of fact, because that requires something capable of verification.<sup>107</sup> The size of land to be bought and sold would only have been capable of verification if the parties had a common intention about this matter, ex hypothesi, the parties had different intentions.<sup>108</sup> Therefore, "the land to be bought and sold" could not be verified.<sup>109</sup>

Professor MacLauchlan's criticism shows that no mistake about the same matter of fact pursuant section 6(1)(a) was given. In fact the Conlon vs Ozolins case does obviously not fit under none of the kind of mistakes of section 6.

The dissenting judge Somers J formulated it like this:

"I do not consider that in ordinary parlance it can be said that the purchaser made any mistake at all. He intended to buy the four lots described to and inspected by him, and that, according to the agreement he did."<sup>110</sup> Somers J also mentioned the

consequences of such a definition of common mistake: "For as often as one party is mistaken in intention the other party will be taken to be relevantly differently mistaken about the same matter of fact so as to bring the case within subpara (iii)."<sup>111</sup>

That "could not have been the legislative purpose: If it were subpara (i), which requires knowledge by one party of the mistake of the other, seems superfluous."<sup>112</sup>

That is why the reasoning of Woodhouse P. and McMullin J., in which they try to explain why a common mistake according to section 6 (1)(a)(i) is given, makes quite an artificial impression on an unprejudiced reader. There was simply no common mistake, because the only erroneous party is Mrs Ozolins.

Nevertheless the reasoning of the majority was somehow inevitable. The reason for this was simply that the judges wanted to grant relief to Mrs Ozolins but were not able to do so under the Act. The Act could not handle the special circumstances of the case

<sup>106</sup> D W McLauchlan "The Demise of Conlon v Ozolins: 'Mistake in Interpretation' or Another Case of Mistaken Interpretation?"(1991) 14 NZULR 229, 231.

<sup>107</sup> D W McLauchlan "Mistake as to Contractual Terms" (1986) 12 NZULR 123, 144.

<sup>108</sup> D W McLauchlan "The Demise of Conlon v Ozolins: 'Mistake in Interpretation' or Another Case of Mistaken Interpretation?"(1991) 14 NZULR 229, 231.

<sup>109</sup> D W McLauchlan "Mistake as to Contractual Terms" (1986) 12 NZULR 123, 144.

<sup>110</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 508 (CA) Somers J dissenting.

<sup>111</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 508 (CA) Somers J dissenting.

<sup>112</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 508 (CA) Somers J dissenting.



that were later described as particular facts.<sup>113</sup> The judges were confronted with the decision whether they should take away the garden, which might have been her “purpose of life” in her dotage, from an elderly widow. Moreover she had had difficulties to express herself in English, so that it was hard to say that the mistake was her “fault”. Who would want to take away the garden from an old lady under such particular facts?

That is why the decision of the Court of Appeal was determined on social grounds.<sup>114</sup> Because the Act was viewed as a Code the judges had to find a possibility to grant relief within the Act. But within the Act there was just one “back door” to avoid an unjust result: to insinuate that a common mistake under the Act was given. So, the mistake of Mr Conlon seems to be an insinuation in order to subsume this case under the Act.

Therefore, the judges transformed the actual unilateral mistake of Mrs Ozolins by “verbal skill” into a common mistake by selecting as the matter of fact the “size of land to be bought and sold”.<sup>115</sup>

Woodhouse P explains the application of section 6 (1)(a)(iii) that “the provision being remedial does not deserve to be construed narrowly or by any reference to any of the rather mixed judicial conclusions based upon Common Law.”<sup>116</sup> Instead “the language must receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act.”<sup>117</sup>

In this passage of the judgment you can see that the majority judges realised that they were defining the common mistake in a broad and very doubtful way. Nevertheless “this fair and liberal construction” was the only way to achieve a “just” result within the “Code”.

In this case it can be concluded that the Act did not provide the “just” result the judges intended to achieve. Therefore, the Act was not successful and it appears that it would have been better to stay with the traditional approach. Although in Common Law there would have been no possibility to grant relief, because a unilateral mistake

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<sup>113</sup> *Paulger v Butland Industries* [1989] 3 NZLR 549,553 (CA) Hardie Boys J.

<sup>114</sup> Julia Pratt “Paulger v Butland Industries Ltd; a further consideration and interpretation of the Contractual Mistakes Act 1977 and a limitation of the scope of *Conlon v Ozolin*” (1991) 2 ICCLR 26, 28.

<sup>115</sup> A Beck and R Sutton Contractual Mistakes Act 1977 in Law Commission Report No 25: *Contract Statutes Review*, Wellington 1993, 127,137.

<sup>116</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 499(CA) Woodhouse P.

<sup>117</sup> *Conlon v Ozolins* [1984] 1 NZLR 489, 499(CA) Woodhouse P.



is not sufficient under the old Common Law as well. But because of Equity the courts had the measures to achieve a flexible result. In Equity a unilateral mistake may entitle Mrs Ozolins to have the contract rectified<sup>118</sup> in a way that mitigates the hardship of the Common Law result. Therefore, the traditional approach provided the flexibility to achieve the “just” result due to the “particular facts.

Now it should be examined whether Conlon was an outlier-decision. If that would have been the case this could have been easily corrected by later decisions of the courts, which were coherent with the wordings of the Act and provided the “just result” necessary within the Act.

(ii) *Engineering Plastics v J Mercer & Sons Ltd*<sup>119</sup>

In this case the defendant ordered 4000 O-rings: the order referred to the plaintiff's letter of 20 July but did not repeat the price, which was stated in the letter to be “\$644.96/c”. The plaintiff delivered in all 4075 rings to the defendant and then invoiced it for \$644.96 per hundred, plus a tooling charge and freight: a total of \$ 27,246.42 which meant that each O-ring cost \$ 6,67. The defendant had thought that each O-ring was going to cost 43 cents because it had not been realised that \$ 644.96 was the price per hundred.

The High Court applied *Conlon v Ozolins* and held that the mistake was one that came within the section 6 (1)(a)(iii) of the Act: “Each party had a mistaken belief about 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 sell the 4000 rings for \$644.96, plus the tooling charge.”<sup>120</sup>

As examined above it can be stated as well, that the only person mistaken was the defendant. He did not know that he was contracting for 644.96 per hundred and therefore his belief was erroneous. Here a unilateral mistake was held as sufficient under the Act although there were not particular facts like in *Conlon v Ozolins* that

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<sup>118</sup> *Chitty on Contracts*(27 ed, Sweet & Maxwell, London, 1994) 293 and 323.

<sup>119</sup> *Engineering Plastics Ltd v Mercer & Sons Ltd* (1985) 2 NZLR 72 (HC).

<sup>120</sup> *Engineering Plastics Ltd v Mercer & Sons Ltd* [1985] 2 NZLR 72,82 (HC) Tompkins J.



could justify the decision. So, in this case the apprehension of Somers J. became true, that every unilateral case could be subsumed under section 6 (1) (a) (iii).

(iii) *Paulger v Butland Industries Ltd*<sup>121</sup>

The company Dingwall and Paulger Ltd was in financial difficulties. So Mr Paulger<sup>122</sup> entered into a contract for the sale of its business, which Paulger expected to realise enough money to pay the company's unsecured creditors.

He sent a letter to the creditors on the company's letterhead advising them of the sale and giving assurances that the company would be paying off its creditors within 90 days. To these assurances he added the words "The writer personally guarantees that all due payments will be made." He signed the letter with "M J Paulger, Chief Executive".

The company was put into receivership before the sale was completed. After the 90 days- period had expired and its debts remaining unpaid, one of the creditors, Butland Industries made demand upon Mr Paulger and subsequently brought summary judgment against him, claiming that the letter was a personal guarantee. Paulger contended that the letter was a gratuitous promise without legal effect and that he had not intended to provide a binding guarantee.

Mr Paulger's counsel argued that like in *Conlon* section 6(1)(a)(iii) was satisfied. He argued the same matter of fact was the source of the funds for payment of the creditors. The different mistakes were in Mr Paulger "thinking that it would be only from the proceeds of sale and in the respondent thinking that it would, if need be, come from Mr Paulger's own resources."<sup>123</sup>

The Court of Appeal did not support this contention, but reconsidered *Conlon* and held: "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 plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning."<sup>124</sup>

<sup>121</sup> *Paulger v Butland Industries* (1989) 3 NZLR 549 (CA).

<sup>122</sup> ,an officer and founder of this company,

<sup>123</sup> *Paulger v Butland Industries*[1989] 3 NZLR 549, 553 (CA) Hardie Boys J.

<sup>124</sup> *Paulger v Butland Industries*[1989] 3 NZLR 549, 553 (CA) Hardie Boys J.



According to the court, section 6(1) (a) (iii) had not been satisfied because "it was not a case of common mistake at all. For the respondent was right: It was only Mr Paulger who was mistaken."<sup>125</sup>

So the Court of Appeal found that there was no cross- purpose mistake but merely a unilateral mistake, which was only in the interpretation of the contract pursuant section 6(2). Although the Court departed with this decision from *Conlon*, it did not overrule the decision of *Conlon*. It instead tried to explain why *Conlon* was not applied. Hardie Boys J referred to the wordings of McMullin J and claimed that the mistakes of Conlon and Ozolins were not to be read as to each other's intention. He justified this opinion by saying that "*Conlon v Ozolins* is a decision on its particular facts. It is not authority for invoking the Act, where one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of his own words."<sup>126</sup>

This justification as to why he did not apply *Conlon* is from a legal point of view certainly not sufficient. Butland was as much "mistaken" as Conlon was. In *Conlon*, as well as in *Paulger*, the plain meaning of the written contract was objectively clear.<sup>127</sup>

A difference to the question whether a mistake pursuant section 6 (1) (a) (iii) was given is not recognisable. Some authors assume that the reason why Hardie Boys J did not expressly say that *Conlon* was wrongly decided was that the Court in this occasion only comprised three judges, Somers, Wylie and Hardie Boys J. Therefore, it was not in the position to overrule *Conlon*, because the Court of Appeal will consider overruling its previous decision only if a full court of at least five judges is sitting.<sup>128</sup> The better way to interpret the decision of the Court is that he did not want to overrule *Conlon*.

Hardie Boys J was strikingly honest in not applying *Conlon* because it was a decision on its own "particular facts". These facts were that it would be unjust to take away the garden from the old lady. Comparable facts were not given in *Paulger*. To overrule

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<sup>125</sup> *Paulger v Butland Industries*[1989] 3 NZLR 549, 553 (CA) Hardie Boys J.

<sup>126</sup> Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2001 3 ed Brookers Wellington) 244.

<sup>127</sup> Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2001 3 ed Brookers Wellington) 244.

<sup>128</sup> Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2001 3 ed Brookers Wellington) 243.



*Conlon* would have meant that under cases with such particular facts relief could not be granted. In order not to discount the possibility to achieve a "just" result within the Act, Hardie Boys J did not overrule *Conlon*. The result of this decision was in the end a very unstable legal solution, where *Conlon* took over the position that Equity once had: To achieve justice in exceptional cases.

In the end the judges were the ones who were confronted with this "justice problem" and had to iron out the flaws of the act. If you remember that one aim of the act was to abolish the inherently meaningless tests, it can be stated that this aim has not been achieved by the Act, because the judges were forced to develop the *Paulger/Conlon* test to achieve a "just" result within the act. The reason why the judges could not achieve this just result was, because the former flexibility of the traditional approach was taken away from the judges with the Codification of the few remediable cases of section 6. That is especially grave because the declared intention of the Committee was to offer more flexibility for the judges. To offer the judges more flexibility on the discretion side, but to take away simultaneously the flexibility, when it comes to determining whether a remediable case of mistake occurs, just could not work out. Here it becomes obvious that the solution of the Act was only a half-hearted approach to achieve this aim. If you want to strengthen the role of the judge by giving him more flexible remedies you have to go all the way. That means that you have to give the judge the possibility to exercise this discretion. The Act was only a half-hearted attempt, because the judge had to overcome the hurdles of the narrow prerequisites of the Act. Assumed that the intention of the committee was exactly the opposite, meaning that they wanted to confine the power of the judges by enacting the narrow section 6, what is then the sense of broadening simultaneously the discretion side? So the Committee appeared to be half-hearted: on the one hand they found that the judges were competent enough to choose exactly the right remedy appropriate for the individual case. On the other hand they were not sure that the judges were competent enough to determine the cases of mistake, which were remediable.

Afterwards, this decision<sup>129</sup> was applied by the High Court in *Shivas v Bank of NZ*<sup>130</sup>, including the reference to *Conlon*. But Tipping J confessed in regard to the proper interpretation of section 6(1)(a)(iii) he found the approach of the dissenting judge

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<sup>129</sup> (Paulger)

<sup>130</sup> *Shivas v Bank of NZ* (1990) 2 NZLR 327(HC).



Somers J, who negated a common mistake, in that case much more convincing than that of Woodhouse P and McMullin J who subsumed the case under section 6(1)(a)(iii).<sup>131</sup> He only applied *Conlon* because he was bound to apply the law as laid down by the majority.<sup>132</sup>

(iv) *Mechenex Pacific Services Ltd v TCA Airconditioning Ltd*<sup>133</sup>

In this case TCA<sup>134</sup> sent a written quotation stating that the offer was for machinery of a type and form similar to that specified and that the coils offered were for the duties given in the specifications. Attached to the quotation were schedules given in the specifications. Those indicated a four-row configuration and a required water flow of 5.39 litres per second. Mechenex<sup>135</sup> had to install a system with an eight-row model and a water flow of 4 litres a second. Mechenex placed, without reading the detailed schedules, a written order for "32 coils as per your quotation... as per spec supplied". This order was acknowledged and accepted by TCA. TCA manufactured and delivered the coils, but Mechenex rejected them because of the higher water flow required and also refused to pay.

In his reasoning Hardie Boys J explained, "there was no mistake on TCA's part. Its quotation was exactly what it was intended to be". There was only a unilateral mistake, "if there was one"<sup>136</sup>. Therefore, the mistake was "of the same character as that of the unfortunate appellant in *Paulger v Butland*."<sup>137</sup>

Other than in the decision *Shivas v Bank of NZ*<sup>138</sup> the Court of Appeal did not even mention *Conlon v Ozolins* anymore. It appears that, although it was never explicitly overruled, the definition like in this case of common mistake should not be followed in other cases in the future.

<sup>131</sup> *Shivas v Bank of NZ* [1990] 2 NZLR 327, 338(HC) Tipping J.

<sup>132</sup> *Shivas v Bank of NZ* [1990] 2 NZLR 327, 338(HC) Tipping J.

<sup>133</sup> *Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd* [1991] 2 NZLR 393, 398 (CA) Hardie Boys J.

<sup>134</sup> (the respondent)

<sup>135</sup> (the appellant)

<sup>136</sup> *Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd* [1991] 2 NZLR 393, 398 (CA) Hardie Boys J.

<sup>137</sup> *Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd* [1991] 2 NZLR 393, 398 (CA) Hardie Boys J.

<sup>138</sup> *Shivas v Bank of NZ* (1990) 2 NZLR 327(HC).



(v) Assessment

Although it was the intention of the Parliament not to enact purely unilateral mistakes, the Court of Appeal in *Conlon* subsumed a case where only one party was mistaken under section 6 1(a)(iii). This decision was from a legal point of view<sup>139</sup> wrong, because now every unilateral mistake could be brought under this section. However, regarding the “justice” of the individual case the decision appears to be right. In *Paulger* this was recognised, and since this decision the so-called cross-purpose cases were no more subsumed under section 6 1(a)(iii). Therefore, *Conlon* was not explicitly overruled<sup>140</sup>. After a while the courts did not mention the decision anymore, but this does not mean that the judges would not apply *Conlon* in a comparable situation where justice asks for it. This unstable solution is certainly not helpful to achieve another aim of the Act, which was judicial security. If a lawyer were asked whether a purely “unilateral” mistake is sufficient to grant relief under the Act, he would not be able to answer in a definite way.

However, what gives more cause for concern is that in *Conlon* the judges appeared to have problems finding a “just” result within the Act. The judges wanted but could not grant relief to Mrs Conlon, if they would have applied the Act as it was intended by the legislature. To achieve a “just” result that was adequate, because of the “particular facts” of *Conlon*, they had to transform a unilateral mistake into a common mistake. This transformation was in the end responsible for a lot of confusion under judges, academics and attorneys.

The solution that is established after *Paulger* recalls the solution before the Act was “codified”: *Conlon* overtook the part, which was formerly occupied by Equity. The courts still refer to *Conlon* as a last resort, in cases where the only “just” result would be to grant relief, however pursuant to the Act relief is not available. Thus the judges developed in *Conlon* a way to gain back their flexibility that was taken away from them by the Act. Therefore, it appears that the flexible solution of the traditional approach was a better way to achieve the “just” result.

If you analyse why this unstable solution of *Conlon/ Paulger* occurred the supporter of the traditional Common Law would surely purport “because the Statute was

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<sup>139</sup> (sticking to the wording of the Act)

<sup>140</sup> ,but only explained, that it was a decision on its “particular facts”



enacted". Under the pure Common Law the judges would have maybe been more flexible, because they were not required by the legislature to subsume under the Act. This surely is one possible way to see it. The more convincing way is that the problem was not that there was a new Act, but that this Act was not sufficient to codify the Law of Mistake in a "just" way. In this case that means that the differentiation between a unilateral and a common mistake, to determine whether relief should be granted or not, was not "just".

The author of this paper purports that a wider understanding of mistake like in the German Civil Code<sup>141</sup> could offer a more just solution. Here the mistaken party can challenge the contract. This wider approach has not given rise to judicial uncertainty, because the challenge is aligned to certain obstacles. Firstly, the declaration has to be challenged as soon as possible, without culpable delay when the party knows of the mistake<sup>142</sup>.<sup>143</sup> Secondly, the consequences for the mistaken party can be grave. The mistaken party has to compensate the damage that the other party had because she relied on the contract. Therefore, this solution is able to achieve a "just" result without sacrificing the judicial certainty, because the mistaken party has primarily an own interest that the contract will be performed.

#### 4 *Departure from the "fundamental"- requirement*

Before the Act a mistake was only remediable if the mistake was to some fundamental matter.<sup>144</sup> This fundamental requirement was in two significant ways amended. Firstly, it was sufficient for the grant of relief<sup>145</sup> that the mistaken parties were "influenced in their decision by the mistake". This wording substituted the original formulation "relying on mistake" which was<sup>146</sup> proposed by the Reform Committee. The Statute Revision Committee suggested this amendment after "confusion was expressed by those who gave evidence at the first hearing of the committee as to what could constitute "reliance" upon mistake.<sup>147</sup> The amendment from "relying" to

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<sup>141</sup> (BGB)

<sup>142</sup> § 121 BGB (=unverzueglich )

<sup>143</sup> Gerhard Robbers *An Introduction to German Law* (3 ed, Nomos, Baden-Baden, 2003) 214

<sup>144</sup> *Bell v Lever Bros Ltd* [1932] AC 161(HL).

<sup>145</sup> pursuant all subsections of section 6 (1)(a).

<sup>146</sup> (originally)

<sup>147</sup> Hon Jim McLay (8. September 1977) 413 NZPD 2804.



“influence in his decision” was harshly criticized, because it was contended to unnecessarily widen the courts jurisdiction to grant relief.<sup>148</sup>

The second significant departure of the fundamental –requirement was that in all cases of mistake, relief is only available if the mistaken contract has resulted in a disproportionate exchange of values<sup>149</sup>: The result has to be “a substantially unequal exchange of values”<sup>150</sup> or a “benefit or obligation substantially disproportionate to the consideration therefore”<sup>151</sup>.

In the “old” Common Law the economical value of the exchange was not a criterion to determine whether a mistake was remediable.<sup>152</sup> The decisive criterion was, whether the mistake was of a fundamental nature. This is a big difference, because when a “substantial inequality of the exchange” of values is given that does not necessarily mean that the mistake is “fundamental”.<sup>153 154</sup>

(a) Intention for these amendments

With the enactment of the new “influence” requirement the Legislature intended to depart from the previous Common Law. In the Common Law it was decisive that the mistake was to some fundamental matter.<sup>155</sup> Only in such cases it was contended, the extreme injustice of holding one of the parties to the contract outweighs the general principle that apparent contracts should be enforced.<sup>156</sup>

Whether a mistake was fundamental was determined by certain tests developed by the courts. There could be no mistake as to quality, for example, unless the thing acquired was “different in kind” from the thing expected<sup>157</sup> or unless it related to an essential

<sup>148</sup> Hon Jim McLay (8. September 1977) 413 NZPD 2804.

<sup>149</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 304.

<sup>150</sup> pursuant section 6 (b)(i).

<sup>151</sup> according to section 6(b)(ii).

<sup>152</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 304.

<sup>153</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 304.

<sup>154</sup> To put it in other words: The fact that a mistake had resulted in one party expending a considerable sum in return for something of much less value did not mean that the mistake was fundamental-what was required was that the mistake has resulted in that party receiving something radically different from what that which was contracted for.

<sup>155</sup> *Bell v Lever Bros Ltd* [1932] AC 161.

<sup>156</sup> Guenter Treitel *The Law of Contract* (10<sup>th</sup> ed, Sweet & Maxwell, London, 1999) 262.

<sup>157</sup> *Kennedy v Panama New Zealand and Australian Royal Mail Co. Ltd* (1866-67) LR 2 QB 580, 587,588.



and integral element of the subject-matter.<sup>158</sup> In contrast to this, under the Act the necessity for such “inherently meaningless tests” should disappear. The requirement of “influence” is already satisfied, if the party merely shows, that the mistake (of fact or law) was one of the factors, which he considered in deciding whether to enter into the contract.<sup>159</sup> This would not be a sufficient criterion to satisfy the named fundamental requirement under the Common Law. Therefore, by the use of the word “influenced” it is clearly contemplated that the mistake need not have to be so serious as to entirely negate consent as to the whole transaction.<sup>160</sup>

It appears that the intention was to amend the narrow requirement of “fundamental matter”. The intention to widen the applicability in this context is also expressed by the amendment from the original wording “relying” to “influence”. To show reliance the party would have to show that it was the fact or state of affairs about which he was mistaken that actually induced him to enter into the contract.<sup>161</sup> In contrast to that the word “influenced” merely requires that the party have to show that the mistake was one of the factors, which he considered in deciding whether to enter the contract.<sup>162</sup>

But the Reform Committee not only wanted to change the fundamental –requirement because it wanted to widen the possibilities in which relief could be granted. It also viewed the definition of “fundamental” as imprecise, because it was “too broad to be a satisfactory description “. <sup>163</sup> With the enactment of the disproportionate values requirement in section 6 (1) (b) the Committee wanted to precise in which cases according to the Committee relief should be granted. The Committee viewed the “law of mistake as essentially pragmatic, concerned with the maintenance of substantial justice in contracts rather than with the perpetuation of an idealistic concept of “consent”.<sup>164</sup> This was emphasised further by stating “the mere fact that a contract has become somewhat different from that what was intended ought not to warrant relief

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<sup>158</sup> G L Lang “The Contractual Mistake Act 1977”(1978) 4 Otago LR 245, 251.

<sup>159</sup> Donald J Lange “Statutory Reform of the Law of Mistake”(1980) 80 Osg HLJ 429,454; G L Lang “The Contractual Mistake Act 1977”(1978) 4 Otago LR 245, 250. .

<sup>160</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 302.

<sup>161</sup> G L Lang “The Contractual Mistake Act 1977”(1978) 4 Otago LR 245, 250.

<sup>162</sup> Donald J Lange “Statutory Reform of the Law of Mistake”(1980) 80 Osg HLJ 429,454; G L Lang “The Contractual Mistake Act 1977”(1978) 4 Otago LR 245, 250. .

<sup>163</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976,15.

<sup>164</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 20.



unless the contract has also become unfair.”<sup>165</sup> Therefore, cases could be excluded where the concern of the mistaken party not to deal with the other of them was personal rather than economic.<sup>166</sup>

(b) The experience with these innovations

Only in rare cases since the enactment have the judges construed the influence-requirement in a narrow way. For example in *Mitchell v Pattison* the Court held that the mistake should be a significant factor.<sup>167</sup>

Besides the influence requirement has been widely construed as the Committee intended it.<sup>168</sup> In *Ware v Johnson* for example Prichard J held that “influence” means “something which both parties must necessarily have accepted in their minds as an essential and integral element of the subject matter”, bearing in mind that “essentiality” is no longer the necessary ingredient.”<sup>169</sup> Under the terms of this wide understanding of mistake only in cases where a party is entirely indifferent to the matter in question, it cannot be said that the decision to enter the contract was “influenced” in any way.<sup>170</sup>

Regarding the introduction of the requirement of a substantial inequality there have been some discussions and insecurities about what exactly substantially unequal and substantial disproportionate means.<sup>171</sup> Sometimes the courts held that a rough benchmark of 10-25 % difference in value was sufficient<sup>172</sup> but in other cases a bigger disparity in value was necessary.<sup>173</sup>

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<sup>165</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 20.

<sup>166</sup> Brian Coote “The Contractual Mistake Act as a Code: Some Further Thoughts” (2002) 8 NZBLQ 223, 225.

<sup>167</sup> *Mitchell v Pattison* (28 June 1990) HC A 1163/84, Gault J; A Beck and R Sutton Contractual Mistakes Act 1977 in Law Commission Report No 25: *Contract Statutes Review*, Wellington 1993, 127, 136.

<sup>168</sup> *Shotover Mining Ltd v Brownlie* (30 September 1987) HC CP 96/86, 158. McGechan J; A Beck and R Sutton Contractual Mistakes Act 1977 in Law Commission Report No 25: *Contract Statutes Review*, Wellington 1993, 127, 136.

<sup>169</sup> *Ware v Johnson* [1984] 2 NZLR 518, 538 (HC) Prichard J.

<sup>170</sup> John F Burrows, Jeremy Finn and Stephen Todd *S Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 303.

<sup>171</sup> Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2001 3<sup>rd</sup> ed Brookers Wellington) 245.

<sup>172</sup> *Conlon v Ozolins* (1984) 1 NZLR 489(CA).

<sup>173</sup> *Engineering Plastics Ltd v J Mercer & Sons Ltd* (1985) 2 NZLR 72(CA).



Sometimes the courts were very precise in determining why a disproportional exchange of value was given. For example in *Snodgrass v Hammington*<sup>174</sup> the Court of Appeal held that the difference of \$35.,000 to \$40.,000 between the contract price and the value of the house that was subject matter of the contract satisfied the requirement of substantial inequality. In other cases this requirement was just affirmed, like in *Slater v Wilmshurst* without further explications and just contended that "there was a very substantial obligation quite disproportionate to the consideration received as Crown".<sup>175</sup>

(c) Assessment

The introduction of the wider requirement of influence has been received very well and has not led to an opening of the floodgates for the grant of relief, which was feared.<sup>176</sup> However, the legislature acted again half-hearted because this wide requirement is incoherent with the very narrow enactment of remediable cases in section 6.

With the enactment of the "substantial unequal" and "substantial disproportionate" the legislature chose to enact judicial indefinite terms and, therefore, left it to the courts to determine when a disproportionate exchange of values is given. This could also be regarded as half-hearted if you remember that the aim of the legislature was to achieve more judicial certainty. But the legislature cannot be blamed for this, because it appears to be the right decision to leave questions, which depend very strongly on the individual case to the courts.

However, the enactment of this requirement appears to be in another aspect the wrong decision. The legislature emphasised with this prerequisite that it saw the law of mistake as essentially pragmatic. Relief should not be granted when the contract has become somewhat different from that what was intended ought not to warrant relief unless the also become unfair when contract has."<sup>177</sup> Unfairness according to the Committee occurs when the exchange of values was "substantial unequal" or "substantial disproportionate". The mistake the Committee made in this context was to equate unfairness with economical unfairness. That simultaneously did not cover

<sup>174</sup> *Snodgrass v Hammington* (1995) 10 PRNZ 672(CA).

<sup>175</sup> *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991] 1 NZLR 344, 357 (HC) Gallen J.

<sup>176</sup> Hon Jim McLay (8. September 1977) 413 NZPD 2804..

<sup>177</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 20.



cases where the reason for the unfairness was not economical. For example it could have been easily contended that the exchange of values in Conlon was not substantial unequal.<sup>178</sup> But even if you assume that the exchange of value was not substantially unequal it would not have been just not to grant relief to Mrs Ozolins. Therefore, the adjustment of the values from a more personal to a more economical law of mistake took away a lot of the flexibility to achieve a “just” result.

## **B The Implementations of More “Flexible” Remedies**

If in the previous Common Law a fundamental mistake existed the contract was void. If the court held that there was no fundamental mistake the contract was valid and the mistaken party had to perform.

Now under the Act if the prerequisites of section 6 are given, the court may grant relief according to section 7.

### *1 Intention*

The old “all or nothing” solutions in Common Law to hold a contract valid or void was regarded as too inflexible. Now the court has a variety of possibilities to exercise its discretion. The judge can declare the contract to be valid, and subsisting in whole or in part, he can cancel the contract and grant relief by variation of the contract or by restitution or compensation.<sup>179</sup>

In the Act are almost no guidelines as to how discretion shall be exercised. There are no statements in which cases what type of relief is appropriate. The judge is also very free in determining which circumstances are important “whether to grant relief”<sup>180</sup>

One consideration that the court should take into account is according to section 7 (2) “the extent to which the party... caused the mistake”. So, the Act implemented a very wide understanding of discretion for the courts.

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<sup>178</sup> Like Greig J in the High Court decision did.

<sup>179</sup> Section 7(3)

<sup>180</sup> Section 7(2).



## 2 Experience

In practice the broadening of the remedies available under the Act have been received well.<sup>181</sup>

For example in *Engineering Plastics Ltd v J Mercer & Sons Ltd*<sup>182</sup> Tompkins J used the relief-power for a compromise. In this case the plaintiff intended to charge \$ 6.67 per ring and the defendant intended to pay \$ 0.429 per ring. Tompkins J varied the contract by providing a price of \$ 4 per ring.<sup>183</sup> In the previous Common Law, assumed that a fundamental mistake would have been given, the defendant would not have had to pay. Assumed that there would have been no mistake of a fundamental nature the contract would have been valid and the defendant would have had to pay \$ 6.67 per ring.

Therefore, the Act gives the courts the flexible remedies that were intended. Courts have now enough possibilities to achieve a just result.

However, little can be said about the way in which the courts exercise the discretion powers conferred upon them.<sup>184</sup> There is no clear policy recognisable to figure out which kind of factors influenced the discretion in which way. One factor surely is "the extent the mistaken party has caused the mistake", because this factor is explicitly named in section 7 (2). But this is only "one of the considerations" taken into account and not the crucial consideration. Which other considerations are taken into account cannot be said yet, because of the relatively few cases in which relief has actually been granted.<sup>185</sup>

Further it is not clear how "caused" is construed by the courts and whether it is important that the mistake was caused carelessly. In *Australian Guarantee Corporation (NZ) v Wyness* the Court of Appeal only insinuated that in cases where a party caused carelessly a mistaken belief in the other party, this party will forfeit relief

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<sup>181</sup> Andrew Beck and Richard Sutton Contractual Mistakes Act 1977 in Law Commission Report No 25: *Contract Statutes Review*, Wellington 1993, 127,160.

<sup>182</sup> *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985] 2 NZLR 72, 83 (HC)Tompkins J.

<sup>183</sup> *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985] 2 NZLR 72, 83(HC) Tompkins J.

<sup>184</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 307.

<sup>185</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 307.



in the court's discretion.<sup>186</sup> However, a clear policy in this direction cannot be recognised.

There is also a degree of uncertainty as to the correct principles to be applied in the nature or quantum of any relief to be granted. In some cases like in *Engineering Plastics Ltd v J Mercer & Sons Ltd*<sup>187</sup> the courts tried to use the discretion in a very innovative way and achieved results that were not available under the law before. In other cases the courts did not use the discretion in such a way, but gave compensation on the same basis as in any other case where a contract had not been performed according to the terms, without further exercise of the discretion.<sup>188</sup>

### 3 Assessment

Although the new remedies brought more flexibility on the discretion side to the courts it has to be stated again that the codification of these remedies was in the overall context a half-hearted approach.

First, there are concerns whether the enactment of these remedies really changed a lot in comparison to the former law. The basic approach for the codification was that the remedies available in cases of mistake were too inflexible.<sup>189</sup> This approach only seems to be right if you just consider the law of mistake in Common Law. But besides the Common Law there still was the possibility for the granting of relief in Equity. It appears to be artificial not to consider Equity in this circumstance. Equity gives relief in certain circumstances when it would be a hardship to hold a party to a contract which was valid, because the "narrow" fundamental" mistake under the Common Law was not satisfied. In Equity the "more flexible remedies" already existed:<sup>190</sup> It could refuse specific performance<sup>191</sup>, it could rescind the terms of the contract, again on terms or it could rectify a contractual document where a mistake had been made, not in the formation but in the recording of a contract.<sup>192</sup> Admittedly those flexible remedies were only available when a hardship for one party was given, but it can be argued that only in these circumstances those remedies are really needed.

<sup>186</sup> *Australian Guarantee Corporation (NZ) Ltd v Wyness* [1987] 2 NZLR 326, 334 (CA). Somers J.

<sup>187</sup> *Engineering Plastics Ltd v J Mercer & Sons Ltd* (1985] 2 NZLR 72, 83(HC) Tompkins J.

<sup>188</sup> *Ware v Johnson* (1984) 2 NZLR 518 (HC).

<sup>189</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 8.

<sup>190</sup> Guenter Treitel *The Law of Contract* (10 ed, Sweet & Maxwell, London, 1999) 286.

<sup>191</sup> (or grant that remedy only on terms)

<sup>192</sup> Guenter Treitel *The Law of Contract* (11 ed, Sweet & Maxwell, London, 2003) 311.



And only in those cases of hardship the requirements of certainty emphasised by the Common Law was sacrificed in Equity.<sup>193</sup> Under the new law there is a wide discretion of the court independent whether there is a hardship or not. The legislature failed to enact guidelines for the courts how to exercise this discretion. Therefore, it appears that under the Act there is a much greater uncertainty as to how the judges will decide than before.

So, in this context the Act appears to be a half-hearted approach: On the one hand the Act should abolish the equitable doctrine that "is not altogether free from uncertainty".<sup>194</sup> On the other hand the legislature empowers the courts with so much discretionary power in every case of mistake that it cannot be predicted what the result of a litigation regarding mistakes might be. The only factor that is named<sup>195</sup> is the extent to which the party has caused the mistake.<sup>196</sup> It is not clear which other factors are important for the discretion. The development of these factors was left to the Courts, but until now there "is little to be said about the way in which the courts exercise the powers".<sup>197</sup> Regarding judicial certainty the reform was certainly not helpful in this context and therefore half-hearted.

But even if we leave the purported intention of legal certainty aside the enactment of the new remedies was a half-hearted approach in the overall context. At this point it has to be emphasised that the sacrifice of judicial certainty could have been easily justified because the high aim was to achieve more "flexibility" and therefore more "justice" in the individual case. As pointed out before the Act appears to be in this context incoherent. The judges have to overcome the narrow named cases of section 6 to have the opportunity to exercise their wide discretion. That means the flexibility, which is given to the courts on the one hand to achieve a "just" result on the discretion-side is taken away from the courts on the prerequisites-side. So, the court has in some cases no possibilities to achieve the "just" result in the individual case that would be appropriate because it does not fit into a category of section 6.<sup>198</sup>

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<sup>193</sup> Guenter Treitel *The Law of Contract* (10 ed, Sweet & Maxwell, London, 1999) 286.

<sup>194</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 7.

<sup>195</sup> in section 7 (2).

<sup>196</sup> As shown above it is not even clear what is meant by "cause".

<sup>197</sup> John F Burrows, Jeremy Finn and Stephen Todd S *Law of Contract in New Zealand* (2 ed, Butterworths, Wellington, 2002) 307.

<sup>198</sup> See the problematic of unilateral mistake and constructive knowledge.



#### ***IV HAVE THE OTHER BIG INTENTIONS OF THE ACT BEEN ACHIEVED?***

Beside the already examined intentions, there were other major aims that the Act should achieve. The Committee formulated these aims as the "amalgamation of fragmented doctrines into a single body of law" and "the abolition of the differentiation of mistake in Common Law and Equity". These major aims were expressed in section 5 (1): "the 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."

More than 25 years after the enactment it should be examined whether these aims of the act have been achieved in the practice. Therefore, the practice of the courts since 1977 will be appreciated.

##### ***A Amalgamation of Fragmented Doctrines into a Single Body of Law***

One in the Report of the Committee explicitly named objective of the Act was "the amalgamation of the present fragmented doctrine, some based upon mistake and others based upon different legal devices, into a single body of law dealing with mistake".<sup>199</sup> The intention was to abolish the different concepts related to mistakes, which sometimes were announced as relating to mistake and sometimes to such as failure of "offer and acceptance to correspond".<sup>200</sup>

One rule of the common law that was related to mistake is the objective principle of *Smith v Hughes*. According to this principle you are bound despite lack of intention, if you lead another person to reasonably believe in the terms you are offering.<sup>201</sup> In this case the promisor typically is mistaken.

Evidently in the Act there is no section, which would codify the objective principle although it is related to mistakes. Therefore, pursuant section 5 of the Act this rule of the Common Law is pre-empted and the objective principle was abolished by the Act.<sup>202</sup>

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<sup>199</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 10.

<sup>200</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 3.

<sup>201</sup> *Smith v Hughes* [1871] LR 6 QB 597, 607 (CA) Blackburn J.

<sup>202</sup> that would be the conclusion of DF Dugdale "A Code is a Code is a Code" (2002) 8 NZBQL 129.



For the purpose of this paper the question that should be asked is whether this mistaken-related principle is still applied beside the Act. If this is the case it could be argued, that the "amalgamation of the present fragmented doctrines into a single body of mistake" has not been achieved.

### 1 *The development in the adjudication of the courts*

The question whether the objective principle could still be applied beside the Act was again firstly considered in the highly discussed decision of *Conlon*.<sup>203 204</sup>

Greig J of the High Court asked, "whether that principle can be applied in the facts of this case having regard to the provisions of the Contractual Mistake Act 1977." He invoked also on the earlier decision of *McCullough v McGrath Stock and Poultry Ltd*<sup>205</sup>. Greig J agreed with the judgment of Mahon J in that decision to apply the principle beside the Act and Mrs Ozolins was therefore bound by the principle.<sup>206</sup> If that conclusion would be wrong and the prerequisites of section 6 of the Act would be given he would take this objective principle into account:

"Principles such as *Smith v Hughes* are intended to provide justice and are to maintain in the words of 4(2) of the Act, the general security of contractual relationships. This mistake was created and supported by the conduct of the defendant and she was careless and negligent in signing the agreement, which specifically provided for the sale of the four lots. It would not be just, in my view, to grant her relief."<sup>207</sup> Greig J.'s view can be summarised that the objective principle could be applied both, beside the Act and also in the Act by exercising the discretion. Therefore, he decided that Mrs Ozolins was bound to the contract and relief could not be granted.

The question whether the objective principle of *Smith v Hughes* still could still be applied was negated by the Court of Appeal, Mc Mullin J stated clearly<sup>208</sup>:

"However, there is nothing in the Contractual Mistake Act nor the report of the committee to support the view taken by Mahon J which, if adopted, would severely

<sup>203</sup> *Conlon v Ozolins* (1984) 1 NZLR 489.

<sup>204</sup> For the facts of the case see above under...

<sup>205</sup> *McCullough v McGrath's Stock & Poultry LTD* [1981] 2 NZLR 426, 428(HC) Mahon J.

<sup>206</sup> *Conlon v Ozolins* [1984] 1 NZLR 489,494 (HC) Greig J: "Although the Act created a code it did not include in that code the principle exemplified by *Smith v Hughes* since that operated only upon the question that a mistake in fact existed, which is not included in the statutory code."

<sup>207</sup> *Conlon v Ozolins* [1984] 1 NZLR 489,495 (HC) Greig J.

<sup>208</sup> *Conlon v Ozolins* [1984] 1 NZLR 489,504 (CA) McMullin J.



restrict the operation of the Act itself. In enacting the Act Parliament provided an entirely new code applicable to every case of mistake, which fitted within its framework. It replaced with its own provisions the old and unsatisfactory rules of the Common Law and those others which Equity had evolved in an endeavour to mitigate the harshness of the former. Thus a person who is a party to a contract, to which some element of mistake attaches, must now look to the statute and now longer to the Common Law or Equity for his remedy, if there is to be one.”

So according to McMullin beside the Act was no place for the *Smith v Hughes* principle: “To hold that the *Smith v Hughes* principle still operates to defeat the application of the Act would be to deprive the statute of much of its force; it would ignore the very wording of section 5 (1) which expressly says that the Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted on the grounds of mistake.”<sup>209</sup>

According to the majority of the Court of Appeal the mistaken-related principle of *Smith v Hughes* could no more be applied beside the Act, so that this decision is coherent with the intention of the legislature that beside the Act there should exist no mistaken-related concepts.

Contrary to *Conlon* the High Court in *Engineering Plastics v J Mercer & Sons Ltd*<sup>210</sup> held that “by accepting the plaintiff’s offer in the manner in which it had, the defendant conducted itself that the plaintiff could reasonably believe that it was assenting to the terms contained in the letter of 20 July”.<sup>211</sup> Although in this judgment Tompkins J granted relief under the Act he expressively applied the *Smith v Hughes* principle and held that the defendant was first bound by the contract.<sup>212</sup> Against the intention of the legislature a mistaken-related principle was applied beside the Act. This High Court decision was confirmed by the judgment of the Court of Appeal in *Paulger v Butland Industries Ltd*.<sup>213</sup> Although it held that *Paulger* was mistaken<sup>214</sup>, it still applied the mistaken-related principle of *Smith v Hughes*<sup>215</sup>:

<sup>209</sup> *Conlon v Ozolins* [1984] 1 NZLR 489,504 (CA) McMullin J.

<sup>210</sup> *Engineering Plastics Ltd v Mercer & Sons Ltd* (1985) 2 NZLR 72 (HC).

<sup>211</sup> *Engineering Plastics Ltd v Mercer & Sons Ltd* [1985] 2 NZLR 72, 78/79 (HC) Tompkins J.

<sup>212</sup> *Engineering Plastics Ltd v Mercer & Sons Ltd* [1985] 2 NZLR 72, 78/79 (HC) Tompkins J.

<sup>213</sup> *Paulger v Butland Industries* (1989) 3 NZLR 549 (CA).

<sup>214</sup> *Paulger v Butland Industries* [1989] 3 NZLR 549,553 (CA) Hardie Boys J.

<sup>215</sup> *Paulger v Butland Industries* [1989] 3 NZLR 549,552 (CA) Hardie Boys J.



"The letter sent by Paulger must be construed from the point of view of the reasonable man in the shoes of the recipient..."

It held further that "Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively"<sup>216</sup>. Like the High Court in *Engineering Plastics v J Mercer & Sons Ltd* they afterwards held that the Act applied but decided that none of the prerequisites of the subsections were fulfilled. Therefore, the court did not grant relief.

## 2 *The experience with the Act regarding this intention*

The Introduction of the Act led to confusion in relation to the question whether the Contract Formation Rules were still applicable beside the Act or not.

According to *Conlon* it was abolished, because it was not in the Act and pursuant to section 5(1) this rule of Common Law was pre-empted by the Act. This decision should have led to a clarity whether all mistaken related-Common Law rules are pre-empted by the Act or not, because it was also in conformity with the expressed intention of the Legislation.

But in the end this decision led to more confusion. Professor McLauchlan held that this Court of Appeal decision supported his view that the common law principles remain relevant beside the Act.<sup>217</sup> Other commentators still appear to view the objective theory as eroded<sup>218</sup>; others draw a distinction between contract formation rules and pre-empted mistake claims.<sup>219</sup> After this decision not only the possible intention of the Parliament was questioned but also the intention of the majority of the Court of Appeal, whether they still applied the objective theory or not.

Because of this uncertainty it became necessary to *explain* the *Conlon* decision. In *Paulger v Butland* it had to be clarified that the objective principle was not abolished by the Act. Also the following decisions could not only focus on the Act, but also had to deal with the decision in *Conlon*.

<sup>216</sup> *Paulger v Butland Industries* [1989] 3 NZLR 549, 550 (CA) Hardie Boys J.

<sup>217</sup> D W McLauchlan, "The Contractual Mistakes "Code": A Polite Response to Mr Dugdale" (2002) 8 NZBLQ 132, 135.

<sup>218</sup> DF Dugdale "A Code is a Code is a Code" (2002) 8 NZBQL 129.

<sup>219</sup> Richard Sutton "The Code of Contractual Mistake: What went wrong?" (2003) 9 NZBLQ 234, 243: "This (the objective principle) is an objective example of an old rule upholding the contract, being made subject to a new rule that may lead to the contract being void."



### 3 Assessment

After all the discussions the objective theory is still applied by the courts. The introduction of the Act had at least no impact on this rule of contract formation, which is related to mistakes. So that the aim of the legislation that was “the amalgamation of the present fragmented doctrines... into a single body of law dealing with mistake”<sup>220</sup> has not been achieved by the Act. Therefore, most of the courts seem to appreciate that the Legislation did not want to abolish this principle. The only result of the Act was confusion in the jurisdiction and between legal academics whether the Act abolished the objective principle or not.

The intention of the “amalgamation of the fragmented doctrines into a “single body of law” was doomed to fail right from the beginning. The approach to codify just partially the law of contracts by several “mini-codes” was for this aim the wrong approach. That is because it ignores the fact that mistake-related doctrines are found in different areas of the Contract Law. If you want to codify such principles of contract formation<sup>221</sup> into a “single body of law” you necessarily have to codify the contract formation rules as well. The contractual law of mistake touches not only questions of the rescission of a contract but also principles of contract formation. As shown the law of mistake is deeply rooted in the Contract Law. Hence, you cannot “codify” one part of the law of contract<sup>222</sup> and leave another part “uncodified”<sup>223</sup>. The New Zealand experience has shown that such an attempt to “codify just extracts of the contract law in “mini-codes”, only leads to confusion and judicial uncertainty. Instead of this half-hearted approach, there are only two ways to deal with the law of mistake: The first solution is a codification of the whole contract law; the second solution is to leave the development of the contract law totally to the courts.

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<sup>220</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 10.

<sup>221</sup> (like the objective principle)

<sup>222</sup> (for example the law of rescission)

<sup>223</sup> (for example the law of contract formation)



### *B The Abolition of the Differentiation of Mistake in Common Law and Equity*

At Common Law, if there was a mistake the contract was void, whereas Equity took the view that the contract was voidable and would grant relief in certain circumstances.<sup>224</sup>

The Law Committee saw the problem that the law of mistakes was a fragmented series of doctrines, which were based upon different concepts.<sup>225</sup> These "double standard" for mistake was not altogether free from uncertainty.<sup>226</sup> To unify and simplify the law of mistakes the Committee created section 5 (1) which stated, "this Act shall have effect in place of the rules of Common Law and of Equity governing the circumstances in which relief may be granted, on the grounds of mistake..."

The intention of the Committee was to abolish the old distinction between mistake in Common Law and Equity, which was appreciated as an unnecessary complexity, and artificiality in the law of mistake". Section 5 (1) is the only section where this intention is expressed, because according to this section now all relief in relation to mistake can only be granted within the Act.

#### *1 Experience and assessment*

With the enactment of section 5 the double standard of mistake, because of the "narrow" mistake in Common Law and the wider equitable doctrine of mistake, was abolished. In this context it is interesting that the legislature chose to enact the broader understanding of mistake by stating that a mistake means also a mistake of law<sup>227</sup>, which was until then only in Equity a remediable mistake. The abolition of this artificial distinction was in the year 1977 a very progressive and bold step. However, the enactment was still a half-hearted approach: on the one hand the judicial uncertainty that occurred because of the distinction between mistake in Common Law

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<sup>224</sup> Maree Chetwin and Stephen Graw *An Introduction to the Law of Contract in New Zealand* (2001 3<sup>rd</sup> ed Brookers Wellington) 236.

<sup>225</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 3.

<sup>226</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 8.

<sup>227</sup> Section 2(1).



and Equity should be eroded, the uncertainty was augmented by the widening on the discretion-side for the question how and what kind of relief should be granted.<sup>228</sup> So, it appears that the legislature only shifted the problem of judicial certainty that was caused by the distinction between mistake in Common Law and mistake in Equity to another level. First the judicial security was not developed very much; because although no mistake in terms of Common Law was given, there still could be a mistake in Equity that nullifies a contract. Now this problem is solved, because either there is a mistake or there is none. However, it is not clear what the result will be of this mistake. Even assumed the Law Reform Committee accepted this shift of the problem<sup>229</sup> in order to preserve the flexibility the approach they chose in the Act was only a half-hearted way.

That is because the court has only theoretically the huge discretion of what kind of relief and how he will grant relief. In reality this flexibility is not worth very much, because the courts have to overcome first the narrow prerequisites of section 6 to grant the wide discretion of section 7.<sup>230</sup>

So, also in this context the Act was only a half-hearted approach.

## 2 *Developments in a "pure" Common Law jurisdiction*

As you can see in New Zealand, the "partial codification" of the contract law did not achieve the determined aims, because it was a half-hearted approach. Therefore, it is interesting to evaluate the recent developments in "pure" Common Law Countries like the UK and Canada where until now no legislative intervention has occurred.

### (a) United Kingdom

Like in New Zealand, prior to the Act, in the UK until recently the traditional distinction existed between the "fundamental" mistake in Common Law and the broader approach of the equitable doctrine of mistake. According to a decision of the EWCA this has changed:

In *The Great Peace*<sup>231</sup> the contract for salvage services to be provided by the 'Great Peace' for the 'Cape Providence'<sup>232</sup>, that was in serious difficulties at sea, was made

<sup>228</sup> See above: the implementation of more flexible remedies, page 32.

<sup>229</sup> ,and therefore simultaneously the problem of judicial uncertainty,

<sup>230</sup> See above: the implementation of more flexible remedies, page 32.

<sup>231</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* (2002) EWCA Civ 1407; [2003] QB 679.



on a shared assumption that the 'Great Peace' would be 35 miles away and therefore the nearest available ship. Then it was discovered that in fact it was 410 miles away and the defendants, after finding a closer vessel that could render support, wanted to cancel the contract.

At first instance Toulson J held that the contract was not void at law, because the mistake did not turn the contract into something essentially different from what the parties bargained.<sup>233</sup> Then he turned to a mistake in Equity and stated that there is no right to rescind in Equity on grounds of common mistake a contract that is valid and enforceable at Common Law.<sup>234</sup> Further he stated to hold that the court has discretion to set aside a contract entered into under a fundamental mistake if the court considers that the general justice of the case merits it "puts palm tree justice in place of party autonomy."<sup>235</sup>

The Court of Appeal upheld this view that there is no separate jurisdiction in Equity to set aside a contract on the ground of common mistake if the contract is not void at Common Law.<sup>236</sup> None of the cases following *Solle v Butcher* defined a test of mistake that gives rise to the (supposed) equitable jurisdiction to rescind in a manner that distinguishes this from a test of mistake that renders a contract void in law.<sup>237</sup> Further it is not possible "to define satisfactorily two different qualities of mistake, one operating in law and one in equity".<sup>238</sup>

That meant that the contract was held valid and the defendants had to pay \$ 82.500 according to the terms of the contract. According to the contract this sum was the minimum amount that the defendant had to pay as a cancellation fee.

Therefore, in the UK the distinction between mistakes in Common Law and in Equity has been abolished.

So it appears that in the UK the legal position is now the same as in New Zealand. For this reason the result under the Act would have to be the same. But surprisingly it is

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<sup>232</sup> (the Great Peace and the Cape Providence are both ships.

<sup>233</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2001] 151 NLJ 1696; [2001] All ER (D) 152 at [56].

<sup>234</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2001] 151 NLJ 1696; [2001] All ER (D) 152 at [118].

<sup>235</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2001] 151 NLJ 1696; [2001] All ER (D) 152 at [119-120].

<sup>236</sup> *Chitty on Contracts* (29 ed, Sweet & Maxwell, London, 2004) 393.

<sup>237</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679 at [153].

<sup>238</sup> *ibid.*



very questionable whether this is the case. Both parties were mistaken about the distance between the vessels. Thus according to section 6 1(a) (ii) of the Act both “parties were influenced in their respective decisions to enter into the contract the same matter of fact. A “substantially unequal exchange of values” can be seen in the fact that the defendants had to pay \$ 82.500, which the defendant has to pay without receiving the services of the Great Peace granted. So the defendant could get relief granted under the Act unless the court find that the defendant would have to bear the risk of the mistake.<sup>239</sup> The contract does not include any provision that the defendant has assumed the risk of a mistake about the distance between the vessels. The only way that the courts could find this would be to hold that the term of the cancellation fee in the contract implies that the defendant has to bear the risk for any cancellation. So, the courts would have some problems to achieve the same result like the Court of Appeal in the UK. If the courts would not come to this finding, the Court would have to consider on the discretion-side according to section section 7(2) whether the defendant caused the mistake and were in some way to blame for not ensuring that the claimants gave an appropriate undertaking on location.<sup>240</sup>

Hence the legal positions in New Zealand and in the UK are not the same although in both countries the equitable doctrine of mistake has been abolished.

(b) Canada

At this point it is enlightening to look at a Commonwealth country, where still a pure Common Law solution exists. In *Pacific National Investments Ltd. v Victoria (City)*<sup>241</sup> the Supreme Court of Canada recently confirmed that in a case of common mistake<sup>242</sup> “the doctrine of unjust enrichment provides an equitable cause of action that retains a large measure of remedial flexibility to deal with different circumstances according to principles rooted in fairness and good conscience. This is not to say that it is a form of palm tree justice that varies with the temperament of the sitting judges.”<sup>243</sup>

<sup>239</sup> according to section 6 (1)(c)

<sup>240</sup> Adam Chandler and James Devenney and Jill Poole “Common Mistake: Theoretical justification and remedial inflexibility” [2004] JBL 34, 54.

<sup>241</sup> *Pacific National Investments Ltd. v Victoria(City)* [2004] SCC 75 para 13 Binnie J.

<sup>242</sup> In this case the parties were mistaken about the enforceability of their agreement [at 39].

<sup>243</sup> *Pacific National Investments Ltd. v Victoria(City)* [2004] SCC 75 para 13 Binnie J.



In this case an agreement was made which contented a "rezoning commitment". Both parties were mistaken about the enforceability of their agreement. The result of this mistake would have been that the defendant<sup>244</sup> would have received extra works and improvements valued at \$1.08 million without anything in return. Although the contractual claim was rejected because the city lacked the authority to make the zoning commitment it did, the Supreme Court granted an equitable remedy and held that the respondent City was obligated to pay to the plaintiff \$1.08 million.

Binnie J emphasised in his judgment all the starches that Equity in such cases provides: "equity looks to substance rather than to form". He identified "the substance of the problem" as the "1.08 million worth of improvements which were found to be the fruit of an ultra vires demand". This was according to the judge an "unjustified windfall at the plaintiff's expense". Therefore, "Courts of Equity have at all times relieved against honest mistake in contracts ... where not to correct the mistake would be to give an unconscionable advantage to either party."<sup>245</sup>

Eventually, he emphasised that "the equitable doctrine has the remedial flexibility to reverse an enrichment the trial judge found to be manifestly unjust".

Other than in the UK the equitable doctrine was upheld because the doctrine was evaluated as being necessary to provide the necessary flexibility that is required in some individual cases to achieve a just result.

### (c) Assessment

The developments in the UK and in Canada are significant because they give an idea how the law of mistake would have developed if the half-hearted codification would not have taken place in New Zealand.

In Canada the situation is very much comparable with the legal status in New Zealand prior to the Act. The equitable doctrine comes into play when under the Common Law relief cannot be granted but according to principles like fairness and good conscience<sup>246</sup> is needed to achieve a "just" result. Therefore, in Canada Equity assures that the courts have the "flexibility" that is needed to mitigate the otherwise unjust result.

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<sup>244</sup> (a municipality)

<sup>245</sup> *Pacific National Investments Ltd. v Victoria(City)* [2004] SCC 75 para 39 Binnie J.

<sup>246</sup> (which are both subspecies of the paramount principle justice)



Although this flexibility of the traditional solution was acknowledged by the EWCA in the UK, the court chose to abolish the distinction because of the judicial uncertainty that arises out of this distinction. Toulson J justified the rejection of the equitable doctrine because he held that a court's discretion to set aside a contract entered into under a fundamental mistake if the court considers that the general justice of the case merits it "puts palm tree justice in place of party autonomy".<sup>247</sup>

This perception is a staggering evaluation of the traditional approach and the role of the judge in general. It especially misjudges how the courts exercised their discretion under the old law. The equitable jurisdiction to set aside a contract has only been exercised if the enforcement of the contract would cause hardship to the mistaken party.<sup>248</sup> Therefore, Binnie J was right when he stated that the exercising of this discretionary power is not to say that it is a form of palm tree justice that varies with the temperament of the sitting judges.<sup>249</sup> In fact Equity gave the judges the flexibility needed in exceptional cases.

This was also expressed in the evaluation of Lord Phillips MR<sup>250</sup> who appreciated the great advantage that "an equitable doctrine to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of Common Law which holds the contract void in such circumstances."<sup>251</sup>

Although he acknowledged this greater flexibility, which resulted because of the discretion that the judges possessed under the traditional approach, he weakened the role of the judge by the abolition of the equitable doctrine.

The result of such a debilitation of the discretion of the judges is inflexibility: the contract will be either fully binding or void.<sup>252</sup> In a clear case like in the *Great Peace* this might not be a problem, but the flexibility might be necessary to achieve a just result in cases with their "own particular facts".

Now, after the *Great Peace* decision it will be difficult for the judges in the UK to take considerations like fairness and good conscience into account, in cases where it might be necessary to achieve a "just" result. To avoid that this undesirable situation does

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<sup>247</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* (2001) 151 NLJ 1696; [2001] All ER (D) 152 at [119-120]

<sup>248</sup> *Chitty on Contracts* (27 ed, Sweet & Maxwell, London, 1994) 295.

<sup>249</sup> *Pacific National Investments Ltd. v Victoria (City)* [2004] SCC 75 para 13 Binnie J.

<sup>250</sup> ,although he abolished the equitable doctrine,

<sup>251</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679 at [161] Phillips.

<sup>252</sup> *Chitty on Contracts* (29 ed, Sweet & Maxwell, London, 2004) 409.



not occur Lord Phillips MR demanded that the aim to “give greater flexibility to our law of mistake” should be achieved by a legislative intervention.

The attempt of the Act, that was considered to grant relief for mistakes where it would have been sufficient to give rise to the equivalent equitable jurisdiction before the passing of the Act<sup>253</sup> cannot be recommended in this context. The reasons for this evaluation are the already named flaws of the Act. But the experience with the Act can be useful for a future codification. A promising approach for a legislative intervention could be to enact the broader understanding of mistake in Equity<sup>254</sup>, which according to Lord Phillips was more flexible.<sup>255</sup> At this point again a view from the German Civil Code is illuminating, where a broader understanding of mistake is enacted. Here, like in Equity a mistaken contract is only voidable and not void. It is also sufficient that just one party is mistaken<sup>256</sup>. This wider approach on the prerequisite-side strengthens the role of the judge because there is enough scope for the judge to achieve a “just” result. Concerns regarding the possible judicial uncertainty can also be refuted, because in the Act there are some obstacles for the mistaken party enacted.<sup>257</sup>

## V CONCLUSION

The Contractual Mistakes Act 1977 was in some ways a very progressive and bold attempt to codify the Law of Contractual Mistake. Firstly, there is on the one side the equalisation of mistake of law and mistake of fact, which was codified in the Act. Secondly, in the Act was also the abolition between the distinction of the Common Law and Equity doctrines of mistake enacted. Therefore, it anticipated developments that took the pure Common law over twenty years until they were resolved. Also a very positive and well-received innovation was the implementation of more flexible remedies on the discretion side.

Unfortunately, at this point it can as well be seen very clearly that the solution of the Act was in many ways a half-hearted attempt, because the aim of the act was also to

<sup>253</sup> *Slater Wilmhurst Ltd v Crown Group Custodian Ltd* [1991] 1 NZLR 344, 357 (HC) Gallen J.

<sup>254</sup> Andrew Phang “Controversy in Common Mistake”(2003) May/June Conv & Prop Law 247-256.

<sup>255</sup> *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWCA Civ 1407; [2003] QB 679 at [161].

<sup>256</sup> (= unilateral mistake)

<sup>257</sup> Explained above on page 27; Gerhard Robbers *An Introduction to German Law* (3 ed, Nomos, Baden-Baden, 2003) 214



achieve judicial certainty.<sup>258</sup> This intention does not go along with the widening of the discretion-powers of the courts.

Also incoherent appears the very wide definition of mistake<sup>259</sup> and the wide requirement of influence on the one hand and the narrow remediable cases of common mistake<sup>260</sup> which have to be satisfied for the grant of relief. But these are just minor flaws, which are no big problems of the Act.

A much bigger incoherency, which had grave consequences, was the widening of the discretion that contravenes strongly with the narrow cases of section 6. At this point the gravest problem of the Act exists, which is a "justice" problem. This arose because only the cases of common and mutual mistake pursuant section 6 were remediable. But there were still cases beside those "codified" cases where it would be "just" to grant relief. Under the old Common Law the judges would have still had the possibility to grant relief under the equitable doctrine. Because the judges were robbed of this flexible institute to grant a just result, they were forced to transform those cases<sup>261</sup>—like *Conlon*—by verbal skill under the Act.

But *Conlon* revealed also that the Act failed to achieve the determined goal, which was the "the amalgamation of the present fragmented doctrines... into a single body of law dealing with mistake"<sup>262</sup> Also in this context the Act was just a half-hearted approach. The codification included only aspects of the rescission of contracts and not principles of the formation of contracts. So the legislature ignored the fact that mistake-related doctrines are found in different areas of the Contract Law. But the New Zealand experience with the "codification" does not necessarily mean that the Common Law countries should leave the mistake of law to the traditional Common Law and to Equity. However, this appears to be a better solution than just a "partial codification". Nevertheless this traditional approach has its deficits. One big disadvantage is that a valid contract in Common Law can still be nullified in Equity. Although this gives the courts the advantage of a great flexibility it also causes the big disadvantage of uncertainty for the contract-parties. This was also recognised when in the UK the Court of appeal abolished the equitable doctrine and Lord Phillips

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<sup>258</sup> That was why the equitable doctrine was abolished.

<sup>259</sup> in section 2(1)

<sup>260</sup> in section 6

<sup>261</sup> (like cases of constructive knowledge or unilateral mistakes)

<sup>262</sup> Contracts and Commercial Law Reform Committee, *Report on the effect of Mistakes on Contracts* Department of Justice, Wellington 1976, 10.



demanded for a legislative intervention to achieve greater flexibility. Therefore, the other arguable way would be a “codification” of the whole contract law and not just extracts of it. This codification would have to ease carefully the contradicting aims of “flexibility of the courts” which is necessary to achieve a just result and “judicial certainty” for the contracting parties.

At least in some aspects it might be helpful to take a look at the more successful codification in Germany. Here the whole contract law was enacted, and not just extracts of it. In addition a wider approach like in Equity was enacted. A mistake does not nullify a contract but only one party can challenge the contract.

This has not given rise to judicial uncertainty, because in the Act there are some disadvantages for the mistaken party enacted<sup>263</sup>. With such an enactment the balance between judicial certainty and flexibility and justice can be achieved.

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<sup>263</sup> ( e.g.: compensation for the party, that relied on the contract)



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