JULIE ANN QUIGG

# THE CASE OF CONLON v. OZOLINS - MORE THAN ONE MISTAKE?

Submitted for the LL.B (Honours) Degree
at the Victoria University of Wellington

August 1985

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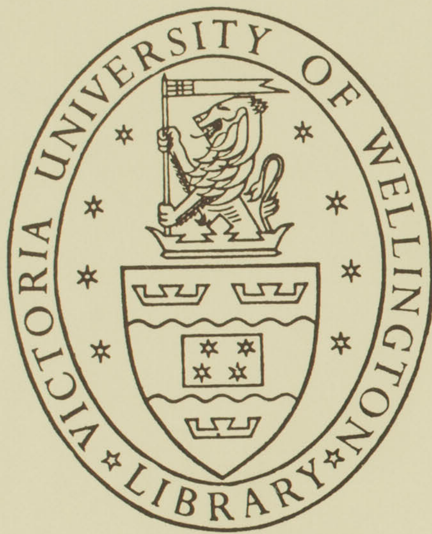
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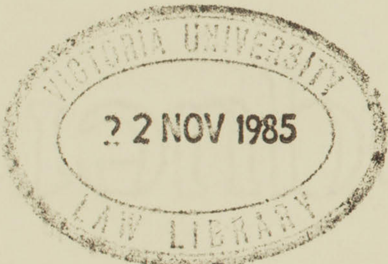


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## I. INTRODUCTION

In 1977, the Contractual Mistakes Act was passed. It was a measure intended to reform the law relating to the effects of mistakes on contracts.(1) The Act confers on the courts wide powers to grant relief in certain cases where one or more of the parties has entered into a contract under the influence of a mistake.

Conlon v. Ozolins(2) represents the first consideration of the Act by the Court of Appeal. The parties had entered into a contract, which although was expressed in clear and unambiguous language, represented the true intentions of one of the parties only. The Court of Appeal held that the mistaken party, Mrs Ozolins, was able to be granted relief under the Contractual Mistakes Act, even though the other party, Mr Conlon, had been unaware of her error. The Court's decision is of considerable importance to the law of contract. The Court made a more than surprising use of the provisions of the legislation in order to enable relief to be available, and in so doing, effected a major change in both the analysis and result of cases of the type involved in Conlon v. Ozolins.(3) It will be my submission that the Court of Appeal's decision is contrary to the intentions of both the Contracts and Commercial Law Reform Committee, which was initially responsible for the legislation, and of Parliament itself.

## II. CONLON V. OZOLINS - THE FACTS

Mrs Ozolins, the defendant, was an elderly widow who owned some land in Palmerston North. The land was contained in two certificates of title. One certificate of title had been issued in respect of the section upon which the defendant's house had been built. This land had a street frontage. The rest of her land, almost an acre in area, had been sub-divided into four lots and was contained in a separate certificate of title. These four lots were back sections and ran parallel to the street, forming an 'L' shape with the house section. Lot four shared a common boundary with the house section and had been developed as the defendant's garden. Visually it was a continuation of the house property. It was

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separated by a large fence from lots one to three, which had remained undeveloped.

In December 1981, the plaintiff, Mr Conlon, approached the defendant and inquired about the possible sale of her extra land. Mrs Ozolins, who desired to sell the paddock area, lots one to three, mentioned a price of $45,000 and referred Mr Conlon to her solicitor.(4) The solicitor, however, had never been to the properties and failed to appreciate that when his client spoke of selling "the land at the back",(5) she was referring only to the paddock area, and not to all of her back land, which included her garden area as well. The solicitor produced for the plaintiff, the certificate of title for the four lots as showing the land for sale. As a result, Mr Conlon assumed Mrs Ozolins' intention was to sell all of that land.

The parties settled upon a price of $42,000, and an agreement for the sale and purchase of the four lots was drawn up by the defendant's solicitor. Before the defendant signed the agreement, her solicitor opened out the certificate of title for the four lots and asked her what she was selling. She immediately replied, "Not my home".(6) The contract was then signed by both parties.

The defendant later discovered that by mistake, she had contracted to sell all of the back land, including of course, her garden. She refused to complete the transfer. The purchaser, Mr Conlon, then brought a suit for the specific performance of the contract.

## III. RELIEF UNDER THE COMMON LAW AND EQUITY

Under the law as it existed prior to the enactment of the Contractual Mistakes Act, Mrs Ozolins would have been most unlikely to have been granted any relief from the obligations which she had mistakenly undertaken. Even though she and Mr Conlon had been at cross-purposes in respect of the subject matter of the contract and therefore were not in a state of true consensus, it is likely that the courts would have held her to the apparent agreement evidenced by the written contract. The law

judged the parties not by what they had in their minds, but rather by what they had said and done. Blackburn J., in Smith v. Hughes[7] said [8]:

> "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not ad idem, there is no contract unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v. Cooke 2 Ex at p.633. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

There were, however, three situations in which relief was possible notwithstanding the existence of an apparent agreement. One was where the apparent agreement was in fact ambiguous, so that it was not possible to determine just what was the subject matter of the contract.[9] The second was where the mistake made by one party was known to the other party, and that party had been involved in sharp practice in relation to that mistake.[10] The third was where the party seeking to enforce a contract had, by his negligence, caused or contributed to cause the mistake.[11]

Mrs Ozolins would have been unable to avail herself of any of these three exceptions. The contract which she had signed was unambiguous. It gave rise to one interpretation only - that all four lots were to be sold. Mr Conlon had been unaware of Mrs Ozolins' mistake, and in no way had he caused or contributed to cause its occurrence.

The only other possibility for relief was the withholding by the Court, of an order for the specific performance of the contract, leaving the other party to a claim for damages. This equitable discretion was only exercised where the granting of an order for specific performance would

have resulted in undue hardship being suffered by the mistaken party,[12] although in considering the question of hardship, courts also had regard to any hardship which might have been suffered by the other party if the order was refused.[13]

The equitable discretion to withhold a decree for specific performance has been left untouched by the Contractual Mistakes Act.[14] It is still available, notwithstanding any lack of jurisdiction to grant relief under the Act itself. As a result, its possible exercise was considered by both Greig J. in the High Court, and Somers J. in the Court of Appeal. However, both judges refused to exercise their discretion, holding that although Mrs Ozolins would suffer hardship in losing her garden and in having to change her mode of living,[15] the fact remained that she was the one responsible for the mistake, and a refusal to grant the decree would result in a hardship to the plaintiff, who had entered into another transaction relying on his ability to purchase all of the four lots.[16] This matter was not considered by Woodhouse P. or McMullin J. in the Court of Appeal.

## IV. THE CONTRACTUAL MISTAKES ACT 1977

The Contractual Mistakes Act was enacted in 1977 following a report by the Contracts and Commercial Law Reform Committee.[17] The Act was intended to remedy the perceived defects of the existing law. Criticisms which were made about the law included allegations that it consisted of "a fragmented series of doctrines",[18] and that it relied on tests for mistake which were "inherently meaningless".[19] Furthermore, the law was criticised as having difficulty coping with the concept of negligence,[20] and the doctrinal differences between the Common Law and Equity were regarded as unsatisfactory.[21] The biggest criticism however, was that the remedies available under the law were "drastic and inflexible".[22] The Contracts and Commercial Law Reform Committee annexed a draft Bill to its report. This Bill formed the basis of the Contractual Mistakes Act.[23]

For most purposes the Act was intended to be a code. Section 5(1) provides:

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

Section 5(2) provides that:

"Nothing in this Act shall affect -

(a) The doctrine of non est factum;(24)

(b) The law relating to the rectification of contracts;

(c) The law relating to ... fraud ... or misrepresentation, whether fraudulent or innocent;

..."

As previously mentioned, section 5(3) preserves the equitable discretion of the courts to withhold a decree of specific performance.

Section 6 sets out the circumstances which are required to exist before relief can be granted under the Act. The pertinent provisions of this section state that:

"(1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract -

(a) If in entering into that contract -

(i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party ...; or

(ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or

(iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and

(b) The mistake or mistakes, as the case may be, resulted at the time of the contract -

(i) In a substantially unequal exchange of values; or

(ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor;"

Section 2(1) provides that a "mistake" can be of law or of fact, and section 2(3) states that:

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

This provision was included in the Act to deal with the possible argument that a mistake resulted in there being no contract, and therefore relief is not possible under the Act, because section 6 requires the existence of a contract.

The relief which may be granted under the Act is dealt with by section 7. The Act confers on the courts a discretion to grant that relief which it thinks just in all the circumstances of a case. Section 4(2) provides, however, that the powers to grant relief under Section 7, in the circumstances mentioned in section 6:

"... are not to be exercised in such a way as to prejudice the general security of contractual relationships."

This provision was inserted into the Contractual Mistakes Bill by the Select Committee after concern about contractual certainty and security had been expressed.

## V. THE APPLICATION OF THE ACT IN CONLON V. OZOLINS

### A. The Smith v. Hughes Principle:

In the High Court, Greig J. held that the Smith v. Hughes(25) principle operated to prevent Mrs Ozolins from being able to obtain any relief under the Act. His Honour adopted the approach taken by Mahon J. in McCullough v. McGrath's Stock & Poultry Ltd.(26) In that case, McGrath, a governing director of the defendant company, had contracted to purchase four allotments of farm land. He refused to complete the transaction when he later discovered that the property was comprised within three certificates of title and not four, as he had originally been told by the vendor. The contract had correctly described the land as being comprised within three certificates of title. The vendor, but not the purchaser, knew this. Mahon J. held that the defendant was estopped from asserting that he was influenced in his decision to enter into the contract by a mistake. The defendant was estopped from contending that he did not correctly appreciate the particulars of the contract.(27) Mahon J., with whom Greig J. concurred, said the Smith v. Hughes(28) principle could be applied notwithstanding the enactment of the Contractual Mistakes Act 1977. His Honour said that although in section 5(1) of the Act the legislature had codified the circumstances in which relief could be granted on proof of mistake, it has not touched upon the question as to the manner of providing the existence of mistake or the circumstances from which the existence of mistake could be inferred either factually or as a matter of law. The Smith v. Hughes(29) principle was said to operate only upon the question of whether mistake in fact existed, and its operation was therefore not excluded by anything within section 5 of the Act.(30)

In the Court of Appeal, Greig J's judgment was set aside. The majority, comprised of Woodhouse P. and McMullin J., held that the requirements of section 6(1)(a) had been satisfied, thus enabling relief to be granted under the Act. The Smith v. Hughes[31] principle was said to be no longer a bar to relief, and the facts of the case were held to be within the particular wording of section 6(1)(a)(iii).[32]

In respect of the Smith v. Hughes[33] principle, McMullin J., with whom Woodhouse P. concurred, said:[34]

> "... there is nothing in the Contractual Mistakes Act nor the report of the committee to support the view taken by Mahon J. which, if adopted, would severely restrict the operation of the Act itself. In enacting the Contractual Mistakes 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 no longer to the common law or equity for his remedy, if there is to be one. 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 s.5(1) which expressly says that the Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted on the grounds of mistake. Therefore, in so far as it holds that the operation of estoppel by representation is not excluded by the Contractual Mistakes Act, McCullough v. McGrath was wrongly decided. It should not now stand in the way of the appellant."

The majority, in so far as it held that a party is not prevented from asserting that a mistake was made, must be correct. The

approach of Mahon J. in McCullough v. McGrath,[35] and of Greig J. in the High Court, resulted in mistake cases being decided outside of the provisions of the legislation which was enacted to deal with those cases. The Contracts and Commercial Law Reform Committee in its report on the law of mistake, said that one of the objects of their proposed law reform was to amalgamate the then fragmented doctrines of mistake into one single body of law.[36] Yet an effect of Mahon and Greig J.J.'s approach was that there were two bodies of law for cases in which a mistake had been made: one in which the mistake was able to be raised, and another in which the mistaken party was estopped from asserting the mistake.

However, it would be going too far to hold that since the enactment of the Contractual Mistakes Act 1977, there is no room in the law of contract for the parties to ever be judged by what they had said and done, rather than by what they intended. This is of considerable importance in the area of contract formation, in which the courts have on previous occasions, assessed the words and conduct of the parties to an alleged contract, in order to determine whether that contract was in fact made.[37] The continuance of such an objective assessment in this area, was recognised by Somers J. in the Court of Appeal. His Honour said:[38]

> "The declaration in s.5 and the provisions of s.2(3) suggest that Parliament has assumed that s.6(1)(a) includes all cases in which common law mistake would prevent a contract coming into existence at all. But that case aside the normal principles under which the existence of a contract is to be determined are not affected by the Act. One such principle is that a party may not be allowed by reason of his conduct to deny his apparent assent to a contract or a term thereof: eg Wood v. Scarth (1858)1 F & F 293. He is estopped from denying the objective phenomenon of agreement. That is what I understood Blackburn J. to have meant in Smith v. Hughes (1871)LR 6QB 597, 607 when he referred to Baron Parke's statement about estoppel in Freeman v. Cooke (1848)2 Exch 654

> (itself a case of trover). It is not easy to envisage the case of a party estopped from disputing his assent to a contract yet successfully able to urge some mistake about that inferred assent to which the Act can apply and in respect of which relief should be given."

His Honour continued:[39]

> "But there is no need to resort to the course of negotiation in the present case for it resulted in a written contract in which the agreement is apparent from the words used. They exhibit no ambiguity of any description. Indeed before the Act the vendor in the instant case could, as I think, have had no relief in mistake. Her intention is discoverable from the words of the contract. Her error was truly 'unilateral' - it was unknown to the purchaser. ... That circumstance however can provide no guide to the construction of an Act intended to reform the law. It would itself be a mistake to approach the provisions of the Contractual Mistakes Act in general and s.6(1)(a) in particular influenced by the rules of law which operated before its enactment. A new start is called for."

Somers J. views the Smith v. Hughes[40] principle as requiring an objective assessment to be made of the words and conduct of the parties to an alleged contract, in order to determine whether that contract had in fact been made. His Honour sees the principle as operating to prevent a party, not from claiming that a mistake has been made, but from denying that a contract has been created. Somers J. said that it was not necessary to assess the words and conduct of Mrs Ozolins and Mr Conlon, because their intentions to contract and the terms of their contract could be ascertained from their written agreement.

His Honour states that it is difficult to see how a party could receive relief under the Act, if that party has been prevented from

denying his assent to a contract, by the operation of the principle. If a party has attempted to deny an intention to make any contract, it is certainly difficult to see how that party could get relief. Section 6(1)(a) requires the party seeking relief to show, amongst other things, that he was influenced in his decision to enter a contract by a mistake.(41) This necessarily involves showing an intention to contract, as such an intention is inherent in the decision taken to enter the contract. Yet, such an intention had previously been denied. In the case where a party seeking relief has intended to make a contract, but not on the terms of the apparent agreement, the question of whether that party could get relief under the Act, but be prevented from denying his assent to the apparent agreement, depends on the use of section 6(1)(a)(iii) by the courts. Under the Common Law, the Smith v. Hughes (42) principle did not operate if the party against whom relief was sought, either knew of the mistake at the time the contract was made, or had shared that mistake. These 'exceptions' are reproduced in section 6(1)(a) in subparagraphs (i) and (ii). Had the use of section 6(1)(a)(iii) been limited to situations, which under the Common Law would also have attracted an exception to the principle, it would indeed be difficult to see how a party could get relief under the Act, yet also be prevented from denying his assent to a contract. It would also not affect the result of any case whether the Smith v. Hughes(43) principle operated to prevent a party from asserting a mistake, as opposed to preventing that party from denying his assent to the contract. However, because of the wide use of section 6(1)(a)(iii) made by the majority in Conlon v. Ozolins,(44) Somers J. dissenting, it would be possible for a party to be prevented from denying his assent to a contract, yet able to be granted relief under the Act. The majority had used this provision in order to enable relief to be available, whereas under the Common Law, Mrs Ozolins would have been held to the contract, because when viewed objectively, she was in agreement with Mr Conlon, and no exceptions to the objective principle applied. This wide use of section 6(1)(a)(iii) means that a different result could be achieved in a case, if the Smith v. Hughes(45) principle

prevented a party from raising a mistake. Thus, it was important for the majority to overrule Mahon and Greig J.J's use of the principle, in order for them to enable relief to be available.

The majority said that in so far as McCullough v. McGrath[46] held that the Smith v. Hughes[47] principle was not excluded by the Contractual Mistakes Act, it was wrongly decided.[48] The principle must not, however, be totally eliminated from the law of contract by the majority judgments. The principle can, and surely must survive the enactment of the Act in so far as it provides the objective tests of contract formation, as was recognised by Somers J. This application of the principle does not interfere with the ability of the courts to entertain applications for relief under the Act, because it is concerned with ascertaining whether there is a contract in any given sense. This must be done before the effect of a mistake in respect of that contract can be assessed. The majority Judges did not consider the wider applications of the Smith v. Hughes[49] principle, so their apparent overruling of it should be limited to what they did consider - whether a party could be prevented from asserting a mistake, when there were no reasonable grounds for having made that mistake and when the other party was unaware of the error.

B. The Satisfaction of Section 6(1)(a)(iii)

Each of the three Courts of Appeal judges continued on to examine whether the facts of Conlon v. Ozolins[50] came within the particular wording of section 6(1)(a)(iii). This provision requires that each party must have been influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law. It had been accepted that if Mrs Ozolins was to be able to receive relief under the Act, the case had to satisfy section 6(1)(a)(iii), as Mr Conlon had not known of her mistake,[51] and nor had he made it himself.[52]

The majority of the Court of Appeal, comprising of Woodhouse P. and McMullin J., held that the requirements of subparagraph (iii) had been satisfied. Woodhouse P. said:[53]

> "... there can be no doubt that each then mistakenly believed that the written document correctly represented a mutual intention which did not exist. He mistakenly thought she was consciously selling all of the land at the rear of her house including the garden; she mistakenly thought he was buying merely the land beyond the high fence. To put the matter in another way, each had a mistaken impression about the boundaries of the tract of land being bought and sold. Mr Conlon believed 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 decisions to proceed and finally to enter into the written contract were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other and also that each mistake was about the size of land to be bought and sold."

Similarly, McMullin J. said:(54)

> "The present case comes within s6(1)(a)(iii). .... The appellant's mistake was in thinking, as Greig J. found, that she was selling only lots 1 to 3; the respondent's in thinking that the appellant intended to sell lots 1 to 4."

Somers J., on the other hand, held that the case did not fall within the terms of the provision at all. He said:(55)

> "It is clear that the vendor was influenced in her decision to enter the contract by mistakenly thinking the land described in the contract did not include the rear portion of what she called her home. In substance her mistake concerned the subject matter of the contract. It can be expressed in different ways - she mistook the legal description in the agreement; she mistakenly sold four lots instead of three.

The next question is what different mistake about the same matter of fact - the subject matter of the contract - did the purchaser make? It was submitted that he mistakenly supposed the vendor intended to sell that which she did not.

That posited mistake of the purchaser too can be put in different ways - he mistakenly supposed the vendor meant what she said in the contract; he mistakenly supposed her to be intending to sell four lots. But however put it is in the end a suggested mistake about the vendor's state of mind. That is no doubt a matter of fact but it can hardly be described as the same matter of fact about which the vendor was mistaken. Her mistake was as to the subject matter of the sale."

His Honour continued:(56)

"But there is a more fundamental difficulty. 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, is what he did."

In addition to his finding that the case did not fall within the literal wording of section 6(1)(a)(iii), Somers J. also concluded that the case was not one which Parliament had intended to be covered by that provision. He said:(57)

"The instant case is one which Parliament intended to be met only if the purchaser knew of the vendor's mistake - that is to say if the case fell within s6(1)(a)(i). If the purchaser's postulated mistake - namely that he erroneously thought the vendor intended to sell him all four lots - is sufficient to bring the case within subpara (iii), there will be few, if any, cases of mistaken intent not falling within the Act. 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). I do not consider this can have been the legislative purpose. If it were subpara (i) which requires knowledge by one party of the mistake of the other seems superfluous."

His Honour concluded with a defence of his dissent, by saying:[(58)]

> "If this should seem a restrictive approach it must be recalled that mistake involves an area in which the law prior to the Act, and Parliament in the Act, has had to balance the injustice of committing a party to a contract he did not intend to make and the commercial expectation of security of contract which has received special mention in s4(2)."

In holding that the facts of Conlon v. Ozolins[(59)] satisfied the requirements of section 6(1)(a)(iii), the majority effected a major departure from the previous law in both the analysis and result of cases in which a contract has been made, but representing the true intentions of only one of the parties. Previously, in the absence of knowledge of one party's mistake by the other party, relief was only possible if the court chose to exercise its equitable discretion to withhold a decree of specific performance, leaving the party seeking to enforce the contract, to his remedy in damages. Now, as a result of the decision in Conlon v. Ozolins[(60)], not only is that avenue available, but so is the possibility of relief under section 7 of the Act.

As is apparent from the dissent of Somers J., there are difficulties in accepting that the particular wording of section 6(1)(a)(iii) has been met. It is certainly an unusual and surprising analysis of the facts to hold that Mr Conlon made a mistake. Even if it is accepted that his supposed mistake was made, there still remains the question of whether that mistake was in respect of the same matter as her mistake was. As has been seen, Somers J. said that it was not, and

Woodhouse P. said that it was. McMullin J. did not even address the issue.

Whether the respective mistakes of Mrs Ozolins and Mr Conlon were about the same matter of fact depends on how those mistakes are analysed. Certainly, her mistake was in respect of the subject matter of the contract, the boundaries of the land being bought and sold. His 'mistake' was about her state of mind. To take a narrow approach, as was done by Somers J., the two mistakes are not about the same matter, and therefore, the requirements of section 6(1)(a)(iii) are not satisfied. However, under a more liberal analysis, the two mistakes can be said to be about the same matter of fact, in this case, the subject matter of the contract. Notwithstanding that Mr Conlon's mistake is initially about Mrs Ozolins' state of mind, he mistook her mind in respect of the boundaries of the land to be bought and sold. Hence, his mistake can be tied in with her mistake, and the section 6(1)(a)(iii) requirement can be analysed as being met.

Section 6(1)(a)(iii) also requires that each party must have been influenced in their respective decisions to enter into the contract by their respective mistakes. This requirement was not dealt with at any length by the judges in Conlon v. Ozolins(61). This may have been because only a relatively low standard has been set in respect of it. Prichard J. in Ware v. Johnson(62) said:

> "[It] means no more than that both parties must necessarily have mistakenly accepted in their minds the existence of some fact which affects to a material degree the worth of the consideration given by one of the parties."

All that was said in respect of this requirement in Conlon v. Ozolins(63), was by Woodhouse P., who, after stating the mistakes made by each party, said that the subparagraph (iii) requirements had been satisfied. Obviously this requirement is not going to be regarded as particularly difficult to meet.(64)

Notwithstanding the difficulties in bringing the facts of Conlon v. Ozolins[65] within the wording of section 6(1)(a)(iii), the majority found that the requirements of the provision were satisfied. In reaching this conclusion, the majority adopted a very liberal approach to the legislation. Indeed, Woodhouse P. went as far as to say:[66]

> "... in my view the case provides a classical example of one of the situations which is intended to fall within the remedial words of s.6(1)(a)(iii)."

His Honour continued:[67]

> "The provision being remedial does not deserve to be construed narrowly or by reference to any of the rather mixed judicial conclusions based upon the common law. Instead, in accord with the Acts Interpretation Act 1924 the language must 'receive such fair, large and liberal interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit'. I am satisfied the object of the Contractual Mistakes Act is promoted by construing it to include the present case."

However, with respect, I submit that the use of section 6(1)(a)(iii) by the majority was not in accordance with the intentions of those responsible for the legislation, and therefore the facts of Conlon v. Ozolins[68] do not provide a 'classical example' of a subparagraph (iii) situation at all. It is my submission that in cases, such as Conlon v. Ozolins[69], where there is an unambiguous contract which correctly represents the true intentions of only one of the parties, relief under the Act was only intended to be available if the error of the mistaken party was known to the other party at the time the contract was made.

The Contracts and Commercial Law Reform Committee thought it should be essential to operative mistake that either:[70]

"(i) the mistake was made by one party, and known to the other; or

(ii) the mistake was made by both parties; or

(iii) the mistake was in respect of a particular matter on which one party entertained one belief, and the other party entertained another."

In the ensuing explanation, the Law Reform Committee gave the case of Raffles v. Wichelhaus(71) as an example of parties having different beliefs in their minds about the same subject. In that case, the parties had agreed to buy and sell a consignment of cotton sailing "ex Peerless from Bombay". Unknown to the parties, there were two ships meeting that description, and each party had a different ship in mind. Because of the ambiguity in the description, the Court was unable to determine which ship was referred to in the contract. As a consequence, the Court held that no binding agreement had been made. The Law Reform Committee said that the Raffles v. Wichelhaus(72) situation should be covered by any new legislation.(73)

Gilmore(74) has argued that the case of Raffles v. Wichelhaus(75) was wrongly analysed. He said that the identity of the ship carrying the tender of cotton was not a true condition of the contract. He said the mistake over the two ships did not relate to a fundamental aspect of the contract, as the law required for operative mistake.(76) Nevertheless, he gave the case of Kyle v. Kavanagh(77) as an alternative example of an ambiguous contract, in respect of which each party has adopted a different meaning. In that case, the parties had contracted for the sale and purchase of a section of land in "Prospect Street", in Waltham. In the seller's action for the price, the buyer pleaded that there were two "Prospect Streets" in Waltham, and that each party intended to deal with different lots of land. The buyer's plea was accepted, and the court held that there was no contract.(78)

Both case examples involve a mistake in respect of a particular matter on which one party entertained one belief and the other party entertained another. However, in the proposed Bill annexed to the Law Reform Committee's report, the wording of subparagraph (iii) was changed to cover 'a different mistake by each party about the same matter of fact or law."

There are difficulties in bringing the Raffles v. Wichelhaus[79] and the Kyle v. Kavanagh[80] situations within the new wording. Finn has said:[81]

> "Despite the particularity of the drafting, the criteria are not entirely free from difficulties. It is clear from the Report (para 19) that the Raffles v. Wichelhaus (1864)2 H & C 906 situation is intended to be covered. But the Report (ibid) sees that case as being one of the parties having '... different beliefs in their minds about the same subject'. It is doubtful whether [sub]paragraph (iii) will cover that situation - since the case is often analysed as one where one of the parties must have had the correct ship in mind but the court could not decide which. If that is so, then one of the parties was right, and there cannot be a 'different mistake about the same matter of fact or law'."

The cases can be analysed as coming within the particular wording of subparagraph (iii) if each party is said to have made a mistake as to the intention of the other, in respect of the subject matter of the contract. Indeed, Raffles v. Wichelhaus[82] was analysed by Corbin[83] in such a way. He said:[84]

> "In the famous case of the ships named Peerless, neither party made a mistake in expression; each one correctly described the ship that he meant to describe. The mistake that each one made was in believing that the other party intended to describe the same ship that he himself described. Here they were 'mutually' mistaken, which means that both

> were mistaken. Were these 'mutual' mistakes identical? Not quite, although they had common elements. Both parties believed that there was only one ship named Peerless sailing from Bombay, when in fact there were two; both believed that there was agreement in meaning, when in fact there was not. But, in believing that the other party meant the same ship as himself, they were making closely similar but not identical mistakes."

As has been seen, this liberal approach to the requirement of section 6(1)(a)(iii) that the mistakes of the parties must be in respect of the same matter, was adopted by the majority in Conlon v. Ozolins(86), but rejected by Somers J. in his dissent. It is apparent from the problems with bringing the Raffles v. Wichelhaus(86) and Kyle v. Kavanagh(87) situations within the terms of the legislation, that this wider approach may be necessary if section 6(1)(a)(iii) is to cover cases which it was intended to cover. That is, cases involving a contract which admits of two meanings, and where each party had a different meaning in mind. However, the use of subparagraph (iii) is not limited to cases which involve an ambiguous contract. For example, Sutton(88) said that if two parties contract to buy and sell a Commer truck, but one party thinks the truck is a Datsun, while the other thinks it is a Leyland, then section 6(1)(a)(iii) is satisfied. Clearly, this is correct. Each party has made a different mistake in respect of the make of the truck.

Even if it is accepted that the majority in Conlon v. Ozolins(89) properly dealt with the question of whether the supposed mistakes in that case were in respect of the same matter, it remains my submission that the use of subparagraph (iii) to cover the Conlon v. Ozolins(90) situation, was not in accordance with the intentions of those responsible for the legislation. It is my submission that for cases where there is a contract which, although unambiguous, represents the true intentions of only one of the parties, the intention was for those cases to be analysed as involving only one mistake, and that relief was to be unavailable unless the error of

the mistaken party was known to the other, at the time the contract was entered.(91)

The legislation was drafted against the background of the Common Law, which treated such cases as involving only one mistake. For example, in Riverlate Properties Limited v. Paul(92) a written lease expressed that any exterior and structural repairs were to be the liability of the landlord. This was in accordance with the understanding of the tenant, but not with that of the Landlord, who had intended the tenant to be proportionately liable for those repairs. Russell L.J., who delivered the judgment of the Court of Appeal, referred to the defendant tenant as having:(93)

> "... acquired a leasehold interest on terms upon which [she] intended to obtain it, and who thought when [she] obtained it that the lessor intended [her] to obtain it on those terms,..."

Yet, unlike Conlon v. Ozolins,(94) the case was dealt with as involving a mere unilateral mistake, and because there had been no knowledge of the landlord's mistake by the lessee, the landlord was not entitled to any relief.(95)

Similarly, in Wallace v. McGirr,(96) the defendant, who was offered a house number six, carelessly inspected number sixteen. He signed a contract for the number six house, after reading the offer, but believing it to be for house number sixteen. The mistake had been wholly that of the defendant, and had not been known by the plaintiff. In these circumstances, the Court held the mistake to be purely unilateral, and because of the lack of knowledge, the defendant was bound.(97)

A final example is the more recent case of Leighton v. Parton.(98) This case involved a contract for the sale and purchase of lot number five of a subdivision. The defendant contended that he had intended to deal with lot number four. Mahon J. said that the case involved a mere unilateral mistake, and because of the absence of

knowledge of that mistake, on the part of the plaintiff, no relief was possible.

Indeed, it was recognised by Somers J. that under the previous law, Conlon v. Ozolins(99) would have been analysed as involving a unilateral mistake.(100) The majority, however, who held that the case involved two mistakes, and not just one, made it clear that they would not be influenced by the Common Law rules. McMullin J. said:(101)

> "... I see no reason to go outside the statute and return to the common law for a definition of operative mistake. One of the problems of the common law, as Professor Sutton and the Report pointed out, was in its definition and classification of mistake. The Contractual Mistakes Act is a remedial measure. As its long title indicates, it aims at a reform of the law. To construe it by reference to common law classifications would be to return to principles deliberately discarded because they were unsatisfactory."

Woodhouse P. said section 6(1)(a)(iii), being remedial, was not to be construed by reference to any of what he termed the "rather mixed judicial conclusions based upon the common law."(102)

However with all due respect, the Common Law was clear, not mixed, in its classification and treatment of mistake cases, of which Conlon v. Ozolins(103) is an example, where there existed an unambiguous contract representing the true intentions of only one of the parties. The report of the Law Reform Committee(104) did not refer to the Common Law classifications of operative mistakes as either unilateral, common or mutual as unsatisfactory or a feature of the law which was intended to be changed. Notwithstanding Sutton's opinion that such classifications were a good guide through 'the maze of the common law', but not a suitable inclusion in any statutory reform,(105) a classification system was adopted, and the categories appear to be based on those of the Common Law. It

appears that the main purpose of the legislation was to enable the courts to grant a wider range of relief measures and not to alter the jurisdiction of the courts to grant relief in what were regarded as unilateral mistake cases.(106) As Dukeson(107) has argued, it is likely that the section 6(1)(a) categories of operative mistake were intended to parallel and not expand the traditional categories of mistake.(108) Sutton himself thought that the Contractual Mistakes Bill, as it was, did not extend the law in respect of unilateral mistake very much, if at all.(109) Indeed, even the Chairman of the Statutes Revision Committee, the Honourable Mr McLay, M.P. was of the opinion that no major change was proposed by the Bill in respect of the categories of mistake. He said:(110)

> "... there are two distinct aspects of the Bill. The first is clearly nothing more than a codification, and that is the definition of 'mistake', but the clause that prescribes the new remedies - that will soften the effect of contractual mistake - is new, and those are the remedies that the law reform committee recommended."

In its report, the Law Reform Committee said that in cases involving mistakes made by one party only, relief should not be available under the proposed legislation unless the other party knew of that mistake.(111) Yet Conlon v. Ozolins(112) allows relief to be granted in cases which were previously seen as involving only one mistake, and which were intended to remain being analysed in such a way, even though the other party is unaware of the error.

Furthermore, the Law Reform Committee said:(113)

> " We also recognise that 'operative mistake' is confined to that class of mistake which would justify a court in setting a contract aside and does not extend to that type of error which is less fundamental and merely justifies a court from withholding an order for specific performance."

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Yet Conlon v. Ozolins[114] allows relief in cases where previously, because of the absence of knowledge, the only possible relief was the withholding of the decree for specific performance in accordance with the equitable discretion of the court.

The Rt. Hon. Mr David Thomson, M.P., the then Minister of Justice and Minister responsible for the legislation, also emphasised the requirement of knowledge in unilateral mistake cases. He said:[115]

> "Clause [6] sets out the circumstances that must prevail before relief may be granted. A number of submissions did not appear to appreciate the mutuality concept of the clause - that is, that relief would be available only where the mistake was made by both parties, or made by one party and known to the other."

Yet, as a result of the Court of Appeal's decision, the courts will have jurisdiction in terms of section 6(1)(a), to grant relief in almost every case before them. The only cases not covered are those involving a mistake by one party, in respect of a matter to which the other party did not turn its mind. It is now possible for a contract to be upset in cases, of which Conlon v. Ozolins[116] is an example, where the party against whom relief is to be granted, is entirely innocent and realistically unmistaken, This is a significant departure from the approach of the Common Law, which was not intended to be altered, and it ignores the 'mutuality' concept in respect of operative mistakes, which was referred to by the Minister responsible for the Bill.

Furthermore,the decision limits the effect of section 6(1)(a)(i). Previously, this provision would have been of considerable importance in cases where realistically, only one party was mistaken. Now, it will only need to be invoked in cases in which knowledge of the mistake is clearly proven - most other essentially unilateral mistake cases will fall within section 6(1)(a)(iii).

So ?

By enabling relief to be granted against parties who are entirely innocent and realistically unmistaken, the decision also jeopardises certainty in contracting. Under the Common Law, relief could not be ordered against a party unless there was some reason why it would not be unjust to do so. For example, that party had known of or shared the mistake, or had been partly or wholly to blame for its occurrence, or alternatively, if the contract had been ambiguous. But now, a contract can be overturned against any party. Where is the contractual certainty which, because it was considered so important, received special mention by Parliament?(117)

## VI. CONCLUSION

In the area of contractual mistakes, there is a need for the law to strike a balance between the competing interests of the parties involved. The interests of the mistaken party in not being held to potentially burdensome contractual obligations which were not intended to be undertaken, and the interests of the other party in being able to obtain the benefits of a contract, which may have been entered into in good faith and without knowledge of the existence of any mistake.

In its favour, the Court of Appeal's decision in Conlon v. Ozolins(118) allows relief to be given in cases where although the party against whom relief would be granted is entirely innocent, the burdens or inequalities arising from the mistake are so substantial that a greater injustice could be done if some form of relief was not granted. It may be that a judicious use of the safeguards provided in section 6(1)(b) and section 7 to prevent the wholesale granting of relief, can achieve better results that would otherwise have been possible.

However, it remains apparent that in enabling Mrs Ozolins to receive relief, the majority of the Court of Appeal went against the intentions of both the Contracts and Commercial Law Reform Committee and of Parliament. Certainly, it was intended that all contractual mistakes cases be dealt with in terms of the legislation, so the overruling of

McCullough v. McGrath [119] in so far as it was held that the Smith v. Hughes[120] principle operated to prevent a party from raising his mistake, was the proper course to take. However, it is equally apparent that in Conlon v. Ozolins[121], which was essentially a unilateral mistake case, and was intended to be regarded as such, relief was not to be available in the absence of the knowledge of the mistake by Mr Conlon. Therefore, contrary to the opinions of the majority, the Conlon v. Ozolins[122] decision was not in accordance with the intentions behind the legislation. The judgment to be preferred is the dissent of Somers J..

## FOOTNOTES

1. C.f. the Title to the Act.

2. [1984]1 N.Z.L.R. 489

3. Idem. That is, cases involving a contract on clear terms, but representing the true intentions of one of the parties only, and where the error of the mistaken party was unknown to the other.

4. Mrs Ozolins had recently had the three lots valued at $36,000 and advertised for sale in a local newspaper for $40,000, although the plaintiff had been unaware of those advertisements.

5. Supra, n.2, at p.497.

6. Supra, n.2, at p.501.

7. (1871) L.R. 6 Q.B. 597

8. Idem, p.607.

9. Illustrated by the case of Falck v. Williams [1900] A.C. 176. The parties were negotiating about two chaterparties: one to carry shale from Sydney to Barcelona, and the other to carry copra from Fiji to Barcelona. A coded telegram was sent by the plaintiff's agent, intended to confirm the copra charter. The telegram was ambiguous and was understood by the defendants, to refer to the shale charter. The Privy Council held that there was no contract.

10. Riverlate Properties Ltd v. Paul [1975]1 Ch. 133 (C.A.). In Leighton v. Parton [1976]1 N.Z.L.R. 165, 168, Mahon J. said that there had to be adequate and distinct proof that the other party had taken studied advantage of the error and had sought to profit by it.

11. Scriven Brothers & Co. v. Hindley & Co. [1913]3 K.B. 564.

12. Tamplin v. James (1880) 15 Ch.D.2.15; Goddard v. Jeffreys 45 L.T. 674; Mills v. Fox (1887) 37 Ch.D, 153.

13. Keats v. Wallis [1953] N.Z.L.R. 563; Nicholas v. Ingram [1958] N.Z.L.R. 972.

14. Section 5(3).

15. Although Greig J. thought it questionable just how much longer Mrs Ozolins and her elderly relative would be able to continue that mode of living anyway. Supra, n.2. at p.496.

16. Supra, n.2. at pp.495-496 per Greig J., and pp. 508-509 per Somers J..

    The plaintiff had bought a property which had a common boundary with part of the defendant's back land. He was intending to move the house on this property to lot four, and to develop the section and lots one to three by the building of townhouses thereon. This transaction was entered into after Mr Conlon had seen the defendant's solicitor, but before the contract for the defendant's property had been formed.

17. Report On The Effect of Mistakes On Contracts (May 1976) hereinafter referred to as "the Report".

18. Idem, p.3. The Report identified the different types of mistakes as being mistakes about the nature of a document, and its terms, about the identity of one of the parties, and about the subject matter of the contract. It said the law was presented as "a complicated network of legal doctrine, in which these errors are categorised and different lines of authority applied to them." This was said to result in different techniques of decision-making being applied in some cases.

19. Supra, n.17 at p.4. This was illustrated by reference to the well-known trilogy of mistake of identity cases consisting of Phillips v. Brooks Limited [1919] 2 K.B. 243, Ingram v. Little [1961] 1 Q.B. 31 and Lewis v. Averay [1972] 1 Q.B. 198 . Whether or not the contract was void depended on who the seller "intended" to deal with - the rogue (represented to be the reputable person) or the reputable person. For a discussion of the effect of the Act upon this line of cases, see McLauchlan, D.W., Mistake of Identity after the Contractual Mistakes Act 1977 10 N.Z.U.L.R. 199.

20. There was a question of whether, for example, fault was a bar to equitable relief, as a result of the case of Solle v. Butcher [1950] 1 K.B. 671.

21. The Report, at p.7, said that there appeared to be a "double-standard" for mistake as a result.

22. Supra n.17 at p.8.

23. A number of changes were made to the Law Reform Committee's Bill, although the basic form remained the same.

24. This doctrine was pleaded by the defendant in Conlon v. Ozolins (supra n.2). In essence, it is a plea that the document signed was so entirely or fundamentally different from what it was thought to be, that it could not be said it was ever the persons intention to sign it. Negligence in signing has been said to be a bar to relief. The leading case on the doctrine is the House of Lords' decision in Gallie v. Lee [1971] A.C.1004.

    In Conlon v. Ozolins, all of the judges held that Mrs Ozolins could not avail herself of the plea.

25. Supra, n.7.

26. [1981] 2 N.Z.L.R. 428.

27. Idem, p.433.

28. Supra, n.7.

29. Idem.

30. Supra, N.26, at p.434.

    In Conlon v. Ozolins (supra, n.2), Greig J., in case he was wrong on the Smith v. Hughes (supra, n.7) point, considered whether relief would be possible under the Act if Smith v. Hughes (supra, n.7) was

not a bar. He assumed that the particular requirements of section 6(1)(a)(iii) were satisfied, but held that the contract was not sufficiently unequal in terms of section 6(1)(b). He further held that even if he did have jurisdiction under the Act to grant relief, he would not have exercised his discretion to do so.

31. Supra, n.7.

32. The majority also held that the requirements of section 6(1)(b) were satisfied on the facts, which was also necessary before section 7 relief could be granted.

33. Supra, n.7.

34. Supra, n.2, at p.504.

35. Supra, n.26.

36. Supra, n.17 at p.10.

37. For example, this was done by the Court of Appeal in both _Boulder Consolidated Ltd_ v. _Tangaere_ [1980] 1 N.Z.L.R. 560 and _Concorde Enterprises Ltd_ v. _Anthony Motors (Hutt) Ltd_ [1981] 2 N.Z.L.R. 385.

38. Supra, n.2, at p.507.

39. Idem.

40. Supra, n.7.

41. This is a requirement in each of the subparagraphs of s.6(1)(a).

42. Supra, n.7.

43. Idem.

44. Supra, n.2.

45. Supra, n.7.

46. Supra, n.26.

47. Supra, n.7.

48. Supra, n.2 at p.504, per McMullin J., with whom Woodhouse P. concurred.

49. Supra, n.7.

50. Supra, n.2.

51. In terms of s.6(1)(a)(i).

52. In terms of s.6(1)(a)(ii).

53. Supra, n.2, at pp. 498-449.

54. Supra, n.2, at p.505.

55. Supra, n.2, at pp. 507-508.

56. Supra, n.2, at p.508

57. Idem.

58. Idem.

59. Supra, n.2.

60. Idem.

61. Idem.

62. (1983) Unreported, Hamilton Registry, A16/82.

63. Supra, n.2.

64. Dukeson, S. [1985] N.Z.L.J.39 (Feb.), in a casenote on Conlon v. Ozolins (supra, n.2), criticised the satisfaction of this requirement in the case of Engineering Plastics Ltd. v. Mercer (1984) Unreported, Auckland Registry, A580/83. The vendor had made an unambiguous written offer, which had been accepted by the purchaser, but under the influence of a mistake. Tompkins J. held the case came within s.6(1)(a)(iii). Dukeson said, "With respect, it could not be said by any stretch of the imagination that the vendor was acting under the influence of a mistake".

65. Supra, n.2.

66. Idem, p.499.

67. Idem.

68. Supra, n.2.

69. Idem.

70. Supra, n.17 at p.15.

71. (1864) 2 H & C 906; 159 E.R. 375.

72. Idem.

73. Supra, n.17 at p.16.

74. Gilmore, The Death of Contract (1974) Ohio State University Press, Columbus, Ohio.

75. Supra, n.71.

76. Supra, n.74 at pp. 37-38.

77. (1869) 103 Mass. 356.

78. Supra, n.74, at p.121.

79. Supra, n.71.

80. Supra, n.77.

81. Finn, J.N. The Contractual Mistakes Act 1977 8 N.Z.U.L.R. 312, 317.

82. Supra, n.71.

83. Corbin, A.L., 3 Corbin on Contracts (1960) West Publishing Co., St.Paul, Minn.

84. Idem, at p.671.

85. Supra, n.2.

86. Supra, n.71.

87. Supra, n.77.

88. Sutton R., The Contractual Mistakes Bill 1977 in Commercial Law Seminar (1977, Legal Research Foundation Inc., Auckland) 45 at p.50.

89. Supra, n.2.

90. Idem.

91. That is, that relief be available only in terms of s.6(1)(a)(i).

92. [1975] 1 Ch.133.

93. Idem, at pp. 140-141.

94. Supra, n.2.

95. Supra, n.92 at p.145.

96. [1936] N.Z.L.R. 483.

97. The Court did, however, choose to exercise its equitable discretion to withhold a decree for specific performance, leaving the plaintiff to a claim for damages.

98. [1976] 1 N.Z.L.R. 165.

99. Supra, n.2.

100. Idem, p.507.

101. Supra, n.2, at p.505.

102. Supra, n.2, at p.499.

103. Supra, n.2.

104. Supra, n.17.

105. Sutton, R., Reform of the Law of Mistake (1976) 7 N.Z.U.L.R. 40, footnote 51, on p.50. This paper lead to the Law Reform Committee's Report.

106. The Committee's biggest criticism of the previous law was that the available remedies were "drastic and inflexible". (Supra, n.17 at p.8.)

107. Dukeson, S., [1985] N.Z.L.J.39 (Feb.).

108. Idem. He thought the primary motivation for the passing of the Act was not to widen the ambit of the types of mistake which would be operative, but to enable the courts to exercise a wide range of remedies in appropriate cases.

109. Supra, n.88. The "studied advantage" requirement of the Common Law - see Leighton v. Parton [1976] 1 N.Z.L.R. 165, 168, - was not reproduced in the proposed legislation. Knowledge only was required.

110. N.Z.Parliamentary debates, Vol.413, 1977: p.2806.

111. Supra, n.17 at pp. 16-17. The Report noted that there had been considerable deliberation on whether knowledge should be required, but the conclusion had been that it should be necessary.

The Committee noted that unjust enrichment was far less clear when the case involved a mere unilateral error.

112. Supra, n.2.

113. Supra, n.17 at pp. 10-11.

114. Supra, n.2.

115. N.Z.Parliamentary debates, Vol.415, 1977: p.4287.

116. Supra, n.2.

117. C.f. s.4(2) which was inserted into the legislation by the Select Committee.

118. Supra, n.2.

119. Supra, n.26.

120. Supra, n.7.

121. Supra, n.2.

122. Idem.

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