JOSHUA WILLIAMS MEMORIAL ESSAY 1978
THE CONTRACTUAL MISTAKES ACT 1977

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Sir Joshua Strange Williams, who was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have therefrom provided an annual prize for the essay which in the opinion of the Council makes the most significant contribution to legal knowledge and meets all requirements of sound legal scholarship.

We publish below the winning entry for 1978.

Prior to 1977 few would have envied the practitioner faced with a case involving mistake. Help at last appeared to be on the way when, in May 1976, the Contracts and Commercial Law Reform Committee[1] presented its *Report on the Effect of Mistakes on Contracts*[2] to the Minister of Justice. Incorporated in the *Report* was a critical review of the existing law relating to the effect of mistakes on contracts, the conclusion of which included a recommendation for statutory reform of the law of mistake. This conclusion was embodied in a draft Bill which was submitted with the *Report*.

The Committee expressed dissatisfaction with several aspects of the existing law of mistake.[3] Among these was the fragmented nature of the old law, the inherently meaningless tests and definitions of mistake that were being used, the impact of negligence in mistake, and the shaky theoretical foundations which had allowed both common law and equitable doctrines of mistake to develop and so set an apparent "double standard" for mistake. These meant that counsel arguing a case involving mistake were forced either to reconcile or distinguish a large number of apparently conflicting authorities, and judges had to formulate an elaborate chain of reasoning fraught with subtle distinctions. However, the Committee found that the most serious defect in the pre-Act law was the failure to provide adequate and flexible remedies for cases involving mistake. This resulted in the very real reluctance of the courts to commit themselves to a clear policy in defining mistake, and they would occasionally find it necessary to shelter behind ambiguous and meaningless definitions in order to prevent the harsh consequences attendant

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1 The Reform Committee (hereinafter referred to as "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 J. S. Henry, Mr W. Iles, Mr J. H. Wallace, Mr A. E. Wright (Secretary).

2 Hereinafter referred to as the *Report*.

3 See *Report*, paras. 5-10. It would not be practical in an article of this length to include an in-depth analysis of the law relating to mistake as it stood prior to the Act. For such an analysis, see R. J. Sutton, "Reform of the Law of Mistake in Contract" (1976) 7 N.Z.U.L.R. 40. Both the *Report* and the draft Bill were influenced greatly by a paper presented to the Committee by Mr R. J. Sutton of the Faculty of Law of the University of Auckland. The basis of that paper is to be found in the above-mentioned publication.

upon a finding of mistake. The draft Bill tendered by the Committee thus reflected the need to establish certain principles to determine whether or not the court has jurisdiction to entertain a case of mistake, to establish a much wider range of remedies than those previously available, and to amalgamate the existing fragmented doctrines into a single body of law dealing with mistake.[4]

The resulting statutory regime of reform, embodied in the Contractual Mistakes Act 1977,[5] has received little or no attention, judicial or otherwise, and in fact seems to have slipped almost unnoticed into the law of contract. The complete lack of judicial comment means that any discussion is necessarily speculative, but since the Act is now part of our law it becomes pertinent to examine its aims and possible effects.

The Definition of "Mistake"

Section 2(1) of the Act simply defines "mistake" as a "mistake, whether of law or fact" — a definition very different from that contained in the draft Bill tendered by the Committee. The *Report* recognised that the most common error is, generally speaking, a mistake of fact.[6] However, it noted that other errors could be equally as disastrous, for example errors of opinion, of expression of the terms of the contract, or of law. The courts had been ambivalent in their attitude to these errors, sometimes granting and sometimes withholding relief. The Committee felt that no arbitrary restriction should be placed on the ambit of any proposed reform, and recommended that these types of mistake should be included. However, the Statutes Revision Committee appears to have taken a very different view, deciding that much of the confusion surrounding the law of mistake could be dispelled "by a number of changes that are designed, basically, to make the Bill's intention clearer."[7] Among these changes was a recommendation that the definition of mistake be limited to mistakes of law and fact only.

As the Committee noted, most mistakes are mistakes of fact. Thus the old types of mistake at common law (e.g. mistake as to identity, existence of the subject-matter of the contract etc.) can be seen to come within the Act. The Act defines mistake at a higher degree of abstraction than did the common law. By viewing mistakes as mistakes of "fact" rather than of identity or title, for example, the types of mistake become subsumed within the one broad heading. Thus the definition avoids the fragmentation which plagued the old law of mistake.

The inclusion of mistakes of law will spare the courts the very real practical difficulties inherent in finding the exact demarcation between law and fact.[8] Since the courts have jurisdiction to entertain cases in-

4 *Report*, para. 11.
5 Hereinafter referred to as "the Act".
6 *Report*, para. 15.
7 (1977) 412 N.Z.P.D. 1744 per Mr McLay, MP.
8 The case of *Solle* v *Butcher* [1950] 1 K.B. 671 affords an excellent illustration of these difficulties. The question before the court was whether the reconstruction of a war-damaged flat was so extensive as to make it a new flat, and therefore outside the scope of the Rent Restriction Act. It was held by a majority of the Court of Appeal that this was a question of fact. The divergence of opinion in the Court was reflected in the form in which the question was to be put. If the inquiry were whether the flat was new or old, then it was a matter of fact. If, on the other hand, it were whether the Rent Restriction Act applied, then it was clearly one of law. The very fact that the court was divided on this point is some indication of the difficulty of drawing a clear distinction between mistakes of law and those of fact.

volving mistakes both of law and fact, it will not matter in marginal cases such as *Solle* v *Butcher*[9] whether the mistake is declared to be one of law or fact.

However, it is submitted that it will sometimes be difficult to distinguish between errors of fact and those of opinion. Where the parties are mistaken as to the existence of the subject-matter of the contract, they can be seen to hold the mistaken *belief* that the subject-matter existed at the time of the contract. Where there has been a mistake as to title, they both *believed* that one party held the legal title to the property in question. Should the courts choose to see such mistakes in this light, then it is submitted that they may not come within the ambit of the Act. However, since such mistakes have been held to be mistakes of fact at common law, it is likely that they will be held to be mistakes of fact under the Act. Although the Act has "effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted",[10] it is submitted that the courts are likely to look to the common law in determining whether or not a mistake is one of fact or opinion. Where a similar mistake has been held to be one of fact or law at common law, that finding may influence the court in holding that the mistake under consideration comes within the Act. It is submitted that this practice should be avoided as much as possible. To turn to the common law for guidance is to undermine the effectiveness of the Act as a code.

A situation where the common law would provide little help, however, is that which arose in *Frederick E. Rose (London) Ltd.* v *William H. Pim Jnr. & Co. Ltd.*[11] There, horsebeans were sold on the basis of a mistaken opinion, held by both parties, that they would pass as "feveroles" in another part of the world. At common law, the mistake was held to be one of opinion and relief was denied. If the judge decided to grant relief under the Act, he could simply declare that the mistake as to the nature of the horsebeans was one of "fact". If, on the other hand, the judge felt that the case did not merit relief, he could simply label the mistake one of "opinion". Under the draft Bill the mistake would be operative under either description, and relief could be acorded or refused simply by the appropriate exercise of the discretion vested under section 7. It is submitted that the distinction between opinion and fact which will now have to be made by the courts will necessarily involve a degree of artificiality and arbitrariness. It is these very distinctions that the Act was intended to remove.

The Committee considered[12] that one type of mistake should definitely be excluded for reasons of general legal theory. This was a mistake as to a party's expectations from the contract. If, for example, A agrees to build a house for B at a fixed price, and his expectations of profit are frustrated as a result of unexpected inflation, then the Committee considered that any remedy should lie in the law of frustration and not in the law of mistake. Yet Clause 2(1)(c), included in the draft Bill to specifically exclude such errors, was also removed by the Statutes Revision Committee. It is thus arguable that such situations may come within the Act, but a frustrating factor such as inflation would generally

9 Supra n. 8.
10 The Act, s.5(1).
11 [1953] 2 Q.B. 456.
12 *Report*, para. 17.

make itself known *after* the contract was entered into, so that the parties would not have entered into the contract relying on such a mistake. Thus the wording of section 6(1)(a) would seem to preclude relief.

It is to be noted that for the purposes of the Act a mistake in the interpretation of a document is a mistake of law.[13] This section is largely an expansion of the old common law rule that a mistake in the interpretation of a written contract was a mistake of law.[14] Section 2(2) will bring mistakes in the interpretation of wills, contracts, deeds, agreements, and in fact every kind of written document, within the scope of the Act. It must be regarded as a useful provision in that these documents come within the Act without the court having to determine whether the error in question has in fact been an error of law. It is, however, subject to section 6(2)(a), which declares that should the actual contract in question have been wrongly interpreted, there is no operative mistake.

Another useful machinery provision is section 2(3), which makes it clear that the provisions for relief apply even where the mistake means that there is technically no contract.

Section 4: Purpose of Act

The statement of the purpose and policy of the Act bears a strong resemblance to the preambles which used to be found at the beginning of Acts of Parliament. At first the section would not seem to add much to the Act, since the intention of the Legislature becomes clear if the Act is read carefully and in conjunction with the *Report* of the Law Reform Committee.[15] The section appeared for the first time when the Bill was reported back from the Statutes Revision Committee, and reflects the very real concern of that body that the intention of the Act be made clearer.[16] In practical terms, section 4(1) will enable the courts better to give effect to the Act in accordance with section 5(j) of the Acts Interpretation Act 1924.

Subsection (2) of section 4 is rather more difficult to ascribe a precise meaning to. Whereas subsection (1) is concerned with describing the aim and object of the Act, subsection (2) appears to place a limitation on the operation of the Act. The powers are granted in order to allow the courts to mitigate the arbitrary effects of mistakes on contracts, but they may not be used outside the sphere of mistake so that they prejudice the general security of contractual relationships (presumably by becoming a general remedy in the law of contract). In practice, the section may not be of very great importance. It really only makes explicit what is necessarily implicit in an Act of this kind, but the very fact that such sections are rarely found in statutes makes it worthy of note.

The Doctrine of Non Est Factum

Section 5(2)(a) provides that nothing in the Act shall affect the doctrine of *non est factum*. This defence permits one who has signed a

13 S.2(2).

14 See *Sharp Brothers and Knight* v *Chant* [1917] 1 K.B. 771; *Holt v Markham* [1923] 1 K.B. 504.

15 The court may look at such reports in order to find the mischief the Act is intended to cure. Reports may not be used, however, to aid in interpreting the actual words of the Act — that is the function of the court. See: *Black-Clawson International* v *Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591; *Davis* v *Johnson* [1978] 2 W.L.R. 182, 192 per Lord Denning M. R.; *Harding* v *Coburn* [1976] 2 N.Z.L.R. 517, 581 per Cooke J.

16 (1977) 412 N.Z.P.D. 1744 per Mr McLay M.P.

written document to plead that "in spite of his signature, it is not his deed in contemplation of law."[17] The defence has very narrow limits, for in order to make out a successful plea the person executing the document must show that the transaction which the document purports to effect is totally different in substance or in kind from the transaction intended. A good example was given by Byles J. in *Foster* v *MacKinnon* when he said:[18]

> it was as if he had written his name . . . on the flyleaf of a book, and there had already been, without his knowledge, a bill of exchange . . . on the other side of the paper.

The effect of a successful plea of *non est factum* is that the transaction contained in the document is not merely voidable against the person who procured its execution, but is entirely void for subsequent holders.[19]

The Committee recognised that the circumstances in which a person can disclaim his deed raise considerations different from those with which the law of mistake is concerned.[20] The Committee found it was possible to envisage situations where a person would be able to obtain relief under the doctrine of *non est factum* but not under the proposed Act. Thus the draft Bill specifically provided that any reform should not impinge upon the scope of the doctrine.

When the nature of the situations in which the defence of *non est factum* would be pleaded is measured against the wording of section 6 of the Act, it can be seen that only rarely would such situations come within the Act. In these situations one party has signed a document in complete ignorance of its true nature. Often he does not know that he has entered into a contract at all.[21] Or, if he does know that he has entered into a contract, he had no idea of the true nature of that contract.[22] In such a situation, it would be very difficult for him to claim under section 6(1)(a) that he was influenced in his decision to enter into the contract by a mistake that was material to him. He never made a decision as such, so that any subsequent inquiries into the type of mistake that he made become pointless. Thus he would not be entitled to relief under the Act.

If either the Law Reform Committee or the Statutes Revision Committee had wanted to include *non est factum* within the scope of mistake, then it would have been a relatively straightforward operation to modify section 6(1) to accommodate it. Since this was not done, it must be assumed that *non est factum* was specifically intended to remain outside the Act. This would seem to be contrary to the object and policy of the Act. A successful plea of *non est factum* means that the contract is void *ab initio,* thus depriving bona fide third parties of any benefit which they might have gained under it. One of the basic aims of this Act is to

17 Anson, *Law of Contract* (24th ed. 1975) 301-306.
18 (1869) L.R. 4 C.P. 704, 712.
19 There is at present uncertainty as to the effect negligence on the part of the person signing the document has on the plea of *non est factum*. See e.g. *Carlisle and Cumberland Banking Co.* v *Bragg* [1911] 1 K.B. 489. Cf. *Saunders* v *Anglia Building Society* [1971] A.C. 1004, 10019; 1023; 1027; 1037-38. See *Anson,* supra n.17 at 304-305.
20 *Report,* para. 13.
21 See e.g. *Lewis* v *Clay* (1897) 67 L.J.Q.B. 224.
22 See e.g. *Foster* v *Mackinnon,* supra n.18.

protect such third parties. This aim will be defeated to a large extent if the doctrine of *non est factum* continues to control the mistaken signing of written documents.

Grounds for Relief

Section 6 sets out the grounds for relief under the Act. All three subsections of section 6 must be satisfied before relief may be granted. Of course the court has the discretion to refuse relief if it thinks fit.

Section 6(1)(a)(i) provides for the situation where one party only is mistaken when entering into a contract. Such a party must be "influenced in his decision to enter into the contract by a mistake that was material to him." In addition, the existence of the mistake must be "known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief)."

In the draft Bill, the Committee used the words "relying on a mistake" rather than "influenced in his decision". To "rely on a mistake" seems to be a more stringent test than that laid down by the Act. To show such 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. However, it seems that to prove that a factor "influenced him in his decision to enter into the contract", a party would only have to show that the fact about which he was mistaken was *one* of the factors which he considered in deciding whether or not to enter into the contract. If the party can show that he considered a factor, then presumably the conclusion he came to after this consideration was influenced by the factor.

At first sight, the requirement that the mistake be "material" to the party seeking relief seems to be somewhat superfluous. If a factor has influenced a party in his decision to enter into a contract, then it would seem to follow that a mistake with regard to that factor would be material to the party. However, this depends upon the construction to be given to the words "mistake that was material to him". Is such a mistake a mistake as to a matter of fundamental importance? Or is it a mistake about a factor in which the party simply had an interest? The fact that the phrase follows "influenced in his decision" indicates that it is probably somewhere in the middle of the two. It is submitted that a "mistake that was material to him" will probably be interpreted as a mistake about a factor the validity of which is of considerable importance, yet which is not necessarily fundamental to the decision to enter into the contract. One way of applying the test is to pose the question: "Would the party have entered into the contract if the true facts had been known?" If the answer is in the negative, it can be seen that the mistake relates to a factor that was important in the mind of the party. However, it may not necessarily have been fundamental to his decision to enter into the contract. Other equally as important, or even more important, factors may have influenced him in his decision. Had he known the true state of affairs, however, he would not have entered into the contract.

Such an interpretation would mean a marked departure from mistake as it was viewed by the courts at common law. At common law the mistake had to be a fundamental one that removed the very basis of the contract before a court would allow the contract to be set aside. Such

an approach led to many of the problems that were encountered under the old law. Tests developed that, in the opinion of one writer, "set the requirements too high and have resulted in some judges seeking more flexible standards through an assertion of the doctrine of 'equitable mistake'."[23] There could be no mistake as to quality, for example, unless the thing acquired was "different in kind" from the thing expected,[24] or unless it related to "an essential and integral element of the subject-matter."[25] This led to situations such as that in *Leaf* v *International Galleries*.[26] There, A bought from B a picture which both believed to have been painted by Constable. Several years later, when A tried to sell the picture, he found that it was not painted by Constable at all. However, the mistake did not avoid the contract since the picture was not different in kind or in substance from the thing which A expected.[27] Under the Act, the necessity for such a distinction disappears. There has been a mistake of fact, and it is obviously a fact that A would consider material. If the court considered that the mistake also satisfied sections 6(1)(b) and (c) then relief might be granted. Seen in this light, the Act is far more liberal in its requirements than was the old law.

Where one party only has been mistaken, the other party must clearly know of his mistake before relief may be granted. The Committee made it clear[28] that the situation where one party knows of the other's mistake and remains silent should be covered by any reform. It was pointed out that the cases show[29] that such a party should be exposed at least to the risk of an investigation even if the court decides in the end that relief should not be granted against him.

The most striking feature of section 6(1)(a)(i) is that relief may not be granted where the party against whom relief is sought does not know of the mistake. The reason for the requirement of actual knowledge appears to be that "where the error concerns a matter which is not in his mind, and is not relevant to him when he enters the contract, the contract will no doubt still appear to be a fair one as far as he is concerned."[30] Thus there are stronger reasons for enforcing it. However, it is submitted that the exclusion of this type of error is contrary to the stated policy and purpose of the Act. The purpose of the Act is to mitigate the arbitrary effects of mistakes on contracts. The party who has been mistaken will suffer the same harsh consequences regardless of whether or not the other party has knowledge of the mistake. To grant relief in one case but not the other is to make an arbitrary distinction. The desire to grant relief may also lead to findings of actual knowledge where in fact there has only been constructive knowledge. The very fact

23 Sutton, supra n.3 at 49.
24 See *Kennedy* v *Panama, New Zealand and Australian Royal Mail Co. Ltd.* (1867) L.R. 2 Q.B. 580, 587-588. See also *Brownlie* v *Campbell* (1880) 5 App. Cas. 925, 937.
25 *Bell* v *Lever Bros. Ltd.* [1932] A.C. 161, 235 per Lord Thankerton.
26 [1950] 2 K B. 86.
27 The court was also influenced (ibid., 91) by the fact that there was a substantial delay between the date of the contract and the discovery of the mistake. Delay would not appear to be an important factor under the Act except in so far as the court may take it into account in deciding how to exercise its discretion under s.7.
28 *Report*, para. 19.
29 See e.g. *Magee* v *Pennine Insurance Co.* [1969] 2 Q.B. 507, 514 per Lord Denning M.R.
30 Sutton, supra n.3 at 49-50.

that an operative mistake has occurred should be sufficient to allow the court to use its discretion to make such orders as it thinks just. Proper exercise of the discretion would then take such factors as knowledge into account. It is submitted that knowledge is relevant only to the quantum or nature of relief. It is not relevant as a determinant of the court's jurisdiction to entertain an application for relief.

With the wording of section 6(1)(a)(i) requiring actual knowledge on the part of the party against whom relief is sought, the question now arising is how a court is to tell whether a person did in fact know that the other party was mistaken. The *Report* added[31] that the courts will not be precluded from granting relief by a self-serving protestation of ignorance of the mistake, but did not go on to explain how they are to distinguish between such protestations and genuine declarations of ignorance. It appears that the courts will simply have to determine this question with regard to the actions of the parties both before and after the contract was entered into, their candour and credibility in the witness-box, and also all the relevant circumstances surrounding the case.

Section 6(1)(a)(ii) corresponds with the notion of common[32] or mutual[33] mistake at common law. Here, although the parties are genuinely agreed, they contract on the basis of an assumption which subsequently proves to be false. The Act simply requires that the parties make the same mistake of law or fact, and that this mistake influences them in their respective decisions to enter into the contract.

Section 6(1)(a)(iii) covers situations in which parties make different mistakes about the same matter of fact or law. Thus the kind of situation which arose in *Raffles* v *Wichelhaus*[34] will come within the Act. In that case a contract referred to the ship *Peerless* from Bombay. However, it happened that there were two ships of that name leaving from Bombay within months of each other, and the parties had different ships in mind. Thus the parties were mistaken in different ways about the same fact. Generally, the courts looked to see whether a reasonable third party would take the contract to mean what A understood it to mean, or what B understood it to mean.[35] If, from the whole of the evidence, a reasonable man would have inferred the existence of a contract in a given sense, then the court would hold that a contract in that sense was binding on both parties. However, cases such as *Raffles* v *Wichelhaus* could occur, in which it was impossible to impute any definite agreement to the parties.[36] In such cases, the court had to declare that no contract whatsoever had been created. The ambiguity of the expressed terms prevented the court from presuming the existence of any agreement between the parties. Although these situations will not be common, the Act should cover them. Where both parties are mistaken in different ways about the same matter of fact or law, it seems that the court will no longer have to try to determine whether a disinterested third party would have taken the agreement to have the meaning ascribed to it by one party, or that ascribed to it by the other. The *fact* of the mistake made by both parties will be enough to bring it within the Act.

31 *Report*, para. 20.
32 As used by *Cheshire & Fifoot*, Law of Contract (4th ed., New Zealand) 182.
33 As used by *Anson*, supra n.17 at 273.
34 (1864) 2 H. & C. 906.
35 See *Smith* v *Hughes* (1871) L.R. 6 Q.B. 597, 607 per Blackburn J. See also *Cornish* v *Abington* (1859) 4 H. & N. 549, 556 per Pollock C. B.
36 See also *Scriven Bros. & Co.* v *Hindley & Co.* [1913] 3 K.B. 564.

Section 6(1)(b) must also be satisfied before a court may proceed under section 7 to grant relief. Whereas section 6(1)(a) is concerned with establishing the *existence* of a mistake, section 6(1)(b) relates to the *effect* the mistake must have before relief may be granted.

It is to be noted that the time when the effect of the mistake is gauged is "at the time of the contract." Thus the court will not grant relief if the exchange of values becomes unequal *after* the contract is entered into.[37] Presumably the only remedy available for this kind of inequality lies in the law of frustration.

Section 6(1)(b)(i) declares that the mistake must result in a "substantially unequal exchange of values." The Committee was of the view that "the mere fact that a contract has become somewhat different from what was intended ought not to warrant relief unless the contract has also become unfair."[38] Thus the Act requires that the mistake has caused the resulting exchange of values to be substantially unequal.

It is impossible to lay down definite principles which the courts look to in deciding whether or not a situation is unfair or inequitable. Such a decision depends very much upon the view of the judge in question. Should he consider, having had regard to all the circumstances of the case, that it would be unjust to allow the contract to continue as it stands, then he may find that the situation is unfair. In this respect, the Act is very similar to the approach taken by the courts in their equitable jurisdiction. Both are concerned with mitigating the harsh effects of common law mistake. Both concentrate on remedies rather than definitions. Such an approach requires a good deal of latitude to be given to the court in determining whether or not grounds exist for intervention and the granting of relief. The court must be left with a residual discretion, even after a mistake has been proved to exist, to deny relief if it is of the opinion that relief is not warranted or would be unfair in the circumstances. Equity demanded that it be "inequitable" for one party to adhere to his strict rights under the contract. Under the Act, the same object has been accomplished both by giving the courts a great deal of discretion under section 7 and by requiring that the mistake result in a "substantially unequal" exchange of values. Deliberately indefinable, this phrase should give the courts additional room to manoeuvre in deciding whether or not justice demands that relief be granted. Hopefully the courts will measure the inequality of exchange in more than monetary values.

The mistake may also, by section 6(1)(b)(ii), result in "the conferment of a benefit or in the imposition of an obligation . . . substantially disproportionate to the consideration therefor." Presumably this will allow the courts to intervene where there has been no actual exchange of goods or payment of money, but where a debt has been incurred or credit has been extended as a result of the mistake. Again, such a debt or credit will have to be considerable before the court will intervene, and it is likely that there will also have to be an element of unfairness present before relief will be granted.

Bars to Relief

Although the Act provides a comprehensive range of remedies, there are three bars to relief.

37 E.g. through inflation or decline in the value of one of the objects of exchange.
38 *Report,* para. 24.

The first is with regard to contracts that provide for the risk of a mistake to be borne by one party. The Committee considered that it should be a bar to relief if the contract itself puts the risk of error on one or other of the parties. This is because[39]

> if the parties have provided for the events that have occurred, then it seems impossible to argue that their contract has become inappropriate to the real situation, which they did not know.

This finding is hard to fault in logic. If the parties have provided for a mistake, they must have seen that it was at least a possibility. Thus they cannot argue that the contract is inappropriate to the real situation of which they had no knowledge at all. This reasoning lies behind section 6(1)(c), which provides that where the party seeking relief is either expressly or impliedly obliged to assume the risk of the mistake, then relief shall not be granted to him.[40]

It is submitted, however, that any assumption of risk will have to be very clearly provided for to effectively disqualify a party from relief under the Act. In the case of the implied assumption of risk, strict requirements must be satisfied before such an implication is made.[41]

One of the major criticisms to be made of this section is the manner in which it is expressed. Reading the section in isolation, one would think that it means that where a contract expressly or impliedly provides for the risk of mistakes then the party seeking relief does not by any term of the contract have to assume the risk of his belief being mistaken. Yet this is the very opposite meaning to that intended by the section. The subsection must read with section 6(1). Then it reads:

> A Court may . . . grant relief to any party to a contract . . . where . . . the party seeking relief is not obliged by a term of the contract to assume that his belief about the matter in question might be mistaken.

It is submitted that section 6(1)(c) would have been far clearer if it had been made an independent provision, and did not depend for its effect upon introductory words that are a great distance from the rest of the provision.

The second bar to relief is that set down in section 6(2)(a). It provides that "a mistake, in relation to [a] contract, does not include a mistake in its interpretation." It can immediately be argued that strict construction of the word "contract" means that the section is redundant in the light of section 6(1)(a). Since any interpretation of a contract can only take place after the contract has been formed, a mistake as to such an interpretation would be a mistake made *after* the contract was entered into. Section 6(1)(a) makes it clear that the party or parties must be mistaken at the time of the "decision to enter into the contract".

39 *Report*, para. 23.

40 The Committee expressly disapproved of the decision of Chilwell J. in *Waring* v *S. J. Brentnall Ltd.* [1975] 2 N.Z.L.R. 401. In that case a vendor agreed to sell property of which, unknown to him, he was not the owner. Chilwell J. held that this mistake was fundamental, but that it was not unconscionable for the buyer to insist on the contract. The reason for this was that the seller had undertaken to give a good title, whether or not he had one at the date of sale. The Committee commented (para. 23) that it was difficult to see how such an error could be "fundamental" if the vendor had undertaken to sell the property in any event.

41 See *B.P. Refinery (Westernport) Pty. Ltd.* v *Shire of Hastings* (1978) 16 A.L.R. 363, 376 per Lord Simon of Glaisdale.

Thus the mistake must occur prior to the formation of the contract. This means that, independently of section 2(2), section 6(1)(a) would have operated to preclude relief for an erroneous interpretation of a contract. To give meaning to the provision, however, "contract" must be construed as meaning "draft contract".

Although the Committee accepted that a mistake in the interpretation of any other document may amount to a "mistake of law", it considered[42] that a mistake in the interpretation of the contract itself should not provide a ground for relief. To provide otherwise would be to open the door to abuse of the proposed jurisdiction by a contracting party against whom an unfavourable court decision on a matter of construction had been given. Such a party could request relief on the basis of his having held what transpired to be a "mistaken" interpretation of the effect of his contract. The Committee felt that:[43]

> the security of the contractual relationship requires that [parties] should be held to the interpretation of the contract as settled by the appropriate process of construction.

The third absolute bar is set down in section 6(2)(b). It provides that there has been no mistake if the party discovers the mistake and still elects to enter into the contract. This section really accords with common sense. If a party is aware of the true state of affairs, then he is not mistaken at all. Hence if he becomes aware of the mistake *before* he enters into the contract he is not mistaken when he enters into it. Relief should obviously not be available if such a party later discovers his position not to be as advantageous as he had anticipated.

Although not an absolute bar to relief, the mandatory direction in section 7(2) should be noted. The extent to which the party seeking relief caused the mistake *must* be taken into consideration in deciding whether or not relief will be granted. This is the only consideration which the Act specifically directs the court to take into account when exercising its discretion in section 7 to grant relief. Presumably, therefore, appellate tribunals will be able to pronounce upon the validity of any ruling which is not made with this consideration in mind. The Act does not declare that a party who has helped cause the mistake will be denied relief; the court must merely take the factor into consideration.

Section 7(2) was not included in the draft Bill submitted by the Committee, and it was in fact inserted by the Statutes Revision Committee. No reason was given for its insertion by that Committee when the Bill was reported back to the House, but it seems to be an acknowledgement of the view of the Law Reform Committee[44] that although relief should never be refused on grounds of carelessness, the court might look to see whether that carelessness has caused loss, and, if so, the extent of that loss.

In practice, it is submitted that section 7(2) should seldom be used to completely deny relief to a party who has helped cause the mistake. The underlying theme of the whole Act is that the courts are to look at the fact of the mistake and the consequences flowing from it. To deny relief simply because a party has contributed to the mistake would, it is submitted, be to undermine that theme. Instead, it is to be hoped that

42 *Report*, para. 21.
43 Idem.
44 *Report*, para. 7.

any consideration of the extent to which the party seeking relief caused the mistake will be reflected in the *nature* of relief granted. The courts are given an absolute discretion to vary orders under section 7(3)(c) and under section 7(6), and these may be used to do justice in such situations.

Nature of Relief

By section 7(3), the court is vested with a discretion to make various kinds of orders. The language used in this section makes it clear that the court has a complete discretion as to what kind and in what way orders are to be made.

The court has a discretion to "make such order as it thinks just", the various kinds of orders mentioned in subsections (a) to (d) are "in particular but not in limitation", and the court may do "one or more of the following things". It is hard to imagine a more discretionary power than that conferred under section 7(3), and it is also hard to imagine how the use of this discretion could be challenged before an appellate tribunal. It is submitted that such tribunals will be very hesitant in declaring any exercise of the discretion to have been wrong or invalid.

By section 7(3)(a), the court may declare the contract to be valid in whole or in part or for any particular purpose. The Committee felt[45] that the fact that the contract is technically a nullity ought not to prevent a court from validating it if the justice of the case so required. It seems that this subsection would apply to contracts which have never in fact come into existence due to the mistake. An example would be a mistake as to identity. In such a case there is no contract, because the false offeree cannot accept an offer addressed to someone else. Under the Act, a court might use section 2(3) to be able to proceed under section 7(3)(a) to declare the contract valid and subsisting either in whole or in part.

Section 7(3)(b) provides for cancellation of the contract. This would be used where the contract is still valid and binding, but the circumstances show that it would be unfair to allow one party to enforce his strict rights. If he were allowed to do so, the exchange of values under the contract would become substantially unequal. In such a case the court may simply cancel the contract.

"Cancellation" will probably have the effects of "cancellation" as laid down in the draft Contractual Remedies Bill which is now before the Statutes Revision Committee. This Bill is based upon a draft Bill prepared by the Contracts and Commercial Law Reform Committee as part of the *Report on Misrepresentation and Breach of Contract.* Under clause 8(3) of the Bill, cancellation has the following effects:

> (a) So far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further;
> (b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

Once the contract has been cancelled, the court may use its powers under section 7 to vest property in other parties to the proceedings and also to grant monetary compensation to affected parties. Thus the results of such a cancellation will be vastly different to those following a setting-aside of the contract at common law.

45 *Report,* para. 25.

Section 7(3)(c) allows the court to vary the contract. Read with section 7(6), the court may vary the contract in any way it thinks fit. Presumably section 7(3)(c) would only be invoked after section 7(3)(a) had been used to declare the contract valid and binding. The Committee noted[46] that the court should have the power to modify the parties' contractual obligations in order to meet remedial problems which have arisen. Such a power would at first sight seem to involve imposing upon parties obligations to which they have not assented. However, as the Committee pointed out,[47] the parties in effect surrender their legal "autonomy" when they agree to enter into the contract. If no other way can be found out of their predicament, then a new set of obligations should be supplied to achieve that purpose.

Section 7(3)(d) empowers the court to grant relief by way of restitution or compensation. The Committee considered[48] that these powers would be a useful adjunct to the court's present powers, and there can be no doubt that they will aid the court to do justice in future cases. The new provisions ensure that, should the circumstances demand it and should the loss be able to be quantified for the purposes of compensation or specified with regard to restitution, then the court will be able to mitigate any loss caused by the validation of a contract. Although parties are bound to suffer to a certain extent, the loss will be able to be spread more evenly through compensation orders.

Section 7(5) gives the court the very strong power to vest the property forming the subject-matter of the contract, or the consideration for the contract, in any party to the proceedings. The court may also direct such a party to transfer or assign such property to any other party to the proceedings. The court is thus entrusted with a great deal of responsibility, for it has an unlimited discretion as to how to deal with the subject-matter of a mistaken contract. When it is remembered that this involves dealing with other people's land and chattels, possibly in a manner of which they do not approve, it can be appreciated that section 7(5) gives the court very strong powers indeed. Be that as it may, section 7(5) is a necessary corollary to the other remedies available under the Act. Once a contract has been cancelled, the court may now simply vest the subject-matter of that contract in the original owner again. Or, in cases where title to the property has already been registered under the Land Transfer Act 1952, the court may direct the registered proprietor to transfer or assign the property to the original owner.

Section 7(6) again reflects the discretionary and remedial nature of the Act. The court may make any orders "subject to such terms and conditions as the court thinks fit." This subsection, too, is a necessary corollary to the rest of the section. Every contract encountered by the courts will be different, and section 7(6) will allow judges to mould the various orders they make to better fit the circumstances of each case. If one party has been careless, for example, the court may declare an order of restitution to be conditional upon that party making some recompense to the other party. The court may also recognise that the party paying compensation cannot afford to pay in one lump sum, so an order

46 Ibid., para. 29.
47 Idem.
48 Ibid., para. 27.

under section 7(6) may be varied to allow payment in instalments. Thus section 7(6) will aid the courts to do justice in both practice and theory.

Rights of Third Persons

Section 8(1)(a) prohibits the making of any order under the Act which invalidates any disposition of property by a party to a mistaken contract for valuable consideration. Section 8(1)(b) also immunises subsequent purchasers of the subject-matter of the mistaken contract. However, the section goes on to set down several express qualifications to these bold provisions. Third parties and subsequent purchasers must not have been parties to the original contract, they must not have had notice of the infirmity of that transaction, and they must have acted in good faith. Thus it seems that any evidence of fraud or sharp dealing on the part of such parties will allow relief to be sought against them. It is submitted that actual notice will be required for relief to be granted against a third party or a subsequent purchaser. If actual knowledge is required on the part of the party to the contract against whom relief is sought, then it seems rather illogical that subsequent purchasers may have relief sought against them merely because they ought to have known that there had been a mistake somewhere along the line. The circumstances of each case will probably show whether or not a person has acted in good faith. If a third party acquires property very cheaply and hurriedly sells it to another person at a profit, then the court may find that he was not acting in good faith. In extreme cases, the court may also find that such a person must have had actual knowledge that the vendor had acquired the property fraudulently.[49]

In spite of these qualifications, it is clear that section (1) is a very important and powerful section. It overrides all the subsections of section 7 so that notwithstanding the court's very wide powers to restore to and vest property in other persons, no property may be taken from a third party or subsequent purchaser who has purchased it bona fide for value. It is submitted that this section probably more than any other will operate to remove some of the harsher effects of a finding of mistake at common law. At common law, a finding of mistake meant that third parties lost any property which they had purchased if it formed part of the subject-matter of the contract.[50] Such property was held never to have left the owner. Under the Act third parties are placed in a virtually impregnable position provided they have acted honestly. This means that they are in a far better position than the actual party or parties who entered into the contract under the influence of the mistake. Whereas the power to grant or deny relief to the parties to the mistaken contract is completely discretionary, the court is expressly prohibited from interfering with the property rights of third parties save in certain circumstances. It is to be noted, however, that the court may still use section 7(3)(d) to order a third party to pay compensation to the original owner.

Who May Apply for Relief?

Section 7(4) details who may apply for relief under the Act. The range of applicants includes not only the persons to whom the court

49 See e.g. *Efstratiou* v *Glantschnig* [1972] N Z.L.R. 594.
50 See e.g. *Cundy* v *Lindsay* (1878) 3 App. Cas. 459.

may grant relief but also other persons "to whom it is material to know whether relief will be granted." Section 6(1) declares that relief may be granted "to any party to a contract", but section 7(1) adds that relief may also be granted "to any person claiming through or under such parties." Presumably third parties and subsequent purchasers[51] would thus be able to apply for relief under section 7(4)(a). Since relief may only be granted to a person who entered into the contract under the influence of a mistake (or persons claiming through or under that person), it seems that other parties to a multipartite contract who did not enter into the contract under the influence of the mistake would not be able to apply for relief under section 7(4)(a). Instead, they may apply for relief under section 7(4)(b) as parties to whom it is material to know whether relief will be granted.

What Tribunals May Grant Relief?

"Court" is defined by section 2(1) as the Supreme Court, the Magistrate's Court inasmuch as it derives jurisdiction under section 9, and Small Claims Tribunals with jurisdiction under section 10. Section 2(1) must also be read in conjunction with section 11, which amends the Arbitration Act 1908 so that arbitrators and umpires may exercise the same powers under section 6 and section 7 as the court. Thus the Act is designed to cover litigation at all levels.

However, with the majority of cases involving the real estate and building industries, it is probable that the majority of actions involving mistake will be heard before the Supreme Court. It is difficult to envisage many actions related to these industries in which the amount at stake is less than $3000. Even so, it is possible that the delay and expense of a Supreme Court hearing may encourage parties to exercise their rights under section 9(1)(c) to have the action tried before a magistrate.

It is submitted that Small Claims Tribunals and arbitrators should not have been given jurisdiction under the Act. In an area where principles are bound to be developed very carefully by the courts, it seems somewhat anomalous that other tribunals are also allowed to apply the Act without having had the benefit of full legal argument. The only way to really achieve consistent principles is to leave interpretation and application of the Act to tribunals that are entirely judicial in character. The New Zealand Law Society actually made submissions along these lines with regard to the powers given both to arbitrators and Small Claims Tribunals. However, they were rejected by the Statutes Revision Committee.[52] If arbitrators and Small Claims Tribunals do exercise any of the powers conferred under the Act, then it is to be hoped that they will take pains to tread the same path as the Magistrate's Court and Supreme Court in interpreting and applying the Act.

Conclusions

The codification of the law relating to mistake was a bold move on the part of the Contracts and Commercial Law Reform Committee, and the difficulties it encountered were not made any easier by the fact that such a codification had never been attempted before in any common law jurisdiction.

51 I.e. parties to whom the subject-matter of a mistake contract has passed from a party to that contract, and subsequent purchasers of that subject-matter.
52 (1977) 413 N.Z.P.D. 2804.

The Act concentrates on remedies rather than all-embracing definitions. "Mistake" is defined very abstractly as "a mistake, whether of fact or law." This means that the courts will not have to divide the types of mistake into categories such as mistake as to identity, title, or existence of the subject-matter etc. If the mistake can be seen in a more abstract way as one of "fact" or "law", then the court may proceed to consider whether it satisfies the other requirements for relief. In this way the Act has gone a long way towards eliminating much of the confusion previously stemming from the law relating to mistake. The abstract definition of "mistake" is obviously one of the primary instruments which the Committee has used in its attempt to amalgamate the existing fragmented doctrines into a single body of law dealing with mistake.

Section 6(1)(a) carries on this theme. In describing when a mistake may take place, it makes use of the only feature which was shared in common by the various types of mistake within the categories of mutual and unilateral mistake at common law; namely the number of people who are mistaken. One party may be mistaken to the knowledge of the other party, both parties may make the same mistake, or both parties may hold mistaken beliefs about the same matter. In this way, the Act avoids the difficulty of requiring the courts to interpret technical words such as "mutual" and "unilateral". The fact that they are used in different ways by textbook writers would have made their incorporation in the Act most undesirable.

It is clear from section 6(1)(b) that the mistake must have had an important effect on the contract. It must result in a substantially unequal exchange of values or in the conferment of a benefit or the imposition of an obligation considerably disproportionate to the consideration provided therefor. The mistake must affect the contract considerably, and there must be an element of inequality or unfairness present before the court may grant relief. Section 6(1)(b) is couched in the widest possible terms, so that any exchange from an actual cash payment to the extending of credit and the incurring of a debt comes within the Act.

If the grounds of relief are established, the court has the widest discretion imaginable in determining what relief, if any, should be granted. Practically any kind of order may be made by the court, with the addition of the power to award compensation and to vest property in other persons being among the most noticeable and potentially the most important. It is, however, to be noted that these very strong powers will not be able to be exercised to deprive third parties and subsequent purchasers of property which formed the subject-matter of the contract. At common law, these persons were the ones most adversely affected by a finding of mistake, but under the Act they will fare even better perhaps than the party seeking relief. No doubt principles will emerge as to the kinds of situations in which the various powers will be exercised. Until that time, little more can be said than that the utmost discretion has been vested in the courts in the hope that they will be able to, if not do perfect justice in every situation, then at least find the least painful alternative for the parties concerned. However, the Act is not without its shortcomings.

It is submitted that difficulty will be encountered with the present definition of mistake. In particular, it will sometimes be very difficult to distinguish between an error of fact and one of opinion. The Law Reform Committee no doubt hoped to solve this difficulty by including

errors of opinion within the definition of "mistake". The Statutes Revision Committee saw fit to remove it. Much will now depend on the attitude of the judge in each case. If he wants to accord relief, then border-line cases will be labelled "errors of fact". If he does not, they will be discarded as "errors of opinion". The Act was designed to "bring mistake out in the open", so to speak. This object is to a certain extent defeated if such distinctions as that between "opinion" and "fact" continue to have to be made.

However, if the courts apply the Act in a consistent manner, then the patchwork nature of the old law should be replaced by a body of substantive law which is cohesive and coherent.