## JOSHUA WILLIAMS MEMORIAL ESSAY 1985

*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 written by a student enrolled in law at the University of Otago 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 1985.*

# THE CONTRACTUAL MISTAKES ACT 1977 AND CONTRACT FORMATION:

## *CONLON* v *OZOLINS; ENGINEERING PLASTICS LTD* v *MERCER & SONS LTD*

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### I INTRODUCTION

The Contractual Mistakes Act of 1977[1] governs the circumstances under which relief from contractual obligations may be granted on the ground of mistake. Many, perhaps even most, contract disputes can be characterized as involving a mistake of one form or another. Traditionally, the majority of such cases were dealt with by doctrines other than mistake, for example, rules relating to contract formation (offer and acceptance), fraud, misrepresentation and the judicial interpretation of express and implied terms. In isolating mistake from other contract problems the Act superimposes a much broader doctrine over areas in which these existing doctrines already operate rather than eliminating them altogether. It provides for a very considerable extension of the Court's discretionary powers in, potentially, a great number of contract disputes.

The focus of this paper is on the interaction between the Act and the rules of contract formation. Two recent decisions on mistake – *Conlon* v *Ozolins*[2] and *Engineering Plastics Ltd* v *Mercer & Sons Ltd*[3] – provide the starting point for this examination.

In *Mistake and Unjust Enrichment,* Professor Palmer prefaced his discussion with the following comment: "Mistake is so common in human affairs that one who wishes to discuss the subject must start by fixing some

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1 Hereafter "the Act".
2 [1984] 1 NZLR 489.
3 [1985] 2 NZLR 72.

appropriate boundaries."[4] Professor Palmer makes the useful distinction between *mistake as to the terms of the contract* which occurs when there is a misunderstanding between the parties as to some term/s of an apparent contract so that the parties are not in actual agreement; and *mistake in assumption of fact* in which an agreement has been reached and correctly recorded, but one or both parties make a false assumption concerning some matter relevant to the decision to enter into the contract. The distinction parallels that between the statements "I did not intend to say this" and "I *did* intend to say this but it was because I mistakenly believed the facts were thus and so".[5]

The significance of this distinction is that only in respect of mistake as to terms does the question of contract formation arise.[6] In such cases, the Court's inquiry has traditionally been twofold. First: when should the terms of the contract be taken to have been assented to? and second: to what extent is it an excuse for one party to argue that he had made a mistake as to the terms to be included in that contract? The answer to one question has an inevitable and direct bearing on the answer to the other question. Mistake as to the terms of a contract and the notion of assent in contract formation are merely two sides of the same coin. To resolve these issues the Court must choose between different ways of determining assent and apply the chosen test to the facts.

The objective theory has long been accepted as providing the test of assent. Accordingly, where a party has so conducted himself that a reasonable man would believe that he is unambiguously assenting to the terms as proposed, he is *estopped* from asserting his true intention and is bound by the contract as if he had intended to agree. For although the meaning of language is not inherent but is only in the minds of men, one person can ascertain the meanings of another's language only by reference to some external standard. Consequently, it is well established that an apparent meeting of the minds will suffice for a binding contract.[7]

If contract is to perform its function in the exchange of goods and services and in the planning and carrying out of an immense variety of enterprises, the law must generally entitle a person to judge what others say and do by the meanings normally attached to such words and actions and enforce the realisation of reasonable expectations arising out of a contract. The Legislature recognised and affirmed these values in section 4(2) of the Act which directs the Court not to exercise its powers under the Act "in such a way as to prejudice the general security of contractual relationships". However, rigid application of the objective theory of contract formation may, in certain circumstances, hold a mistaken party to a contract which that party neither fully understood nor assented to at great hardship to that party, while the other party is unjustly enriched. This is

4 Palmer, *Mistake and Unjust Enrichment* (1962) 3.
5 Ibid at 5-6.
6 Ibid at 5.
7 *Smith* v *Hughes* (1871) LR 6QB 597; *Oades* v *Spafford* [1948] 2 KB 74; *Woodhouse AC Israel Cocoa Ltd SA* v *Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271 (HL); *Capital Finance Co Ltd* v *Bray* [1964] 1 All ER 603, [1964] 1 WLR 323 (CA).

also recognised by the Legislature. Section 4(1) states that the purpose of the Act is to "mitigate the arbitrary effects of mistake on contracts".

The Court's task, therefore, must be the maintenance of a proper balance between these two desirable, yet conflicting aims — the avoidance of harshness arising out of mistake and the general need for certainty and finality in transactions. One must not be allowed to prevail at the expense of the other. The key to success will lie primarily in the Court's interpretation and application of the criteria for operative mistake contained in section 6 of the Act.

First, section 6(1)(a) requires that an operative mistake be a unilateral mistake known to the other party,[8] a common mistake,[9] or a mutual mistake.[10] Secondly, section 6(1)(b) requires that the mistake/s must result in a substantial inequality of exchange; or the conferment of a benefit or the imposition of an obligation which is substantially disproportionate to the consideration. Thirdly, no relief is said to be available for mistake: first, where the mistaken party has expressly or or impliedly assumed the risk of mistake on that point (section 6(1)(c)); second, where the relevant mistake was as to the interpretation of the contract (section 6(2)(a)); and third, where a party becomes aware of the mistake before entering into the contract but elects to do so notwithstanding (section 6(2)(b)). The Court's power to grant relief on the satisfaction of these criteria is discretionary rather than mandatory.[11] However, since the Legislature has gone to some lengths to describe these criteria as indicative of the limits of relief allowed, their scope requires closer examination. This paper concentrates on the interpretations of, and the interaction between, sections 6(1)(a) and 6(2)(a) in determining the general scope of relief for mistake.

It will be argued that the Court of Appeal's interpretation of section 6(1)(a) in *Conlon* v *Ozolins* unjustifiably abandons the objective theory of contract formation, and in so doing gives an unduly wide scope to relief for mistake, leaving inadequate protection for the reasonable expectations of contract parties. The Court of Appeal does this by importing a hitherto legally irrelevant consideration into contract formation — the *subjective intentions* of contracting parties (as distinct from the objective manifestations of their intentions) — so that, where the subjective intentions of the contracting parties do not correspond, each party can be said to be mistaken about the other party's subjective intentions with respect to the contract terms. The Court of Appeal sees this as a mutual mistake in terms of section 6(1)(a)(iii) for which relief may be given. Such an approach overlooks the important point that one party's intentions as to terms may correspond exactly with an objective construction of the written agreement, and that the other party's actions or words may have led the first party reasonably to believe that this was the meaning both had assented to. Traditionally, the courts would have enforced the reasonable expectations arising from

8 Section 6(1)(a)(i).
9 Section 6(1)(a)(ii) where both parties make the same mistake on the same point.
10 Section 6(1)(a)(iii) where the parties make *different* mistakes on the same point.
11 Section 6(1) says "A court *may* . . . grant relief under section 7 of this Act to any party to a contract —
(a) If . . ."

an objective assessment of the written agreement and the parties' words and actions. Accordingly, no relief is available where only one party is mistaken about the terms of the contract and this mistake is not known to the other party. The Court of Appeal's interpretation of section 6(1)(a), however, may allow relief to be given to a party whose mistake as to terms was *unknown* to the other party. In this case when can contracting parties be certain that they have enforceable contracts upon which to base their planning, actions, and expenditure?

The balance which it is the Courts' task to preserve has, the writer believes, been tilted unduly in favour of a mistaken party and against the preservation of certainty and finality in transactions. This effect is reinforced by the High Court's interpretation of section 6(2)(a) in *Engineering Plastics Ltd* v *Mercer & Sons Ltd.* Section 6(2)(a) *excludes* from relief mistakes in the interpretation of the contract and so has the potential to act as a counterbalance to the wide interpretation given to operative mistake in section 6(1)(a) by the Court of Appeal. However, its effectiveness in this respect was minimised and circumvented by Tompkins J in his interpretation and application of the provision.

The imbalance identified by the writer is not confined to the Courts' treatment of sections 6(1)(a) and 6(2)(a) but appears also to be the result of the operation of other provisions under the Act. Section 6(1)(b), for example, requires that a mistake result, at the time of the contract, in a substantially unequal exchange of values. However, when inequality reaches the point of being "substantial" is a question of degree and open to differences of opinion as shown in *Conlon* v *Ozolins.* While Greig J in the High Court was not persuaded that the case fell within the meaning of section 6(1)(b),[12] McMullin J in the Court of Appeal, with whom Woodhouse P concurred, believed that it did.[13] In any case, it may be thought that an objective standard should be applied in measuring the inequality of values exchanged so that there would be no inequality if the values exchanged are objectively fair, even if mistake resulted in the parties receiving something different from what they thought had been agreed upon. However, the High Court in the *Engineering* case applied the subjective standard. There, the inequality of values exchanged was said to exist because while the contract price was $6.67 per O-ring supplied, the defendant purchaser could have obtained rings suitable for its use for between 54.4 and 78.3 cents each. However, the rings supplied under the contract were of a higher quality which was reflected in the price of $6.67.[14] Thus, Tompkins J's finding[15] that *"To the defendant* . . ., the benefit from the contract, that is, the rings being supplied pursuant to it, was substantially disproportionate to the consideration", can only be explained by a subjective assessment of the values exchanged under the contract. Such subjectivity exacerbates the uncertainty which already results from a subjective assessment of the parties' intentions as to contract terms. The general security of contractual relationships is left inadequately safeguarded.

12 Supra n 2 at 495.
13 Ibid at 505.
14 Supra n 3 at 79.
15 Ibid at 82-83.

In the same vein, section 7 confers on a court very wide discretionary powers to make any orders "it thinks just" once an operative mistake is found. The only mandatory consideration is the "extent to which the party seeking relief . . . caused the mistake".[16] This is, again, a question which is open to differences of opinion and conducive of uncertainty.[17] In addition, the Court is empowered to grant relief by variation of the terms of a disputed contract (as was done in the *Engineering* case where the contract price of $6.67 per ring was reduced to $4) or by way of restitution or compensation. In this way obligations which have not been voluntarily assumed by the parties may be imposed by the courts. This is contrary to the idea that a contract should be enforced because the parties have agreed to be so bound. However, Professor Sutton regards objections based on the loss of contractual autonomy as artificial. He reasons that the law's only concern with such broken down contracts is to work out rights and liabilities in an arrangement that has ceased to function.[18] When such a view is combined with the modern trend away from awarding expectation damages and towards awarding only reliance damages in executory contracts,[19] it is contended that the regulatory function of contract law may be in danger of being overlooked.[20] A mistaken party will be tempted to refuse to render the promised performance since he may only have to compensate the other party for reliance losses, rather than expectation losses. Generally no reliance losses will be proved because the harm will be too subtle or imprecise to be satisfactorily established. The reasonable expectations arising from a contract may therefore be defeated.

On the other hand, section 7 also empowers a court to affirm and enforce the reasonable construction of a contract even where an operative mistake is made out. However, the possibility that courts may often affirm a contract cannot justify the wide scope given to operative mistake by the Courts' interpretation of section 6 in the two cases. For there is a significant difference between contracts which are enforceable of right and contracts which are declared enforceable by the exercise of a Court's statutory discretion.

The importance of the scope of sections 6(1)(a) and 6(2)(a) examined below must, therefore, be seen in the light of an Act which, as a whole, is geared towards a high degree of discretionary justice, contains large elements of uncertainty and provides inadequate protection for the reasonable expectations of contracting parties.

Section 6 of the Act ostensibly provides guidelines to the Courts in determining the limits of relief. However, the writer argues that there is more form than substance to these "limits" when the objective theory of con-

16 Section 7(2).

17 For example, in *Conlon* v *Ozolins* while Greig J at 495 and Somers J at 508 were of the view that the responsibility for the mistake lay with Mrs Ozolins and that this "must count powerfully against her", McMullin J at 506 and Woodhouse P at 497 and 499 took far more sympathetic approaches, concluding that any fault on her part did not disqualify her from relief.

18 Sutton, "Reform in the Law of Mistake in Contract" (1976) 7 NZULR 40 at 53.

19 See Atiyah, *An Introduction to the Law of Contracts* (2nd ed 1981) 22.

20 See Palmer, *Law of Restitution,* (1978) Vol 3 para 15.9.

tract formation is ignored. An operative mistake must be a unilateral one known to the other party, a common or mutual one; to apply section 6(1)(a), therefore, a court must identify the nature of the mistakes and the mistaken party or parties. "Mistake", however, is a relative rather than an absolute term. It indicates a deviation from some accepted standard. In the absence of some fixed and objectively ascertainable standard, answers to the questions of who is mistaken and what about, are of doubtful significance. Subjectivity in the assessment of contractual intentions allows *all* cases, specifically excluded from relief by one criterion, to "re-enter" via an alternative criterion by a simple redescription of the mistakes made. The purported limit is, therefore, no limit at all.

Lastly, the writer explores some alternative interpretations of sections 6(1)(a) and 6(2)(a) which may redress the imbalance perceived in the present judicial approach.

## II WHAT MISTAKES QUALIFY FOR RELIEF? SECTION 6(1)(a)

### *1 The Decision in Conlon* v *Ozolins*

The defendant, Mrs Ozolins, owned land comprised in two certificates of title. One was issued for the section on which her house stood and the other for land which backed on to the house section. The back land was subdivided into four lots. Lot 4 was divided from lots 1, 2 and 3 by a substantial fence and was used by the defendant as a garden. Lots 1, 2 and 3 had the different appearance of a grass paddock.

The plaintiff, Mr Conlon, approached Ozolins about the possibility of purchasing the vacant land and she referred him to her solicitor who, having mistaken Ozolins' intentions, supplied Conlon with a photocopy of the certificate of title describing all four lots. Shortly thereafter Conlon and Ozolins signed a contract for the sale and purchase of the land. The agreement drawn up by Ozolins' solicitor described the sale of lots 1, 2, 3 and 4 for the price of $42,000. Ozolins later refused to sign the transfer on the ground that she had intended and was willing to sell only lots 1, 2 and 3 but not 4.

Conlon brought proceedings for specific performance. He had planned to build town houses for sale and had purchased an adjacent property to provide better access to the land he had contracted to buy. Ozolins sought relief under the Contractual Mistakes Act 1977. Relief was denied in the High Court; however, the Court of Appeal held that she qualified for relief under the Act. In reaching this conclusion the Court held as a matter of statutory interpretation:

i) that the operation of estoppel is ousted by section 5 of the Act so that in spite of her representations to Conlon, Ozolins could not be estopped from alleging mistake; and

ii) that the facts revealed a section 6(1)(a)(iii) mistake, in that the parties had made different mistakes about the same matter of fact; and

iii) that the consequence of the mistake was a substantial inequality of value exchanged in terms of section 6(1)(b).

The Court of Appeal concluded that it had insufficient evidence before it on the question of the nature of relief which should be granted to Ozolins,

and so remitted the case to the High Court for determination on that point. However, Woodhouse P predicted that: "It is almost inevitable . . . that the Judge will reach the conclusion that there should be no order for specific performance . . . ."[21]

The Court's decision will now be examined in detail.

(a) Is Estoppel Ousted by the Contractual Mistakes Act?

Section 5 of the Contractual Mistakes Act provides that:

> 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 . . . . (emphasis added)

In *McCullough* v *McGrath Stock and Poultry Ltd*[22] this section was interpreted by Mahon J as *not* having ousted the operation of estoppel by representation. He saw two separate issues as being involved; first, the existence of a mistake, and second, the circumstances in which relief may be granted on proof of mistake. Mahon J reasoned that the Act replaced the rules of common law and equity only as to the second issue. He therefore held that the pre-existing rules pertaining to the resolution of the first issue, including estoppel, continued to operate.

Mahon J's interpretation was approved and followed by Greig J in the High Court decision in *Conlon* v *Ozolins,* but expressly rejected and overruled in the Court of Appeal decision. There, McMullin J, with whom Woodhouse P concurred, said:[23]

> In enacting the Contractual Mistakes Act Parliament provided an entirely new code applicable to every case of mistake which fitted within its framework . . . . 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.

He rejected Mahon J's approach as severely restricting the operation of the Act and depriving it of much of its force. The Court of Appeal's position is logically sound. Section 5 establishes the Act to be the code governing the circumstances for the granting of relief in cases of mistake. Estoppel can be seen as operating directly on this issue. It does not deny the existence of a mistake, as Mahon J suggests, it merely provides that where X acts in a way which induces a reasonable contract expectation in Y, X is precluded from asserting mistake to escape his or her contractual obligation. In other words, in *this* circumstance no relief is available for the mistake.

The powers granted to the courts under the Contractual Mistakes Act *must* include the power to determine whether a mistake has occurred and by whom it has been made. Otherwise, courts could always circumvent the

21 Supra n 2 at 499.
22 [1981] 2 NZLR 426.
23 Supra n 2 at 504.

operation of the Act and so undermine one of the major aims of the Act identified by the Contracts and Commercial Law Reform Committee:[24]

> . . . the amalgamation of the present fragmented doctrines, some based upon mistake and others based upon different legal devices, into a *single body of law dealing with mistake.*

As indicated, a case involving mistake could also be dealt with by the traditional rules governing offer and acceptance, innocent misrepresentation and implied terms. Professor Sutton notes that the unfettered application of these rules may circumvent what the Act is trying to achieve. He therefore concludes that the Act should be allowed to take the "first bite" so that, only "where these related doctrines . . . deal with cases which do *not* involve any mistake, their operation is entirely unfettered".[25] Cases involving mistake and previously dealt with by these doctrines are now to be dealt with under the Act.

Consistently, the Contracts and Commercial Law Reform Committee's *Report on the Effect of Mistake on Contracts* states that:[26]

> . . . [D]octrines such as "offer and acceptance" . . . should not be excised from the law altogether, since they are not concerned *solely* with problems arising from mistake.

In the light of the Act, the traditional inquiry into the existence and terms of a disputed contract becomes secondary once a mistake is alleged and relief is sought under the Contractual Mistakes Act. Regardless of whether a valid contract is found by the operation of estoppel, the direct business of the court is to determine whether the alleged mistake exists and whether it satisfies the criteria for relief provided in section 6.[27]

Although estoppel is *technically* ousted as the Court found, it is nevertheless the writer's contention that the policies underlying the doctrine cannot be disposed of so easily. The considerations which prompted the courts of common law and equity to adopt the objective theory of assent, and as a corollary, the principle of estoppel by representation,[28] are so fundamental to the general security of contractual relationships that they must also be of major concern to the Court in its interpretation and application of the Act to any fact situation. Has this been the case?

(b) The Court's Interpretation of Section 6(1)(a)(iii)

*Conlon* v *Ozolins* concerned a situation where two parties had not reached actual agreement due to some different understanding of a term of the agreement, although clear expression of agreement existed in writing accurately stating the meaning of one party. The Court of Appeal by a

24 Contracts and Commercial Law Reform Committee, *Report on the Effect of Mistakes on Contract* (1976) para 11.

25 Sutton, "The Contractual Mistakes Bill 1977", Commercial Law Seminar, Legal Research Foundation, at 47.

26 Supra n 24 para 12.

27 Note that section 2(3) specifies that "there is a contract for the purposes of the Act where a contract *would have* come into existence but for the circumstances of the kind described in section 6(1)(a) of this Act".

28 See Introduction.

two to one majority found an operative mistake in terms of section 6(1)(a)(iii), that is, each party had made a different mistake about the same matter of fact. That fact was said to be "the size of the land to be bought and sold"[29] – a term of the contract. However, the emphasis was placed not so much on each party's mistake about the term as on each party's mistake about the other's *intention* with respect to this term. Woodhouse P stated:[30]

> . . . [Each] 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 . . . . Mr Conlon believed that from the outset the vendor had been willing to complete a sale of all four lots: about that he was mistaken. On the other hand she believed he had limited his purchase to the land north of the fence: about that she was mistaken. It is an analysis which shows that their respective 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 . . . . [I]n 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).

In this way the focus is placed on the subjective intention of the parties, as opposed to the outward manifestation of intent traditionally accepted as the standard. This interpretation of section 6(1)(a)(iii) stands in sharp contrast to the long established objective theory of contract formation. It amounts to saying that, where two parties are mistaken as to each other's subjective intentions regarding some term/s of their agreement so that offer and acceptance do not subjectively correspond, the Court may grant relief on the satisfaction of the remainder of section 6 even though a binding contract exists under the traditional objective test. Thus it may not be enough that the parties objectively have *an agreement,* the Court may require that they also be subjectively *in agreement.*

The unpalatable and far-reaching consequences of such an approach to relief for mistake call the Court's reasoning into question.

(c) Objections to the Court's Approach

As previously indicated, the major policy conflict in this area is between the protection of reasonable expectations (variously described as the certainty and sanctity of contract) and the recognition of the importance of contract as representing a willed act. When two such important values run at cross-purposes over such a complex and wide-ranging area as contract, it is hardly to be expected that one should always prevail. Yet the logical consequence of the Court of Appeal's reasoning is precisely this one-sided approach.

When the *Conlon* v *Ozolins* situation is seen as analogous to that of agency, the inadequacies of the Court's interpretation of section 6(1)(a)(iii) are highlighted. In that case, it was Ozolins' solicitor who first mistook Ozolins' wishes in respect of the quantity of land to be sold. He believed and led Conlon to believe that she was offering all four lots of land for sale. In the High Court, Greig J regarded as of some significance the fact

29 Supra n 2 at 499.
30 Ibid at 498-499.

that the agreement finally adopted was drawn up by the solicitor on behalf of Ozolins – the party subsequently alleging mistake as to the terms of the contract. In an agency situation, if a party is ignorant of the limitations on the agent's authority then that party is entitled to assume that the agent is acting within the authority which he or she purports to have, particularly where the principal specifically refers the party to the agent. The principal can sue the agent but is nevertheless bound by the agent's representations as reasonably interpreted.[31] This legal result rests on similar policy considerations to the doctrine of estoppel.

The Court of Appeal's approach in *Conlon* v *Ozolins* is analogous to allowing a principal in this situation to apply for relief on the ground that he or she did not intend to contract on the basis which the other party intended, *regardless of the nature of the representations made by his or her agent.* The legitimate expectations of contracting parties deserve greater protection than is offered by this approach. If parties are no longer entitled to rely on the ostensible meaning attributable to words and conduct, then what security has any person in the possession of rights gained through an apparently valid contract?

In addition to policy objections, the Court's interpretation suffers from defects of logic and language. First, it is the writer's contention that Ozolins' mistake was essentially as to the *subject matter of the contract.* The contract specified four lots, she thought it said three. That she can thereby be described as being additionally mistaken in thinking Conlon intended to buy three lots is not the significant fact. On the other hand, Conlon's only mistake concerned *Ozolins' state of mind.* He cannot realistically be said to have been mistaken as to the subject matter of the contract as Woodhouse P suggests[32] since his understanding corresponded exactly with the written contract. In his dissenting judgement, Somers J agrees that Conlon's mistake "can hardly be described as the *same* matter of fact about which the vendor [Ozolins] was mistaken".[33] Ironically McMullin J put forward a similar description of the mistakes made although he found the case *did* come within section 6(1)(a)(iii). He said:[34] "The appellant [Ozolins'] mistake was in thinking . . . she was selling only lots 1 to 3; the respondent's in thinking that *the appellant intended* to sell lots 1 to 4 (emphasis added)." This, however, is *not* a situation of different mistakes being made about the *same* matter of fact.

Second, it is highly significant that any situation of mistake as to terms is open to a number of descriptions. McMullin and Woodhouse JJ characterized the facts as evincing a *mutual mistake*; Somers J, however, described the facts as evincing an *unilateral mistake* made by Ozolins which was unknown to Conlon. He said:[35]

31 See Guest, *Anson's Law of Contract,* (26th ed 1984) 549-557.
32 Supra n 2 at 499.
33 Ibid at 508.
34 Ibid at 505.
35 Ibid at 508.

> I do not consider that in ordinary parlance it can be said that the purchaser [Conlon] 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.
>
> 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 s (6)(1)(a)(i).[36]

In fact the situation could just as easily have been described as one of *common mistake* of fact rather than of term. That is, both parties were mistaken in their belief that Ozolins' solicitor correctly relayed Ozolins' offer to Conlon. This would satisfy section 6(1)(a)(ii). The point is that, under the legislative scheme of the Act, different legal consequences attach to these different characterizations. Flexibility and fluidity in the definition of operative mistake was one of the aims of the Act. However, where the *same* fact situation can attract different legal results depending on how the majority of a court chooses to describe it and the number of descriptions is not meaningfully limited, then surely this flexibility has resulted in the loss of any definite shape to the purported criteria for operative mistake. What passes for controlled flexibility is, in truth, a floppiness which leaves each case at the mercy of judicial manipulation. The categories of section 6(1)(a) must, therefore, be considered rather inappropriate as criteria for relief when we are dealing with mistakes as to terms. They provide a court with no meaningful guidance as to whether relief should be granted in any given case.

*2 Alternative Analysis of Section 6(1)(a)*

The Court of Appeal's decision in *Conlon* v *Ozolins* establishes the present law on the scope of section 6(1)(a)(iii). Having examined its shortcomings, the remainder of this paper looks at some of the arguments which may be adduced and alternative analyses which may be adopted if the Privy Council or Court of Appeal were called to depart from the present position.

(a) Who Made What Mistake? The Need For An "Anchor"

The confusion over the proper description to be attached to a particular fact situation reveals the need for some "anchor" or standard against which a court can determine which party made what mistake. When applied to mistakes as to terms, section 6(1)(a)(ii) requiring *both* parties to be mistaken in the *same* way about the *same* contract term/s cannot be the subject of relief under the Act. There is no real misunderstanding; the terms were merely wrongly recorded and the proper remedy is rectification, which is expressly preserved by section 5(2)(b). That leaves section 6(1)(a)(i) dealing with unilateral mistakes and subparagraph (iii) dealing with mutual mistakes. But it is not clear whether a misunderstanding as to the terms of a contract should be described as one or the other. This is because in any situation of unilateral mistake not known to the unmistaken party, there will always be a mistake on *each* side about the *other's* intentions as to the terms. Under the traditional view of contract formation the subjective intentions of contracting parties are not legally relevant. What matters is the objective and external manifestations of those intentions.

36 Note that he treats Conlon's mistaken belief about Ozolins' state of mind as immaterial for the purposes of section 6(1)(a).

However, in *Conlon* v *Ozolins* the Court of Appeal took its inquiry into the parties' subjective beliefs and rendered them legally relevant factors in its assessment of mistake under the Act. The effect is that a subparagraph (iii) mutual mistake becomes inherent in every unilateral mistake unknown to the other party.

Thus, where X makes a mistake as to the terms of the contract[37] X will seek relief in reliance on this mistake. Where this mistake is known to the other party Y at the time of contract formation then an operative mistake exists by virtue of subparagraph (i). This is not contested since in this case Y's expectations arising from the contract cannot be said to be reasonable and so do not warrant protection. But it is unsound and illogical to say, as the Court of Appeal's analysis necessitates, that where X's mistake is *not* known to Y, then the Court may still find an operative mistake in terms of subparagraph (iii). In his dissenting judgement Somers J commented that:[38]

> 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.* (emphasis added)

(b) Objective Test of Mistake – the "Anchor"

A Court's task in applying the Act to a situation of mistake as to terms involves the making of a choice whereby the expectations of one party may be realised, at least potentially, while the expectations of the other will be defeated or impaired. Persuasive reasons should exist for favouring the expectations of one party, and Professor Palmer, with whom the writer agrees, suggests that this reason should lie in the fact that that party's expectations are clearly more reasonable than those of the other party.[39] To make this determination the Court must adopt some standard against which to measure the reasonableness of the parties' understandings.

The task is more straightforward where the agreement has been reduced to writing. The words used can be examined to ascertain which party holds the more objectively reasonable understanding of the contract.

It is contended that where the expression of a term is found by the Courts to be *unambiguous* in the bargaining context and one party intends to contract on the understanding as expressed and reasonably interpreted; and that party believes in good faith that the other party is contracting on the same understanding; but the other party is not because of some mistake for which he or she is, in a broad sense, responsible, resulting in a discrepancy between his or her intention and the meaning expressed in the words used; then the factors favouring enforcement of the contract are strong. No relief should be granted under the Act.

37 A mistake because it is at variance with the words of the contract as reasonably construed.
38 Supra n 2 at 508.
39 Supra n 20 para 15.3.

*Conlon* v *Ozolins* is such a case. The contract there was specified to be for four lots as Conlon understood it to be. Thus, the misunderstanding arose from the mistake of Ozolins only and so is not a mutual mistake situation. Ozolins is only entitled to relief if her mistake was known to Conlon.[40] However, since he was not aware of her mistake, he should have been entitled to deal with Ozolins on the basis of her offer as made, recorded and accepted by him. The correct representation of an offer is the offeror's responsibility. Therefore it should be immaterial that as a result of the offeror's mistake, the acceptor becomes inevitably mistaken in his or her belief that the offeror's offer corresponds with his or her true intention.

A different situation arises where the language expressing an agreement is uncertain. There, a misunderstanding as to the terms of a contract may arise because the parties have assigned to the language different meanings. In this case, the Court, if possible, needs to determine which is the more objectively reasonable meaning. This was the situation in *Engineering Plastics Ltd* v *Mercer & Sons Ltd.*[41] There, pursuant to the defendant's inquiries, the plaintiff wrote to its suppliers requesting the price of 4,000 large O-rings. The plaintiff then relayed its suppliers' reply to the defendant in the form of an offer to sell these rings at the price of "$644.96/c" (plus tooling charge). The plaintiff intended to sell at "$644.96 *per hundred*" but the defendant took the symbols "/c" to be a typing error and so interpreted the price to be for all 4,000 rings. The defendant company accepted the offer as put to it and had received 583 rings before it discovered its mistake and thereafter refused to continue with the contract.

The defendant argued, inter alia, that the symbols "/c" had no generally recognised meaning and should therefore be ignored, leaving the contract price to be $644.96 plus tooling charge for all 4,000 rings. Tompkins J rejected this contention, accepting the plaintiff's contention that there was an established custom or usage in the trade of those involved in dealing with O-rings to use the symbols "/c" when quoting prices to mean "per hundred".

Nevertheless, Tompkins J accepted[42] the defendant's alternative contention that this was a case for relief under the Contractual Mistakes Act. In reaching this conclusion, he largely followed the Court of Appeal's reasoning in *Conlon* v *Ozolins* and found a section 6(1)(a)(iii) mutual mistake established. He further found that relief was not precluded by section 6(2)(a) since this was not a mistake as to the interpretation of the contract. The scope of section 6(2)(a) will be examined in Part III. Tompkins J declared the contract to be valid and subsisting but varied its terms from the contract price of $6.67 per ring to $4.00 per ring.

The case arose because different meanings were attached to the symbols "/c" by the two contracting parties. However, since the Court found that the plaintiff was entitled to follow the accepted usage of "/c" as meaning "per hundred", and assuming the plaintiff reasonably believed that the

40 Section 6(1)(a)(i).
41 Supra n 3.
42 Ibid at 78.

defendant was doing the same, then it is contended that the contract should be enforced in accordance with the plaintiff's understanding. The defendant's undisclosed interpretation will render the situation one of unilateral mistake *un*known to the other party which is not entitled to relief under the Act. This analysis would parallel the pre-Act law on unilateral mistakes.[43]

Support for this view can be found in the example of unilateral mistake given by Professor Sutton in his comment on the Contractual Mistakes Bill.[44] He said that where A sells "X"[45] to B, A believes he has sold "Y" while B believes he has bought "X", then there is a unilateral mistake by A to be relieved only if it was known by B.

Under such an analysis, the estoppel doctrine with its corollary of objectivity in determining assent, technically ousted by section 5 of the Act, is nevertheless preserved in essence in subparagraph (i) of section 6(1)(a). It provides that no relief can be granted for unilateral mistake unless it is known to the other party. Subparagraph (iii) should be interpreted in this light. However, the Court of Appeal's interpretation of subparagraph (iii) completely undermines subparagraph (i). It renders subparagraph (i) superfluous in so far as it allows subparagraph (iii) to effectively include *all* cases specifically excluded by subparagraph (i). Subparagraph (iii) should not have been interpreted in such a way.

(c) The Suggested Scope of Section 6(1)(a)(iii)

It is contended that section 6(1)(a)(iii), which requires the parties to be differently mistaken about the same matter, most logically covers a factual situation where the contract is specified to be for "X". However, A believes it is for "Y" while B believes it is for "Z". In this case, both parties can truly be said to be mistaken in the sense of some deviation from the standard. However, A and B's mistakes are *different* ones on the same matter (the subject of the contract). For example, in *Conlon* v *Ozolins*, subparagraph (iii) would be satisfied if Ozolins believed the contract was for three lots, Conlon believed it was for two lots and the contract specified four lots.[46]

A variation of the above situation exists where again the agreement is for "X", and A and B attribute different meanings to "X", but the words or symbol "X" is so ambiguous in the bargaining context that it is incapable of objective ascertainment by the Courts. In this case, A and B are differently "mistaken" about the same point in the sense that there exists no ascertainable standard against which to judge any deviation. Therefore, it is not possible to determine which party's meaning is more objectively reasonable. The Report of the Contracts and Commercial Law Reform Committee[47] makes it clear in reference to *Raffles* v *Wichelhaus*[48] that

43 Supra n 7.
44 Supra n 25 at 50.
45 That the contract is for "X" is determined by an objective assessment of the action of and words used by the contracting parties as evidence of their intentions.
46 If Conlon too believed the contract was for three lots then this would be a case for rectification of the written contract.
47 Supra n 24 para 19.
48 (1864) 2 H&H 9061, 159 ER 375.

section 6(1)(a)(iii) was intended to cover such a situation. In that case, the contract referred to the ship "Peerless from Bombay". However, unknown to the parties, there were two ships of that description and each party had a different ship in mind. The Court was unable to resolve this ambiguity by assigning a definite, more reasonable meaning even judging the parties' intentions by the most objective of tests. Each party's expectation was reasonable but it was not an expectation for which the other party could be held responsible for he had no reason to anticipate it.[49] Subparagraph (iii), in the sense of unresolvable ambiguity, would be satisfied in the *Conlon* v *Ozolins* situation if the contract had been for "the land at the back"; the parties holding different beliefs as to the quantity of land involved; and the court being unable to assign a definite meaning to the words.

Even if this is conceded to be a correct interpretation of subparagraph (iii), the statutory wording, in describing the parties in the above situation as being "differently mistaken about the same matter of fact", can be described as rather clumsily and awkwardly drafted. However, the writer believes that the above analysis of section 6(1)(a), anchored on the objective view of contract formation, not only provides a useful test of assent and reasonable expectations arising out of contracts, but also formulates a workable test in determining which party made what mistake/s for the purposes of the section 6(1)(a) criteria for relief. It redresses the imbalance which results from the Court of Appeal's analysis in giving greater protection to reasonable contract expectations.

## III MISTAKES OUSTED FROM RELIEF: SECTION 6(2)(a)

The second limb of this inquiry into the general scope of relief for mistake as to terms under the Act focuses on section 6(2)(a). It provides that:

> For the purposes of an application for relief under section 7 of this Act in respect of any contract, —
> A mistake, in relation to that contract, does not include a mistake in its interpretation.

Accordingly, where a mistake is as to "the interpretation of the contract", no relief is obtainable under the Act even though all other criteria for relief are met. Section 6(2)(a), therefore, operates as an ouster from relief and as such constitutes a potentially powerful limiting factor on the general scope of relief for mistake. If section 6(2)(a) is interpreted widely, then the concerns expressed about the wide interpretation of section 6(1)(a)(iii) adopted by the Court of Appeal in *Conlon* v *Ozolins* lose some of their force. On the other hand, if section 6(2)(a) is interpreted too narrowly, a correspondingly narrower interpretation of section 6(1)(a)(iii) is called for to regulate the overall scope of relief for mistake.

Section 6(2)(a) was not even raised in *Conlon* v *Ozolins* and its treatment in the *Engineering* decision is, in the writer's view, evasive and unsatisfactory. The question framed by Tompkins J[50] in that case was whether the defendant, in attaching the meaning it did to the words of the contract "price $644.96/c", made a mistake in the interpretation of the contract.

49 See Waddams, *The Law of Contracts,* (1977) 56, and Palmer supra n 20 at 396.
50 Supra n 3 at 83.

However, he side-stepped the issue, reasoning that although one could answer "yes" to the question "that [mistake] was not the mistake that gave rise to the right of relief". Rather, the operative mistakes related "to what the parties thought the other intended when they entered the contract". Section 6(2)(a) and Tompkins J's analysis of it warrant more detailed examination.

*1 The Meaning of "Mistake in the Interpretation of the Contract"*

What is meant by a "mistake in the interpretation of the contract"? The Shorter Oxford English Dictionary takes "interpretation" to mean the process of explaining, elucidating, expounding or rendering clear the meaning of something. "The contract" is the collection of terms agreed on by the contracting parties. What these terms are should be determined by the application of normal principles of contract formation including an objective view of the intention of the parties. Difficulties arise because "the contract", involving the concept of an *agreement* or understanding between two parties, is more than the *written* document, which merely evidences the agreement reached. Agreement can exist at many levels of generality and mistakes in interpretation can occur at any of these levels. For example, a mistake may be made as to the:

(1) *Nature of the transaction* –

Here the mistaken party claims: "I did not know this was a land transfer agreement. I thought it was a contract of employment". Where the signor is not negligent, such a case is dealt with by the principle of *non est factum* which is specifically preserved by section 5(2)(a).

(2) *Existence of a certain term* –

Here the claim is: "I knew this was a land transfer agreement, but I did not know there was a term in the agreement on this matter."

(3) *Nature of that term* –

Here the claim is: "I knew we had dealt with this matter, but I thought we had agreed on such and such."

(4) *Words used* –

Here the claim is: "I did not know the contract document said 'XYZ', I thought it said 'ABC'." Mrs Ozolins' mistake was of types (3) and (4).

(5) *Meaning of the words used* –

Here the claim is: "I knew the contract said 'XYZ' but I thought that meant 'ABC'. I did not realise that it would be interpreted to mean 'OPQ'." This was the nature of the defendant's mistake in the *Engineering* case.

Which of these are to be included in the definition of "mistake in the interpretation of a contract" such that no relief is available under the Act? Does it include all of them, since they merely represent different levels of agreement which are inherent in the concept of a contract? Or are only some to be included? If only some, what is the justification?

In his judgment, Tompkins J approved and acknowledged the assistance of the Report of the Contracts and Commercial Law Reform Committee in reaching his conclusion on section 6(2)(a). On this the Committee stated:[51]

51 Supra n 24 para 21.

> It would be going too far, we think, to enable a party who has failed in a dispute over the interpretation of the contract to obtain relief from his promise on the grounds that he had entered into the contract on the mistaken belief that he thought the *words which by common consent had been adopted by the contracting parties* meant something different from the *meaning ascribed to them by applying the ordinary process of the construction of contracts* . . . . At present we do not think that the door should be opened to the assertion that a party should be relieved from his contract merely because he may have interpreted *the words* in a sense different from that adopted by a court of construction. If he can show that the meaning he has ascribed to the words was also adopted by the other parties to the contract, then his proper remedy is to have the contract rectified. If he cannot show that, then we think the security of the contractual relationship requires that he should be held to the interpretation of the contract as settled by the appropriate process of construction. (emphasis added)

Thus, it is accepted that the meaning of the words of a contract must be ascertained by "applying the ordinary process of construction", as the writer earlier contended, rather than be allowed to bear the subjective meaning attributed by the individual contracting parties. However, Tompkins J and the Committee's view that "mistake as to the interpretation of the contract" means mistake as to the meaning of the "words adopted by common consent" merely begs the question: when will the words of a contract be considered to have been adopted by common consent?

As the reader will have gathered, our inquiry has taken us back to the question of contract formation. On an objective view, one who signs or otherwise signifies assent to writing with intent to make it legally operative would be bound whatever his or her subjective understanding of the contents, provided the other party reasonably relies on the appearance created. On this view, section 6(2)(a) would cover the mistakes catalogued in (2) to (5) above (that is, mistakes as to the existence, nature and words used to describe the terms, and the meaning of the words adopted). Essentially, this would oust all mistakes as to terms from relief under this Act.

However, it may be that a *subjective view of assent* to the words representing the terms of the contract was intended. The Committee emphasised that section 6(2)(a) deals only with mistakes in the "*interpretation* of the terms of the contract",[52] rather than mistakes as to the terms of the contract. In the New Zealand Commentary to Halsbury's Laws of England, Professor Sutton said:[53]

> In general, a party cannot rely on a mistake about interpretation of a contract, as a ground to set that contract aside . . . . Where, however, negotiating parties are *totally at cross-purposes* about what is to be included in the contract, that would seem *more than a mere error as to interpretation of the written document, and section 6(1)(a)(iii) would apply.* (emphasis added)

On this interpretation, section 6(2)(a) would only apply where the contracting parties have subjectively consented to the words used to express their agreement, that is, they should not be "at cross purposes about what is to be included in the contract"; and subsequently, one party misinterprets these words. Such a view would limit the operation of section 6(2)(a) to

52 Ibid para 21.
53 New Zealand Commentary on Halsbury's Laws of England, Ch 107, C44.

type (5) mistakes. Mistake as to the existence, nature and words used to describe the terms, types (2), (3) and (4), would still qualify for relief under section 6(1)(a)(iii). In the overwhelming majority of highly complex transactions, the parties who ultimately sign the agreement will not have directed their minds to each individual term of the agreement which has usually been bargained out by other people on their behalf. This view of section 6(2)(a) would allow relief where one party subsequently alleges mistake about one of the terms, the mistake not coming under the section 6(2)(a) ouster, because the words had not been subjectively consented to. This approach is consistent with the Court of Appeal's decision in *Conlon* v *Ozolins*. Mrs Ozolins' mistake was as to the nature of the term regarding the amount of land to be sold and as to the words used in the contract, *not* as to the meaning of the words subjectively adopted by common consent. The section 6(2)(a) ouster, therefore, did not apply.

An immediate objection to this view that section 6(2)(a) refers only to mistakes in the interpretation of the *words* of a contract is that section 6(2)(a) itself is not expressed in such limiting terms, and after all it is the statute which expresses the law. Second, by strict definition a mistake as to the interpretation of the contract can only take place *after* the contract has been formed. But, to qualify for relief under section 6(1)(a), the mistake must have been made "in entering into that contract", that is, *prior* to actual contract formation. Section 6(2)(a) would be redundant if its only function was to oust from relief mistakes which were made after contract formation and so could not have qualified under section 6(1)(a) in any case. Such mistakes can hardly be said to have "influenced" the mistaken party to "enter into the contract", in the words of section 6(1)(a). It is, therefore, contended that the reference in section 6(2)(a) to mistakes in the interpretation of "that contract" refers to the *understanding of the parties as to the nature of the terms to be included in the contract, and not merely to the words used to express that agreement.* This view would oust mistakes (2) to (5) from relief under the Act. Support can be found for this view in the language of section 6(2)(a) which, as mentioned previously, does not equate "the contract" with "the words". If it did, the operation of section 6(2)(a) would be confined to *written* contracts and there is no justification for distinguishing between written and unwritten contracts.

Moreover, it is artificial to distinguish misinterpretation of the words of the contract subjectively assented to from mistake as to the nature of the term/s of the agreement, irrespective of whether the mistaken party subjectively knew of the words used to represent them or not. This is because, in the majority of cases, misinterpretation of the words of a contract occurs precisely *because* there existed a *prior* mistake about the nature of the particular term which the words represent. This would be so regardless of whether the party who finally applies for relief has directed his or her mind to the precise words of the contract or not (although a misinterpretation is less likely to occur where the words *have* been specifically adverted to). For example, if Mrs Ozolins had specifically directed her mind to the words describing lots 1 to 4 but had misinterpreted them to be the legal description of the land she actually intended to sell then, on the narrow view of section 6(2)(a), relief would have been barred. However, this is no weaker case for relief than the actual facts of *Conlon* v *Ozolins* where she

did not specifically advert to the words used and so was not excluded from relief by section 6(2)(a).

This artificial distinction between misinterpretation of the words of the contract subjectively assented to and mistake as to the nature of the term/s of the contract leads to another absurdity. Even if the narrow view of section 6(2)(a) were accepted, such a mistake could evidently always be reworked by the courts into a "different" mistake *not* ousted by section 6(2)(a) but for which relief is available. Since the most frequent cause of misinterpretation of words of a contract subjectively assented to (which is ousted from relief by section 6(2)(a)) is some prior mistake about the nature of the term described by the words; and this *mistake as to terms* can, in turn, be described as a mistake as to the *other party's intention* about the nature of the term; this last mistake is said to be the one which gives rise to relief. Section 6(1)(a)(iii) is satisfied because each party is differently mistaken about the other party's intention about the term. Thus, section 6(2)(a) is effectively circumvented. The importance of the judicial technique of characterization must not be underestimated.

This very technique was employed by Tompkins J in the *Engineering* case where the defendant misinterpreted "/c" to mean nothing instead of "per hundred". He said:[54]

> It could be considered that the defendant, in attaching the meaning it did to the words in the contract . . . made a mistake as to its interpretation of the contract . . .

One would certainly have thought so in view of the fact that each party had specifically adverted to the relevant symbols "/c". However, Tompkins J continued:

> . . . but in my view that is not the mistake that gives rise to the right to relief. That, as I have indicated, was a mistaken belief by each party about *the intention of the other* concerning the price. That is not a matter of interpretation . . . . (emphasis added)

Tompkins J proceeded on the assumption, it is contended a mistaken one, that where a fact situation evinces a section 6(2)(a) mistake which is specifically excluded from relief, relief can nevertheless be given if the Court is willing to rework the section 6(2)(a) mistake into a section 6(1)(a)(iii) mistake. This looks at the issue from the wrong perspective. To have any real effect section 6(2)(a) must oust from relief mistakes which would otherwise have qualified. The correct view, it is contended, is that where any section 6(1)(a) mistake has the quality of a mistake in interpretation of the contract, then no relief is available under the Act.

### 2 *Suggested Analysis*

It is evident that when the objective theory of contract formation is abandoned in an area as large and complex as mistake, the finely balanced structure called contract law (in which the objective theory provides a foundation stone) may become severely weakened. The consequences are unacceptably and perhaps unforeseeably far-reaching. The writer believes

54 Supra n 3 at 83.

that the objective theory serves such important contract aims that, unless expressly and clearly indicated, a statute should not be interpreted to undermine its effect. Three alternative analyses of the Act can be adopted by a court which desires to preserve the essence of the objective theory of contract formation.

First, section 6(1)(a) can be interpreted as being applicable only to mistakes in assumption of *fact* which raise no issues of contract formation. The parties are in agreement but one or both claim that this has resulted from a mistaken assumption of fact. This interpretation seems to have been the intention of those who drafted the Statute as evidenced by the Report of the Contracts and Commercial Law Reform Committee. In its introduction the Committee commented[55] that, even if their recommendations on misrepresentation and breach were adopted, that still left:

> . . . untouched the class of agreements which came to grief because one or more of the parties has made a *mistaken assumption of existing fact or law.* In such cases it is necessary to decide whether or not the agreements shall attain or retain contractual force, and if they do, whether or not the parties who have been mistaken shall be entitled to relief. (emphasis added)

Further support for this view can be found in the language of section 6(1)(a) which requires that "in entering into the contract . . . one or both parties are influenced in his/their decision/s to enter into the contract by a mistake". This focuses on the *reasons* for entering into the contract rather than whether there has been assent to the terms. Accordingly, the "mistake of fact" referred to in section 2 and section 6(1)(a) would exclude mistakes as to the terms of a contract which *do* directly raise the question of contract formation. Section 6(2)(a) would operate to prohibit a mistake as to terms from being "turned into" a mistake in assumption of fact in the manner adopted in the *Engineering* case.

A second approach is to interpret section 6(1)(a) as covering both mistakes of fact and mistakes as to terms as the Courts did in the cases referred to, but then to give section 6(2)(a) a wide interpretation equating mistakes in the interpretation of contracts with mistakes as to terms and so ousting this category of mistakes from relief under section 7. Under these first two approaches, mistakes as to terms would not be dealt with by the Contractual Mistakes Act but rather by the pre-existing common law. This would seem to be unduly restrictive of the operation of the Act.

The third approach is really a modification of the second approach and is suggested in Part II. Section 6(1)(a) would include mistakes as to terms, but the scope would be limited by "anchoring" the categories of section 6(1)(a), in particular subparagraphs (i) and (iii), to an objective assessment of which party had made a mistake and what constituted the mistake. Accordingly, most mistakes as to term/s will turn out to be unilateral mistakes unknown to the other party and so fail to qualify for relief.

55 Supra n 24 para 4.

## IV CONCLUSION

The law of mistake must maintain a balance between protecting the reasonable expectations of contract parties created by a promise of future performance and avoiding unfairness resulting from mistake. This dual aim and the need for balance are recognised by our Legislature in the Contractual Mistakes Act. However, in the two recent cases discussed, the Courts have attributed a very wide scope to the circumstances which would entitle a court to grant discretionary relief for mistake. In so doing, they have tilted the balance too far in favour of a mistaken party, leaving inadequate protection for the reasonable expectations of the other contracting party. The problem lies not only with the Courts' interpretations but also with the actual wording of sections 6(1)(a) and 6 (2)(a). These provisions yield no meaningful limitations on the scope of operative mistake, as they purport to do, when objectivity is ignored in contract formation and interpretation. Since many contract disputes can be said to involve mistake by one or both parties, a continuation of the present judicial thinking may see an increase in the number of cases in which mistake is pleaded. Some alternative approaches aimed at redressing the imbalance have been discussed. The key lies in the retention of a fundamental premise of our contract law — the objective theory of contract formation.