



THE CONTRACTUAL MISTAKES ACT 1977 CONTRACTUAL REMEDIES ACT 1979 AND THE FAIR TRADING ACT 1986

THE CONTRACTUAL MISTAKES ACT 1977

The Contractual Mistakes Act 1977 is a code governing the circumstances in which relief may be granted on the grounds of mistake to a party to a contract. The Act was designed to establish clear rules as to when the Courts could look beyond the objective assessment of the terms of the contract, to giving the Courts the option of looking at the parties actual mistaken belief in entering the contract, and on discerning a mistaken belief, giving the Court the discretion to remedy the situation.

As a fetter on the unrestricted use of judicial discretion in cases of mistake, the Act specifically states that the powers under the Act are not to be exercised in such a way as to prejudice the general security of contractual relationships. This was inserted to allay fears that the sanctity and reliability of contracts could be set aside if too great a latitude was given to the doctrine of mistake.

Nevertheless over the last 10 years there has been a considerable amount of uncertainty caused by what many saw as an over-readiness by the Courts to intervene in cases of apparent mistake. The high point of this intervention is shown in the Court of Appeal decision in **Conlon v Ozolins**. However the effect of that decision is, for practical purposes, now spent and the statute is now operating as it was intended.

In order to be able to obtain relief, a contracting party must bring itself within the grounds set out in section 6 of the Contractual Mistakes Act (1977). There are broadly three conditions required to be satisfied:

- a) The party was influenced in its decision to enter into the contract by a material mistake the existence of which was known to the other party (“the unilateral mistake”) **or** all parties were influenced in their decision to enter the contract by the same mistakes (“the common mistake”) **or** that party and one other party were influenced in their decisions to enter into the contract by a different mistake about the same matter of fact or law (“the mutual mistake”).
- b) The mistake resulted at the time of the contract in a substantially unequal exchange of values.
- c) The party seeking relief has not by a term of the contract undertaken to assume the risk of a mistake.

A point of major significance in the Act, is that a mistake may be one of law as well as of fact. This is an important change in the law, as formerly it was generally accepted that a mistake of law would not afford a mistaken party any relief from the contract. However, while a mistake in the interpretation of a document is a mistake of law, relief is not available in respect of a mistake in the interpretation of the contract itself.

If the above criteria are satisfied the Court may grant relief. The Contractual Mistakes Act (1977) radically changed the types of relief which may be granted; no longer is the contract to be wholly void or wholly valid. The Court has a discretion to make any order it thinks just, including power to cancel the contract, vary it, declare it to be valid and grant relief by way of restitution or compensation. Property may be ordered to be transferred, although nothing is to invalidate any disposition of property to a person not a party to the mistaken contract who has no notice of the mistaken contract and who otherwise acts in good faith. One of the factors to which the Court will have regard in exercising its discretion is whether the party seeking relief caused the mistake.

There have been some problems with the definition of “mistake” particularly that of “mutual mistake”, when a party to a contract and another party were influenced in their decisions to enter into the contract by a different mistake about the same matter of fact or law. The definitional problems in large part stemmed from the decision of the Court of Appeal in **Conlon v Ozolins** which gave a very liberal interpretation to the meaning of “mutual mistake”.

In that case two people signed an agreement recording the sale of four lots of land. The purchaser thought he was purchasing all four lots, while the vendor intended only to sell three. It was held to be a case where parties had been influenced by different mistakes about the same matter (ie. a mutual mistake), namely the boundaries of the land to be sold. The problem with the result of this decision was that it gave any defendant to a contract claim the chance to raise a defence that he or she intended a different bargain and misunderstood the document that was signed.

Conlon v Ozolins was effectively overruled by the Court of Appeal in 1989 in **Paulger v Butland Industries**, a decision which has been confirmed since. In **Paulger** the Court of Appeal found that **Conlon** was a decision on its particular facts, and that it was not authority for invoking the Contractual Mistakes Act (1977) where one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of his or her own words. For then the mistake is one in the interpretation of the contract, and the party making it cannot avail itself of the Act.

The current state of the interpretation of the Act now then seems to accord with the intention of Parliament and not make inroads into the security of contract as earlier feared.

A problem experienced by consulting engineers is where a mistake is identified by the engineer in the tender offer by a contractor or where a contractor, after a contract has been awarded, claims that there has been a mistake in the tender.

The problem will often be provided for in the conditions of tender. NZMP 3914:1994 for example provides in clause 105.6 that if a tender contains an error such as to vary the tendered sum, and the principal or his agent becomes aware of the error prior to the acceptance of any tender, then the principal shall draw the error to the attention of the tenderer who must then confirm whether the tender remains open for acceptance at the tendered sum.

If the situation is not covered by the conditions of the tendering or the error is not discovered prior to the tender being accepted, then this may be a situation which is covered by the Contractual Mistakes Act (1977). It must however fulfil the three criteria mentioned earlier on. It

must also be a mistake of the applicable sort, that is it should not be a mistake in the interpretation of the contract.

THE CONTRACTUAL REMEDIES ACT 1979

The Contractual Remedies Act 1979 lays down a set of brief and simple statutory rules about misrepresentation and breach of contract.

The Act substituted the previous complex common law rules with a single set of remedies for misrepresentations inducing the making of a contract and for the repudiation or breach of a contract. A single new remedy called "cancellation" was established for misrepresentation, repudiation and breach of contract, if the breach is sufficiently serious. Damages may be claimed instead of, or in addition to, cancellation. The Contractual Remedies Act (1979) is of general application and applies to most contracts, the most notable exception being for the sale of goods which are governed by the Sale of Goods Act. The most important sections of this Act are sections 5 to 9.

Section 5 preserves contractual autonomy, by allowing parties to make their own express provision for the remedies for and consequences of, breach. Such provisions prevail over the sections of the Act in the event of inconsistency between them.

Section 6 provides that damages are available to a party who has been induced to enter into a contract by a misrepresentation. The section provides that damages may be awarded for a misrepresentation "as if the representation were a term of the contract".

It is important to remember that certain specific steps as prescribed in section 8 are to be taken prior to cancellation. Those steps are:

- a) Notice of cancellation must be given (either by words or conduct)
- b) After cancellation there must be no further performance, and prima facie all property, including money, must stay where it was at the time of cancellation.

The Court has a wide discretion to make just orders to apportion the loss fairly.

The Act specifies a number of types of breach which will entitle the other party to cancel. Those are contained in sections 7 (3) and 7 (4) of the Act. Sections 7 (5) and 7 (6) impose limitations on the right to cancellation.

The Act, as stated above preserves the remedy of damages for breach of contract. Furthermore section 9 of the Act gives the Court a discretion as to choice of remedy which is remarkably broad. The Court under section 9 (2) and section 9 (3) has wide powers to order a party to transfer property, pay money or to refrain from doing certain acts. The Courts appear to have taken a liberal view that under section 9 of the Act. They no longer simply apply the strict rules as to damages but look at the case in its entirety and come to an assessment that takes into account all the performances, breaches, gains and losses of all the parties to the contract.

The Court of Appeal has now confirmed that section 9 allows the Court to give such remedy as is thought to be appropriate without being tied down by rules concerning common law relief.

As with the Contractual Mistakes Act (1977) there was concern that the introduction of wide discretion to Courts would undermine certainty and predictability in the commercial arena. The

view now appears that that has largely not been the case and the Contractual Remedies Act (1977) has become an effectively operating statute.

THE FAIR TRADING ACT 1986

Another innovation has been the Fair Trading Act 1986. There is a degree of similarity between the Fair Trading Act and the Contractual Remedies Act. It will in some circumstances be necessary for parties to decide under what Act the relief which they seek should be brought.

The Fair Trading Act (1986) was designed to prohibit certain conduct and practices in trade, to provide for the disclosure of consumer information relating to the supply of goods and services and to promote product safety and also to repeal certain enactments such as the Consumer Information Act 1969. In addition to civil remedies, in some instances the Fair Trading Act (1986) also provides for criminal sanction in the event of its breach.

There are numerous situations in which there is interface between the Fair Trading Act (1986) and the Contractual Remedies Act (1979). Whereas the Contractual Remedies Act codifies the law of contract in relation to innocent, negligent and fraudulent misrepresentations, section 9 of the Fair Trading Act extends the standard of care in contractual situations to all conduct in trade. "Trade" is defined in the Fair Trading Act (1986) as extending to the professions and would thus be applicable to members of this Association. The remedies available pursuant to section 9 of the Fair Trading Act are also not limited to third party actions. A person who has been induced to enter a contract by a misrepresentation may issue proceedings under either or both Acts and may be entitled to one or more of the remedies under the Fair Trading Act no matter what remedy may be provided under a contractual warranty.

In many circumstances section 9 of the Fair Trading Act (1986) may well be preferred as a cause of action to section 6 (1) of the Contractual Remedies Act (1979) in situations of contractual misrepresentation because:

- a) There is no requirement in section 9 of the Fair Trading Act to prove a contract in relation to the conduct; and
- b) There is no requirement in section 9 of the Fair Trading Act for the representation to have induced entry into the contract; and
- c) The measure of damages in section 9 of the Fair Trading Act is tort based and thus may contain penal provisions whereas remedies under the Contractual Remedies Act have been traditionally governed by the traditional contract law measure.

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