A Reputation For Boldness: Statutory Reform of Contract Law in New Zealand.

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Speaking in a debate on the Contractual Mistakes Bill, the Hon Dr A M Finlay, a former Labour Attorney General and Minister for Justice, commented that, 'I am bound to say that the Contracts and Commercial Law Reform Committee has a reputation for more boldness than do some of the others'.[1] The Contracts and Commercial Law Reform Committee (CCLRC) pre-dated a permanent, freestanding, Law Commission by two decades[2] but it was still not the first law reform body in New Zealand. A Law Revision Committee within the Department of Justice was formed in 1937.[3] By the 1960s there was a growing dissatisfaction with the pace of law reform around the world and New Zealand was no exception.[4] A pamphlet written by JR Hanan,[5] the Minister for Justice in 1965,[6] argued that New Zealand needed to break away from English law and forge its own way. Hanan wrote that: 'The primary aim should be to select whatever seems best for New Zealand and freely adapt it to our needs and desires, whether it comes from England or another country or is an original product'.[7] The CCLRC was a sub-committee of the new Law Revision Committee created in 1966. It would be

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[1] (20 May 1977) 410 NZPD 7.

[2] The New Zealand Law Commission was finally established in 1986.

[3] For an account see JH Farrar, *Law Reform and the Law Commission* (Sweet & Maxwell 1974) 80-89; Sir Kenneth Keith, 'Law Reform' in Sir Ian Barker and Ian Wear (eds), *Law Stories Essays on the New Zealand Legal Profession 1969-2003* (Lexis Nexis 2003) 353, 356-58.

[4] The Law Commission Act 1965 created the English Law Commission. The Department of Justice was very aware of the law reform movement elsewhere: Department of Justice, *Law Revision Programme*, 11 Feb 1966, see Conferences, Commissions, Committees - Contracts and Commercial Law Reform Committee 'Temporary' 1966-69, ANZ AAAR/500/21/2/60 (Temporary 1966-69).

[5] https://teara.govt.nz/en/biographies/5h6/hanan-josiah-ralph

[6] *The Law in a Changing Society A policy and Programme for Law Reform* (Ministry of Justice 1965).

[7] Ibid 20.

the driving force behind a series of statutory reforms of contract: Illegal Contracts Act 1970, Contractual Mistakes Act 1977 (NZ), Contractual Remedies Act 1979, Contracts (Privity) Act 1982. Reform of contract law in New Zealand was carried out in a piecemeal fashion but the legislation when taken together can be regarded as creating a partially codified law of contract in New Zealand which was recently consolidated in the Contracts and Commercial Law Act 2017.[8]

MEMBERSHIP OF THE COMMITTEE

Throughout its life the CCLRC was made up of academics, lawyers from practice, and civil servants from the Department of Justice. Their first report, *Misrepresentation and Breach of Contract*, was published in 1967 and there were eight signatories. Academic lawyers have always played a prominent part in law reform in New Zealand. The jurisdiction is a relatively small one in terms of population and one consequence is that individual commissioners can have a disproportionate influence on reform.[9] The 1937 Law Revision Committee contained one academic lawyer and by 1965 every law faculty in the country was represented.[10] Academic lawyers continued to be prominent in the new structure. Professor Brian Coote from the University of Auckland served on the Committee for its entire existence. He is a specialist on contract law best known for the idea that contractual liability rests on an assumption of responsibility.[11] His book, *Exception Clauses*[12] contributed to the decision of the House of Lords to overturn the idea of fundamental breach.[13] The second academic member of the Committee, Professor Peter Ellinger, was, at the time based at Victoria University Wellington,[14] and best known for his work on banking law.[15] In the final years of the CCLRC Professor John Burrows, of the

[8] This chapter is looking at the subject historically so references are to the original legislation.
[9] New Zealand may be similar to Scotland, which has a similar population. Individual academics continue to have a major influence on law reform in that jurisdiction. Examples include Professors Clive and Reid. I am grateful to Professor MacQueen for this insight.
[10] Hanan (n 6) 10-11. At the time there were Law faculties at Auckland, Canterbury, Otago, Wellington. Until 1961 degrees were awarded by the University of New Zealand and these organisations were 'university colleges'.
[11] This issue is explored in two volumes of collected essays. Rick Bigwood (ed), Brian Coote, *Contract as Assumption Essay on a Theme* (Hart Publishing 2010) JW Carter (ed), Brian Coote, *Contract as Assumption II: Formation, Performance, and Enforcement* (Hart Publishing 2016).
[12] (Sweet & Maxwell 1964).
[13] *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 (HL).
[14] He later moved to Monash University and then returned to National University Singapore where he had begun his career. For a useful biography see, Dora Neo, Tang Hang Wu, Michael Hor (eds), *Lives in the Law Essays in Honour of Peter Ellinger, Koh Kheng Lian, Tan Sook Yee* (NUS Faculty of Law 2007) 2-7.
[15] *Modern Banking Law* (1st edn, Oxford University Press 1987). This book is now in a 3rd edition.

University of Canterbury, replaced Ellinger. Until recently Burrows was one of the co-author of the leading New Zealand work on contract law.[16]

ES Bowie QC, who was the first Chair,[17] was succeeded by Sir Muir Chilwell QC in 1968. Following Chilwell's elevation to the Bench in 1973[18] Colin Patterson, who later become Chair of the Securities Commission, Chaired the committee.[19] Other practitioners sat on the CCLRC at various points. Donald Dugdale was variously a partner at Kensington Swan, a Law Commissioner and barrister.[20] John Henry and John Wallace who joined later on were leading Auckland barristers.[21] Both would both become judges.[22] JR Fox practiced in Christchurch.[23] The final group were civil servants. BJ Cameron was a senior civil servant in the Department of Justice,[24] Walter Iles QC worked for Parliamentary Counsel Office and the Law Drafting Office. Along with Coote and Dugdale, Illes and Cameron comprised the four Commissioners present through the entire life of the Committee.

THE OPERATION OF THE COMMITTEE

Given the commissioners were part time for which they received a small daily attendance fee (originally £8) it is remarkable that so much was achieved.[25] Four meetings a year during the first few years was typical.[26] It was

[16] This is now, Jeremy Finn, Stephen Todd and Matthew Barber, *Burrows, Finn and Todd on Law of Contract in New Zealand* (6th edn, Lexis Nexis 2017).
[17] Bowie was appointed a QC in 1965 and died in 1969: Anon, 'Queen's Council' in Robin Cooke (ed), *Portrait of a Profession* (AH & AW Reed 1969) 181, 183.
[18] https://www.lawsociety.org.nz/news-and-communications/people-in-the-law/obituaries/obituaries-list/hon-sir-muir-chilwell-qc,,-1924-2014
[19] Patterson was described as 'a very able commercial lawyer' (4 Oct 1978) 421 NZPD 4133.
[20] https://www.lawsociety.org.nz/news-and-communications/people-in-the-law/obituaries/obituaries-list/donald-frederick-dugdale,-1933-2011 He has been described as 'learned, outspoken and fearless' see, John Cadenhead 'Life in the Courts' in Barker and Wear (n 3) 51, 66.
[21] Ibid 66.
[22] Sir John Henry in the Court of Appeal and Sir John Wallace in the High Court. Wallace was a significant figure in various law reform capacities including as a Law Commissioner see: http://www.lawsociety.org.nz/news-and-communications/people-in-the-law/obituaries/obituaries-list/sir-john-wallace-knzm-qc-1934-2012
[23] At the firm White, Fox and Jones.
[24] Cameron was a significant figure in the law reform programme over many decades see, GS Orr, 'Law Reform and the Legislative Process' (1980) 10 VUWLR 391, 394-95; GWR Palmer, *Reform: A Memoir* (Victoria University of Wellington Press 2013) 317. For Cameron's thoughts on law reform see: BJ Cameron 'Legal Change over Fifty Years' (1987) 3 Canterbury L Rev 198.
[25] Fees for Standing Committee, Temporary 1966-1969.
[26] Annual Report 1966, Bowie to Hanan, 28 Nov 1966, Annual Report 1967, Bowie to Hanan 1 Dec 1967: Law Reform Contracts and Commercial Law Reform Committee Minutes/Agenda 1966-69 ANZ AAR/500/21/2/60 (Minutes/Agendas 1966-69).

difficult to find times suited to all the members. The Committee secretary, Margaret Bryson, wrote with some frustration in 1972: 'Faced with our usual problems of getting people and material together.'[27] That year only two meetings of the full committee had been possible.[28] Ministry of Justice files contain numerous telegrams cancelling meetings at the last minute. Scheduling was erratic. As the Chair's annual report to the Minister of Justice in 1974 makes clear, work did continue. Two sub-committees, one based in Auckland and the other in Wellington, also worked on proposals between meetings of the full committee.[29]

In 1970, Chilwell asked the minister if the CCLRC might employ research assistants and special experts.[30] A report by Richard Sutton on contractual mistake was hugely influential.[31] Committee members were also well informed of developments outside of New Zealand. Patterson visited the English Law Commission in 1971 and met with English academic and Law Commissioner Professor Gower.[32] In a letter to Cameron he mentioned the work of the Commission on a contract code, which although later published, was never enacted having fallen foul of disagreements between the English and Scottish Law Commissions.[33]

THE STATE OF CONTRACT LAW IN NEW ZEALAND IN 1960s

The first general contract textbook to appear in New Zealand, in the early1960s, was based on the well-established English treatise by Cheshire and Fifoot.[34] The fact that a New Zealand version appeared at all was a step forward. It suggested that New Zealand contract law was beginning to assert a degree of independence. The New Zealand editor, Jack Northey, in the preface summed up the state of play in 1960:

[27] Margaret Bryson to members, 27 July 1972: Minutes/Agendas 1969-73.
[28] Annual Report 1972, Chilwell to Finlay, undated: Minutes/Agendas 1969-73.
[29] Annual Report 1974, Pattinson to Finlay, 4 March 1974: Law Reform Contracts and Commercial Law Reform Committee Minutes/Agenda 1974-78, ANZ, ABVP W4927 LEG 21-5-2 (Minutes/Agendas 1974-78).
[30] Chilwell to Riddiford 6 Feb 1970: Minutes/Agendas 1969-73.
[31] Sutton began his career at the University of Auckland, and was later a Chair and Dean at the University of Otago, and in the 1990s a Law Commissioner: https://www.lawsociety.org.nz/news-and-communications/people-in-the-law/obituaries/obituaries-list/richard-john-sutton,-1939-2009
[32] Pattinson to Cameron, 25 Feb 1971, Contracts and Commercial Law Reform Committee - General Correspondence, ANZ, AAAR, 500, 21/2/60.
[33] H McGregor, *Contract Code Drawn up on Behalf of the English Law Commission* (Giuffré 1993). On the dispute see: LCB Gower, 'Reflections on Law Reform' (1973) 23 U Toronto LJ 257, 264-65; TB Smith, 'Law Reform in a Mixed Civil Law and Common Law Jurisdiction' (1974-75) 35 La L Rev 927, 946-48.
[34] GC Cheshire and CHS Fifoot, *The Law of Contracts* (Butterworth & Co 1945). Earlier works exist on specific contracts, see for example, PL Hollings, *The New Zealand Sale of Goods Act and Mercantile Law Act* (Abel, Dykes and Co 1929).

> New Zealand lawyers have been denied access for far too long to a comprehensive text-book on the New Zealand Law of Contract. They have been obliged to make use of books published in the United Kingdom containing few references to New Zealand and Commonwealth decisions… In a few instances, a book based on United Kingdom statutory provisions can mislead the New Zealand reader.[35]

Almost all the authorities cited were English. This was partly balanced by the fact that there were already more New Zealand statutes than English ones in the table of legislation: fifty-six as against thirty from the UK. In contrast the current, 2018 edition cites an enormous number of New Zealand cases and in the twelve pages table of statutes, UK legislation takes up less than a page.

The briefing notes provided to the Chairs of the various reform committees contained a clear statement of intent. It was the job of the committees it was explained:

a. To settle from time to time general programmes of law reform and allocate work to standing committees or suggest special bodies;
b. To review progress annually; and
c. To add items to the programme, to alter priorities, and generally to revise [the] programme to the extent that this is desirable or necessary.

The Chairs were also asked to 'refer tactfully to [the] desirability of pressing ahead with all due speed.'[36] The CCLRC had a full agenda from the beginning. The projects identified at the first meeting included misrepresentation, breach of contract, sale of goods, contractual mistake and illegal contracts.[37]

The traditional approach to contract reform in New Zealand until this point was to adopt English statutes. The Sale of Goods Act 1908 and the Frustrated Contracts Act 1944 followed this model.[38] Work on the Minors' Contracts Act 1969 and, after a much longer period, the Contractual Remedies Act 1979, was already underway when the CCLRC took over both projects. The 1966 arrangements were in keeping with the spirit of Hanan's remarks of the previous year. The direction that reform of the law of contract would take was evident from the start even though the CCLRC did no more than comment on the Bill of what became the Minors' Contracts Act 1969.[39] Two features of that Act would have echoes in later legislation. Under a heading, 'Act to be a code',

[35] JF Northey, *The Law of Contract by GC Cheshire and CHS Fifoot New Zealand Edition* (Butterworths 1961) v.
[36] Chairman's notes: Temporary 1966-69.
[37] 1st Meeting, Minutes 4 August 1966: Temporary 1966-69.
[38] They were based on the Sale of Goods Act 1893; Law Reform (Frustrated Contracts) Act 1943 respectively.
[39] 10th Meeting, Minutes, 8 Nov 1968: Minutes/Agendas 1966-69.

Section 15(1) states that: 'The provisions of this Act shall have effect in place of the rules of the common law and of equity'. The second notable feature of the legislation replicated elsewhere, was the way that it gave a court discretion in ordering relief.[40] The discretion given to judges is one of the most significant and most criticised features of the New Zealand reforms. The CCLRC may not have foreseen quite the extent to which judges would embrace discretion. Coote as one of the original members of the CCLRC, has suggested in relation to s 7 of the Illegal Contracts Act 1970, that 'the choice of relief and the criteria for its application have in practice turned out significantly different from what the reformers appear to have expected or intended.'[41]

ILLEGAL CONTRACTS

The modern common law on illegal contracts is highly unsatisfactory. In the debate on the Bill, Dr Finlay said that he hoped that the Act would bring an end to the high volume of litigation.[42] In the recent English Supreme Court decision, *Patel v Mirza*[43] Lord Toulson observed: 'The application of the doctrine of illegality to each of these different situations has caused a good deal of uncertainty, complexity and sometimes inconsistency'.[44] The majority on that occasion favoured a flexible approach which was informed by whether 'it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system'.[45] A range of factors were identified as relevant to this inquiry,[46] but Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed, stressed that this did not mean that a court would act in an 'undisciplined' fashion. He explained that, 'The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate'.[47] Lord Sumption with whom Lord Clark agreed was particularly critical of this approach which he called 'unprincipled and uncertain'.[48]

[40] Minors' Contracts Act 1969 s 5(2) and s 6(2).
[41] B Coote, 'Validation under the Illegal Contracts Act' (1992) 15 NZULR 80, 105.
[42] (18 Nov 1970) 370 NZPD 5112.
[43] [2016] 3 WLR 399. For various essays on the decision see: Sarah Green and Alan Bogg (eds), *Illegality after Patel v Mirza* (Hart 2018).
[44] Ibid [3].
[45] *Patel* (n 43) [120]. For support for this approach see, Andrew Burrows, 'Illegality after *Patel v Mirza*' (2017) 70 CLP 55-71.
[46] *Patel* (n 43) [120].
[47] *Patel* (n 43) [120].
[48] *Patel* (n 43) [261].

Lord Sumption mentioned the Illegal Contracts Act 1970 and observed that that it made 'the application of the illegality principle subject to a broad judicial discretion'.[49] The approach in New Zealand requires a court to exercise discretion in granting a remedy rather than when illegal behaviour is identified. Illegality rendered a contract 'of no effect'.[50] Yet as a result of s 7(1) a court may grant, 'such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the court in its discretion thinks just'. In the debate on the legislation the Acting Minister of Justice, David Thomson, noted that the court is 'necessarily left, with a fairly wide discretion' under the section though it might be more accurate to describe the discretion as 'very' rather than 'fairly' wide as was pointed out at the time.[51] The CCLRC recognised that this provision might be controversial[52] but pointed out that the discretion wasn't totally 'untrammelled'.[53] Section 7(3) lays down factors for a court to consider and notes that in deciding not to grant relief a court may have regard to the public interest.

Under the Act a contract might be validated even if it is illegal (typically because it fails to conform with a statute) when formed. The CCLRC explained that this provision was to cover relatively minor procedural illegality and building permits were given as an example.[54] The Act makes it possible for a court to vary or even validate a contract. Coote has pointed out that the CCLRC expected restitution would be the normal remedy in the face of an illegal contract and compensation would then be available when restitution was impossible.[55] Yet as Coote also concedes the main remedy in these decisions has been validation albeit often with a variation. In a series of decisions, contracts have been validated not merely for some procedural slip but where the contract concerned is in breach of substantive law.[56] This amounts to a radical change to the existing law. It gives a judge the power to rewrite a contract.

[49] *Patel* (n 43) [259].
[50] Illegal Contracts Act (1970) s 6. There were some exceptions, one of which reversed the common law position and allowed property to pass under an illegal contract in some circumstances notably where there is a bona fide purchaser for value without notice of the illegality.
[51] MP Furmston, 'The Illegal Contracts Act 1970 – An English View' (1972) 5 NZULR 151, 161.
[52] *Illegal Contracts Report of the Contracts and Commercial Law Reform Committee* (1969) 10
[53] Ibid. 11.
[54] Illegal Contracts (n 52) 3.
[55] Brain Coote, 'Validation under the Illegal Contracts Act' (1992) 15 NZULR 80, 88.
[56] These cases are discussed in detail by Coote ibid, 98-103. They include: *National Westminster Finance New Zealand Ltd v South Pacific Rent-a-Car Ltd* [1985] 1 NZLR 646 (CA); *Catley v Herbert* [1988] 1 NZLR 606 (CA).

In addition to its general provisions, s 8 of the Illegal Contracts Act 1970, provides for contracts in restraint of trade. Although the CCLRC report only covered this reform briefly it involved a significant change to the existing law. Historically most of the difficulties around restraint of trade have concerned whether a term is an unreasonable restraint of trade and therefore renders the contract void.[57] Under the Act a court is given discretion to amend or modify a contract with the proviso that if the change 'so alter the bargain between the parties that it would be unreasonable to allow the contract to stand' a court could 'decline to enforce the contract'.[58] A court might even rewrite the terms of a contract.[59]

Writing in the *Contract Statutes Review* more than twenty years later, Professor Coote argued that 'By and large …the Act seems to have worked well'.[60] Arguably, the main weakness of this legislation is that it is subject to the old common law rules in defining whether a contract is illegal or in restraint of trade.[61] Given much of the former is statutory and the latter is well settled these do not present major problems for the most part. As the first major piece of contract legislation produced by the CCLRC it set the tone for much of what would follow. It gave judges greater discretion, particularly to alter the terms of an agreement, than they had before and they have shown themselves to be willing to use it.

MISTAKEN CONTRACTS

The Illegal Contracts Act 1970 has caused few difficulties. The Contractual Mistakes Act 1977 remains much more controversial. It provides a good case study of the perils of codification. The changes largely had the support of the various District Law Societies[62] but the passage of the legislation through parliament was less smooth. The original Bill was subject to significant amendments by the Statute Law Reform Committee.[63]

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[57] For a discussion see: JD Heydon, *The Restraint of Trade Doctrine* (LexisNexis Butterworths 2018) 1-33.
[58] Illegal Contracts Act 1970, s 8(1)(c).
[59] For an example see: *Cooney v Welsh* [1993] 1 ERNZ 407 (CA).
[60] Brian Coote, 'The Illegal Contracts Act 1970' in *Law Commission Report 25, Contract Statutes Review* (Law Commission 1993) 173, 186. Support for this view can be found in, Andrew Beck, 'Illegality and the Courts' Discretion: The New Zealand Illegal Contracts Act in Action' (1989) 13 NZULR 389.
[61] Finn et al (n 16) 505, note that the legislation has broad application and that 'there will indeed be very few cases where there will not be some jurisdiction to grant relief'.
[62] Wellington District Law Society 29 Oct 1976; Nelson District Law Society 21 Sept 1976; Manawatu District Law Society 13 Oct 1976; Canterbury District Law Society, 26 Oct 1976; Auckland District Law Society 26 Nov 1976: Law Reform Contracts and Commercial Law Reform Committee Contractual Mistake, ANZ, ABVP W4927 LEG 21-5-19 (Contractual Mistake).
[63] (19 July 1977) 412 NZPD 1743-44.

Richard Prebble, an opposition Labour MP at the time, called the Bill 'reckless' and 'irresponsible'.[64] His main argument was that the legislation was unnecessary. Mistaken contracts were, he argued, largely a problem of the building industry and better solved by arbitration. He thought that the provisions were uncertain and ambiguous and would lead to litigation.[65] The subsequent history of the legislation shows him to have been right.

Contractual mistake has been a conceptual mess since the nineteenth century. Prior to the 1850s mistake was pleaded under the general issue as a way of showing that the parties had failed to reach agreement and a something for a jury to determine. The nineteenth century say the emasculation of juries and the emergence of a new legal doctrine built around ideas derived from Will Theory.[66] Mistake was one area of the law of contract where legal writers were particularly influential but their solution gave rise to a number of problems. The doctrine of mistake covers several distinct scenarios. The parties may have failed to agree because they had made a mutual mistake. In this instance the parties make different mistakes or at cross-purposes. The better analysis is that no contract is formed because the parties neither subjectively nor even objectively agree.[67] Contractual mistake also embraces unilateral mistakes. These occur where one party knows that the other is labouring under a mistake or where a rogue tricks someone into contracting with a false identity.[68] The final group of cases involve a common mistake. On the surface the parties objectively appear to agree but they have both agreed under a false premise. It was traditionally difficult to avoid contracts for common mistake because a fundamental mistake is required.[69] Other doctrines like non est factum and rectification operate around the edges of contractual mistake.

The situations brought under the umbrella of mistake sit uneasily as a single doctrine. The old law was unsatisfactory in other ways as well. Australian judges have sought to counter the narrowness of the doctrine of common mistake by developing equitable mistake.[70] The English Court of Appeal has refused to go down this

[64] (15 Nov 1977) 415 NZPD 4477-78.
[65] (8 Nov 1977) 415 NZPD 4287-88.
[66] For more detail on these developments see W Swain, *The Law of Contract 1670-1870* (Cambridge University Press 2015) 206-212 and C Macmillan, *Mistakes in Contract Law* (Hart Publishing 2010) 96-180.
[67] *Raffles v Wichelhaus* (1864) 2 H & C 906, 159 ER 375 (EXCH).
[68] A mistake at common law renders a contract void and is therefore more attractive when someone is deprived of property by mistake and which now sits with an innocent third party. Misrepresentation only renders a contract voidable.
[69] *Bell v Lever Bros Ltd* [1932] AC 161 (HL).
[70] For a critique of this case law see Warren Swain, 'Common Mistake in Equity: Some Unanswered Questions' (2015) 30 Aust Bar Rev 124-35.

route.[71] Lord Phillips was critical that the same facts could lead to different outcomes in law and in equity[72] and authority to the contrary was overruled.[73] In his influential report, Richard Sutton saw little merit in a parallel equitable doctrine of mistake either because he thought it made the law unclear.[74] The CCLRC agreed.[75] Equity arguably gives an untidy solution but it does at least render a contract voidable rather than void. The common law gives an all or nothing outcome. The contract is either enforceable or void for mistake. One or both of the parties to the supposed contract may be completely blameless. This outcome can cause difficulties for a third party who finds that they are without good title to property that they believed was theirs because under a void contract title does not pass. The CCLRC thought that it had found a better solution:

> [R]eform must achieve a great deal more than a redefinition of mistake. It must place the emphasis upon the remedies rather than the technical definition of mistake. Whether or not a particular mistake ought to result in relief being given must depend in large measure, as it does now, upon the judge's own sense of justice and caution.[76]

The report went on to explain that legislation would determine whether there was a mistake; would establish a wider range of remedies; and rather than the current fragmented doctrine would create 'a single body of law dealing with mistake'. The proposed range of remedies on offer was much broader than those on offer under the existing mistake doctrines in common law or equity.

Section 6 is the core of the legislation. The types of mistake described by s 6(a) largely correspond to the existing categories of unilateral, common and mutual mistake. Section 6(b) is an additional and novel requirement. It requires a court to look to the substance of the contract produced by the mistake to determine whether there is unequal value or disproportionate benefit or obligation between the parties. Finally the statute requires a contract to be silent on the attribution of risk in the case of a mistake. Importantly this makes the Act a dead letter in many commercial contracts because they will not be silent on the attribution of risk for mistakes. The circumstances in which a court in its discretion may grant relief and the types of relief available are laid down in s 7. As with the Illegal Contracts Act there is no longer an all of nothing outcome. A court can declare

[71] *Great Peace Shipping Ltd v Tsavliris (International) Ltd* [2003] QB 679 (CA).
[72] Ibid [157]-[161].
[73] Namely *Solle v Butcher* [1950] 1 KB 671 (CA).
[74] For some support for Equitable mistake in New Zealand prior to the Act see, *Waring v S J Brentnall Ltd* [1975] 2 NZLR 401, 409-410**.**
[75] Richard Sutton, A Reform Proposal [1.3.4], where he described the equitable doctrine as 'resting on insecure foundations': Contractual Mistake.
[76] *Report on the Effect of Mistakes on Contracts* (1976) 9-10.

the contract valid notwithstanding the mistake or vary it. The Act, in s 8, also deals with the protection of third parties.

David McLauchlan has described the Contractual Mistake Act as 'conceptually and philosophically bankrupt'.[77] There is enough material to fill a book, or at least a post-graduate dissertation on the problems created by the Act.[78] The problems of the legislation fall into three main categories. The first set of issues arise out of the legislative drafting. A second group of objections concerns the application of the legislation, which in turn relates to a third point about the status of the legislation and how it fits with the existing common law.

The Statute Revision Committee[79] removed a more detailed definition of mistake from the Bill. The Act stated in s 2(1) that 'mistake is a mistake of fact or law'. This wording does not actually define what a mistake is but does make clear that contractual mistake includes mistakes of law.[80] The brevity of s 2(1) has caused few problems with the exception of whether ignorance counts as a mistake.[81] A second definitional gap is more significant. In s 6(1)(a)(i) relief will only be granted for those 'material' unilateral mistakes of which the other party had 'knowledge'. Knowledge is a contested concept in private law.[82] The CCLRC made clear that they equated knowledge with actual knowledge[83] and therefore constructive knowledge (what the party ought to have known) should be insufficient to grant relief. The Court of Appeal has confirmed actual knowledge is required.[84] However, some judges have adopted a very broad definition of actual knowledge, which is very little different to constructive knowledge.[85]

[77] David McLauchlan 'Analysing Mistake' (1997) 3 NZBLQ 194, 194.
[78] Christian Koennecke, 'The Contractual Mistakes Act 1977 The Experience of a Partial Codification of Contract' Unpublished LLM Dissertation Victoria University Wellington 2005.
[79] The original Bill is contained in the appendix to the CCLRC Report.
[80] These were historically excluded: *Bilbie v Lumley* (1802) 2 East 469, 102 ER 448 (KB).
[81] Someone is ignorant when they do not consider a question as opposed to when they are mistaken in their deliberations. The case law is not entirely easy to reconcile: *New Zealand Refining Co v Attorney-General* (1993) 15 NZTC 10,038 (CA); *Slater Wilmhurst Ltd v Crown Group Custodian Ltd* [1990] 1 NZLR 344, 356-57 (HC).
[82] For example, liability for third parties in trusts law under the rule in *Barnes v Addy* (1874) LR 9 Ch App 244 (CA).
[83] *Mistakes* (n 76) [19].
[84] *Tri Star Customs and Forwarding Ltd v. Denning* (1999) 1 NZLR 33 (CA) and in doing so overturning the trial judge, see DF Dugdale, 'Constructive Notice of Unilateral Mistake' (1996) 2 NZBLQ 203.
[85] *King v Wilkinson* (1994) 2 NZ Conv Cas 191,828 (HC).

Conlon v Ozolins[86] is undoubtedly the most controversial decision under the Act. The Court of Appeal adopted a very expansionist view of the legislation. The defendant was an elderly widow with a poor command of English who agreed to sell to the plaintiff some plots of land adjoining her house. She consented to sell the 'land out back'. Her solicitor included plots 1-4 in the conveyance. On signing the contract the defendant discovered that her garden was included in the contract which was not her intention. She refused to convey the land. A majority of the Court of Appeal held that there was a mistake within 6(1)(a)(iii) – namely a different mistake about the same matter of fact or law and also met the condition that the mistake resulted in 'substantially unequal exchange of values'.[87] Woodhouse P thought that there was a mistake about the size of the land to be sold.[88] McMullin J found the mistake in the defendant believing that intending to selling lots 1 to 3 and the plaintiff in thinking that the defendant intended to sell lots 1-4.[89] Somers J dissented because he thought that there was no mistake within the wording of the statute.

It is difficult not to agree with Somers J's dissent. The mistake in *Conlon v Ozolins* can be analysed in two other ways. Both of these fall outside the statute. On one view there was a mistake of intention because one party intended one thing and one intended another. A mistake of this sort is not a 'different mistake about the same matter of fact or of law' as required by s 6(1)(a)(iii). Alternatively there was a unilateral mistake by the defendant about the land to be sold but this mistake was unknown to the other party and so fell outside s 6(1)(a)(i). A subsequent Court of Appeal in *Paulger v Butland Industries Ltd*[90] has distinguished *Conlon v Ozolins*. Hardie Boys J observed that *Conlon v Ozolins* is 'not an authority for invoking the Act where one party misunderstood the clearly expressed intention of the other, or where one party meant something different from the plain meaning of his own words'.[91] Two Court of Appeals interpret the legislation differently. There is as yet no Supreme Court decision which settles whether a wide or narrow interpretation of the legislation is appropriate.

[86] [1984] 1 NZLR 489 (CA).
[87] Under the legislation in order for the mistake to be operative it has to meet one of the conditions of s 6(1)(b) namely a mistake which creates a substantially unequal exchange of values or creates a benefit or obligation substantially disproportionate to the consideration given.
[88] *Conlon* (n 86) 498.
[89] *Conlon* (n 86) 505.
[90] [1989] 3 NZLR 549 (CA). See also *Chatfield v Jones* [1990] 3 NZLR 285, 288 (CA).
[91] Ibid, 554.

Conlon v Ozolins is a good example of judges not merely stretching the meaning of legislation but completely subverting it. The facts fall outside the Act whatever sympathy one might feel with the defendant. The decision also raises a more fundamental point about the post-Act status of the objective test and the rules of contract formation. The outcome is difficult to square with the traditional approach to contract formation as reflected in venerable authorities like *Smith v Hughes.*[92] *Conlon v Ozolins* looks like just the kind of case that would be best solved using the objective test of contract formation. This approach involves asking whether a reasonable person in the position of the plaintiff would believe that the sale included all four plots of land? As a written contract for the sale of land it is difficult to conclude, when put in these terms, that the answer can be anything other than there was a sale of all four plots from the perspective of an objective reasonable person. It would have been different if the plaintiff knew or ought to have known that the defendant could not have intended to sell all four plots.[93]

There is a tension at the heart of the legislation about what it means to say that the Act is a code. Section 5 states that the Act: 'shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted'. Dugdale, himself of course, a member of the CCLRC insisted that 'A Code is a Code'.[94] McLauchlan has consistently argued that in as far as the Act is a code it is only a code of relief.[95] As a result the existing common law principles unless they relate to relief should be unaffected. On this view the law of contract formation is untouched. This is hardly a trivial matter because it goes to the nature of contracts. Sutton conceded that *Raffles v Wichelhaus*[96] was technically a decision on contract formation but argued that it would be desirable if it were brought within the definition of mistake.[97] Reconciling the doctrines of mistake and formation in the legislation is far from easy. Formation is a question of intention and intention is not covered by 6(1)(a)(iii). In *Raffles v Wichelhaus*[98] one of the parties intended the contract to be performed by a ship called Peerless and the other intended performance by another Peerless. The objective test for contract formation provides no answer because on an objective view either party might have been right. As a result there was no contract. The decision only falls under the Act if it is a mutual mistake of fact relating to the identity of

[92] (1871) LR 6 QB 597 (QB).
[93] That is had the facts been like *Hartog v Colin & Shields* [1939] 3 All ER 566 (KB).
[94] (2002) 8 NZBLQ 129.
[95] DF Dugdale, 'A Code is a Code is a Code' (2002) 8 NZBLQ 129.
[96] *Raffles* (n 67).
[97] Sutton (n 75) [2.3.2].
[98] *Raffles* (n 67).

the ship which arguably blurs the boundary between fact and intention. The mistake in Raffles was one of intention the fact is merely what was intended.

One member of the CCLRC has argued that the Act was always intended to conform with the objective theory of contract.[99] This may be so but if the Act preserves the objective test it does so in name only. This is because *Conlon v Ozolins*[100] allowed the possibility of opening more contracts to challenge even when they satisfy the objective test of contract formation. Such an approach sits awkwardly with s 4(2) which states that relief ought not be granted which would, 'prejudice the general security of contractual relationships'. While the actual provisions on relief have given less trouble than might have been expected[101] the same cannot be said of the next statute.

MISREPRESENTATION AND BREACH OF CONTRACT

Of all of the contract reforms, the Contractual Remedies Act 1979 has had the biggest impact.[102] Despite its name the legislation was not in fact concerned with remedies in the usual sense of the term – meaning the rules surrounding the award of damages, specific performance etc. Rather as the explanatory note to the Bill made clear, the legislation was designed: 'to modify the law of contract by giving substantially the same remedies for misrepresentation inducing the making of a contract and for the repudiation or breach of a contract.'[103] The legislation took a long time to reach the statute book. A subcommittee to look into this question predated the formation of the CCLRC. This report was partly motivated by a report in 1962,[104] which led to legislation in England in 1967.[105] The main feature of the English legislation was the introduction of a new remedy of

[99] Brian Coote, 'The Contracts and Commercial Law Reform Committee and the Contract Statutes' (1988) 13 NZULR 160, 173-77. Coote also notes that Raffles is not properly viewed as a case of mistake.
[100] [1984] 1 NZLR 489.
[101] A Beck and R Sutton, 'Contractual Mistakes Act 1977' in Law Commission (n 60) [2.08], [2.82-96]
[102] For a detailed analysis of the legislation see: F Dawson and DW McLauchlan, *The Contractual Remedies Act 1979* (Sweet & Maxwell 1981).
[103] http://www.nzlii.org/nz/legis/hist_bill/crb19781041218.pdf
[104] *Law Committee Tenth Report* (1962) Cmnd 1782. For a discussion of the recommendations see, J Unger, 'Reform of the Law Relating to Innocent Misrepresentation' (1963) 26 MLR 292.
[105] Misrepresentation Act 1967. This legislation is heavily criticised by Professor Campbell in this volume. For an earlier critique see, PS Atiyah and GH Treitel, 'Misrepresentation Act 1967' (1967) 30 MLR 369.

damages for innocent misrepresentations not incorporated as terms of the contract and not fraudulent or negligent.[106]

A New Zealand report, *Misrepresentation and Breach of Contract*, appeared at the same time as the English Act.[107] This original report was reprinted in 1978 alongside a draft Bill and a further short report.[108] It was evident from the start that the New Zealand approach would be more ambitious than the English one yet there was a debate within the CCLRC about how far change ought to go:

> Some of us feel that what is needed is to escape altogether from traditional categories and rules that hinder the courts in determining the true bargain between contracting parties. Others consider that these rules and these distinctions do play a valid and useful role in the law and doubt the wisdom of dispensing with them.[109]

At the heart of the subcommittee report is the startling suggestion that there was no 'real distinction in principle' between representations and contractual terms[110] and that abolishing the parol evidence rule would eliminate the distinction.[111] Although the parol evidence rule survived, the line between representations and contract terms did become blurred (and was even arguably for practical purposes abolished), and this was reflected in the way that the legislation was structured.

As in many other areas that were reformed the existing law as it applied to misrepresentation was unsatisfactory. A patchwork of remedies for misrepresentation had grown up over centuries in both law and equity. The distinction between innocent misrepresentation giving a right to rescind and negligent or fraudulent misrepresentation giving a right to damages was swept away by the Act. Damages became the primary remedy for representations (including innocent misrepresentations)[112] and were assessed on a contract measure even when the basis of the claim was a misrepresentation.[113] The Act also permitted a contract to be cancelled for

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[106] Section 2(1) overlaps with common law negligence but with some important differences because of the idea of the fiction of fraud. Section 2(2) allows damages in lieu of rescission. For a discussion see: Edwin Peel, *Treitel The Law of Contract* (14th edn, Sweet & Maxwell 2015) [9-043-9-049], [9-059-9-063].
[107] *Misrepresentation and Breach of Contract Report of the Contracts and Commercial Law Reform Committee* (1967). Noting at para 1.1 the motivation for the report. (1st Report)
[108] *Misrepresentation and Breach of Contract Report of the Contracts and Commercial Law Reform Committee Incorporating Further Report Presented January 1978 and Draft Contractual Remedies Bill* (1978).
[109] 1st Report (n 107) [1.2].
[110] *Law Revision Committee Sub-Committee on Innocent Misrepresentation Interim Report* (1966) 3 (Temporary 1966-69).
[111] Ibid. 3.
[112] Set out in s 6 of the Act.
[113] The CCLRC were arguably too sanguine about this change - see the response to McLauchlan in 56th Meeting, Minutes, 27 April 1979 in *Contracts and Commercial Law Reform Committee Minutes and Agendas* 1979-1983, ANZ, ABVP W4927 LEG 21-5-2 (Minutes/Agendas 1979-83).

misrepresentation and for repudiation as well as breach.[114] It is more difficult to cancel a contract for a misrepresentation than to rescind one. This is because the consequences of the misrepresentation were now relevant when determining whether a contract could be cancelled. The provisions on cancellation for breach the Act largely codified the existing law and cemented the place of *Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[115] in New Zealand.

In *Altimarloch Joint Venture Ltd v Moorhouse*[116] Wild J observed that: 'what s 6 does not do is constitute the misrepresentation a term of the contract. The section is aimed at a remedy…and not the quality of the liability'.[117] Yet the Contractual Remedies Act 1977 is a radical reform. It almost abolishes the distinction between a representation and a term by treating the consequences of both in the same way through cancellation and by awarding damages on a contract measure.[118] This approach was not entirely out of line with other influential voices at the time. In *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd*[119] Lord Denning held that, '[I]f a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was a warranty'.[120] His judgment shows a willingness to treat representations as contract terms. Yet it is actually quite difficult to argue on principle that a contractual promise and a misrepresentation should receive the same treatment. One obvious difference is that a representation is actionable without consideration. It is not obvious why a gratuitous representation especially if it is innocent should generate a right to damages. The only limit on liability for representations other than those laid down by the Act is that it falls within the legal definition of an actionable misrepresentation.[121] The different judicial

[114] Set out in s 7 of the Act.
[115] [1962] 2 QB 26 (CA).
[116] CIV-2005-406-91, 23 March 2009 (HC) (unrept).
[117] Ibid. [32].
[118] The distinction is not abolished entirely because it is possible to breach a term without considering any issues of inducement whereas a representation has to have induced the contract. On the damages point see: *Crump v Wala* [1994] 2 NZLR 331 (HC). It has been said that assessment might be a speculative exercise: *Walsh v Kerr* [1989] 1 NZLR 490, 494 Cooke P (CA).
[119] [1965] 1 WLR 623.
[120] Ibid, 627.
[121] The old case law on this question still applies and so, for example, a statement of opinion is not actionable. In addition the limits on what counts as a misrepresentation, mean as Professor Campbell points out, that it is difficult to conceive of many instances of the situation in which there is a *wholly* innocent misrepresentation (one made without any fault).

attitudes towards imposing liability for wholly innocent half-truths[122] may reflect a deeper unease about awarding damages for misrepresentations where fault is absent.[123]

Three members of the original subcommittee, Cameron, Iles and Patterson, joined the CCLRC.[124] One of the driving forces behind the sub-committee report, Professor Allan, left New Zealand to become Dean at the University of Tasmania.[125] Yet despite this overlap in membership there was a clear difference of opinion between some of those involved in the CCLRC. Dugdale and Coote certainly had some reservations about the sub-committee report.[126] The final CCLRC report represented a compromise albeit one that retained the spirit of the sub-committee proposals.[127]

In common with some of the other reforms the Act gives judges discretion in granting relief following the cancellation of a contract. Damages are preserved by s 10. These are limited by the provisions in s 9 which also lays down additional remedies and which under s 9(2) include the award of compensation and orders for the recovery of benefits conferred under the contract. The powers to grant relief are fettered by s 9(4)(a)-(f), s 9(5), s 9(6). Given s 9(4)(f) allows a court to consider any matter it sees as proper it is evident that the factors set out in the Act are not over limiting. Just as some judges have applied the Contractual Mistakes Act in an expansive fashion so some judges have taken a broad view of this legislation.[128] In *Thomson v Rankin*[129] Cooke P said:

> It is a wide jurisdiction…in exercising the jurisdiction the court may inter alia have regard to the various heads of compensation often classified as restitution, reliance losses, or expectation losses. Further the relative responsibility of the parties is a matter which will fall for consideration in cases where some apportionment is just…All in all the legislature has in s 9 endowed the courts with a valuable instrument for achieving justice, of course, on declared and rational principles which need not be trammelled by common restrictions.

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[122] A half-truth involves a statement which is rendered untrue as a result of the representor remaining silent rather than a positive act on their part.
[123] Contrast, *Ladstone Holdings Ltd v Leonora Holdings Ltd* [2006] 1 NZLR 211 (HC) with *Clarkson v Whangamata Metal Supplies Ltd* (2003) HC Auckland CIV-2003-404-6869 (HC). I am grateful to Marcus Roberts for raising these authorities with me. For a discussion of the problems of half-truths and innocent misrepresentation which argues that the Act does cover such situations, see Rick Bigwood, 'The Full Truth about Half-Truths' [2006] NZLJ 114.
[124] Chairman's note for the first meeting, Temporary 1966-69.
[125] For his life see, Reginald Hiscock, 'David Allan 1928-2006' (2006) 18 Bond LR 1. For Allen's views see, David E Allan, 'The Scope of the Contract - Affirmations or Promises Made in the Course of Contract Negotiations' (1966) 2 U Tas L Rev 227.
[126] 3rd Meeting, Minutes, 20 Jan 1967, Minutes/Agendas 1966-69.
[127] 4th Meeting, Minutes, 5 May 1967, Minutes/Agendas 1966-69; 1st Report (n 106) [10.1-10.3].
[128] For example, *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173, 177 (CA).
[129] [1993] 1 NZLR 408, 410 (CA).

The legislation allows a judge to take into account the whole of the course of conduct of the parties when awarding damages.[130] A court is free to disregard the normal common law restrictions on damages in awarding compensation under s 9.[131] Some judges have used s 9 to fashion a new remedy rather than granting relief from the consequences of the normal remedies.[132] It will sometimes be more attractive for a party to seek compensation under s 9(2)(b) than damages under s 10 especially as an award under this section allows 'such sum as the court thinks just'. As one of the Commissioners has pointed out these are instances when judges have used the 'contract statutes for the purposes of what might be characterised as judicial reform by a sidewind'.[133]

A CONTRACT CODE FOR NEW ZELAND

The final major contract reform, the Contracts (Privity) Act 1982 allowed a non-party to enforce a contract for their benefit. It was similar to legislation in some Australian States[134] and predated reform in England and Wales.[135] The CCLRC pointed out that barring a non-party enforcing a contract made for their benefit amounted to a 'frustration of contractual intentions'.[136] The solution was to allow a contract to be enforceable when it conferred a benefit on a designated third party.[137] The legislation did not allow judges the kind of broad discretionary relief found in earlier legislation.[138] Difficulties with the application of the legislation are mainly confined to s 4 which identifies a third party beneficiary for the purposes of the Act.[139] The legacy of such a diverse body of legislation as a body of reform as whole is more difficult to assess but some themes do emerge.[140]

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[130] *Young v Hunt* [1984] 2 NZLR 80 (HC).
[131] *Gallagher v Young* [1981] 1 NZLR 734 (HC).
[132] *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68 (HC).
[133] Brian Coote, 'Remedy and Relief under the Contractual Remedies Act 1979 (NZ)' (1993) 6 JCL 141, 156.
[134] Reforms that pre-date the New Zealand legislation are: Property Law Act 1969 (WA) s 11(2); Property Law Act 1974 (Qld) s 55(1).
[135] Contracts (Rights of Third Parties) Act 1999.
[136] *Privity of Contract A Report by the Contract and Commercial Law Reform Committee* (1981) [6.2].
[137] Under s 4 of the Act.
[138] Although see s 7 of the Act which states that a third party may be entitled to compensation when the main contract is varied or discharged. This provision caused some debate amongst members of the committee for example see, Burrows to Patterson, 4 May 1981, *Colin Patterson Papers - relating to the Contracts and General Law Reform Committee*, ANZ, ADFI W5452 Box 1.
[139] S Todd, 'Contracts (Privity) Act 1982' in Law Commission (n 49) [5.12-5.26].
[140] For other assessments not otherwise cited see, JF Burrows, 'Contract Statutes: The New Zealand Experience' [1983] Statute L Rev 76; George Barton, 'The Effect of the Contract Statutes in New Zealand' (2000) 16 JCL 233; Rick Bigwood, 'The Partial Codification of Contract Law: Lessons from New Zealand' in Mary Keyes and Therese Wilson (eds), *Codifying Contract Law International and Consumer Law Perspectives* (Ashgate 2014) 165-203.

In 2012 the then Attorney-General published a discussion paper about codifying the law of contract in Australia.[141] These plans never came to fruition. One of the criticisms that could be made of the scheme was that it underestimated the difficulties of codification and overstated the benefits. The New Zealand contract statutes provide a useful case study in some of the difficulties created by large-scale legislative reform of contract law. This kind of bold statutory reform is extremely difficult. One of the hurdles is often political.[142] Time is often a factor in drawing up large-scale codes.[143] Cameron reported in 1970 that the Contractual Remedies Bill would go before Parliament in 1971.[144] In fact nearly fifteen years elapsed from the initial subcommittee report to the statute. Reform of the rights of third party beneficiaries, which was first discussed in 1972 took almost as long.[145] Some of the blame lays with the Government legislative programmes. The way that the CCLRC worked added to the delays. The fact that the committee members were part time and relied on reports from academics who were not members added to the delays.[146] There were some benefits in this system as well. The continuity of members was the obvious strength of these arrangements.

The CCLRC did not lack ambition. The Contractual Mistakes Act 1977[147] was explicitly termed a code. The Contractual Remedies Act 1979 states in relation to cancellation that the section, 'shall have effect in place of the rules of the common law and of equity'.[148] Patterson in a letter to Cameron in 1971, described the work of the CCLRC in these terms: 'their general brief to codify the law of contracts'.[149] Yet there is still some ambiguity around the relationship between the old law and the statutory new. The problem can be illustrated with reference to the rules relating to cancellation in the Contractual Remedies Act 1979.

[141] Warren Swain, 'Contract Codification in Australia: Is It Necessary, Desirable and Possible?' (2014) 36 Syd LR 131.
[142] For a very good example see, n 33 and Professor MacQueen's chapter in which he describes the events surrounding the uk contract code which he calls 'a study in failure'.
[143] Warren Swain, 'Codification of Contract Law: Some Lessons From History' (2012) 31 UQLJ 39, 49.
[144] 20th Meeting Minutes 27 Nov 1970, Minutes/Agendas 1969-73.
[145] 27th Meeting, Minutes 15 Dec 1972; 30th Meeting, 29 June 1973, Minutes/Agendas 1969-73.
[146] Some of the delay on reform of privity was caused by the time taken for JC Thomas who was commissioned to write a report on privity which was never produced: 30th Meeting, Minutes 29 June 1973, Minutes/Agendas 1969-73; 38th Meeting, Minutes 28 July 1975, *Contracts and Commercial Law Reform Committee Minutes and Agendas* 1979-1983, ANZ, ABVP W4927 LEG 21-5-2 (Minutes/Agendas 1974-78). Responsibility for a paper was eventually passed to Burrows, 39th Meeting, Minutes, 19 Sept 1975, Minutes/Agendas 1974-78.
[147] In s 5 of the Act.
[148] Section 7(1).
[149] Patterson to Cameron, 25th February 1971, General Correspondence.

The provisions on cancellation mirror the common law rule in *Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*[150] but they are not identical. Courts have proved reluctant to lay down guidance.[151] A less serious breach is probably required in order to allow a contract to be cancelled than was the case prior to the legislation.[152] Yet if the new rule was a break with the past then it was not perhaps an entirely decisive one. On some occasions the pre–Act law has been influential. In *Garratt v Ikeda*,[153] the Court of Appeal held, that when a right unconditionally accrued before cancellation then it was not discharged. Tipping J explained that, 'If Parliament had intended to change the common law in this important respect, a clear statement to that effect could have been expected in the legislation. There is no such statement'.[154] Tipping J was prepared to adopt a narrower view of the Act than the kind that appealed to someone like Cooke P. He stressed that the discretion under s 9 was limited in s 5 when the parties make provision under the contract. There will always be difficulties were legislation seeks to replace a long established body of common law. It is asking a lot to expect judges to forget a whole body of previous learning.[155] Nor is a statute the end of the law making process. Even the great Civilian Codes leave room for judicial innovation.[156]

In other respects the New Zealand contract legislation was a clear break with the past. This was most striking in the way that the legislation blurred the boundary between a misrepresentation and a contractual promise almost to breaking point. The provisions on discretionary relief are quite unlike anything elsewhere. These are the most controversial part of the entire scheme. Provisions of this sort invite judicial activism. The contract statutes perhaps foreshadowed the legal zeitgeist of the 1980s onwards. Some New Zealand judges have attempted to

[150] *Hong Kong Fir* (n 113).
[151] *Jolly v Palmer* [1985] 1 NZLR 658, 662 (HC).
[152] Dawson and McLauchlan (n 102) 98; *Oxborough v North Harbour Builders Ltd* [2002] 1 NZLR 145, 153 (CA), 'a little less onerous'.
[153] [2002] 1 NZLR 577 (CA).
[154] Ibid. 582.
[155] There are other examples of the continued relevance of the old law even despite a major statutory reform for example in the English Sale of Goods Act 1893: Paul Mitchell, 'The Development of Quality Obligations in Sale of Goods' (2001) 117 LQR 645, 663.
[156] Bernard Rudden, 'Courts and Codes in England, France and Soviet Russia' (1973-1974) 48 Tul L Rev 1010, 1025-1026.

reject formalist reasoning and at the same time to endow the New Zealand common law with a character of its own.[157] Fairness is one value that some judges have emphasised.[158]

The precise meaning of fairness and any role it and discretion more broadly should play in private law adjudication is surely contestable.[159] Writing about the work of the CCLRC Sir Kenneth Keith has said that:

> Depending on the subject-matter considered by the committee, the members could build up experience of recurring issues and develop ways of approaching them. This can be seen in the work of the CCLRC on the balance between rule and discretion in the law of contract, and the impact of the proposed changes on basic contract principle and security of contract, particularly in the commercial area.[160]

A cogent criticism of the contract legislation is that the CCLRC got the balance wrong and in doing so left the state of the law in uncertainty.[161] Section 9 of the Contractual Remedies Act 1977 is particularly vulnerable to criticism of this sort.[162]

Hanan would conclude his pamphlet on law reform by saying that, 'The revision of the law is an area of human activity where a small nation like New Zealand is under no handicap'.[163] Professor Coote has denied that the members of the CCLRC ever intended to bring about 'revolutionary' change.[164] Certainly most of the statutes build on ideas that were already present in the law. When set against the development of the no-fault Accident Compensation Scheme in New Zealand the changes in contract law were much less radical.[165] Yet at the same time it doesn't seem much of an exaggeration to say that the New Zealand contract statutes are a radical reform done quietly. Empowering courts to grant relief when it is just to do so is quite different from a traditional view

[157] John Smillie, 'Formalism, Fairness and Efficiency: Civil Adjudication in New Zealand' [1996] NZ L Rev 254.
[158] Sir Robin Cooke, 'Fairness' (1989) 19 VUWLR 421; E W Thomas, *The Judicial Process* (Cambridge University Press 2005) 272-81, 392-94.
[159] For a New Zealand perspective see John Smillie, 'Security of contract and the purpose of contract law' (2000) 6 NZBLQ 104-113.
[160] Keith (n 3) 353, 360.
[161] For an acknowledgement of this criticism by a Commissioner see, Brian Coote, 'Security of Contract and the New Zealand Contract Statutes' (2000) 6 NZBLQ 114.
[162] DW McLauchlan, 'Contract and Commercial Law Reform in New Zealand' (1984) 11 NZULR 37, 45-46.
[163] Hanan (n 6) 29.
[164] Coote (n 98) 188.
[165] In its latest form in the Accident Compensation Act 2001.

of contract in which a court will give effect to the intentions of the parties.[166] The reforms broke down the boundary between representations and contractual terms. In place the division between contractual rights and remedies was also muddied. The way that relief was set up allowed a court to in affect rewrite a contract. Yet at the same time in other respects, the intentions of the parties remained paramount as in s 5 of the Contractual Remedies Act 1979.[167] The law of mistake, illegality and third party rights were put on new footings. This might not be quite amount to death of traditional contract law in New Zealand[168] but it equally it amounts to rather more than incremental reform.

[166] For a criticism along these lines, see Francis Dawson, 'The New Zealand Contract Statutes' [1985] LMCLQ 42, 43.
[167] And in a more limited fashion under s 6(1)(c) of the Contractual Mistakes Act 1977.
[168] In substance, this is the claim in GP Barton, 'Whither Contract?' [1981] NZLJ 369.