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1 The Objective Sense of the Promise

1.1 Agreement

In order for a valid contract to be formed, there must be an agreement between the parties (offer and acceptance), consideration, an intention to create legal relations, and the parties must have the capacity to contract. It is essential to the creation of a contract that both parties should agree to the same thing in the same sense (*Smith v Hughes* (1871) LR 6 QB 597 per HannenJ).

One pattern in answering questions

For a valid contract to be formed, there must be an offer, acceptance of it, (intention to create legal relations) and consideration. On the facts, a valid contract is formed between A and B when ...

1.2 Objective principle

A person’s words or conduct must be interpreted in the manner in which a reasonable person (in the other party’s position) would objectively understand them (*Denny v Hancock* (1870) LR 6 Ch App 1). To create a contract by exchanging promises between two parties, what is necessary is that the intention of each as it has been communicated to and understood by the other should coincide (*Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal (The Hannah Blumenthal)* [1983] 1 All ER 34 per Lord Diplock).1

In reality, there are three perspectives from which the objective principle is applied: from the promisor’s perspective; from the promisee’s perspective; and from the third party’s perspective. For example, in *Wilmott v Johnson* [2003] 1 NZLR 649, it was stated that the conduct of the parties should be viewed objectively as it would be by an independent third party observer. *Upton-on-Severn Rural District Council v Powell* [1942] 1 All ER 220 can also be seen as having adopted this approach.

1.3 Mistake

1.3.1 Unilateral mistake and mutual mistake

(a) Unilateral mistake

Mistake and two theories

According to the subjective theory, in cases of unilateral mistake there is no binding contract either at common law or in equity; in deciding whether the contract is void ab initio for the unilateral mistake, regard will be had to the doctrine of estoppel in order to determine whether effect should be given to the claim that there has been unilateral mistake; on the other hand, according to the objective theory, there is a contract which continues to be binding, unless and until it is avoided in accordance with equitable principles which transform a valid contract into a voidable one; according to the subjective theory, the contract is void ab initio, whereas according to the objective theory, it is voidable only (*Taylor*).

(b) Mistake and the objective theory

The terms of a contract are determined objectively. So, where a purchaser is mistaken due to his own lack of reasonable care, and not through the vendor’s fault, the contract is not invalidated (*Tamplin*). However, there is no contract where a purchaser agrees to purchase property based on a mistake caused by the misrepresentation of the property on the part of the vendor and the mistake alone may have been sufficient to mislead him on reasonable grounds about the property (*Denny*).

1 This is a very strong endorsement of the idea underlying *Smith v Hughes* (1871) LR 6 QB 597 (especially Blackburn J’s objective approach).
According to the objective theory, once a contract has been made, (ie, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter), then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground: neither party can rely on his own mistake to say it was a nullity from the beginning, even if it was a mistake which to his mind was fundamental, and even though the other party knew that he was under a mistake: in the absence of fraud or misrepresentation, resort must be had to equity to escape from the terms of the contract on the ground of unilateral mistake (Solie v Butcher [1950] 1 KB 671 per Denning LJ: Taylor).

If you have entered into a written contract under a serious mistake about its contents in relation to a fundamental term, you cannot rely on your own mistake to say it was void from the beginning; however, at least where the counterparty has not materially altered his position and the rights of strangers have not intervened, you will be entitled in equity to an order rescinding the contract, if the other party is aware that circumstances exist which indicate that you are entering into the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that you do not become aware of the existence of your mistake or misapprehension (Taylor).

(2) Mutual mistake

Mutual mistake occurs where, in forming an agreement, the contracting parties are talking at cross-purposes. No agreement is reached because there is no meeting of the minds (no consensus ad idem). Mutual mistake will render a contract void only where the mistake is fundamental, such as a mistake as to the subject matter of the contract (Raffles). If the mutual mistake is merely about a secondary characteristic, the mistake will not be serious enough to negate consent and the contract will have been formed (Smith).

Even if both parties are mistaken about the terms of the offer, as long as the parties’ minds objectively met, a valid contract is formed, the terms of which are objectively to be determined (Powell).

Tamplin v James (1880) 15 Ch D 215

Facts: A man signed a contract to purchase property in the belief that the property included an adjoining field which he knew had always been used by the vendors. The sale particulars, however, clearly excluded the field. The vendors brought an action for specific performance.

Issue: Can a unilateral mistake be a defence?

Held: The purchaser was bound by the contract and could not resist specific performance on the ground of mistake.

Ratio: Where a purchaser is mistaken due to his own lack of reasonable care, and not through the vendor’s fault, the contract is not invalidated. (A party’s failure to correctly check the specifics of the terms of a contract will not vitiate that contract.)

Denny v Hancock (1870) LR 6 Ch App 1

Facts: An intending purchaser of certain land went to see the property with a sketch plan prepared by the vendor’s agent. The plan showed the property as purporting to contain three elm trees. Going to the property, he reasonably believed that an iron fence constituted the western boundary, which turned out not to be the case. The vendor brought an action for specific performance.

Issue: How should the object of a given agreement be determined?

Held: Promises should be interpreted in the manner in which a reasonable person (in the other

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2 This principle is arguably restricted to those cases in which a plea of non est factum cannot be relied on; ie, those cases where the actual written contract is not radically different from the contract purported to be entered into.
party’s position) would objectively understand them. The purchaser inspecting the property with the plan in his hand would naturally conclude that the iron fence was the boundary. The promise was objectively different from what he thought it was. Specific performance could not be decreed against him as he was misled by a mistake of the vendor.

**Ratio:** There is no contract where a purchaser agrees to purchase property based on a mistake caused by the misrepresentation of the property on the part of the vendor and the mistake alone may have been sufficient to mislead him on reasonable grounds about the property.

**Raffles v Wichelhaus (1864) 159 ER 375**

**Facts:** An agreement was made to buy a cargo of cotton, on a ship named “Peerless” sailing from Bombay to England. There were actually two ships of the same name. Both were loaded with cotton sailing from Bombay, one in October, and the other in December. The buyer meant the former; the seller, the latter. When the seller offered a cargo of cotton carried on the “Peerless” which had left Bombay in December, the buyer refused to accept the cotton or pay for it. The seller brought an action against the buyer to recover the price.

**Issue:** Has a contract been formed when the parties were talking at cross-purposes?

**Held:** Parol evidence from the defendant buyer may be admitted because of the ambiguity of the agreement. On the facts, no agreement had been reached because the terms were too ambiguous and it was impossible to identify which ship the contract referred to.

* The buyer’s mistake was an excuse because, objectively, there was ambiguity as to which “Peerless” shipment was being contracted for. A reasonable observer could not say which ex “Peerless” applied and the contract was too uncertain to be valid.

* Although reference is made to the subjective approach to the formation of a contract, the facts of the case can be used to illustrate an objective approach. Having allowed the introduction of evidence of each party’s intention, it would be for the jury to decide which party’s interpretation was the more reasonable. If this could not be resolved because of the agreement being totally ambiguous, the mistake would prevent the formation of a contract.

**Smith v Hughes (1871) LR 6 QB 597**

**Facts:** A farmer bought some good oats after examining a sample. On delivery he found they were good new oats rather than good old ones which he assumed he would buy, though the word “old” had not been mentioned by the either party. The purchaser refused to receive them. The vendor brought an action against the purchaser claiming the price and damages.

**Issue:** (1) Has a contract been formed when the parties were talking at cross-purposes? (2) (Even if a contract has been formed) will acquiescence on the part of the seller entitle the purchaser to avoid the contract?

**Held:** (1) Agreement had been reached because the subject matter had been identified as “good oats”. Whether the oats were new or old was just a secondary characteristic, and the age of the oats did not form part of the subject matter of the contract. Mistake or ambiguity about a secondary characteristic (the age of oats) did not affect the formation of the agreement (per Cookburn CJ).

If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party on that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.⁴

On the sale of a specific article, unless there be a warranty making it part of the bargain that it possesses some particular quality, the purchaser must take the article he has bought even though it does not possess that quality (per Blackburn J).

(2) Where a specific article is offered for sale without warranty and the buyer has full opportunity of inspecting and forming his own judgement, if he chooses to act on his judgement, he should do so at his own risk. The vendor was under no duty to the purchaser to inform of his possible mistake about the nature of the oats. His passive acquiescence, in the absence of anything from the purchaser which intimated his understanding that the seller was selling old oats, did not entitle the purchaser

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⁴ This idea is said to be the classic exposition of the objective approach.
to avoid the contract (per Cookburn CJ).

Even if the vendor is aware that the purchaser thinks that the article possesses the certain quality, and would not have entered into the contract unless he thinks so, the purchaser is still bound, unless the vendor is guilty of some fraud or deceit on him; a mere abstinence from disabusing the purchaser of that impression is not fraud or deceit (per Blackburn J).

* It could be argued that the age of oats was more than of secondary importance considering their value, which differs between new oats and old ones. Besides, if the objective standard were to be applied in a narrower way, it could be said that a reasonable person “in the same line of business as the purchaser” would think that good oats would mean old good oats.

* The decision was made on the assumption that (1) the buyer said nothing about old oats; (2) the seller said nothing about old oats; (3) the buyer believed that the oats were old; and (4) the seller was aware that the buyer believed so. The result would have been different if (1) there was an implied warranty (eg, where the buyer had ordered the goods for a specific purpose); (2) the seller had acted fraudulently; or (3) the seller was under a duty to reveal facts to the buyer.

* The court does not take an entirely subjective approach to the question of formation of contract, because it ignored the buyer’s mistake as to the quality of the oats.

* This case is generally said to be one of caveat emptor; ie, in cases of a contract for sale, the starting point at common law is caveat emptor and the risk is on the buyer; the buyer buys the subject-matter of a contract at his own risk and therefore should examine and test it himself for obvious defects and imperfections, etc (Chandler v Lopus (1603) 79 ER 3).

* See ss 6, 7 of Contractual Mistake Act 1977.

**Upton-on-Severn Rural District Council v Powell [1942] 1 All ER 220**

**Facts:** A farmer, noticing a barn was on fire, called the local Upton police chief and asked for “the fire brigade” (which meant the Upton brigade) to be sent. The Upton fire brigade showed up and began to put out the fire. While the fire was still burning, a neighboring fire chief came and informed that the farm was really in his district, and so the Upton fire brigade was not under obligation to put it out for free. The farmer, hearing about this, refused to pay for the service. The Upton fire sought to enforce the implied contract for the cost of putting out the fire.

**Issue:** Is one liable in contract for services requested in the belief that the services were gratuitous even though they could have been received without charge from another party?

**Held:** A contractual duty to pay arises when one request services from a party in the erroneous belief that the service were free, even though the party was entitled to such services without charge from another party. What the farmer wanted was the Upton fire brigade to come to extinguish the fire, and they did so. To have them do so would, in objective terms, incur charges. The fact is irrelevant that the farmer was mistaken about whether the service would require charge.

**考え方:** The objective terms of the offer were that the farmer would pay a reasonable sum if the Upton fire brigade came to extinguish the fire.

Subjectively, both parties did not know that the farmer would need to pay a reasonable sum for their services. But the terms of the offer must be understood in the way that a reasonable person in the other party’s position would have understood them (Denny).

In this case, it can be said that a reasonable person in the position of the Upton fire brigade would have understood that the farmer would pay a reasonable sum for the services because the farm was objectively out of their district.

For this reason, even though the result would go against both parties’ expectation held when the contract was formed, the farmer was held liable in contract for the services he received.

* In this decision, the detached objectivity test was adopted, which takes a viewpoint independent of that of either party.

* Contractual arrangements are enforced because (1) they create legitimate expectations in both parties that their undertakings will be carried out; (2) it is quite common for a party to a contract to incur further expenditure on reliance on the promise made; and (3) if one party actually does perform his side of the bargain, it would be unconscionable to allow the other party to avoid paying the price. This decision is contrary to the reason (1).

**Taylor v Johnson (1983) 151 CLR 422**

**Facts:** The owner of ten acres of land (J) granted an option in writing to T or his nominee to purchase the land for $15,000. The option was exercised by T, and T’s nominees (Ts) entered into a contract with J to purchase the land for $15,000. J later declined to perform the contract on the ground that she had mistakenly believed that when she signed the option and the contract, the price was $15,000.
Evidence showed that the value of the subject land was in the vicinity of $50,000, and that its value would have increased to around $195,000 if a proposed rezoning of the land became effective. The trial judge found that J had mistakenly believed when she signed the option and the contract that the price was $15,000 per acre, but that T was unaware of the mistake, and he ordered specific performance.

The Court of Appeal substituted its findings as to the knowledge, state of mind and motivation of the purchaser for those of the trial judge, and it upheld the appeal.

**Issue:** Was the contract void?

**Held:** A general inference which flows from the evidence is that T and J each believed that the other was acting under a mistake or misapprehension, either as to price or value, in agreeing to a sale at the purchase price which he or she believed the other had accepted. The evidence leads to an inference that T deliberately set out to ensure that J was not disabused of the mistake or misapprehension under which he believed her to be acting.

The judgments of Blackburn and Hannen JJ in *Smith* provide support for the proposition that a contract is void if one party to the contract enters into it under a serious mistake as to the content or existence of a fundamental term and the other party has knowledge of that mistake. That approach accorded with what has been called the “subjective theory” of the nature of the assent necessary to constitute a valid contract.

The “subjective theory” is that the true consent of the parties is essential to a valid contract. The contrary view, namely that described as the “objective theory”, is that the law is concerned, not with the real intentions of the parties, but with the outward manifestations of those intentions. In practice, as between the contracting parties, there is little difference in the result of the application of the two competing theories since allied with any assertion of the “subjective theory” is acceptance of one manifestation of the doctrine of estoppel which would ordinarily operate to preclude one who had so conducted himself that a reasonable man would believe that he was assenting to the terms of a proposed contract, from leading evidence as to what his real intentions were.

As a matter of legal technique, however, there is a significant difference between the two theories. According to the subjective theory, in cases of unilateral mistake there is no binding contract either at common law or in equity, equity following the common law in this respect. Of course, in deciding whether the contract is void ab initio for the unilateral mistake, regard will be had to the doctrine of estoppel in order to determine whether effect should be given to the claim that there has been unilateral mistake. On the other hand, according to the objective theory, there is a contract which, in conformity with the common law, continues to be binding, unless and until it is avoided in accordance with equitable principles which take as their foundation a contract valid at common law but transform it so that it becomes voidable. The important distinction between the two approaches is that, according to the subjective theory, the contract is void ab initio, whereas according to the objective theory, it is voidable only.

The clear trend in decided cases and academic writings has been to leave the objective theory in command of the field. Once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground; neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake; in the absence of fraud or misrepresentation, resort must be had to equity to escape from the terms of the contract on the ground of unilateral mistake (*Solle* per Denning LJ).

In cases, such as the present, where the mistake is as to the existence or content of an actual term in a formal written contract, neither party can rely on his own mistake to say it was a nullity from the beginning, even if it was a mistake which to his mind was fundamental, and even if the other party knew that he was under a mistake. It is therefore necessary to consider the scope of the basis on
which relief in equity is available from the contractual consequences of unilateral mistake. If you have entered into a written contract under a serious mistake about its contents in relation to a fundamental term, you will be entitled in equity to an order rescinding the contract, if the other party is aware that circumstances exist which indicate that you are entering into the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that you do not become aware of the existence of your mistake or misapprehension.

This is a principle which is best calculated to do justice between the parties to a contract in the situation which it contemplates. Our comment can, for present purposes, be limited in its application to the case where the counterparty has not materially altered his position and the rights of strangers have not intervened.

In the present case, at the time J signed both option and contract, she mistakenly believed that the relevant document stipulated that the purchase price was $15,000 per acre whereas the stipulated purchase price was $15,000 in total. The stipulation as to price was plainly a fundamental term of the contract. The proper inference to be drawn from the evidence is that, both at the time when J executed the option and at the time when she executed the contract, T believed that she was under some serious mistake or misapprehension about either the terms (the price) or the subject matter (its value) of the relevant transaction. He deliberately set out to ensure that J did not become aware that she was being induced to grant the option and, subsequently, to enter into the contract by some material mistake or misapprehension as to its terms or subject matter. The appeal must fail (per Mason ACJ, Murphy and Deane JJ).

The finding of the trial judge should be accepted that T’s belief at the time the option agreement was signed and at the time the contracts were exchanged was that it was the intention of J to sell the two lots in question for the full price of $15,000.

J having intended to sell the land for $15,000 per acre, as the trial judge also found, the case was one of mutual mistake in the sense that each of the parties to the bargain mistook the intention of the other. That did not prevent the formation of a contract. The option and the sale being in writing, there was sufficient evidence of agreement.

Moreover, in the case of a written agreement, the parties are bound by the words which they have used, and, if there is a dispute, whatever interpretation may ultimately be given to them by a court notwithstanding any belief the parties may themselves have held as to their meaning. Equity will not intervene to enable rescission of a contract involving a mistaken intention by one party unknown to the other except in circumstances involving unconscionable dealing by that other. Mistake is not of itself a ground for the rescission of a contract.

Fraud, misrepresentation or, perhaps, sharp practice falling short of actual fraud will suffice as a basis for rescission in the eyes of equity but, given the finding of the trial judge in this case, there is nothing in T’s conduct on which such relief could be supported.

If a party seeking to rely on a mistake has so conducted himself that it is a reasonable conclusion that he has bound himself contractually in a particular manner, he is estopped from showing that his intention was otherwise. In this case, assuming that T believed, at the time the option agreement was signed and the parts of the contract of sale were exchanged, that J intended to sell the land for $15,000, there was no fraud, no misrepresentation and no sharp practice on his part. The only reasonable conclusion to be drawn from J’s signature of the option agreement, which was unambiguously expressed and which she apparently read, was, as the trial judge found, that she intended to be bound by its terms and by the terms of the contract of sale which she subsequently signed. The appeal should be allowed (per Dawson J).

All the judges considered that a contract had been formed. The majority, applying general equitable principles, held that the contract was voidable in equity for unilateral mistake and not void ab initio at common law.

*This case supports the detached objective theory which emphasises that intention is the product of manifested words and acts.

1.3.2 The plea of non est factum (“this is not my deed”)

The general principle is that a person will be bound by a written document which he has signed,
whether or not he has read or understood it (L’Estrange v F Graucob Ltd [1934] 2 KB 394).\(^4\)

Where it is not possible to rely on misrepresentation or mistake, the plea of non est factum may be a last resort. A successful plea renders the contract void so that a third party cannot acquire a good title under it. However, as innocent parties may have relied to their detriment on this signature as being binding, the plea has been narrowly construed.

**1. The early law**

Since at least 1580 the common law has allowed a party in certain circumstances to say, “Subjectively, I never intended to execute this agreement; I never intended to undertake this obligation.” This is the common law doctrine of non est factum.

In *Thoroughgood v Coke* (1582) 76 ER 408, where the plaintiff, who could not read, was deceived into signing a deed without understanding its contents, was successful in relying on this doctrine. In that case, the plaintiff was induced by deception to transfer his land, which was subsequently transferred to a third party. Since the third party acquired rights in relation to the land, the plaintiff could not set the contract aside for fraud by saying it was voidable. The plaintiff was unable to understand the document because he could not read. He signed the document substantially different from the one which he thought was put in front of him. He was not careless in his understanding because he was deceived. Because the deed was obtained by deception and it was reasonable for the plaintiff to have it read out to him, he was allowed to say, “This agreement was never my deed; therefore, the contract was void.”

The plaintiff having objectively manifested his consent to the transaction by signing the deed and delivering it, his mistake which was induced by deception vitiated his consent. The court applied the doctrine of non est factum and declared that the contract was void. This case supports a subjective view of the law of contract.

**2. The current law**

A plea of non est factum is available only if (1) the transaction which the document purports to effect is essentially/fundamentally/radically different in substance or in kind from the transaction intended although (2) the person who signed it took care what he signed; a plea of non est factum is not relied on if you were careless when signing the document or the actual transaction is not fundamentally different from the imagined transaction (*Saunders: Landzeal*). The requirement of non-carelessness (2) is likely to apply only against innocent parties, so that where the mistake is due to the conduct of the other party it will not be necessary for the defendant to prove this element (*Petelin v Cullen* (1975) 132 CLR 355). In *Landzeal*, distinction was drawn between contractual parties on the one hand, and between the person who signed the document and innocent third parties on the other; however, it seems that the requirement of non-carelessness was maintained.

**a. The underlying theory**

The doctrine of non est factum inevitably involves applying the subjective rather than the objective test to ascertain the intention. It takes the intention which a man has in his own mind rather than the intention which he manifests to others (the intention which as reasonable men they would infer from his words and conduct) (*Saunders* per Lord Pearson).

If a blind man, or a manual who cannot read, or who for some reason (not implying negligence) forbears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, at least if there be no negligence, the signature so obtained is of no force, and it is invalid not merely on

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\(^4\) See 8.3.3.
the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (Foster v Mackinnon (1869) LR 4 CP 704).

**Saunders v Anglia Building Society (sub nom Gallie v Lee) [1971] AC 1004**

**Facts:** G, an elderly widow of 78, had a leasehold interest in a house. She knew her nephew wished to raise money on the house and that L, his business associate, was to assist him in obtaining this. G wanted to be sure that she could live in the house for the rest of her life. L asked her to sign a document, but she had broken her glasses and could not read it. She asked what the document was and signed it when L told her that it was a deed of gift of the house to her nephew. In fact, it was an assignment of the house to L for £3,000. L mortgaged the house for £2,000 to the building society (the innocent third party). When L defaulted on the mortgage installments, the building society sought possession of the house. G pleaded non est factum and asked for a declaration against the building society that the assignment was void.

**Issue:** Can G rely on non est factum?

**History:** Lord Denning in the Court of Appeal (Gallie v Lee [1969] 1 All ER 1062) held as follows:

The case raises the important question: What is the effect in law when a man signs a deed, or a contract, or other legal document without reading it; and afterwards it turns out to be an entirely different transaction from what he thought it was? He says that he was induced to sign the document by the fraud of another, or, at any rate, that he was under a fundamental mistake about it. So he comes to the court and claims that he is not bound by it.

In such a case, the legal effect is one of two: either the deed is not his deed at all (non est factum); or it is his deed, but it was induced by fraud or mistake (fraud or mistake). There is a great difference between the two. If the deed was not his deed at all (non est factum), he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. On the other hand, if the deed was his deed, but his signature was obtained from him by fraud or under the influence of mistake (fraud or mistake), the document is not a nullity at all. It is not void ab initio it is only voidable: and in order to avoid it, the person who signed the document must avoid it before innocent persons have acquired title under it. If a person pays out money or lends money on the faith of it, not knowing of the fraud or mistake, he can rely on the document and enforce it against the maker. It avails the maker nothing, as against him, to say it was induced by fraud or mistake.

Whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature (ie, a document which, it is apparent on the face of it, is intended to have legal consequences), if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it he has represented, to all those into whose hands it may come, that it is his document, and once they act upon it as being his document, he cannot go back on it and say it was a nullity from the beginning. If his signature was obtained by fraud, or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point, but not when it has come into the hands of one who has in all innocence advanced money on the faith of it being his document or otherwise has relied on it as being his document.

In the present case, G cannot say that the deed of assignment was not her deed. She signed it without reading it, relying on the assurance of L that it was a deed of gift to her nephew. It turned out to be a deed of assignment to L. But it was obviously a legal document. She signed it, and the building society advanced money on the faith of it being her document. She cannot now be allowed to disavow her signature.

**Held:** A document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, that is, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions,
or adjectives, could be used such as “basically”, “radically” or “fundamentally”. In substance, the test does not differ from that which was applied in the leading cases of *Thoroughgood* and *Foster*, except in moving from the character/contents distinction to an area in better understood modern practice.

To this general test, it is necessary to add certain amplifications. First, there is the case of fraud; ie, where a signature obtained by fraud is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signers did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (*Foster*). In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable.

Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect.

Thirdly, there is the case where the signer has been careless in not taking ordinary precautions against being deceived.

The correct rule is that, leaving aside negotiable instruments to which special rules may apply, a person who signs a document, and parts with it so that it may come into other hands, has a responsibility, that of the normal man of prudence, to take care what he signs, which, if neglected, prevents him from denying his liability under the document according to its tenor. The onus of proof in this matter rests on him (ie, to prove that he acted carefully), and not on the third party to prove the contrary.

The preceding paragraphs contemplate persons who are adult and literate. As to persons who are illiterate, or blind, or lacking in understanding, the law is in a dilemma. On the one hand, the law is traditionally, and rightly, ready to relieve them against hardship and imposition. On the other hand, regard has to be paid to the position of innocent third parties who cannot be expected, and often would have no means, to know the condition or status of the signer.

The law ought to give relief if satisfied that consent was truly lacking but will require of signers even in this class that they act responsibly and carefully according to their circumstances in putting their signature to legal documents.

In the present case, G was a lady of advanced age, but by no means incapable physically or mentally. She fell short, very far short, of making the clear and satisfactory case which is required of those who seek to have a legal act declared void and of establishing a sufficient discrepancy between her intentions and her act (per Lord Wilberforce).

*Lord Denning in the Court of Appeal considered that the only scope for non est factum should be to protect a very small sector of the community; namely, those who cannot read or are disabled. The House of Lords broadly agreed with Lord Denning, but it advanced a slightly wilder view.*

*The House of Lords held that the document was not fundamentally different than G thought because she knew that her nephew and L were jointly interested in raising money on the house. Against that background, a transfer to L rather than to her nephew was not fundamentally different. Anyway, both the actual transaction and the imagined transaction were transfers that divested herself of her interest in the house.*

*It was pointed out by Lord Pearson that the doctrine of non est factum inevitably involves applying the subjective rather than the objective test to ascertain the intention. It takes the intention which a man has in his own mind rather than the intention which he manifestes to others (the intention which as reasonable men they would infer from his words and conduct).*

**Landzeal Group Ltd v Kyne [1990] 3 NZLR 574**

**Facts:** LG carried out decorative work on motor cars through independent contractors. K approached LG’s manager, D, in October 1988 and following an interview, was given a contract form to take away, read and consider. At the next meeting, K drew attention to some omissions and inconsistencies in the document. D produced another document, which was substantially similar in its contents but contained a restraint of trade clause (cl 21) on a separate page which had not been included in the first document. The restraint was limited to the Wellington region and for a period of one year. K signed that contract.
without reading it. K did not discover until some months later that the contract contained the restraint of trade clause and said that he would not have signed the contract had he known that it contained that clause. In September 1989, K advised D that he intended to start a business on his own account, and after some altercation D terminated K’s contract. LG issued proceedings against K, seeking injunctions in reliance on the restraint of trade clauses in the contracts. K’s principal defence was that there was no contract, relying on the plea of non est factum.

**Issue:** Can K rely on the plea of non est factum? Is an employment contract containing a restraint of trade clause radically different from an employment contract which does not contain such a clause?

**Held:** As far as non est factum is concerned K says he was not aware that the contract contained cl 21 and believed he was signing a contract substantially similar to that which he had been given to peruse at home. He says that the contract was radically different to the contract he believed he was signing and into which he intended to enter and he would not have entered into it had he been aware of its true characteristics.

As appears from the discussion in Saunders, those aspects of the plea of non est factum which have attracted most attention are the similarity or otherwise of the nature of the documents and the care or lack of it evinced by the person wishing to rely on the plea.

In the present case, these were contracts of a similar scope and nature. Putting aside certain minor differences between the respective first pages, the significant difference is the inclusion or absence of the restraint of trade clause. Before the decision in Saunders, it had generally been accepted that it was necessary for the document which had actually been signed to be different in character/nature from the document which the signatory believed him or herself to be signing as distinct from a difference in content. This distinction was not accepted as a necessary distinction in Saunders.

The question then becomes whether a contract of employment which contains a restraint of trade clause radically different from a contract which does not?

The nature of a restraint of trade clause and the attitude of the law to it is such that a contract of employment which contains one may properly be said to be radically different from one which does not. There is a sufficient difference between the two contracts to justify the plea of non est factum if the other requirements of that plea can be satisfied.

The courts have recognised a distinction in considering rights and obligations as between the parties to the contract and innocent third parties. Comments in the Australian case of Petelin referred to in Conlon v Ozolins [1984] 1 NZLR 489 in particular by McMullin J at p 502 indicate that the situation may be looked at differently by the courts in considering rights and responsibilities as between the parties to the contract as distinct from the position of an innocent third party who has been misled by a genuine signature.

K was given a document to perusal which he believed on reasonable grounds to be the basis of the contract into which both parties contemplated he would enter, and he was given an assurance that the only omission was the schedule as to payment.

With some hesitation, it could not really be said that a person with the rather limited legal background of K was careless in not reading in detail a document presented for his signature where he had already been given what he believed to be a document setting out the terms on which he would be employed, studied this and agreed to accepting employment on the basis of it.

This view is enforced when taking into account the difference in the way in which it is appropriate to look at the matter as between the parties to the document as distinct from an innocent third party, even bearing in mind the onus on K.

It follows that K is entitled to rely on the plea of non est factum subject only to the consideration that his failure to take any action once he became aware of the existence of the clause may found a submission that by continuing with full knowledge of what he had signed he endorsed the contract from that point.

K said that some months after entering into the contract he had occasion to check the document and then discovered it contained the restraint of trade clause. He did not however raise the matter with LG or make any complaint. He said that he would not have been prepared to sign the original document had he known it contained a restraint clause. He also said that he was at that time at least unaware
of what a restraint of trade clause was.

The document signed was radically different from the transaction intended. Accordingly, it must be void and could not become valid by some subsequent affirmation unless that affirmation was made clearly intentionally and with knowledge. That could not be said to be the case here.

On the basis of those conclusions, LG is not entitled to the injunction which it seeks against K.

*The common law doctrine of non est factum is saved by s 5(2)(a) of the CMA.

*You can get an order for rectification if (1) there is an agreement in respect of a particular matter; (2) the parties had a common intention in relation to that matter; (3) and by mistake the writing does not reflect that common intention.

1. 3. 3 Rectification

Rectification is an equitable remedy by which the court alerts the words that have been used in a written contract in order to reflect the actual intention of the parties. Parties who wrongly record their agreement can apply for rectification to make the contract conform to their actual agreement.

In order for the court to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties prior to the agreement which it is sought to rectify: it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement; if one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then the court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties (Crane v Hegeman–Harris Co Inc [1939] 1 All ER 662 per Simonds J; Dundee). Flowing from this statement are the following elements:

(1) There must be a pre-existing accord between the parties relating to the term in question;
(2) That accord must have been a continuing common intention right up until the time of execution; and
(3) The writing as executed does not reflect the continuing common intention.

This is an equitable jurisdiction; equity intervenes to prevent fraud and unconscionable behaviour; it intervenes because the defendant in equity was acting unconscionably; it acts by making a decree against the defendant and says, “This contract must be rectified.”

(1) Unilateral mistake

If one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he will be precluded from resisting rectification on the ground that the mistake is unilateral and not common (Roberts).

However, the exclusion contained in s 5(2)(b) of the CMA is not intended to allow relief via rectification where a unilateral mistake occurred but the innocent party had no knowledge (Tri-Star).

**Dundee Farm Ltd v Bambury Holdings Ltd [1978] 1 NZLR 647**

**Facts:** DF agreed to sell its farm to BH. The land was contained in three separate certificates of title, but owing to a mistake a fourth certificate was included in the description of the land set out in the agreement. The fourth certificate actually related to a separate property 10 miles away. This mistake was discovered after the date for settlement had passed and before BH had paid any purchase money. BH sued DF seeking rectification and specific performance of the contract for the sale of the farm.

The trial judge ordered the fourth title to be deleted from the transfer. The appeal was taken on a basis that the parties were in fact still in negotiation and that there was not actually a common continuing intention right up until the time of execution.

**Issue:** Was there a common continuing intention between the parties?
Held: In order for the court to exercise its jurisdiction to rectify a written instrument, it is not necessary to find a concluded and binding contract between the parties antecedent to the agreement which it is sought to rectify; it is sufficient to find a common continuing intention in regard to a particular provision or aspect of the agreement; if one finds that, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument, and the formal instrument does not conform with that common agreement, then the court has jurisdiction to rectify, although it may be that there was, until the formal instrument was executed, no concluded and binding contract between the parties (Crane per Simonds J).

In the present case, the judge held that there was a common intention, subsisting at the time the agreement was signed, to buy the land comprised in the farm irrespective of the number of certificates of title and of the precise acreage. There is no doubt that at the point of time when the price was finalised there was a common intention to buy and sell the farm in the sense of all the land that actually belonged to the farm and whether or not that land was comprised in three or more titles.

In the circumstances the remedies of rectification and specific performance were available to DF.

*The Court of Appeal assessed the evidence carefully and found that the parties had actually settled on a sale and purchase of the farm; there was a common intention to dispose of the farm. The purchaser’s statement that he thought he was going to get the house (the title to which was wrongly included) was found dishonest because there was a common intention to deal with the farm.

*The equitable remedy of rectification is specifically preserved by s 5(2)(b) of the CMA.

*You can get an order for rectification if (1) there is an agreement in respect of a particular matter; (2) the parties had a common intention in relation to that matter; (3) and by mistake the writing does not reflect that common intention.

**A Roberts & Co Ltd v Leicestershire County Council** [1961] 2 All ER 545

**Facts:** AR successfully tendered for a school construction contract on the basis that construction would take 18 months. L inserted a provision for its benefit in the contract that construction would take 30 months. L knew that AR still thought the construction period was 18 months when it executed the contract. AR applied for rectification.

**Issue:** Can a contractual party apply for rectification on the basis of unilateral mistake?

**Held:** AR claims rectification of the contract on two alternative grounds: (1) that it was the common intention of the parties that the contract should include a period for completion of 18 months and the period of 30 months was inserted under common mistake; and (2) that the council cannot be heard to say that it was not mistaken as to the date for completion since when it executed the contract it well knew that the company was mistaken as to the date for completion included in the contract, yet stood by and took no step to draw AR’s attention to its mistake.

On the facts, it is clear that the council and AR were not at one on the length of the period for completion intended by them respectively to be inserted in the contract; accordingly, AR is not entitled to rectification on the first ground relied on by it. The second ground rests on the principle that a party is entitled to rectification of a contract on proof that he believed a particular term to be included in the contract, and that the other party concluded the contract with the omission or a variation of that term in the knowledge that the first party believed the term to be included.

By what appears to be a species of equitable estoppel, if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common. A party claiming rectification must prove his facts beyond reasonable doubt, and this high standard of proof must equally apply where the claim is based on the above principle.

In the present case, AR believed that the 18-month period of completion was included in the contract. The question then is whether the council, when it concluded the contract with the 30-month period, do so in the knowledge that AR believed the 18-month period was included in it. On the facts, it can be inferred beyond reasonable doubt that the council (the council officer concerned) did know that AR believed the period for completion under the contract to be 18 months. Accordingly, the date for the completion should be rectified to reflect the intention of the builder.

1. 3. 4  **Mistake as to quality**
A mistake as to quality of the thing contracted for will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be, in which case the parties’ consent is vitiated because the subject-matter of the contract is essentially different: for mistake to be operative at common law, it must be fundamental: it must make the apparent consent defective by reason of it going to the identity of the subject-matter or its existence (Bell).

**Swinton v Whitinsville Savings Bank** 42 NE 2d 808 (Mass 1942)

**Facts:** S bought a house from WSB which turned out to be infested with termites. Two years later, a termite infestation forced S to make costly repairs to prevent further damage to the house. S sues WSB for damages on the basis that it was aware of the problem but failed to reveal it to him before the purchase was made.

**Issue:** Does a failure to inform the buyer of a house of a termite infestation give rise to a cause of action for recovery of damages caused by the undisclosed condition?

**Held:** There is no allegation of any false statement or representation, or of the uttering of a half truth which may be tantamount to a falsehood. There is no intimation that the defendant by any means prevented the plaintiff from acquiring information as to the condition of the house. A failure to inform the buyer of a house of a termite infestation does not give rise to a cause of action for recovery of damages caused by the undisclosed condition.

**Bell v Lever Bros Ltd** [1932] AC 161

**Facts:** B and S entered into a contract with the plaintiff company under which they agreed to serve for five years as chairman and vice-chairman of the plaintiff’s subsidiary company. While acting in these capacities, they, in breach of duty, entered into secret speculations in cocoa for their own benefit. Subsequently, their services were no longer required. The plaintiff company negotiated with them both to give up their appointments in return for monetary compensation. Being unaware of the breaches of duty, which would have justified terminating the agreements without compensation, the plaintiff company agreed to compensation of £30,000 and £20,000 respectively. After the money was paid, the plaintiff discovered the breaches of duty and sued B and S to recover the money. The jury found that when B and S had agreed to the compensation, they had forgot about their breaches of duty: therefore, it was a question of common mistake as both parties had made the same mistake.

**Issue:**

1. Was the compensation agreement void by reason of mutual mistake?
2. Can the compensation agreement be avoided by reason of the failure of disclosure?

**Held:**

1. In cases of mistake as to quality of the thing contracted for, a mistake will not affect assent unless it is the mistake of both parties, and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. Of course, it may appear that the parties contracted that the article should possess the quality which one or other or both mistakenly believed it to possess. But in such a case, there is a contract and the inquiry is a different one, being whether the contract as to quality amounts to a condition or a warranty, a different branch of the law.

   In such cases as *Smith v Hughes* (1871) LR 6 QB 597, I am inclined to think that the true analysis is that there is a contract, but that the one party is not able to supply the very thing whether goods or services that the other party contracted to take: therefore, the contract is unenforceable by the one if executory, while if executed the other can recover back money paid on the ground of failure of the consideration.

   In the present case, the agreement which was terminated had been broken so that it could be repudiated. Is an agreement to terminate a broken contract different in kind from an agreement to terminate an unbroken contract, assuming that the breach has given the one party the right to declare the contract at an end?

   It would be wrong to decide that an agreement to terminate a definite specified contract is void if it turns out that the agreement had already been broken and could have been terminated otherwise.
The contract released is the identical contract in both cases, and the party paying for release gets exactly what he bargains for. It seems immaterial that he could have got the same result in another way, or that if he had known the true facts he would not have entered into the bargain. This conclusion can be supported on the ground that it is of paramount importance that contracts should be observed, and that if parties honestly comply with the essentials of the formation of contracts (ie, agree in the same terms on the same subject-matter) they are bound and they must rely on the stipulations of the contract for protection from the effect of facts unknown to them. 

Nothing is more dangerous than to allow oneself liberty to construct for the parties contracts which they have not in terms made by importing implications which would appear to make the contract more business-like or more just. The implications to be made are to be no more than are “necessary” for giving business efficacy to the transaction, and it appears that, both as to existing facts and future facts, a condition would not be implied unless the new state of facts makes the contract something different in kind from the contract in the original state of facts. Thus, in *Krell v Henry* [1903] 2 KB 740, Vaughan Williams LJ finds that the subject of the contract was “rooms to view the procession”; therefore, the postponement made the rooms not rooms to view the procession.

In the present case, the identity of the subject-matter was not destroyed by the mutual mistake (per Lord Atkin).

(2) It was argued for the plaintiff that the agreement for compensation could have been avoided by it because of the non-disclosure of misconduct as to the cocoa dealings. Ordinarily, however, the failure to disclose a material fact which might influence the mind of a prudent contractor does not give the right to avoid the contract (per Lord Atkin).

*It was held that the mistake was insufficient to render the contract void for mistake. The plaintiff company received exactly what it bargained for; ie, the termination of the contracts with B and S. It did not matter that the same result could have been achieved without having to pay compensation to them. However, As Lord Atkin noted in his speech, the plaintiff would not have entered into the agreement had it known of the true state of affairs. The mistake did not merely make the agreement less desirable; it made the agreement of such a nature that the plaintiff would never have entered into it. As Lord Warrington noted in his speech, the mistake should be regarded as fundamental to the bargain as any error one can imagine.*

*The principle underlying this decision is that a mistake as to quality should not enable a completed contract to be undone since the parties have agreed in the same terms on the same subject matter. The net effect of this decision is that it promotes certainty, but at the expense of fairness and flexibility.*

### 1. 3. 5  The Contractual Mistake Act 1977

(1) **The purpose of the Act**

Section 4 of the CMA states the purpose of Act as follows:

1. The purpose of this Act is to mitigate the arbitrary effects of mistakes on contracts by conferring on courts appropriate powers to grant relief in the circumstances mentioned in s 6.
2. These powers are in addition to and not in substitution for existing powers to grant relief in respect of matters other than mistakes and are not to be exercised in such a way as to prejudice the general security of contractual relationships.

(2) **The substitution of statutory remedies for the remedies at common law and in equity**

Section 5 of the CMA provides as follows:

1. Except as otherwise expressly provided in this Act, this Act shall have effect in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party.
2. Nothing in this Act shall affect—
   a. the doctrine of non est factum;
   b. the law relating to the rectification of contracts;
   c. the law relating to undue influence, fraud, breach of fiduciary duty, or misrepresentation,

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5 From this statement, it can be said that Lord Atkin endorsed the objective theory.
whether fraudulent or innocent:
(d) the provisions of the Illegal Contracts Act 1970 or of sections 94A and 94B of the Judicature Act 1908:
(e) the Frustrated Contracts Act 1944.
(3) Nothing in this Act shall deprive a court of the power to exercise its discretion to withhold a decree of specific performance in any case.

(3) Three types of mistake
Section 6 of the CMA provides as follows:
(1) A court may in the course of any proceedings or on application made for the purpose grant relief under s 7 to any party to a contract—
(a) if in entering into that contract—
(i) that party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or 1 or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or
(ii) all the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
(iii) that party and at least 1 other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
(b) the mistake or mistakes, as the case may be, resulted at the time of the contract—
(i) in a substantially unequal exchange of values; or
(ii) in the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
(c) where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.
(2) For the purposes of an application for relief under s 7 in respect of any contract,—
(a) a mistake, in relation to that contract, does not include a mistake in its interpretation;
(b) the decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake.

By providing in s 6(2)(a) of the CMA that, for the purposes of an application for relief under that Act, a mistake does not include a mistake in the interpretation of the contract, Parliament plainly intends to maintain the well-established principle that contracts are to be construed objectively, and to avoid the great uncertainty that would arise were a party to be permitted to plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning (Paulger).

(a) Unilateral mistake known to the other party
Section 6(1)(a)(i) broadly equates with what used to be unilateral mistake. Under this provision, the other party must have known of the mistaken party’s mistake.

Section 6(1)(a)(i) requiring actual knowledge, constructive knowledge (“sought to have known”) being insufficient: however, the court may infer actual knowledge from proved circumstances, even if the person in question denies having that knowledge (Tri Star).

(b) Common mistake
Section 6(1)(a)(ii) broadly covers what used to be common mistake. Both parties make the same mistake in entering into the contract.
Different mistakes about the same matter of fact or law

The proposers of this Act intended that s 6(1)(a)(iii) cover cases where there was latent ambiguity in the terms used by the parties which had concealed from them the fact that they had been at cross-purposes during the formation of the apparent contract. A typical example at common law is the case of *Raffles v Wichelhaus* (1864) 159 ER 375.

On a traditional view, however, the latent ambiguity cases may fall outside the Act because in cases where the words used admit of only two possible meanings, objectively viewed, there cannot be two mistakes by both parties; one party must have reached the correct position. We are not able to argue that s 6(1)(a)(iii) captures mistakes of intentions; we are not able to argue that if the seller intends the October “Peerless” and the buyer intends December “Peerless”, there is the same mistake of fact. You have different mistakes of intentions. You do not have different mistakes about the same matter of fact.

*Conlon v Ozolins* [1984] 1 NZLR 489

**Facts:** O owned about an acre of land. A certificate of title had been issued for the section on which her house had been built. Another certificate of title had been issued for the rest of the land which backed on to the house section. This backland had been subdivided into four sections of approximately equal area and were lots 1, 2, 3 and 4. Lot 4 was physically divided from lots 1, 2 and 3 by a fence and was used by O as a garden. Lots 1, 2 and 3 were in grass. The grass was mowed regularly but no other gardening was done on it. O was an elderly woman (aged 73) who had some difficulty in expressing herself in English which was not her native language. She entered into a contract with C for the sale and purchase of some of the land owned by O. The written agreement, which had been drawn up by O’s solicitor, recorded that the land being sold and purchased were lots 1, 2, 3 and 4 and that the purchase price was $42,000. When O’s solicitor called on her to sign the transfer, she refused to do so on the ground that all she was willing to sell were lots 1, 2 and 3. Lot 4 was part of her back garden and she had no intention of selling that land. C brought proceedings against O for specific performance. He intended to build town houses for sale and had purchased an adjacent property to provide better access to the land purchased from O.

In the High Court, the judge ordered O to specifically perform the contract. He found that she was not by reason of age or any other defect deficient in understanding, and in understanding, at least in a general way, the transaction on which she was entering. He also found that it was not her intention to sell all four lots. She had intended to retain lot 4 and continue to use that as part of her home. However, the judge was satisfied that C was entirely unaware of this limitation on O’s intention. Having regard to his knowledge of the land and the fact that the her solicitor had supplied him with a photocopy of the certificate of title which showed all four lots, C was completely innocent of any mistake or any knowledge or idea that O was mistaken. The judge held that neither the plea of non est factum nor the CMA applied; but even if the Act had applied this was not a case in which he would have been prepared to grant relief. The refusal of specific performance would be a hardship to C. The hardship O of the loss of her garden and the inevitable change in her mode of living was not such as to lead the judge to the view that there would be injustice in granting specific performance. It was the careless conduct of O which persuaded the judge that specific performance should be granted. O appealed.

**Issue:** Was the mistake within the ambit of s 6(1)(a) of the CMA?

**Held:** Considered objectively, the document is perfectly unambiguous and reflects no kind of mistake by anybody. Nor was this a situation of mutual mistake. In the face of the writing, the mistake which she genuinely made is incapable of assisting her in relation either to the plea of non est factum or the other defence of mutual mistake.

The critical question in this case is whether the facts bring it within the ambit s 6(1) of the CMA. It is accepted on O’s behalf that if she is entitled to relief it must be in terms of subs (1)a(iii). Accordingly, the immediate question is whether the facts demonstrate that the vendor on the one side and the purchaser on the other were “influenced in their respective decisions to enter into the contract by a
different mistake about the same matter of fact”.

Throughout the period of negotiation and during the actual time of execution of the written contract, these parties were at cross purposes. There was no correspondence of verbal offer and acceptance. Each mistakenly believed that the written document correctly represented a mutual intention which did not exist. C mistakenly thought O 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. Each had a mistaken impression about the boundaries of the tract of land being bought and sold. Their respective decisions to proceed and finally to enter into the written contract were influenced by a mistaken belief on the one side that was different from the mistaken belief on the other and also that each mistake was about the size of land to be bought and sold.

Once carried into the written agreement, the contract could not be undone at common law, but 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). The provision being remedial does not deserve to be construed narrowly. The object of the CMA is promoted by construing it to include the present case. The appeal should be allowed (per Woodhouse P).

The declaration in s 5 and the provisions of s 2(3) suggest that Parliament has assumed that s 6(1)(a) includes all cases in which common law mistake would prevent a contract coming into existence at all. But that case aside the normal principles under which the existence of a contract is to be determined are not affected by the Act. One such principle is that a party may not be allowed by reason of his conduct to deny his apparent assent to a contract or a term thereof. He is estopped from denying the objective phenomenon of agreement.

Before the Act the vendor in the instant case could have had no relief in mistake. Her intention is discoverable from the words of the contract. Her error was truly “unilateral”; it was unknown to the purchaser.

In the instant case, the vendor relies on s 6(1)(a)(iii). It is clear that the vendor was influenced in her decision to enter the contract by mistakenly thinking the land described in the contract did not include the rear portion of what she called her home. In substance, her mistake concerned the subject-matter of the contract. It can be expressed in different ways: she mistook the legal description in the agreement; she mistakenly sold four lots instead of three. The next question is what different mistake about the same matter the purchaser made. It was submitted that he mistakenly supposed the vendor intended to sell that which she did not.

Her mistake was as to the subject-matter of the sale. On the other hand, I do not consider that in ordinary parlance it can be said that the purchaser made any mistake at all. He intended to buy the four lots described to and inspected by him, and that, according to the agreement, is what he did.

The instant case is one which Parliament intended to be met only if the purchaser knew of the vendor’s mistake (ie, if the case fell within s 6(1)(a)(i)). If the purchaser’s postulated mistake (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 cases of mistaken intent not falling within the Act. This cannot have been the legislative purpose. If it were subpara (i) which requires knowledge by one party of the mistake of the other seems superfluous.

If this should seem a restrictive approach, it must be recalled that mistake involves an area in which the law prior to the Act, and Parliament in the Act, has had to balance (i) the injustice of committing a party to a contract he did not intend to make and (ii) the commercial expectation of security of contract which has received special mention in s 4(2).

This case does not fall within s 6(1)(a) at all.

A plea of non est factum was also raised. But the transaction which the agreement for sale and purchase effects is not sufficiently different from that which the vendor intended to enter to justify relief. As well, the purchaser being relevantly innocent, for he did not know and had no reason to suspect that it was signed under a misunderstanding, the vendor would need to show that her failure to understand the real position was not due to a failure to take reasonable precautions on her part. She could not do so (per Somers J).

*This case is thought to be wrongly decided because it is impossible to explain why it fits in with the non est factum line
This case can be best understood by seeing it as an attempt to abandon the objective theory of contract for the purposes of interpreting s 6(1)(a).

*Somers J, a minority, considered that there is no fact about which they share different mistakes; there were only two different intentions; there is no mistake of any fact.

*If you were to adopt the truly subjective theory of consent, the parties had not reached an agreement because there was no consensus ad idem. You cannot say one side is right and the other is wrong. Implicit in the concept of one side being right and the other being mistaken is the objective theory.

**Paulger v Butland Industries Ltd** [1989] 3 NZLR 549

**Facts:** P was an officer of DP. In 1988, DP was in financial difficulties. It entered into a contract for the sale of its business and P expected the sale to realise enough money to pay its unsecured creditors. Wishing to preserve DP’s good name, P sent a letter to creditors advising them of the sale and giving assurances that the company would be paying its creditors out within 90 days. To these assurances he added the words “The writer personally guarantees that all due payments will be made.” The letter was signed “P, Chief Executive”. DP was then put into receivership before the sale was completed, and the unsecured creditors were not paid. BI, a creditor of the company, received the letter on 8 August 1988 which meant that the 90 day period expired on 6 November. On 9 November, its debt having remained unpaid, BI made demand on P and subsequently sued him, claiming that the letter was a personal guarantee by P of DP’s debts. P contended that the letter was a gratuitous promise without legal effect and that he had not intended to provide a binding guarantee.

**Issue:** Can P rely of s 6(1) of the CMA?

**Held:** A guarantee, like any other contract, is constituted by offer and acceptance, and requires consideration. And as with any other contract, whether or not there has been offer and acceptance is to be determined objectively in the light of the surrounding circumstances.

The letter, sent as it was without further explanation, must be construed “from the point of view of the reasonable man in the shoes of the recipient” (Boulder Consolidated Ltd v Tangaere [1980] 1 NZLR 560 per Cooke J).

The critical sentence “The writer personally guarantees that all due payments will be made,” can be read only as an assurance over and above those that preceded it, which were themselves unqualified assurances that the funds were available and that payment would be made from them. Added to those assurances, the sentence cannot be read as anything other than an undertaking that if for some reason the debt were not paid from those funds, P would himself see that it was paid.

Therefore, the letter amounted to an offer of a personal guarantee by P, on which he became bound to every creditor who in response to the letter forbore from pursuing his debt for the requested period of 90 days.

It is submitted that the case could fall within either para (ii) or para (iii) of s 6(1)(a) of the CMA. Paragraph (ii) provides for the situation where all the parties to the contract were influenced in their respective decisions to enter into it by the same mistake. It is submitted that here the common mistake the parties made was as to the effect of P’s letter. Paragraph (iii) provides for the situation where the parties were each influenced by a different mistake about the same matter of fact or law. Here, it is argued that the common subject-matter was the source of the funds for payment of the creditors, with P thinking that it would be only from the proceeds of sale, BI that it would, if need be, come from P’s own resources.

These submissions must be considered in the light of s 6(2)(a) which states that a mistake for relevant purposes does not include a mistake in the interpretation of the contract. Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively, and to avoid the great uncertainty that would arise were a party to be permitted to plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning.

This case does not fall within s 6(1)(a)(ii). It is a superficial analysis to say that any mistake the parties may have made as to the effect of the letter was the same mistake. The mistake each made may have been as to the same subject-matter, but it was not the same mistake: BI thought P was giving an unconditional personal guarantee; P thought he was giving something less than that. And if it were correct to say that the mistake they both made was as to the effect of the letter, then this
was a mistake in its interpretation, and so s 6(2)(a) applies to it. However, it was not a case of common mistake at all, for BI was right. It was only P who was mistaken.

Conlon is a decision on its particular facts. It is not 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. For then the mistake is one in the interpretation of the contract, and the party making it cannot avail himself of the Act (s 6(2)(a)).

In the present case, P says that he did not intend his letter to mean what it clearly did mean. That is a mistake in the interpretation of the contract and it cannot be relied on.

*The reasoning in Paulger is inconsistent with Conlon.*

**Mechenex Pacific Services Ltd v TCA Airconditioning (New Zealand) Ltd [1991] 2 NZLR 393**

**Facts:** MPC had a contract to install the air-conditioning equipment in a new building. The building’s specification called for a particular brand of air-conditioning, “Tempezone”, which worked on a water flow rate of 4 litres per second. MPC approached TCA to see if it could supply the “Tempezone” system. TCA could not, but offered a similar system instead. T’s quotation drew attention to its schedules. These made clear that T was proposing to deliver a system requiring a water flow of 5.9 litres of water a second. MPC made an order “as per [TCA’s] quotation”. When TCA supplied the equipment, it was rejected by the building contractors as unworkable. MPC refused to pay TCA. TCA sued MPC to recover the price.

**Issue:** Can P rely of s 6(1) of the CMA?

**Held:** It is fundamental to the formation of a contract that the parties be ad idem, that there be correspondence of offer and acceptance. The CMA does not affect this principle. And so the well-known words of Blackburn J in Smith v Hughes (1871) LR 6 QB 597 still apply.

There was no mistake on the part of TCA whose quotation was exactly what it was intended to be. If there was a mistake, it was that MPS without reading the quotation, placed an order for what it thought was a four litre per second flow, but in terms that objectively meant that it was in fact ordering for a 5.39 litre per second flow. It was therefore a mistake as to the interpretation of the contract which excluded s 6(2)(a) of the CMA from the application of a s 6(1)(a)(ii).

* This case is important as showing that the objective principle survives the enactment of the CMA.

**Tri-Star Customs and Forwarding Ltd v Denning [1999] 1 NZLR 33**

**Facts:** The Ds had entered into a written agreement with TC whereby D granted a lease of a commercial building to TC together with an option to purchase the building. The final agreement specified that the annual rental was “plus GST”. However, the purchase price was recorded as $720,000 with no mention of GST. It was clear that unless the agreement specified otherwise the purchase price was inclusive of GST. The Ds maintained that it understood that GST would be added. The Ds sought rectification or relief under the CMA.

**Issue:** (1) Can the Ds rely on s 6(1)(a)(i)? Is actual knowledge necessary on the part of the other party to apply s 6(1)(a)(i)?

(2) Can the Ds seek equitable remedy in the form of rectification?

**Held:** (1) The mistake found by the trial judge was a belief that the Ds would “get $720,000 out of the transaction”. The belief was mistaken because no allowance was made for the incidence of GST. Having held that the mistake was material, the judge went on to hold that TS had constructive knowledge of the Ds’ mistake, and that a substantially unequal exchange of values had resulted. The findings of materiality and an unequal exchange of values are not under challenge.

The critical issue concerns the requirement that the existence of the mistake must be “known” to TS. The starting point is the use of the word “known” in the statute. In its ordinary meaning the word connotes possession of information, or a state of awareness. We can see no justification for construing s 6(1)(a)(i) as requiring anything other than actual knowledge. It may of course be proper for a court to infer actual knowledge from proved circumstances, even if the person in question denies having that knowledge. There is nothing in the statute which calls for a different construction. An example where an extended meaning of the word to include “ought to have known” was rejected can be
found in *London Computator Ltd v Seymour* [1944] 2 All ER 11.

In the present case, TS did not have actual knowledge of any relevant mistaken belief held by the Ds.

(2) There was no common continuing intention between the parties relating to GST; therefore, rectification is not available.

*(Obiter)* The exclusion contained in s 5(2)(b) is not intended to allow relief via rectification where a unilateral mistake occurred but the innocent party had no knowledge. To hold otherwise would render s 6(1)(a)(i) otiose.
2 _An Intentional Assumption of Liability_

2.1 **Intention to create legal relations**

For a contract to be legally binding, there must be an intention to create legal relations: the parties to an agreement must intend that it be legally enforceable. This requirement prevents the courts from being clogged up with disputes to which no legal liability should be attached.

In determining whether contractual intent was present, what matters is whether a reasonable person in the circumstances would have intended to create a legally binding agreement (*Jones* per Salmon LJ); ie, whether a reasonable person in the other party’s position would have understood that there was contractual intent.

Whether the parties had an intention to be legally bound can be found in light of their conduct subsequent to the agreement (*Jones* per Fenton Atkinson LJ).

The onus of proving lack of intention falls on the party alleging it.

**Jones v Padavatton** [1969] 1 WLR 328

**Facts:** A mother agreed with her daughter that if the daughter gave up her secretary job to study for the bar in England, she would pay maintenance. The mother gave monthly payments and bought a house. The daughter lived there, and some of the rooms were rented out. Then they had a quarrel while the daughter was still completing her bar exams. The mother brought an action against the daughter for possession of the house.

**Issue:** Was there an intention to create legal relations between the parties?

**Held:** The agreement was purely a domestic agreement which raises a presumption that the parties do not intend to be legally bound by the agreement. There was no evidence to rebut this presumption.

There was no intention here. This arrangement, made when the parties were on good terms, was one of those family arrangements which are not intended to be binding. The same principles as applied in *Balfour v Balfour* [1919] 2 KB 571 apply here: the arrangement regarding the house was an adaptation of the arrangement for the mother to financially assist her daughter and was not a binding contract (per Danckwerts LJ).

An objective test is applied to determine if contractual intent is present, ie considering what the parties said and wrote in the light of all the circumstances, whether a reasonable person, speaking or writing thus in such circumstances, would have intended to create a legally binding agreement.

As a general rule, when agreements are made between close relations there is a presumption against intention. This is a presumption of fact which derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations. In the very special circumstances of this case, the presumption was rebutted. The parties intended that the daughter should have some legal rights. The duration of the arrangement was not specified, but it can be interpreted as the usual term which would last for a reasonable time. It could not possibly exceed five years and the arrangement had therefore validly terminated (per Salmon LJ).

Whether the parties had an intention to be bound can be found in light of their conduct subsequent to the agreement. First, the daughter accepted £42 per month from her mother which was less than she had thought her mother had promised; second, many material matters were left open when the arrangement changed from direct financial support to the arrangement with the house; third, on one occasion the daughter refused to let her mother into the house, and at that time she believed that a normal mother would not sue her daughter in court. That provided a strong indication that the daughter ‘never for a moment contemplated the possibility of the mother or herself going to court to enforce legal obligations’ (per Fenton Atkinson LJ).

*The way of the interpreting the conduct of the parties differed between the judges.*

2.1.1 **Domestic and social arrangements**
Domestic agreements are presumed not to be intended to be binding (*Balfour*). A couple living in amity at the time of an agreement generally do not intend that they should be legally bound. This presumption can be rebutted by the evidence to the contrary. For example, if a domestic agreement was made between a couple where the marriage is breaking down, it can be regarded as binding (*Merritt v Merritt* [1970] 1 WLR 1211).

**Balfour v Balfour** [1919] 2 KB 571

**Facts:** A man went to Ceylon, but his wife was ill and remained in England. He agreed to pay her £30 per month for the maintenance of the household and children while they were apart. Later the marriage broke up, and he defaulted on the payments. She brought an action against him.

**Issue:** Was there an intention to create legal relations between the couple?

**Held:** Such an arrangement as the one in the present case made between the couple was not a contract because the parties did not intend to be legally bound.

*The rule laid down in *Balfour* has subsequently interpreted as a presumption that parties to a domestic agreement do not intend to create legal relations.*

2.1.2 Business and commercial agreements

Business and commercial agreements are presumed to be intended to be binding; this presumption can be rebutted by the evidence to the contrary (*Rose and Frank*).

When parties in negotiation for the sale and purchase of land instruct solicitors and contemplate the preparation of a formal agreement, the ordinary inference is that they intend to contract only by means of the formal document which each will be required to sign (*Carruthers v Whitaker* [1975] 2 NZLR 667). In the field of commercial contracts, for which signed writing is not required by law, the natural inference is the same in the absence of factors to the contrary; in other words, acceptance by itself may not result in a binding contract if it was the intention of the parties not to be bound until a formal contract is entered into (*Concorde*).

Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it is subject to and is dependent on a formal contract being prepared; the words “subject to the preparation and approval of a formal contract” in a document prevents the document from being regarded as a final agreement of which specific performance can be enforced (*Winn*).

**Definition**

Honourable pledge clause is a clause contained within a contract stipulating the contract has no legal basis and cannot be enforced (See *Rose and Frank*). A letter of comfort is a letter by a party to a contract to the other party stating an eagerness to enter into contractual obligations without creating legal relations (See *Kleinwort Benson Ltd v Malaysia Mining Corporation Bhd* [1989] 1 All ER 785). Subject to contract is an agreement that is not legally effective as a contract.

**Rose and Frank Co v J R Crompton and Brothers Ltd** [1923] 2 KB 261

**Facts:** An American firm bought paper from a carbon paper manufacture in England and sold it in New York. After dealing with each other for years they entered into a written agreement as to the American firm having exclusive rights to buy and sell the manufacture’s goods. The agreement said, “This agreement is not a formal or legal agreement. It will not be subject to the jurisdiction of either the British or American courts. It is a record of the intention of the parties to which they honourably pledge themselves and is to be carried out with mutual loyalty and friendly cooperation.” Following a series of disputes the American firm brought an action against the manufacturer.

**Issue:** Can a clause be put in a contract saying that it is not legally binding, or is there a binding contract anyway?

**Held:** Although in business relations it is generally assumed that a contract has been intended, here there is a specific clause stating the clear intention of the parties not to be bound in a legal contract.
In contract law it is the intentions of the parties that matters, and here they are clearly stated. As the parties did not intend to be bound, there is no legally enforceable contract.

**Winn v Bull** (1877) 7 Ch D 29

**Facts:** By an agreement in writing, a person agreed with another to take a lease and carry out substantial repairs to the property by a certain amount of money that he would receive from another lessee. The agreement was subject to the preparation and approval of a formal contract. The intending lessee, contending that the terms were contrary to the intention of the agreement, refused to take a lease. The lessor brought an action against the alleged lessee claiming specific performance.

**Issue:** Was there a contract between the parties?

**Held:** Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. The words 'subject to the preparation and approval of a formal contract' in a document prevented the document from being held to be a final agreement of which specific performance could be enforced. There was no binding contract in this case.

**Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd** [1923] 2 NZLR 385

**Facts:** A company manufacturing under licence emulation—producing guns entered into negotiations with another company so that the former company would produce the gun and the latter would purchase and distribute it in Australia. The manufacturing company was advised by the solicitors of the other company that any contract was conditional on marketability and as this had not eventuated the contract must be treated as at an end. The manufacturing company brought an action for damages for wrongful repudiation.

**Issue:** Was there a contract between the parties?

**Held:** It was an important commercial agreement of some complexity and the normal inference was that the parties did not intend to be bound before the agreement had been drawn up and executed on both sides. There was nothing to displace that inference, and there was no contract.

**Questions and Answers**

**Question 1**

Discuss the extent to which, if at all, the rules on ITCLR (Intention to create legal relations) are outdated.

**Brief answer**

(1) With regard to the presumption against ITLCR socially/domestically —
The presumption against ITCLR is based on two policy considerations. The floodgates argument remains very persuasive. In light of likely reductions in public funding, the courts will be increasingly sensitive to caseload. This aspect of the presumption would not seem to be outdated. The argument that the law should not readily interfere in the domestic and social spheres of our lives has been argued to be outdated. Balfour was decided in the early twentieth century and perhaps reflects profoundly different understandings of the roles of spouses in the family and a less litigious culture more generally.

(2) With regard to the presumption in favour ITCLR commercially:
The argument that the courts prefer negotiations in commercial situations to take place on a general understanding that agreements are intended to be binding remains a sound argument. Indeed, the law has developed to generally give increasing protection to consumers so this aspect of the rules would not seem to be outdated.

(3) With regard to the ways in which the presumptions can be rebutted:
None of the rules regarding the rebuttal of the presumptions appear to be outdated.

**Question 2**
There is a fishing competition in the North Island. X catches the biggest fish out of all the competitors and wins $20,000 first prize. However, the fishing organisers tell X that the number of entries in the competition is fewer than expected and that they will only pay him $10,000. The entry form contains a clause stating that “any decision by the organisers shall be final and shall not be called into question in any Court of Law”. Advise X as to his legal position.

**Answer**

X wants to know whether he is entitled to claim $20,000 or $10,000 from the organisers, which depends on whether a valid contract has been formed when X catches the biggest fish.

**[Issue 1]** If all the elements of contract are satisfied, there is a unilateral contract formed between X and the organisers when he fishes the biggest fish. On the facts, there is an offer, acceptance and consideration. The issue here is whether the organisers have an intention to create legal relations.

**[Law 1]** For a contract to be legally binding, there must be an intention to create legal relations. Business and commercial agreements are presumed to be intended to be binding; this presumption can be rebutted by the evidence to the contrary (Rose and Frank).

**[Application 1]** In the present case, it can be argued that there is a business relationship between X and the organisers. Then, the presumption arises that they intend to be legally bound. However, the entry form contains a clause similar to the one found in Rose and Frank, where it was held that no contract was intended. The presumption will thus be rebutted by the wording of the entry form.

**[Conclusion 1]** Therefore, no contract has been formed between X and the organisers when he catches the biggest fish.

**[Issue 2]** However, they say that they will pay him $10,000. For a valid contract to be formed, consideration must move from the promisee. The problem here is whether X has provided valid consideration for that promise by the organisers.

**[Law 2]** Consideration must be given in return for the promise, and it cannot generally be something given or done before the other’s promise was made (Roscorla). However, an act that predates a promise can be good consideration (executed consideration) if the act is done at the request of the promisor (ie, the other party) and it is understood at that time that there will be some payment for it; the later promise can be regarded as mere confirmation of the original, unspoken one (Re Casey’s Patents). To this one more requirement should be added: the benefit conferred in return for the promise must have been enforceable had the promise been given in advance (Pao On).

**[Application 2]** In the present case, it can be said that X participates in the competition at the request of the organiser because they ask for the entry. Considering the nature of such a competition, it is understood, or probably announced, that there will be a payment to whoever has caught the biggest fish. However, as discussed above, the organisers have no intention to be legally bound when X catches the fish, and the third requirement is not met.

**[Conclusion 2]** Therefore, a valid contract has not been formed between X and the organisers when they promise to pay him $10,000.

For these reasons, I would advise X that he is not entitled to claim $20,000 or even $10,000 from the organisers.
### 3. Offer

#### 3.1 What is an offer?

An offer is an expression of willingness by the offeror to contract on a set of specific terms with the intention to be bound by the contract once the offer is accepted. The terms of the offer must be definite and unambiguous. An offer, to be valid, must be communicated to the offeree (Taylor v Laird (1856) 1 H & N 266). An offer may be express or it may be implied from the offeror’s conduct.

An offer may be made to a single person, or to a class of persons. It may also be made to the public at large, becoming a contract with whoever has accepted the offer before its termination (Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256).

**Definition**

A bilateral offer is a promise made in exchange for another promise; a bilateral contract is an agreement in which one party promises to perform an act in exchange for a promise from the other party to perform another act. A unilateral offer is a promise made in exchange for performance of an act; a unilateral contract is a contract in which one party promises to perform an act in exchange for performance of an act, but the other side does not promise anything, in which case the contract is accepted (and therefore binding) when the offeree performs the act in accordance with the terms of the offer, thus forming a binding contract (See Carlill).

#### 3.2 Invitation to Treat

An invitation to treat is an expression of willingness to negotiate; it is where one party who is inviting another to make an offer. Having considered the offer, the original party can choose to reject or accept the offer.

The terms of an invitation to treat is not so definite or unambiguous as to treat it as an offer; besides, the person sending such an invitation does not have an intention to be legally bound. These features differentiate an invitation to treat from an offer.

Invitations to treat include the display of goods; the advertisement of goods; and an invitation for tenders.

#### 3.2.1 Tendering

Tendering is a commercial practice by which one party who wants to buy or sell something or wants work to be undertaken indicates a willingness to deal and calls for firm expression of interest from other parties. The person who called the tenders then decides which, if any, will be accepted.

An announcement calling for tenders is not usually regarded as an offer in the absence of the evidence to the contrary; it is normally an invitation to treat (Spencer).

**Spencer v Harding (1870) LR 5 CP 561**

**Facts:** A circular was sent out which said, “We are instructed to offer to the wholesale trade ... the stock of A ... which will be sold at a discount in one lot....” They refused to sell the goods to the person who submitted the highest tender. He brought an action against them.

**Issue:** Does an announcement calling for tenders constitute an offer?

**Held:** The announcement calling for tenders was not a firm promise to sell to the person submitting the highest tender; it only indicated that the defendants were prepared to receive offers to buy. Here, there was a total absence of any words to intimate that the highest bidder was to be the purchaser. Such an announcement amounted to an invitation to treat.