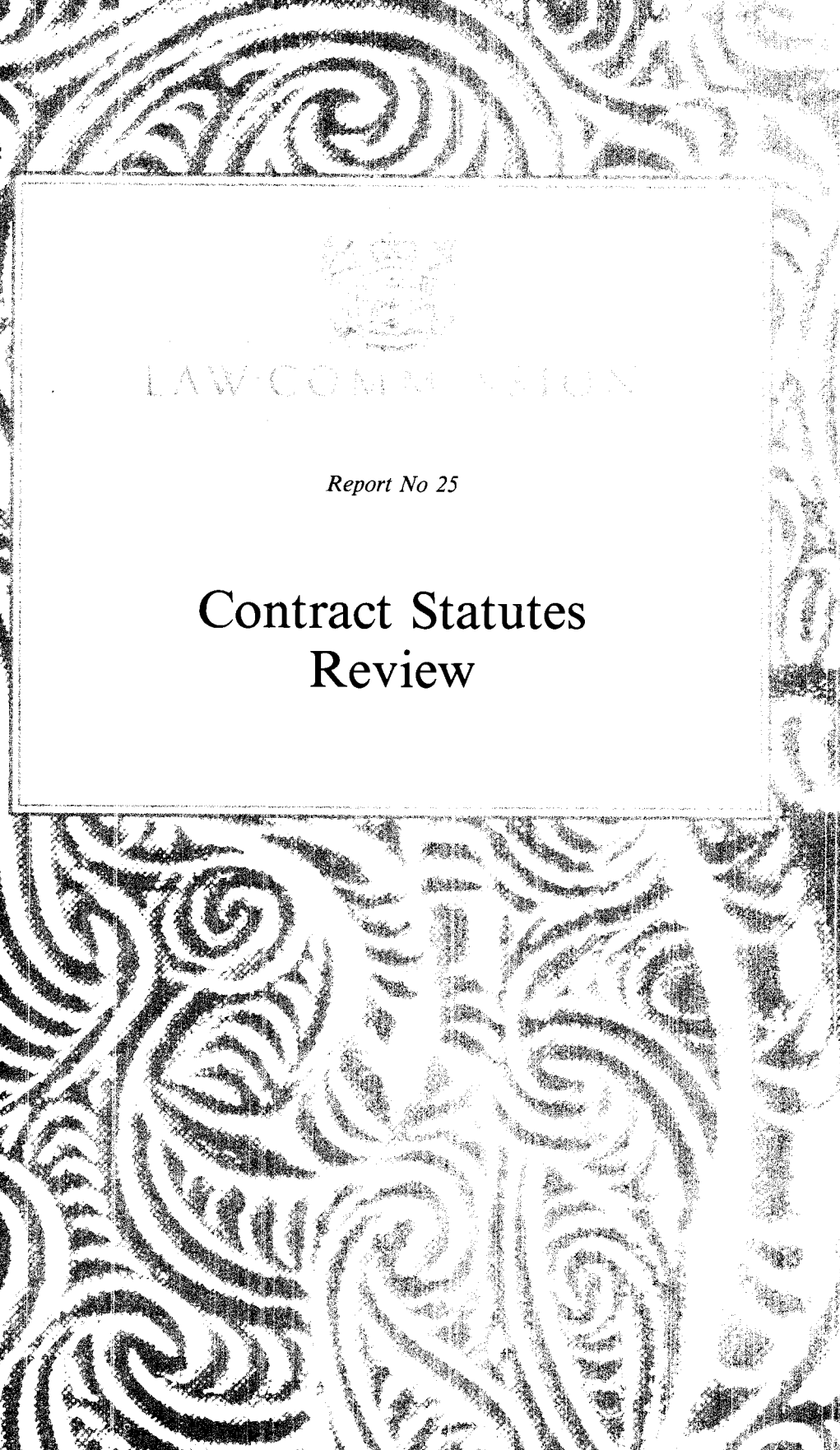

LAW COMMISSION

Report No 25

Contract Statutes Review

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its aim is to help achieve coherent and accessible laws that reflect the heritage and aspirations of New Zealand Society.

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CONTENTS

4 May 1993

Dear Minister

I am pleased to submit to you Report No 25 of the Law Commission, *Contract Statutes Review.*

The Commission undertook the review of six contract statutes with the assistance of leading experts whose papers are included in this publication. The preparation and wider dissemination of these valuable accounts of the jurisprudence which has developed around the statutes was the major purpose of the review.

The Law Commission also asked the authors to propose changes in the legislation where they thought them justified. On the basis of those proposals and related consultations the Law Commission recommends a number of amendments. For the most part, those recommendations involve only a fine tuning of the existing legislation. Recommendations on two matters do however go further. Amendments to the Sale of Goods Act 1908 would bring cancellation of contracts for the sale of goods within the Contractual Remedies Act 1979. The recommendations regarding the need to redefine "Court" reflect the internationalisation of New Zealand's commercial relations. The contract statutes may increasingly be applied in foreign jurisdictions as a result of greater contacts with our trading partners. As contacts with other jurisdictions develop, it is imperative that our laws are framed in such a way that they can be understood and applied elsewhere. The application in New Zealand of the statutes to contracts governed in part by foreign law also has to be resolved.

The recommendations in the report can be seen as part of a wider programme of contract law reform. The Consumer Guarantees Bill, the proposal to accept the United Nations Convention on Contracts for the International Sale of Goods and the possibility of a review of the Sale of Goods Act 1908 are part of this work. The Commission in general supports these developments and sees its present recommendations as consistent with them.

Yours sincerely

K J Keith
President

Hon Douglas Graham MP
Minister of Justice
Parliament House
WELLINGTON

PREFACE

The papers which accompany the Commission's report in this publication were prepared by specialists in contract law from university law faculties and from the profession. The Commission is extremely grateful to the authors of the papers:

- John F Burrows LLM (Cant) PhD (Lond), Professor of Law at the University of Canterbury
- Donald F Dugdale BA LLB (NZ), Partner in law firm Kensington Swan, Auckland
- Campbell T Walker, formerly staff solicitor in law firm Kensington Swan, now Judges' clerk, Court of Appeal
- Andrew Beck BBusSc (Capetown) LLB (Witw) LLM (SA), Senior Lecturer in Law at the University of Otago
- Richard Sutton BA LLM (Auck) LLM (Harv), Professor of Law at the University of Otago and now a member of the Law Commission
- Brian Coote LLM (NZ) PhD (Cantab), Professor of Law at the University of Auckland
- Peter Watts LLB (Hons) (Cant) LLM (Cantab), Senior Lecturer in Law at the University of Auckland
- Stephen Todd LLM (Sheffield), Associate Professor of Law at the University of Canterbury
- David J Goddard BA (Hons) (VUW) BA (Oxon), Partner in law firm Chapman Tripp Sheffield Young, Wellington

As will be seen throughout the publication, the authors have, as well as writing the papers, contributed in other aspects to their discussion and review and, in the case of David Goddard, to the drafting of the Contract Statutes Amendment Act which is part of the report. The papers make a major contribution to the understanding of the statutes and the way in which they have been applied in the New Zealand courts.

The Commission would also like to express its thanks to those who participated in the three meetings held at the offices of the Commission to discuss the papers. At the first meeting, held in May 1990, were Brian Coote, Francis Dawson, Donald Dugdale, David McLauchlan, John Burrows, Stephen Todd and Jim Cameron. The meeting was chaired by Jack Hodder.

The second meeting, held in March 1991, was attended by each of the above together with David Goddard, Hugo Hoffman, Peter Watts, Andrew Beck, Richard Sutton and John Fogarty QC. Jack Hodder again chaired the meeting which was also attended by other members of the Law Commission.

The third meeting held in December 1992 was attended by Donald Dugdale, Campbell Walker, Hugo Hoffman, David McLauchlan, Jim Cameron, Bob Dugan, David Goddard and Rex Ahdar, and was chaired by Richard Sutton.

In addition, further contributions were made to particular papers: Professor PRH Webb considered early drafts of Mr Goddard's paper on International Transactions; a similar role was performed by Mindy Chen-Wishart in respect of the Contractual Mistakes Act paper and by the late John Fox and Jeremy Finn for the paper on the Contracts (Privity) Act.

Finally, special mention should be made of the significant contribution of Jack Hodder who, as a member of the Law Commission until his appointment as partner in the law firm Chapman Tripp Sheffield Young in 1991, was responsible for the initiation of the project.

SUMMARY OF RECOMMENDATIONS

In general terms the contract statutes considered in this report work well, as shown in the papers included in this publication. The papers are commended to those interested in the general law of contract and the effect of the distinctive New Zealand contract legislation.

There are however a small number of points where improvements can be made to the detail and the coherence of the legislation. The following recommendations are made:

1. Provision should be made to clarify the wording of the following specific provisions so as to give full effect to the purpose of the legislation or current practice:

   Contractual Remedies Act 1979, ss 4 (clauses in contracts precluding enquiry into misstatements and agency), 7(3) and (4) (cancellation of contract), 8(1)(b) (notice of cancellation) (report, paras 23, 26; para 1.41; draft Act, ss 3–5)

   Illegal Contracts Act 1970, s 7(3) (factors taken into account) (report, para 3.39; draft Act, s 9)

   Contracts (Privity) Act 1982, s 6(b)(iii) (change of circumstances by beneficiary) (report, para 78; draft Act, s 2)

2. The Sale of Goods Act 1908 should be amended to enable the cancellation of a contract for the sale of goods to be governed by the provisions of the Contractual Remedies Act. (report, para 36; draft Act, ss 6, 7)

3. Each of the contract statutes needs amendment to address more explicitly contracts which are made overseas, or have an international element. In particular, provision needs to be made so that

   - in general, the well established principle that domestic statutes only apply to contracts, or matters affecting contracts, which are governed by New Zealand law, is recognised in the legislation; and
   - overseas courts, when dealing with contractual matters governed by New Zealand law, are not prevented from applying the New Zealand contract statutes or considering how any powers, which are vested in "the Court" by those statutes, should be exercised. (report, para 86; draft Act, s 10)

4. The Arbitration Act 1908 should be amended so that arbitrators may be empowered to give any remedy or relief under the contract statutes that a High Court may give. (report, para 97; draft Act, s 13)
5. The provisions dealing with the jurisdiction of the District Courts and Disputes Tribunals under the contract statutes should be simplified and brought in line with the principles on which jurisdiction is conferred on the Court and Disputes Tribunal generally. (report, paras 105, 109; draft Act, ss 11, 13)

REPORT OF THE LAW COMMISSION

I

The Scope and Outcome of the Review

INTRODUCTION

1 Contracts play a central role in modern society. The transactions by which goods, services and real property are sold or leased or mortgaged are supported and governed by an intricate collection of rules and principles which make up what we know as the law of contract. In New Zealand the law of contract was inherited in the nineteenth century from English law. New Zealand judicial decisions have in general followed those in England. However, in recent times, particularly during the 1970s, the general law of contract in New Zealand became distinctive with the enactment of a series of Acts of Parliament dealing with particular issues. This publication is in large part a progress report on those Acts, and on some related issues which arise in the wider law of contract.

2 The Law Commission came into existence in 1986, superseding the part-time law reform committees. One of those committees, the Contracts and Commercial Law Reform Committee ("CCLRC"), was the primary author of the contract statutes with which this report is concerned. The impressive work of the CCLRC was reviewed by one of its long-serving members, Professor Brian Coote, of the University of Auckland, in an article, "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160.

3 Professor Coote drew attention to what he considered was the CCLRC's underlying purpose, which was "not to weaken but rather to strengthen the institution of contract by liberalising the effect of

the law in a limited number of areas where it could operate unfairly" (188 – 189). In discussions with the Law Commission, which sowed the seed for the present publication, he invited the Commission to review the developments that had occurred in judicial practice under the statutes, assessing them against this underlying purpose.

4 Now that the review has been undertaken, it can be said immediately that not only have the statutes by and large achieved their purpose, but also that any fears which might have been entertained for "sanctity of contract" because discretions were conferred on the courts have proved to have little if any foundation. That is not to say that the courts have managed without difficulty or (although very infrequently) expressions of anxiety. From time to time they have expressed uncertainty about the width of the powers conferred by a statute, and encountered problems in interpreting particular provisions. To acknowledge this, however, is not to detract from the efforts of those who framed the legislation. Indeed, the remarkable thing is that, after frequent application of three at least of the statutes in the courts, there are so few points where suggestions can confidently be made for the improvement of the legislation.

5 It should also be acknowledged that the courts have undertaken their task conscious of, and sympathetic to, the underlying philosophy of the statutes, and willing to take the opportunities the statutes afforded them to reach reasonable and just conclusions. Whatever theoretical issues may be raised in the following pages, the reader will need to search very diligently to discover any case in which it might be seriously claimed that the result was unjust. It has been suggested that the statutes appear to have taken on a life of their own and may have permitted the court to adopt a wider version of its role than that anticipated when the legislation was first proposed. If that is so, then in the Commission's view that is not in itself a cause for concern, it is rather a positive feature of the legislation and the court's jurisdiction under it.

THE PROJECT PLAN

6 The original review plan prepared by the Commission involved an examination of the provisions and operations of five statutes:

Minors' Contracts Act 1969
Illegal Contracts Act 1970
Contractual Mistakes Act 1977

Contractual Remedies Act 1979
Contracts (Privity) Act 1982

7 These are not, of course, the only statutory provisions which have an impact on the law of contract. Of particular note is the Fair Trading Act 1986, but that legislation was too recent to justify inclusion in the review plan—which envisaged a retrospective survey. Most recently, the Consumer Guarantees Bill 1992 has been introduced into the House of Representatives and when this Bill is enacted it too will make important changes to the present law. Further significant statutes, which were omitted from the review because they dealt with particular types of contract and not contract law generally, include the Sale of Goods Act 1908, the Hire Purchase Act 1971 and the Credit Contracts Act 1981. Other significant statutes will be found in the table of New Zealand Statutes in the Law Commission discussion paper on unconscionability, *"Unfair" Contracts* (NZLC PP11 1990), 61.

8 A statute which might well have been included in the review, but was not, is the Frustrated Contracts Act 1944. Happily this omission was repaired when Professor Burrows kindly allowed us to include, as Appendix A, the paper he wrote on this topic in 1982 for the CCLRC. Although his paper has not been updated since he wrote it, it still represents Professor Burrows' view on the options for the reform of the law and its inclusion will enhance the usefulness of the present publication.

9 For this project individual reporters wrote papers which

- identified uncertainties, obscurities, anomalies and defects apparent on the face of the statute, or revealed by subsequent case law,

- suggested remedies for or clarification of the problems identified, and

- recorded any other matters, including the drafting and interrelationship of the various statutes, to which the Law Commission should have regard, given the policy objectives of the various statutes.

10 The Commission was fortunate in being able to engage specialists in contract law from the university law faculties. Recognising the

advantages of wider and practitioner input the Commission suggested that each reporter should discuss his paper with one academic colleague and one practising lawyer before submission to the Commission.

11 The plan also contemplated that those involved in the preparation of papers would be brought together, with others, at seminars hosted by the Law Commission, to discuss the papers and the identified potential for further reforms. The paper by Professor Coote on the Illegal Contracts Act 1970 was considered at the first seminar, held on 10 May 1990, when there was also the opportunity for discussion of a draft of the Law Commission's discussion paper, later published as *"Unfair" Contracts* (NZLC PP11 1990). The other papers—by that time expanded to cover ss 94A and 94B, inserted in the Judicature Act 1908 by the Judicature Amendment Act 1958 (mistaken payments) and international contracts—were considered at the second seminar which was held on 1 and 2 March 1991. A further seminar was held on 14 December 1992 to discuss the paper prepared by Mr Dugdale and Mr Walker (para 28).

12 These seminars featured forthright, constructive and enjoyable discussion of the issues in a forum with a high degree of representation of those who had previously been members of the CCLRC. The meetings were not designed to, and did not, produce explicit decisions on specific reform proposals, but the general direction of the debate was clear in most cases and, given the calibre of the participants (listed in the Preface), deserves considerable weight.

13 Overall, the general consensus was that little substantive change to the statutes would be helpful. In large part, this opinion was founded on the view that the statutes had worked well and that judicial interpretation of the statutes had clarified many issues in a way consistent with the general philosophy of the legislation.

14 Given this general assessment of the law, the Commission takes the view that no fundamental changes are called for at this time. There are, however, a number of less fundamental, but nevertheless significant, matters where legislation could usefully be proposed. In some cases, this involves only removing some remaining uncertainties, or restating particular provisions so as to reflect more adequately the way in which they are now applied by the courts. In one area in particular, however—the application of the statutes to contracts which operate across national boundaries—the Law Commission

considers that it is desirable to go beyond the confines of the law as it was originally framed, and give thought to matters which were not spelt out by the CCLRC when proposing the legislation.

15 The legislation which will be proposed in this report involves fine-tuning, designed to reduce uncertainties and eliminate minor drafting infelicities and anomalies. The value of such an approach should not be underestimated. It gives weight to the continuing cost of uncertainties in such a fundamental area of commercial law. In line with the emphasis given in the Law Commission Act 1985 to the need for clarity and accessibility, the revision stresses the efficacy of legislative change, while at the same time recognising that to be effective and just the law of contract must depend primarily on the well-informed and properly guided judgment of those who advise on its application and those who administer it in courts and other tribunals.

16 This publication is not only the occasion for a review of the detail of the legislation. Far more significantly, it is the vehicle by which the papers given by our contributors, and the debate they stimulated, can be made more generally available to people who are interested in the law of contract in New Zealand. The Commission believes that this material will help those who deal with issues touching upon the contract statutes, inside and outside the courtroom. The spirit of the statutes, and the methods the courts have adopted in applying them, are to be found in the papers, and not in the detail of the proposals for reform to which we now turn.

ADOPTION OF THE REFORM PROPOSALS

17 In the papers there are a number of law reform proposals. The authors did not press all of their proposals with the same degree of insistence, and the Commission does not mention those suggestions which the authors themselves hesitated to advance and which were not taken up with vigour in the subsequent debates. Further, as will be indicated in the notes to each of the papers, some of the proposals (which were advanced forcefully by their authors) appeared not to command sufficient support among the other contributors or commentators to justify putting them forward at this time as recommendations of the Law Commission. In this section of our report, we will deal only with those proposals which survived the dual scrutiny we have described. That is not to say that the other proposals may

not have merit; and certainly they deserve the opportunity to be discussed by a much wider audience.

18 We have also included in our draft Contract Statutes Amendment Act a few minor changes to the contract statutes for the reasons given in the papers.

19 This report concentrates on a limited number of recommendations which the Commission considers should be implemented at this time, where we are satisfied that legislation would remove problems which have arisen, or could arise, under the relevant Act. We consider them in the order in which they appear in the papers.

THE CONTRACT STATUTES

CONTRACTUAL REMEDIES ACT 1979

20 The Contractual Remedies Act made major changes to the law relating to misrepresentation and breach of contract. In particular, it provided new remedies for cases where a party was induced to enter into a contract because of the other's misrepresentation. It also defined (in very general terms) the circumstances when an innocent party to a contract can bring all the obligations under it to an end on account of a serious misrepresentation or breach by the other party. It further provided for the remedies each party is to have in that case. Two sections call for particular attention here, ss 4 and 8. Additional proposals for amendment to the Sale of Goods Act 1908, to enable the Contractual Remedies Act to apply more fully to contracts for the sale of goods, are discussed in paras 27 – 36.

Section 4

21 This section deals with contractual clauses which prevent courts from enquiring into whether misrepresentations or promises have been made by the other party, or from finding that they form part of the contract or were otherwise relied upon. Professor Burrows draws attention to an infelicity in the drafting of this section, because it appears to say that (although the enforcement of such clauses is in the court's discretion) the court cannot when exercising that discretion give consideration to whether the statement has been made (para 1.05).

22 Mr Goddard has pointed out further difficulties with the section (paras 7.73 – 7.75; 7.80 – 7.81). These relate to the fact that, if the

section was ever to be considered by a foreign court, it is unclear whether it sets out a "procedural" rule (dealing with how the court admits and assesses evidence) or a "substantive" one (dealing with whether such a statement vitally affects the contract the parties have agreed to). In the former case, even if the contract was one which was properly governed by the law of New Zealand, an overseas court would not give effect to the section. In the latter, it may well do so.

23 More will be said about the international aspects of the contract statutes later in this report (paras 80 – 100). In the meantime it is sufficient to say that, for the reasons given by Mr Goddard, the Commission considers that s 4 should be amended to make it clear that the section is a matter of substance and not procedure. Mr Goddard has suggested an approach to re-drafting the section which would also overcome the difficulty mentioned by Professor Burrows, and we have adopted that approach in the draft Act.

Section 8

24 There was common ground that there is a problem with s 8(1) (paras 1.61 – 1.69). That section applies when one party has broken the contract, or evidently intends to do so, and the other party wishes to cancel the contract and be absolved thereby from any further duties under it. The general principle stated in s 8 (with which there was no disagreement) is that the innocent party's decision to cancel the contract must be notified to the guilty one, provided that it is reasonably practicable to do so. However, the proviso is not wide enough. No provision is made, for example, for the situation where the guilty party makes it perfectly clear that they will have nothing further to do with the contract, and the innocent party, taking that at face value, fails to give notice of cancellation.

25 The Commission agrees that to require notification in this and similar cases serves no useful purpose. Further, there have been examples in the reported cases where an innocent seller of property, acting in a perfectly natural way but not knowing the law, has failed to give the appropriate notice. This can cause legal difficulties if the property is resold while the original contract for sale still remains legally uncancelled. In these cases, as Professor Burrows has pointed out (para 1.69), the courts have responded to the justice of the situation so that the vendor has not suffered, but only in the teeth of the

wording of the section, and at the cost of some contortion in legal reasoning.

26 *The Law Commission therefore recommends that s 8(1)(b) be amended to include a further exception to the general rule requiring notification.* The exception could be invoked where the conduct of the guilty party is such that they could not reasonably expect notification of cancellation. Admittedly this leaves the court with a discretionary power which is not fully defined, but it accords in result with the current trend of judicial decision and provides a clearer basis for it than the reasoning adopted at present.

The Application of the Contractual Remedies Act to Contracts for the Sale of Goods

27 The Contractual Remedies Act does not apply generally to contracts for the sale of goods. Such a contract cannot be "cancelled" under the Act. The statutory provisions which (in conjunction with the common law) govern the buyer's and seller's right to bring a contract to an end are to be found in the Sale of Goods Act 1908. There are substantial differences between the two sets of provisions which need to be reconciled. The CCLRC did not deal with the problem for the good reason that it was expected at the time that further legislation would be introduced dealing generally with sales of goods to consumers. It did not wish to anticipate the conclusions which might be reached by those responsible for framing such legislation.

28 Now that the Consumer Guarantees Bill has been introduced, that obstacle has been removed. The Law Commission considers that it is timely to deal with the relationship between the two earlier pieces of legislation. In principle, the Contractual Remedies Act should govern all contractual relationships, including sales of goods, except insofar as the special characteristics of sales of goods require the general rules to be modified. The Commission invited Mr D F Dugdale and Mr C T Walker to write a paper discussing the changes to the two pieces of legislation which would be necessary before the Contractual Remedies Act could apply in general terms to sales of goods. Their paper is included as a further addendum to Professor Burrows' paper on the Contractual Remedies Act.

29 The Commission, in giving the authors this task, did not see it as a general review of the present law on cancellation of a contract for

the sale of goods. There is much to be said for undertaking such a review, but it would need to be done as part of a general reform of the law of sale of goods. That would be a longer-term project which, once commenced, might take some years, and in the meantime the inter-relationship between the two statutes will continue to cause unnecessary difficulties in the courts. The Commission takes the view that it is useful to isolate this one particular problem—the relationship between the two statutes—and deal with it now. Of course, the result may well be that some provisions of the Sale of Goods Act which are now open to criticism will be left intact, and that some uncertainties in the present law will not be cleared up. But if there is clearly a problem now, which can be dealt with as part of the present project, it should not be deferred simply because even better legislation may be proposed in a few years' time. We are therefore very much in accord with the authors when, in para 1.155 of their paper, they say they "have consciously endeavoured to avoid changing the existing law beyond what is necessary to achieve the harmonisation which is our principal objective".

30 The proposed reforms are designed to operate in a wider legislative context. If other reforms to contract law which are currently under consideration are enacted, there will be three distinct regimes applicable to sales of goods:

- Local consumer sales will for the most part be governed by what is now the Consumer Guarantees Bill.
- Local non-consumer sales will be governed by the combined application of the Contractual Remedies Act and the Sale of Goods Act. (So too will consumer sales, as regards matters not covered by the Consumer Guarantees Bill.)
- Many international sales will be governed by the provisions of the Vienna Convention on Contracts for the International Sale of Goods (see NZLC R23 1992).

The Commission believes the first task is to bring the Contractual Remedies Act and the Sale of Goods Act together (thereby removing unnecessary fragmentation of the law), and the authors have at our request made this their first priority. Nevertheless, there is much to be said for at least making it possible for the courts to "harmonise" the principles which underlie the three separate regimes, so that there will not be arbitrary or unjustified differences depending upon which legislation happens to apply to the particular case. The Commission

considers that the paper goes a considerable distance in this direction.

31 The authors' proposals (which have in large measure been adopted by the Commission as its own recommendations) are set out in detail in their paper. Based on their proposals, the following are in broad outline the Commission's recommendations. A brief commentary follows.

(a) The longstanding distinction between "conditions" and "warranties" should be abolished. Whether a breach was sufficient to justify the other party in treating the contract as being at an end would depend upon the general criteria in the Contractual Remedies Act s 7.

(b) The ambiguous term "rejection" would not be used in the Act to refer to cases where the buyer of goods was entitled to, or did, treat the delivery of non-conforming goods as bringing the contract to an end. The Act would specifically refer, in such cases, to the buyer's right to cancel the contract. In other cases, a buyer who has the right to "reject" could refuse to accept delivery of non-conforming goods, but would not necessarily also have the right to determine the contract for breach.

(c) The buyer's right to reject goods which do not comply with the contract (specifically, under the terms implied by ss 14 – 17 of the Sale of Goods Act) would be preserved. If the non-conformity was of a serious character, or if the seller was unable or unwilling to deliver conforming goods, the buyer could also have the right to cancel the contract. However, the buyer would not be taken to have exercised the right to cancel merely on account of having rejected delivery of non-conforming goods.

(d) A rejection of goods or cancellation of the contract by the buyer would have the effect of revesting title to the goods in the seller. This would be an exception to the general rule adopted in the Contractual Remedies Act, that cancellation does not bring about any change in the current state of ownership unless and until that is ordered by the court under s 9. However, this rule of divesting would be a limited one, which would cease to apply once the goods had been delivered to and accepted by the buyer.

(e) "Acceptance" of non-conforming goods by the buyer would prevent the buyer from cancelling the contract, so that the only remedy would be damages for loss caused by the breach.

(Acceptance could occur if the buyer kept the goods after having had a reasonable opportunity to examine them and discovered the defect complained about, or if the buyer did some act inconsistent with the seller's ownership, eg, by selling them on to someone else.)

(f) The present s 13(3) of the Sale of Goods Act, which provides that the acceptance of part of a consignment of goods ordinarily precludes the buyer from rejecting the rest, would be repealed. Whether or not the buyer could cancel the contract, will depend generally on the Contractual Remedies Act, s 7.

Other recommendations in the paper of a consequential kind are not repeated here.

32 Recommendations (b) and (c) call for particular comment, since here the Commission is departing (not without hesitation) from the recommendations of Mr Dugdale and Mr Walker. The proposal they make for changing the law of "rejection" of goods was extensively discussed at the meeting of 14 December 1992, as a result of which the Commission was persuaded that (given the limited purpose of the present enquiry) it should proceed with caution. The principal issues raised in the discussion are indicated in notes the Commission has added at the critical points in the authors' paper. Basically the question is whether a buyer should have the right to reject goods whenever there is a significant non-conformity with the contract requirements, so that the seller must put the goods right or face the likelihood that the contract will be cancelled. This allows the buyer to put pressure on the seller to provide conforming goods. The proposals in the paper could have the effect of limiting that right to cases where conformity is either agreed to be essential, or (as provided by s 7 of the Contractual Remedies Act) the effect of the non-conformity is "substantially to reduce the benefit . . . or . . . increase the burden" of the contract for the buyer. The Commission considers that it is preferable to retain a more extensive right of rejection, and to maintain a sharp distinction between the right to reject non-conforming goods and the right to cancel the contract itself.

33 Consistently with the principle of that distinction, reference is made in our draft legislation to the seller's "right to cure" a delivery of defective goods, by taking them back and repairing them or providing other conforming goods in their place. Where a seller undertakes to do that, the buyer would not normally have the right to cancel the contract merely because of the defective delivery. This is a

commercially realistic way of dealing with such problems, as long as the buyer does not have to wait too long or the deficiency is not so great that the buyer must have substantial doubts about whether future performance can be relied upon. Both the Consumer Guarantees Bill and the Vienna Convention make provision for seller cure, and the development has been studied and supported by a New Zealand legal writer, Mr Rex Ahdar, in a very useful article "Seller Cure in the Sale of Goods" [1990] Lloyds Mar & Com LQ 364. There is a strong suggestion that the right to cure is already available under the present legislation, and under our proposals its scope will remain a matter for the courts to decide.

34 The only other point which calls for comment is recommendation (e) which will limit the buyer's right to cancel to those cases where the buyer has not "accepted" the goods. No such restriction is to be found in the Contractual Remedies Act. Particularly where the goods cannot be restored to the seller, it might be argued that it will still, on some occasions, be best to unravel the transaction and impose terms, rather than limit the buyer to the remedy in damages. But the authors meet this by pointing out, with some force, that such a rule could lead to uncertainty of title, because under their proposals cancellation will of itself revest property in the seller.

35 The provisions of the Contractual Guarantees Bill are in this respect somewhat more favourable to consumer buyers, but that is appropriate given the different context in which the law will operate. As between a commercial buyer and seller, it is more important to have a rule which, in relatively concrete terms, informs the parties who will be responsible for holding and disposing of an unsuitable product. Any financial consequences will be worked out in the context of an award of damages against the party in breach.

36 *The Law Commission therefore recommends that the proposals made in Mr Dugdale and Mr Walker's paper, modified as indicated, be adopted.*

CONTRACTUAL MISTAKES ACT 1977

37 The Contractual Mistakes Act dealt with the effect of a mistake on the validity of a contract and the remedies available under it. It defined what was meant by the term "mistake" in such a way that it might reasonably have been expected that courts would be more willing to exercise the jurisdiction than they had in the past. At the

same time, it provided a more flexible set of remedies than had previously applied under equity or the common law.

38 Of all the contract legislation of the 1970s, the Contractual Mistakes Act appears to have received the most adverse academic and judicial comment. In their paper, Mr Beck and Professor Sutton maintain that the fears expressed by academic writers have not in general been borne out by judicial practice. Further, the criticisms of the judges had been directed at one particular type of case, which lies at the outer edges of the law of contractual mistake and where the granting of relief may be expected to be controversial. This type of problem has attracted a significant share of the case law. In the contributors' view, the current judicial practice, far from leading to uncertainty and undermining the general sanctity of contracts, is, if anything, too restrictive. It may result in relief being refused in cases where it could properly be given without making undue inroads into the general policy that the sanctity of contract should be preserved. Further, unless the Contractual Mistakes Act is more liberally applied, there is a risk that courts will be forced to return to the older common law of mistake in order to give complete relief, contrary to the intentions of the framers of the legislation.

39 Attention at the seminar focused in particular on the complex inter-relationship between two provisions of the Act. The first, s 6(1)(a)(iii), states that the Act applies (inter alia) to that type of mistake where two parties "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". The second, s 6(2)(a), states that the term "mistake" does not include "in relation to that contract" (ie, the contract in respect of which relief is sought) "a mistake as to its interpretation".

40 The typical problem arises where the parties proposing to enter into a contract conduct their negotiations at complete cross-purposes as to the subject matter of the contract they are proposing to deal with: A, for example, believes she is selling one lot of land, B that he is buying a different lot. This mistake continues until the contract is concluded, and it turns out that the contract as written (either by chance, or as a result perhaps of carelessness by A or misleading conduct by B) favours B's view of the matter. The question is whether, and in what circumstances, A should be able to obtain relief in respect of that mistake. Further, if there are circumstances in which A should be relieved from the consequences of the mistake,

how are they to be distinguished from the much more common situation where A makes an offer to B, or accepts an offer from B, not realising that its terms have a meaning that A, had he or she known about it, might not have agreed to? In those cases at least, A is usually quite undeserving and should not normally be able even to resist an application for summary judgment, let alone succeed in establishing mistake in defended proceedings.

41 Currently, the courts are inclined to accept that in the first example, there may be a "different mistake about the same matter of fact or law", that is, about the subject matter of the contract. A believes one thing, B another, about the same thing, that is, the lot which is being bought and sold. But having found in A's favour, there then is a strong tendency to hold that the mistake is one of "interpretation of the contract" so that the case is excluded from the operation of the Act by s 6(2)(a) anyway. The contributors and commentators discussed the difficulties with this approach from various points of view, but ultimately were unable to offer a solution which a majority could support, although the majority did incline to the view that unless B (the party who sought to rely on the contract as written) was in some way at fault, relief ought not to be available to A under the Act.

42 The Commission considers that it is unwise at this stage to offer any solution of its own, given the inherent difficulty of the problem and the fact that the recent trend of decision appears to have stabilised a situation when previously judges had expressed misgivings about the law that they thought they were obliged to apply. This is an area in which, although the current legislation may not provide an ideal answer, there is sufficient flexibility for the courts to develop the law further if they wish, or maintain the status quo if that is the preferable course.

ILLEGAL CONTRACTS ACT 1970

43 An illegal contract is one which is contrary to law (whether statutory or judge made). The legislation declares that all illegal contracts are "of no effect" and no property can pass from one person to another pursuant to their terms. It also confers wide remedial powers on the courts, including the power to "validate" a contract so that after the court order it will have all the consequences of an ordinary contract.

44 Professor Coote's paper identifies two issues which deserve particular attention. The first relates to the definition of an "illegal contract", and the second to the extent to which courts should be able to "validate" an illegal contract notwithstanding that its terms or effect are inconsistent with the policy and intent of the legislation which made the contract unlawful.

Definition of "illegal contract"

45 As to the first of these, the Commission concurs in Professor Coote's general view that it is preferable that the legislature does not attempt to define, any more precisely than does the present s 3 of the Act, what is meant by an "illegal" contract (para 3.03). That is in general a matter of judicial policy as much as legislative policy.

46 Criticism has been directed at s 5 of the Act, which states that a contract which is lawfully entered into shall not become illegal or unenforceable by reason of the fact that its performance is in breach of any enactment, "unless the enactment expressly so provides or its object clearly so requires". This provision was evidently designed to deal with a problem that had arisen where a contract which could be performed lawfully was in fact performed unlawfully. Some decisions (for example, *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267, and the warrant of fitness cases such as *Berrett v Smith* [1965] NZLR 460 and *Fenton v Scotty's Car Sales Ltd* [1968] NZLR 929) had indicated that the entire contract might then become unlawful, so that the party who had performed the contract in an unlawful way would be unable to recover the contract price. The section gave some indication that (from the legislature's point of view) it was not necessary for the courts to take such a hard line, unless they were convinced that the legislative policy of the particular statute required that result.

47 The criticism made of this provision is that it is illogical to distinguish between contracts which are illegal "as performed", and those which are illegal "as formed". Examples of the latter would be (a) where a contracting party enters into the contract intending to perform it in the same unlawful way; or (b) where the contract specifies the same unlawful act as the only permissible mode of performance which is unlawful. In these cases too, it is said, the contract should not be illegal (with the consequence that it cannot be enforced without a court order) "unless the enactment expressly so provides or

its object so provides". There is no persuasive ground for distinguishing any of these three cases. Further, because the effect of illegality under s 6 is drastic (the entire contract is declared to be of no effect) a case should only be caught in the "net" of the Illegal Contracts Act if that is clearly necessary.

48 Professor Coote has discussed the various ways of dealing with this problem, and pointed out the difficulty which would be encountered in attempting to legislate for it because there are different theories about the way in which illegality affects a contract in law, and brings about the result that it cannot be enforced (para 3.10). He has also shown that further questions arise in the case of contracts which are not prohibited by statute, but which are simply declared "void" or "of no effect". Relief from the effects of such contracts, if they are not also "illegal", is not available under the Illegal Contracts Act.

49 The Commission shares the view of Professor Coote that it is difficult to devise a provision to deal with this apparent anomaly, and the possible advantages of such a provision are unclear. There are also a number of points that could be made against the proposal:

- Any attempt to impose further legislative controls upon the court's decision-making power is inconsistent with the basic philosophy mentioned in para 45, and should not be embarked on without good reason.
- Whether the impact of the Act should be narrowed depends in part upon how drastic the effect of the Illegal Contracts Act actually is. As will presently be seen, (paras 51 – 63) the courts are willing (in the view of some, too willing) to validate the contract under s 7 of the Act unless the relevant legislation clearly precludes that remedy, in which case some other remedy will generally be offered to persons who stand to lose as a result of the illegality. If, as appears, the consequences of holding a contract illegal are not in fact rigid or harsh, then there is no great need to restrict the number of cases which fall within the Act.
- No decided case has been discovered where it appears that the existing s 5 has caused any serious problem, or where its extension in the manner proposed would have assisted the court to reach a fairer or more reasonable solution.

50 We do not therefore propose any amendment to s 5.

Validation under section 7

51 The second issue raised in the paper is whether the courts have not gone too far in exercising the power to validate an illegal contract conferred by s 7. Professor Coote has pursued this point further: "Validation under the Illegal Contracts Act" (1992) 15 NZULR 80. The principal purpose of the article is to contend that the courts, in exercising their powers to validate a contract, have gone appreciably beyond what was envisaged by the CCLRC when formulating the legislation. But, while the author is careful to qualify his observations with the comment that "[d]oubtless, opinions will differ whether [these decisions] have been the result of a delegation by the legislature or of an arrogation by the courts" and also "whether what has happened has been a good or bad thing" (104), there is the strong suggestion that the process has gone too far, and that, as currently drafted, the power to validate is too open-ended.

52 Professor Coote accepts that the courts have not infrequently refused to validate contracts in clear cases where this would be undesirable, for example, contracts to deceive, or contracts to stifle criminal prosecutions, and contracts which are beyond the powers of the parties to achieve, (eg, where a particular consent should have been obtained but was not). But he points to two classes of case where the Court of Appeal in particular has shown its willingness to validate illegal contracts in the face of an apparent statutory prohibition.

Unlawful actions

53 In the first class, particular actions are to be carried out under the contract and a statute makes them unlawful. For example, it sometimes happens that, when arrangements are being made to buy and sell shares, the company's resources are used to facilitate the transaction; yet s 62 of the Companies Act 1955 states that no company shall give financial assistance for the purchase of its own shares. Should contracts which contravene s 62 be validated? The courts have held that the mere fact that the contract has provided for such financial assistance does not prevent validation. They take into account the clear purpose of s 62, namely, the protection of the company's shareholders and creditors. If that purpose is not threatened in any way, they have validated the contract.

54 The principal authority is *Catley v Herbert* [1988] 1 NZLR 606, where the plaintiff sought to enforce a contract for the purchase of the

defendant's shares in two companies. As part of the consideration for the purchase, the plaintiff would acquire property from one of the companies; that property was then to be transferred to the defendant as part-payment for the shares. It was not established whether or not the property was acquired at an undervalue. The court held nevertheless that there was a provision of "financial assistance" to the plaintiff, in that the company would not have sold the property to him for its own business purposes, and only did so to facilitate the sale. The contract between the plaintiff and the defendant was therefore illegal.

55 The court considered that this was a proper case for validation of the contract between the seller and buyer, so that it would be specifically enforced. It held that there was "nothing in the conduct of the parties, or affecting public interest, that weighs against the exercise of the validating power" (617). Creditors were not prejudiced, and the parties to the agreement were virtually the only shareholders. Earlier the court had referred to the fact that the purpose of the parties was to "achieve a dissolution of their business association", and that the defendant's purpose was to take his shares in cash (608). In this case, all shareholders affected were parties to the transaction and they had a perfectly legitimate purpose which could presumably have been given effect to by other means. They happened to choose a vehicle for their purpose which was unlawful, but only technically so, in the sense that none of the reasons for which s 62 was enacted had any application to the particular facts of the case. Once that was established, the case for some kind of relief was made out. Normally, if performance of the contract necessarily involves an unlawful act, one would expect the court to vary its terms (as it is empowered to under s 7(1)(c) of the Act) so that no unlawful act is involved. In *Catley v Herbert* this appears to have been achieved through the terms of the order for specific performance, rather than as a formal variation of the contract. This is dealt with by Hardie Boys J where he points out that the contract would now be carried out in a different way from what was first envisaged (623). He goes on to say "[i]t was for [the plaintiff] to see to completion of the necessary formalities within the company, and it must be presumed that would be done in a proper and lawful manner".

56 The second case, *NZI Bank Limited v Euronational Corporation Limited* (1992) 6 NZCLC 67,913, stands in marked contrast to the earlier decision. There the management of a company conceived a scheme which was clearly designed to sell company assets to assist in

the acquisition of options and shares in the company. The major shareholders, though adversely affected by the scheme, were not properly consulted. The alleged justification for the scheme was that it came within one of the provisions of s 62, dealing with the purchase of shares by employees; but it did not. Richardson J said:

> The deficiencies in the present arrangement cannot be categorised as procedural or technical. They go to the heart of the proviso. (67,933)

He identified a number of ways in which the scheme was inconsistent with the policy of the legislation. To grant relief would, in his view, be "contrary to the object of the enactment and against the public interest" (67,933). The result was that the financiers of the scheme, who had received substantial payments under it, were required to repay them to the company. Cooke P took a similar view, referring to the scheme as a "deliberate attempt to use a provision of the Companies Act for a financial engineering purpose for which it was never intended" (67,921). Gault J concurred with Cooke P and Richardson J.

57 We have referred to these decisions in detail because they seem to us to illustrate the present approach of the courts to the question of relief and validation under the Act. The Commission does not see any difficulty with this way of proceeding, nor any inconsistency with the basic principles of the Illegal Contracts Act or policies of s 62 of the Companies Act.

Contracts "void" or "of no effect"

58 In another group of cases, the statutes which make the contract illegal are directed not at the way in which a contract will be performed, but at the making of the contract itself. Usually, these statutes have a particular economic goal.

59 Their particular feature is that the legislation specifically states that a contract which contravenes its terms is "void" or "of no effect". In some cases, there will be further provision for remedies which are then to be offered to one or both of the parties. An example which has recently been before the courts is the Hire Purchase and Credit Sales Regulations 1957 (now repealed) which aimed to limit the amount of credit which could be given by way of hire purchase. Where the deposit paid by the purchaser fell below 60 percent of the purchase price, the hire purchase agreement was declared to be

"void" and all payments made by the purchaser could be recouped from the vendor. Another example, referred to by the CCLRC in their report *Illegal Contracts*, is s 25(4) of the Land Settlement Promotion and Land Acquisition Act 1952, which makes transactions entered into in contravention of the Act unlawful and of no effect.

60 The effect of the Illegal Contracts Act upon a number of provisions of this kind was analysed by the Court of Appeal in *Harding v Coburn* [1976] 2 NZLR 577, 581 – 587. The principles stated there were again applied by the Court of Appeal to a case involving the Hire Purchase and Credit Sales Stabilisation Regulations 1957, *National Westminster Finance NZ Limited v South Pacific Rent-a-Car Ltd* [1985] 1 NZLR 646. The general principle followed in such cases is that where a statute declares a contract to be "void" or "of no effect", and the contract is illegal, this does not preclude the possibility of validation under s 7 of the Illegal Contracts Act. This is because s 6 of the Act itself makes all illegal contracts "of no effect", as the starting point for determining what relief should be given on the particular facts of the case. Where, however, the statute goes on to provide for a specific remedy in the event of the contract being "void", the court may well be precluded by that express term from granting any other relief under s 7. The practical effect, in the case of the Hire Purchase Regulations, for example, is that the court may validate a contract declared to be "void" or "of no effect"; but if it does not do so, it is precluded by the express provision of the regulations from giving any other relief than what is there provided.

61 If exercised with care, as it has been, this approach seems sound in policy and principle. In the case of the Hire Purchase Regulations, the legislation's intended impact occurred when the contract was entered into. The resulting legal problems will not arise until later, when the vendor is likely to want to recover the money as quickly as possible. This is not at all inconsistent with the legislative purpose of restricting consumer credit. Validating the contract can be the simplest way of ensuring that all parties (especially guarantors) are made to pay for benefits received.

62 Another category of cases which has been noted by Professor Coote in his article on validation is that of contracts where "the parties have failed to comply with the requirements of the Land Settlement Promotion legislation in situations where the Act calls for a determination by the Land Valuation Tribunal" ((1992) 15 NZULR 80, 92). A court will decline to validate the contract in these

circumstances but it will exercise its discretion to vary the contract so that it becomes subject to the consent of the Tribunal. There can be no suggestion that the court has in its decision usurped the statutory function of the Land Valuation Tribunal. However, such a situation is distinct from the cases where there is no aggregation of land and where the illegality is merely a procedural matter. The courts will validate a contract in such circumstances.

63 That is not to say that validation should occur frequently or as a matter of course in such cases. Cooke J said in *Harding v Coburn* that the occasion for the exercise of power would be "an extreme and rare one" (585). The courts are conscious, too, of the fact that such legislation is intended to be "self-policing", in that the harsh effects of invalidation will be a powerful factor in persuading contracting parties to obey the law. This seems to us to be a workable approach to a number of statutes which were passed before the Illegal Contracts Act itself, and where no clear legislative intention can be discerned because the framers of such legislation could not have foreseen what the Illegal Contracts Act would subsequently say. And it sent a clear message to those drafting statutes after the decision in *Harding v Coburn* about what the likely effect would be if similar wording were adopted. This is not a matter which appears to need any revisiting.

64 On the Illegal Contracts Act 1970, therefore, our general conclusion is that the provisions have worked well. We recommend no change designed to alter the direction of current practice.

JUDICATURE AMENDMENT ACT 1958

65 This legislation was not among the reforms proposed by the CCLRC, but was generated by others involved with the law reform process before the CCLRC came into existence. It does not deal solely with the law of contract, although it can readily apply in contractual situations. But consideration of ss 94A and 94B of the Judicature Act 1908, which were inserted by the amending legislation, is not out of place here because of their general legal significance to the law of contract and contract-related restitution.

66 The two sections make changes in what was, in 1958, thought to be the common law applicable to money paid under mistake. Section 94A abolished the common law rule that money paid under a mistake of law cannot be recovered. Section 94B made it a general defence to claims for money paid under mistake (whether the mistake was one

of fact or law) that recipients had innocently altered their position as a result of having received the payment. The defence is not an absolute one, but depends upon the court's determination of whether it is just and equitable that relief should be refused the mistaken payer in all the circumstances of the case.

67 In his paper, Mr Watts helpfully analyses the sections in the light of modern restitutionary theory. He has shown that many of the reservations expressed about s 94A soon after the legislation has passed were either unfounded at the time, or have subsequently ceased to be significant. He also argues that the provision should be extended by repealing s 94A(2), which precludes relief for that type of "mistake" which merely reflects an understanding of the law that is common to the parties at the time of the payment.

68 With regard to s 94B, Mr Watts sees no reason to question the court's general approach to the exercise of its wide powers, but he rightly points out that the definition of "alteration of position" is (by modern standards at least) unduly restrictive. It must be shown that the person invoking the defence has "altered his position in reliance on the validity of the payment"; this seems to mean that the payee must take some active step (eg, paying the money away to a third party), consciously thinking about the validity of the payment, rather than passively accepting the money and doing nothing with it (when it might still be lost, eg, if it is put into a sock under the bed and subsequently stolen).

69 In assessing the suggestions which have been made for law reform in this area, the original legislation must be seen against its original background. In 1958 the body of legal theory now known as the "Law of Restitution" was scarcely conceived, either in this country or in England. There was in its place a collection of rules inherited from an earlier time, which seemed to have no capacity for change or growth. Further progress could only be made with legislative assistance by removing those legal doctrines which prevented the judges from changing the law, in the hope that the courts would then be free to adapt and develop legal principles which were more consonant with contemporary requirements.

70 Although ss 94A and 94B were beneficial and much needed provisions at the time of enactment, Mr Watts' paper illustrates one of the long-term disadvantages of this way of proceeding. What has happened is that, particularly in England and Australia, the courts

have cast off the old doctrines of their own accord and developed a law of restitution or "unjust enrichment", which applies to a much wider range of situations than does our 1958 legislation. For example, as Mr Watts points out, the common law rule that money paid under a mistake of law cannot be recovered is no longer regarded as beyond question, and it is not accepted in some Commonwealth jurisdictions. Further, restrictions which seemed entirely appropriate for innovative legislation of that time are inconsistent with the principles of law which the judges are now accepting and applying.

71 This general legal development is well illustrated by the two English decisions Mr Watts cites in the Annex to his paper, *Lipkin Gorman v Karpnale Ltd* [1992] 2 AC 548, and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1992] 3 WLR 366 (HL) paras 4.80 – 4.86. In the first of these, the House of Lords recognised a wide-ranging principle of restitution, incorporating within it a defence of change of circumstance. In the second of these (as noted by Mr Watts in recommending legislative change in the body of his paper) it was held that money paid to a public authority where the authority has no authority to demand it can be recovered without proof that the payer acted under any form of mistake or coercion. In both of these decisions the law has gone well beyond what it was understood to be in 1958.

72 The question the Commission has to consider is whether, in the light of developments such as these (which are likely to be influential when similar cases fall for decision in New Zealand), the appropriate course is to re-write the provisions of ss 94A and 94B so as to keep up with these new developments. It may be better to let the general law of restitution develop around them so that they eventually cease to be relevant. If the latter approach is chosen, the legislation can perhaps in due course be repealed, though we agree with Mr Watts when he says that such a course would be premature at this stage.

73 We favour leaving the legislation in its present form and awaiting further development of the general law of restitution in New Zealand. We therefore make no recommendations in respect of these two sections.

74 The basic purpose of this legislation is to allow a person ("the beneficiary") who is not a party to a contract, but is named or otherwise indicated in it as a person who is intended to benefit from its provisions, to sue under the contract and enforce the obligations of the person who has agreed to carry out the contract. Associate Professor Todd has explored the operation of its provisions, and is of the view (which we share) that any problems which have appeared in the Act have either been catered for by other proposed legislation, or are not likely to be helped by legislative amendment.

75 The one exception to this is Professor Todd's proposed amendment to s 6, which states the circumstances in which a contract can be varied by the parties to it, so as to exclude the beneficiary (who, it will be remembered, is not a party to the contract) from the rights which were originally intended. One of the grounds for variation (s 6(b)) is that the contract contains an express provision for its variation, as long as the beneficiary is aware that such a provision exists.

76 Professor Todd's concern is with s 6(b)(iii), which deals with the very unusual situation where the beneficiary knows of the contract, but is not informed of the provision permitting variation until some later time. During the intervening period, the beneficiary may alter his or her position in reliance on the contract benefit. Section 6(b)(iii) provides for that, when it says that the contract is not to be varied if that has happened. But (unlike the related provisions in ss 6(1)(a) and 7(2)(b) of the Act) the section says nothing about alteration of position by third persons to the detriment of the beneficiary.

77 To take a hypothetical example, A promises B to pay C (who is B's daughter) $2000; C's husband D, counting on that money coming into the household, then decides he can return to university for another year rather than working. Half-way through the year C and D discover there is a clause in the contract allowing A and B to vary it by agreement so that A is discharged from payment. Taking a strict view of the present law, A and B can vary their contract without regard to C or D, because C has not changed her position though D has done so to C's detriment. If the proposed amendment were enacted, that alteration of position will prevent A and B agreeing that A be discharged.

78 This seems to be a gap in the legislation which needs to be dealt with. *The Law Commission therefore recommends that s 6(b)(iii) of*

the Contracts (Privity) Act 1982 be amended to include reference to alteration of position by third parties detrimentally affecting the beneficiary.

MINORS' CONTRACTS ACT 1969

79 In his paper, Professor Todd reviews the Act and decisions under it and comes to the conclusion that there is no occasion for amendment. We agree.

INTERNATIONAL TRANSACTIONS

80 We turn finally to Mr Goddard's paper, in which he deals with the problems which may arise with contracts which have effect across national boundaries. This can occur, for example, where a contract is made between inhabitants of different countries, or where it is made in one country but provides for its performance in another country.

General law

81 We have already issued a report dealing with one common example of a contract having cross-border effects, (*The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance* (NZLC R23 1992)). The Commission has there supported the Government's intention that New Zealand should accept the United Nations Convention. The legislation proposed in the report would bring the New Zealand law applicable to international sales contracts into line with that of other contracting states. One of the effects would be that, where one party to the sale carries on business in New Zealand and the other is in another contracting state, any difference in the law between the two countries is made irrelevant and a set of rules common to both countries is substituted: see art 1(1)(a). In such a case, no problem of two laws conflicting will arise since both are the same.

82 Where differences between two legal systems are resolved in that way, the matter can be dealt with without further complication. The same is true where, under art 1(1)(b) of the Convention, the matter is referred to the law of a contracting state. But this is not always the case. Further, the Convention does not apply to all the legal rules governing contracts. The New Zealand contract legislation deals

largely with matters which are not covered by the Convention. The reforms recommended in NZLC R23 will not be of assistance there.

83 If a contract has international significance, and the law in one of the countries in which it operates differs from the law of New Zealand, which law will govern the contract—the New Zealand legislation, or the law of the other country? In general (and at the risk of over-simplifying some rather technical and complex law) it may be said that the law which governs the contract is its "proper law", that is to say, "the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection" (Dicey and Morris, *The Conflict of Laws* (11th ed 1987) 1161 – 1162). If the "proper law" of the contract is that of New Zealand, the New Zealand law (with its special statutory provisions) will normally apply. If the "proper law" is that of another country, then the contract law of New Zealand does not apply.

The need for legislative amendment

84 When the CCLRC framed much of the legislation with which this report is concerned, it concentrated on domestic law and appears to have taken the view that wherever the contract had international consequences, these would be taken care of under the general rule that the "proper law" would be applied. In any given case, the "proper law" may or may not be the law of New Zealand. Although Professor P R H Webb had been active in advocating that the matter be specifically dealt with in the legislation, (see [1979] NZLJ 442) the Committee evidently did not perceive any need to make specific provision for this, since (if the legislation is silent) the general principles of conflict of laws would normally apply.

85 Mr Goddard's paper accepts that the general principles of conflicts of laws should determine whether New Zealand or some other law should apply to the contract. The question he raises is whether the statutes as drafted in fact achieve that end. The statutes concerned are the Contractual Remedies Act, the Contractual Mistakes Act, the Illegal Contracts Act and the Contracts (Privity) Act. There are two distinct situations.

86 *Foreign contracts in New Zealand courts.* The first situation arises where a contract which is governed by overseas law is applied

by a New Zealand court to parties who have chosen, or who are obliged, to conduct litigation here, in the absence of special policy considerations. On general principle, one would expect that the law of the other country would apply and it would be inappropriate for a New Zealand court to refer to New Zealand legislation. It seems, however, that by their silence on the point, the New Zealand statutes have left it in doubt whether the legislative intention was not to override the general conflict of laws rule, so that a New Zealand court would be obliged to apply the New Zealand statutes even to a contract whose proper law was not that of New Zealand. *Mr Goddard's suggestion, which the Commission adopts as its own recommendation, is that in each of the statutes the relevant provision should be amended so that it is apparent that, in general, the statute applies only to contracts which are governed by New Zealand law.* We have, however, reserved, for consideration in our work on choice of law, whether a similar change should be made to the Minors' Contracts Act. Capacity to contract is not a matter which is dealt with solely by the "proper law of the contract", if that is different from the law of the place the contract is entered into, or of the place of a young person's domicile. The question requires consideration as part of a review of wider issues of the principles of conflict of laws than we would wish to give it here. In the meantime, it seems unlikely that any harm will be done if the Minors' Contracts Act remains silent on the point.

87 *New Zealand contracts in foreign courts.* The second situation arises where a contract which is governed by New Zealand law is considered by an overseas court. This can happen where parties have chosen or (for reasons such as those outlined by Mr Goddard at paras 7.05 – 7.06) are obliged to bring proceedings in that country. Here again, on general principle one would expect the overseas court to pay close regard to the New Zealand law of contract in determining what effect the contract should have. There are in such cases obvious difficulties in the overseas court simply "applying" the New Zealand statutes because it will be unfamiliar with the principles on which they are based and the judicial practice under them. But this kind of problem is not infrequently encountered in cases involving international transactions, and would usually be overcome by taking evidence from experts on New Zealand law.

88 The difficulty identified by Mr Goddard is that the New Zealand statutes have been expressed in terms which cast doubt on whether they are intended to be applied in this way by overseas courts (paras

7.20 – 7.23). Typical is the Illegal Contracts Act 1970, which makes general provision as to the effect of an illegal contract in s 6, and goes on to say in s 7 that "the Court" may grant the relief mentioned in subs (1). The word "Court" is defined in s 2 as meaning "the High Court or a District Court that has jurisdiction under s 9 of this Act . . ." (there is also a reference to Disputes Tribunals). Clearly this definition applies only to courts in New Zealand.

89 Now it might very well be argued that the purpose of the definition is simply to indicate which domestic New Zealand tribunals are permitted to exercise the discretionary jurisdiction conferred by s 7, and it has no implication at all for what overseas courts may do (it being entirely inappropriate for the legislature of one state to give instructions to the courts of another). But there is also the argument that in view of their special nature, it was intended that the statutory jurisdictions should only be dealt with by the New Zealand courts. This is an ambiguity which can easily be remedied. *We recommend that the term "Court" in all of these statutes be defined to mean "the court or arbitrator or tribunal by or before whom the matter falls to be determined".* We will have a little more to say about the generality of this recommendation later in the report (paras 98 – 100).

How the proposed amendment might also affect domestic law

90 The change in meaning given to the term "Court", if put in the very terse form we suggest in the previous paragraph, will have some effect on domestic law as well, with respect to the jurisdiction of (a) the District Courts; and (b) arbitrators. It is therefore necessary to consider what, if any, modification needs to be made either to the present law, or to the amendment in its simplest form.

91 *The District Courts.* The provisions dealing with the jurisdiction of the District Courts could perhaps be retained, but that is not the course we prefer. We will deal with this matter later in our report (paras 101 – 105).

92 *Arbitrators.* Arbitrators are already permitted to exercise the powers conferred on courts by the Contractual Remedies Act, the Contractual Mistakes Act and the Contracts (Privity) Act: see Arbitration Act 1908, Second Schedule. The Commission would question whether this provision is strictly necessary because any arbitrator appointed to determine an issue where the law is to be applied will be expected to apply the whole of the law, including those statutes which

alter antecedent principles of law by conferring new powers on the "Court" (*Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206). But this may not be the law in New Zealand (*AG v Mobil Oil NZ Ltd* [1989] 2 NZLR 649). In any event the enactment of the new definition of "Court" already proposed (para 89) will be sufficient to achieve that purpose, and the specific reference to certain of the contract statutes in the Second Schedule can be deleted.

93 This amendment, however, requires further thought in the case of two of the statutes, the Illegal Contracts Act, and the Minors' Contracts Act (especially ss 6, 7 and 9). These are omitted from the Second Schedule to the Arbitration Act, presumably on the assumption that only a court should be able to alter the effect of rules of law or statutory provisions which make a contract illegal or void. But this assumption, in the Commission's view, does not give due weight to the nature of the arbitration agreement, which may well be an honest and perfectly legal way of resolving disputes about the effect of an illegal or void contract.

94 With regard to the Minors' Contracts Act, for example, the Law Commission sees no reason why a person of full age should not submit, for determination by an arbitrator, the question whether a contract entered into by that person while a minor, was valid and, if not, what restitution or compensation should be made. And, with respect to the Illegal Contracts Act, although there is no doubt that an agreement to arbitrate a dispute between two bank robbers over the division of the spoils would have no effect in law at all, there seems no reason why two parties to a contract which is inconsistent with a statutory provision should not use arbitration as the method of determining how the consequences of that contract should be dealt with according to law. It will always be a matter for the court to decide, when considering the enforcement of an award, whether the arbitration agreement was lawfully entered into, and whether the remedy the arbitrator awards is one that the parties could lawfully have agreed to undertake, or authorise an arbitrator to impose.

95 The Law Commission dealt with this question in *Arbitration* (NZLC R20), where it was said:

> In essence, the approach to arbitrability favoured by the Law Commission, and reflected in s 8 [of the draft legislation presented in the Report], is that, as a matter of New Zealand law, any dispute which can be settled between the parties by

> direct agreement should be able to be determined by arbitration. Neither form of agreement-based result will be valid where the agreement is contrary to public policy or any other enactment provides that such a dispute may not be submitted to arbitration. (para 231)

Consistently with this view, the Law Commission prefers an answer to this problem which looks to the validity of the agreement to submit the matter to arbitration rather than to the nature of the matter in dispute. Under this approach any questions of legality are generally deferred until the arbitrator's award is sought to be enforced or judicially reviewed, although occasionally the matter may be raised at an earlier stage, for example, in answer to an application to stay court proceedings so that an arbitration can take place.

96 The Commission went on in its report to point out (para 259) that the preferable way of dealing with the definition of an arbitrator's statutory powers is not to spell them out statute by statute (as is presently the case: see Arbitration Act 1908, Second Schedule). It is to give a general definition of the arbitrator's powers, leaving it to the parties to limit this in their reference to arbitration, if they wish to do so. We adhere to that view.

97 *The Law Commission therefore recommends that the Arbitration Act 1908 be amended so that arbitrators may give any remedy or relief under the contract statutes that a High Court might have given.* Reference to the specific contract statutes should then be removed. If the legislation proposed in NZLC R20 *Arbitration* is adopted before the present recommendation, there will be no need for any further legislative provision to achieve that end. If not, there will need to be an amendment to the Second Schedule of the present Arbitration Act 1908. We consider the simplest way of achieving the intended result is to amend it so as to remove all specific reference to contract statutes. This will avoid any argument that a statute not listed in the Schedule may not be applied by the arbitrator. The court may nevertheless decline to enforce an award in any particular case on the ground that the submission of a particular matter to an arbitrator has not cured the underlying invalidity of the contract whose application is in dispute.

Should these reforms apply to all the contract statutes?

98 So far, we have suggested that conflicts of laws problems apply to all the contract statutes. The amendments we have proposed in paras 86 and 89 should make it clear that New Zealand courts will not in general apply the statutes to foreign contracts, and foreign courts may apply the statutes to New Zealand contracts. But, there may be some question whether the Illegal Contracts Act 1970 and the Minors' Contracts Act 1969 should be applied by foreign courts, in cases where the contract is governed by New Zealand law.

99 In an analysis of the Illegal Contracts Act and the Minors' Contracts Act in Mr Goddard's paper (paras 7.63 – 7.65) he is inclined to think not. The Law Commission considers, however, that the way should be left open for foreign courts to refer to these Acts if they wish. In any transaction with international consequences, a foreign court will have to consider carefully how the law would have been applied by a court of the country of the "proper law" (in this case, New Zealand) in estimating the rights that the parties have under a contract. It would seem a little curious if the legislation were to be so framed that a foreign court was encouraged to take upon itself the delicate balancing task involved in deciding whether a contract is illegal under New Zealand law, so that s 6 of the Illegal Contracts Act applies; but then discouraged from deciding how the consequences of s 6 might be mitigated by a New Zealand court.

100 *The Commission recommends that the Illegal Contracts Act and the Minors' Contracts Act be amended in line with the recommendation in para 89.* The proposed formulation of the law in our draft bill removes any suggestion that an overseas court is expressly excluded from entering into such issues. But it does not state, either, that it wishes to invite a foreign court to make that assessment. It is entirely neutral on the point. In this way, it contemplates that the overseas court will exercise its own judgment, reached in the context of the facts of the particular case before it, about how far it should determine matters which are peculiarly governed by New Zealand law. This seems to us preferable to retaining the existing law (which contains a troubling ambiguity as to the legislature's intention), or to purporting to give direct instructions to an overseas court about how it should or should not exercise its own powers, when required to ascertain the current state of New Zealand law.

The Jurisdiction of District Courts

101 The question of the jurisdiction of District Courts was not expressly raised in our discussions with contributors and commentators, and our interest in this topic arose initially, as has been seen, out of the suggestions made for amendment of those provisions in the contract statutes which may have conflict of laws aspects. The various provisions dealing with the District Courts' jurisdiction will be found in the Minors' Contracts Act s 14; the Illegal Contracts Act s 9; the Contractual Mistakes Act s 9; the Contractual Remedies Act s 12; and the Contracts (Privity) Act s 10. All of these sections adopt a common pattern, which is not found in the earlier provisions of the Frustrated Contracts Act 1944.

102 As an example, in the Illegal Contracts Act jurisdiction is currently conferred on the District Courts (a) where the matter arises in the course of some other proceedings in which it has jurisdiction on independent grounds; or (b) where the value of the consideration for the contract is not more than $200,000. It appears that in the latter case an application cannot be made under s 7 of the Act if the consideration for the contract is more than $200,000, even if the matter in dispute, and for which relief is sought, is a much smaller sum. Admittedly, jurisdiction can also be conferred on the District Court by the agreement of the parties, and they may well be wise so to agree in the light of the additional costs which might be incurred in High Court proceedings. But if no agreement is reached, or if the matter cannot be brought to the court as an independent action, then it seems that a District Court cannot hear the case.

103 This legislation was conceived at a time when District Courts had a very limited civil jurisdiction and it may well have been appropriate to exclude them from entering upon cases of contractual complexity. The degree of complexity involved could (with some stretch of the imagination) be fairly indicated by the amount of the consideration of the contract. Whatever the explanation may have been, now that the general jurisdiction and procedural powers of District Courts have been considerably extended, it is much more difficult to see the need for such artificial limitations on the District Courts' powers.

104 The general principle on which jurisdiction is conferred on the District Courts is stated in s 29 of the District Courts Act 1947 (as

amended in 1992). The monetary limit of $200,000 is based upon the amount claimed, rather than the value of the consideration for the contract which forms the basis of the action. It seems that the present restriction in the contract statutes is anomalous and we would favour the repeal of the specific provisions in each of these statutes. This would bring the powers of the District Courts under the contract statutes in line with those of the Disputes Tribunals. Since the Disputes Tribunals Act 1988, the Disputes Tribunals' jurisdiction has been defined in terms of the amount claimed and not the value of the consideration for the contract: see ss 63, 64, 68, 78 and 81.

105 *The Commission recommends that the specific provisions dealing with the jurisdiction of the District Courts in the contract statutes be removed.* The effect of this proposal would be to bring the District Courts' powers in relation to contracts in line with their jurisdiction generally. The courts could hear any case where the debt, demand or damages or the value of the chattels claimed is not more than $200,000. In the course of deciding such a case they could award any of the remedies conferred by the contract statutes (District Courts Act 1947 s 29(1)). Where no monetary remedy is sought, the courts would have general equitable jurisdiction (under s 34), for example to award specific performance, injunction or a declaration, and to determine matters of title (s 35), as long as the value of the property claimed or in issue does not exceed $200,000. It appears to the Commission that there is no need to make any further provision in the District Courts Act dealing specifically with the powers conferred on courts by the contract statutes.

The Jurisdiction of Disputes Tribunals

106 Our consideration of the jurisdiction of the District Court leads naturally to further consideration of jurisdiction issues in relation to the Disputes Tribunals, particularly in light of our recommendation (in para 89) that the term "Court" be redefined.

107 A particular drafting practice has developed which requires (upon every change in the amount of claims in respect of which the Disputes Tribunals have jurisdiction) consequential amendment to every contract statute which the tribunals may apply. Each contract statute defines the term "Court" to include a Disputes Tribunal and sets out in full the jurisdiction of the Disputes Tribunals in relation to the statute.

108 We have already recommended that the definition of "Court" in each of the contract statutes should enable Disputes Tribunals to exercise the jurisdiction of each statute. However, this recommendation, in relation to the Disputes Tribunals, should be expanded to ensure that Disputes Tribunals may confer any remedy or relief able to be conferred by a court. This would best be done by the inclusion of a section to this effect in the Disputes Tribunals Act and consequential repeal of the jurisdiction provisions in each of the contract statutes. *In the case of each of these statutes, the Law Commission recommends their amendment so that the term "Court" be redefined in the manner proposed in para 89. The general jurisdiction clause to be inserted in the Disputes Tribunals Act should include the power to make any orders which a court could make under each statute. The statutes would be referred to specifically by name in a schedule to the Disputes Tribunals Act.*

109 If this recommendation is to be adopted in relation to the contract statutes, it should also be adopted for other statutes which confer jurisdiction upon the Disputes Tribunals; Part VI of the Disputes Tribunals Act consequentially amends the Credit Contracts Act 1981 and the Hire Purchase Act 1971. This has been done in our draft statute, but we have preserved certain specific limitations on the Disputes Tribunals' powers which are at present contained in those Acts.

CONCLUSION

110 In this report, the Law Commission recommends a series of detailed amendments to the contract statutes and related legislation. A draft statute, with commentary, follows. The Commission then presents the papers and observations of the contributors and commentators who have given their time and attention to the contract statutes and the decisions of the courts in applying them. It gives the Commission great pleasure to present these papers in published form, and to commend them to all who take an interest in the law of contract.

111 The draft Contract Statutes Amendment Act recommended by the Law Commission is set out in Chapter II, and is reproduced with a commentary on each section in Chapter III.

112 The contract statutes themselves have been reproduced in Appendix B.

II

CONTRACT STATUTES AMENDMENT ACT 199-

CONTENTS

The Parliament of New Zealand enacts the Contract Statutes Amendment Act [199].

1 Commencement of the Act

This Act comes into force on [ ].

Amendment to Contracts (Privity) Act 1982

2 Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge

Section 6(b) of the Contracts (Privity) Act 1982 is amended by deleting subparagraph (iii) and substituting:

"(iii) The position of the beneficiary had not been materially altered by the reliance of that beneficiary or any other person on the promise before the provision became known to the beneficiary; and"

Amendments to Contractual Remedies Act 1979

3 Statements during negotiation for a contract

Section 4 of the Contractual Remedies Act 1979 is amended by repealing subsections (1) and (2) and substituting:

"(1) A provision in a contract or any other document is void and of no effect to the extent that it purports to preclude a Court from inquiring into or determining the question—

(a) Whether a statement, promise or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or

(c) Whether, if it was a representation, it was relied on;

unless the Court orders that, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time, it

is fair and reasonable that the provision should be conclusive between the parties.

(2) A provision in a contract or any other document is void and of no effect to the extent that it purports to preclude a Court from inquiring into or determining the question of whether, in respect of any statement, promise or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it."

4 Cancellation of contract

Section 7 of the Contractual Remedies Act 1979 is amended in subsections (3) and (4) by deleting "stipulation" wherever it occurs, and substituting in each place "term".

5 Rules applying to cancellation

Section 8(1) of the Contractual Remedies Act 1979 is amended by deleting paragraph (b), and substituting:

"(b) Before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, where:

(i) It is not reasonably practicable to communicate with the other party; or

(ii) The other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract."

Relationship between Contractual Remedies Act 1979 and Sale of Goods Act 1908

6 Amendments to Sale of Goods Act 1908

(1) Section 13 of the Sale of Goods Act 1908 is repealed.

(2) The Sale of Goods Act 1908 is amended by inserting after section 39 the following:

"39A Rejection of goods

(1) A buyer is entitled to reject goods if:

(a) The contract of sale or this Act provides for rejection of the goods in the circumstances which have occurred;

(b) There has been a breach of any term implied in the contract by section 14(a), section 15, section 16(a) or (b) or section 17 of this Act;

(c) There has been a breach of the contract which entitles the buyer to cancel the contract.

(2) Notwithstanding any other provision of this Act, where a buyer rejects goods:

(a) The rejection is not of itself a cancellation of the contract of sale;

(b) It is a question in each case depending on the terms of the contract and the circumstances of the case whether the buyer is entitled to cancel the contract under section 7 of the Contractual Remedies Act 1979;

(c) If the buyer is entitled to cancel, cancellation must be effected in accordance with section 8 of the Contractual Remedies Act 1979.

(3) Without limiting the generality of subsection (2), where a buyer rejects goods delivered before the time at which delivery is due the seller may deliver goods which comply with the contract up to the time at which delivery is due, unless before delivery the buyer is entitled to cancel and does cancel the contract."

(3) The Sale of Goods Act 1908 is amended by inserting after section 55 the following:

"Revesting of property on cancellation

55A Revesting of property on cancellation

(1) If the property in goods has passed to the buyer before the goods are delivered to and accepted by the buyer, and the goods are rejected by the buyer, the property in those goods revests in the seller.

(2) Notwithstanding section 8(3) of the Contractual Remedies Act 1979, if the buyer cancels a contract of sale at a time when property has passed to the buyer in goods which have not been delivered to and accepted by the buyer, the property in those goods revests in the seller.

(3) Nothing in subsection (2) affects any rights acquired by any person under or through the buyer in respect of the goods."

(4) The provisions of the Sale of Goods Act 1908 referred to in Schedule 1 are amended in the manner indicated in that Schedule.

7 Consequential amendments

(1) Section 2(1) of the Motor Vehicle Dealers Act 1975 is amended by repealing the definition of "term".

(2) Section 15 of the Contractual Remedies Act 1979 is amended by deleting paragraph (d).

8 Transitional provision

Nothing in sections 6 or 7 applies in relation to a contract for the sale of goods made before the commencement of this Act.

Amendment to Illegal Contracts Act 1970

9 Court may grant relief

Section 7(3) of the Illegal Contracts Act 1970 is amended by inserting, after "under subsection (1) of this section", the following:

", and the nature and extent of any relief to be granted,".

Jurisdiction under contract statutes

10 Definition of "Court"

The enactments referred to in Schedule 2 are amended by repealing the definition of the term "Court" and substituting:

" 'Court' means, in relation to any matter, the Court, Tribunal or arbitrator by or before whom the matter falls to be determined;".

11 Jurisdiction of Disputes Tribunals

(1) Section 10 of the Disputes Tribunals Act 1988 is amended:

(a) by inserting after subsection (1):

"(1A) A Tribunal shall have jurisdiction to exercise any power conferred by any of the enactments specified in Part 1 of the First Schedule in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to section 13 of this Act, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.";

(b) in subsection (2) by inserting after "specified in" the following: "Part 2 of".

(2) Section 13 of the Disputes Tribunals Act 1988 is amended by inserting after "subsection (1)" the following: "or subsection (1A)".

(3) The Disputes Tribunals Act 1988 is amended by repealing the First Schedule and substituting the following:

"First Schedule

(Section 10)

Other enactments that confer jurisdiction on Disputes Tribunals

Part 1

Contracts (Privity) Act 1982
Contractual Mistakes Act 1977
Contractual Remedies Act 1979
Frustrated Contracts Act 1944
Illegal Contracts Act 1970
Minors' Contracts Act 1969

Part 2

Credit Contracts Act 1981
Fair Trading Act 1986
Fencing Act 1978
Friendly Societies and Credit Unions Act 1982
Hire Purchase Act 1971"

12 Application of contract statutes

The enactments referred to in Schedule 3 are amended in the manner indicated in that Schedule.

13 Repeals

The provisions referred to in Schedule 4 are repealed.

SCHEDULES

Schedule 1

Amendments to the Sale of Goods Act 1908
(Section 6 (4))

Provision	Manner in which amended
section 2(1)	By repealing the definition of "warranty".
heading above section 12	Delete, and substitute "Terms of the Contract".
section 14	By deleting "condition" and "warranty" wherever either occurs, and substituting in each place "term".
section 15	By deleting "condition" and substituting "term".
section 16	By deleting "warranty or condition" wherever it occurs and substituting in each place "term". By deleting "implied condition" wherever it occurs and substituting in each place "term". By deleting "conditions" in the marginal note and substituting "terms".
section 17	By deleting "condition" and substituting "term".
section 33	By deleting "is a repudiation of the whole contract or whether it is a severable breach, giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated" and substituting "entitles the buyer or the seller to cancel the contract under section 7 of the Contractual Remedies Act 1979".
section 37	By renumbering section 37 as section 37(1) and inserting after it: "(2) By accepting goods the buyer affirms the contract for the purposes of section 7(5) of the Contractual Remedies Act 1979, whether or not the buyer is aware of any repudiation, misrepresentation or breach which might otherwise have entitled the buyer to cancel the contract."

section 49	By deleting "rescinded" wherever it occurs in the section and in the marginal note, and substituting in each place "cancelled".
section 54	By deleting subsection (1) and substituting: "(1) Where there is a breach of contract by the seller the buyer may set off any damages to which the buyer is entitled in diminution or extinction of the price, or bring proceedings claiming damages." By deleting "warranty" wherever it occurs in subsection (2) and substituting "the contract". By deleting "warranty of quality" in subsection (3), and substituting "a term as to quality". By deleting "they had answered to the warranty" in subsection (3) and substituting "the term had been satisfied". By deleting subsection (4) and substituting: "(4) The fact that the buyer has set off an amount of damages for breach of contract in diminution or extinction of the price does not prevent the buyer from bringing a claim for damages for the same breach of contract if the buyer has suffered further damage."
section 56	By deleting in the marginal note "and conditions".
section 60	By inserting in subsection (2) after "this Act" the following: "or the Contractual Remedies Act 1979".

Schedule 2

(Section 10)

Enactments in which the definition of "Court" is replaced

Contracts (Privity) Act 1982, section 2	1982, No 132
Contractual Mistakes Act 1977, section 2(1)	1977, No 54
Contractual Remedies Act 1979, section 2	1979, No 11
Credit Contracts Act 1981, section 2(1)	1981, No 27

Hire Purchase Act 1971, section 2(1)	1971, No 147
Frustrated Contracts Act 1944, section 2	1944, No 20
Illegal Contracts Act 1970, section 2	1970, No 129
Minors' Contracts Act 1969, section 2(1)	1969, No 41

Schedule 3

(Section 12)
Enactments amended

Provision	Manner in which amended
Contracts (Privity) Act 1982, section 15	By renumbering section 15 as section 15(1), and inserting after it: "(2) Nothing in this Act shall apply in relation to any contract or part of a contract which is not governed by the law of New Zealand."
Contractual Mistakes Act 1977, section 12	By renumbering section 12 as section 12(1), and inserting after it: "(2) Nothing in this Act shall apply in relation to any contract or part of a contract which is not governed by the law of New Zealand."
Contractual Remedies Act 1979, section 16	By renumbering section 16 as section 16(1), and inserting after it: "(2) Nothing in this Act shall apply in relation to any contract or part of a contract which is not governed by the law of New Zealand."
Hire Purchase Act 1971, section 2(1)	By deleting paragraph (b) of the definition of "Hire Purchase Agreement" and substituting:

	"(b) Made otherwise than at retail; or (c) Which is not governed by the law of New Zealand."
Illegal Contracts Act 1970, section 3	By inserting after "any contract" the following: "governed by New Zealand law".

Schedule 4

(Section 13)
Enactments repealed

Arbitration Act 1908, clauses 10A to 10C of the Second Schedule	1908, No 8
Contracts (Privity) Act 1982, sections 10 and 11	1982, No 132
Contractual Mistakes Act 1977, sections 9 and 10	1977, No 54
Contractual Remedies Act 1979, sections 12 and 13	1979, No 11
Credit Contracts Act 1981, section 45	1981, No 27
Hire Purchase Act 1971, section 47	1971, No 147
Illegal Contracts Act 1970, sections 9 and 9A	1970, No 129
Minors' Contracts Act 1969, sections 14 and 14A	1969, No 41

III

COMMENTARY ON THE DRAFT ACT

113 The paragraphs which follow provide details of the recommendations of the Commission in its report as they relate to each of the sections in the draft Contract Statutes Amendment Act.

1 Commencement of the Act

This Act comes into force on [ ].

114 Two different approaches have been adopted for the application of this legislation. For the sections amending the Sale of Goods Act (and the necessary consequential amendments) the amendments will apply only to contracts entered into after commencement of the Act (see s 8). In all other cases, the amendments, which are either of procedural or remedial character or designed to confirm existing judicial practices, will apply regardless of the date of the contract.

Amendment to Contracts (Privity) Act 1982

2 Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge

Section 6(b) of the Contracts (Privity) Act 1982 is amended by deleting subparagraph (iii) and substituting:

"(iii) The position of the beneficiary had not been materially altered by the reliance of that beneficiary or any other person on the promise before the provision became known to the beneficiary; and"

115 This clause extends the defence of alteration of position, available to the beneficiary of a contract under the relevant section of the principal Act. It will now cover actions which are not those of the beneficiary of a contract, but of someone else. For example, a trustee

of a trust in which the beneficiary has an interest may make a decision under the trust in the belief that the beneficiary is well provided for under the contract, when that is not the case. Assuming the beneficiary did not know that the benefit under the contract could be withdrawn, and was adversely affected by the trustee's decision, the beneficiary would now be protected under the section.

Amendments to Contractual Remedies Act 1979

3 Statements during negotiation for a contract

Section 4 of the Contractual Remedies Act 1979 is amended by repealing subsections (1) and (2) and substituting:

"(1) A provision in a contract or any other document is void and of no effect to the extent that it purports to preclude a Court from inquiring into or determining the question—

(a) Whether a statement, promise or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or

(c) Whether, if it was a representation, it was relied on;

unless the Court orders that, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time, it is fair and reasonable that the provision should be conclusive between the parties.

(2) A provision in a contract or any other document is void and of no effect to the extent that it purports to preclude a Court from inquiring into or determining the question of whether, in respect of any statement, promise or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it."

116 This clause amends two subsections in the principal Act dealing with terms in the contract which purport to prevent a court from enquiring whether a precontractual statement has in fact been made,

ie, made with proper authority. At present, the court is directed merely that it must still enquire into these matters, notwithstanding what the contract says. This is arguably no more than a direction as to the procedure the court must follow, which would not be applied by a foreign court. Under the amended provision, the term ceases to have any effect as part of the contract. In cases where the "proper law" of the contract was New Zealand law, an overseas court would be in a position to apply the contract without the offending clause, giving effect to the rule of policy reflected in the subsections.

4 Cancellation of contract

Section 7 of the Contractual Remedies Act 1979 is amended in subsections (3) and (4) by deleting "stipulation" wherever it occurs, and substituting in each place "term".

117 The customary word for any obligation created by a contract is "term". The principal section uses the more unusual word "stipulation", and it has been suggested that this could be taken to indicate the intention to refer to a term of a more serious or important character. The amendment will remove any basis for that suggestion.

5 Rules applying to cancellation

Section 8(1) of the Contractual Remedies Act 1979 is amended by deleting paragraph (b), and substituting:

"(b) Before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, an intention to cancel the contract, where:

(i) It is not reasonably practicable to communicate with the other party; or

(ii) The other party cannot reasonably expect to receive notice of the cancellation because of that party's conduct in relation to the contract."

118 Under s 8 of the principal Act, as currently drafted, an innocent party must generally give notice to the other party, who is in breach, of an intention to cancel the contract. The only exception is that now stated in subparagraph (i) of the proposed amended section. The section adds the further ground for dispensing with notification set out in subparagraph (ii).

6 Amendments to Sale of Goods Act 1908

(1) Section 13 of the Sale of Goods Act 1908 is repealed.

119 Because cancellation of a sale of goods contract is to be governed by s 7 of the Contractual Remedies Act, the categorisation of contractual terms as conditions or warranties becomes unnecessary. Entitlement to cancel will depend on the agreement of the parties as to the essentiality of the term, or on the seriousness of the effect of the breach.

120 The repeal of s 13, which describes certain circumstances in which a condition is to be treated as a warranty is one of the measures required to effect the change in categorisation of contractual terms. (Other consequential amendments can be found in the First Schedule to the Act.)

121 There are certain circumstances, specified in s 32, where the buyer may accept part only of the goods supplied by the seller and reject the rest. However, if s 32 does not apply and the contract is not severable, and the buyer has accepted part only of the goods, s 13(3) presently applies to preclude rejection of the balance. With the repeal of s 13(3) the question of whether acceptance of part is an affirmation precluding cancellation will be determined by reference to s 7(4) of the Contractual Remedies Act.

(2) The Sale of Goods Act 1908 is amended by inserting after section 39 the following:

"39A Rejection of goods

(1) A buyer is entitled to reject goods if:

(a) The contract of sale or this Act provides for rejection of the goods in the circumstances which have occurred;

(b) There has been a breach of any term implied in the contract by section 14(a), section 15, section 16(a) or (b) or section 17 of this Act;

(c) There has been a breach of the contract which entitles the buyer to cancel the contract.

(2) Notwithstanding any other provision of this Act, where a buyer rejects goods:

(a) The rejection is not of itself a cancellation of the contract [of sale];

(b) It is a question in each case depending on the terms of the contract and the circumstances of the case whether the buyer is entitled to cancel the contract under section 7 of the Contractual Remedies Act 1979;

(c) If the buyer is entitled to cancel, cancellation must be effected in accordance with section 8 of the Contractual Remedies Act 1979.

(3) Without limiting the generality of subsection (2), where a buyer rejects goods delivered before the time at which delivery is due the seller may deliver goods which comply with the contract up to the time at which delivery is due, unless before delivery the buyer is entitled to cancel and does cancel the contract.

122 The concept of rejection in this section applies to the cases where the buyer declines to take delivery of goods, or returns them after discovering they are defective. There is no automatic inference that the buyer is, by rejecting, also cancelling for breach. The distinction between rejection and cancellation is spelt out in s 39A(2).

123 Section 39A(1)(a) refers to a right of rejection conferred by either the contract or s 32 of the Act (circumstances where the buyer may accept part of the goods and reject the rest because of the seller's failure to comply).

124 Section 39A(1)(b) preserves the buyer's right to reject when the seller does not comply with the following terms implied by the Act:

(i) that the seller has title to the goods (s 14(a));

(ii) that the goods correspond with their description (s 15);

(iii) that the goods are reasonably fit for their purpose, the buyer having shown reliance on the seller's skill or judgment and the seller having supplied goods in the usual course of business (s 16(a));

(iv) that the goods are of merchantable quality (s 16(b));

(v) (where the contract is a sale by sample) that the goods supplied correspond with the sample (s 17).

These terms were previously classified as conditions, breach of which entitled the buyer to reject the goods and rescind the contract.

125 Section 39A(1)(c) provides that the buyer may reject goods where there is a right to cancel the contract under the Contractual Remedies Act. This subsection emphasises the distinction drawn by the new proposals between rejection and cancellation and provides that, where the seller's breach is sufficiently serious, according to the s 7 criteria, the buyer may, instead of cancelling the contract, reject the goods and call on the seller to deliver goods which comply with the contract.

126 Subsection (3) provides for the seller's right to repair or replace defective goods before delivery is due under the contract. Unless the Contractual Remedies Act s 7 criteria apply to give the buyer the right to cancel (and the buyer has exercised that right) the seller may, after delivery of defective goods, still comply with the contract whether or not the buyer has requested compliance. The fact that the buyer has rejected the defective goods does not preclude any further right of rejection, provided there is a right to reject according to subs (1). The right of seller cure provided for in this section is not exhaustive; in cases where a seller attempts cure after the due date, whether the buyer is entitled to cancel the contract will turn on the application of the Contractual Remedies Act.

(3) The Sale of Goods Act 1908 is amended by inserting after section 55 the following:

"Revesting of property on cancellation

55A Revesting of property on cancellation

(1) If the property in goods has passed to the buyer before the goods are delivered to and accepted by the buyer, and the goods are rejected by the buyer, the property in those goods revests in the seller.

(2) Notwithstanding section 8(3) of the Contractual Remedies Act 1979, if the buyer cancels a contract of sale at a time when property has passed to the buyer in goods which have not been delivered to and accepted by the buyer, the property in those goods revests in the seller.

(3) Nothing in subsection (2) affects any rights acquired by any person under or through the buyer in respect of the goods."

127 Section 8(3) of the Contractual Remedies Act provides that cancellation has prospective effect only. Section 55A, however, provides differently, recognising the current rule that, if the buyer rejects, property which has passed to the buyer revests in the seller, thereby restoring to the seller the immediate right to possession (Atiyah, *The Sale of Goods* (8th ed), 495). Under s 55A, where the buyer either rejects goods or cancels the contract, and property in goods has passed to the buyer but goods have not been delivered and accepted by the buyer, it is provided that property in those goods will revest in the seller (s 55A(1) and (2)).

128 Section 55A is not concerned with the consequences of cancellation by the seller. There are a number of rules to be found in the Sale of Goods Act governing the situation where the seller cancels before goods have been delivered and accepted by the buyer but property has passed to the buyer.

129 Section 55A(3) preserves the rights any third party may have in the goods.

(4) The provisions of the Sale of Goods Act 1908 referred to in Schedule 1 are amended in the manner indicated in that Schedule.

130 Consequential amendments to the Sale of Goods Act can be found in the First Schedule; a substantial number of the amendments are required to effect the removal of the distinction between conditions and warranties already discussed. Another category of amendments will ensure that the right to cancel is expressly provided for where that is appropriate.

131 One other consequential amendment in the First Schedule should be noted, namely, the new subsection 37(2). This is a departure from the rules regarding affirmation in the Contractual Remedies Act which looks to an actual intention to affirm with knowledge of any repudiation, misrepresentation or breach. Under the Sale of Goods Act, knowledge of an entitlement to cancel is irrelevant. If the goods have been accepted by the buyer, the buyer has affirmed the contract.

7 Consequential amendments

(1) Section 2(1) of the Motor Vehicle Dealers Act 1975 is amended by repealing the definition of "term".

132 The repeal of this definition is required because "term" is defined as a condition. With the removal of the distinction between conditions and warranties, the definition is no longer required.

(2) Section 15 of the Contractual Remedies Act 1979 is amended by deleting paragraph (d).

133 The repeal of s 15(d) of the Contractual Remedies Act is required to allow all of the provisions of the Contractual Remedies Act to apply to contracts for the sale of goods.

8 Transitional provision
Nothing in sections 6 or 7 applies in relation to a contract for the sale of goods made before the commencement of this Act.

134 In para 114 there is a discussion of the timing of the application of amending legislation. The amendments to the Sale of Goods Act (and the consequential changes) will apply only to contracts entered into after commencement of the Act. As the transitional provision is presently drafted, it will not itself comprise an amendment to the Sale of Goods Act 1908. It will be found in the Sale of Goods Amendment Act and its presence will be noted with each amendment to the Sale of Goods Act in the process of annotation.

Amendment to Illegal Contracts Act 1970

9 Court may grant relief
Section 7(3) of the Illegal Contracts Act 1970 is amended by inserting, after "under subsection (1) of this section", the following:

", and the nature and extent of any relief to be granted,".

135 This clause makes it clear that the range of considerations mentioned in section 7 of the principal Act are to be taken into account for all purposes related to the relief to be given to the party who seeks it.

Jurisdiction under contract statutes

10 Definition of "Court"
The enactments referred to in Schedule 2 are amended by repealing the definition of the term "Court" and substituting:

" 'Court' means, in relation to any matter, the Court, Tribunal or arbitrator by or before whom the matter falls to be determined;".

136 The present definition of the word "Court" in the various statutes referred to is expressed solely in terms of the New Zealand courts. It was enacted at a time when the jurisdiction of District Courts was limited by reference to the type of cause of action on which a claim was based, and did not automatically cover statutory claims. The new jurisdiction provision (enacted by the District Courts Amendment Act 1992, No 2) refers to "debts or demands" not exceeding a certain sum, without regard to the basis of the claim. The specific provisions in the old legislation are, therefore, no longer necessary. They are replaced by a section which is not only simpler, but also has the advantage of being less explicit about the application of the Act to domestic courts, removing any suggestion that an overseas court should disregard the powers conferred on the "Court" by the contract statutes if it had to apply New Zealand law to any matter arising under a contract.

137 The definition also includes a reference to tribunals and arbitrators having the same power as courts under each of the statutes. The intention is to make it clear that the power conferred on the "Court" by each of the statutes is part of the general law of the land which all tribunals dealing with any contractual matter should observe and apply. Such a statement may well be unnecessary now that the contract statutes have become generally integrated into New Zealand law, and is included from an abundance of caution. The use of this formula does not imply that, where it is not used in other statutes, a narrower interpretation of the term "Court" is intended.

11 Jurisdiction of Disputes Tribunals

(1) Section 10 of the Disputes Tribunals Act 1988 is amended:

(a) by inserting after subsection (1):

"(1A) A Tribunal shall have jurisdiction to exercise any power conferred by any of the enactments specified in Part 1 of the First Schedule in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to section 13 of this Act, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.";

(b) in subsection (2) by inserting after "specified in" the following: "Part 2 of".

(2) Section 13 of the Disputes Tribunals Act 1988 is amended by inserting after "subsection (1)" the following: "or subsection (1A)".

(3) The Disputes Tribunals Act 1988 is amended by repealing the First Schedule and substituting the following:

"First Schedule

(Section 10)

Other enactments that confer jurisdiction on Disputes Tribunals

Part 1

Contracts (Privity) Act 1982
Contractual Mistakes Act 1977
Contractual Remedies Act 1979
Frustrated Contracts Act 1944
Illegal Contracts Act 1970
Minors' Contracts Act 1969

Part 2

Credit Contracts Act 1981
Fair Trading Act 1986
Fencing Act 1978
Friendly Societies and Credit Unions Act 1982
Hire Purchase Act 1971"

12 Application of contract statutes
The amendments referred to in Schedule 3 are amended in the manner indicated in that Schedule.

13 Repeals
The provisions referred to in Schedule 4 are repealed.

138 The amendments in ss 11 and 13, read together with s 10, put into effect the Commission's recommendations for the jurisdiction of the District Courts and Disputes Tribunals.

139 *Disputes Tribunals.* The Disputes Tribunals will, with the enactment of s 11, have the jurisdiction set out in s 10(1A) or (2) of the Disputes Tribunals Act and it will, because of the repeal of the provisions in each of the contract statutes (by s 13), no longer be necessary to go to each contract statute to ascertain the extent of the jurisdiction of the Disputes Tribunals.

140 *District Courts.* The specific jurisdiction for District Courts currently found in each of the contract statutes will be removed by s 13. Instead, the powers of the District Courts would be those conferred by the District Courts Act 1947.

141 The Fourth Schedule also repeals cls 10A-10C of the Second Schedule to the Arbitration Act 1908; these clauses refer to specific contract statutes. With their repeal, and the enactment of s 10, arbitrators are able to give any remedy or relief under the contract statutes that is within the jurisdiction of the High Court.

142 Section 12 consequentially amends each of the contract statutes (except the Minors' Contracts Act; see report, para 86) and the Hire Purchase Act so that they apply to a contract (or part of a contract) governed by New Zealand law.

143 The Schedules are not reproduced (see 41 – 45 above).

PAPERS ON THE CONTRACT STATUTES

1

CONTRACTUAL REMEDIES ACT 1979[1]

J F Burrows

SCOPE OF THE PAPER

1.01 The Contractual Remedies Act 1979 laid down a set of remarkably brief and simple statutory rules about misrepresentation and breach of contract. It attracted a fair amount of criticism, on the ground that these rules were far too simple, indeed crude, to adequately replace the subtlety and complexity of the common law. Some feared that the law of breach of contract would be distorted by forcing it into such a simplistic framework. There were also fears that some of the Act's rules were based on a misunderstanding of common law principle; and that the Act gave the judges too much discretion in an area where certainty and predictability are important values.

1.02 Yet 10 years of litigation have not thrown up as many problems as some feared. Legal firms were asked to comment on the Act. Although very few responses were received, those that were received were favourable and highlighted very few difficulties. One firm said their comments "only serve to show that we do not perceive any particular difficulties with the Act in its daily applications". Another said that the Act, "with the building up of a useful body of

[1] The paper states the law at December 1990. An annex, written in July 1992 and noting two significant developments following the completion of the paper, accompanies the paper. The footnotes have been added by the Law Commission and incorporate, where appropriate, the discussion at a meeting organised by the Law Commission on 1 and 2 March 1991. (A consideration of the Contractual Remedies Act can also be found in Mr D J Goddard's paper on international transactions (paras 7.73–7.85)).

precedents is generally working satisfactorily". This paper will outline difficulties that have arisen so far. It will confine itself in the main to difficulties which have emerged from the many decided cases. Some of these difficulties are very minor (some may even be thought too minor to justify discussion), but they have been included for the sake of completeness. As will be seen, it is not suggested that all, or even very many, of these difficulties require immediate legislative attention.

SECTION 4—STATEMENTS DURING NEGOTIATIONS FOR A CONTRACT

1.03 This section provides that, if a contractual provision purports to preclude a court from inquiring into certain matters, the court is not precluded from making such an inquiry "unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties".

1.04 The section has worked well overall, and the decisions reached by the courts have been satisfactory. In determining whether it is "fair and reasonable" that the provision should be conclusive, the courts have to weigh up various factors. A good example of such a balancing exercise is *Herbison v Papakura Video Ltd* [1987] 2 NZLR 527.

1.05 The following points may, however, be noted.

- The section is limited in scope. It deals only with certain types of exemption clause: those which attempt to negate the effect of statements made in pre-contract negotiations. It does not affect many other types of exemption clause: see for example *Aggrecote Industries Ltd v AC Hatrick (NZ) Ltd* (unreported, High Court, Christchurch, 21 November 1986, A 135/81). Serious consideration should be given to whether there is any justification for confining relief to such a narrow subclass of exemption clauses. However, this review is probably not the place for it. The Law Commission's discussion paper, *"Unfair" Contracts* (NZLC PP11 1990) provides an opportunity for a much broader discussion of this problem.
- Although the scope of s 4 is limited, it is apparently not confined to cases where the plaintiff's cause of action in respect of the pre-contract negotiations is based on the Contractual Remedies Act. It has been held that the section applies to statements about purpose under s 16(a) of the Sale of Goods Act

1908 (*Broadlands Finance Ltd v Inwood* (1987) 1 NZBLC 102,784), and there is no reason why it should not apply where the plaintiff is suing under other legislation, such as the Fair Trading Act 1986. There is probably no need to spell this out: the section already uses the phrase "any proceedings".

- The third point is the most important. As Professor McLauchlan has pointed out ("Merger and Acknowledgment Clauses under the Contractual Remedies Act 1979" (1988) 18 VUWLR 311), the section has not really been interpreted literally. A literal interpretation would prevent a court from inquiring whether a statement or promise had been made until it had first determined whether it was fair and reasonable that the clause precluding such an inquiry should be conclusive. In fact, however, it has not quite happened that way. The courts have tended to investigate the making of the statement or promise before deciding whether the clause should be conclusive. In other words, the courts have really operated a presumption that such clauses are not conclusive. This method of proceeding has led to results which are perfectly satisfactory and, if that was all there was to it, it is suggested that no reform would be necessary.

  However, in the Court of Appeal recently, Somers J made some remarks which could herald a more literal approach. In *Ellmers v Brown* (1990) 1 NZ ConvC 190,568 (CA), Somers J said there was an argument that, on a grammatical reading of s 4(1):

  > All the circumstances of the case to which regard is to be had would exclude any detail of the circumstances in which it is alleged the promise was made, its weight in relation to the subject matter of the contract, and probably even the alleged nature of the promise.

  With respect to His Honour, the exact purport of these remarks is not clear, but they may well be adopting Professor McLauchlan's point and noting that a grammatical approach would lead to more restrictive results.

  However, not only were Somers J's comments obiter, there is also real doubt as to whether he himself would go so far; he does not, in the end, finally pronounce on the point. The rest of the Court did not discuss the matter.

  It is suggested that, in the meantime, there be no amendment to s 4 to meet Somers J's doubts. Developments should be

monitored to see whether the remarks of Somers J lead to a change of approach by the courts.[2] If the Law Commission takes up the whole question of exemption clauses, amendment at this point could be premature in any event.[3]

SECTION 5—REMEDY PROVIDED IN CONTRACT

1.06 This section preserves contractual autonomy, by allowing parties to make their own express provision for the remedies for, and consequences of, breach. Such provision prevails over the sections of the Act in the event of inconsistency between them.

1.07 Some such statutory provision was necessary. The difficulties which have arisen from this one are no more than one would expect from any provision of this kind.

1.08 There can be difficulties in deciding the extent to which a contractual clause excludes a section of the Act. Sometimes a fine question of construction of the contractual clause is involved. The relationship between the standard Real Estate Institute of New Zealand agreement and the Act has already been the subject of much litigation. Does the clause excluding cancellation for misdescription cover pre-contract representations (*Sharplin v Henderson* [1990] 2 NZLR 134)? Does clause 8, which provides for a settlement notice and cancellation under it, preclude cancellation under the Act? Sometimes the interlocking of clause and Act is quite complex: see, for example, *Kauri Developments Ltd v Nicholson* (1986) 2 NZCPR 532; *Mainzeal Group Ltd v MacIndoe* (1990) 1 NZ ConvC 190,603 (HC). In many cases a party may be able to elect between the remedies under the clause and those under the Act, in which case a question may arise as to when the election has been exercised in respect of one or the other (for example, *Plowman v Dillon* [1985] 1 NZLR 312). Yet similar problems used to arise before the Act (for example, *Hunt*

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[2] The Law Commission considered recommendations for amendment of s 4 in Mr Goddard's paper (paras 7.73–7.75; 7.80–7.81). In adopting those recommendations (see draft Act, s 3) the Commission has also addressed Professor Burrows' concerns about s 4, despite his assertion that no amendment to s 4 should be made at this time (see report, paras 21–23).

[3] Mr F Dawson commented on this paper prior to the March 1991 meeting in a letter set out in full at the end of this paper. Amendment of s 4 (1) is recommended (see 1.126).

v Hyde [1976] 2 NZLR 453) and it is difficult to see how any reformulation of s 5 could avoid them. Clear formulation of the contractual clauses can minimise the difficulties by spelling out their relationship with the Act.[4]

1.09 If a contractual clause purporting to exclude a provision of the Act is unenforceable as being a penalty, the consequences are unclear because of the inconsistent authorities. The cases have involved forfeiture clauses which, had they not been penal, would have precluded an order under s 9. On one view the penal clause is a nullity, and s 9 applies as if it did not exist: *Young v Hunt* [1984] 2 NZLR 80. On the other view s 9 is ousted but, since the penal forfeiture cannot be enforced, common law relief is available: *Turner v Superannuation and Mutual Savings Ltd* [1987] 1 NZLR 218. In *Quadling v Bambury* (unreported, High Court, Auckland, 25 October 1989, CP 656/88), Gault J refrained from pronouncing on this matter "having regard to an apparent difference of view on the point". It remains for a higher court, in an appropriate case, to settle on one view or the other. The matter is not one of great moment.

1.10 As yet, there have been no decided cases on the question of whether s 5 affects exclusion clauses—for example, clauses which provide that no damages will lie for breach of a particular provision. It is fairly clear that s 5 was never meant to prevent such clauses, although apparently this is occasionally misunderstood.

1.11 The difficulties detailed in paras 1.08–1.10 are not such that legislative amendment is necessary.[5]

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[4] See the commentary of Mr Dawson: para 1.127.

[5] Before the March 1991 meeting Professor B Coote raised the question of the effect of s 5 on exception clauses. He suggested that neither the CCLRC nor the government which enacted the Contractual Remedies Act intended s 5 to affect the use of exception and limitation clauses generally. The intention was to avoid negation of the statutory cancellation regime by simple exclusion of the Act. He suggested that there should be clarification to avoid the argument that the reference in s 5 to the contract providing "a remedy" meant that, for example, an exception clause (which effectively denied a remedy) was over-ridden by ss 6 to 10 of the Act. The subject was discussed at the seminar, and the points made were conveniently set out in a subsequent note to the Law Commission by Professor Coote in which he said:

> During the discussion on s 5, three of the practitioner members of the meeting very strongly dismissed as untenable the argument that the section permits limitation clauses but prohibits full exclusions. I should like to think the Courts would take that view when the time comes, but it might help if it were reported that the view is

Definition

1.12 "Misrepresentation" is not defined by the Act, and the courts have assumed that the term retains its common law definition: that is, a misstatement of past or present fact. This carries with it the difficulties of distinguishing between statement of opinion and statement of fact, and statement of present and future fact. (See, for example, *NZ Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569; *Ware Ltd v Johnson* [1984] 2 NZLR 518; and *Hales v Wairau Natural Stone (East Coast) Ltd* (unreported, Court of Appeal, 16 August 1989, CA 198/88)).

1.13 Section 6 has not created these difficulties: they were also well known at common law. The situation is usefully flexible, and nothing is to be gained by codifying a definition of misrepresentation.

1.14 There is a much broader question, which is whether s 6 should be confined to misrepresentations as such. It may be argued that if a non-contractual statement of fact is actionable, a non-contractual promise which has been relied on by the other party should also be actionable. Moreover, sometimes promises as to the future imply statements about the present, and vice versa: the distinction between the two categories is not always crystal clear. (The common law is moving in the direction of enforcing non-contractual promises anyway, using the expanding concept of promissory estoppel: see *Harris v Harris* (1989) 1 NZ ConvC 190,406.)[6]

1.15 However, a review of the Contractual Remedies Act, which is confined to recommending adjustments to the Act, is not the vehicle for attempting to answer such a fundamental question.

The intention of the misrepresentor

1.16 A literal reading of s 6 could lead to the conclusion that the state of mind of the representor is irrelevant: that all that matters is that the representee has been induced by a misstatement made by the representor. However it appears that this is not quite accurate.

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so strongly held. My impression is that most law students read the section in the way rejected and sooner or later the argument is likely to be put before the Court.

[6] See the commentary of Mr Dawson: para 1.128.

1.17 After some difference of opinion in the High Court (cf *Ware v Johnson* [1984] 2 NZLR 518, 538, and *Shotover Mining Ltd v Brownlie* (unreported, High Court, Invercargill, 30 September 1987, CP 96/86)) the Court of Appeal has now held that a false statement does not "induce" a contract unless it was made with the intention of inducing it. In this respect, the section has thus been held not to change the common law. In *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 Hardie Boys J said he could not think the legislature intended a change

> which would make the test of inducement a purely subjective one, judged from the point of view of the representee. Not only is there no spelling out of an intention of that kind; but the familiar verb 'induce' which has always had its two aspects, has been retained. Therefore I consider that it remains the law that it is not enough for a party to say that a representation caused him to act in a particular way. He must also show either that the representor intended him to do so, or that he wilfully used language calculated, or of a nature, to induce a normal person in the circumstances of the case to act as the representee did: I quote from Spencer Bower and Turner at p 132.[7]

See now also *Norwich Union Life Insurance Society v Kennedy* (unreported, High Court, Invercargill, 2 April 1990, CP 104/87).

1.18 Although this may be said to add a gloss to the section, it is doubtful whether the section requires amendment to reflect it. The existence of the intention described by Hardie Boys J will seldom be in issue, and there is considerable virtue in not disturbing the simplicity of the drafting as it stands.

1.19 As at common law, a half truth (that is, a statement which is literally true as it stands but distorts the truth by leaving out relevant matter) may amount to a misrepresentation (eg, *Wakelin v R H and E A Jackson Ltd* (1984) 2 NZCPR 195, *Sturley v Manning* (unreported, High Court, Auckland, 19 December 1984, A 611/82) and *O'Donnell v Station Farm Ltd* (unreported, High Court, Rotorua, 8 December 1986, A84/84). However, the cases are not entirely clear on what ingredients must be proved to constitute a misrepresentation of this kind. A literal reading of s 6 would seem to require only that the statement is objectively misleading, and that the representee was

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[7] The *Savill* decision was considered by Mr Dawson in his commentary: para 1.129.

induced by it to enter the contract. But, influenced by the exposition in Spencer Bower and Turner, *The Law Relating to Actionable Non-Disclosure* (Butterworths, 1990), some of the cases have tended to regard this "half truth" type of misrepresentation as involving breach of a duty of full disclosure. It then becomes relevant whether the representor, perceiving the effect of the partially true statement, "studiously withholds" the additional information. Thus, in *Ware v Johnson*, the question was said to depend on "whether the representor appreciates that what he said, in conjunction with what he has not said, has misled or will mislead the representee, unless the necessary correction is made". In *Sturley v Manning* the same approach was taken. It may be doubted whether this importation of a common law concept is justified by the straightforward wording of s 6, particularly its statement that a misrepresentation may be innocent or fraudulent. Not all cases have taken the same line: see, for example *Adele Holdings Ltd v Westpac Finance Ltd* (unreported, High Court, Rotorua, 18 September 1987, CP 86/87).

1.20 It is not easy to think of the statutory words which could resolve this difficulty. The problem is not a pressing one, and its resolution can safely be left to the courts.

"As if the representation were a term"

1.21 Section 6 provides that damages may be awarded for a misrepresentation "as if the representation were a term of the contract that has been broken". This equates representation and term only for the purpose of awarding damages. For other purposes they are still distinct. Thus:

- If a statement is clearly a term of the contract (eg, if it is incorporated in the written document) there is no need to prove inducement: *Nunney v Wood* (unreported, High Court, Auckland, 11 April 1989, A 1352/84).
- An exclusion clause which, in express terms, covers one may not cover the other (see *Wilsons (NZ) Portland Cement Ltd v Gatx-Fuller Australasia Pty Ltd (No 2)* [1985] 2 NZLR 33, 37 per Prichard J).
- If the contract is for the sale of goods the power to rescind it may depend on whether the statement is a term or a mere representation (see *Retaruke Timber Co Ltd v Stallard* (unreported, High Court, Auckland, 8 January 1990, CP 337/86)).

1.22 However, where all that is in issue is whether or not damages lie, it normally will not matter much whether one classifies the statement as a term or a representation. In some judgments this has been taken to extremes: for example, by describing a warranty written into the contract as a "misrepresentation" (eg, *Young v Hunt* [1984] 2 NZLR 80, 86), by pleading the same statement in the alternative as a misrepresentation or a contractual term (eg, *McLeod & Bailey v Davis* (unreported, High Court, Palmerston North, 11 June 1984, A 37/83) and *Collings v McKenzie* (unreported, High Court, Auckland, 15 December 1987, CP 483/86)) and by saying that a misrepresentation is a term of the contract (eg, *NZ Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569).

1.23 This looseness of judicial terminology is inelegant, but it is difficult to see how any statutory amendment could improve matters. Section 6 is already perfectly clear in this respect, and is not responsible for the imprecision in the judgments.

No action in tort

1.24 Section 6(1)(b) makes it quite clear that no action may be brought against the other party in deceit or negligence: the action is contract or nothing. However, the section does not in terms preclude an action in tort against an agent who is not a party to the contract. In some High Court cases such a tort action has succeeded (eg, *Wakelin v R H and E A Jackson Ltd* and *O'Donnell v Station Farm Ltd* (1984) 2 NZCPR 195). However, the Court of Appeal has not unequivocally endorsed such liability, preferring to "assume, without deciding, that the section does not preclude an action against such a person": *Shing v Ashcroft* [1987] 2 NZLR 154, 158. Although it was not necessary for the Court finally to pronounce on this, this reticence is not easy to understand.

1.25 Although it would be a simple matter to amend s 6 to put the matter beyond doubt, it is doubtful whether this is necessary. The courts will resolve the problem.

Parol evidence rule

1.26 There was disagreement in the CCLRC on the effect of s 6 on the parol evidence rule. There has been little authority on this aspect. In one case the fact that the contract had been reduced to writing was said to be a reason for regarding an oral statement as a representation

rather than a term (see *Falloon v Johnstone* (unreported, High Court, Christchurch, 11 July 1985, A 351/83)). In two other cases the rule was held to preclude reliance on an oral representation which was at variance with an express term of the written contract. In one of those cases, *Wakelin v R H and E A Jackson Ltd,* the plaintiffs amended their claim for a misrepresentation as to turnover from $7000 to $6000, which was the figure contained in an express warranty in the contract. Henry J said that this amendment recognised that "it is not possible to adduce oral evidence to contradict such an express provision".

1.27 The infrequency of the difficulties encountered suggests that there is no substantial problem.[8]

Damages

1.28 It is quite clear that damages for misrepresentation are to be assessed on the contract measure. This could, in some cases, be less than the measure which would have been available in tort before the Act, particularly in respect of fraudulent misrepresentation. If plaintiffs have suffered as a result of fraud, is there a case for saying that they should be entitled to at least the option of claiming the tort measure, if it would afford more ample compensation?

1.29 In *Walsh v Kerr* [1989] 1 NZLR 490, 493 (a case, incidentally, where no finding of fraud was made) Cooke P commented that the Court was "not sure that the profession generally appreciate the effect of the Contractual Remedies Act on damages for misrepresentation".

1.30 Any amendment would complicate the fundamental simplicity of s 6. That simplicity has not yet given rise to substantial problems or serious injustice. In any event, damages may well be a more flexible remedy than is sometimes realised.[9]

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[8] See Mr Dawson's comments regarding the parol evidence rule: para 1.131.

[9] In his commentary, Mr Dawson suggested that the Act should be amended to allow for a tort measure of damages to be recovered in the alternative. The reasons for his preference for a concurrent tort action can be found at para 1.132.

1.31 Section 7 specifies the rules for when a contract may be cancelled. For this purpose, breach and misrepresentation are equated: the same rules apply to both.

The tests for cancellation

1.32 Subsections (3) and (4) lay down the tests for cancellation.

1.33 The tests are not easy to apply. Subsection (4)(a) often depends on the finding of an implied rather than express agreement, and on the concept of essentiality, which imports a question of degree. Subsection (4)(b) depends much more overtly on a question of degree. Each case thus depends on its own facts (*Jolly v Palmer* [1985] 1 NZLR 658, 662). Both subjective and objective factors may be taken into account (*Sharplin v Henderson* [1990] 2 NZLR 134, 137). In response to a request for comment, one firm of solicitors replied:

> Difficulty arises out of the provisions of s 7(4), specifically the concept of 'substantially'. The courts have tended to interpret this test of substantiality around a margin of 10%. Further difficulty arises out of a lack of consistency in judicial approach within the 10% range. We would imagine that there would be some reticence to remove the court's discretion in this area, but the uncertainty which arises under the present situation make it almost impossible to advise clients.

1.34 The consequences of improper cancellation are severe. The reports are already scattered with cases where a party was held to have "cancelled" wrongly. Yet the common law did no better. The statutory tests are little more than a codification of the common law principles enunciated in *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26; the decision in that very case was no more readily predictable than it would have been under the Act.

1.35 In other words, seriousness is always a question of degree, and, given the diversity of human experience, there will sometimes be difficulty in drawing the line. There is nothing much that rewriting the section could do to resolve this problem.

1.36 The problems may be exaggerated in any event. Another firm of solicitors reported that "none of our litigation solicitors report any particular problem with that provision".

1.37 The way the statutory tests are worded, however, has given rise to certain specific questions: these follow.

1.38 Subsection (4)(b) refers to the substantial reduction of the benefit of the contract and the substantial increase in the burden under the contract. In *Jolly v Palmer* [1985] 1 NZLR 658, Hardie Boys J took a literal view of these words, and held that there is only an increase in the burden of the contract if the actual obligations under the contract become more burdensome; it is not enough that collateral matters are affected. Thus, where a purchase contract was not expressly made subject to finance, cancellation was not justified because, as a result of misrepresentation as to the property's value, the purchaser encountered difficulty raising the desired amount on mortgage. If this interpretation is followed, it could perhaps unduly constrict the tests in s 7.

1.39 A rewording of s 7 could resolve this difficulty easily enough: even the omission of the words "under the contract" could be sufficient. But the present wording cannot be said to have caused persistent or serious problems, and it is probably better not to rush to amend the section at this stage. However, this is a matter which one should perhaps keep an eye on.[10]

1.40 Subsections (3) and (4) use the word "stipulation". There has been judicial disagreement over the meaning of this word. Greig J, in *Gallagher v Young* [1981] 1 NZLR 734, thought it should be interpreted to mean "an important part of the contract as agreed upon between the parties". In *Watson v Tennent* (1986) 2 NZCPR 195 Tompkins J disagreed with this formulation insofar as it confines "stipulation" to important terms only. He said:

> I do not consider that whether or not a term is a stipulation should depend upon the degree of importance to be attached to it . . . In my view, any express or formulated term of a contract is a 'stipulation in the contract' within the meaning of s 7(3)(b).

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[10] In his commentary, Mr Dawson referred to the significance of the distinction between executory contracts and executed contracts, suggesting (as in Dawson and McLauchlan's text, 103) that an amendment to s 7 along the lines of the American *Restatement* might be advantageous, with somewhat more emphasis being placed on the importance of an executory transaction. He indicated that the basic test should still be set out in ss 7 (3) and 7 (4) with the matters set out in the *Restatement* being explicit factors to be taken into account by the Court. (para 1.133)

The prevailing view is that Tompkins J's view is correct, otherwise the distinction that subss (3) and (4) attempt to draw between the essentiality of a stipulation and the consequences of its breach becomes virtually meaningless. However, there is an alternative viewpoint, which is that the word "stipulation" was meant to emphasise that there may be terms of such trivial import that no breach of them could ever be in contention as justifying cancellation. However, even if Tompkins J is correct, his formulation raises a further question: is he, in referring to "any express or formulated term", excluding implied terms from his definition? There would seem to be no reason for doing so (see, for instance, *Goodall v Walker* (unreported, High Court, Auckland, 12 April 1989, CP 1813/87) 26).[11]

1.41 Replacing the word "stipulation" with the word "term" in this section might clarify matters. Whether this very minor change is worth the trouble is doubtful.

1.42 Subsection (4) is consistent in its emphasis that the tests of cancellation revolve around the essentiality of the stipulation to, or the effects of the breach on, the cancelling party. This might be seen as precluding reference to factors extraneous to the cancelling party: for instance at common law cancellation was more readily available if the contract was wholly executory, and if the breach or misrepresentation involved fraud.

1.43 So far this seems to have caused no practical problems, and it would be premature to undertake any redrafting.

1.44 Subject to subs (4), a contract may be cancelled if it is clear that a stipulation will be broken. The test of "clarity" (ie, whether it requires certainty or something less) is likely to be the subject of argument at some stage. To date it has been raised in only one case in which the point did not require a decision. In *Le Page v Cunningham* (unreported, High Court, Christchurch, 2 March 1990, A 305/84), one ground for a purported cancellation was that it was "clear" that a builder would be unable to complete by the due date. However, since

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[11] In his commentary, Mr Dawson concurred with the majority judicial view while noting (para 1.134) that the minority view raises an important issue, namely, whether the Act should specifically refer to the common law concept of a warranty as an independent promise.

time was not of the essence, it was not necessary to determine whether it was "clear" that he would not complete by that date.[12]

1.45 Although it may be expected that this provision will cause substantial difficulty in the future, it is again sensible to wait for concrete instances to occur before making changes.

1.46 The section places no time limits on the right to cancel. In *Gallagher v Young*, the purchaser of a house was permitted to cancel after settlement: the Court, in its discretion under s 9, ordered the purchase price to be refunded with interest. Could this have been done even after registration of the purchaser's title? If so, how long afterwards? Is the only criterion whether the delay is so long as to evince affirmation?

1.47 Since the only effect of cancellation in such a case is to give the court a discretion to undo the transaction under s 9, does it matter anyway? No amendment is proposed.

1.48 It has been said that, under the Act, as at common law, those who are not ready and willing to perform their own part of the contract cannot take advantage of the remedy of cancellation: *Chatfield v Jones* [1990] 3 NZLR 285 per Hardie Boys J. In other words, according to this view, cancellation is an action "taken by a party to a contract who is innocent of any wrongdoing within the contractual relationship": *Lenart v Murray* (1988) ANZ ConvR 180, 182 per Jeffries J. However, this view must not be taken as final; in *Kriletich v Birnam Investments Ltd* (unreported, Court of Appeal, 27 February 1991, CA 214/90) the Court of Appeal left the question open. "Readiness and willingness" was a subject of some antiquity, complexity and fineness of learning at common law (see the detailed discussion in *Foran v Wight* (1989) 64 ALJR 1). Section 7 makes no reference to "readiness and willingness", but the section does say it replaces the common law.[13]

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[12] In his pre-seminar comment, Professor Coote suggested that, by use of the word "clear":

> certainty was intended, consistently with the common law (*Universal Cargo Carriers v Citati* [1957] 2 QB 401). However, that word might also leave you the possibility of including the *apparently* certain, which might be no bad thing in some cases.

[13] In his commentary (paras 1.136–1.141) Mr Dawson addressed this topic extensively.

1.49 There is a question whether, in relation to cancellation, "readiness and willingness" is a concept which needs to be retained. If both parties to a contract are in serious breach independently of each other, why should one not be able to put an end to the contract, so that the court can sort out matters between the parties, using its discretion under s 9? However, s 7 does not refer to readiness and willingness. If the courts feel a necessity to read the concept into it, the authorities already cited show that they are quite able to do so. No amendment is proposed.

Exclusion of common law

1.50 Section 7(1) provides that s 7 replaces the rules of common law and equity governing the right to rescind a contract, or treat it as discharged, for misrepresentation or repudiation. This means that the special rules developed by common law and equity in relation to various types of contracts are superseded, and questions concerning cancellation of those contracts must now be determined according to the statutory framework of s 7. That framework, simplistic as it is, is not always easily adaptable to the task.

1.51 The subject of notices making time of the essence after failure to settle on time in land contracts has required judicial attention. The courts have dealt with it by continuing to apply the established equitable rules, and declaring that those rules "remain unaffected, in principle, by the enactment of the Contractual Remedies Act 1979" (Eichelbaum J in *Parker v Emco Group Ltd* (1986) 2 NZCPR 421; see also *Prisk v McKenzie* (unreported, High Court, Christchurch, 10 September 1985, M 378/83) and *Angus v Kinraid* (1988) ANZ ConvR 130). Presumably the explanation is that a party who fails to comply with a notice making time of the essence is deemed to repudiate the contract under s 7(2); alternatively the notice may perhaps be regarded as conclusive evidence that further delay will be treated as substantially increasing the burden, or reducing the benefit, of the contract to the cancelling party. Nevertheless, it must be conceded that these explanations and the judicial lip-service to the Act are not entirely comfortable.[14]

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[14] In comments made before the March 1991 meeting, Mr Dugdale saw less difficulty in relation to non-compliance with the notice making time of the essence:

> If one accepts Lord Simon's *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904 reasoning to the effect that such a notice is an indication of

1.52 In due time the Act will have to be applied to other traditional areas such as rescission brevi manu, defect of title, misdescription, and (most importantly) entire contracts and substantial performance. Most of these will create little difficulty. The last may require some realignment of thinking in the light of the Act, but the judgment of Williamson J in *Le Page v Cunningham* (unreported, High Court, Christchurch, 2 March 1990, A 305/84) suggests that the Act will be quite able to cope.

1.53 That the section works, in respect of making time of the essence, is a tribute to the vitality of common law and equitable thinking rather than to any virtues of the section itself. It may almost be said that the section has gone by default. However, these days the majority of cases will involve the notice provisions of the REINZ contract, which render the section redundant. And since the section, although ill-adapted to the topic, has not yet proved to be a problem, no amendment is proposed.

Affirmation

1.54 Section 7(5) provides that affirmation bars later cancellation.[15] What amounts to affirmation can be a question of some difficulty (see, for example, *NZ Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280 and *Oldham Cullens & Co v Burberry Finance Ltd* (unreported, High Court, Christchurch, 4 October 1985, A 368/83)). The courts seem anxious to hold, where possible, that the party is keeping all options open, rather than affirming. But this difficulty is not created by the Act; it existed at common law too.

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when the giver of the notice would treat non-performance as repudiatory the process fits neatly into section 7(2).

A somewhat different position was taken by Mr Dawson in his commentary: para 1.142.

[15] Before the March 1991 meeting, Mr Dugdale raised a wider point about s 7 (5):

> Of the various grounds on which under the old law it could be argued that the right of rescission was lost, the statute preserves only affirmation. Lapse of time can perhaps be treated as affirmation but there are cases where restitution in integrum is impossible because, eg a chattel has had so much use that the buyer should not be permitted to cancel or a contract has merged in a conveyance. *Gallagher v Young* [1981] 1 NZLR 734, where in a judgment delivered 4 August 1981 Greig J permitted cancellation of a contract of sale settled with delivery of possession on 30 May 1981 is an example of the absurd consequences of this.

1.55 However, the following more specific questions suggest themselves.

1.56 Section 7(5) causes an apparent difficulty in the case of a repudiating purchaser. If the vendor's first response is to affirm and try to hold the purchaser to the contract, the subsection would suggest that the vendor is debarred thereafter from cancelling, in respect of that continuing repudiation. The common law knew a doctrine of conditional affirmation: even the issue of a writ for specific performance did not debar a vendor from later giving up this line of action and claiming damages when the purchaser's intransigence became clear (eg, *Johnson v Agnew* [1980] AC 367). The stark provisions of s 7(5) do not expressly admit this possibility, but clearly it would be absurd not to allow this result. Currently the New Zealand courts appear to be solving the problem either by saying that a threat of specific performance is not necessarily an affirmation (eg, *Stine v Maiden* (1984) 2 NZCPR 176, or by treating each evincement of a continuing repudiation as a separate breach. If a party affirms after the first, it is permissible for the party to have a change of mind and cancel after the second (see, for example, *Jolly v Palmer* [1985] 1 NZLR 658).

1.57 Section 7(5) is crude and overly simplistic in this context, but so far it has created no problems which the courts cannot resolve. No reform is suggested.

1.58 Even at common law, there was doubt on an important matter. To be held to have affirmed, must a party simply have knowledge of the facts of the breach, or must that party also have knowledge of the existence of the right to cancel? The common law authorities were difficult to reconcile, and although one explanation is that a distinction can be drawn between cases where the right of cancellation is conferred by the contract, and cases where it is given by the general law, even this does not explain all the decisions. The matter is no easier under s 7(5). In *Hughes v Huppert* [1991] 1 NZLR 474 Gallen J said that in the end the question is always simply one of fact: has there been a real and genuine affirmation in the circumstances of the case? This approach, he said, has the advantage of "being in accordance with the general proposals and philosophy of the Act in avoiding theoretical problems". It does not, however, make decisions any more predictable. (See also the comment on *Jolly v Palmer* by Professor McLauchlan in (1985) 11 NZULR 272.)

1.59 There may be merit in amending the section to clarify the law on this point. To require knowledge of the right to cancel would ensure that the actions of lay persons, ignorant of the law, would not prejudice them. However, the need for this amendment is not beyond argument. There is an alternative point of view that the present situation ensures a nice flexibility.[16]

SECTION 8—RULES APPLYING TO CANCELLATION

1.60 This section, which deals with the rules applying to cancellation, has caused the most difficulty.

The requirement of notice

1.61 Subsections (1) and (2) provide that the cancellation of a contract does not take effect before the time at which that cancellation is made known to the other party. No particular form of words is required.

1.62 Section 8(1) is open to the interpretation that the cancellation must be made known to the other party personally, rather than being made known to an agent such as a solicitor. This is the view of one firm of solicitors:

> [Section 8] necessarily involves (in our view) service of the notice on that other party . . . To avoid difficulties in this area, we make a practice of servicing notices of cancellation on the party.

However, provided the other party received knowledge, it appears that it does not matter that it was obtained indirectly through the medium of some other person: in *Andas Finance Ltd v Te Kaha Hotel Ltd* (unreported, High Court, Auckland, 19 April 1989, CP 194/87) a cancellation, initially communicated to a repossession agent and relayed to the plaintiff, was held to be effective.

1.63 If thought desirable, s 8(1) could easily be amended by inserting the words "or the other party's agent" in paras (a) and (b). There could, however, be difficulties in this. There may be a question

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[16] At the March 1991 meeting, it was generally accepted that the term "affirmation" is a term of art and has recently been clarified by the decision in *Peyman v Lanjani* [1985] Ch 457. On that basis, the majority of the seminar participants was disinclined to alter s 7 (5).

of who is an authorised agent for this purpose; and withdrawal of authority without notifying the other party could pose practical problems. It is probably better to leave things as they are.

1.64 However, the major difficulty with s 8(1) and (2) is that it requires notice to the other party before a cancellation is effective. A similar rule applied at common law, but it was by no means certain that it was so rigid. The rigidity of the new statutory rule can have an effect which is unacceptably harsh. Thus in *Schmidt v Holland* [1982] 2 NZLR 406 the purchasers of a house property repudiated: they made it quite clear that they no longer had any interest in purchasing the place. The vendors accordingly resold without informing the defaulting purchasers of their intention to do so. It was held that the contract had not been effectively cancelled, and that the vendors had not laid the basis for a claim for damages against the defaulting purchasers. (The case purported to be decided on common law principles, but Hardie Boys J expressly stated that the same position would hold under the Act.)

1.65 Since *Schmidt v Holland* the courts have sought to mitigate the harshness of the "made known" requirement. There have been two routes.

1.66 First, use has been made of the principle of waiver. If the purchaser's repudiation makes it quite clear that there will be no performance, this may be taken to waive the vendor's obligations under the contract: *Innes v Ewing* [1989] 1 NZLR 598 and *Post Haste Couriers Ltd v Casey* (unreported, High Court, Invercargill, 24 October 1989, CP 83/89). Yet it is not entirely clear what it is that is supposedly being waived in such a case. If it is simply the statutory obligation to give notice of cancellation, one must consider whether the apparently mandatory statutory requirement of s 8(1) is susceptible to being waived. One is also left with the question, where notice is absent, of precisely what constitutes the cancellation, and when it takes place. On the other hand, the authorities cited by Eichelbaum J for this waiver principle suggest that what is being waived is not notice of cancellation, but rather, the common law requirement that the vendor remain ready and willing to perform the contract before the vendor can enforce it. Yet it is not clear that the common law went quite so far as to permit the vendor to dispose altogether of the property the subject of the contract: rather it operated simply to excuse a party from "doing a nugatory act", such as tendering a transfer, or nominating a ship, by due date for performance. (The law

on the necessity to be "ready and willing" is fully discussed in *Foran v Wight* (1989) 64 ALJR 1.)

1.67 The Court of Appeal has exercised a degree of caution about this waiver solution, and has refrained from deciding whether it is appropriate in this situation: *Chatfield v Jones* [1990] 3 NZLR 285.

1.68 The second means of avoiding the result in *Schmidt v Holland* is scarcely more satisfactory. In *Chatfield v Jones,* Somers J and Cooke P held that the vendor who resells effectively notifies the purchaser of this in the documents in the ensuing action claiming damages. The requirements of s 8(1) are thus adequately satisfied. But this explanation is conceptually difficult. If the cancellation is not effective until notification, as the section states, how can the vendor have been entitled to dispose of the property before that cancellation was effective? Hardie Boys J grapples with that problem by separating cancellation (which is evinced by the resale) from the notice which renders it effective vis-à-vis the original purchaser. This solution, interesting though it is, contains the logical difficulty that, contrary to the apparent meaning of the section, the cancellation does have some effect before it is "made known" to the purchaser.

1.69 It may be that justice is currently being done, but at the cost of a good deal of confusion. The law should not have to resort to such contortions to reach its goal. This is one area where the Act needs amendment. It is recommended that s 8(1)(b) be amended by inserting after the words "with the other party" some words such as "or where the other party may by his or her conduct be deemed to have dispensed with the need for communication".[17] [18]

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[17] This topic was the most vigorously and extensively discussed aspect of the Act at the March 1991 meeting. In his comment before the meeting, Mr Dugdale opposed any change to s 8 (1) and (2):

> It is trite law that any election to be effective has to be communicated (see, eg *Scarf v Jardine* (1882) 7 App Cas 345, 361). Section 8 (1) (b) deals with such a situation as that encountered in *Car and Universal Finance Co Ltd v Cordwell* [1964] 1 All ER 290. If the other party can be found he must be notified. If he cannot s 8 (1) (b) is available. Why should we fret about those who ignore these simple rules?

But note the divergent view of Mr Dawson: paras 1.144–1.146.

[18] In the course of discussion of this paper at the March 1991 meeting, participants gave substantial support to proposals that s 8 (1) (b) be amended to cover two situations: first, where it was not reasonably practicable to communicate with the other party as at present; but second, the proposed new situation, where in all the circumstances the conduct of the other party was such that he or she could not reasonably

The effect of cancellation

1.70 Subsections (3) and (4) provide that cancellation is de futuro only, but may do so in insufficient detail to cover all eventualities adequately.

Unperformed obligations

1.71 Subsection (3)(a) provides that so far as the contract remains unperformed no party is obliged or entitled to perform it further.

1.72 Read literally, this appears to say that no obligations under the contract can be enforced after cancellation, at whatever time they fell due for performance. However, the cases have held that this subsection does not mean what it appears to say. Thus, an unpaid deposit which accrued due before cancellation remains payable after cancellation, and can be sued for. Despite earlier authority to the contrary, this was settled by *Pendergrast v Chapman* [1988] 2 NZLR 177, followed in *Bussell v Morton Road Farming Corporation Ltd* (1990) 1 NZ ConvC 190, and approved by the Court of Appeal in *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173. The Court of Appeal also makes it clear that this principle is not confined to unpaid deposits: it extends to any debts, or indeed obligations, which accrued due before cancellation.

1.73 Cooke P said:

> The provision [s 8(3)(a)] does not abrogate any cause of action accrued unconditionally before cancellation, whether or not for debt.

This holds, effectively, that the subsection preserves the common law on the effect of rescission for breach as it has developed: see, for example, *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29.

1.74 However, while this may now be regarded as settled, it does mean that the section as drafted is a less than adequate reflection of the law.

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expect communication of the cancellation. The essence of the amendment would be to focus on the conduct of the other party, where such conduct makes it unreasonable to require notice of cancellation. The Commission recommends that s 8 (1) be amended to include a further exception to the general rule regarding notification (see draft Act, s 5; report, paras 24–26).

1.75 Subsection (3)(a) also caters less than adequately for provisions such as liquidated damages clauses and arbitration clauses. Such clauses are normally intended by the parties to survive cancellation; they certainly did at common law, on the basis that rescission for breach cancelled only primary and not secondary (or enforcement) obligations. In the *Langwoods* case the Court of Appeal was not satisfied that s 8(3)(a) need give rise to difficulties in respect of such clauses, noting that "the matter does not fall for discussion in the present case".

1.76 Restraint of trade clauses also give rise to potential difficulties. If an employment contract with a restraint of trade clause is cancelled because of the employee's breach, does the clause survive cancellation? In *Broadcasting Corporation of NZ v Nielsen* (1988) 2 NZELC 96,040, it was held that such a clause did, but there the clause contained an express acknowledgment that it was to apply after termination, so the Court had no difficulty in holding that it was preserved by s 5 of the Act. No doubt most such clauses will be expressed in this way, but in any case where the intention that the clause survive termination was not clearly expressed, s 5 may not provide such a ready solution.

1.77 Although case law is clarifying the meaning of s 8(3)(a), the cases have revealed that the wording of the paragraph is so bare as to be misleading. There is a good case for redrafting it to better reflect the matters outlined.[19]

Property not divested

1.78 Subsection (3)(b) provides that, so far as the contract has been performed at the time of cancellation, no party is thereby divested of property transferred or money paid. This has two practical consequences worthy of mention. First, if the purchase of a business is cancelled after some of the assets have passed to the purchaser, cancellation does not divest those assets. This means that, even after cancellation, the purchaser may trade with them, or dispose of them "to the four winds", as Prichard J put it in *Sturley v Manning* (unreported, High Court, Auckland, 19 December 1984, A 611/82). It also means that the vendor, having no title to the assets, cannot lawfully

[19] In his commentary, Mr Dawson agreed with the views expressed in para 1.77, but noted also the difficulties in the redrafting exercise: para 1.147.

dispose of them without the purchaser's authority, even if the purchaser has walked off the property. There is no impasse here which is not capable of being resolved by agreement between the parties, or, failing that, by a court order under s 9. But the section can pose problems for the untutored who may, understandably, think that cancellation undoes the transaction. Holland J referred to some of the problems in *Young v Hunt* [1984] 2 NZLR 80, 87. Secondly, after cancellation, the party who has transferred property to the other and who now wishes to claim it back is thrown on the discretion of the court under s 9. The transferor has no right to recover it; indeed has no rights of any kind in respect of it. Thus no interest in the property is created which will support a caveat (*Chappell v Jeram & Sheppard* (unreported, High Court, Auckland, 29 April 1987, M 48/86) and no interest in moneys paid which will support an interim injunction restraining disposition of the moneys (*Mayall v Weal* [1982] 2 NZLR 385).

1.79 The other difficulty in subs (3)(b) is the meaning of "property". There is authority that it can encompass some forms of equitable interest (eg, *Chappell v Jeram & Sheppard*), but presumably not equitable interests which depend on the availability of the remedy of specific performance of the contract itself (eg, the purchaser's interest in a contract for the sale and purchase of real estate).

1.80 There would seem to be little point in rearranging the incidence of property (including money), as s 8(3)(b) has provided for it. There must be a prima facie rule: the property must be vested in one party or the other, and, whichever rule is chosen may be misunderstood by lay people. Provided hardship or confusion can be resolved by agreement, or if necessary by court order, there seems to be no substantial argument for rewriting the rules. The unpredictability of vesting orders under s 9 will be addressed when that section is considered.

SECTION 9—POWER OF COURT TO GRANT RELIEF

1.81 This section permits the court, in its discretion, to grant relief after cancellation. Specifically, the court may:

- vest, or direct the transfer of, property;
- direct one party to pay money to the other;
- direct one party to do or refrain from doing any act or thing in relation to the other.

The grant of such relief does not preclude a damages claim (ss 9(3) and 10).

1.82 So far the section has been held to justify a large variety of orders, for example:

- the payment of interest on money: *Gallagher v Young* [1981] 1 NZLR 734; *Kenton v Rabaul Stevedores Ltd* (unreported, High Court, Auckland, 26 April 1990, CP 310/87);
- mesne profits in respect of possession of land: *Nicholls v Forrest* (unreported, High Court, Auckland, 12 June 1986, A 1305/86);
- an account of profits: *Marsland v J Walter Thompson NZ Ltd* (unreported, High Court, Wellington, 29 November 1989, CP 338/86);
- a refund of purchase money: *Gallagher v Young* [1981] 1 NZLR 734; *Nunney v Wood* (unreported, High Court, Auckland, 11 April 1989, A 1352/84);
- an order reopening a cancelled contract: *Herbert v Catley* (unreported, High Court, Rotorua, 11 July 1983, A 42/81);
- a remission of the unpaid balance of the purchase price: *Sturley v Manning* (unreported, High Court, Auckland, 19 December 1984, A 611/82);
- an order revesting stock in the vendor of a business: *Young v Hunt* [1984] 2 NZLR 80.

A number of questions arise.

1.83 The power to order "any act" is very wide: indeed, if taken literally, it appears to be limitless. However, the courts have seen fit to impose their own limits on it. It has been held that it cannot be used to justify the grant of interim injunctive relief: *Hungry Horse Restaurants v Jesson* (unreported, High Court, Auckland, 16 March 1988, CP 299/88). Nor can the power be used to authorise an order equivalent to specific performance in circumstances where that decree would not otherwise be available (see *Location Properties Ltd v G H Lincoln Properties Ltd* [1988] 1 NZLR 307, where Greig J based his decision on s 15 which provides that nothing in the Act shall affect the law relating to specific performance. See also *Alexander v Tse* [1988] 1 NZLR 318, 329). It is unclear whether this power in s 9 can ever be used to reinstate a cancelled contract. *Herbert v Catley,* which did use it in that way, has been criticised (see Francis Dawson "The New Zealand contract statutes" [1985] Lloyds Mar &

Com LQ 42), and, when the *Catley* case went on appeal, the Court of Appeal did not find it necessary to express an opinion. In *Falloon v Johnstone* (unreported, High Court, Christchurch, 11 July 1985, A 351/83) Holland J did envisage the use of s 9 to order performance of part of a cancelled contract. If the power does exist it would be equivalent to a kind of relief against forfeiture. While there is Australian authority that there was such a jurisdiction in equity quite independently of statute (*Legione v Hateley* (1983) 152 CLR 406), the status of that authority in New Zealand is lessened by the decision in *Location Properties Ltd v G H Lincoln Properties Ltd.*

1.84 Currently, then, the ambit of the "any act" jurisdiction in s 9(2)(c) is doubtful, and the courts will take some time to work out its boundaries. But it is probably best to leave that task to the courts. It is doubtful whether the section could be effectively reworded to solve the problem completely; and the experience of the New Zealand courts in operating discretions in other areas inspires confidence.

1.85 More difficulty, however, has arisen in relation to the power to award a monetary sum under s 9(2)(b). The Report of the CCLRC, in recommending the legislation, said of this paragraph:

> The proposed power is not intended to be a substitute for the right to recover damages . . . The Committee envisages that the clause will serve [this purpose]:
>
> (b) To enable the Court to make an *immediate* order directing payment of money as between the parties to the contract, notwithstanding that a claim for damages may be in contemplation or pending. The purpose here is to enable a party to obtain *immediate* monetary relief where the Court is satisfied that that should be given to him. (Italics supplied)

1.86 It thus seems that s 9(2)(b) was meant to empower restitutionary orders (eg, the return of part payments and reimbursement in respect of services performed) and not awards in the nature of damages. That view is reinforced by the retention of damages as a separate remedy in s 10, and, as Professor Coote has pointed out in his article, "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160, by the use in s 9 of the term "relief": damages are better described as a "remedy" than as a form of "relief".

1.87 However, read in isolation the words of s 9(2)(b) could scarcely be wider. They enable the court to make an order directing one party to pay the other "such sum as the court thinks just". There is no prohibition on any concept of compensation, and the notion of immediacy, repeated twice in the Committee's Report, makes no appearance in the section.

1.88 Some judges have recognised the distinction between relief under s 9 and damages under s 10 (eg, Sinclair J in *Petkovich* v *Hunt* (unreported, High Court, Auckland, 24 August 1987, M 83/86), but others have allowed the possibility of an award in the nature of damages under s 9. In *Young v Hunt* [1984] 2 NZLR 80, for instance, Holland J allowed the plaintiff purchaser a sum by way of compensation for misrepresentation as part of a global order under s 9; this sum also contained a substantial sum by way of restitution. (Note the decision of the same judge in *Falloon v Johnstone* (unreported, High Court, Christchurch, 11 July 1985, A 351/83).) In *Gallagher v Young* [1981] 1 NZLR 734, Greig J said:

> It is clear that there is a wide discretion under s 9 to give justice as between the parties. Under that section it is no longer a question of applying the strict rules as to damages and it appears from the effect of s 10 that the just order may replace an inquiry into damages altogether. (740)

1.89 In *Progeni Systems Ltd* v *Hampton Studios Ltd* (unreported, High Court, Christchurch, 11 August 1987, CP 105/86) Tipping J, in making an order under s 9, took account of the fact that no damages had been claimed. But Jeffries J in *Burch v Willoughby Consultants Ltd* (1990) 3 NZELC 78 has gone furthest of all. In a wrongful dismissal case he awarded the plaintiff general damages of $10,000 under s 9(2)(b) in respect of the distress suffered because of the manner of the dismissal. His Honour said:

> Counsel informed the court that as far as his researches reveal the relationship between s 9 orders and common law damages remains to be judicially considered. What seems clear is that the statute itself does not attempt the reconciliation but appears to seek to widen the discretion of the courts in regard to damages whilst leaving common law remedies untouched.

His Honour also reserved leave to return to court later on a second issue, and indicated that

it may be an appropriate case to make an order pursuant to s 9 of the Contractual Remedies Act if there is no other satisfactory way of assessing damages.

(See also *Thomas v Bournville Furniture Co Ltd* (unreported, High Court, Auckland, 26 October 1990, CP 2695/88) where Robertson J intimated approval of Burch.)

1.90 This use of s 9 to award a head of damage that was only doubtfully available at common law (because of the rule in *Addis v Gramophone Co* [1909] AC 488), and to foreshadow a further award—the calculation of which would have been difficult or impossible under the common law rules—can only be described as problematical. If correct, it enables the court to give the go-by to the carefully formulated rules of the common law as to remoteness, and assess damages on a ball-park basis. Justice may perhaps be achieved in this way, and it must be said that the New Zealand courts are, in other cases, taking an increasingly flexible approach to remedies, but it is difficult to imagine that the legislature intended this in enacting the Contractual Remedies Act. If the present common law rules about the assessment of damages are regarded as unsatisfactory, it may be that the remedy is to amend those rules by a separate statute, not to use s 9 to by-pass them.

1.91 It may be that s 9(2)(b) should be redrafted to make it even more clear that its purpose is restitutionary, and that it cannot be used to award a sum in the nature of damages. Wording such a provision will be difficult, for the relationship between restitution and damages is not straightforward. On the other hand, it may be felt that, given judicial trends towards flexibility of remedy (eg, *Day v Mead* [1987] 2 NZLR 443; *Harris v Harris* (1989) 1 NZ ConvC 190,406) it is preferable to retain the present virtually unfettered discretion. To do so, however, could greatly weaken the efficacy of the common law rules of remoteness. Amendment of this provision should be seriously considered.[20]

1.92 A further difficulty with s 9 has already been referred to (para 1.78). Since orders under s 9 are in the court's discretion, claimants have no right to any money or property until an order has been made. This means they are not entitled, pending the hearing of the case, to protective measures such as a caveat.

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[20] This was considered by Mr Dawson in his commentary: para 1.148.

1.93 In deciding whether any reform is necessary two things must be borne in mind. First, if the current discretion is to be removed it can only be replaced by a series of rules which could be complex and virtually impossible to frame exhaustively. This would be contrary to the simplicity of the framework of the remainder of the Act. Secondly, the rival merits of flexibility and predictability are always difficult to assess, and different minds may reach different views on the appropriate balance. It is suggested that, for the time being, the current discretion remain undisturbed.

SECTION 15—SAVINGS

1.94 This is the savings section. Two of the savings require mention.

Section 15(d)

1.95 Nothing in the Act is to affect the Sale of Goods Act 1908, except as provided by ss 4(3), 6(2) and 14. The most important practical effect of this is that, although damages are available for misrepresentation in a contract for the sale of goods (s 6(2)), questions relating to cancellation of a contract for the sale of goods are governed by the Sale of Goods Act 1908 and not the Contractual Remedies Act 1979. Thus, in *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519, involving the sale of a car, the case was held to depend on breach of the implied condition as to fitness for purpose in s 16(a) of the Sale of Goods Act; the remedies were those provided by that Act and by the "rules of the common law" preserved by s 60(2) of that Act. Hardie Boys J said that "there may be very little scope for the application of the new Act" (ie, the Contractual Remedies Act) so far as contracts for the sale of goods are concerned. *Broadlands Finance Ltd v Inwood* (1987) 1 NZBLC 102,784 involved breaches of the condition of merchantable quality in s 16(b) of the Sale of Goods Act in respect of the sale of a tractor.

1.96 Heron J was unequivocal. He said:

> Whilst some provisions of the Contractual Remedies Act are to apply to the sale of goods, ss 7, 8 & 9 cannot apply. The Sale of Goods Act provides in its own way for cancellation or the equivalent by virtue of the right given to reject goods: ss 32, 36 and 37. Section 15 of the Contractual Remedies Act 1979

prevents any question of the Courts attempting to apply two regimes to the same subject matter.

See also *Wrightson NMA Ltd v Christie* (unreported, High Court, Palmerston North, 18 August 1987, CP 108/87).

1.97 If Heron J is correct, it means that even repudiation of a contract for the sale of goods will not be dealt with under the Act: it will be dealt with under the common law rules preserved in respect of contracts for the sale of goods by s 60(2).

1.98 It may be deemed unfortunate that, whereas the Contractual Remedies Act provides a uniform regime for cancellation of contracts of all other kinds, it excludes the most common contract of all: the contract for the sale of goods. The co-existence of the two regimes is confusing. If a transaction involves a sale of goods and some other type of contract, the court will have to separate out the various transactions and apply different rules to them (see for instance, *Retaruke Timber Co Ltd v Stallard* (unreported, High Court, Auckland, 8 January 1990, CP 337/86); hire agreement governed by Contractual Remedies Act, sale agreement by Sale of Goods Act). In some cases a composite transaction (for instance, the sale of a business) is dealt with as a single entity under the Contractual Remedies Act even though part of the subject-matter is goods: eg, *Roe v Guthrie* (unreported, District Court, Nelson, 20 October 1986, Plaint 991/86). (See also *Clotworthy v Davies Transport (Hamilton) Ltd* (unreported, High Court, Hamilton, 19 October 1989, CP 209/87)).

1.99 It is uncertain whether reform is desirable, and if so what form it should take:

- to bring the two sorts of contract into line would require substantial amendment of the Sale of Goods Act. In view of the international character of the sale of goods contract, and the existence of an International Convention on Sales, it is not at all clear that reform of sale of goods in New Zealand should follow the line of our idiosyncratic general law of contract;
- one could reduce the area of overlap by providing that the Contractual Remedies Act is ousted only where it is inconsistent with the express provisions of the Sale of Goods Act. This would mean that matters involving the sale of goods which were previously dealt with by the common law would now be

dealt with under the Contractual Remedies Act. That fragmentation might lead to greater complexity than the present total exclusion;

- one could simply leave things as they are. Even before the Act there were special rules applying to the sale of goods. The Act has not made matters much more complex.[21]

Section 15(h)

1.100 This provision, coupled with savings provisions in other acts, can have the effect that more than one act may apply to a single fact situation, giving a plaintiff a potential choice of causes of action.

1.101 Thus, a misrepresentation may sometimes be actionable under both s 6 of the Contractual Remedies Act and s 7 of the Contractual Mistakes Act. (See for example *Ware v Johnson* [1984] 2 NZLR 518 and *Shotover Mining Ltd v Brownlie* (unreported, High Court, Invercargill, 30 September 1987, CP 96/86).)

1.102 More importantly, there will be many cases of misrepresentation where a remedy will be available under both the Contractual Remedies Act and the Fair Trading Act 1986. The latter Act provides redress for misleading or deceptive conduct "in trade", and the remedies available in the court's discretion include damages, variation, and avoidance. In many cases, therefore, the plaintiff will have a choice of causes of action.

1.103 There are a few differences between the two Acts.

- Misrepresentation will virtually always constitute misleading conduct: the latter expression, however, may possibly be a little

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[21] During the discussion of this paper at the March 1991 meeting, a number of former members of the CCLRC indicated that the savings provision in relation to the Sale of Goods Act 1908 in s 15(d) of the Contractual Remedies Act was based on contemporary expectations of an early revision of the 1908 Act. That revision remains incomplete, although it is understood that the topic is under more or less active consideration by the Ministry of Consumer Affairs and the Law Reform Division of the Department of Justice. The Law Commission, following the consideration of the relationship between the Contractual Remedies Act and the Sale of Goods Act in the paper by Mr Dugdale and Mr Walker, has recommended a number of amendments to the Sale of Goods Act which will, to a limited extent, harmonise the two Acts (see draft Act, ss 6–8; report, paras 27–36). These recommendations are not, however, intended to preclude a full review.

wider, particularly since the Fair Trading Act defines "conduct" as including an "omission" to act, and "making it known that an act will or will not be done". In *Savill v NZI Finance Ltd* [1990] 3 NZLR 135, Hardie Boys J said that he had "no doubt that s 9 of the Act may apply to situations not covered by the Contractual Remedies Act". However, the extent of the difference is far from settled: see *Mills v United Building Society* [1988] 2 NZLR 392.

- Section 9 of the Contractual Remedies Act confers a right to damages whereas the Fair Trading Act gives the court a discretion to award them.
- Only conduct in trade is caught by the Fair Trading Act; the Contractual Remedies Act is wider in that it covers private sellers as well. (See *Newell v Garland* (unreported, High Court, Palmerston North, 14 September 1989, CP 129/89).)
- The plaintiff under the Contractual Remedies Act is required to prove inducement. There is no such express requirement in the Fair Trading Act, although (and it comes to much the same thing) a plaintiff will not have a remedy unless damage is likely to be suffered "by" conduct in contravention of the Act. (See *Savill v NZI Finance Ltd.*)
- While only a party to the contract can sue under the Contractual Remedies Act, anyone can apply for an order under the Fair Trading Act; the person who suffered loss need not even be a party to the action.
- Under the Contractual Remedies Act, damages may only be awarded against a party to the contract; under the Fair Trading Act damages may be awarded against the person who engaged in the misleading conduct. Thus, while under the Contractual Remedies Act no action will lie directly against a fraudulent land agent who makes false statements to a buyer, that agent may be sued directly under the Fair Trading Act.
- Under the Contractual Remedies Act damages are on the contract measure; under the Fair Trading Act they are more likely to be assessed on the tort measure. However, it has been said that tortious principles are a guideline only, and that the Act is intended to have a broader ambit than common law actions of tort. Thus damages for distress and inconvenience may be recoverable under the Fair Trading Act (*Sinclair v Webb & McCormack Ltd* (1989) 2 NZBLC 103,605).

- While a party can cancel a contract for a serious misrepresentation under the Contractual Remedies Act, cancellation (or avoidance) can only be granted in the court's discretion under the Fair Trading Act. Such avoidance under the Fair Trading Act may be ab initio.
- Variation of contract is a remedy under the Fair Trading Act, but not under the Contractual Remedies Act.
- Affirmation of the contract bars cancellation under the Contractual Remedies Act (s 7(3)); it does not necessarily do so under the Fair Trading Act.
- It is easier to contract out of the Contractual Remedies Act than the Fair Trading Act; the only type of clause which is effective to exclude liability under the Fair Trading Act is one which negates the misleading character of the conduct in question.
- The Contractual Remedies Act will almost never apply to cancellation of a contract for the sale of goods; the Fair Trading Act power of avoidance and variation applies to sale of goods as much as to any other type of contract.

1.104 It may well be that the Fair Trading Act will not have the impact in New Zealand in the contract area that it has had in Australia, simply because the Contractual Remedies Act, which has no equivalent in Australia, is a simple, established and attractive cause of action. But there have already been enough cases to make it clear that the Fair Trading Act cannot be ignored in relation to misrepresentations inducing contracts.

1.105 The question to be decided is whether it is desirable that two overlapping Acts, possibly leading to slightly different results, should apply in the same fact situation. The Contractual Remedies Act was meant to provide a single, straightforward remedy for misrepresentation. This desired simplicity is not assisted by overlaying it with an alternative cause of action. If it is felt that this is undesirable, it would be easy enough to amend the Fair Trading Act to provide that it does not apply to situations where a remedy is available under the Contractual Remedies Act. However, it is doubtful whether this amendment is desirable. Simplicity is never alone a compelling argument for change. Alternative causes of action are common in other areas, and allow a plaintiff to choose the remedy most advantageous in his or her particular situation. Moreover the Fair Trading Act is a

public interest measure which sets standards across the community; it may not be desirable to narrow its scope. The Closer Economic Relations Agreement also argues for consistency with Australia.

MISCELLANEOUS

CONFLICT OF LAWS ASPECTS

1.106 The Contractual Remedies Act presents no problem to a New Zealand court dealing with a contract governed by New Zealand law, but could present problems in other contexts. Does the Act apply in overseas courts? Does it apply to contracts governed by an overseas law but performed in New Zealand? Is it confined to contracts where the proper law is the law of New Zealand?

1.107 Professor Webb writes in his article, "Heaven Help the Overseas Contract Lawyers" [1979] NZLJ 442, 444:

> One wonders at once whether s 4, dealing with statements during negotiation for a contract, lays down a rule of evidence or a rule of construction in conflict of laws terms . . . [In respect of ss 5–11] one has the uneasy feeling that the draftsman may again have seen himself as providing a remedy in New Zealand in respect of any contract forming the basis of litigation (and, presumably, arbitration) in New Zealand whether or not New Zealand law is the putative proper law or the proper law, as the case may be. Be, again, that as it may, what will be the case if it is alleged before, say the Supreme Court of South Australia, that a contract, the putative proper law of which is New Zealand law, was entered into by a misrepresentation? Will that Court consider itself equipped to apply the statutory scheme for giving relief, or will it send the parties off upon a trans-Tasman trip to the New Zealand scene as being more convenient?

1.108 Of the New Zealand contract statutes only the Frustrated Contracts Act 1944 contains a conflict of laws provision. Thought should be given to incorporating adequate provisions in the Contractual Remedies Act. This is a specialist area where advice should be

taken not just from conflicts lawyers but also from members of the business community.[22]

COMMON LAW

1.109 Even acts which are expressly declared to be codes (such as the Crimes Act 1961) are occasionally interpreted with reference to the pre-existing common law: old habits die hard. Thus, although s 7 of the Contractual Remedies Act is expressly declared to be in substitution for the rules of the common law, it has been said to be legitimate to have regard to those rules when applying it. In *Ansell v NZI Finance Ltd* (unreported, High Court, Wellington, 14 May & 6 June 1984, A 434/83) Quilliam J said:

> I think it is inescapable that the Courts [in applying s 7(4)(b)] will be guided by the common law and equitable principles which the Act was designed to replace.

This is inevitable. Nor, in the interests of consistency of the law, is it undesirable.

1.110 More problematic, however, is the fact that s 7 of the Act is the only one which does expressly exclude the common law. For example, ss 6, 8 and 9 do not do so. It is questionable whether the framers of the Act intended this difference between s 7, on the one hand and ss 6, 8 and 9, on the other, to be material. However it was commented on, and regarded as significant, by Wylie J in *Pendergrast v Chapman* [1988] 2 NZLR 177, 191. Thus, with regard to s 6, it has been held that the common law requirement of intention to induce remains (para 1.17); and with regard to s 8 it has been held that no change was intended to the common law rule that accrued obligations continue after cancellation: *Pendergrast v Chapman; Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173. By comparison, however, s 9 has been held to exclude the common law remedy of quantum meruit: *Brown & Doherty Ltd* v *Whangarei CC* [1990] 2 NZLR 63.

1.111 It is unlikely that different results would have been arrived at, whatever the wording of the sections, but it is suggested that there is no justification for maintaining the present distinction between them.

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[22] Conflict of laws issues in relation to the Contractual Remedies Act and other contract legislation are discussed, and proposals for reform outlined, in Mr Goddard's paper (paras 7.73–7.85).

Either no sections should refer to the substitution of the common law, or all should. The latter solution is probably the best, and could be achieved by a "code" section early in the Act. (Compare s 5 of the Contractual Mistakes Act 1977.) However, drafting such a code section will not be free from difficulty, for in a few areas common law concepts do need to be preserved: the definition of misrepresentation in s 6, for instance, and the rules of remoteness of damages. Perhaps the code section could be made subject to a proviso "unless the context otherwise requires".[23]

CONCLUSIONS

1.112 It would be a serious error to rewrite the provisions of the Act in any fundamental way. This would be to unsettle a law which has now become familiar to the legal profession and to others applying it. Tacking on detail, and engrafting express exceptions, could also spoil the essential simplicity of the Act. It was always meant to be a set of simple principles, and such legislation is bound to leave room for judicial exegesis. Nor does the experience of the first decade of the Act's existence suggest that any fundamental revision is necessary.

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[23] The limited reference to "code" in the Act was the subject of differing opinions among those who attended the March 1991 meeting. In his commentary, Mr Dawson observed that such concepts as breach, repudiation, affirmation, essentiality and misrepresentation have been worked out over many years of judicial decision making. The amount of work required to convert the Act into a code could not be justified in terms of result: para 1.151.

Mr B J Cameron took a different view in a note to the Law Commission after the March 1991 meeting. He considered that s 8, being part of the scheme introduced by s 7, should be declared to be a code. He went on:

> Whether its subject matter is wide or narrow, a code is in essence a statement of the principles and a starting point. You must look in the first instance to the scheme and principles of the code for answers; you are not to assume that the code intended to change the common law only where there is a manifest inconsistency. That in my opinion is a mimimalist heresy, based on a surely discredited aversion to statutory law.
>
> However, a code is not usually designed to include every detail—so that if it is silent it is defective. Indeed, a mass of detailed rules is (as one participant realised) the antithesis of a practical code.
>
> So there is no conceptual problem in using and importing common law rules *by analogy*, as long as they are within the spirit of the code. And of course the broad principles of the common law underlie all partial codes in a country like New Zealand. This should be well understood and is no objection to declaring a particular provision or scheme to be a code.

The Act has, in fact, been working satisfactorily in most respects. However much may have been lost in precision and detail by comparison with the old common law, there are substantial countervailing advantages in the simple and clear conceptual framework which the Act provides. A practitioner has commented:

> I suggest that our legislation has rightly been directed at achieving a good sense of justice. . . . the overall interests of individual citizens and the welfare of society are better served by applications of law in all areas which seek out and apply equity and justice between the parties and do not straitjacket the parties into preconceived legal theories and arguments which may or may not deliver the desired justice.

1.113 The paper has raised a number of difficulties in the application of the Contractual Remedies Act.

1.114 In the great majority of these difficulties, legislative action is not recommended. This is for varying reasons, some of which are as follows:

- the matter is easily capable of resolution by the courts;
- the matter raises questions which go beyond the scope of the Contractual Remedies Act and are thus inappropriate to this review;
- the difficulty was present even at common law and is inherent in the subject matter;
- the difficulty is the result of the flexibility of the Act's provisions, and that very flexibility has countervailing advantages;
- the courts have already resolved the problem, and it is unnecessary to rewrite the provision merely to reflect the gloss placed on the Act by the courts;
- any amendment would require a fundamental reformulation of the statutory provision, and the degree of present difficulty is not enough to merit this;
- the difficulty is not persistent or serious enough to merit reform at this stage;
- although potential difficulties are apparent, they have not yet arisen in practice, and it would be unwise to initiate reform without experience of how serious those difficulties might be; amendment would only create difficulties of a different kind.

The view has been taken that there is no point in amending for the sake of it.

1.115 However, in a number of situations the difficulties are such that there is an argument for legislative amendment. They are the following:

- s 7, to clarify whether a party can affirm without knowing of the existence of the right to cancel (paras 1.58 and 1.59);
- s 8(1), to provide for waiver of the requirement of notice of cancellation (para 1.64);
- s 8(3), to provide in more detail for the consequences of cancellation (paras 1.71–1.77);
- s 9, to clarify the relationship between damages and the award of a just sum under s 9(2)(b) (paras 1.86 – 1.91);
- a new section to resolve conflict of laws problems (paras 1.106 – 1.108);
- a new section to make it clear that the Act replaces the common law (paras 1.109 – 1.111).

1.116 In addition, legislative amendment may be considered as a possibility in the following situations, although the argument is not so strong:

- s 7: the expressions "of the contract" and "under the contract" in s 7(4)(b) may require examination (paras 1.38 and 1.39);
- s 7: "stipulation" could be replaced by "term" (paras 1.40 and 1.41);
- s 15: the relationship of the Act with the Sale of Goods Act may need consideration (paras 1.95 – 1.99);
- s 15: the relationship of the Act with the Fair Trading Act 1986 may need consideration (paras 1.102 – 1.105).

ANNEX

1.117 Since the preparation of the original paper there have been a number of developments, but two deserve special mention.

THE SCOPE OF SECTION 9

1.118 The question of whether s 9 can be used to make an award in the nature of damages has been subjected to careful and detailed analysis by Fisher J in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68. His Honour concluded that the scope of s 9 is not restricted and that it can be used to make orders in the nature of expectation damages. He pointed out that the expansive language of s 9 contains no express limitations and appears in an Act designed to reform the law. It is unlikely that in using expressions such as "just" the legislation intended to exclude two of the principal methods of assessing loss, ie, reliance and expectation loss. He noted also that the list in s 9(4) of the criteria to which the court may have regard in the exercise of the discretion seems to go beyond mere restitutionary criteria. His Honour said that on his reading of s 9:

> Relief upon cancellation of any given contract must ultimately be determined in a global exercise which takes into account all the performances, breaches, gains and losses of all the parties to that contract. (92)

He said that the section would seem to preclude a piecemeal approach which compensated for loss on one aspect of the contract without regard to benefits gained and other losses incurred with respect to other aspects of the same contract.

1.119 If the *Burch* and *Newman* cases are right, therefore, common law damages remain as a remedy, but it will be open to a plaintiff to base an alternative claim under s 9. This will enable a compensatory award to be made without the need to be tied down by the common law's restrictive rules about remoteness and the kinds of loss recoverable.

THE CONSUMER GUARANTEES BILL

1.120 The Consumer Guarantees Bill 1992 is before the New Zealand Parliament at the time of writing. If passed into law it will further fragment the law on cancellation for breach.

1.121 The Bill implies various guarantees into consumer contracts—for instance guarantees of quality, due care and skill, title, etc—and provides remedies for non-compliance. In the case of a contract to supply *goods* these remedies include the right to require that the supplier repair defective goods and (where the failure is of a substantial character) a right to reject the goods. If the right to reject is exercised after the property in the goods has passed to the consumer, rejection revests that property in the supplier.

1.122 In the case of a contract to supply services, the Bill provides that the consumer may require the supplier to remedy a failure; but where remedy is not possible or where the failure is "of a substantial character" (as defined) the consumer may cancel the contract. Cancellation under the Bill substantially mirrors cancellation under the Contractual Remedies Act 1979. The rules about making the cancellation known to the other party are the same, so are the rules defining the *effects* of cancellation, but with one important exception: the consumer is to be entitled to a refund of money paid unless a Court or Disputes Tribunal orders otherwise.

1.123 It appears that the result will be fragmentation as follows:

(i) Cancellation of commercial contracts for the sale of goods will be governed by the Sale of Goods Act 1908;

(ii) Cancellation of a consumer contract for the sale of goods will be governed, as far as rejection of goods by the consumer is concerned, by the Consumer Guarantees Bill, but for other purposes by the Sale of Goods Act 1908;

(iii) Cancellation *by the consumer* of a consumer contract for the supply of services will be governed by the Consumer Guarantees Bill, but cancellation of such a contract *by the supplier* will be governed by the Contractual Remedies Act 1979;

(iv) Cancellation of a commercial contract for the supply of services will be governed by the Contractual Remedies Act 1979.

CONTRACTUAL REMEDIES ACT 1979 COMMENTARY

F Dawson

1.124 I am in general agreement with the conclusions reached in the paper prepared by Professor Burrows. I have the following specific comments to make on the paper.

Paragraph 1.05 (first subparagraph)

1.125 I agree that there should be no review of the larger question of whether s 4 should be amplified.

Paragraph 1.05 (third subparagraph)

1.126 I think a clear case is made out for amending s 4(1), to answer the points made by David McLauchlan in his article, "Merger and Acknowledgment Clauses under the Contractual Remedies Act 1979" (1988) 18 VUWLR 311, and to remove all doubts caused by Somers J in his recent dicta in the Court of Appeal. The section should be rephrased to oblige the Court to permit the evidence to be heard relating to whether a statement was made, the general circumstances surrounding the transaction etc, and then to rule whether, having regard to the circumstances, it is fair and reasonable that the provision should be conclusive.

Paragraphs 1.08 and 1.09

1.127 The difficulties in the case law relate to the drafting of the provision in the Real Estate Institute of New Zealand standard form contract, and not to s 5. In respect of penalty clauses, the issue is whether a penalty clause is void, rather than whether any difficulty is raised by the terms of s 5, so I agree with Professor Burrows.

Paragraphs 1.12–1.15

1.128 I wonder whether it can be argued that a non-contractual promise is actionable. Is not a non-contractual promise a statement of future intention which is not intended to create legal relations? If so, it is difficult to see how the recipient of the statement can reasonably rely on that statement. In any event I agree with the recommendation.

Paragraph 1.16

1.129 I believe that *Savill v NZI Finance Ltd* [1990] 3 NZLR 135, reintroduces the question of whether a representation must objectively be a material representation for it to be actionable. As I understand the decision, only representations which are intended to operate as an inducement are actionable, although intention will be presumed if the nature of the statement would probably produce the kind of effect on the representee's mind which it did produce. In my view, *Savill* may be supported, as it is a method of screening claims under s 6 (rather in the way that warranties were held actionable if the makers intended to be contractually responsible for their statements). I therefore agree with Professor Burrows, but I think this case does raise an important question of principle, which is whether a misrepresentation ought to be objectively material as well as causative of the contracting party entering into the agreement. I had understood that the leaving out of the word "material" in s 6(1) was deliberate.

Paragraph 1.19

1.130 I agree with Professor Burrows that the courts will work this problem out, though to some extent it must depend on the correctness of *Savill*, and the need for an intention that the representation be acted upon. I myself have subscribed to the view taken by McLauchlan (Dawson & McLauchlan *The Contractual Remedies Act 1979* Sweet & Maxwell (NZ) Ltd, 23), which seems more difficult to support in the light of *Savill.*

Paragraph 1.26—Parol evidence rule

1.131 I support Professor Burrows, but in my view it may be helpful for the Law Commission's report to spell out the reasons for the

misunderstandings which have occurred in this area. The problem is peculiar to our own jurisdiction, and arises because it has been thought that the parol evidence rule of itself excluded evidence of oral misrepresentations in the case of written contracts. The late Mr C I Patterson and Professor McLauchlan had a memorable exchange on this issue at the last session of the CCLRC on the Act. In truth a Court of Equity which had jurisdiction over innocent misrepresentations, always allowed evidence of misrepresentations to be adduced even though there was a written contract. Its jurisdiction was based on the facts raising an equity. In addition, common law courts always admitted evidence of misrepresentation if the plea was in fraud (deceit). So the statements in *Wakelin v R H and E A Jackson Ltd* are clearly erroneous to the extent that they suggest that the parol evidence rule applies to representations. There is no need for reform but the report could lay this fallacy to rest.

Paragraph 1.28

1.132 I think that there is an important issue on the measure of damages under s 6(1) of the Act, and that the Act should be amended to allow for a tort measure to be recovered in the alternative. My view is that this will require a recasting of s 6(1) into alternatives—you may either claim 6(1)(a) relief or 6(1)(b) relief, whichever is the better alternative. I would therefore be in favour of permitting a tort action to be heard concurrently with a statutory claim under s 6. I believe that the availability of the tort action raises exactly the same issue as the availability of actions under the Fair Trading Act 1986. We should remember that, in such a case, the misrepresentation has been made (perhaps even fraudulently) and the loss has been incurred. I do not see why, in these circumstances, a plaintiff should be debarred from recovering on the ground that, had the representation been true, the plaintiff would still have made a bad bargain. Further, I do not see why the contract principles on remoteness based on contemplated loss should apply, rather than the broader tort rules (based on foreseeability) if these work against the plaintiff.

Paragraph 1.33

1.133 In the chapter on essential breach in Dawson and McLauchlan, I referred to the significance of the distinction between executory contracts, where performance was to be rendered by the

defaulting party, and executed contracts, where performance had been rendered by the defaulting party, albeit defectively. I would be very surprised if, in the case of an executed contract, a distinction of 10 per cent could be described as substantial (except perhaps in a genuine case of an entire contract, which is very rare). I agree with Professor Burrows that seriousness is a question of degree, having regard to the circumstances, but wonder whether an amendment along the lines of the American *Restatement* would not in fact be preferable (Dawson and McLauchlan, 103). If such an amendment was to be made, I believe that somewhat more emphasis should be placed on the importance of an executory transaction. I would agree, however, that the basic tests should still be as set out in ss 7(3) and 7(4) of the Act, with the matters set out in the American *Restatement* being referred to as factors to be taken into account by the court.

Paragraph 1.40

1.134 In my view the majority view is clearly correct. But the minority view raises an important issue. Should the Act specifically refer to the common law concepts of a warranty or an independent promise? Clearly, if parties in respect of a term specifically exclude the right to cancel, and provide that breach of that term will only sound in damages, this result will be reached (s 5 of the Act). Should parties be able to achieve the same result by categorising a term as a warranty? Should s 7 be amended to provide that if parties categorise a term as an independent promise or a warranty, a breach of that term will never give rise to the right to cancel?

Paragraph 1.46

1.135 In my view the only criterion is whether there has been conduct amounting to an election to affirm.

Paragraph 1.48

1.136 This is an extremely difficult area. In my view Hardie Boys J is clearly wrong in *Chatfield v Jones,* in suggesting that a contracting party must be ready and willing to perform before that party becomes entitled to cancel the contract, although I am aware that similar statements have been made in certain Australian cases. The true

position at common law was that a party could treat itself as discharged on the ground of the other party's failure to perform, notwithstanding that it had failed to perform its part: see for example *Halsbury's Laws of England* (4th ed) vol 9, para 556.

1.137 This point requires elaboration. Originally at common law, either side could maintain an action against the other side notwithstanding their own failure or refusal to perform: *Nichols v Raynbred* (1615) Hob 88. Thus, if V agreed to sell a cow for $30 delivery to occur on 1 March, V would be in breach if he failed to deliver the cow on 1 March notwithstanding P's failure to tender the $30 or his refusal to pay for the cow. V's promise was absolute, and V was bound to perform in any event.

1.138 If V sought to protect himself, he was able to do so by making the performance of his promise expressly conditional on P's prior performance. In or about 1770, it began to be accepted that promises were presumptively dependent on the prior or concurrent performance of the co-contracting party. Each side's performance was conditional on the other side's prior or concurrent performance. Technically this was achieved by implying a condition that the promisee must show readiness and willingness to perform. In the above example, V would not be in breach unless P were able to show readiness and willingness to pay the price on 1 March, even though V failed to deliver. V's promise to convey was said to be impliedly conditional on P showing readiness and willingness to pay the price.

1.139 This still remains the infrastructure of the common law on breach though the reforms brought about by the Common Law Procedure Act 1854 (UK) have somewhat hidden the significance of readiness and willingness in modern day law. The reason behind this is that, after the 1854 reforms, it was to be assumed in pleadings that all conditions precedent had been complied with, unless the defendant specifically raised an objection by way of defence. Thus, the focus of attention became not so much whether the person seeking to enforce the contract could show readiness and willingness to perform (as was the case prior to 1854): it was rather whether the defendant raised as a defence the failure of the plaintiff to comply with a condition precedent—ie, was not ready and willing to perform a promise, the performance of which was a condition of the defendant's performance. This then began to be known as a breach of a condition precedent (*Bettini v Gye* (1876) 1 QBD 173) and later on as a breach of a condition. The old position nevertheless remains as the basic

infrastructure of the common law approach to discharge by breach, as is made clear by both *Foran* v *Wight* (1989) 64 ALJR 1 and *Fercometal v Mediterranean Shipping Co Ltd* [1988] 3 WLR 200, both of which considered the problem of the unaccepted repudiation.

1.140 Two things follow from the above common law infrastructure, which are very important to an understanding of the workings of the Act. The first is that not every case of non-performance by a promisor constitutes a breach. In the above example, V's failure to perform in supplying the cow will only be a breach if P can show readiness and willingness to perform his part of the contract. If P is unable to show readiness and willingness, V will not be in breach of contract even though V has failed to perform.

1.141 The second important consequence is that the whole of our Act is actually premised on the common law infrastructure because concepts such as "repudiation" and breach of contract only have meaning against their common law background. As a result, I believe that the concept of readiness and willingness is already inherent in the Act, even though s 7(1) makes no express reference to it. The question is whether this ought to be highlighted to achieve greater consistency. My view is that it probably ought not to be highlighted because if it were the Act would need to be very lengthy indeed (cf, the American *Restatement*). I believe that there is great merit in the simplicity of the present statute even though it may be criticised as being deceptively simple. However, to adopt this course is to take a serious risk of the law going completely off the rails by, for example, taking the view that the concept of readiness and willingness has in fact been abolished by s 7(1), an argument which I think can be made quite seriously on normal principles of statutory interpretation.

Paragraphs 1.50–1.53

1.142 I believe that it would be useful if the Act did provide for a mechanism for making time of the essence under the general law, and incorporated into law the reasoning of Lords Diplock and Simon in *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904. I agree with Professor Burrows that many problems are in fact settled by clauses specifically addressing delayed performance, and that s 15(h) preserves the common law learning on time of the essence. But even so certain cases do give rise to difficult questions: see for example *Mainzeal Group Limited v MacIndoe* (1990) 1 NZ

ConvC 190,603 (HC); [1991] 3 NZLR 273 (CA). Even a cursory reading of some decisions shows that the law would be clarified by having a general provision dealing with the effect of failing to perform on time. Many practitioners still have an unfortunate tendency to believe that the act of giving a notice converts an inessential term into an essential term.

Paragraph 1.58—Election to affirm—knowledge of legal rights

1.143 The term "affirmation" is clearly a term of art and *Peyman v Lanjani* [1985] Ch 457 has clarified the question at common law. I would suggest that there is probably an argument for making no alteration, though the contrary could be maintained.

Paragraphs 1.64–1.69

1.144 I agree with Professor Burrows' comments on *Chatfield v Jones*. That decision does not seem to be supportable on the reasons given by the Court of Appeal, though it may be supportable on other grounds. I am of the view that the suggested amendment would not clarify matters, and that the key to unravelling this difficult area is to distinguish between repudiation ("I will not perform any promise") and breach ("I have failed to perform my promise on due date"). The waiver doctrine, in my view, is the waiver of the obligation to show readiness and willingness to perform one's part of the contract as a precondition of being entitled to put the contract into suit. The innocent party in such cases is therefore not basing a claim on wrongful repudiation ("I will not perform my obligation") but on an actual breach by the other contracting party ("you have failed to perform on the due date").

1.145 As I have indicated earlier, the concept of "readiness and willingness" is inherent in the concept of breach. Not every failure or refusal to perform a promise is a breach. I would suggest that the essence of the problem in this area is whether, in the case of an actual breach of contract, an unretracted repudiation should dispense with an innocent promisee's obligation to show readiness and willingness on the date for performance. I therefore suggest that the real question is whether the Act should be amended to confirm that the innocent party may bring an action for actual breach, even though disabled from performing, and was not ready and willing to perform at the time of performance—provided that at the time of acting on the

repudiation, the innocent party was willing to perform and can show on the balance of probabilities that he would have performed his obligations (see the discussion in *Foran* v *Wight* (1989) 64 ALJR 1).

1.146 I doubt, therefore, whether the amendment suggested is quite apposite. There are, in any event, some real problems with the amendment. When will the repudiating party be taken to have dispensed with the need for communication? This is bound, in turn, to give rise to some very difficult questions, and I wonder whether the suggested amendment would simplify the law. It should be remembered that what we are trying to achieve is a simple set of rules to be applied in everyday practice. What is being proposed appears to be an "equitable" exception which will, no doubt, be prayed in aid in every instance of non-compliance with the basic rule. One suspects that very soon the exception will expand and devour the rule.

Paragraphs 1.71–1.77

1.147 I agree with the views expressed in this paragraph, but believe that redrafting s 8(3)(a) of the Act would be very difficult. There is a need to deal with the matter of clauses which are intended to survive termination. I certainly do not think that it would be desirable to pick out certain types of clauses, for example, arbitration clauses or restraint of trade clauses, for special attention. In truth there are many occasions when parties wish stipulations to apply notwithstanding the termination of the contract. It is clear that specific provisions can achieve this result (s 5); the real difficulty is the case where that result is intended by the parties but they have not expressly provided for survival of the term in question.

Paragraphs 1.85–1.91

1.148 The disquiet about this section tends in the main to result from courts having resorted to s 9 to alter traditional contract learning. If we are agreed that the main object behind s 9 is to allow a court to confer restitutionary relief, why not state in s 9 that the paramount object of an order under this section is to reinstate the position of a contracting party prior to the making of the contract? This will still leave room for the odd maverick decision, but this is inherent in the notion of discretion, as John Selden's *Table Talk* pointed out long ago.

Paragraphs 1.95–1.99

1.149 I agree with Professor Burrows. Remedies are central to a code on the sale of goods and no reform of the Sale of Goods Act should be undertaken lightly. I therefore prefer the third option.

Paragraph 1.100

1.150 As already indicated, I see no real difficulty in having alternative statutory causes of action in respect of the same situation, and I would myself allow for tort claims to be brought under s 6(1)(b) so as to allow for tort measure of damages to be awarded in cases where the contract measure was unjust. I would therefore opt for leaving things as they are in the case of the Fair Trading Act.

Paragraphs 1.109–1.111—Replacement of the common law

1.151 This is a very difficult area and I would caution that we proceed with extreme care. Earlier on in this commentary, reference was made to the difficulties surrounding the concept of "breach" and it was pointed out that not every non-performance of a promise will amount to a breach of contract. Whether it does or does not depends on unstated common law principles as to readiness and willingness which must be imported into the Act if meaning is to be given to the concepts of breach or repudiation. Likewise, concepts such as affirmation, essentiality and misrepresentation all clearly involve well defined legal concepts worked out over many years. I cannot envisage the Contractual Remedies Act working as a code without a huge amount of the infrastructure of the common law being set out in it. If, for example, we focus on the concept of repudiation, we can appreciate the extent of the problem raised by codification. If codification of the common law was really intended, it would be necessary to begin by defining repudiation. This definition in turn would need to distinguish between cases in which one party rightfully repudiates and cases in which the repudiation is wrongful and actionable. Clearly, s 7(2) of the Act is only directed to cases of wrongful repudiation. Not every case in which one side says "I will not perform my contract" is a wrongful and actionable repudiation. It may well amount to a justified refusal to perform based on the other side's existing breach or anticipated inability to perform. I personally think that there is a great deal to be said for an amendment of s 7(1) to provide "unless the context otherwise requires". I would, however, be extremely

reluctant to further extend the code concept unless it is accompanied by a thorough redrafting of the Act. As I agree with Professor Burrows that one of the merits of the Act is its simplicity, I would be against this. A good comparison can be found in the American *Restatement of Contracts* which has approximately 100 sections devoted to breach of contract, waiver, repudiation and discharge. It is this sort of enterprise that will be necessary if a code is really what is required.

HARMONISATION OF THE SALE OF GOODS ACT 1908 AND THE CONTRACTUAL REMEDIES ACT 1979[24]

D F Dugdale and C T Walker

INTRODUCTION

1.152 The Contractual Remedies Act 1979 changed the law affecting contracts for the sale of goods in the following ways:

(a) By s 4, which in certain circumstances limits the effectiveness of exemption clauses framed as precluding enquiry into the existence of, status of, reliance on or authority for precontractual statements (see s 4(3)).

(b) By s 6, which in effect merged the remedies for misrepresentation and breach of contractual term (see s 6(2)).

(c) By s 14(1)(a), which removed from the Sale of Goods Act 1908 s 13(3) words the effect of which had been that the right to reject specific goods was lost when property passed.

(d) By s 14(1)(b), which provides that the Sale of Goods Act s 36(1), to the effect that there is no acceptance of unexamined goods until the buyer has had a reasonable chance of examining them, overrides s 37, which provides that the buyer is deemed to have accepted the goods if acting inconsistently with the seller's ownership (most frequently in practice a subsale).

[24] The paper states the law at December 1992. Footnotes have been added which refer to a December 1992 meeting at the Law Commission. At that meeting, the proposals in the paper were discussed in some detail. The footnotes also make reference to the treatment of the proposals in the Commission's report and draft Contract Statutes Amendment Act.

Otherwise the governing provision is s 15(d) which provides that "Except as provided in sections 4(3), 6(2) and 14 of this Act nothing in this Act shall affect . . . (d) The Sale of Goods Act 1908". Because that statute provides in s 60(2) that rules of the common law not inconsistent with the Sale of Goods Act continue to apply to contracts for the sale of goods, the Contractual Remedies Act affects such contracts only in the four respects tabulated above (see *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519).

1.153 What all this means is that those Contractual Remedies Act sections intended to comprise a code governing the cancellation of contracts have no application to contracts for the sale of goods which are in that respect governed by the law as it stood before the Contractual Remedies Act was enacted. This inconvenient situation was contemplated by the CCLRC on whose recommendations the Contractual Remedies Act is based. That committee's programme included the preparation of a statute modifying the Sale of Goods Act by making special provision for consumer sales, and the intention was to postpone the alterations to the Sale of Goods Act needed to make it consistent with the Contractual Remedies Act until that stage. But the committee was disbanded before this task could be completed and the matter remained neglected for a number of years. The introduction in 1992 and likely passage of the Consumer Guarantees Bill means that if nothing is done there will be three codes governing the cancellation of contracts, namely

(a) the Contractual Remedies Act code for contracts other than sales of goods,

(b) the Consumer Guarantees code for consumer sales,

(c) the pre-Contractual Remedies Act rules for sales of goods other than consumer sales.

This is obviously unsatisfactory. If the Law Commission's recommendation that by New Zealand statute the United Nations Convention on Contracts for the International Sale of Goods ("the Convention") be applied to international sales (see NZLC R23) were to be adopted then to those three codes it would be necessary to add a fourth.

1.154 It is in those circumstances that the authors were retained to prepare a working paper in publishable form indicating the amendments to the Sale of Goods Act and the Contractual Remedies Act that would be appropriate to permit the repealing of s 15(d) of the

Contractual Remedies Act, which repeal would of course result in the Contractual Remedies Act becoming applicable to contracts for the sale of goods.

1.155 It is, we think, important to emphasise two points in relation to our general approach. The first is that we have consciously endeavoured to avoid changing the existing law beyond what is necessary to achieve the harmonisation that is our principal objective. There is much to be said for the view that the Sale of Goods Act would benefit from a complete overhaul. Any such review would need to take into account United Kingdom reforms enacted and proposed, and also the terms of the Convention. Our instructions have been based on the premise that to make these relatively minor changes to the Sale of Goods Act without embarking on a major review is a worthwhile exercise, and we agree with this assumption for the reasons noted in para 1.153. It has to be acknowledged, however, that the restricted nature of our task has left us with an uneasy awareness that to a degree we are perpetuating anomalies that one would expect a more root-and-branch review will in due course bring to an end.

1.156 The other matter to note in relation to our approach relates to certainty:

> But as in all commercial transactions the great object is certainty, it will be necessary for this Court to lay down some rule and it is of more consequence that the rule should be certain, than whether it is established one way or the other. (*Lockyer & Ors v Offley* (1786) 1 TR 252, 259; 99 ER 1079, 1083 per Willes J)

As Sir McKenzie Chalmers himself put the matter in 1894, in his introduction to the first edition of his annotation of the statute,

Moreover, in mercantile matters, the certainty of the rule is often of more importance than the substance of the rule.

We will need to return to the issue of certainty in the context of s 9 of the Contractual Remedies Act. In the meantime we note that we have, in devising our recommendations, endeavoured to keep the need for certainty firmly in mind. It is arguable that the Sale of Goods Act amended as we recommend is in fact more not less certain than it now is. As the law stands, a court may decline to be bound by the parties' description of a term as a condition. Under the Contractual Remedies Act, a court is bound by the parties' classification of a term as essential.

1.157 We have dealt with matters in the following sequence:[25]

- The condition/warranty dichotomy—paras 1.158 - 1.161
- Rejection—paras 1.162 - 1.166
- Acceptance—paras 1.167 - 1.169
- Acceptance of part of the goods—paras 1.170 - 1.172
- Rescission by the seller—paras 1.173 - 1.174
- The effect of s 9—paras 1.175 - 1.179
- Miscellaneous amendments—paras 1.180 - 1.181

THE CONDITION/WARRANTY DICHOTOMY

1.158 Under the Sale of Goods Act contractual terms are classified as conditions or warranties, with rescission as a remedy available only for breach of the former. This proved unsatisfactory as an exhaustive classification, the courts devising an innominate intermediary class of terms. With regard to these terms, the right to rescind because of breach turned on the seriousness of the consequences of the breach. The Contractual Remedies Act s 7 provides a more sophisticated code based not on the classification of the term but on either the agreement of the parties as to its essentiality or the seriousness of the effect of its breach. We see no problem in applying this code to contracts for the sale of goods. It is in fact based on the judge-devised innominate or intermediate class referred to. (We note that the approach of art 25 of the Convention, which defines the breaches justifying avoidance of the contract under art 49, is not too different. Avoidance is available if the breach "results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract".)

1.159 Under this head the changes to the Sale of Goods Act needed are as follows:

(a) Repeal the definition of warranty in s 2(1).

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[25] With the exception of the recommendations in para 1.164, the Commission has adopted the substance of the authors' recommendations as its own: see report, para 31. The Commission has, however, made drafting changes in some instances; the reader is referred to the draft Contract Statutes Amendment Act ss 6 and 7, for the definitive version of the Commission's recommended legislation.

(b) Repeal s 13 (but we discuss in paras 1.170 – 1.172 the need for a provision replacing s 13(3) as it relates to the situation where part of the goods has been accepted).

(c) Replace the heading that precedes s 12 with the heading "Terms of the Contract".

(d) Replace the words "condition", "warranty" and "warranty or condition" where they occur in ss 14, 15, 16 (and its headnote) and s 17 with the word "term".

(e) We hesitated over whether to recommend that in s 30 the words "concurrent conditions" be replaced, perhaps by such an expression as "concurrent essential terms". The word "condition" is used here more in the sense of "condition precedent" than in the sense in which it is employed in ss 13 to 17. The explanation contained in the section means that the question of what term is employed is of scant practical importance, and in the end it seemed to us best to leave the section as it stands.

(f) Delete the words "and conditions" from the headnote to s 56.

1.160 An alternative approach might have been to substitute for the word "condition" not the word "term" but the words "essential term", thereby putting it beyond doubt that a breach confers on the other party a right to cancel analogous to the right to rescind for breach of condition.[26] But the Contractual Remedies Act approach is that, absent contrary agreement, the right to cancel turns on the seriousness of the effect of the breach, and it is in our view inconsistent with this approach to postulate by statutory implication an agreement as to essentiality that does not in fact exist.

1.161 This is a convenient point to note that as a result of changes proposed in this report, the controversy surrounding the decision in *Riddiford v Warren* (1901) 20 NZLR 572, to the effect that rescission of a contract for sale of goods on the grounds of innocent misrepresentation is unavailable, is resolved.

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[26] This view was advanced forcefully by Professor McLauchlan at the meeting of 14 December 1992. He suggested that it was more in line with the limited purpose of "harmonisation" proposed by the Commission and adopted by the authors. It was also noted that in England, the Law Commission recommended the retention of the "condition/warranty" distinction (*Sale and Supply of Goods*, 1987, Cmnd 137, para 4.15). But the Commission was there particularly concerned with the effect any change in the law might have on the rights of consumer purchasers, to which the present proposals have no application.

REJECTION

1.162 Section 29 of the Sale of Goods Act casts on the buyer the duty "to accept and pay for" the goods. Where the seller is in breach the buyer may reject the goods. The word "reject" is used in the Sale of Goods Act only in ss 13, 32 and 54. It is plain that in the phrase "reject the rest" in ss 32(2) and (3) the word "reject" is used in the narrow sense of "refusing to accept delivery of" and should be left untouched.

1.163 Our task has been complicated by a lack of unanimity among commentators as to the effect to be ascribed to the word "reject" in ss 13(2), 13(3), 32(1), 54(1) and in the references to "rejecting the whole" in ss 32(2) and (3). Does "reject" always mean no more than "refusing to accept delivery of", so that in the Contractual Remedies Act terms cancellation would require something more than rejection? If this solution were adopted, ss 32 and 54 would be left untouched, and it would be as well to insert a provision for the avoidance of doubt spelling out that a right to reject will not necessarily confer a right to cancel, and that cancellation will require, as well as rejection, a communicated election to cancel.[27] The alternative approach is to proceed on the basis that (as once robustly observed by Devlin J) rejection "is after all only a particular form of the right to rescind the contract" (*Kwei Tek Chao v British Traders and Shippers Ltd* [1954] 2 QB 459, 480). While acknowledging that there are respectable academic arguments against the conflation of rejection and cancellation,[28] it seems to us that the recommendations set out in the succeeding paragraph which, except in the contexts referred to in the

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[27] At the meeting of 14 December 1992, there was considerable discussion of the merits of this counter proposal, with the balance of opinion tending against the authors' own proposals, made later in the paragraph. The Commission recognises that the arguments for the two views are well balanced, and that, in the course of a more general review of the law of non-consumer sales, the proposals in the paper may be well found to represent a forward-looking and generally acceptable solution to the problem. However, the Commission believes that, for the present, the counter-proposal should be incorporated into our draft legislation, because we cannot see any way of dealing with the difficulties referred to in the notes to this paragraph, without bringing about a substantial change in the balance between the existing rights and expectations of the buyer and seller of goods which do not conform with the requirements of the contract.

[28] Professor Coote made this point in correspondence with the Commission, referring to the article by the late Professor J L Montrose, "The Operation of Description in a Contract of Sale of Goods" (1937) 25 Can Bar Rev 760, 768.

previous paragraph, substitute "cancel" for "reject", represent a workable solution more consistent with current commercial practice than the alternative proposal discussed above.[29] The one possible anomaly resulting from our preferred solution is in the situation where, when delivery is rejected, the seller is still in time to tender a conforming delivery. There should therefore be a provision to the effect that, where goods are tendered before the date on which delivery was due, their rejection will constitute a cancellation only if the seller fails to make a conforming delivery on or before the date on which delivery was due.[30] This formulation would, of course, if the circumstances of the tender amount in the particular fact situation to a repudiation, leave it free to the buyer to accept such repudiation then and there.

1.164 We have already recommended the repeal of s 13. We deal with s 54 later in this paper. In relation to s 32 the words "cancel the

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[29] Two difficulties were raised with this proposal:

- While in many cases a buyer who rejects non-conforming goods will also intend to cancel the contract, this need not necessarily be so. Provision should be made allowing a buyer to refuse to accept the goods, yet to hold the seller to a continuing obligation to carry out the contract.
- As framed, the proposal (when coupled with the abolition of the distinction between "conditions" and "warranties") offers no legal test for when a buyer may refuse to accept non-conforming goods. Assuming there is to be a complete conflation of "rejection" and "cancellation", a buyer could reject goods only where the provisions of the Contractual Remedies Act also confer a right of cancellation (cf the Convention on Contracts for the International Sale of Goods, arts 46 - 52). This could considerably reduce the bargaining power of a buyer who receives goods which do not fully conform with what has been promised, and would make a significant change in the existing law.

The Commission, having accepted the view that a distinction should be drawn between the concepts of "cancellation" and "rejection", has offered a solution to both these problems in its proposed draft legislation. This is the inclusion of a proposed new s 39A in the Sale of Goods Act, which provides, in subs (2), that rejection by a buyer does not necessarily amount to cancellation. Subsection (1)(b) makes it clear that a buyer may reject goods (but not necessarily cancel the contract) wherever there is a breach of one of the terms implied by the Act. Having rejected the goods, the buyer would have the right to cancel the contract if the seriousness of the defect, or the buyer's continued unwillingness or inability to provide a conforming product, brought the provisions of s 7 of the Contractual Remedies Act into play. (draft Act, s 6)

[30] Notwithstanding the views expressed in the preceding footnotes, the Commission takes the view that provision for a right of "seller cure" has independent merit, and it has been included in the proposed new s 39A, in a slightly modified form.

contract" should replace the words "reject them" in subs (1) and "reject the whole" in subss (2) and (3).[31] The expression "reject the rest" in the same two subsections should be left untouched.

1.165 It should be noted that as the law is (and following these changes would continue to be), cancellation under s 32 is available by reason of breaches of a gravity far less than is contemplated by the Contractual Remedies Act s 7(4). But s 7(4) provides for express agreement as to essentiality, and s 32 is declaratory of the law merchant which is itself distilled from an accumulation of such agreements. We suggest that, although the Contractual Remedies Act s 15(h) may make the change strictly unnecessary, for the avoidance of doubt, in the Contractual Remedies Act s 5 after the word "contract" where it first appears, there be inserted the words "or any other statute".

1.166 To complete the dovetailing, it is necessary to reconcile the rule that the effect of rejecting goods after property has passed is that title revests in the seller, with the provisions of the Contractual Remedies Act s 8(3)(b) that "no party shall by reason only of the cancellation, be divested of any property transferred ... pursuant to the contract".[32] In the draft that follows, the exception of goods that have been accepted is intended to take care of the various situations where restitutio in integrum is impossible. It would obviously be inconvenient, in the majority of fact situations, for property (which in the case of a contract for specific goods may have passed to the buyer without any delivery) to remain in the buyer after cancellation. Any intervening third party rights are taken care of by the words "as between buyer and seller" in the draft. If the seller has in the meantime become insolvent so that, by rejecting, a buyer who has paid in advance of delivery loses the property in the goods without any effective right to recover the price, that is a risk which the buyer must weigh up in deciding whether or not to cancel. We suggest therefore that there be inserted in the Sale of Goods Act a new s 55A to the following effect:

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[31] In view of the conclusions reached in relation to the concept of rejection generally, the Commission has not taken up this proposal. The comments in the following paragraph have no application to the Commission's own draft legislation.

[32] A similar provision is a necessary part of the Commission's legislation also.

55A Revesting on cancellation

Notwithstanding the provisions of the Contractual Remedies Act 1979 s 8(3) where after property in goods is transferred to the buyer

(a) a contract is cancelled by the buyer; or

(b) goods are rejected by the buyer

such cancellation or rejection shall unless the buyer has accepted the goods revest as between buyer and seller such property in the seller.

ACCEPTANCE

1.167 Section 7(5) of the Contractual Remedies Act reads:

> A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

This provision is a statutory expression in relation to the situations to which it applies of the general rule that a party is bound by an election made with knowledge of the relevant facts. Under the Sale of Goods Act the equivalent to affirmation is acceptance, and a buyer may in certain circumstances be deemed to have accepted even without knowing the relevant facts. (An example, as ss 36 and 37 now stand, would be if the buyer resold goods ignorant of the fact that they were defective as a consequence of not having taken an opportunity to examine them.)

1.168 The issue then is whether to retain the existing Sale of Goods Act rule as an exception to the general provisions of the Contractual Remedies Act, or to change the Sale of Goods Act rule for the sake of conformity. We have no doubt that the former is the more satisfactory alternative. One objective of the Sale of Goods Act provision and the law merchant on which it was based was clearly certainty and it would be wrong to interfere with this for the reasons suggested in para 1.156. This seems consistent with the approach of the English Law Commission (*Sale and Supply of Goods*, 1987, Cmnd 137, paras 5.6 – 5.13).

1.169 The amendment required is to add to s 37 the following new subsection:

> (2) A buyer who has accepted the goods is deemed thereby to have affirmed (within the meaning of the Contractual Remedies

Act 1979 s 7(6)) the contract for sale whether or not such acceptance was with knowledge of the repudiation, misrepresentation or breach.

ACCEPTANCE OF PART OF THE GOODS

1.170 Section 32 of the Sale of Goods Act provides for certain circumstances where the buyer has accepted part only of the goods. Where s 32 does not apply, and the contract is not severable, the effect of s 13(3) (the repeal of which we have recommended) is that, in the absence of agreement to the contrary, acceptance of part precludes rejection of the balance.

1.171 The question then is whether:

(a) Section 13(3) should be repealed without more, leaving the question of whether acceptance of part is an affirmation precluding cancellation to the application of the general provisions of the Contractual Remedies Act s 7(4). (The law would then be not profoundly different from that laid down by art 51 of the Convention.)

(b) Section 13(3) should be re-enacted in the language of the Contractual Remedies Act. But this would be to reproduce the defects in the present law. The capricious (when measured against s 32(3) to which s 13(3) is subject) consequences resulting in various fact situations from the application of s 13(3) are discussed, along with the English Law Commission's recommendations for reform, in Atiyah *The Sale of Goods* (8th ed, 1990) 514 – 519.

(c) Section 13(3) should be replaced by a new rule or set of rules.

1.172 Our initial inclination was to depart from our resolve (recorded in para 1.155 above) to avoid changing the existing law beyond what is necessary to achieve harmonisation, and to suggest the insertion in s 37 of the following new subs (3) (which reflects in (c) the wording of the English Law Commission's draft statute) as follows:

(3) In cases to which s 32 does not apply, the buyer's acceptance of part of the goods shall be an affirmation within the meaning of the Contractual Remedies Act 1979 s 7(5) of a contract of sale only if

(a) at the time of acceptance the buyer has had a reasonable opportunity to examine the balance; or

(b) the goods so accepted are three-fourths in value or more of the whole; or

(c) the goods so accepted and some or all of the balance are a unit division of which would materially impair the value of the goods or the character of the unit.

In the end, however, we decided to recommend that s 13(3) should be repealed without more, with the consequences noted in para 1.171(a) above. It was our view that the test of substantiality that would then be applied under the Contractual Remedies Act s 7(4) would no more give rise to problems in practice than does the rule governing the converse situation set out in the Sale of Goods Act s 33(2).

RESCISSION BY THE SELLER

1.173 Under the Sale of Goods Act, the seller's right to rescind is the counterpart of the buyer's right of rejection, and we considered whether the de futuro effect of the Contractual Remedies Act remedy of cancellation causes problems similar to those discussed in the case of rejection in para 1.166 above. It seems clear however, that so long as the seller retains possession, he or she is adequately protected by rights of retention and resale, and that a rescinding seller who has given up possession is confined to rights in personam against the buyer.

1.174 In ss 49(1) and (4) and the headnote, "rescinded" should be replaced by "cancelled".

THE EFFECT OF SECTION 9

1.175 Section 9 of the Contractual Remedies Act entitles a court to grant relief following cancellation. There is no corresponding present provision applying to rejection or rescission under the Sale of Goods Act. The issue then is whether it is appropriate for s 9 to apply to contracts for the sale of goods. The only argument against it so applying is the theoretical element of uncertainty that may be introduced to contracts that should be certain. Will s 9 make excessively soggy that which should be crisp? We should make it plain that it is not our view that s 9 introduces undue uncertainty into contract law. It is

more a matter of trying to anticipate possible objections to our proposals.

1.176 It is important to note that what a court is empowered to do under s 9 is to grant *relief*. There are various reasons for the section:

(a) It can be seen as the last of a series of statutory provisions empowering courts to grant relief in situations where, but for the statute, the loss lay where it fell. The earlier statutes are of course those dealing with frustrated contracts, illegal contracts and contracts vitiated by mistake.

(b) It is aimed at the injustice of such cases on entire contracts as *Sumpter v Hedges* [1898] 1 QB 673.

(c) It reflects the fact that while the impossibility of restitutio in integrum was a defence to a claim for rescission for misrepresentation, there is no corresponding defence to a claim for cancellation by allowing redress in such circumstances.

1.177 We have noted the arguments collected by Fisher J, in *Newmans Tours Ltd v Ranier Investments Ltd* [1992] 2 NZLR 68, suggesting that relief by way of monetary compensation under s 9 may take the place of an award of common law damages, and further may not be subject to the same limitations. Fisher J himself noted that this "expansive" view of s 9 was probably not intended by the CCLRC which originally recommended the legislation (89). His Honour nevertheless concluded that ss 9 and 10 of the Contractual Remedies Act were not intended to operate so as to make the jurisdiction to grant relief under s 9 and the jurisdiction to award damages mutually exclusive.

1.178 Fisher J's approach may be thought to find some obiter support in the judgment of the President and from the interestingly populist views expressed in the judgment of Anderson J in the Court of Appeal decision of *Thomson v Rankin* [1993] 1 NZLR 408. But it would be odd if the law provided such a tabula rasa as Fisher J suggests where there had been cancellation but not in other claims for damages for breach of contract. In our respectful view the courts are likely to preserve the distinction between damages on the one hand and s 9 relief on the other, and to exercise their s 9 powers sufficiently cautiously to make it appropriate that s 9 should apply to contracts for the sale of goods.

1.179 We note that one advantage of s 9 applying to contracts for the sale of goods will be (assuming it to be correct that *Brown &*

Doherty Limited v Whangarei County Council [1990] 2 NZLR 63 was rightly decided and that s 9 applies even when an action is framed as one to recover moneys where consideration has totally failed) that in a *Rowland v Divall* [1923] 2 KB 500 situation, a court will have power to discount a buyer's claim to take account of the benefit already obtained from using the goods.

MISCELLANEOUS AMENDMENTS

1.180 The final three subsections of s 54 might logically have been dealt with in paras 1.158 – 1.161 of this paper. For the reasons set out in that paragraph, in subss (2) and (4) "warranty" should be replaced by "term". In subs (3) "warranty of quality" should be replaced by "a term as to quality" and "if they have answered to the warranty" should be replaced by "if such term had been satisfied". The reason for treating s 54 separately is the provisions of subs (1). But for its conferring on the buyer a right to abatement of the price, that subsection could simply be repealed. That statutory right of abatement is simply declaratory of the pre-existing common law right.

> It must however be considered that in all these cases of goods sold and delivered with a warranty . . . the rule which has been found so convenient is established; and that it is competent for the defendant . . . not to set off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject matter of the action was worth, by reason of the breach of contract. *(Mondel v Steel* (1841) 8 M & W 858, 870; 151 ER 1288, 1293 per Parke B)

Although in these circumstances it would probably be possible simply to repeal subs (1), leaving the situation to be governed by the right of abatement recognised by the cases preceding the Sale of Goods Act, it would, we think, be better and avoid doubt if the existing subs (1) were replaced by a new subsection along the following lines:

> Where there is a breach of the terms of a contract of sale by the seller the buyer may set up against the seller such breach in diminution or extinction of the price.

1.181 Insert in s 60(2) after the word "Act" the words "or the Contractual Remedies Act 1979".

CONCLUSION

1.182 The objective of harmonising the two statutes demands assonance rather than unison. As is clear from s 15(h) of that statute the framers of the Contractual Remedies Act always contemplated that while the Contractual Remedies Act would govern the generality of contracts, different rules might be appropriate to specific classes of contract. If our recommendations are adopted, the only important respects in which the rules as to cancellation of contracts for the sale of goods will differ from those relating to the generality of contracts will be:

(a) an exception (in the case of certain fact situations amounting to acceptance) to the rule in the Contractual Remedies Act s 7(5) that knowledge of the breach is required for affirmation;

(b) an exception to the rule in s 8(3)(b) of the Contractual Remedies Act that cancellation does not divest any party of transferred property.

1.183 The changes to the two statutes that we have recommended are as follows:

Sale of Goods Act 1908

s 2(1)	—Repeal the definition of warranty
s 12	—Replace the preceding heading with the heading "Terms of the Contract"
s 13	—Repeal
s 14	—Replace the words "condition" and "warranty" with the word "term"
s 15	—Replace the word "condition" with the word "term"
s 16	—Replace the word "conditions" in the headnote with the word "terms"
	—Replace the words "warranty or condition" and "condition" with the word "term"
s 17	—Replace the word "condition" with the word "term"
s 32	—Replace the words "reject them" in subs (1) with the words "cancel the contract"
	—Replace the words "reject the whole" in subss (2) and (3) with the words "cancel the contract"
s 37	—Add a new subs (2) (refer para 1.169)

s 49 —Replace the word "rescinded" in the headnote, subss (1) and (4) with the word "cancelled"

s 54 —Replace subs (1) with a new sub-section (refer para 1.180)

—Replace the word "warranty" in subss (2) and (4) with the word "term"

—Replace the words "warranty of quality" in subss (3) with the words "a term as to quality"

—Replace the words "if they have answered to the warranty" in subs (3) with the words "if such term had been satisfied"

s 55A —Add a new section (refer para 1.166)

s 56 —Delete the words "and conditions" from the headnote

s 60 —Insert the words "or the Contractual Remedies Act 1979" after the word "Act" in subs (2)

Contractual Remedies Act 1979

s 5 —Insert the words "or any other statute" after the word "contract" where it first appears

s 15 —Delete para (d)

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CONTRACTUAL MISTAKES ACT 1977[33]

A Beck and R Sutton

INTRODUCTION

2.01 We have been asked by the Law Commission to examine and review the provisions of the Contractual Mistakes Act 1977, and to report on the ways (if any) in which it might be improved. Preparatory to writing this paper, we considered academic comments on the Act, as well as reported and unreported cases decided under its provisions. We have appended a discussion of the recent decision of the Court of Appeal in *Mechenex Pacific Services Ltd v TCA Airconditioning (NZ) Ltd* [1991] 2 NZLR 393.[34] We have only one major recommendation for amendment to the Act.[35]

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[33] The paper states the law at January 1991. The annex was contributed by the authors immediately after the March 1991 meeting. The footnotes have been added by the Law Commission and incorporate, where appropriate, references to the discussion at the March 1991 meeting and to correspondence regarding the paper before and after the meeting. Proposals for the amendment of the Contractual Mistakes Act can also be found in David Goddard's International Transactions paper (paras 7.67 – 7.72).

[34] Full references to the cases cited in the paper are given where they first appear in the text; for each reference thereafter only the year is given.

[35] This recommendation was repealing s 6(2)(a)—a mistake, in relation to that contract, does not include a mistake in its interpretation—and making the element of interpretative mistake a discretionary factor in the exercise of the discretion under s 7. For further comment with regard to this proposal, see note 44.

Other responses to the paper, and further suggestions made by other participants, are canvassed by footnote where appropriate.

2.02 In our view, the basic criteria to be applied in making this assessment are those set out in the CCLRC's *Report on the Effect of Mistakes on Contracts* (1976), and in particular para 4, where it is observed:

> A notable feature of the cases on mistake is that the agreements the parties may have made turn out to be entirely inappropriate, with the consequence that if such agreements are enforced, one party may be grossly enriched at the expense of the other . . . In both common law and civil law jurisdictions, however, it appears that the courts have over the past two centuries become increasingly sympathetic to the idea that, where a serious error has occurred, the contract ought not to be enforced according to its terms. This change in judicial attitudes no doubt reflects a similar movement in commercial and social opinion. Unfortunately, it has placed a heavy strain on the established doctrines of contract, and the time has come when they are no longer adequate.

This passage is important because it shows that the Committee had no intention, in drafting the report and associated legislation, to state the law in such a way that the power of judicial intervention would be carried beyond what either the community, or the judges, regard as its reasonable limits. And this limited purpose was reaffirmed, when the Bill passed into law, by the addition of s 4(2), which stated that the jurisdiction was not to be exercised in a way which would "prejudice the general security of contract relationships".

2.03 The Committee was concerned, however, to remove artificial legal obstacles which seemed to prevent the courts from doing complete justice in such cases, and to strike a fair and acceptable "balance between avoiding the unfairness of holding a party to an inappropriate transaction which was not fully assented to, and protecting other parties to the contract (and those claiming under them) who have a legitimate interest in seeing the contract performed".[36] The basic difficulties referred to by the Committee included:

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[36] The authors note that this passage, which can be found in para 5 of the Committee Report, and which sought also to identify the underlying direction of the prior law, was cited with approval by the Court of Appeal in *Boote v R T Shiels & Co Ltd* [1978] 1 NZLR 445, 449 – 450, a case decided before the Act came into effect.

- the fragmented nature of much of the existing law (paras 5 and 8);
- the unsatisfactory nature of the legal "tests" which were supposedly decisive as to whether a court might give relief or not (para 6);
- the uncertain significance of criteria based on the carelessness of one or other of the parties, when entering into a contract (para 7); and
- the fact that the available remedies for contractual mistake were both drastic and inflexible (para 9).

A symptom of this was the fact that cases on mistake, whose facts seemed relatively simple, occupied many pages of law reports and involved the citation of numerous authorities (see para 10, citing *Waring v S J Brentnall Ltd* [1975] 2 NZLR 401).

OUTLINE OF DISCUSSION

2.04 Our discussion of the Act commences with an overview of the fundamental criticisms which have been levelled at it (paras 2.05 – 2.09). Following that, the jurisdictional limits of the Act are considered (paras 2.10 – 2.46). Because of the considerable judicial attention they have attracted, we have reserved, for separate consideration under the next head, the problems of cross-purpose mistake (paras 2.47 – 2.75). We then go on to consider the application of the Act in respect of third persons who are not themselves parties to the contract (paras 2.76 – 2.81). In the final section, we examine the relief provided for under the Act (paras 2.82 – 2.96). Our recommendations are included in the discussion of each aspect.

FUNDAMENTAL CRITICISMS

2.05 The principal theoretical criticisms which have been advanced against the Act are:

- it should be more precise;
- it runs counter to the "objective" theory of contract; and
- the types and extent of relief should be more limited.

FAILURE OF THE LEGISLATION TO BE SUFFICIENTLY SPECIFIC

2.06 The main criticism of the Act can be categorised broadly as the uncertainty produced by the introduction of a discretionary remedy: see Reynolds [1977] NZ Recent Law 239; Finn (1979) 8 NZULR 312, 318 – 319; McLauchlan (1984) 11 NZULR 36, 42; Dawson [1985] Lloyds Mar & Com LQ 42. It must be accepted, as Burrows says (see [1983] Stat LR 76, 82, where he defends the approach taken by the legislature), that "the New Zealand legislature has taken a risk" in enlarging the scope of discretionary solution of contract problems. The extent of this risk, and whether the courts have used the discretion to reach wrong or inconsistent conclusions, can only be tested against specific problems which have arisen under the Act. The attack based on "uncertainty" is best considered in relation to particular points of supposed difficulty.

ABOLITION OF THE OBJECTIVE THEORY

2.07 One important area of difficulty for commentators has been the decision of the Court of Appeal in *Conlon v Ozolins* [1984] 1 NZLR 489 which has been viewed by many as eroding the "objective theory" of contract: see Dawson [1985] Lloyds Mar & Com LQ 42, 44, 50; Dawson (1985) 11 NZULR 282; Chen-Wishart (1986) 6 Otago LR 334; and Beck [1987] Lloyds Mar & Com LQ 325, 331, 337 – 338.[37] Others have suggested that the decision is in conformity with an objective approach, although it curtails its effect: see McLauchlan (1986) 12 NZULR 123; Burrows [1987] NZLJ 238. Yet another view has been expressed that the decision is wrong, and the Act was always intended to conform with the objective theory: see Coote (1988) 13 NZULR 160, 173 – 177. Whatever its effect on the objective theory, the decision undoubtedly had a major impact on the law of contract: see the discussion on cross-purpose mistake starting at para 2.47. However, any imbalance which might have been created now appears to have been redressed by the Court of Appeal in its subsequent decisions (see para 2.59). This objection is therefore likely to be more subdued in the future: see, for example, Dawson [1990] NZ Recent Law Review 13.

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[37] The authors note in addition to the references set out in para 2.07, that another commentator, Dukeson [1985] NZLJ 39 takes the related point, that the decision opens the way for any claim of mistake, even if unilateral—but see now para 2.59.

2.08 The wide terms in which the discretion to grant relief is couched have been seen by some as a cause for concern, virtually reducing the actual contract to the status of mere guidelines: see Dawson [1985] Lloyds Mar & Com LQ 42. In the light of subsequent decisions, this would appear to be unjustified: there are few objections to the results in those cases where relief has actually been granted (see paras 2.82 – 2.96).

2.09 Some academic concern has also been expressed about the decision of Prichard J in *Ware v Johnson* [1984] 2 NZLR 518, 541 – 542, where relief was granted on the basis of an implied term of the contract and misrepresentation, as well as under the Contractual Mistakes Act: see Dawson [1985] Lloyds Mar & Com LQ 42, 50 – 51; and Asher (1988) 13 NZULR 190, 195. Although the scope for discretionary relief under the Act undoubtedly does result in potential overlap with other remedies, the notion of an overlap is not foreign to the common law and the practical outworkings of this overlap do not seem to be of great significance: see Coote (1988) 13 NZULR 160, 187 – 188.

JURISDICTIONAL REQUIREMENTS

2.10 We consider this topic under three broad headings:

- definition and scope;
- the qualifying requirements in s 6(1);
- the disqualifying provisions in ss 6(1) and 6(2).

As already stated, we have reserved the qualifying requirement contained in s 6(1)(a)(iii) for consideration in more detail in the next section.

DEFINITION AND SCOPE

Definition of "mistake"

2.11 Some commentators (Sutton "Contractual Mistakes Bill" in *Commercial Law Seminar* (Legal Research Foundation, 1977) 45, 46; Lang (1978) 4 Otago LR 245, 247; Finn (1978) 8 NZULR 312, 315) suggest that the Statutes Revision Committee's deletion of all reference to mistakes of opinion from the Bill, as drafted by the Law Reform Committee, has been unhelpful, and has contributed an

unnecessary uncertainty in the application of the Act. It has been argued, to the contrary, that the provision originally proposed was entirely unnecessary, since (contrary to the view of the Committee) the common law saw no difficulty in giving relief for errors about matters of opinion (Lange (1980) 80 Osg H LJ 429, 437 – 440). Whatever the true position may be, it is sufficient to note that no difficulties seem to have arisen as a result of the chosen definition. It is clear, of course, that an error in expectation or judgment as to the future prospects of a project or enterprise will not qualify as a "mistake": for example, *Clement v Walker* (1983) 1 BCR 446, 455 – 456.

2.12 We do not recommend any change.

The definition of "mistaken contract"

> The Act defines a mistaken contract as including the situation where a contract would have come into existence but for the circumstances of the kind described in s 6(1)(a) of the Act. (s 2(3))

2.13 This has caused some difficulty, but largely among those who have failed to appreciate its purpose (which is well analysed in *AIC Retail Finance Ltd (in rec) v Henri* (unreported, High Court, Auckland, 21 March 1990, CP 491/87, Wylie J); see also South Australian Law Committee, *Report on the Effect of Mistake upon Contracts* (1987), 56 (hereafter cited as "SALRC Report"). Basically the definition is designed to ensure that, even though there is no contract at common law, the fact that parties mistakenly believe there is a contract is sufficient to invoke the provisions of ss 6 and 7 of the Act, so that the court can exercise its remedial jurisdiction. It does not of itself turn a non-contract into a contract; that requires validation under s 7. The dictum of Thorp J, in *Ubix Copiers Ltd v General Finance Acceptance Ltd* (unreported, High Court, Auckland, 5 December 1989, CL 135/88, Thorp J) 47, appears, with respect, not to have taken the definition sufficiently into account.

2.14 It is respectfully submitted that s 2(3) was carried too far in *Dronjak v NZ Police* [1990] 3 NZLR 75; the purpose of the section is not, by its own strength, to convert a non-contract into a contract, but to give the court jurisdiction to do so, in proceedings brought for that purpose under ss 6 and 7 of the Act. Nor does it apply where there is no suggestion the parties intend contractual relations to exist between them: in *Re UEB Industries Pension Fund, Brabant v Ibell* [1990] 3

NZLR 347, 369. It seems doubtful, too, whether s 2(3) can be invoked in cases where prescribed tender conditions are not complied with, and the offeree returns the documents to the tenderer: *Ritchies Transport Holdings Ltd v Education Board* (unreported, High Court, Dunedin, 10 December 1989, CP 96/87, Tipping J), although in that case summary judgment was refused so that the point could be argued.

2.15 Nor is the definition applicable where there is no apparent contract, but only an error about the procedures which would have been necessary to bring a contract about: see Beck [1988] NZLJ 184, noting *Ritchies Transport Holdings Ltd* (1989).

2.16 We do not recommend any change.

A code governing relief on grounds of mistake

2.17 Section 5(1) of the Act provides that it is a code governing "the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract . . .". Is this intended to apply to cases where a party has entered into a perfectly valid contract, but has made a mistake about the obligations created by it, and (let us say) has mistakenly paid money to the other party? Must the claim for recovery of that money be considered under the statute, or can it be brought under the general law of money paid under mistake?

2.18 In one case, *Marac Finance Ltd v Dyer* (unreported, High Court, Christchurch, 20 November 1989, CP 160/88) Holland J, whose analysis concentrated on s 6 of the Act, said that the legislation applies only where there is a mistake when the parties enter into a contract, and not where the mistake occurs when they are seeking to perform it. Gallen J reached the same conclusion in *N B Hunt & Sons Ltd v Maori Trustee* [1986] 2 NZLR 641. But there is a case to the contrary: *England v G & D Ritchie Holdings Ltd* (unreported, High Court, Wellington, 28 February 1989, CP 912/88, McGechan J). (There a mistaken contract was involved, not the mistaken performance of a supposed obligation under a contract.) McGechan J, after carefully considering the provisions of s 5, suggested that mistakes arising out of the performance of a contract are exclusively governed by the Contractual Mistakes Act. If the latter view is correct, then there will be considerable difficulties in applying the Act to such cases, because any claimant must prove, as an essential preliminary

to relief, that they made a mistake *in entering into* a contract: s 6(1)(a).

2.19 Our reading of the Committee's report, and the authorities cited in it, leaves us in little doubt that the Committee's purpose was to deal only with mistakes in entering into contracts, and not with mistakes in performing them. Further, as far as the statute is concerned (and with all due respect to McGechan J), the reservation in s 5(2)(d) of the provisions of ss 94A and 94B of the Judicature Act 1908 would have been pointless if the Contractual Mistakes Act (with its own provisions for mistakes of law, and its own remedies) were to be regarded as paramount. There may be great benefit in a statute which regards "mistake in contract", embracing both entry and performance mistake, as a subject worthy of separate treatment; however, the present legislation would be imperfectly designed if it were so intended.

2.20 Legislative clarification may be necessary to avoid further difficulties in connection with ss 94A and 94B of the Judicature Act 1908.[38]

2.21 The Act is a code only insofar as it relates to the relief which will be granted, and, until it is invoked, it will be necessary to use the previous law to determine whether there is or is not a contract. In *AIC Retail Finance Ltd (in rec) v Henri* (1990) the Court held that, because no relief was sought on the basis of mistake, a case involving a contract concluded under a mistake of identity was void at common law and unaffected by the Act. The chief problem in the case seems to have been one of pleading, and the result was entirely consistent with the philosophy of the legislation.

THE QUALIFYING REQUIREMENTS IN SECTION 6(1)

General

2.22 Even taking into account the problem of cross-purpose mistake, which, it will be suggested, is one which lies towards the outer limits of operative mistake (see para 2.54), it may be said that the Act has offered a relatively simple framework in which the problems of

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[38] Peter Watts, in his paper on ss 94A and 94B of the Judicature Act 1908, also discusses the relationship of those sections with the Contractual Mistakes Act; he recommends (para 4.08) that the two situations of mistake continue to be treated separately.

contractual mistake can be worked out. There have been more than fifty reported and unreported cases on contractual mistake since the legislation was introduced. After one or two uncertain early steps—*McCullough v McGrath's Stock & Poultry Ltd* [1981] 2 NZLR 428 and *Gold Star Insurance Co Ltd v Shields* (unreported, High Court, Auckland, 11 February 1983, M 672/82, Chilwell J), a line of authority overruled by the Court of Appeal in *Conlon v Ozolins*—courts have by and large confined their consideration to the provisions of the Act, and to a few important decisions under it; they have found no occasion to go outside it to the earlier law. As will be seen in paras 2.27 and 2.30, the critical jurisdictional provisions dealing with "unilateral" mistake known to the opposite party, and with "common" mistake, have not been problematical in practice, despite the initial reservations expressed by some commentators.

2.23 These provisions have, where possible, been beneficially construed, having regard to the basic objectives of the Act: see generally *Conlon v Ozolins* and the construction of the requirement of "influence" at para 2.24. In recent decisions, there has also been a welcome tendency to remove the emphasis from the jurisdictional requirements of s 6(1), and to concentrate instead on the appropriate form of relief to be granted in cases where a contracting party has clearly been mistaken: see *Wijeyaratne v Medical Assurance Soc NZ Ltd* [1991] 2 NZLR 332; *Slater Wilmshurst v Crown Group Custodian Ltd* [1991] 1 NZLR 344. In the *Wijeyaratne* decision, the Court accepted that, on the facts before it, the case could be variously analysed so as to fall within paras (i), (ii) or (iii) of s 6(1)(a). It felt no need to lay down precisely which was the appropriate paragraph to apply, as long as the mistake fell generally within the section. If this broad approach continues to be followed, s 6(1)(a) is unlikely to cause many problems, but then the issue will be more how to deal with s 6(2)(a); see paras 2.69 – 2.75. However, there can still be "hard cases" which cannot be brought within the confines of the section: one example is *Broadlands Finance Ltd v Norman* (unreported, High Court, Wellington, 26 May 1987, A 49/85, Davison CJ) which involved an inopportune exchange of mortgaged chattels without the mortgagee being informed. In that case, one of the owners tried unsuccessfully to get relief from an express guarantee given to the mortgagee in respect of the chattel he transferred, after the other defaulted.

Influence: s 6(1)(a)

2.24 The "influence" requirement in s 6(1)(a) has been widely construed: in *Ware v Johnson* [1984] 2 NZLR 518, 540, Prichard J held it to mean that the parties must "necessarily have accepted in their minds the existence of some fact which affects to a material degree, the worth of the consideration given by one of the parties", and been mistaken about that fact. In *Mitchell v Pattison (No 2)* (unreported, High Court, Auckland, 28 June 1990, A 1163/84, Gault J) the Court held that the mistake should be a "significant factor" in the party's decision to contract. Materiality does not appear to have given rise to problems. The substitution of the words "influenced by" (in the Act) for the term "relying on" (in the Committee's draft Bill) has been seen as giving s 6 a "broadening perspective": see *Shotover Mining Ltd v Brownlie* (unreported, High Court, Invercargill, 30 September 1987, CP 96/86, McGechan J), 158.

2.25 Fears were expressed, at the time the Act was passed, that this test would prove too liberal: see Lang, 250; Lange, 454. Further, the statement in subparagraph (i) of that paragraph, that the mistake must be "material" to the mistaken party, should perhaps be more severe, for example, a matter of "considerable importance" in s 6(1)(a)(i); see Lang, 250. There is, however, an opposing view, that even a requirement of "materiality" is too high, so its inclusion in s 6(1)(a)(i) may cause problems: see Lange, 454; SALRC Report 67 – 68. Neither of these fears seems to have been borne out by judicial experience.

2.26 We do not recommend any change.

Mistake known to other party: s 6(1)(a)(i)

2.27 This important jurisdictional requirement appears to have been applied without difficulty. The paragraph was invoked successfully in *Shotover Mining Ltd v Brownlie* (1987) although in that case a fraudulent misrepresentation was also proved. In a number of cases, relief has been refused on the short ground that the mistake was not known to the other party: *Parker v Wakefield* (unreported, High Court, Auckland, 9 November 1983, A 303/82, Hardie Boys J); *Croy v MacDonald* (unreported, High Court, Christchurch, 10 May 1989, CP 684/88, Master Hansen); *BNZ v McLellan* (unreported, High Court, Greymouth, 19 June 1989, CP 16/88, Williamson J); *Jenkins v Lind* (unreported, Court of Appeal, 20 September 1990, CA 147/84);

Mitchell v Pattison (No 2) (1990), 449; *Shivas v BNZ* [1990] 2 NZLR 327, 356 – 358; *Chiswick Investments Ltd v Pevats* [1990] 1 NZLR 169, 175; *Langdon v McAllister* (unreported, High Court, Auckland, 26 July 1985, A 91/83, Tompkins J).

2.28 Some commentators have questioned whether it is consistent with the spirit of the Act to remove from its operation cases where only one party is mistaken: see Lang, 251 – 252; Lange, 442 – 445. There is some merit in this point, which is reflected in the way in which, by verbal skill, the same mistake can be made to appear either common or unilateral, depending on what is selected as "the" matter about which a mistake has been made. It is doubtful, however, whether the criticism is fundamentally important. The restriction may be seen as the legislature's one concession to the old formalist's way of thinking, or as a pragmatic "short-cut" to a solution which would usually be seen to be just, even if more elaborate and strictly "correct" methods of reasoning were adopted. Art may be long, but life is short.

2.29 We do not recommend any change.

Common mistake: s 6(1)(a)(ii)

2.30 In the few cases where common mistakes have occurred, the provisions of the Act do not appear to have caused any problems; the section was applied in *Ware v Johnson* [1984]; *Dickson v Shanley* (1984) 1 NZBLC 102,085; and *Marac Finance Ltd v Dyer* (unreported, High Court, Christchurch, 20 November 1989, CP 160/88, Holland J). The section was also invoked in cases where the Court found it applicable, or assumed that it might apply, but then went on to dismiss the claim on other grounds: *Brown v Castles* (unreported, High Court, Rotorua, 15 September 1987, A 15/85, Doogue J); *Dennis Friedman Ltd v Rodney CC* [1988] 1 NZLR 184; *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991].

2.31 We do not recommend any change.

Inequality of exchange: s 6(1)(b)

2.32 As we have already pointed out, one of the objectives of the Act was to provide relief where a mistake had resulted in an unfair exchange of values between the parties to the contract. This is reflected in the provisions of ss 6(1)(b)(i) and (ii). By and large, the

requirements of s 6(1)(b) have not provided a stumbling block either to parties seeking relief, or to the courts. The statutory provisions have not been the subject of minute analysis; in the few cases where they have been considered relevant, it is their general tenor which has been seen as important: see, for example, *Shotter v Westpac Banking Corp* [1988] 2 NZLR 316, 332 - 333.

2.33 There are two instances in which the claim of mistake may be said to have foundered on the issue of unequal exchange of values: see *Brown v Castles* (1987); *Wilson v Thompson* (unreported, High Court, Auckland, 13 October 1986, A 492/84, Thorp J); both involved a failure to produce sufficient evidence to establish any inequality, let alone a substantial one. (And see also *Jenkins v Lind* (1990), 36 - 37.) In other cases where this has been in issue, the requirement has been relatively easy to satisfy. *Taupo Machine Services Ltd v Field Equipment Ltd* (unreported, High Court, Rotorua, 30 June 1986, A 13/80, Savage J) involved a question as to the inclusion of a vehicle amongst goods to be sold; the vehicle was worth $4000, the total purchase price was $27 250. This 14.7 per cent discrepancy was found to be a substantial inequality of exchange, although the Court also took into consideration the nature of the assets being acquired, and the fact that they ultimately realised only $10 000 in a liquidation sale. Likewise, in *Conlon v Ozolins*, the Court of Appeal held that a discrepancy which, on the most favourable evidence, amounted to 28.6 per cent of the purchase price was substantial (505); and in *Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd* (unreported, High Court, Whangarei, 13 May 1987, CP 12/86, Chilwell J) there was a discrepancy of only 9.5 per cent—but there the matter was referred back to the District Court for further evidence. In *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991] the contract would, if carried out, have involved an equal exchange of values, but (because of the fact about which the parties were mistaken) it could not be completed, so the seller would have had to pay substantial damages without getting anything in return. Although relief was refused on other grounds, the Court accepted that this was a case of substantial inequality of exchange. There do not seem to have been any cases—except possibly *Jenkins v Lind* but the facts of that case, as the High Court Judge himself observed, were very confused—involving a situation where the mistake was subjectively of great significance to the party making it, but objectively resulted in no less being received by way of benefit. (This possibility was referred to by Sutton in *Commercial Law Seminar* (LRF 1977)

50; Finn (1979) 8 NZULR 312, 316; McLauchlan (1986) 12 NZULR 123, 152 – 153.) It seems that the position is to be reviewed objectively: *Wilson v Thompson* (1986). Apart from the case of mistaken identity, which we will consider later (see paras 2.78 – 2.81), no practical difficulties have emerged in the operation of this provision.[39]

2.34 We do not recommend any change.

THE DISQUALIFYING PROVISIONS IN SECTIONS 6(1) AND (2)

Contractual provisions for risk of mistake: s 6(1)(c)

2.35 The courts have not been confronted with a plethora of contractual provisions designed to exclude the discretion of the court under the Act: the difficulties foreseen by Finn (1979) 8 NZULR 312, 317 have not materialised.[40] Should this situation arise, it may be necessary to revise the contents of s 6(1)(c) in the future. The only decision thus far which has given detailed consideration to the subsection is *Shotover Mining v Brownlie* (1987): the case is unusual because the Court found fraud and made it clear that no clause in the contract would be able to exclude a mistake induced by fraud. In that

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[39] At the March 1991 meeting, Professor Coote suggested that the section be amended to deal with the question of the identity of the subject matter of the contract (even if there had not been an unequal exchange of values). Although the force of the point was not denied, there appeared to be a preference to leave the matter alone at least until there had been some hard case which confirmed the existence of a problem in practice.

[40] Professor Coote, after the March 1991 meeting, commented on the discussion of s 6(1)(c). He emphasised the use of the section as a mechanism for allocating risk. He noted the implicit collateral support in *Ware v Johnson* [1984] 2 NZLR 518 for the view that, for the section to apply, an exception clause or other express reference to risk must be employed. His contention is that, in *Ware v Johnson*, once the Court had implied into the contract a warranty that the plants were in a satisfactory condition, the seller carried the contractual risk as to the condition of the plants. He noted in his article "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) NZULR 160 that in cases falling under the subsection,

> section 7 cannot be used by the courts in any way to diminish the claims under the contract of the party not in default since to do so would be to re-allocate the risks assumed by the defaulting party and thereby to assume a jurisdiction which the Act, by s 6(1)(c) expressly excludes. (180)

This criticism appears to be borne out, in general terms, by para 23 of the CCLRC report, but it should be noted that the Committee did offer the reservation that "in some cases it might be argued that an error is so fundamental that a clause purporting to allocate risk cannot apply to it . . . that seems to be a matter of construction."

case, McGechan J held that any such clause would fall to be construed in accordance with the normal canons of construction and should not be strictly construed (160); the contra proferentem rule was applied against the party who inserted the clause, however (163). This view might contribute to the necessity for a further review of the whole concept underlying s 6(1)(c) in the future, should the use of contractual provisions become a cause for concern.

2.36 In *Shotover Mining*, a clause excluding warranties was not found sufficiently explicit to exclude mistakes (162). The standard "errors or misdescriptions" clause found in contracts for the sale of land was also present in that contract. It was interpreted in the way it has been interpreted historically: as not dealing with all mistakes, and in particular, not excluding substantial mistakes. On the other hand, in *Dennis Friedman Ltd v Rodney CC* [1988], a clause requiring a tenderer to be satisfied as to the feasibility of work to be done, and the sufficiency of the tender, was held sufficient to exclude any argument concerning mistake as to the nature of material encountered in excavations.

2.37 Although the exclusion in s 6(1)(c) is more extensive than the provisions made in overseas model legislation (see Lange, 455 – 456), it has not been the subject of criticism here. While the section is not happily drafted, and seems on an unsophisticated reading to say the opposite of what it is in fact designed to achieve (see Lang, 254), it has not given rise to anything contentious.

2.38 We do not recommend any change.

Mistakes in interpretation: s 6(2)(a)

2.39 Section 6(2)(a) prohibits the court from granting relief in respect of a mistake in the interpretation of the contract which is sought to be reviewed. It is our view that, since the Court of Appeal decision in *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549, 553 – 554,[41] this has become the provision of the Act which is most likely to give rise to difficulty.

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[41] The authors originally noted that this was a view foreshadowed in *AGC (NZ) Ltd v Wyness* [1987] 2 NZLR 326, where the Court of Appeal took a particularly strong line on parties being bound by the words they use, but that was in the context of the exercise of the discretion under s 7.

2.40 There has been some criticism of this restriction because there may well be instances where such a case is genuine and deserving of relief: see Sutton, *Commercial Law Seminar* 1977, 45, 51. An example is where a clause has a particular legal meaning which the layperson is unlikely to be aware of, and a business house regularly inserts such a clause in its standard form contracts, knowing that its customers are likely to mistake, or fail to appreciate, its effect. When confronted with a situation where a party has failed to read a contract, the courts have tended to class this as a mistake in interpretation. Such a case seems somewhat arbitrarily excluded by s 6(2)(a).

2.41 This would not be a problem if the courts gave a restricted meaning to the word "interpretation". For a further analysis of the interpretative possibilities of the provision, see Chen-Wishart (1985) 6 Otago LR 334, 348 – 352. In *Dickson v Shanley* (1984), for example, the Court found that, because a party had not actually considered the wording of a lease, but thought the particular clause would *apply* only in limited circumstances, this was not a mistake in interpretation. The effect of a "demolition" clause in a lease was in dispute. It was not the lease, but a contract assigning it, that was allegedly entered into under mistake, so s 6(2)(a) did not apply anyway, but the Judge preferred to rest his decision on this ground. The reasoning was referred to with approval in *Grose v NZ Farmers Co-op* (unreported, High Court, Christchurch, 3 March 1987, A 255/83, Williamson J) but that situation was very different: there the party was mistaken as to how easily a condition in a contract could be fulfilled, not as to its meaning (30 – 31).

2.42 Subsequently, however, the word was given a wider meaning. A failure to read the contract, and choosing rather to place one's own interpretation on it, has been classed as a mistake in interpretation:

> I do not think "interpretation" in s 6(2)(a) is used in the technical lawyer's sense I have described. In my view it must be equally applicable to the situation of a layman who, taking the risk of advising himself as to the meaning of a document simply reads and thinks he understands it. It must be equally applicable to the layman who reads only part of the document because he thinks he need not trouble with some of the more wordy clauses or the "fine print". It would seem strange to me if it were otherwise. . . . [W]hat then of the layman who makes no attempt to read the document, but simply signs on the basis of a general description of the document, e.g., as in this case

> that it is a guarantee? I think that a signatory in that situation who assumes, because it is a guarantee and that it is for a particular purpose—in this case the raising of a specific loan—his liability thereunder must therefore be limited to that specific loan, is placing his own interpretation on the document however ill-formed and baseless it may be. (*Shotter v Westpac* [1988] 331)

This decision, although not the specific point, was cited with approval by the Court of Appeal in *Paulger v Industries* [1989], where the failure of an offeror to appreciate the meaning to be ascribed to language in the contract was also found to be a mistake of interpretation (see paras 2.59 – 2.60). Failing to read a document was also held to be a mistake in interpretation in *Shivas v BNZ* [1990] (362). But a contrary view appears to have been taken in *Weddel NZ Ltd v Taylor Preston Ltd* (unreported, High Court, Wellington, 18 August 1992, Heron J) 10 – 11.

2.43 The difficulty with treating all mistakes of this type as not being susceptible to relief is that the court has no opportunity to discriminate between deserving and undeserving cases. Accordingly, there appears to be need for reform if the Act is to achieve its purpose of ameliorating the common law position. We will consider the matter further after *Paulger* and related cases have been discussed in the next section, and a definite recommendation will be made. Meanwhile, our provisional view, based on the cases so far considered, is that s 6(2)(a) is defective and amendment may be required.

2.44 Potential unfairness caused by the application of s 6(2)(a) could be avoided by removing mistakes in interpretation from among the jurisdictional requirements, and including them as a factor in the exercise of the court's discretion in deciding whether to grant relief.

Knowledge of error: s 6(2)(b)

2.45 Section 6(2)(b) precludes the possibility of relief where the party becomes aware of the mistake before entering into the contract. It does not appear to have given rise to any cases or problems. It should accordingly remain as it stands.

2.46 We do not recommend any change.

CROSS-PURPOSE MISTAKE

2.47 We have reserved for separate consideration the particular class of mistake which qualifies for relief as "cross-purpose" mistake under s (6)(1)(a)(iii). That section speaks of cases where

> that party and at least one other party . . . were each influenced in their respective decisions to enter the contract by a different mistake about the same matter of fact or law.

2.48 We propose to refer to:

- the objective of the legislature in introducing this particular reform;
- the decision of the Court of Appeal in *Conlon v Ozolins* and its aftermath; and
- the later decision of the Court of Appeal in *Paulger's* case, where (without departing from its earlier decision) the Court initiated an appreciable change in the direction of authority.

This will provide the basis for an evaluation of the present state of the law on the ambit of s 6(1)(a)(iii); and the role that s 6(2)(a), dealing with mistakes in interpretation, plays in the solution of the problem.

2.49 We will conclude this part of the paper with a recommendation for amendment of the Act. This conclusion has already been foreshadowed: see paras 2.39 – 2.44. We are of the view that the defective link in the chain is s 6(2)(a) and that, without weakening the effect of the valuable contributions the Court of Appeal has already made in dealing with the problem, the requirement in s 6(2)(a) should no longer be a mandatory disqualification for relief. It should instead be added to the list of factors which will normally militate against the granting of relief.

OBJECTIVE OF REFORM

2.50 At common law, the classic example of "cross-purpose" mistake was *Raffles v Wichelhaus* (1864) 2 H & C 906; 159 ER 375, which, according to para 19 of the CCLRC's *Report on the Effect of Mistakes on Contracts* (1976), inspired the inclusion of paragraph (iii) in s 6(1)(a). In that case, two parties contracted for cargo coming from abroad on a ship called the "Peerless". But there were two ships of that description, coming in different months, and the parties had different ships in mind. They were therefore at cross-purposes; there

was no way of telling which of the two ships was referred to in the contract; so neither party could enforce the obligations they thought the other had incurred under that contract. The buyer made one mistake (that the ship under consideration was the Peerless[x]), while the seller made a different mistake (that the ship under consideration was the Peerless[y]), and both mistakes related to the same matter—namely, the identity of the ship, which was a vital element in describing the goods which had been sold. So the legislation envisaged that, even though at common law there was no contract (because there was no genuine correspondence between offer and acceptance), there would be a contract for the purposes of the Act (see s 2(3)). Assuming the other jurisdictional provisions applied, it would be open to the court to give the parties appropriate relief.

CONLON V OZOLINS AND ITS AFTERMATH

Conlon v Ozolins

2.51 The question of cross-purpose mistake arose for consideration by the Court of Appeal in *Conlon v Ozolins*. This case involved a sale of land by a widow to a developer; throughout the negotiations, she thought she was selling the "back" land, not including her garden, while he thought he was getting "lots 1, 2, 3 and 4". Lot 4 in fact included the garden: the developer knew this, but the widow did not, and the developer did not know of her error. The majority of the Court found that

> these parties were at cross-purposes. He mistakenly thought she was 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. (498, per Woodhouse P)

2.52 What happened then was that a contract was prepared by her solicitor who, after consultation with both parties, included lot 4 in the agreement, not realising his client's mistake. She signed it. The majority of the Court of Appeal (Woodhouse P and McMullin J) held that this was a case in which the Contractual Mistakes Act applied, and that the Judge had erred in making an order for specific performance without taking into account what relief he should give under the

Act.[42] Somers J dissented. He took the view that, once the contract was signed, there was no need to look to the prior negotiation; because the contract set out the correct position, the widow's mistake was "unilateral" (507).

2.53 Without implying any criticism of the decision itself, it must be recorded that it resulted in a great deal of professional uncertainty about the effect of s 6(1)(a)(iii), and led not a few judges to consider they might be obliged to grant relief in cases which in their view were unmeritorious. The difficulty stemmed from a formulation of the grounds of decision which was chosen by McMullin J. He spoke in these terms:

> The appellant's mistake was in thinking, as Greig J found, that she was selling only lots 1 to 3; the respondent's in thinking that the appellant intended to sell lots 1 to 4. (505)

(Woodhouse P's statement that "each then mistakenly believed that the written document correctly represented a mutual intention which did not exist" is not dissimilar, but he then went on to express the matter as set out in para 2.51.) The formulation could, it appeared, be relied upon by any person who claimed that the contract did not say what that party thought it would say. This caused considerable problems in applying the law to people whose claims to the exercise of the court's beneficial jurisdiction were tenuous indeed.

The problem lies at the outer limits of the law

2.54 It must be recognised that the difficult cases involving cross-purpose mistake have arisen at the outer limits of the courts' powers to relieve against contractual mistake. The Committee, when it put forward its draft legislation, was well aware of the problems inherent in proposing verbal formulae which would effectively define those outer limits. Yet it felt obliged to offer such formulae, both to distinguish this new jurisdiction from other statutory and non-statutory powers to award relief, and also to give some guidance to judges about what falls within the jurisdiction and what does not (para 14).

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[42] The authors originally included the following footnote:

Little indication was given as to what the appropriate relief would be, though Woodhouse P considered it "almost inevitable" that specific performance would be refused (499). It would have been perfectly competent for the lower Court to have awarded damages to the developer, on the basis of his expectation interest; ie, what he would have recovered if the plaintiff had been in breach.

2.55 McLauchlan (1986) 12 NZULR 123, 156 – 159, has proposed that the jurisdictional sections of the Act be replaced with a broad provision allowing the courts to interfere wherever there is fundamental mistake, the legislation making no attempt to define what is meant by that term. This was a possibility which was before the Committee in 1976, and which was rejected after careful thought and study. Even so, in light of the difficulties that have been experienced with "cross-purpose" mistake, this is an option that the Commission may wish to consider. The authors of this report, however incline to the view that such a development would be inopportune at this time. Two out of the three "limbs" of s 6(1)(a) seem to have been accepted at face value by the courts, without the need to probe back into earlier case law; the statutory adoption of the expression "fundamental" would constitute a standing invitation to such an enquiry.

2.56 Nevertheless, it has to be accepted that the legislative intention was less than clearly stated, and, once the statute was held to have abandoned the common law's "objective" theory of contract, the field seemed open for dubious defences which (even if they did not ultimately succeed) might at least withstand the rigours of an application for summary judgment. A summary judgment may be granted, however, even where the defendant deposes to facts which would bring the case within s 6, if it is clear that the discretion would be exercised against the defendant: *AGC (NZ) Ltd v Wyness* [1987] 2 NZLR 326, 330 (CA) per Somers J.

Cases where the legislation is of dubious application

2.57 The following are examples of cases where such defences were advanced. In all of these cases, the basic argument seems to have run along these lines: "I thought our contract would say *this*; you thought it would say *that*; therefore, when entering into the contract, we made different mistakes about the same thing, that is, what the contract would say." In none of them was the defence upheld, but the judges appeared to find difficulty in disposing of the defence (as they would have hoped to do) by reference to the wording of s 6(1)(a)(iii).

- Guarantors undertook that property mortgaged by the debtor was unencumbered. Their defence, to an action based on breach of this undertaking, was that they thought the mortgagee would take a memorandum of priority from the prior mortgagee, as the mortgagee had in the past, so that their undertaking was irrelevant: see *AGC (NZ) Ltd v Wyness* [1987];

Somers J thought there were "substantial difficulties" with such a defence, but went on to hold that the discretion would be exercised against the guarantors anyway (329).

- In an insurance contract, the insured thought that property owned by all his companies was covered, whereas the insurer thought that the policy related only to the one company. The policy was drafted in accordance with the insurer's view: see *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* (unreported, High Court, Christchurch, 15 December 1986, A 5/85, Hardie Boys J) where it was held (inter alia) that the mistake was not about the "same matter of fact or law". (Compare the different result reached in the not dissimilar case of *Wijeyaratne v Medical Assurance Soc NZ Ltd* [1991].)

- Two sale agreements were entered into by the same parties: one was able to proceed, the other was not. But the seller objected, on the ground that its directors had thought the two agreements would be interdependent. There was nothing in the contract which supported that view, although admittedly the seller was influenced in its decision to sell one property by the fact that the buyer would then be willing to buy the second: see *Grose v NZ Farmers Co-op* (1987) where Williamson J doubted that s 6(1)(a)(iii) should be read so as to give such a defence, although he was bound by *Conlon v Ozolins* to hold to the contrary. He considered that, in any event, the directors had not been influenced by a mistake, but had simply been "left to hope" that the two transactions would go ahead together.

- Prospective purchasers of a company thought they were not personally liable under a contract to take its shares, but intended to undertake liability only as agents for a company to be formed. The contract made them personally liable, as the seller had expected: see *Jones v Chatfield* (unreported, High Court, Auckland, 13 July 1989, CP 580/87). Fisher J, after referring to the "unfortunate" decision in *Conlon v Ozolins*, held that the defence could not be sustained on the facts. On appeal, the Court of Appeal did not deal with the question of mistake, but took the opportunity to explain *Conlon v Ozolins*: see *Chatfield v Jones* [1990] 3 NZLR 285.

- The purchaser of a business believed that a third party was committed to providing the business with future contracts. In fact this was not the case; but the seller had left all enquiries on

this subject in the hands of the purchaser, and had no view on the matter himself: see *Minns v McIntosh* (unreported, High Court, Rotorua, 25 September 1987, A 50/85, Doogue J). Doogue J found there was no mistake on the point, and no substantially unequal exchange of values.

- The claimants brought a negligence claim against the builders of their house, alleging structural damage. The claim was settled by their solicitor's offer that the claimants would re-sell the house to the builder at its "value". The claimants wished to set the settlement aside, because they had not realised that "value" meant the value as depreciated on account of the structural damage: see *Wilson v Thompson* (1986). Thorp J held that, while under s 6(1)(a)(iii) this might be a case to which the reasoning in *Conlon v Ozolins* applied, there was not sufficient evidence of an unequal exchange of values under s 6(1)(b).

2.58 To apply the doctrine of "cross-purpose" mistake to afford relief in these cases may well be to stretch a sound principle too far. None of these cases was very much like the foundation case of *Raffles v Wichelhaus* (1864) 2 H & C 906, 159 ER 375, where both parties were under a misapprehension (that there was only one ship called the "Peerless") which was likely to have a serious effect on how the contract was to be expressed. In all of them, what was at stake was not a hidden "trap" arising because of an unknown, or insufficiently appreciated, state of affairs. Rather, there was in each case a failure (sometimes careless, and sometimes even—one may suspect—deliberate) to enquire into the meaning of contractual words which in the end proved inconvenient, and which should on their face have prompted further enquiry if the claimant genuinely believed in the position afterwards asserted. And, in not a few of these cases, there was no history of cross-purpose negotiation over a period of time; instead, the claimant made, or accepted, an offer completely "out of the blue".

PAULGER V BUTLAND INDUSTRIES LTD

2.59 The matter was reconsidered by the Court of Appeal in *Paulger v Butland Industries Ltd* [1989]. In that case, the defendant wrote an unsolicited letter to the creditors of a company of which he was founder and chief executive. The letter stated that "The writer personally guarantees that all due payments will be made." This was

implicitly in return for "tolerance" over a period of 90 days while the affairs of the company were being rearranged. When sued as a guarantor, the defendant said he had no intention of offering a personal guarantee, only an undertaking to apply the funds of the company to the debts. Hardie Boys J, delivering the judgment of the Court, held:

- There was no common mistake; the plaintiff thought it was getting a personal guarantee, and the defendant thought he was giving less. And, even if there was a common mistake about how the letter should be interpreted, that could not assist the defendant because of the provisions of s 6(2)(a) of the Act, which preclude relief on the basis of such a mistake.

- There was no "cross-purpose" mistake. Referring to *Conlon v Ozolins*, the learned Judge said,

> It is apparent from those judgments that the "same matter of fact" about which the parties made different mistakes, was the extent of the subject matter of the contract which they negotiated. Thus Woodhouse P said "each had a mistaken impression about the boundaries of the tract of land being bought and sold". (498) And McMullin J said "The appellant's mistake was in thinking . . . that she was selling only lots 1 to 3; the respondent's in thinking that the appellant intended to sell lots 1 to 4." (505)
>
> These words of McMullin J are not to be read as referring to what each party believed the other intended, because then the parties' respective mistakes would have been about different things: his about her intention, hers about his; yet McMullin J held that it was a case for para (iii).
>
> This is an important distinction. For *Conlon v Ozolins* 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. This distinction was made and applied in *Shotter v Westpac Banking Corporation* [1988]. (553 – 554)

The defendant's case failed because his mistake was a unilateral one which was, in any event, a mistake in the interpretation of the contract.

2.60 This decision can be used to dispose of those cases where it cannot be shown that the process of negotiating the contract has been seriously affected by a mistake about what is to be the subject matter of the contract, and all that can be said is that the supposedly mistaken party did not fully appreciate the consequences the contract would have. So, in a subsequent case, a licensor of a prospecting licence mistakenly thought the clause it had included against assignment by the licence also prohibited major changes in share ownership of the licensee company: see *Golden Point Mining Co Ltd v Consolidated Traders Ltd* (unreported, High Court, Wellington, 21 December 1989, CP 837/89, McGechan J). There the Judge had no difficulty in disposing of a claim made under the Act. He simply characterised the licensor's error as a mistake about interpretation of the contract. This is how one would expect the cases discussed in para 2.57 to be dealt with after *Paulger's* case.

EVALUATION: THE PRESENT AMBIT OF SECTION 6(1)(a)(iii)

An unresolved difficulty

2.61 However, all of this leaves as an open issue the correct application of the law to a rather different class of case, where there is a genuine and evident error in the process of negotiation, and the subsequent course of events, including the signature of the contract, can plainly be seen by an objective bystander to have been affected or influenced by that error. The contract may well reflect the view that one or other of the parties has of the "cross-purpose" mistake, but that, as has been seen, is not necessarily an answer to a claim made under the legislation. *Conlon v Ozolins* itself is one such example. The effect of *Paulger* on such cases is far from clear. Because *Conlon v Ozolins* was described by the Court of Appeal as a "decision on its particular facts", there is no guarantee that a case with similar but not identical facts will be treated in the same way. While it is possible to contend that, before she made a mistake in interpretation, Mrs Ozolins made another mistake which cannot be so characterised (namely, that she and Mr Conlon were in full accord about what was to be bought and sold, when they were not), this may not assist in avoiding the proscription of mistakes in interpretation contained in s 6(2)(a). As the legislation stands at present, it will always be open to

a court to use that section to justify a decision not to enter into the discretionary arena.

Cases where relief may still be given

2.62 As well as *Conlon v Ozolins*, there have been a number of other cases decided under the statute which may be thought to fall within the same category. And the case of *Lewis's Department Stores Ltd v Provident Life Assurance Co Ltd* (unreported, High Court, Wellington, 9 September 1983, A 15/83, O'Regan J), is of the same character; there, the parties were proved to have been at cross purposes over whether a replacement lease in a new building would give the plaintiff the same frontage as either the plaintiff's existing frontage or the frontage of another related shop in the existing building. But the Contractual Mistakes Act appears not to have been relied upon by counsel, and the case turned solely on whether or not specific performance should be decreed—it was not.

2.63 Certainly, the courts which decided each of the following cases accepted that there was an operative mistake, though that conclusion now has to be re-examined in the light of *Paulger's* case.

- The defendants had previously bought certain items used in the hotel trade, called "O-rings", from the plaintiffs. They agreed to buy a further batch of somewhat larger O-rings at a given figure "/c", which was intended by the plaintiffs, and found by the Court as generally understood, to mean "per hundred". But these O-rings were of a different quality from, and considerably more expensive than, those previously purchased; a fact of which the defendants were unaware. Perhaps confused by the fact that the O-rings they had bought earlier were much cheaper, they failed to realise that the quote was "per hundred", and wrongly assumed it was a total price, regarding the expression "/c" as a mere typing error. They thought they would have to pay a total price of $1717, whereas the plaintiffs intended to sell for a total price of $27 141. The contract, properly interpreted, favoured the plaintiffs' view: *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985] 2 NZLR 72. Tompkins J upheld the defendant's claim that there was an operative mistake under s 6(1)(a)(iii)).
- An intending subcontractor quoted a price in its tender to a contractor. As a result of the provisions in earlier versions of

the tender documents, and a discussion with the contractor's representative, the subcontractor believed that an additional allowance of $7000 would be made in the contract, and accordingly offered a reduced price. But the terms of the tender (which the subcontractor did not check) had been changed to remove all references to that allowance. The subcontractor did not discover the alteration until after the tender had been accepted: *Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd* (1987), where Chilwell J found that there was operative mistake, applying *Conlon v Ozolins*).

- The buyer of the plant and equipment of a business thought that a certain motor vehicle (worth $4000) was included in the sale, at the total price of $27 000. There appears to have been some confusion about what the contract covered, and the Court found that "there was room for a good deal of misunderstanding. [The seller's] method of negotiating—his style of speaking and documentation of the proposals—could I think reasonably have left [the buyer] with the impression that the Chrysler Valiant was included": *Taupo Machine Services Ltd v Field Equipment Ltd* (1986) 16. But the schedule in the written contract made it plain that the vehicle in question was not included; counsel both accepted that s 6(1)(a)(iii) applied, and the Court did not give the matter any independent consideration.

- Two parties to the proposed lease of a shop were under a misapprehension as to whether, under the terms of the proposed lease, the rental could be increased to its fair value at the expiry of the government's rent control legislation. Both parties were agreed that some change would be made, though nothing about that was included in the written agreement, and the parties (as it turned out) were clearly at cross purposes about how they thought the new rental would be assessed: *Vee Jay Gifts Ltd v Kekesi* (unreported, High Court, Hamilton, 5 August 1987, A 263/85, Doogue J), where it was held that there was a concluded agreement, although the provision as to increased rental was not settled; and that, the parties having made different mistakes about this matter, the case came within s 6(1)(a)(iii).

2.64 It will be noted that, in all of these cases, there was a pattern of prior negotiations between the parties which led one or both of them

into error about what their contract would contain; the parties accordingly entered a contract which would never have been entered into had either party known the truth. Certainly, the claimant with that knowledge would not have done so; and it is open to argument that even the party favoured by the contract, if aware of the misunderstanding, would have been bound in all conscience to draw it to the claimant's attention. In that sense at least, the parties were at cross purposes about the "same" matter.

The preferable ground of decision

2.65 In order to justify the results in these cases and distinguish them from the examples mentioned in para 2.57, it is necessary to indulge in a process of analysis, which goes well beyond merely ascertaining the meaning of the words "different mistake about the same matter", found in s 6(1)(a)(iii). It is not our purpose to suggest that relief should be given in these cases simply because of their distinguishing feature: namely, that there was a demonstrable mistake in the course of negotiation, occurring before either party put pen to paper. If anything can be learned from judicial decisions on the previous law of contractual mistake, it is that conceptual distinctions cannot be trusted as the primary focus when determining, in borderline cases, whether relief should be given or not.

2.66 The presence of such a distinguishing feature, however, may point to further factors which, if established in the case, could justify a court in departing from the general principle that anyone who signs a contract ought to be bound by it. Was the mistake about a matter that was very important to the contracting parties, and which would fundamentally distort the bargaining process if they were unaware that it was not settled? Was it caused by entirely unexpected factors that neither party might reasonably have guarded against? Had the other party contributed to the mistake, by making the position unclear during negotiations, or secretly altering the terms offered to the mistaken party? These are considerations which, while they may well influence the exercise of the court's discretion under s 7, cannot easily be derived from the wording of the jurisdictional requirements in s 6.

Is amendment of s 6(1)(a)(iii) necessary?

2.67 Obviously, it would be helpful if some precise verbal formula could be found which would allow a ready distinction between those cases to which s 6(1)(a)(iii) can usefully be applied, and those to which it cannot. But it does not seem realistic to expect to find one. This may not matter, however. As long as a liberal approach is adopted to the construction of s 6(1)(a), so that the whole merits of the case can be considered (see para 2.23), this apparently confused situation will be of little practical consequence. If s 6(1)(a)(iii) were the only relevant provision, we would have been inclined to suggest that the courts might safely be left to reach this conclusion for themselves, if they consider that course appropriate.

2.68 We do not recommend any change to s 6(1)(a)(iii).[43]

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[43] A proposal, initially articulated by Professor Coote at the March 1991 meeting and attracting a certain amount of support, was that the scope of s 6(1)(a) be extended to cover mistakes where one party has induced confusion in the other (it being noted that the common law provided relief if there were knowledge on the part of the inducer). It was suggested that this might involve an extension of s 6(1)(a)(iii) or, alternatively, a new (iv) (and ought perhaps extend to situations where the inducer ought to have known of the confusion).

Although preferring the status quo option, Mr Dugdale suggested that concerns over the interpretation of the Act in *Paulger v Butland Industries* might be met by a provision reading:

> A mistake as to whether a provision is included in a written contract is not a mistake in interpretation within the meaning of s 6(2)(a).

There was a considerable degree of support for this formula, although some considered that the word "provision" might be better phrased in terms of "the contents" of a contract. Underlying this approval was the suggestion that the *Paulger v Butland Industries* decision had largely disposed of concerns about *Conlon v Ozolins* but that its own "heresy" should be corrected.

Mr Dugdale also offered a provision designed to reverse the decision in *Conlon v Ozolins* which would read:

> There is not a mistake for the purposes of s 6(1)(a)(iii) by reason only of the fact that the party seeking relief was mistaken as to the intention of any other party.

This attracted some support, although less than the provision mentioned in the previous paragraph. It seemed that this relative lack of support arose from the fact that deficiencies in the *Conlon* reasoning had been identified in *Paulger*.

Following the production of the two Dugdale provisions, Professor Sutton suggested another which would expand the scope of s 6(1)(a)(ii) to situations where the court was

> satisfied that the process of negotiation has been affected by an error [as to the contents of the contract] in a fundamental way and having regard to whether

2.69 The position is complicated considerably, however, by the importance now accorded to s 6(2)(a), and the relationship between that section and s 6(1)(a)(iii). While it is not easy to ascertain the present attitude of the Court of Appeal to this question, High Court decisions are now taking a path through s 6(2)(a) to reach the conclusion that relief should be refused. *Shotter v Westpac* [1988] was a case where a guarantor signed a guarantee for a company's debts, not realising that the guarantee also covered debts the company had itself guaranteed. The Judge said:

> I think it is clear, on any analysis of the facts and no matter how one plays with words to describe the mistake differently, that the mistake of Mr Shotter was in misunderstanding what the guarantee demand said, as to the extent of his liability. (330)

This, as we have seen (see para 2.42), he characterised as a mistake in interpretation. In *Paulger,* the Court of Appeal approved of the reasoning in *Shotter.* This in turn raised doubts about the correctness of the reasoning in *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985], discussed in para 2.63 (the "O-rings" case). *Conlon v Ozolins* was regarded as different because there the emphasis was on the boundaries of the land which formed the subject matter of the contract. It seems that this will now be regarded as the most likely explanation why *Conlon v Ozolins* did not involve a mistake in interpretation.

2.70 The consequence of this would appear to be that, where the alleged mistake pertains to a matter which does not exist outside the document (or words) expressing the relationship between the parties (as is the case with the words "/c" in the example of the O-rings), the mistake will inevitably be classed as a mistake in interpretation, so that the case will be put beyond the ambit of the Contractual Mistakes Act. The cases decided after *Paulger* are beginning to demonstrate this. In *Golden Point Mining Co Ltd v Consolidated Traders*

(a) the other party's conduct induced or contributed to the mistake, or
(b) the other party ought to have known that it had occurred, or was likely to occur.

This proposition did not attract substantial support within the group, although some thought that it would provide a useful and complementary provision if the two Dugdale propositions were enacted.

Ltd (1989) where there was a mistake as to the ambit of a clause governing share sales, the Court referred to *Paulger* and did not even attempt to view the situation other than as a question of interpretation. In *Shivas v BNZ* [1990]—a claim that a guarantee was given under the mistaken impression that the bank would provide some financial accommodation to the company, or that the guarantee would be limited in amount—Tipping J, having struggled through a *Conlon v Ozolins* type of analysis, accepted with relief the approach of the Court of Appeal in *Paulger*, which had been decided in the interim (80 – 81). And see also *Robt Jones Investments Ltd v W F & E L King Ltd* (unreported, High Court, Hamilton, 19 March 1990, CP 77/87, Anderson J) 24; *Wrightson NMA Ltd v Kennedy* [1990] DCR 33. But compare *Ubix Copiers Ltd v General Acceptance Finance Ltd* (unreported, High Court, Auckland, 5 December 1989, CL 135/88), where Thorp J held that a mistake as to the contents of a document is not a mistake as to "interpretation".

2.71 It seems that the High Court in *Jones v Chatfield* would have followed a similar line if the *Paulger* reasoning had been available to it. On appeal, Cooke P made specific reference to the Judge's remark that *Conlon v Ozolins* was a standing invitation to any defendant to claim that he or she had intended a different bargain and had misunderstood the document which was signed. He said:

> I am sure that the members of this Court who decided that case would not have intended to extend any such invitation and that it is important in applying th[e] Act not to overlook that the mistakes covered by it do not include mistakes as to interpretation. Moreover, relief under the Act is discretionary; in administering the Act the integrity of written contracts, particularly in commercial dealings, must be a cardinal consideration. (288)

2.72 There is now a serious question as to whether the decisions in *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985], *Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd* (1987), *Taupo Machine Service Ltd v Field Equipment Services Ltd* (1986) and similar cases have not been impliedly overruled by the Court of Appeal; these cases all involved a "mistake as to intention" analysis by the Court. Whatever the true position may be, there is a clear danger that some meritorious cases may be excluded from the court's discretionary powers to grant relief on a rather arbitrary basis, and it is very difficult for potential litigants to know in advance which approach the

court will take. In our opinion it would be far more satisfactory to encourage courts to refuse relief on a discretionary basis in a case such as *Paulger*, rather than to permit or compel them to avoid any consideration of the merits of granting some form of relief, by classing such mistakes as mistakes of interpretation.

2.73 The development described in paras 2.69 – 2.72 seems to us to be unhelpful and inconsistent with the overall policies of the legislation. It could be arrested if the requirement in s 6(2)(a) were amended, so that it ceases to be a mandatory disqualification for relief, but is instead added to the list of factors which normally militate against the granting of relief but are not necessarily fatal to it.

2.74 We recommend that s 6(2)(a) be made a discretionary factor within the ambit of s 7. The effect of this, together with a liberal construction of s 6(1)(a), will be that claims involving genuine mistakes are evaluated by the courts in their discretion.[44]

2.75 We are conscious that, given that the decision in *Paulger* has provided judges with a ready means of disposing of unmeritorious cases such as those discussed in para 2.57, the enactment of such a provision could be misinterpreted in some quarters as an endeavour to plunge the courts back into the confused situation which existed after the decision in *Conlon v Ozolins*. That is not our purpose, and the amending legislation would have to be carefully drafted to make it clear that wherever a party entered into a contract, and later contended that its terms were misunderstood, it would require strong circumstances to take the case out of the general rule that the expectations engendered in the other party by such action ought normally to be enforced. Nevertheless, unless some such provision is enacted, we foresee that confusion and difficulty will continue to result from the efforts of the courts to fairly resolve issues like those which arose in the cases discussed in para 2.63.

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[44] This recommendation was referred to in note 35. The recommendation was one which did not find favour at the March 1991 meeting; it was thought that the proposal could create an unacceptable increase in uncertainty when applying the Act. The option of preserving the status quo, both in relation to this proposal and to other points of dissatisfaction noted in the paper, had a reasonable amount of support. The Commission has decided not to pursue this recommendation further at this time (see report, paras 37 – 42).

THIRD PARTIES GENERALLY

2.76 Section 8 deals with the protection of dispositions made to third parties under a mistaken contract. It appears that the section, and the related jurisdiction under s 7(5), have only been considered by the courts in one case, *Mitchell v Pattison (No 1)* (unreported, High Court, Auckland, 5 June 1986, A 1163/84, Thorp J), which was decided on an interlocutory application to strike out certain relief claimed. The plaintiff, who had allegedly entered into a lease by mistake, sought to set aside the lease against both the lessees and a registered sublessee. It was alleged that the sublessee had notice of the mistake, and had acted without good faith, but not that he had committed "fraud" within the meaning of the Land Transfer Act 1952. The Court decided that the Act did not supersede the indefeasibility provisions of the Land Transfer Act 1952, and the claim to recover the property from the sublessee should be struck out. Thorp J indicated, however, that a claim for compensation would be available. This case raises a difficult issue as to the extent of the inroads made by the Contractual Mistakes Act on the indefeasibility provisions of the Land Transfer Act 1952. While it is clear that the court may order the retransfer of land between contracting parties (s 7(5)), it is not clear to what extent this may be possible against third parties with notice of the mistake. Section 7(5) is phrased in very wide terms: if a third party can be joined in the proceedings, a vesting order could be made against that party. However, joinder would only be possible if, on a correct interpretation, the Contractual Mistakes Act allows such relief to be granted. Sections 7(5) and 8 give some indication that this may be so, but this tends to fly in the face of the indefeasibility tradition. The matter is, however, so intertwined with the policies which lie behind the Land Transfer Act, that it would be inappropriate to attempt to change the law as part of the present review.

2.77 We recommend no change to the law at this time.

MISTAKEN IDENTITY

2.78 There are acknowledged problems in applying the legislation to the classic problem of mistaken identity. However, the only case to deal with a problem of mistaken identity after the Act was passed, involved a mortgage entered into by a person other than the intended mortgagor: see *AIC Retail Finance Ltd (in rec) v Henri* (unreported,

High Court, Auckland, 21 March 1990, CP 491/87, Wylie J). The case was not pleaded in terms of mistake, and was therefore resolved according to the common law. The Court did suggest, however, that relief might have been available under the Act. This would be true for some, but not all, cases of mistaken identity.

2.79 The most troublesome problem arises where A "sells" a car to B, thinking B is the financially reputable person C, when in fact B is a rogue. B's title to the car (unlike the land in *Mitchell v Pattison* (1986)) would be dependent on the validity of the contract between A and B. Having bought the car, B on-sells it to the third party D. At first sight, this would appear to be a mistake on the part of A, which is known to B so that the Act can be invoked, but other provisions suggest that A has no remedy against D. This is based on the strong wording of s 8(1), which, at first sight, precludes the possibility of any relief whatsoever being given against third parties who purchase without notice of the mistake: see Lang, 258. Some commentators have assumed that this provision is designed to resolve all such questions in favour of the ultimate buyer, D: see, for example, Harrison [1977] NZ Recent Law 24, 28.

2.80 However, the general trend of comment suggests that the matter is more complex than that, and that the legislation may simply not have dealt with the problem at all: see Reynolds [1977] NZ Recent Law 239, 240; Sutton, *Commercial Law Seminar*, 1977, 53 – 54; and Finn (1979) 8 NZULR 312, 319 – 320. Various ways have been suggested around this problem under the legislation as it stands: see Finn, 320; and McLauchlan (1983) 10 NZULR 199, 228 – 230, but none of them is particularly compelling. Professor McLauchlan has considered this problem in considerable depth, and is rightly critical of the Committee for having declared its intention to deal with such cases, yet not carrying that intention through in any clear and coherent manner. Those involved in the former processes of law reform will recall that, although Parliamentary Counsel usually sat on reform committees, the practice was not to produce a draft Bill on a reference, until the final form of the report was settled. "Amateur" legislative drafting was not encouraged. The result was that committees could find that a report contained unresolved difficulties of principle, which did not become apparent until the drafting stage was reached. One of the present writers (Sutton) can recall occasions when it was necessary to go back to a report and rewrite it, taking those difficulties into account.

2.81 There are clear problems in this area, but the present exercise does not appear to be the appropriate vehicle for resolving them, and no changes are recommended at this time.[45]

RELIEF UNDER THE ACT

2.82 From this discussion, it will be apparent that a large amount of judicial time has been devoted to determining whether it is possible to invoke the discretion to grant relief under the Act. Far less time and energy has been expended in working out general principles for the exercise of the discretion to grant relief. Despite the wealth of case law under the Act, the consequences of a successful application may still be regarded as somewhat unpredictable. Even in the cases where the discretion has been exercised, not much appears in the way of clear guidelines, although some clear trends have emerged. We propose to consider:

- the extent of the courts' remedial powers;
- how the discretion is exercised;
- the factors that are relevant to the exercise of that discretion; and
- the quantum of monetary awards.

WHAT THE COURTS MAY DO

2.83 The broadening of the remedies available for contractual mistake, which was one of the principal objectives of the Act, seems to have been well received: s 8(1)(b) of the Act: *Mitchell v Pattison (No 1)* (1986). These extended powers can usefully be exercised to cure technical contract defects, as is illustrated in *DFC of NZ v McSherry Export Kilns Ltd (in liq)* (1987) 3 NZCLC 99,998.

2.84 In *DFC of NZ v McSherry Export Kilns Ltd*, a debenture had been inadvertently executed before the company which did so was formally incorporated. No one was prejudiced by this slip, but if the ordinary law had taken its course, a subsequent debentureholder would, somewhat to its surprise, have become first chargeholder, and

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[45] At the March 1991 meeting, when s 8(1) was discussed, it was generally agreed that the present review did not present the appropriate opportunity to consider whether s 8(1) operated too inflexibly in favour of third party interests, nor to consider generally the rule of law that persons cannot transfer personal property if they are not owners of it (nemo dat quod non habet).

would thereby have been considerably enriched. The Court invoked the provisions of ss 2(3) and 7 of the Contractual Mistakes Act to validate the contract.

2.85 Other examples of apparently void or ineffective contracts which might be validated under the Act are two insurance cases: *Wijeyaratne v Medical Assurance Soc NZ Ltd* [1991], where an insured party was not technically the owner of the property insured; and *Cee Bee Marine Ltd v Lombard Insurance Co Ltd* (1986), where the insured party was a group of companies, whose owner erroneously thought that all the companies would be covered. Relief was refused in the latter case, however, one of the reasons being that alteration of the contract terms would have materially increased the insurer's risk. In contrast with these cases, it was held in *Langdon v McAllister* (1985) that, where there is a term which is unenforceable for non-compliance with the Contracts Enforcement Act 1956, the Contractual Mistakes Act is excluded (32).

THE EXERCISE OF THE DISCRETION

2.86 The leading decision of *Conlon v Ozolins* provides no assistance in this area because the matter was remitted to the High Court for a decision and was presumably settled; there appears to be no further High Court judgment, as is also the case with *Hawkins Construction Ltd v McKay Electrical (Whangarei) Ltd* (1987). At the high water mark of cases following *Conlon*, full credence was given to the mistaken party and the contract was simply altered to reflect what the party mistakenly believed: see *Taupo Machine Services Ltd v Field Equipment Ltd*; cf *Vee Jay Gifts Ltd v Kekesi* (1987). On the other hand, in *Cee Bee Marine v Lombard Insurance Co Ltd*, discussed in the previous paragraph, the Court displayed a marked reluctance to manipulate a contract of insurance so that it would reflect liability in accordance with the premiums which had been paid (this may have been because it was thought that the primary responsibility rested with the broker, who was ultimately held liable).

FACTORS RELEVANT TO THE EXERCISE OF THE DISCRETION

Causing the mistake

2.87 The only factor which the court is expressly directed to consider in the exercise of its discretion is the extent to which the party seeking relief caused the mistake: s 7(3). In *AGC (NZ) Ltd v Wyness*

[1987], where the Court of Appeal assumed that the jurisdictional grounds had been satisfied for the purposes of its decision, the Court made it clear that a person who had executed a clear document which gave an erroneous impression to the other party would be unable to benefit from the discretion. So sure was the Court of this approach that it was able to grant summary judgment against the defendant without a trial on the merits. This attitude was reaffirmed in *Paulger*: see paras 2.54 – 2.56.

2.88 Similar sentiments have been expressed where the court has found the error was substantially the result of the actions of the applicant: this can be seen in *Golden Point Mining Ltd v Consolidated Traders Ltd* (1989) and *Grose v NZ Farmers Co-op Assoc of Canterbury* (1987); (see also *Slater Wilmshurst Ltd v Crown Group Custodian Ltd* [1991], where, however, the factual basis for this holding is perhaps more debatable—the Judge was influenced by the old common law rule in *Bain v Fothergill*). In this context the courts have not expressed definite opinions on the extent to which a party is to be regarded as responsible for actions of an agent, a matter which was of considerable significance in *Conlon v Ozolins*, but not discussed by the Court of Appeal. If the authorities under the Illegal Contracts Act 1970 are followed, a party will not ordinarily be allowed to escape consequences on the ground that it was only an agent who acted: *House v Jones* [1985] 2 NZLR 288 (CA).

Security of contractual relationships

2.89 A further matter which has been seen as important in connection with the discretion is the injunction contained in s 4(2) concerning the security of contractual relationships, particularly where the parties are commercial operators engaged in business dealings: this aspect was stressed in *Grose v NZ Farmers Co-op Assoc of Canterbury*; but see *Golden Point Mining Ltd v Consolidated Traders Ltd* (1989) and *Shotover Mining Ltd v Brownlie* (1987). On the other hand, this aspect was not even mentioned in the judgments in *Conlon v Ozolins*, except that of Somers J in his dissenting judgment, nor was it invoked in *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985]. It may be that s 4(2) has come to the fore in the aftermath of *Conlon v Ozolins*; while it would be unfortunate if this were to be relied on as a general reason to refuse relief, it probably plays a useful role in ensuring that a balance is struck in the exercise of the court's discretion. In *Shotover Mining* the Court stressed that s 4(2) should not be

elevated to a point where the Act is of no practical use, and this is perhaps a timely warning. In practice, however, the subsection does not appear to have given rise to any unjust decisions and there is no reason at present to consider its removal.

2.90 We do not recommend any change.

Other factors

2.91 In *Shotover Mining Ltd v Brownlie* (1987), McGechan J adverted to several other matters which might influence the discretion (163 – 164). He considered that the existence of a mistake gave rise to a presumption that the discretion *should* be exercised. No doubt this is especially so where (as in that case) mistake is induced by fraud. The comments of the Judge are, however, not specifically directed to that eventuality but appear to be designed as general indications, albeit obiter. The courts have also held that the interests of third parties are an important consideration (as in *Shotover Mining*, 163, for example) as is the fact that some benefit has already been obtained under the contract (see *Parker v Wakefield* (1983)) and that the subject matter of the contract is of no use to one of the parties, but some use to the other: see *Engineering Plastics Ltd v J Mercer & Sons Ltd* [1985]. The courts may also look to the position in the industry as a whole, as well as the likely costs of the mistake to both parties: *Engineering Plastics,* 83 – 84.

2.92 As a general rule, relief should only go as far as is necessary to remedy the injustice which has occurred. There is therefore a "minimum modification" attitude on the part of the courts: see *Shotover Mining Ltd v Brownlie*, 164. Following this approach, in *Vee Jay Gifts v Kekesi* (1987) (see paras 2.62 – 2.63) the Court held that the parties had to be bound to those terms of the lease which were clearly intended to be part of the contract; and on the question of the disputed rent for the remaining part of the term, the Court held that this was a matter for negotiation or, failing that, arbitration.

2.93 We do not recommend any change.

THE QUANTUM OF MONETARY AWARDS

2.94 When it comes to actual figures, it seems to be accepted that an ordinary measure of damages is appropriate where the contract is held to be subsisting and to have been breached, and no case has been

made out to interfere with ordinary contractual expectations: see *Shotover Mining* (1987), 191. However, where some adjustment is necessary in order to do justice, the guidance offered by the courts thus far is scant. The major illustrative case is *Engineering Plastics*. In arriving at a new contract price, Tompkins J said:

> I have not arrived at this figure by any arithmetical process. It is a somewhat arbitrary assessment intended to take into account the various and conflicting factors to which I have referred. (84)

Monetary adjustments were also made in *Taupo Machine Services Ltd v Field Equipment Ltd* and *Dickson v Stanley* (1984).

2.95 Tompkins J's description is a candid assessment of the process, and it is to be hoped that litigants will accept (as they have in numerous other areas of law) that there is no precise arithmetical way of taking into account factors such as the extent to which the mistaken party contributed to the mistake. However, in due course one might look for some minimum guidelines, for example, a statement that a party should not be out of pocket as the result of a mistake which was caused mainly or entirely by the other party, or that a party is entitled to at least reasonable remuneration for work done in reliance on the existence of a contract. This is ultimately an issue to be worked out by the courts rather than through legislation.

2.96 We do not recommend any change.

SUMMARY

2.97 In summary, it is our opinion that the Act has, to a large extent, been successful in achieving its aim of providing for a more extensive and systematic approach to relief for mistake. The only significant reform we perceive as necessary, in order to ensure that the Act continues to perform this important function is the removal of the prohibition on relief for mistakes in interpretation: para 2.74. This can be dealt with just as well in a discretionary fashion, while avoiding what is currently an arbitrary limitation on relief.

2.98 In the way of minor change, to clear up confusion rather than alter the present direction of decisions under the Act, we suggest that consideration might be given to amendments designed to establish the relationship between the Act and ss 94A and 94B of the Judicature Act 1908: para 2.20.

2.99 Other areas of concern have been highlighted, especially with regard to the situation of third parties, but we do not consider that the present brief encompasses the magnitude of the alterations that this would require.

ANNEX

Mechenex Pacific Services Ltd v TCA Airconditioning (NZ) Ltd

2.100 Since preparing this paper, we have had the opportunity to consider the important decision of the Court of Appeal in *Mechenex Pacific Services Ltd v TCA Airconditioning (NZ) Ltd* [1991] 2 NZLR 393 which deals with some of the difficulties which may arise where an application for summary judgment is defended on the ground of an alleged "cross purpose" mistake.

THE FACTS

2.101 The contract in question required the plaintiff/respondent to supply airconditioning coils to the defendant/appellant, who was a subcontractor engaged to install airconditioning equipment in a building in Auckland. The specifications for that project required "8-row" coils, which would need a lower water flow rate than the "4-row" coils which the plaintiff was in a position to supply. This problem was discussed by representatives of the plaintiff and the defendant. There was conflicting affidavit evidence about what was said at these discussions. The defendant's representative said he was left with the impression that the plaintiff could supply coils which complied with the specifications (with one exception not relevant to the present proceedings). The plaintiff's representative said he made it clear that "4-row" units would be quoted for.

2.102 The specification in the head contract, under the heading "Typ Floor AHU", referred to a "flow rate of 4l/s" and called for an "8-row coil". After the discussion described above, the plaintiff sent the defendant a quotation for the supply of coils "for the duties given in the specification, and referenced as Typ Floor AHU". The quotation and its schedules, in the Court's view, clearly referred to 4-row coils. The defendant's representative, however, deposed that, seeing those words in the quotation, he did not think fit to check the schedules but simply assumed that these were 8-row coils as the specifications required. When the coils arrived they were found unsuitable for the project since the available water flow was not of a high enough

rate. The plaintiff sued the defendant for the purchase price, and sought summary judgment.

THE DECISION

2.103 The Court affirmed the general principle of contract formation of *Smith v Hughes* (1871) LR 6 QB 597 which, it said, was not affected by the Contractual Mistakes Act 1977 (396). In that case Blackburn J said:

> I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not ad idem, there is no contract *unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other.* (607, emphasis added)

2.104 The Court pointed out that "consistently with the requirement for an objective assessment, it is not enough for one party simply to say that he meant something different from what his words would reasonably be taken to mean". However, the Court also seems to have recognised that if the conduct of the other party brought about the misunderstanding under which the mistaken party is labouring, the mistaken party may not be estopped from asserting lack of consensus. The Court referred, in this connection, to the old case of *Scriven Brothers & Co v Hindley & Co* [1913] 3 KB 564, where A T Lawrence LJ said, of a mistaken bid at an auction:

> ... the finding of the jury upon the sixth question [that the form of the auctioneer's catalogue and the conduct of its foreman, or one of them, contributed to cause the mistake that occurred] prevents the plaintiffs from being able to insist upon a contract by estoppel. Such a contract cannot arise when the person seeking to enforce it has by his own negligence or by that of those for whom he is responsible caused, or contributed to cause, the mistake. (569)

2.105 Though this point is referred to first as an argument by counsel, relying on *Scriven Brothers & Co v Hindley & Co*, the Court goes on to apply it to the facts of the case.

2.106 The Court appears to have accepted (or at least not demurred to) the proposition that, in such cases, not only does the contract fail

for want of consensus, but also that relief may be available under the Contractual Mistakes Act.

2.107 On the evidence the Court was unable to find any fault on the plaintiff's part; it was held to be the defendant's responsibility to read the quotation properly. There was therefore, a valid contract between the parties. The only question then was whether the mistake made by the defendant fell within the Contractual Mistakes Act. There was the obvious difficulty here that the defendant, having failed to read the document, made a mistake as to interpretation: a mistake "of the same character as that of the unfortunate appellant in *Paulger v Butland Industries Ltd*". The Court rejected an argument that the quotation did not form part of the contract. Even were that argument to be accepted, however, the Court pointed out that, as in *Paulger*, the plaintiff had in fact not been mistaken at all. There was accordingly no defence under the Contractual Mistakes Act.

HOW THE CASE MIGHT HAVE BEEN DECIDED

2.108 If our proposed reform were implemented, the outcome of the case would have been the same. Even if the parties could be seen as being at cross-purposes summary judgment could still be granted. We hope our presumption will be forgiven, when we respectfully offer the following suggested reasoning:

> In this case the supposed mistake advanced by the defendants is, at best, nebulous in character, and would have had no effect whatsoever if they had taken the most ordinary precaution of reading the specifications they were sent. Even if it could have been maintained that technically their mistake fell within s 6(1)(a)(iii), they had as a result of their admitted failure to take such precautions obtained equipment ordered specially for them by the plaintiffs. There would need to be special circumstances, not disclosed in their affidavits, for the Court's discretion under s 7 to be exercised in their favour. The defendants' case cannot be significantly strengthened by any further fact-finding in respect of prior conversations between the parties before the specifications were sent, since no specific misrepresentation or misleading statement is alleged by the defendants, who refer only to their state of mind at the conclusion of that conversation.

2.109 The Court's analysis, with its reliance on the Contractual Mistakes Act only after the common law has been applied to determine whether the contract will stand or not, must give rise to some concerns. This is especially so when viewed in the light of what has to be established to defeat a summary judgment application.

- *Circumvention of the requirements of the Act.* In cases where the party seeking relief makes a mistake of interpretation, and the other party either knows of it, or has contributed to the circumstances which allow it to occur, then, it may be argued, the mistaken party will not, at common law, be held to the objective meaning of the contract. If there is no contract at common law, both parties will be mistaken as to its existence; *that* mistake is not one of interpretation, and relief would therefore be available under the Act. Unless one adopts a strict approach to the codification brought about by the Act and insists that it provides the *only* relief for situations of contractual mistake, s 6(2)(a) would effectively be circumvented. If this approach is followed, one ends up with the old problem of being able to manipulate the description of a mistake so as to achieve what one will.

  We ourselves would prefer to see the Act amended so as to remove the troublesome s 6(2)(a), since we believe that the above reasoning (while perhaps more conducive to just results, in certain classes of case at least), can only result in distortion and artificiality. Admittedly, the framers of the Act did envisage that the courts would, on rare occasions, be obliged to look behind the provisions of the Act to the common law, to determine the underlying status of the contract. But it was hoped that, for the most part, cases would be decided by the direct application of its provisions and the exercise of the discretions conferred by ss 6 and 7. The *Mechenex* case, potentially at least, commits all cases where the alleged mistake falls within s 6(1)(a)(iii) to the prior scrutiny of the common law. And yet, once that is done, there is still the possibility of relief under the Act. This process of moving in and out of the Act, virtually at will, does not seem to us to be systematically sound.

- *Uncertainty in operation of the common law doctrine.* It is possible that cases where one party is clearly aware that the other party attaches a meaning to the contract other than the correct

one, or where confusing bargaining practices are adopted (as discussed in paras 2.61 – 2.62), may now be held to fall within the *Scriven v Hindley* approach. While this may provide some apparent flexibility, it has the inherent danger of being subject to common law developments in jurisdictions which do not provide for relief in the way the Act does. There is a strong possibility that a doctrine which is conceived and nurtured in another jurisdictional setting may not prove appropriate in ours.

A further difficulty is the uncertainty as to which party has to make the application for relief under the Act. If any party seeking to enforce an apparent contract has to make an application under the Act to deal with the eventuality that the other side will claim "no contract", a summary judgment becomes a far more remote possibility. As we see it, the normal position should be that the party seeking to avoid a transaction for mistake should be required to invoke the jurisdiction. This is, of course, how the situation evolved in *Mechenex* and was probably precisely what the Court of Appeal had in mind. Generally, the defendant in a summary judgment application will have to raise all possible defences and the Court can deal with them as it did in *Mechenex*. If a bold defendant simply raises the no-contract defence with some plausibility, however, it may be very difficult to bring the Act into play before trial.

- *The relative significance of "fault" and "mistake".* The Contractual Mistakes Act is predicated on the assumption that there should be a contractual doctrine whose central feature is the fact that one or both of the parties have entered into it under a *mistake*. That is to say, what is important is not the fault or carelessness of one party, but the mistake of the other. Such matters are relevant, but not necessarily decisive. As the consequences of the *Mechenex* case are further explored, it is, in our view, likely that an over-emphasis on fault will occur. The central issue at stake —when should a contract be set aside for mistake?—may be lost sight of. It needs to be borne in mind that there will continue to be deserving cases where, without fault on either side, the parties make such a fundamental mistake that an important part of their contractual relationship remains unbargained for. They simply fail to realise that it is not already settled; each believing it is settled when it is not.

2.110 Although many of the difficulties are mere possibilities thrown up by the Court's decision, our concern is that harm may be done to the systematic development of a proper mistake jurisdiction. This may well be avoided by insisting that, where a contractual mistake is involved, parties must seek relief under the Act, rather than by coming through the door of estoppel. Such a policy could be strengthened if the Act were to be amended, as we suggest in our paper, by the removal of the provision in s 6(2)(a), dealing with mistakes as to interpretation. Then, in cases which arguably involve mistakes of interpretation, the courts could begin their enquiry with the provisions of the Act, rather than with the somewhat uncertain law that operates outside it.

3

THE ILLEGAL CONTRACTS ACT 1970[46]

Brian Coote

GENERAL COMMENTS

3.01 Whatever criticism on theoretical grounds there may have been of the Illegal Contracts Act 1970 over the years, there seems to be no doubt that, in practice, it has worked reasonably well. That does not mean that there are no problems left in the area of illegal contracts but they do not require a fundamental recasting of the Act. Some fine tuning is the most that is needed.

SECTION 3—"ILLEGAL" CONTRACT DEFINED

3.02 This section raises three main questions:

- whether illegal contracts should be defined;
- whether the Act should be extended to cover void or unenforceable as well as illegal contracts; and
- whether the Act should also be extended to cover at least some relationships other than contracts.

Definition

3.03 Some commentators (for example, M P Furmston "The Illegal Contracts Act 1970—An English View" (1972) 5 NZULR 151, 154 - 155) have criticised the Act for not defining illegal contracts.

[46] The paper states the law at March 1990. The footnotes have been added by the Law Commission and incorporate, where appropriate, the discussion at the meeting organised by the Law Commission on 10 May 1990.

Since there can be disagreement on the circumstances in which a contract can be illegal for breach of an enactment (a point which is particularly relevant to the possible amendment of s 5, see paras 3.09 – 3.21) it would be idle to pretend that difficulties of definition do not exist. The real question is whether, on that account, the legislature ought to intervene. It is considered that it should not. The Illegal Contracts Act was deliberately minimalist in its intent in the sense that, while it gave the courts powers to grant relief which they could not realistically have been expected to evolve for themselves, it left to them the definition of illegal contracts, as a function they could and should appropriately retain. The question of whether a contract should be illegal can be as much a matter of judicial policy as of public policy, or of the policy of the legislature. It is an area where the courts are competent to develop the law in response to changes in society and should be left free to do so.[47]

3.04 It is noteworthy that in none of the three overseas reports which have recommended legislation on illegal contracts (those by the Law Reform Committee of South Australia (1977), the Law Reform Commission of British Colombia (1983) and the Ontario Law Reform Commission (1987)) is a definition attempted. On the contrary, the Ontario *Report on the Amendment of the Law of Contract* (1987) has recommended against definition on the ground that this is an area best left to judicial development (231).

Void and unenforceable contracts

3.05 At first sight, it may seem odd that the parties to an illegal contract may, because of the Act, in the end receive better treatment than the parties to a contract which is merely void or unenforceable (see the Ontario Report, 224).

3.06 Of course, in respect of one type of void contract, the restraint of trade, the Act does make remedial provision. But restraint of trade contracts are regarded at common law as contrary to public policy and in some sense illegal, which most void contracts are not.

3.07 A principal problem in extending the Act to void or unenforceable contracts would be one of defining limits. Should the Act extend to transactions coming within, say, the Minors' Contracts Act 1969 or the Contracts Enforcement Act 1956, or to penalties as distinct

[47] Those at the May 1990 meeting agreed with this conclusion.

from liquidated damages? And what of contracts that are void for mistake or for uncertainty? The reasons for voidness and unenforceability are legion and bear no necessary relationship to those which determine whether a contract should be illegal. Even assuming that a reform in the area of void and unenforceable contracts was thought desirable, it would not follow that the appropriate method would be an amendment to the Illegal Contracts Act.[48]

Relationships other than contracts

3.08 Transactions and relationships other than contracts can be affected by illegality, obvious examples being trusts and claims under the Law Reform (Testamentary Promises) Act 1949. Even the duty of confidence can be so affected: *Attorney-General v Guardian Newspaper (No 2)* [1990] AC 109, 282, per Lord Goff of Chieveley. Here again, and assuming that a reform were desirable, it is not something which would properly be achieved by an amendment to an act dealing with illegal contracts. A little more difficult is the question of whether s 8 ought to be extended to cover restraints of trade in relationships other than contracts of which the leading example is *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403. Arguably, the limits of s 8 are so narrow that it should be irrelevant to their application whether or not a restraint were strictly contractual. As against that, though, to extend the Act beyond contracts, even in this one particular, could compromise the argument against extension of the far more wide-ranging provisions of the Act which deal with contracts that are illegal in the full sense.

SECTION 5—BREACH OF ENACTMENT

3.09 Commentators such as M P Furmston (cited at para 3.03, 158 – 159) have made the obvious objection that to apply the rule of construction enacted in this section to contracts that are legal *when* formed, and not to the question whether a contract is illegal *as* formed, is arbitrary. Arguably, the effect of s 6 is so drastic that it could be considered a desirable quid pro quo that the incidence of

[48] The point was made at the May 1990 meeting that the Act originally focused on illegal contracts because courts treated void contracts more generously and the Act was supposed to rectify the discrepancy. However, the situation had now been reversed, and the relief provisions in the Act are more generous for illegal contracts than was the relief available for void contracts at common law.

illegality be minimised as much in respect of formation as it is in respect of performance.

3.10 However, the drafting of suitable amendments would not be easy because of the differing views as to the circumstances in which contracts can be illegal by reason of an enactment.[49]

3.11 The standard view is that all contracts are illegal if they are prohibited by an enactment (whether expressly or impliedly), or which have as their purpose the performance of an act which is so prohibited. Contracts made void or ultra vires by statute are not on that account illegal, unless the enactment also prohibits them, whether expressly or impliedly. On this view, the fact that a contract has been made void by statute does not by itself make it illegal. It is believed the argument to the contrary, recently put forward by Mr Beck ("Illegality and the Courts' Discretion" (1989) 13 NZULR 389, 392) is not supported by the case he cited, *Broadlands Rentals Ltd v R D Bull Ltd* [1976] 2 NZLR 595. The regulations in that case not only made non-conforming contracts void but also made it an offence to enter into them.

3.12 An alternative view held by some is that a statutory prohibition, whether express or implied, cannot by itself cause illegality. For there to be illegality some other factor must be present, the obvious example being a prohibited act which has also been made an offence. What lies behind this view is a concern about contracts made ultra vires by statute. Clearly, a contract ought not to be illegal simply because it is ultra vires and void. But there is a perception that contracts made ultra vires by statute are ipso facto impliedly prohibited. Accordingly, to treat all prohibited contracts as illegal would be to condemn all ultra vires contracts to illegality. For those taking this view, the reasoning in *Lower Hutt City Council v Martin* [1987] 1 NZLR 321 and in the unreported cases following it to which Mr Beck refers in his article (cited at para 3.11) is defective in its failure to embark on an inquiry as to the existence of the factor, additional to prohibition, which is thought to be required.

3.13 A standard response to this concern would be that it does not follow automatically from the fact that a contract has been made

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[49] The Commission, agreeing that it would not be easy to draft suitable amendments to s 5, has also identified in its report a number of arguments against amendment and does not recommend any change (report, para 42).

ultra vires by statute, that it has thereby also been prohibited. Whether it has been prohibited is a separate question which turns on the interpretation and construction of the relevant statute. Only if such a prohibition is found to exist will the contract, on ordinary principles, be illegal.

3.14 The difference between these two approaches is clarified by the first two alternative drafts of a proposed subsection (3), set out at para 3.19.

3.15 It is obvious that if all contracts, whether prohibited expressly or impliedly, were illegal, but that contracts merely void or ultra vires without more were not, it would be relatively straightforward to decide in particular cases whether or not a contract came within the provisions of the Illegal Contracts Act. On the other hand, if express or implied prohibition were not enough and other factors also had to be present, characterisation of contracts as illegal would be that much less certain unless the additional factors were clearly defined (such as the commission of an offence).

3.16 For present purposes, though, the relevance of this difference of opinion is to the drafting of any reform of s 5 which sought to take account of illegality in the formation of contracts. The problem is illustrated by cl 5 of the original Illegal Contracts Bill, which was divided into two subsections, of which the present section was (1) and the following was (2):

> A contract the object of which or of any provision of which is the doing of an act that is prohibited by any enactment shall be illegal, unless the enactment otherwise provides or its object otherwise requires.

3.17 That provision was, of course, deleted by the Statutes Revision Committee of the House. Its significance here is that it is predicated on a particular view of the circumstances in which a non-conforming contract will be illegal, namely, that where a contract is prohibited it will on that account be illegal. On the other hand, simply to reverse that onus would tend to institutionalise the view that in the ordinary case a merely prohibited contract would not be illegal. Adoption of either alternative would, in effect, presuppose the sort of definition of illegal contracts which has already been rejected in paras 3.02 and 3.03 dealing with s 3.

3.18 Any amendment to s 5 to cover contracts that are potentially illegal as formed would have to deal both with contracts, the formation of which was illegal by statute, and with contracts, the purposes of which included the commission of an illegal act. In relation to the second of these categories, it would, for example, seem inappropriate that the result in a case like *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 should differ depending on whether one or both parties intended that the vessel should sail below the Plimsoll line. Cases in this second category could be appropriately covered by adding to s 5 a second subsection in terms such as:

(2) No contract the object of which or of any provision of which is the doing of an act which is in breach of an enactment shall be illegal unless the enactment expressly so provides or its object clearly so requires.

3.19 As to a new subsection to deal with contracts the formation of which may be illegal by statute, the form it should take would obviously be affected by the view of statutory illegality on which it was premised. If the view taken were that prohibition alone is insufficient to make the contract illegal, a possible formula would be:

(3) Where the act of entering into a contract is prohibited by any enactment such contract shall not be illegal unless the enactment expressly so provides or its object clearly so requires.

On the other hand, if the standard view were taken that prohibition by itself is sufficient for illegality, a formula such as the following would be more appropriate:

(3) The act of entering into a contract shall not be taken to be prohibited by an enactment unless the enactment expressly so provides or its object clearly so requires.

3.20 Both these drafts could be considered unacceptable, if only because each is predicated on a particular view of the circumstances in which contracts can be illegal as formed.

3.21 A more neutral formula would be:

(3) The formation of a contract shall be accounted the breach of an enactment only if the enactment expressly so provides or its object clearly so requires.

3.22 Though this section has been criticised for reversing the common law rule that property can effectively be passed under an illegal contract (R J Sutton "Illegal Contracts Act 1970" [1972] NZ Recent Law 28), that was, of course, the result intended. The purposes of the CCLRC were: first, to make available, in respect of all illegal contracts, the restitutionary remedies held to apply in *Bowmakers v Barnett Instruments* [1945] KB 65 and *Joe v Young* [1964] NZLR 24, and secondly, to "clear the decks" for the application, alternatively, or in addition, of the s 7 discretions.

3.23 Three questions would seem to require at least some consideration:

- whether there should be a time limitation on the application of s 6;
- whether the rule in *Bowmakers v Barnett Instruments* and *Joe v Young* still applies; and
- whether the word "express" should be inserted before the word "provisions" in s 6(1).

Time limitation

3.24 Theoretically, it might not be discovered, until 50 years after it had taken place, that a transfer of real or personal property was illegal and therefore of no effect by virtue of s 6. If there is a problem, it seems in practice likely to be only minor. If land were involved, *Fraser v Walker* [1966] NZLR 331 would apply. If the transfer were of goods, a claim in detinue might be possible but, in that case, the transferee would doubtless invoke the s 7 discretions, in which case the courts would no doubt apply a laches type rule of some sort, as in *House v Jones* [1985] 2 NZLR 288.

Bowmakers v Barnett Instruments

3.25 The second question more strictly arises under s 7, but it depends on the effect of s 6. It is whether the Act precludes, or should preclude, common law claims by title holders on the basis of their ownership, along the lines of *Bowmakers v Barnett Instruments* and *Joe v Young*. Such a claim might have the advantage for the owner of being as of right, rather than discretionary. In the article referred to in para 3.22 (published soon after the Act was passed), Professor

Sutton expressed the view that such claims could still be made. On the evidence of their *Report on Illegal Contracts*, the members of the CCLRC certainly had in mind the effect of *Bowmakers* and *Joe v Young*. The contrary argument stems from s 7(7), which provides:

> Subject to the express provisions of any other enactment, no court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

3.26 That subsection was, of course, inserted after the Bill left the CCLRC. It has been the basis of dicta in the Court of Appeal which might suggest that no relief of the *Bowmakers* type can any longer be had at common law. (See *Broadlands Rentals Ltd v R D Bull Ltd* [1976] 2 NZLR 595, 596, line 42 and 598, line 46.) The reply to that would be that s 7(7) refers to claims "in respect of any illegal contract", whereas the very point of *Bowmakers* and *Joe v Young* is that the owner's claim is based on ownership and is not a claim "in respect of" any illegal contract.

3.27 While it may not be clear whether, in view of s 7(7), the *Bowmakers* rule does still apply, it is believed that resolution of the problem can safely be left to the courts.[50]

"Express"

3.28 The third question concerns the omission of the word "express" from the phrase "but subject to the provisions of this Act ..." in s 6 and its inclusion in s 7. This difference was treated as

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[50] Reference was made to comments of the Ontario Law Reform Commission in its *Report on the Amendment of the Law of Contract* (1987) at the May 1990 meeting. In that Report it was stated:

> There is also some question as to the soundness of section 6 of the New Zealand Act. Even in terms of existing law, it is debatable whether it is correct to describe an illegal contract as being of no effect. In addition, it seems somewhat contradictory, section 6 having declared an illegal contract to be of no effect, to confer on a court, under section 7(1), power to validate an ineffective contract. Section 6 also raises important interpretational questions as to the types of property and conveyances that are caught by it, and it may greatly complicate transactions by forcing parties to the original bargain, or those claiming from or under them, to seek a judicial validation order whenever there is any suggestion of illegality affecting it. Even third parties may feel insecure although section 6 purports to protect them. (224)

But there was general support for the view stated in the paper.

significant by the Court of Appeal in *Harding v Coburn* [1976] 2 NZLR 577, 584. On the other hand, there is anecdotal evidence that it was merely the result of an oversight. If the difference were unintentional, an argument could be made that a consistent usage should be adopted.

3.29 The problem with a change of that kind would be that it, too, could very easily assume an unwarranted significance and, in the circumstances, it would seem to be safer to leave things as they are.

SECTION 7—COURT MAY GRANT RELIEF

3.30 Once again, three questions seem to need some consideration:

- whether the power to validate contracts should be restricted;[51]
- whether the punitive role of illegality has been unduly reduced by the courts; and
- whether the scope of s 7(3) should be extended.

The power to validate contracts

3.31 The most distinctive feature of s 7 is the extreme width of the powers given by subs (1). It is noteworthy that much less extensive powers have been recommended in the three subsequent overseas law reform reports on illegal contracts referred to in para 3.04. Restitutionary relief is one thing. The power to validate is quite another (see the Ontario Report, 232), and raises the issue of whether and to what extent it should be possible for the courts to reverse the application of Acts of Parliament.

3.32 It was clearly the intention of the CCLRC to allow validation, even of contracts made by statute expressly of no effect and where the act of entering into such contracts was itself expressly forbidden. The Land Settlement Promotion and Land Acquisition Act 1952 was an example mentioned.

3.33 In practice, the approach of the courts in relation to that legislation has been to couple validation with variation of the contract to make it conform, for example, by making it subject to the consent of the Land Valuation Tribunal (*France v Hight* [1987] 2 NZLR 38),

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[51] Since this paper was written, the power to validate was the subject of an article by Professor Coote "Validation under the Illegal Contracts Act" (1992) 15 NZULR 80 discussed in the report of the Law Commission, paras 51 – 64.

unless variation would be otiose because no rural land was being transferred. At the other end of the scale, and in relation to other legislation, validation has been refused where its effect would have been retrospectively to authorise a payment which, it was held, was not only ultra vires the payor, but was also impliedly prohibited by the relevant statute (*Lower Hutt City Council v Martin* [1987] 1 NZLR 321).

3.34 Between those extremes are two Court of Appeal decisions on the propriety of which different views are entertained. In *Catley v Herbert* [1988] 1 NZLR 606, a contract for the purpose of enabling a company to provide financial assistance for the purchase of its own shares was validated. This was not a case where, by variation, the contract could be made to conform. Validation meant that the Court was authorising the breach of an enactment, and the case can be distinguished from *Martin* only on the basis that permitting the breach in the instant case would not offend against the motive behind the prohibition (namely, the protection of shareholders and creditors). Earlier, in *National Westminster Finance v South Pacific Rent-a-Car Ltd* [1985] 1 NZLR 646, the Court of Appeal was able, by validation, to defeat a provision prescribing the consequences of illegality which would otherwise have overridden the discretionary powers conferred by s 7. Once again, this was not a case where the contract could be made a conforming one as a condition of validation. It remained a contract for a deposit of 10 per cent, instead of the prescribed 60 per cent, and validation, therefore, in substance authorised the breach of the relevant provision.

3.35 The most recent case on s 7 to go to the Court of Appeal was *Re AIC Merchant Finance Ltd* [1990] 2 NZLR 385. There, the Court recognised that validation under s 7 should not be employed to negate the effect of a provision of the Securities Act 1978 and therefore refused it. On the other hand, it was decided that other forms of relief were not subject to the same objection and compensation was granted with effects substantially similar to those of a validation.

3.36 Whether there ought to be some statutory restriction placed on the power to validate is something on which opinions seem to be

rather sharply divided.[52] There would certainly be no consensus in favour of amending s 7 at this stage.

Punitive role

3.37 According to its *Report on Illegal Contracts*, the CCLRC, in concluding s 7(3) with the words "... but shall not grant relief if it considers that to do so would not be in the public interest", had in mind the desirability in some cases of retaining the "swingeing" effect of illegality on contracts. The example mentioned was r 10 of the Hire Purchase and Credit Sales Regulations 1957, and the Committee's concern was for cases where enforcement by inspectors and the police was impracticable and where the effects of illegality on the contract had to provide the principal sanction against breach.

3.38 There are dicta in *R D Bull Ltd v Broadlands Rentals Ltd* [1976] 2 NZLR 595 (CA) which might be thought unduly to discount the continuing role of illegality as a punitive sanction. On the other hand, the self-policing role was given some acknowledgment by Cooke J in *Harding v Coburn* [1976] 2 NZLR 577, 585. Ultimately, the importance of that role in particular cases has to be a matter of judgment. At least at this stage, no amendment to s 7 would seem to be called for.

Scope of section 7(3)

3.39 A minor amendment which might be useful would be the alteration of the first line of s 7(3) by the addition of "and if so of what nature and to what extent" between the words "whether" and "to". The considerations listed in the subsection are potentially as relevant to the nature and extent of relief as they are to the question of whether relief should be given in the first place.

3.40 Finally, the meaning of s 7(7) has already been considered at para 3.25 , in relation to s 6.

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[52] This observation was borne out by the discussion on s 7 at the May 1990 meeting. How far s 7 should prevail over conflicting specific statutory policies was debated, but inconclusively.

3.41 Again, three questions seem to require consideration:

- the possible need for a difference of approach to restraints against employees;
- a possible lacuna where, under s 8(c), the court declines to enforce a contract; and
- the question of non-contractual restraints.

Restraints against employees

3.42 The main published criticism of this section was made by G F Dawson ([1975] NZ Recent Law 356 and in "The New Zealand Contract Statutes" [1985] 1 Lloyds Mar & Com LQ 42, 47) and arose from the decision of the Court in *H & R Block Ltd v Sanott* [1976] 1 NZLR 213 not only to redraft the restraint to make it reasonable but, having done so, to award damages for breach of the restraint as redrawn. The fear expressed was that the decision would encourage restrainors to impose extravagant restraints in the hope that the restrainee would observe them rather than risk litigation, and in the expectation that, by virtue of the *Sanott* case, they would have nothing to lose by so doing. That possibility was considered particularly undesirable in respect of restraints on employees which the courts have traditionally treated more restrictively than they have restraints, say, on vendors of goodwill. The argument was accepted by the Ontario Committee, who recommended the following good faith proviso:

> The court should not exercise its powers ... unless the party seeking to impose the provision has acted in good faith and in accordance with reasonable standards of fair dealing (Ontario Report, 228, 234).

3.43 Under s 8, the powers of the courts are discretionary and there would therefore, in any event, be room for refusing relief in a case of blatant abuse. If some express constraint were thought desirable, another possibility might be that relief be refused if the covenanted restraint were so unreasonable as to be penal in character (ie, intended to be in terrorem rather than a bona fide protection of the relevant interest). However, any problem there may be is not with the drafting of the section as it stands. The problem is one of application, and a court before which the matter had been adequately argued

could be expected to have some regard to the differences of approach adopted in the pre-Act authorities.

Court declining to enforce a contract

3.44 If, under s 8(c), a court declines to enforce a contract, there are circumstances when it might also wish, if possible, to be able to grant at least restitutionary relief. A case which illustrates this is *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, which concerned a contract between a young composer of popular music and a music publisher. It was of the "slavery" type and in a similar case a New Zealand court might well under s 8(1)(c) decline to enforce it. However, before the litigation commenced, the copyright in a number of the restrainee's songs had passed to the restrainor. As the law stands at present, it is not easy to see on what legal basis a court could order that the copyright be transferred back to the composer and, in the event, a claim for return was not pursued by him.

3.45 A possible solution would be to expand s 8(1) to allow a court, when declining to enforce a contract, to order the return of property transferred or moneys paid thereunder. As against that, it has to be said that the absence of power to grant restitutionary relief in a case like *Macaulay* is a factor of the general law of restitution and has nothing to do with illegality as such.

3.46 Whether an amendment should be recommended and, if so, what form it should take are matters on which opinions are likely to be divided.[53]

Non-contractual restraints

3.47 Section 8 again raises the wider questions adverted to earlier about whether the discretions in s 7 should apply to restraints of trade (and indeed, to other "void and unenforceable" restraints generally). And if, as is favoured, that notion is rejected, ought s 8 to be amended to apply to non-contractual restraints, as in *Pharmaceutical Society of Great Britain v Dickson*? Both those matters are discussed in para 3.08.

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[53] As proved to be the case at the May 1990 meeting.

RECOMMENDATIONS

3.48 In the event, two amendments are likely to receive general support:

(a) section 5 should be amended to extend the principle of interpretation there stated to the question of whether contracts are illegal as formed, if that can be done in a way which does not involve the statutory definition of an illegal contract;

(b) section 7(3) should be amended to apply the criteria there listed to the nature and extent of relief, as well as to the question of whether relief should be granted in the first place.

3.49 In addition, attention has been drawn to what some have thought to be problem areas but where the need for amendment is less evident.

3.50 By and large, though, the Act seems to have worked well and the indications are that at this stage no major changes are called for.

4

JUDICATURE AMENDMENT ACT 1958— MISTAKEN PAYMENTS[54]

P Watts

SCOPE OF REVIEW

MISTAKEN PAYMENTS AND CONTRACTS

4.01 The law relating to mistaken payments, including that found in ss 94A and 94B of the Judicature Act 1908, has application well beyond mistakes made in the context of a contract between the payer and the payee. A mistake might be made, for instance, in a payment under a supposed statutory obligation, or an equitable one, or in a decision by a payer to make a gift. This means that any review of ss 94A and 94B, let alone the law of mistaken payments generally, would necessarily have application outside the Law Commission's current project to review the contract reform statutes. This difficulty suggests that the Contractual Mistakes Act 1977 is not the place to put a revised version of these sections, let alone a code of the law of mistaken payments, as was given as a possibility for consideration.

4.02 On the other hand, would it be sensible to divide the law on mistaken payments into payments in the performance of a contract

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[54] The paper states the law at February 1991. The annex, which comments on the decisions of the House of Lords in *Lipkin Gorman v Karpnale Ltd*, and *Woolwich Equitable Building Society v Inland Revenue Commissioners*, and the New Zealand Court of Appeal decision in *Re Goldcorp Exchange Ltd* (reported as *Ligget v Kensington*) was written in October 1991. The footnotes to this paper have been added by the Law Commission and incorporate some details of discussion at the March 1991 meeting as well as some comments from Mr D Dugdale made before the meeting.

and payments in other circumstances? This would permit rules dealing with mistakes in the performance of contracts (dealt with in ss 94A and 94B) to be added to those dealing with mistakes in formation (dealt with in the Contractual Mistakes Act 1977).

4.03 Observe that I am not suggesting that rules applying to mistakes in the performance of contracts can be absorbed by those dealing with mistakes in the formation of contracts. Although ss 94A and 94B may, prior to the 1977 Act, have had some application where payments were made under a contract void for mistake, for the reasons set out in paras 4.26 – 4.28 there is now no overlap in the operation of those sections and the provisions of the 1977 Act.

4.04 This raises the question of why a distinction is drawn between the two situations of mistake. The distinction turns on whether or not the plaintiff received consideration for the benefit conferred or apparently promised to be conferred: if so, the 1977 Act will apply, if not, then the common law still applies. In short, it has long been considered that, where the plaintiff has received consideration for the benefit, a stricter remedial regime ought to apply.

4.05 Many reasons are advanced for this, which will not be gone into here, but, quite apart from the desire to promote the security of transactions, the courts have been much less inclined to become involved where, whatever the promisor's mistake, something has at least been received in return for the promise. Further, were a strict stance not taken, it would be very easy for a promisor who is no longer happy with what has been received in exchange, to manufacture a mistake. On the other hand, where the plaintiff's mistaken act has not been the subject of counter-consideration, the benefit conferred will be a windfall for the defendant. In such circumstances the defendant is hanging on to a gift, and, unless the parties are closely related, there is small chance of a plaintiff duping the court by claiming to have been mistaken when really there had been a change of mind; people who are otherwise at an arm's length do not usually act gratuitously.

4.06 Given that the distinction is a valid one, it is certainly not essential that the one Act deal with both situations of mistake. It might be thought that the common factor that the plaintiff and the defendant are both parties to a contract or apparent contract warrants the two regimes being placed together. On the other hand, it may be that to do this will only exacerbate the error into which some

judges have fallen, which is to fail to perceive the distinction, with the consequence that they have contemplated applying the wrong legislative provisions or regimes to the wrong situation (see the discussions by McLauchlan and Rickett, [1989] NZ Recent Law Review 277, Kós and Watts, "Unjust Enrichment—the New Cause of Action" (NZLS Seminar 1990) 104, and Watts [1990] NZ Recent Law Review 348 – 349).

4.07 Further, although the law treats mistakes in the formation of contracts differently from other mistakes, no such distinction has, in general, been drawn between mistakes in the performance of a contract, an equitable obligation, or a statutory obligation. Thus, any addition to the Contractual Mistakes Act 1977 to deal with mistakes in the performance of contracts will not remove the need for ss 94A and 94B; there will instead be duplication.

4.08 Overall, it is suggested that the two situations of mistake should continue to be treated separately. Where it is a mistake in the performance of a contract only which is at issue, both the stricter jurisdictional requirements of the 1977 Act and the wider range of remedies there provided, namely to validate and vary contracts and to grant compensatory sums, are unnecessary.

4.09 It is not recommended that ss 94A and 94B be made part of the Contractual Mistakes Act 1977, even to the extent of dealing in the 1977 Act with mistakes in the performance of contracts only.[55]

REVIEW OR EXTENSION OF SECTIONS 94A AND 94B?

4.10 Another difficulty with the reference has been to determine where to stop once one considers the matters on which ss 94A and 94B have an effect. Certainly, any gaps or infelicities in those sections ought to be remedied, but wider questions arise as to whether the reforms introduced by the sections are good ones and, if so, how far they might be extended.

4.11 It is clear that ss 94A and 94B are not stand-alone provisions. They do not codify the law on mistaken payments, but deal only with two aspects of that law: s 94A abrogates *Bilbie v Lumley* (1802) 2 East 469; 102 ER 448 (payments under mistake of law not recoverable); and s 94B abrogates *Baylis v Bishop of London* [1913] 1 Ch 127 and *R*

[55] See paras 2.17 – 2.21 in the paper on the Contractual Mistakes Act 1977 where the distinction between the two situations of mistake is also considered.

E Jones Ltd v Waring & Gillow Ltd [1926] AC 670 (no defence that one has dissipated or otherwise ceased to benefit from payment).

4.12 Additionally, insofar as s 94B introduces a change of position defence, it applies only to mistaken payments and does not apply to payments vitiated by factors other than mistake. Nor does it apply to benefits conferred other than payments (this latter factor applies equally to s 94A). It is arguable that the change of position defence ought to be available for causes of vitiation apart from mistake (for instance, the analogous restitutio in integrum qualification to the equitable remedy of rescission of contract applies even though the contract was obtained by duress or unconscionability). It may also be desirable to extend the sections to deal with benefits other than payments.

4.13 It is proposed to deal with the alleged shortcomings of the reforms introduced by ss 94A and 94B, before proceeding to the larger issues. Before doing that, one can say that the reforms introduced by the sections have not yet been overtaken by case law developments, although that stage may not be far off.

4.14 There are signs that the old common law decisions which the sections were designed to abrogate are being undermined in various parts of the Commonwealth (as to mistakes of law, see *Air Canada v Attorney General of British Columbia* (1989) 59 DLR (4th) 161 (SCC); *R v Tower Hamlets London Borough Council, ex parte Chetnik Ltd* [1988] AC 858 (special statutory provision); and *Sandvik v Commonwealth* (1989) 89 ALR 213 (Crown as payer always an exception), and as to change of position, see *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1; and *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677). However, these developments are not yet conclusively established as law. I have no wish to argue that the purposes of the reforms in ss 94A and 94B are bad ones.

SHORTCOMINGS OF SECTIONS 94A AND 94B

4.15 The shortcomings of ss 94A and 94B can be divided into two categories: those which plainly undermine the intent of the reformer, and those which arise irrespective of the reformer's intent. The most comprehensive survey of the shortcomings of the sections remains R J Sutton's "Mistake of Law—Lifting the Lid of Pandora's Box", in J F Northey ed, *A G Davis Essays in Law* (1964), 218. Most of these

alleged shortcomings, no longer demand changes to the wording of the sections, if they ever did.

NEED FOR ACTIVE ALTERATION OF POSITION UNDER SECTION 94B

4.16 I suggest that there is only one defect in either section which plainly needs correction. It is not on Professor Sutton's list, although it has been picked up in Goff and Jones' brief comments on the sections (see *The Law of Restitution* (3rd ed), 693 – 694). The change of position defence instituted by s 94B applies only where the recipient has taken active steps following the payment. The current wording does not extend to circumstances where the defendant has failed to do something in reliance on the validity of the payment. This results from the natural meaning of the phrase "has so altered his position in reliance on the validity of the payment", and the construction is supported by the Court of Appeal judgments in *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1. This case did not involve the construction of s 94B, but of the nearly identical defence found in s 311A(7) of the Companies Act 1955 (in respect of voidable securities and the recovery of voidable preferences).

4.17 This distinction between active and passive steps is unjust. For example, s 94B would not apply to the circumstances in *Atlantic Coast Line Ry Co v Jacob Schirmer & Sons* 69 SE 439 (1910) where the mistaken payer's negligence, in taking so long to discover the fraud of the third party which had caused it to make the payment to the defendant, meant that the defendant had lost its chance to trace the whereabouts of the fraudulent third party, its customer.

4.18 More difficult is the situation, instanced by Goff and Jones in criticising the New Zealand provision, where the defendant, having just received the payment, has the cash or cheque stolen. Arguably, the bad luck of the defendant in this case may have only a chance connection with the payment; what if the plaintiff's notes were in the defendant's left pocket, and the same number of notes were in the defendant's right pocket, and this time the thief took the notes in the right pocket? Certainly, the defendant would have a stronger case if the sum received from the plaintiff was out of all proportion to the sum which the defendant would normally have been holding at the time.

4.19 If the phrase "has so altered his position" were replaced with "his position has so altered", the problem exemplified by the *Atlantic Coast Line* case would be overcome, but not that instanced by Goff and Jones. To encompass the latter situation, including the instance of the large sum which the defendant would almost certainly not have had in a place where it might be stolen, the words "in reliance on the validity of the payment" would have to be removed as well. Those words are there to counteract suggestions that, where it was known that the payment resulted from a mistake the defendant might nonetheless spend the payment and claim the change of position defence, or that changes of position which have no connection with the payment might be relevant.

4.20 These points are adequately met by the defendant always having to show that the change of circumstance makes it "inequitable" for a court to grant relief to the plaintiff, thereby leaving to the courts' good sense the exclusion of defendants who knew, or ought to have known, of the mistake (see paras 4.44 – 4.47), or whose circumstances have changed for reasons which have nothing to do with having received the payment: see *Hydro Electric Commission of the township of Nepean v Ontario Hydro* (1982) 132 DLR (3d) 193, 216, where it was held that the poverty of the defendant was insufficient; but contrast, however, *Menzies v Bennett* (unreported, Supreme Court, Napier, 14 August 1969, Beattie J) noted R J Sutton "Case and Comment—More on Money Paid under Mistake" [1970] NZLJ 5. The essence of the defence was stated by Somers J in *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12, 17 (another case on s 311A of the Companies Act) as being one where: "to order repayment would leave the original recipient in a worse position than if he had never received the money at all". Consideration might be given to putting these dicta into statutory form, but it is submitted that less major rephrasing of the existing wording is sufficient.

4.21 Section 94B should be amended by removing the phrase "so altered his position in reliance on the validity of the payment" and replacing it with "his or her position has so altered since the [payment]".[56]

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[56] Professor Sutton, at the March 1991 meeting, emphasised the principle of unjust enrichment which underpins the section. If the payment did not enrich the payee, then the fundamental element of an unjust enrichment claim would dissipate.

SECTION 94A DOES NOT EXPLAIN WHAT IS MEANT BY A "MISTAKE"

4.22 The first of Professor Sutton's criticisms of the sections (222 – 223) is that s 94A does not define what is meant by "mistake". He points out that, in most cases where the courts formerly denied relief to a plaintiff on the grounds that any mistake alleged was merely one of law, the plaintiff was in all events indifferent to the true state of the law at the time the payment was made. He then suggests that it is likely that the courts will take the view that s 94A covers these situations of indifference (223). With respect, although there have been no New Zealand cases on s 94A, I very much doubt that the courts will do that. To include cases of indifference would be a fundamental error, and would be inconsistent with the rule of restitution that a payment made to settle an honest claim is irrecoverable.

4.23 It is suggested that the concept of mistake in s 94A (as mutatis mutandis it is in respect of mistakes of fact) encompasses:

- advertence to, but miscomprehension of, the law by the payer where the payer has no reason to know that the payee may have a different view of the law;
- absolute inadvertence by the payer to the question of law.

It will not cover advertence and indifference, or advertence then payment despite knowledge that a different view of the law is held by the payee. It is admitted that deciding into which category a particular payment falls will turn on nice questions of the state of the respective minds of the payer and the payee, but the principle is clear. Nonetheless, this is not to say that there ought not to be an exception to this principle where the payee, who is known to have a different view of the law, is the Crown or a public authority. This situation is discussed in paras 4.64 and 4.65.

4.24 It is suggested that it is not necessary to amend s 94A to make it clear that indifference by a payer or payments made to settle a bona fide claim will not be within the concept of mistake of law. The New South Wales Law Reform Commission in its recent report, *Restitution of Benefits Conferred under Mistake of Law* (Report LRC 53, July 1987, 46, and 53 – 54), seemed content to think that the New

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Mr Dugdale, before the meeting, drew the distinction between a payee's omission and the acts of the third parties. He observed that the section should include the payee's omission. But there was no justification for extending the section to the acts of third parties, as in the pickpocket example.

Zealand wording would not cover situations where there was indifference or settlements of bona fide legal disputes.

4.25 It is not necessary to clarify what is meant by mistake in s 94A.

UNCERTAIN APPLICATION OF SECTIONS 94A AND 94B TO MISTAKES IN THE FORMATION OF CONTRACTS ETC

4.26 Professor Sutton next makes a case that s 94A might have application in a number of contexts other than the action in money had and received, including payments made under an illegal contract, a contract formed by mistake (including bonds given by mistake), or a contract induced by misrepresentation (223 – 230). Since he expressed these views, of course, the Illegal Contracts Act 1970, the Contractual Mistakes Act 1977 and the Contractual Remedies Act 1979 have been passed. Insofar as Professor Sutton was correct in his views (for a different view, see the earlier commentary by B J Cameron "Payments Made Under Mistake—Judicature Amendment Act 1958" (1959) 35 NZLJ 4, 5), these statutes, if they do not each exclude the possibility of the use of ss 94A and 94B in similar circumstances, remove any incentive for the courts to use them. Although I shall take up in the next paragraph a small point about the Contractual Mistakes Act, I do not perceive the need for any amendment to ss 94A and 94B. The other situations Professor Sutton refers to, namely the rule in *Ex parte James* (1874) LR 9 Ch 609, estoppel cases, and credits in account, either do not seem to need clarification or they can be dealt with incidentally as part of other changes that might be made to the sections.

4.27 To the extent to which the law of contract holds that a contract affected by mistake is void, it seems that the right of a payer to recover money paid in such circumstances was formerly based on the old action in money had and received (see *Chitty on Contracts* (1989), 227 – 231, 244 – 245). It would follow that, before the passing of the Contractual Mistakes Act 1977, ss 94A and 94B probably had a role to play in these cases. That is no longer the case because s 5 of the 1977 Act would appear to abrogate the use of the action in money had and received in these circumstances. Since ss 94A and 94B do not create causes of action, but are dependent on the common law actions, their operation must fall with the common law to the extent that the 1977 Act applies. This is not to say, of course, that the 1977 Act has in any way affected ss 94A and 94B; the sections have nothing on which to operate in these cases. The savings provision in respect

of ss 94A and 94B found in s 5(2)(d) of the 1977 Act is really only useful because the wording of s 5(1) is not expressly restricted to mistakes in the formation of contracts. If s 5(1) were so expressly restricted, then it would be a good idea to remove s 5(2)(d), which may be a source of confusion to the unaware.

4.28 There is no pressing need to state to what situations of mistaken payment or to what causes of action ss 94A and 94B apply. Section 5 of the Contractual Mistakes Act 1977 might be tidied up to make the relationship between the two sets of provisions clearer.

NO RECOVERY UNDER SECTION 94A WHEN LAW WAS COMMONLY UNDERSTOOD TO REQUIRE THE PAYMENT

4.29 Section 94A(2) excludes from the operation of subs (1) payments made at a time when the law either required the payment or was commonly understood to require the payment from the preceding sub-section. The phrase "commonly understood" is inherently vague. This is not, of course, a "defect" which might defeat the intention of the drafter; it was a deliberate choice of wording (see Cameron (1959) 35 NZLJ 4, 5). It seems obvious that a payer does not make a mistake of law if the law is as assumed at the time of payment. The difficulty was to deal with reversals of common law rulings by appellate courts. Is a decision of an appellate court which overrules a series of first instance decisions "changing the law", or is it merely declaring the true law? The drafter is also likely to have been concerned about the possibility of a flood of litigation following a court decision which disabuses a common notion of what the law was.

4.30 The common understanding exception is problematic. Its unsatisfactory aspects indicate that it ought to be removed, but it may be that some other provision is necessary to replace it. The major difficulty with the concept is its vagueness. This vagueness makes it difficult to avoid arbitrary assessments of when relief is not available, and the phrase is not certain to preclude a flood of litigation should the public suddenly perceive a widely, but far from universally, held mistake of law. Further, the fact that a claimant's error of law is widely held does not of itself seem to make that claim less meritorious than that of a person who makes an idiosyncratic error.

4.31 In relation to the vagueness of the phrase, Professor Sutton asked, "would a single decision of first instance, or the 'better view' of

a series of conflicting judgments, or a long-held opinion of a text-writer, come within those words?" (223). What if, in relation to a public levy, numerous people have expressly doubted the lawfulness of the levy, while still paying it? Is there a common understanding in these circumstances? What if a Court of Appeal decision overrules an earlier first instance case, a payment is then made consistent with the Court of Appeal decision, and that ruling is within six months itself reversed or overruled by the Privy Council? In other words, does a recent decision of an appellate court instantly create a common understanding?

4.32 An example of the subtlety of the common understanding test is *Bell Bros Pty Ltd v Shire of Serpentine-Jarrahdale* [1969] WAR 155 (the only case under a parallel provision to s 94A of which I am aware, it was reversed on appeal on other grounds—see (1969) 121 CLR 137), where the Court thought credence should be given to the views of practising lawyers, appropriate government officials working in the relevant field, and so on to determine whether the error of law was widely held. The New Zealand wording has been criticised by the Law Reform Commission of British Columbia, the Law Reform Committee of South Australia, and the NSW Law Reform Commission (see the NSW LRC Report, 51 – 56).

4.33 On the other hand, the mischiefs which the phrase was designed to overcome may be real ones, so that merely removing the phrase may not be altogether satisfactory. I have no doubt that the prospects of a flood of litigation where a court disabuses the public of a widely held error of law can be overstated. Where the error is widespread, many payers will not be mistaken, but will be either indifferent as to the true state of the law or making the payment in the face of a known different view of the law held by the payee (see paras 4.22 and 4.23). Further, limitation periods will provide a measure of protection to payees (although there are difficulties in respect of restitutionary proprietary claims—see para 4.77). However, it is not at all clear that the change of position defence in s 94B will always protect a payee. Where the payer's payment is small, but one of a very large series of payments, it seems unlikely that the payee will be able to argue alteration of position as a result of the very payment of the payee; the reliance on the payment is cumulative with other payments, and may have taken place in anticipation of the payment and not after it.

4.34 In many cases, the payee will be the State or a public body which has the power to alter the relevant law with retrospective effect, and protect itself that way, or otherwise may be authorised to increase the charges payable by its constituents to cover the fact that it has to make a large number of refunds. In this respect, it is noteworthy that s 409 of the Income Tax Act 1976 provides for refunds of tax paid which was not properly payable, without reference to any difficulties that may result for the Government. All the same, it might be thought that payees ought to be protected from the disruption which might occur when their error of law is shared by many payers. Rather than merely relying on the "common understanding" bar (which would protect the payee when it had not relied on the validity of its apparent right to the payment, and may not protect the payee where the error of law is not universally held), it would be more efficacious to have a change of position defence which covered the situation.

4.35 The difficulty with extending s 94B to cover changes of position taken in anticipation of a series of payments is that it works arbitrarily against the poor payers who are unlucky enough to have paid before the mistake is discovered. Unless the circumstances are strong enough to justify an estoppel, I doubt whether the law ought to allow a defence to a party which has acted in anticipation of a series of payments. It is conceivable that a payee might have incurred very large expenditure in anticipation of the payments. At least in relation to public bodies, it is inconceivable that payees would be obliged to continue making payments once the mistake of law became known, and, if so, it then becomes unfair to preclude the persons who have paid from recovery. There are competing considerations, but, on balance, I do not recommend any change to s 94B, but still advise the removal of the "common understanding" exception.

4.36 This still leaves the question, when is there a change in the law such that the payer's payment was required by law rather than being made under a mistake? There are two situations of difficulty: first, where there is a change in statutory wording, but it is not clear whether the legislature is merely clearing up a doubt as to the meaning of the earlier provision; and secondly, where a court declines to follow without distinguishing an earlier court's decision on a question of common law (it is not possible, of course, for a court to change a

statutory rule, even when it declines to follow an earlier court's construction of the rule). The second of these cases raises the declaratory theory of case law.

4.37 It might be thought desirable to adopt a clear rule as to when there is a change in case law, such as by providing that it is only where the Court of Appeal or the Privy Council consciously decides to overrule an earlier decision of its own that there is a change of law. This would still leave it to the court which is hearing a case under s 94A to determine whether a change in statutory wording was merely clarifying the earlier position, or changing it. It may be that it is simpler merely to allow the courts to determine when there is a change in the law in both circumstances of difficulty. This was the recommendation of the NSW Law Reform Commission (55 – 56). It is doubtful whether it is necessary that the statute provide that there can be no recovery for mistake of law where the law was as it was assumed at the time of payment. If the "common understanding" part of s 94A(2) is to be repealed, the whole subsection could safely be removed.

4.38 The exception to recovery in s 94A(2) based on common understandings of the law should be removed. In that case the entirety of the subsection could be removed.[57]

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[57] Mr Dugdale in commentary prior to the meeting (and commenting on an earlier draft of the paper) offered an alternative treatment of the exception to recovery in s 94A(2). His comments are set out in full:

> What the Act seems to say at present is that the payer can recover if he makes his payment under an error peculiar to him but not if the payment is made pursuant to communis error. It is difficult to see that this distinction can be sustained on any basis other than expediency. The situation is not improved by the opening words of s 94A(2) which seem to imply that payments are made pursuant to a mistake of law but the remedy is not available when the true position is simply that there was no mistake. I am inclined to agree that the reference to common understanding should be done away with and I would like the point made in the previous sentence addressed so that subs (2) would read something like this:
>
> > For avoidance of doubt it is expressly declared that a payment is not made under a mistake within the meaning of this section if made at a time when the law requires or allows the payment to be made or enforced notwithstanding that the law may have changed subsequently to such payment.
>
> This leaves unresolved the question of whether or when the law is changed when the change results from a judicial decision or decisions. I would be tempted to take the coward's way out and leave that for the courts to resolve.

4.39 Professor Sutton was of the view that the power in the court, to decline relief where the payee has changed position in circumstances making it inequitable to grant relief in whole or in part, was too wide, such that the "court is left merely making [sic] ex gratia payments with other people's money" (243). The leading case on the section, *Thomas v Houston Corbett & Co* [1969] NZLR 151, decided subsequent to Sutton's article, has in the eyes of many confirmed the dangers of the discretion. Even Goff and Jones (in their 2nd ed, 546; a passage removed in their 3rd ed) considered that decision a difficult one and a generous application of the statutory discretion. The decision was also thought to go too far by the NSW Law Reform Commission and the Law Reform Commission of British Columbia (see the NSW LRC Report, 58 – 61).

4.40 The facts of the *Thomas* case are well known. Very briefly, the respondent law firm made a mistaken payment to the appellant, the mistake having been induced by the fraud of one of the firm's employees. The appellant, in turn also defrauded, passed part of the payment on to the fraudulent employee. The appellant claimed the s 94B defence in respect of the moneys passed on. The payee could show that he had lost some of the moneys in circumstances that, if he was ordered to make repayment, would leave him in a worse position than if he had never received the payment. However, the Court took the view that that was not sufficient in these circumstances. It decided that both parties ought to bear some responsibility for the loss of the funds to the fraudulent party, and after some difference of view, resolved to apportion fault on the basis of two thirds to the payer and one third to the payee.

4.41 While I am uncertain about the apportionment which the Court undertook in *Thomas*, I am content that the Court should have imported concepts of contributory negligence, or applied a principle which says that where two parties have been the subject of a common fate it is just that they share the resulting loss. This is not to say that the wide discretion conferred in s 94B is needed. It might be possible to flesh out the discretion by listing relevant factors. However, on balance, I do not think that the discretion in s 94B is dangerous. After all, the uncertainty it creates affects only litigants, which is not as bad as uncertainty in the law which affects parties who otherwise have to arrange their affairs. In other words, the rules of restitution do not usually create planning problems because they operate outside the

intentions of the parties, and they give way to any express planning by way of contract which the parties may have undertaken. Further, the discretionary power is certainly no less desirable than the powers found in the Illegal Contracts Act, the Contractual Mistakes Act and the Contractual Remedies Act (as for the uncertain scope of the Fair Trading Act 1986, I prefer not to comment).

4.42 The discretion conferred by s 94B should not be removed or narrowed.

RELATIONSHIP BETWEEN SECTION 94B AND SECTION 51 OF THE ADMINISTRATION ACT 1969

4.43 If one thinks that the Judicature Act 1908 is an obscure place to find provisions relating to the law of mistaken payments, almost as obscure is s 51 of the Administration Act 1969, which appears to apply not only to the estates of deceased persons but also to inter vivos trusts. The section contains a change of position defence similar to s 94B, in respect of equitable and statutory tracing claims arising out of the misdistribution of assets by an administrator or trustee. Although the long title to the 1969 Act refers to the consolidation and amendment of earlier statutes dealing with the estates of deceased persons, and the heading to the part of the Act in which s 51 makes a similar reference, the precise wording of s 51 and the preceding sections suggests that they must apply also to inter vivos trusts. In all events, there is some degree of overlap with s 94B, insofar as s 94B clearly applies to mistaken distributions of trust property.

Section 51

51. Restriction on following assets—In any case where an administrator or trustee has made a distribution of any assets forming part of the estate of any deceased person or subject to any trust, relief (whether under subsection (1) of section 49 of this Act or in equity or otherwise) against any person other than the administrator or trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, may be denied wholly or in part, if—

(a) The person from whom relief is sought received the assets or interest in good faith and has altered his position in the reasonably held belief that the distribution was properly made and would not be set aside; and

(b) In the opinion of the Court it is inequitable to grant relief or to grant relief in full, as the case may be.

4.44 It will be seen that the only differences of substance between s 51 and s 94B are: first, s 51 would apply not only to mistaken misdistributions of trust property but also to deliberate misdistributions of trust property, and secondly, the recipient has to have altered position in the reasonably held belief that the distribution was properly made. The first of these differences relates only to whether the scope of s 94B might not be made wider, and is returned to in paras 4.73 and 4.74. The second difference raises the question of whether the defendant's belief in an entitlement to the payment needs to be reasonable under s 94B. I think that the answer is yes. Given that the test always ought to be, what would a reasonable person in the position of the defendant have believed, it seems sound in principle to deny the payee the change of position defence if that standard has not been met. Furthermore, a recipient for value of assets transferred in breach of fiduciary duty needs to show that there was no actual or constructive knowledge (see *Westpac Banking Corp v Savin* [1985] 2 NZLR 41). There is much to be said for having a consistent test for all these situations.

4.45 Two further questions remain. First, should s 94B be amended to expressly provide that the payee must change position in the *reasonably held belief* as to an entitlement to the payment? And, secondly, should the overlap between s 94B and s 51 be removed? As to the first question, I think the answer is "no" if the example envisaged in paras 4.19 and 4.20 is to fall within s 94B. The person who receives a mistaken payment knowing of the mistake, but who has it stolen (without negligence) before there is an opportunity to return it, would fall outside the section if these words were added to s 94B. The answer to the second question may depend on whether ss 94A and 94B are generally extended in their application. If these sections are to remain limited to situations of mistake, then s 51 would still have a role to play in respect of deliberate misdistributions of trust property. At the same time, irrespective of whether or not s 51 might be shorn of its application to mistaken distributions of trust property, its wording ought to be brought into line with the wording of s 94B, as amended by the suggestion in para 4.21. If that occurred, there would be little harm in having two statutes covering the same situation. Consideration might also be given to moving s 51 and the preceding sections to the Trustee Act 1956.

4.46 It can be remarked here that the wording of s 51, requiring the defendant to change position in the reasonably held belief of entitlement to the payment, occurs in other legislation. These provisions too might be altered to provide a format consistent with that proposed for s 94B of the 1908 Act. A list of relevant provisions is: s 311A(7) of the Companies Act 1955; clause 48(1) of the Companies Bill; s 58(6) of the Insolvency Act 1967; and s 6(b) of the Contracts (Privity) Act 1982. (The list does not claim to be exhaustive.)

4.47 No changes need to be made to s 94B to deal with the overlap with s 51 of the Administration Act 1969. Consideration ought to be given to the wording of s 51 and to whether, if there is not to be a complete rationalisation of the statutes, s 51 and the sections preceding it might not be better placed in the Trustee Act 1956. Other statutory change of position defences might be brought into line with the proposed amended s 94B.

RELATIONSHIP BETWEEN SECTION 94B AND OTHER COMMON LAW DEFENCES

4.48 As already stated, s 94B is not a code of defences to mistaken payments. In particular, two other defences should be considered here: they are estoppel and the bona fide purchase defence.

Estoppel

4.49 It is clear that at common law a payer can by estoppel lose the right to recover a mistaken payment. One peculiar advantage for a payee, which this defence may have over s 94B, is that the payee may have a complete defence even if only part of the funds have been dissipated as a result of the plaintiff's representation of entitlement (see *Avon County Council v Howlett* [1983] 1 All ER 1073; and *Hart v Frontino & Bolivia South American Gold Mining Co Ltd* (1870) LR 5 Ex 111, discussed by Sutton, op cit, 241). This difficulty might be overcome by making s 94B the only defence in actions to recover mistaken payments. However, that would involve a partial tinkering with the doctrine of estoppel. The better solution would seem to be to hope that the dicta in the estoppel cases are ultimately found to be wrong, or, if necessary, to pass a separate statutory provision applying to estoppels generally.

Bona fide purchase defence

4.50 Situations of mistake involving three parties can throw up extremely difficult problems. The bona fide purchase defence operates in this situation. It is probably not a true defence but the assertion of a contract between the payer and the payee, which if it is vulnerable at all must only be so under the Contractual Mistakes Act 1977.

4.51 A classic illustration is *Porter v Latec Finance (Qld) Pty Ltd* (1964) 111 CLR 177. In this case, both Porter and Latec, in that order, had separately provided funds to a fraudulent third party, L H Gill. Both parties thought they were providing the funds to H H Gill, the honest but hapless father of L H Gill, who owned some land. L H Gill had by forgery purported to give each of Porter and Latec a mortgage over his father's land. Latec, instead of paying all its loan funds direct to L H Gill, paid part of them to Porter in order to discharge the assumed loan made by Porter and to obtain a discharge of what was assumed to be Porter's mortgage. Of course, Porter did not get a valid mortgage, and neither did Latec. Latec claimed back the payment to Porter on the basis of money had and received under mistake. The majority of the High Court of Australia denied Latec's claim on the basis that, even if there was not a binding contract of loan between Porter and L H Gill (because of mistake as to identity and not merely as to attributes, sed quaere), there was a quasi-contractual debt between them, which L H Gill authorized Latec to redeem on his behalf.

4.52 Two slightly different views appear in the judgments of the majority judges (Barwick CJ, Owen and Taylor JJ). First, all three judges were of the view that, because there was a debt (albeit quasi-contractual) owed by L H Gill to Porter, which L H Gill authorised Latec to discharge, Latec did not make the payment on its own behalf, but on behalf of L H Gill. The explanation for this holding is not altogether clear. It may be that there is a bare rule of law that, if an agent makes a payment on behalf of the principal with the principal's authority, then the recipient can always keep the funds, even when the funds came not from the principal but the agent. But perhaps the better view is that there is an executed contract between the payer/agent and the creditor/payee by which the payment is made from the agent's own funds in return for the creditor discharging the debt. It seems that, unless the payer intends to take an assignment of the debt between the creditor and the third party, no consideration

will pass from the creditor to the payer unless the debtor is also content that the debt be discharged. (See *Barclays Bank v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677. The point is controversial; for literature on the subject see Kós and Watts, 110, note 28.) On the facts of the *Porter* case, Barwick CJ also found an additional item of consideration passing between Porter and Latec which confirmed for him a contract between them. That item was the express request by Porter for Latec to discharge its apparent mortgage.

4.53 In New Zealand it would follow that on either analysis any relief from a restitutionary claim would have to be sought under the Contractual Mistakes Act 1977. This may be just as well, because if the payer, in circumstances such as those in *Porter*, can proceed within the ambit of the 1977 Act the discretionary powers might enable the court to share the losses of the fraud between the two parties. The discretion in s 94B could not achieve such loss-sharing, because it is hard to see how Porter's position had changed following the payment.

4.54 It is not recommended that there be an attempt to put into statutory form the relationship between s 94B and estoppel and the bona fide purchase defence.

EROSION OF SECTION 94B BY OTHER LEGISLATION

4.55 Section 182 of the Customs Act 1966 provides for the Collector of Customs to recover from a taxpayer refunds made to that taxpayer in error, whether the error was one of fact or law. It provides, however, for a three year limitation period unless the taxpayer was fraudulent. A virtually identical provision was formerly found in s 55 of the Sales Tax Act 1974, now repealed.

4.56 In *Campbell v Phillips* (1982) 6 NZTC 61,873, O'Regan J held that s 55 of the 1974 Act was a code to which s 94B of the 1908 Act did not apply. He reached this conclusion on the basis that another quite unrelated section of the 1974 Act made reference to s 94A, which made the silence about s 94B appear deliberate, and on the basis that several other Acts expressly make themselves subject to s 94B (such as the then Accident Compensation Act 1972). One might add that perhaps stronger points in favour of the Judge's conclusion were that the reference to errors of law within the section itself indicated that the drafter did not intend to rely on ss 94A and 94B, and that the shorter limitation period was intended to be a

substitute for the change of position defence. Nonetheless, s 94B is clearly capable of covering mistaken payments by Crown officials in performing statutory duties (the First Schedule of the Crown Proceedings Act 1947 applies the relevant part of the Judicature Act to the Crown), and there does not seem any reason to free the Crown from the section. This does not entail a change to s 94B, but a change to the Customs Act (and any other similar provisions there may be) should be made.

4.57 Section 182 of the Customs Act 1966 should be made subject to s 94B.

POSSIBLE EXTENSIONS OF SECTIONS 94A AND 94B

4.58 A number of things could be done towards putting other matters to which ss 94A and 94B relate into statutory form. I propose here to raise the possibilities for the purpose of discussion. I have not had time to formulate considered recommendations on most of these issues. I start with the more minor possibilities.

EXTENDING SECTIONS 94A AND 94B TO BENEFITS OTHER THAN MONEY

4.59 One of the criticisms of Professor Sutton was that ss 94A and 94B apply only to payments (242). This restriction can seem arbitrary. It is possible, for instance, that title to goods might be transferred under a mistake. An oft-quoted example is of the buyer who purchases 125 cans of fruit, and then returns five of them to the seller, having mistakenly counted 130 cans. The relevant mistake there is one of fact, but it is conceivable that a mistake of law could also cause the transfer of title to chattels. Even more likely, it may be that the recipient of the chattel has altered position in reliance on the mistaken transfer, and wishes to rely on a defence similar to that in s 94B. One situation where a mistaken transferor might seek proprietary remedies is where, by mistake of law, a mortgagee discharges its mortgage security (the underlying debt will be discharged only if the discharge was by deed or there was accord and satisfaction), or a lienholder releases possession of the chattel. Again the transferee may wish to plead change of position.

4.60 The NSW Law Reform Commission, following similar recommendations from the earlier reports in British Columbia and South Australia, recommended the extension of ss 94A and 94B to benefits other than money (47 – 49). However, it included within its concept

of "benefit" not only money, the crediting of an account, and the transfer of any real or personal property, but also the performance of any service. Restitutionary recovery for services is more complicated than recovery of other "benefits", for the reason that unrequested services are not usually an enrichment in the first place (see Kós and Watts, 127 – 147). And, if the recipient can be found to have freely accepted them, it will be unusual then that a defence of change of position will be justifiable. Further, it now seems that a recipient can become estopped when the services (or mere work) performed were performed under a common mistake of law (see *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133).

4.61 On the other hand, if one is going to include services within the sections, then it may be that mere unrequested work which incontrovertibly benefits the defendant ought also to be included. Indeed, it may be that there is more need for the change of position defence to the restitutionary claim for incontrovertible benefit (for a discussion of the need for a change of position defence to incontrovertible benefit claims, see Kós and Watts, 146 – 147). Thus, on the assumption that Lord Denning MR's judgment in *Greenwood v Bennett* [1973] 1 QB 195 is rightly decided, a plaintiff might have a cause of action having deliberately improved the market value of a chattel on the mistaken basis of ownership. It may be just to allow the owner a defence if the chattel is stolen or accidentally destroyed before the plaintiff recovers for the enrichment (if the owner is unlucky enough to lose it after having paid out the plaintiff, then the loss must surely fall on the owner alone).

4.62 After some hesitation, I have concluded that there are unlikely to be dangers in extending ss 94A and 94B to cover benefits other than money (including services) conferred under a mistake. The extension ought also to include work which confers an incontrovertible benefit on the defendant.

4.63 There is a case for extending ss 94A and 94B to cover benefits other than money. If services are to be included so too should unrequested work which confers an incontrovertible benefit.

RECOVERY OF MONEYS PAID TO CROWN AND PUBLIC BODIES WHERE NO "MISTAKE"

4.64 As alluded to in para 4.23 above, there will be no relevant mistake within s 94A where the plaintiff has received a demand from

the defendant, adverts to the relevant question of law, correctly doubts if the payment is due, but nonetheless meets the demand. This is the voluntary settlement of a demand. Nor is there usually any possibility of the plaintiff succeeding in duress if the demand goes no further than a threat to bring civil proceedings to recover the alleged debt. These rules have long been regarded as applying equally to the Crown as to private citizens (for recent judicial discussions see *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1989] 1 WLR 137[58], and *Air Canada v Attorney-General of British Columbia* (1989) 59 DLR (4th) 161, (SCC)). Professor Birks and others have argued persuasively that at least the Crown ought to be subject to a separate rule (for his most recent published article on this topic where the writings of others are collected, see P B H Birks, "Restitution from the Executive: A Tercentenary Footnote", in P D Finn ed, *Essays on Restitution* (1990), ch 6. The reasons for arguing that any payment not actually lawfully due to the Crown should be recoverable include those that the Bill of Rights 1688 was designed to protect the subject from demands for money by the State not supported by law, and that demands by the Crown are inherently coercive.

4.65 One might query whether the Crown's position is any more coercive than that of a private concern which has unlimited resources to take its claim to court. Nonetheless, insofar as the power to apply statutory penalties for late payment is not seen as coercive (see *William Whiteley v R* (1909) 101 LT 741), the Crown is in a special position; the payer has to weigh the chances of succeeding very carefully because, should the claim that the money is not payable fail, the payer may end up paying not only the demand but also penalties for late payment. There are other obscure iniquities in respect of state demands too, such as the suggestion that payments made to the state or statutory body in order to obtain a licence which in law one does not strictly need are not recoverable (see *Bell Bros Pty Ltd v Serpentine-Jarrahdale* (1969) 121 CLR 137).

4.66 Although there is some force in the counter-argument that a broad rule which permits recovery of all ultra vires payments to public bodies could prove disruptive of public finances, this does not outweigh the case for implementing the broad rule. In fact, ultra vires

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[58] And note also the annex, which discusses the Court of Appeal and House of Lords appeals from this decision at the end of this paper.

demands which *do* currently amount to duress colore officii can lead to the body having to make refunds which are equally disruptive to public finances. And in any event, the public bodies ought to be adequately protected by any of:

- the change of position defence;
- the ability to strike a new and lawful levy; or
- ready access to Parliament to obtain a change in the law if necessity requires it.

4.67 Consideration should be given to implementing a provision which makes prima facie recoverable all payments made in response to demands by public bodies where the payments were not in fact lawfully due.

EXTENSION OF SECTION 94B TO SITUATIONS OTHER THAN MISTAKE

4.68 Goff and Jones (691 – 699) and Birks, *Introduction to the Law of Restitution* (410 – 415) argue for a change of position defence which is applicable to restitution claims generally. The US *Restatement of Restitution* in para 142 (set out in Goff and Jones, 691) has the following general provision:

(1) The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.

In fact, the need for such a defence outside the situation of mistake is probably less pressing than with mistake. This is because, while the recipient of a mistaken payment can be quite innocent, in most other situations involving involuntary payments the defendant payee will have few merits. So, a change of position is unlikely to appeal to a judge who has found that the defendant exercised duress to obtain the payment, and a fortiori if the defendant stole the money. Yet, where the benefit received by the defendant is not money but a contract, even a defendant who has exercised duress, undue influence or fraud is not precluded from defending an order for rescission on the ground that restitutio in integrum is not possible (see *The Atlantic Baron* [1979] QB 705; *O'Sullivan v Management Agency & Music Ltd* [1985] QB 428; and *Spence v Crawford* [1939] 3 All ER 271).

4.69 One might doubt that the mere provision by the defendant of consideration in these cases is sufficient to explain the presence of

defences to the restitutionary claim. Further, there is New Zealand authority that the defence of an agent to the action in money had and received, that the money has been paid to the principal (which may be a type of change of position defence), can apply in duress claims—see *W M Bannatyne & Co v Carter* (1901) 19 NZLR 482. And finally, in respect of restitutionary claims based on wrongful taking of money where the defendant is an innocent recipient from the original miscreant, there is a defence where consideration has been provided without actual or constructive knowledge of the wrongdoing of the predecessor in title (see paras 4.43 – 4.44). Note that this defence will not avail in respect of chattels; the nemo dat quod non habet rule will allow the owner to sue an innocent party in tort. Unless the nemo dat rule is to be abrogated, care would have to be taken in extending the scope of s 94B, to ensure that the current bounds of the torts of conversion and detinue remained unaffected.

4.70 Quite apart from restitutionary claims based on involuntariness (ie, mistake, duress and taking without consent), there is a case for a change of position defence in respect of restitutionary claims based on failed conditions. Thus, if money or other property is transferred deliberately, but on the basis of conditions or assumptions which are either known to the recipient or in circumstances where the defendant was ignorant that even the property had been transferred, then the benefit can usually be recovered if the conditions cease to be met. This is the (total) failure of consideration rule, which finds an equitable equivalent in the resulting trust (see Kós and Watts, 15 – 17 and 26 – 30).

4.71 There must be a strong case for arguing that, if the money or other benefit is lost or destroyed before the conditions fail or the assumptions are dashed, the defendant ought to have complete or partial defence. There is some evidence that the plaintiff in a total failure of consideration case must indeed be able to restore the defendant to the position prior to transfer in order to obtain relief (see eg, *Hunt v Silk* (1804) 5 East 449). However, these cases are better treated as cases where the plaintiff has itself received an enrichment which can no longer be returned to the defendant (see Birks *Introduction*, 417).

4.72 Consideration might be given to implementing a general change of position defence to restitutionary claims along the lines of that found in the US *Restatement of Restitution.* Unless the nemo dat

rule is to be removed, it would need to remain clear that the scope of restitutionary claims did not include tortious ones.

CODIFICATION OF THE LAW OF MISTAKEN PAYMENTS

4.73 I have left until last the idea that the whole law of mistaken payments might be codified. This ordering reflects, with the attention I have been able to give the matter so far, what I consider are priorities for further reform. It will be observed that two of the preceding suggestions for reform are inconsistent with merely extending ss 94A and 94B to codify the law of mistaken payments. These are the suggestions that the sections might be extended to apply to benefits other than money, and that the change of position defence in s 94B might be applied to all restitutionary claims.

4.74 Putting aside these earlier suggestions, what might be gained by codifying the law of mistaken payments, and what difficulties might there be? The core of the old action for money had and received is, at least on the face of things, fairly straightforward and could easily be stated in statutory form. According to *Thomas v Houston Corbett & Co*, recovery should follow where a payment has been made and the payment would not have been made but for the mistake. A statutory statement might make the law more accessible, although I doubt if there is a pressing need for this in respect of the law on mistaken payments.

4.75 The apparently simple core of the right to recover mistaken payments is, however, somewhat deceptive. The *Thomas* formulation did discard a number of ingredients which had appeared from time to time (including the need for a shared mistake, cf contractual mistakes), but there remain two others which may still be applicable. These are that the mistake must be fundamental, and that the mistake must be one which, had the facts been as the payer supposed, would have created a legal liability to make the payment. These additional ingredients have come under judicial and academic criticism in recent times (see Kós and Watts, 107 – 109). As there is an old New Zealand Court of Appeal decision which supports the mistake as to liability point (*Weld v Dillon* (1914) 33 NZLR 1221), it may be useful to abrogate this ruling by statute.

4.76 However, caution might be needed before we take the final step of removing the concept of fundamentality. Although it is suggested that the liability point ought to go, it does not follow that all

mistaken gifts ought to be recoverable. It may be that the concept of fundamentality continues to be useful for shutting out undeserving plaintiffs. Thus, even where a donee has not disposed of money, it may be just that the funds can be retained by the donee, and that a donor should not be able to reopen gifts because of a change of mind on the pretext of some mis-estimation. An example might be the gift by the aunt to the niece at law school. The aunt wants to recover the money when the niece suddenly decides to throw in her law studies to pursue her communist beliefs, which were unknown to the aunt. I am arguing that mistakes as to the personal attributes or beliefs of a donee ought not normally to justify recalling a completed gift. This may be the only qualification I would want to make in respect of gift recovery, but caution suggests that there may be other qualifications so that the admittedly vague concept of fundamentality ought not to be jettisoned. This is the danger of statutory codification; it is somewhat easier to leave a concept "in reserve" at common law, whereas if the concept is in a statute the courts may feel obliged, if not to apply all the listed criteria, then to justify why they are not applying a criterion.

4.77 The points just made relate to the codification of the basic action. I envisage the following other troublespots which would need careful consideration if there were to be an attempt to codify other aspects of the action:

- As was seen in paras 4.50 – 4.53, mistakes involving the positions of three parties present special difficulties. Does the recipient of the payment, a creditor of the relevant third party, really give value by agreeing to the discharge of the third party's debt? Such payees are not in substance any worse off if they have to repay the moneys to the mistaken party. On current law, it appears that, if the payer did not have the third party's authority to discharge the debt, the payee must repay the funds (*Barclays Bank v W J Simms Son & Cooke (Southern) Ltd* [1980] QB 677), but if the authority was given then the moneys need not be restored (*Porter v Latec Finance (Qld) Pty Ltd*, para 4.51; *Union Bank of Australia v Murray-Aynsley* [1898] AC 693 (JCPC), criticised by E P Ellinger, *Modern Banking Law*, 152). Further, in situations other than mistake, namely where the money received had been misappropriated by the payer, it is not at all clear that the courts have yet decided that the innocent recipient may keep the money

merely because the payer intended to discharge its debt to the payee—fresh value may be needed (contrast *Murray-Aynsley* with *The Tiiskeri* [1983] 2 Lloyd's Rep 658, 666, and *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, 582).

- If the codification were to be exhaustive of the defences which payees can raise, there are still uncertain aspects to many of the existing defences, including those of estoppel, receipt by agents who have passed on the funds to their principals (see Kós and Watts, 111 – 112, and Birks, "Misdirected Funds: Restitution from the Recipient" [1989] Lloyd's Mar & Com LQ 296), and the newcomer, the person whose receipt was so fleeting that it was not apparent that the funds had even been received (*National Commercial Banking Co of Australia v Batty* (1986) 65 ALR 385, discussed Kós and Watts, 112 – 113).
- If the codification were to be exhaustive of remedies, again careful consideration of the case law and appropriate principles would be required. It is not clear yet that the mistaken payer is entitled to proprietary remedies, let alone ought to be (see Kós and Watts, 33 – 38). The remedies at common law have traditionally been personal only, but the remedies of beneficiaries of trusts who wish to follow up mistaken payments made by their trustees have been proprietary (see *Re Diplock* [1948] Ch 465). *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105 suggests that all mistaken payments ought to lead to proprietary relief (this decision having been approved on different facts in *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180). On the other hand, the equitable remedy of rescission has traditionally not been thought available after winding up or bankruptcy (see Watts [1990] NZ Recent Law Review 339 – 343). This confused state of the law led Thorp J in *Re Goldcorp Exchange Ltd* (unreported, High Court, Auckland, 17 October 1990, M 1450/88) to ask whether, in a payee's insolvency, the position of a carelessly mistaken payer ought to be better than that of the person whose payment has been made pursuant to a fraudulently induced contract. It appeared to the learned judge that we might be better to stick to the simple pari passu rule, thereby avoiding the deeming of trusts in order to create a priority regime. An additional complication resulting from the use of constructive trusts is that, if the trust is not purely remedial but is its own cause of action as well as remedy, the limitation period may run from when the trust was

created by the court, and not from the date of the payment (see Goff and Jones, 735).

- The preceding sub-paragraph raises another point, namely whether, if the equitable mistaken payments action has a different remedy to the common law action, it might not be different in other ways from the old action in money had and received. It is clear that ss 94A and 94B were intended to apply to both causes of action.

4.78 If, as I have suggested, ss 94A and 94B were extended to cover non-monetary enrichments, and, in respect of s 94B, causes of action other than mistake, then it would be incongruous to add to these sections a codification of the law of mistaken payments alone. But, if one were to codify the other relevant grounds for restitutionary recovery as well, one could end up codifying much of the entire law of restitution. This would include the actions for:

- recovery for mistakenly conferred work and services (the quantum meruit, proprietary estoppel and so on);
- necessitous intervention;
- duress; and
- failure of consideration.

This would be a very big undertaking. Otherwise, I doubt whether it is yet the time to simply state a cause of action in unjust enrichment in bald statutory form. On the other hand, a compromise would be to have a Restitution Reform Act which contained extended versions of ss 94A and 94B, together with new sections designed to clear up other unresolved difficulties in the common law of restitution.

4.79 I doubt that a codification of the law on mistaken payments is desirable. But consideration ought to be given to promoting a Restitution Reform Act, which might clarify or remedy a number of the remaining unsatisfactory aspects of the common law restitutionary rules concerning mistake and other matters.

ANNEX

4.80 Since this paper was written there have been two important decisions in England, *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 in the House of Lords (noted by Watts (1991) 107 LQR 521 and Birks [1991] Lloyd's Mar & Com LQ 538), and *Woolwich Equitable Building Society v Inland Revenue Commissioners* both in the Court of Appeal [1991] 3 WLR 790 and in the House of Lords [1992] 3 WLR 366, together with the decision of the New Zealand Court of Appeal in *Re Goldcorp Exchange Ltd* (reported as *Ligget v Kensington* (1992) 4 NZBLC 102,576).

LIPKIN GORMAN V KARPNALE LTD

4.81 *Lipkin Gorman* decides that in relation to the so-called action in money had and received, there is a change of position defence. The facts of the case involved a deliberate misappropriation of the plaintiff's moneys for the purposes of gambling. It is therefore a case where the plaintiff's consent to the dispositions did not occur at all, rather than one where there was mistake. But it is clear that their Lordships regarded the defence as available to all claims for money had and received, claims which they recognised were based on a principle in unjust enrichment. Although the decision in the case was restricted to the common law claim for money had and received, there are indications that the defence would be available to all restitutionary claims in like circumstances to the case before them (see the judgment of Lord Goff of Chieveley, 33 – 34). Lord Goff made reference to s 94B of the Judicature Act 1908 in his judgment.

4.82 This case, were it to be adopted in New Zealand, potentially undermines any need for s 94B. In short, the common law has caught up with, and perhaps overtaken, the provision. I doubt whether a court would find that s 94B has precluded the development at common law of a similar defence in New Zealand. If this is so, the case rather lessens the urgency for the amendments to s 94B suggested in paras 4.17 – 4.21 and at the end of paras 4.70 – 4.72 of the paper. On the other hand, the question arises as to whether s 94B should now be repealed. I suggest that this would be premature. Certainly one would want to make it clear in any repeal provisions why the step was being undertaken.

4.83 It is useful to outline both the Court of Appeal's and the House of Lords' decision in this case. The Court of Appeal by a majority (Glidewell and Butler-Sloss LJJ, Ralph Gibson LJ dissenting) held that the payments made to public bodies which are not due to them are prima facie recoverable at common law. It is not necessary to show that a payment was made under duress. However, the majority recognised two limits to recovery from the public body, one of which they approved and the other of which they considered needed a House of Lords' decision for its removal. The first of these is that a payment will not be recoverable if the payer was indifferent as to whether the payment was due at the time of payment. The second is that if payment resulted from the payer's mistake of law again the payment would not be recoverable. This latter limitation makes the distinction between paying because of the public body's demand and paying because one wrongly assumed that the law required it a rather subtle one. The majority felt obliged by precedent to accept the distinction nonetheless.

4.84 The House of Lords, again by a majority (Lords Goff of Chieveley, Browne-Wilkinson and Slynn of Hadley; Lords Keith of Kinkel and Jauncey of Tullichettle dissenting), has now upheld the Court of Appeal's decision. At the same time the majority strongly indicated, without deciding the point, that the common law's bar on recovery of payments made under mistake of law should be abrogated (see also *Restitution of Payments Made under a Mistake of Law* English Law Commission Consultation Paper, No 120, 1991).

4.85 This case again shows that the common law is catching up with, and perhaps overtaking, the reforms implemented here in 1958. The case, albeit in obiter dicta, supports recovery where there is a mistake of law, but without suggesting that there is a restriction in respect of mistaken views of the law which are commonly held as does s 94A of the Judicature Act 1908 (see paras 4.29 – 4.38). In addition the case clearly upholds the argument that payments not due to public bodies ought to be recoverable without the need to prove duress or mistake. This makes unnecessary the reform recommended for consideration in paras 4.64 – 4.67 above.

4.86 The question as to what should now be done in New Zealand is a difficult one. Will the courts feel free to follow the English case

given the local circumstance that we already have statutory provisions covering the area? Given that Parliament saw fit to impose certain restrictions on the right of action conferred by s 94A, the courts may feel more inhibited in allowing plaintiffs to by-pass those restrictions by using the House of Lords' decision than they would be with allowing the defence conferred by s 94B to be made redundant by the same means. A wait-and-see attitude may mean that the first litigant loses the benefit of the new developments. On the other hand, it is too early yet to tell whether the common law might not itself impose restrictions on recovery. On balance, I adhere to the view expressed in para 4.38 that the "common understanding" restriction found in s 94A(2) should be removed, leaving s 94A(1) in place, thereby deferring the question of whether it might not also be repealed.

RE GOLDCORP EXCHANGE LTD (REPORTED AS *LIGGET V KENSINGTON*)

4.87 In this case the Court of Appeal has purported to follow the decision in *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] Ch 105, discussed in para 4.77, thereby reversing on this point the decision of Thorp J also discussed in para 4.77. I do not think that this decision necessitates any statutory reform.

5

THE CONTRACTS (PRIVITY) ACT 1982[59]

S Todd

5.01 The object of this paper is to review the operation of the Contracts (Privity) Act 1982. These are still early days, the Act only having been in force for eight years. It has been considered in a relatively small number of cases. The difficulties or doubts that have arisen so far will be identified and discussed.

BACKGROUND

5.02 In 1981 the report of the CCLRC, *Privity of Contract*, was presented to the Minister of Justice. The Committee considered that the rule that no burden can be cast upon a third party by a contract to which that third party is not joined should be left unchanged, but was satisfied that the benefit aspect of the rule, preventing a person who is not a party to a contract from suing on that contract, was in need of reform. The Committee recognised that there were means of avoiding the rigours of the privity doctrine, noting, inter alia, the impact of relevant rules on assignment, agency, trusts, covenants running with land and the tort of negligence. The Committee also recognised that in proper cases the courts had usually been able to give effect to the intentions of the contracting parties. The reported cases in which those intentions had been frustrated by the doctrine were seen as relatively few.

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[59] The paper states the law at February 1991. The footnotes have been added by the Law Commission.

5.03 However, the Committee "looked in vain for a solid basis of policy justifying the frustration of contractual intentions" (Report, para 6.2). It pointed out that many legal systems in the world permit the third party beneficiary under a contract to enforce the promise of a benefit conferred on that party, noting in particular that in the United States, where the courts early on rejected the privity doctrine, any serious consequences flowing from its absence would certainly have been felt and expressed forcefully. The Committee thus proposed the enactment of legislation giving enforceable rights to strangers to contracts in certain circumstances. The report incorporated a draft Bill designed to give effect to its recommendations. That Bill, with minor amendments, became the Contracts (Privity) Act 1982.

ANALYSIS

5.04 The purpose of the Act, broadly, is to allow an intended beneficiary of a contract between others to enforce the benefit conferred by the contract, yet not to interfere too much with the autonomy of the contracting parties. The Act lays down rules concerning who can sue under the Act, protects the beneficiary by setting limits on the normal right of contracting parties to vary or discharge the contract, and provides for the defences available to the promisor in an action by the beneficiary.

SECTION 2—INTERPRETATION

5.05 The definition of "benefit" in s 2 includes immunities and limitations or qualifications of obligations or rights. The intention is to allow the third party to take the benefit of exclusion or limitation clauses which are intended to apply to that party. It should be noted in this context that if a person contracts as agent for another, no privity issue arises. (The importance of this point for cases involving pre-incorporation contracts is discussed in the following paragraphs.)

5.06 In *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154, the Privy Council held that stevedores employed by the carrier of goods were able to rely on a clause in the bill of lading issued by the carrier to the consignors, excluding the liability of any servant or agent of the carrier, or any independent contractor employed by the carrier, for, inter alia, loss of or damage to the goods arising from neglect or default by the servant, agent or independent contractor. The clause could be treated as an offer by the consignor,

made through the carrier as the stevedores' agent, that if the stevedores would unload the goods, the consignor would hold them free from liability. The stevedores accepted the offer by unloading the goods.

5.07 In *Satterthwaite*, then, the stevedores became a contracting party. The Contracts (Privity) Act will apply where the intention is to contract for the benefit of a non-party. Where this is the case, (and there is no longer a need to resort to strained analyses so that the *Satterthwaite* principle can be invoked), s 4 can confer the benefit of an immunity on the third party. Arguably, there is a slight difficulty with the wording of the section. It provides that, where a promise contained in a deed or contract confers a benefit on a designated person who, although not a party, is intended to be able to sue, "the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise". The section seems to presuppose that the beneficiary is bringing the action, not defending it. The point is a minor one, for the section can presumably be read as allowing the non-party to "enforce" the promise conferring the immunity by pleading it as a defence to the claim by the promisor.

SECTION 4—DEEDS OR CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

5.08 So far, judicial discussion of the Act has been almost entirely about the ambit of s 4, the key provision.

5.09 The CCLRC gave close attention to the definition of the kind of benefit that third parties should be able to enforce. The Committee thought that the common intention of the contracting parties, ascertained according to the ordinary rules of construction, should have a decisive effect in determining whether or not the third party should have enforcement rights. It was not desirable that the beneficiary should always be obliged to establish that the parties to the contract intended that the beneficiary could enforce the promise. But nor was it wished that a promise should be enforceable where, as a matter of construction, this would not have been intended by the parties. As a result s 4 applies to promises to confer benefits on sufficiently designated third parties, whether or not the contracting parties intended them to be enforceable, but subject to a proviso allowing the contracting parties to show that the beneficiary was not intended to have an action.

5.10 It is apparent that, in the absence of specific provision by the contracting parties, some uncertainty in determining entitlement to sue is inescapable. The designation requirement and the proviso seek to minimise it but cannot remove it altogether. Greater certainty might be achieved by putting the onus of proof of intention on the beneficiary, but that would involve a change in the policy of the Act.

5.11 The cases so far have been about the application of s 4 to pre-incorporation contracts and to contracts involving nominees.

Pre-incorporation contracts

5.12 Section 4 states that the beneficiary should be "designated by name, description or reference to a class (whether or not the person is in existence at the time when the deed or contract is made)". The question arises whether s 4 can apply to a contract purportedly made for a company yet to be formed.

5.13 At common law a company not in existence at the time of the contract could not, as a principal, be bound by or take a benefit under the contract, nor could it ratify the contract (*Kelner v Baxter* (1866) LR 2 CP 174). This position was changed by the Companies Amendment Act (No 2) 1983, introducing a new s 42A into the Companies Act 1955. The section, in summary, allows a company to ratify a contract made in its name or on its behalf within the period specified in the contract or, if no time is specified, within a reasonable time after incorporation. The contract is then valid and enforceable as if the company had been a party to the contract when it was made. The person who contracted on behalf of the company is personally liable on an implied warranty that the company would be incorporated and that it would ratify the contract.

5.14 If a company, after its incorporation, can rely on s 4, it can enforce the benefit of the contract without ratifying the contract, in which case it is not bound by it. In an action by the company, the other party can plead non-performance or defective performance as if the company was a party (s 9) and can also seek relief for breach of warranty under s 42A. The other party cannot, however, sue the company on the contract (save to the extent s 9 permits the bringing of a counterclaim). If the company ratifies the contract under s 42A, clearly the other can sue.

5.15 *Palmer v Bellaney* (1983) ANZ ConvR 467 is an early decision holding that s 4 applied in the case of a contract made by X "as agent for a company to be formed" and that the company accordingly could enforce the contract. This decision is criticised in Farrar and Russell's *Company Law and Securities Regulation in New Zealand* on the ground, inter alia, that s 14(1)(d) of the 1982 Act provides that nothing in the Act is to affect the law of agency, and the pre-incorporation cases are applications of the law of agency (32 – 34).

5.16 The question was considered once again in *Speedy v Nylex New Zealand Ltd* (unreported, High Court, Auckland, 3 February 1989, CL 29/87) where Wylie J rejected Farrar and Russell's argument. His Honour said that the pre-incorporation cases show that these "contracts" form no part of the law of agency. Rather, they established that, because the so-called "principal" was non-existent at the time of the contract, there could be no agency. In interpreting s 4 the court should ignore s 42A of the 1955 Act, and giving "person" in s 4 the meaning ascribed to it by the Acts Interpretation Act 1924 as including a corporation, and giving full recognition to the provision that the section applies whether the "person" is in existence at the time when the contract is made or not, it was difficult to read the section as other than applying to a company to be formed. His Honour added that he did not think that the present case was, in any event, one where s 42A would apply. The contract was made and executed for the benefit of the company yet to be formed. It was not purporting to be made by the company before its incorporation, nor was it a contract made on behalf of the company before and in contemplation of its incorporation.

5.17 Wylie J discussed the application of s 4 in the context of pre-incorporation contracts once again in *Cross v Aurora Group Ltd* (1989) 4 NZCLC 64,909. In this case, the solicitors for Cross had formed a shelf company called Felstead. Later Cross entered a contract with Aurora Group Ltd on behalf of "Cross Property Management Ltd, a company currently being formed". Cross then changed Felstead's name to Cross Property Management Ltd and claimed to adopt and ratify the contract. It was held that s 42A could not apply, for the agreement was not entered into on behalf of Felstead, as it then was, and the contract thus was not capable of ratification by Cross Properties Management Ltd. Section 4 of the Contracts (Privity) Act could not help either, because there was no sufficient identification of Felstead as Cross Properties in terms of the Act.

"Designation is a strong word, a positive word and means something more than a mere contemplation or possibility."

5.18 The fact that a company when formed might be able to take the benefit of a contract under s 4 without being liable to be sued on the contract is no reason for saying s 4 ought not to apply, for a third party beneficiary taking advantage of the section is always in that position. Indeed, as *Speedy* shows, s 4 and s 42A do not in fact overlap. Section 4 applies where A and B intend to bind themselves by contract, and some benefit under the contract is to go to C. Section 42A applies where A contracts with B as agent for C, a company to be formed. The intention is that the contract should be with C, on C being incorporated. The common law was unable to deal with this case and s 42A fills the gap. A contract *for the benefit of* C is not the same as a contract *on behalf of* C. *Speedy v Nylex* is a case in the first category but most pre-incorporation cases are likely to be in the second. *Palmer's* case arguably was wrongly decided, not because s 4 cannot apply at all but because it was a case where B contracted simply as agent for C.

5.19 On this analysis, amendment to either s 42A or s 4 is not strictly necessary. The proposals for the reform of s 42A in the Law Commission's Report No 9, *Company Law: Reform and Restatement*, and now contained in the Companies Bill, seek to put the matter beyond doubt. Clauses 157 to 160 of the Bill are intended substantially to re-enact s 42A, but also to make it clear that the new provisions (as introduced) operate as a code. Clause 157(5) states, inter alia, that notwithstanding the Contracts (Privity) Act 1982, if a pre-incorporation contract (defined as in s 42A) has not been ratified by a company, the company may not enforce it or take the benefit of it. The 1982 Act could, however, still apply for the benefit of a company to be formed, the contract in question not purporting to be made by or on behalf of the proposed company.

Nominees

5.20 In several cases the question has arisen whether, in a contract made with X "or nominee", the nominee can sue as a third party beneficiary under s 4.

5.21 In *Coldicutt v Webb and Keeys* (unreported, High Court, Whangerei, 1 June 1983, A 50/84) it was held that the nominee could sue, because

- the nominee had been designated by description; and
- the only purpose of the words "or nominee" was to give the nominee the right to complete the contract.

Subsequent cases have held the contrary. In *McElwee v Beer* (unreported, High Court, Auckland, 19 February 1987, A 445/85) Wylie J thought

- assuming a nomination results in a benefit to the nominee, it is the nomination, not the contract (or the promise under the contract), that confers it;
- a nomination does not in itself confer a "benefit", for mere nomination simpliciter leaves all the benefits with the original party to the contract and merely results in legal title being transferred to the nominee; and
- a person "designated by description" connotes a person identifiable at the time of the contract, not someone who by capricious choice of the contracting party may subsequently be brought within the description.

5.22 The Court of Appeal has since taken the same view, at least on the third point. In *Field v Fitton* [1988] 1 NZLR 482, Bisson J observed that an assignee, by the very nature of an assignment, is unlikely to be a person designated by name, description or reference to a class upon whom a benefit is conferred in a contract. Whether a nominee who is not a party might have the benefit of the Act will depend on the nominee being defined with sufficient particularity to come within the designation prescribed in s 4. It is difficult to treat a bare nominee not designated by name as a person identified by description or as being within a designated class of persons. The nominee could be anyone at all. If the nominee is not named, the word "nominee" in the contract should be qualified by the addition of a descriptive phrase, or by the addition of the particular class within which the nominee falls so as to specify or identify the nominee in the manner required by s 4. Furthermore, there must be an intention to create an obligation enforceable at the suit of the nominee. On the facts it was not possible to impute such an intention from the mere addition of the words "or nominee" without more.

5.23 The Court of Appeal did not deal with the point whether a nomination does in fact result in a benefit within the meaning of the Act. The question arose again in *Karangahape Road International Village Ltd v Holloway* [1989] 1 NZLR 83, where Chilwell J, without

referring to *McElwee v Beer*, came to the same conclusion as in that case. His Honour pointed out that until the nomination is made no person is identified. Identification requires the further act of nomination. The benefit referred to in s 4 is one conferred by the promise contained in the contract, not one conferred by a party with a right to nominate. He thus held that s 4 did not apply in the circumstances, because the promises conferring benefits were conferred on the other contracting party, not the nominee. Furthermore, following *Field v Fitton*, the nominee was not specified or particularised, nor was there an intention to create an obligation enforceable at the suit of the nominee. The decision in *Brown v Healy* (unreported, High Court, Auckland, 25 July 1988, A 147/84) is to the same effect.

5.24 Whether a designated nominee can take advantage of s 4 is uncertain. *McElwee* and *Karangahape* suggest that the benefit may still be regarded as being conferred by the nominator, not the contract. Indeed, the difficulty may arise in any case where, at the time of the contract, the third party is a person yet to be chosen by one of the contracting parties. Suppose an exclusion clause in a contract is expressed to be for the benefit of an independent contractor doing work for one of the parties. Arguably the benefit might be seen as being conferred only by that party when the contractor is appointed. It is not clear that there is great merit in making this distinction between a benefit under the contract, and a benefit by act of one of the parties. In all these cases it can equally well be argued that the benefit is conferred by the contract, notwithstanding the fact that the precise identity of the particular beneficiary is left to be ascertained. Bisson J in *Field* thought that a sufficient designation of the nominee or class of nominee, together with the requisite intention that the nominee should be able to sue, would be enough. It may be that the narrower view in the first instance cases will not prevail.

5.25 The approach taken in *Field v Fitton* itself may also be seen as unduly restrictive. If a nominee is referred to in a contract it is with the intention of meaning something, and that must be the creation of legal obligations in favour of that nominee. The view of the matter taken by Hillyer J in *Coldicutt's* case, although overtaken by the decision in *Field*, nonetheless seems to be supportable in principle and satisfactory in its result.

5.26 The nominee cases pose problems which have not all been worked out, but it seems best that the problems be left to the courts to resolve.

SECTION 5—LIMITATION ON VARIATION OR DISCHARGE OF PROMISE

SECTION 6—VARIATION OR DISCHARGE OF PROMISE BY AGREEMENT OR IN ACCORDANCE WITH EXPRESS PROVISION FOR VARIATION OR DISCHARGE

SECTION 7—POWER OF COURT TO AUTHORISE VARIATION OR DISCHARGE

5.27 Section 5 sets out the circumstances which, subject to ss 6 and 7, preclude variation or discharge of the contract without the consent of the beneficiary. These are, in brief, where:

- because of the beneficiary's reliance on the promise, the position of the beneficiary has been materially altered; or
- the beneficiary has obtained judgment upon the promise; or
- the beneficiary has obtained the award of an arbitrator upon a submission relating to the promise.

5.28 Section 6 allows the parties to vary or discharge the contract:

- by agreement between the parties and the beneficiary; or
- pursuant to express provision in the contract which is known to the beneficiary and the beneficiary has not, before becoming aware of the provision, materially altered his or her position in reliance on the promise.

5.29 Section 7 provides that where variation or discharge is precluded, or where it is uncertain whether it is precluded, by the beneficiary having materially altered his or her position in reliance on the promise, either party can apply to a court to authorise the variation or discharge upon such terms or conditions as the court thinks fit. In particular, the court can require that the promisor pay to the beneficiary such sum by way of compensation that the court thinks just.

5.30 There has been no judicial consideration of these provisions. An order under s 7 was made in *Minister of Trade and Industry v New Zealand Steel Ltd* (unreported, High Court, Auckland, 23 June 1987, M 529/87), but without discussion of the substance of the section.

5.31 It is apparent that ss 5, 6 and 7 in combination seek to balance the interest of a third party beneficiary in being able to sue on a contract between others with the interest of the contracting parties in being able to vary or cancel their contract. The chosen solution is to allow variation in the ordinary way until there is a material alteration in the position of, or judgment obtained by, the beneficiary. The

parties can, however, expressly stipulate for the retention of their right to vary or discharge, and make this known to the beneficiary. Even where the beneficiary has acted in reliance on the promise, and a right to vary has not been reserved by the contract, the contracting parties' hands are not completely tied. They can apply to the court to permit variation upon such terms and conditions as it thinks fit.

5.32 The thinking of the CCLRC was that, in general, compensation under s 7 would be confined to the reliance loss of the beneficiary since, ex hypothesi, the rights of the beneficiary would no longer stem from the contractual will of the parties (Coote, "The Contracts (Privity) Act 1982" [1984] NZ Recent Law 107, 114). In an appropriate case, however, such as where restitution is no longer possible, the court may order payment of the plaintiff's full expectation loss.

5.33 It might be desirable to amend s 6 in one minor respect. Section 5(1)(a) precludes variation or discharge of a promise to which s 4 applies where the position of the beneficiary has been materially altered by the reliance of that beneficiary *or any other person* on the promise. Section 7(2)(b), in like manner, enables the court to order payment of a just sum if satisfied that the beneficiary has been injuriously affected by such reliance. Section 6(b)(iii), by contrast, precludes variation pursuant to an express provision in the contract where, inter alia, *the beneficiary* had not materially altered his or her position in reliance on the promise before becoming aware of the provision. The latter does not, therefore, cover the case where the beneficiary's position has been materially altered by the reliance of another person on the promise, before the beneficiary became aware of the provision. It would make for consistency if the sub-paragraph provided that the beneficiary's position had not been materially altered by reliance on the promise (whether reliance by the beneficiary or any other person), before the reservation in the contract became known to the beneficiary. Then the beneficiary would be able to notify persons who might act in reliance on the promise about the existence of the reservation (Newman, "The Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982" (1983) 4 AULR 338, 353). It will, however, be a rare case in which the present wording might assume significance: the need for this reform is not pressing.[60]

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[60] The Law Commission recommends the amendment of s 6(b)(iii) in the manner proposed by Professor Todd (see draft Act, s 23, report, para 78). Professor

SECTION 8—ENFORCEMENT BY BENEFICIARY

5.34 Section 8 has to be read together with s 4. It confirms that the obligation imposed on the promisor by s 4 can be enforced at the suit of the beneficiary as if the beneficiary were a party to the deed or contract, and takes away the defences of the beneficiary not being a party and not having provided consideration. The beneficiary can obtain full contract damages and also equitable relief.

SECTION 9—AVAILABILITY OF DEFENCES

5.35 Section 9 deals with the defences available to a promisor in an action by the beneficiary. Section 9(2) provides that, subject to subss (3) and (4), all defences, set-offs and counterclaims which would have been available to the promisor in an action by the promisee are equally available in an action by the beneficiary. Section 9(3) prevents the promisor from raising against the beneficiary, by way of set-off or counterclaim, any issues which do not arise out of the contract that contained the promise in favour of the third party. In addition, by s 9(4) the beneficiary is liable on a counterclaim only if the beneficiary elects with full knowledge of the counterclaim to proceed with the claim against the promisor, and the liability of the beneficiary is limited to the value of the benefit conferred by the promise.

5.36 It is a natural corollary of the principle that the beneficiary's rights stem from the contract that the promisor may assert any contractual defences available in answer to a claim by the beneficiary. The scheme set out in s 9 covers the ground and no difficulties with its terms have been identified.

CONCLUSION

5.37 It is not easy, in making a reform of the kind contained in the 1982 Act, to foresee all the problems and achieve the right balance between the interests of all the persons concerned. The Ontario Law Reform Commission in its *Report on Amendment of the Law of Contract* (1987), after looking at the position in New Zealand and

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McLauchlan, at the March 1991 meeting put forward a formula for amendment to s 6(b)(iii) to cover the situation where a third party alters the position of the beneficiary. He recommended an amendment to the subsection so that it would provide:

> The position of the beneficiary has not been materially altered by the reliance of that beneficiary or any other person on the promise before the provision became known to the beneficiary [or that other person as the case may be].

elsewhere, thought there was danger in enacting detailed legislation which tried to cover all the ground, and preferred to recommend that there should be enacted a legislative provision to the effect that contracts for the benefit of third parties should not be unenforceable for lack of consideration or want of privity. This would permit the courts to enforce third party rights if justice so required and leave them free to fashion the principles to be applied on a case by case basis, without creating a new source of obligation. No doubt there is merit in that approach, yet the fears of the Ontario Commission have not been borne out so far as the New Zealand Act is concerned. No serious problems posed by the terms of the Act have yet come to light. Although the law is not entirely clear in certain respects, notably regarding entitlement to sue under s 4, the decisions are not such as to require amendment of the Act.

6

MINORS' CONTRACTS ACT 1969[61]

S Todd

6.01 The purpose of this paper is to review the provisions of the Minors' Contracts Act 1969 concerning the contractual capacity of minors. The review proved to be a straightforward task. It examines the commentary on and discussion of the Act which is available, which comprises one article (Burrows, "The Minors' Contracts Act 1969 (NZ)" (1973) 47 ALJ 657) and three decisions interpreting its terms. Only one of these decisions—*Morrow & Benjamin Ltd v Whittington* [1989] 3 NZLR 122—is of real significance. Certain provisions of the Act can give rise to minor difficulties but it is doubtful whether any amendment is needed.

6.02 The Age of Majority Act 1970 deals with a preliminary matter of definition. By s 4 a minor is a person who has not attained the age of 20.

HISTORY

6.03 Prior to the enactment of the 1969 Act, the law concerning minors' contracts was made up of a mixture of common law and statute. The general rule at common law was that a contract made by a minor was voidable at that minor's option. The word "voidable" was used in two different senses. Certain contracts were voidable in the sense that they were valid and binding upon the minor unless repudiated before, or within a reasonable time after, the minor

[61] The paper states the law at February 1991.

attained the age of majority. Other contracts were voidable in a different sense, ie, they were not binding upon the minor unless ratified when the minor reached 21 years of age. Contracts of service and contracts for necessaries were treated as exceptional. The former were regarded as valid. The latter imposed liability on the minor, although whether this was of a contractual or quasi-contractual nature was a matter for debate.

6.04 These common law rules were affected in two important particulars by the Infants Act 1908, which reproduced the provisions of the Infants' Relief Act 1874, a United Kingdom statute. First, the statute provided that three particular types of contract should be "absolutely void"; namely contracts of loan, contracts for goods (other than necessaries) and accounts stated. Secondly, it provided that it should no longer be possible to ratify at 21 those contracts which previously had not been binding on the infant unless ratified.

6.05 This amalgam of rules was complex and unsatisfactory in a number of respects. The distinctions between the different kinds of contracts were sometimes hard to draw and often it seemed there were no good reasons for drawing them; whether contracts said to be "absolutely void" really were absolutely void was uncertain; a minor might sometimes be immune from contractual liability in quite unconscionable circumstances, as, for example, where the adult contracting party had been misled by the minor as to the minor's true age; and, conversely, a minor's inability to make binding agreements in some circumstances could cause hardship or difficulty for the minor personally.

REFORM

6.06 In 1965 an informal committee made up of representatives of the Law Society and the Department of Justice examined the law relating to minors' contracts. The Committee put forward proposals for reform in an unpublished report presented to the Minister of Justice in 1966. The Committee re-examined its proposals in the light of the *Report of the Committee on the Age of Majority* (1967) in England (the Latey Report), after which a draft Bill was referred to the CCLRC for scrutiny. The Bill was then introduced into Parliament and enacted as the Minors' Contracts Act 1969.

6.07 The Minister of Justice (the Hon J R Hanan) explained that the object of the Bill was

to clarify and simplify the law, to enlarge the contractual capacity of older minors, and to give a proper degree of protection to younger people against exploitation whilst at the same time doing greater justice than the present law does to the fair and honest trader. (NZPD vol 360, 495 – 496).

6.08 The Act has since been described as constituting

> a uniquely New Zealand response to the age-old problem of preventing persons taking advantage of youthful inexperience without unduly interfering with the ordinary course of commerce and the rights of innocent adults. (*Morrow & Benjamin Ltd v Whittington* [1989] 3 NZLR 122, 124)

The provisions of the Act, as amended in 1970, 1971 and 1974, are intended to constitute a code to replace the old rules relating to the contractual capacity of minors (s 15). The Act applies to contracts made, compromises and settlements agreed to, and discharges and receipts given, after 1 January 1970 (ss 1(2), 15(2)).

6.09 As a general rule, the Act does not seek to distinguish between different types of contracts, although particular provision is made for compromises and settlements. Rather, the broad scheme of the Act is to divide minors' contracts into separate categories according to the marital status or age of the minor. There are three levels of enforceability:

- contracts which are of the same effect as if the minor were of full age and capacity;
- contracts which are presumptively enforceable, but in respect of which the court has certain powers to intervene, cancel or vary the contract; and
- contracts which are presumptively unenforceable against the minor but in respect of which the court has power to intervene to enforce the contract in whole or in part.

ANALYSIS

6.10 It is not proposed to comment on each section of the Act. Only those sections or parts of sections which might give rise to difficulty or which raise special points of principle will be considered.

SECTION 4—MARRIED MINORS

6.11 Section 4 operates to confer full contractual capacity upon a minor who either is or has been married. The other sections of the Act which set out special rules for minors thus do not apply. Section 2(2) provides that in ss 5, 6, 9, 10 and 12 the term "minor" does not include a minor who is or has been married.

6.12 Section 16(2) provides that every agreement entered into by a minor who is or has been married, whereby a trust is extinguished or the terms of a trust are varied, shall have effect as if the minor were of full age if, before the minor enters into the agreement, it is approved by a District Court.

6.13 The rationale behind s 4 seems to be:

- that by marrying a minor chooses to assume the status of a person of full capacity, with all concomitant obligations; and
- that married minors need to have full contractual capacity in order to do such things as enter into tenancies, make important household purchases and obtain credit.

Whether these considerations justify removal of special protection for the minor, or whether a married minor might be seen as especially in need of protection, no doubt is open to debate. As the policy issue has been determined, however, there does not seem to be a compelling reason to reopen it. The actual terms of s 4 are clear and give rise to no particular difficulty.

SECTION 5—CONTRACTS OF MINORS OF OR OVER THE AGE OF 18 YEARS, CERTAIN CONTRACTS CONCERNING LIFE INSURANCE, AND CONTRACTS OF SERVICE

6.14 Section 5 applies in the case of contracts of minors of or over the age of 18 years, certain contracts concerning life insurance and contracts of service. Any such contract is enforceable as if the minor were of full age, unless the court is satisfied that the consideration for the minor's promise or act is so inadequate that it is unconscionable, or that the obligations it imposes on the minor are harsh or oppressive, in which case the court has a discretion to cancel or vary the contract.

6.15 A court is empowered to grant relief under s 5 only where the conditions set out in subparas (a) and (b) of subs (2) are satisfied. It is apparent that this subsection is deliberately expressed in narrow

terms, to differentiate it from s 6, where relief is presumptively available. The significance of this point in interpreting s 6 will be considered later. So far as s 5 is concerned, the precise wording of these subparagraphs, even though deliberately narrow, is such that certain arguably deserving cases may not be covered. It is not entirely clear whether terms excluding the liability of the adult, or allowing the adult a wide latitude to withdraw from the contract, are caught. Such clauses may not necessarily be seen as affecting the consideration supplied by the adult or as imposing an obligation on the minor. It might be simpler if the Act provided that the contract or any term of it be "harsh and unconscionable", but the courts are quite capable of interpreting s 5 to reach this result, without any amendment.

6.16 Relief can be granted only where the consideration was unconscionable or the terms harsh or oppressive at the time the contract was made. Subsequent events which cause the contract to become a bad bargain—as where the value of the subject matter drops—are irrelevant. What is not so clear is whether s 5 can operate where the contract objectively was unfair but the adult was not guilty of unconscientious conduct, as where both parties acted in good faith but the contract goods turn out to be seriously defective. While clarification might be desirable, the problem is not a serious one and can be left to the courts to resolve.

6.17 Whether s 5 might be extended to bring into account the circumstances in which a contract with a minor was made perhaps deserves consideration. Suppose an 18 year old is persuaded, without any misrepresentation being made, to enter a contract to purchase something the minor does not need or cannot afford, but the consideration is not inadequate and the terms are not harsh or oppressive.

6.18 In *Morrow & Benjamin's* case it was said to be "at least arguable" that s 5 would not protect a minor engaging in share dealings who was given credit by his stockbrokers notwithstanding that he would be quite unable to meet his trading obligations, on the basis that the minor had received consideration in the form of property in the shares and options purchased, and there was nothing extraordinary in the terms of the dealings between the parties which could be called oppressive, harsh or unconscionable. The common law would give a remedy in these circumstances if the contract was not one for necessaries. To widen the ambit of s 5 would, however, narrow or remove the distinction between it and s 6 and seemingly undermine the policy of the Act in this respect. Thus no change is recommended.

6.19 The court has flexible powers to grant relief once entitlement under subparagraphs 2(a) or (b) is established. There are further powers contained in s 7.

SECTION 6—CONTRACTS OF MINORS BELOW THE AGE OF 18 YEARS

6.20 An unqualified rule whereby a contract between an adult and a minor under 18 could be enforced by the minor but not by the adult could create serious injustice. The solution provided by s 6 is to render the contract unenforceable against the minor unless the court is satisfied that the contract is fair and reasonable, in which case the court has a discretion to enforce the contract in whole or in part. If the court is satisfied it is not fair and reasonable, it may in its discretion cancel or vary the contract.

6.21 The different phraseology of ss 5 and 6 is commented upon by Thorp J in *Morrow & Benjamin Ltd v Whittington.* His Honour observed that the threshold tests in the two sections do not easily interrelate, but that at least it could be said that it is improbable that such different language would have been used unless the two formulae were intended to involve different criteria and have different results. It must follow that the s 6 test of "fairness and reasonableness" cannot be satisfied merely by establishing that there was consideration and that the contract was not harsh or oppressive. Fairness and reasonableness were not to be assessed as between consenting and informed adults (ie, excluding consideration of the age of the minor), for that would introduce an unwarranted gloss on the word "reasonable" and would disregard the essential purpose of the legislation. His Honour recognised that there was a difficulty with this view, for most of the matters which would ordinarily be considered in assessing the reasonableness of a contract between an infant and an adult are specifically listed in s 6(3) as matters to be considered by the court *after* it has concluded that a contract is fair and reasonable, as matters to be considered by the court in the exercise of its discretion to decide whether or not a contract should be enforced. His Honour nonetheless preferred the view that these matters should be taken into account at the outset to determine whether a contract is reasonable. On this basis there was no jurisdiction to make the declaration that the contracts were binding on the minor, for the itemised matters indicated that the contracts were unreasonable. The plaintiff stockbrokers were aware of the defendant's minority, the contracts were for the purchase on credit of highly speculative investments, the

plaintiffs knew the minor's means were inadequate and that he was relying on resale to pay for the shares and they regarded him as unreliable but still failed to implement their normal credit controls. If, however, a basis for considering the exercise of the discretion to enforce the contracts was found, his Honour said that, for the same reasons, the discretion should not be exercised in the plaintiffs' favour.

6.22 Thorp J's interpretation seems correct. If the enquiry into fairness and reasonableness looked no further than the actual terms of the contract, excluding consideration of the circumstances in which the contract was made, the test would be virtually indistinguishable from that in s 5. The s 6(3) factors may still have a part to play in the exercise of the court's discretion, even where the contract is found to be fair and reasonable, for they can be brought into account at the time of the court proceedings rather than as at the time of the contract. For example, a court might decide not to hold a minor to a fair and reasonable contract because the minor cannot afford to perform it.

6.23 The problem identified by Thorp J in *Morrow & Benjamin Ltd v Whittington* thus seems to have been resolved satisfactorily. Amendment of the Act is not needed.

SECTION 7—COMPENSATION OR RESTITUTION

6.24 Section 7 is concerned with orders for compensation or restitution of property. The section has to be read in conjunction with ss 5 and 6. The powers it confers can be exercised as a form of relief ancillary to the making of an order under s 5 and independently of the making of an order under s 6. No change seems to be needed here.

SECTION 9—MINOR MAY ENTER INTO CONTRACT WITH APPROVAL OF DISTRICT COURT

6.25 Under s 9 a contract entered into by a minor with the approval of a District Court has effect as if the minor were of full age. The extent to which the procedure in this section has been used is not known. Clearly, it is inappropriate for agreements of no great importance. Its main value would seem to be in providing a means for resolving uncertainty in the case of minors' contracts involving substantial sums or with long term consequences.

SECTION 10—GUARANTEES AND INDEMNITIES

6.26 By s 10 a guarantee by an adult of a minor's contract is enforceable to the extent that it would be if the minor were a person of full age. The section thus provides a simple method for a commercial concern to avoid the risk that a contract made with a minor might not be enforceable. It is a useful provision and no problems with its terms have been identified.

SECTION 12—SETTLEMENT OF CLAIMS BY MINORS

6.27 Section 12 sets out special rules concerning the compromise or settlement of claims by minors. In order to be binding the compromise or settlement must have the approval of the High Court or District Court. As originally drafted the section referred to "an agreement whereby the minor agrees to compromise or settle the claim". In *Re Martin* [1970] NZLR 769, it was held that the subsection did not cover a document executed pursuant to a prior agreement to compromise, as opposed to the agreement itself. Section 12 was amended in 1970 to overcome this particular difficulty.

6.28 Sections 5 and 6 do not apply to compromises or settlements by minors (ss 5(5)(b) and 6(4)(b)). The policy of s 12 is to treat these agreements differently from other contracts. The section comes into operation in the case of claims for "money or damages" which are compromised or settled. In *Re Fowler* (1988) 7 NZAR 166, the Accident Compensation Appeal Authority held that an award of compensation in favour of a minor relates to a claim for money within the terms of s 12, so any settlement with a minor should be approved by a court of competent jurisdiction. In this particular case the minor accepted a lump sum award and six years later sought a variation, saying s 12 had not been satisfied. After the Corporation declined the application a review officer reconsidered the matter on the merits and decided the original award was adequate. On appeal to the Accident Compensation Appeal Authority, Judge Willis thought that, while the award should possibly have been approved under the Minors' Contracts Act, in the particular case the appellant had to be regarded as having ratified the award, because he had attained the age of 20 three years before he challenged it.

6.29 It is doubtful whether the Accident Compensation Corporation does in fact make settlements with minors. Dealings between the claimant and the Corporation might give the appearance of a bargain,

but the reality is that the Corporation determines entitlement under the statute and makes an award accordingly. The minor can, if dissatisfied with the award, use the review and appeal procedures under the 1982 Act in the ordinary way. The better view is, then, that there was no settlement in *Re Fowler* and that s 12 had no application. Judge Willis suggested that an amendment to the 1969 Act would clarify the situation so far as claims against the Corporation are concerned, but it appears that this is not in fact needed.

SECTION 15—ACT TO BE A CODE

6.30 While s 15 states that the Act is to be a code concerning a minor's contractual capacity, it does not purport to change the old common law rule that a minor is not liable for a tort directly connected with any contract upon which no action will lie on account of his or her minority. (A tort action in respect of fraudulent representations by a minor regarding age, specifically dealt with in s 15(4), is in fact barred by s 6(1)(b) of the Contractual Remedies Act 1979.) The Minors' Contracts Act tends to undermine the rationale for this rule, for there is no longer any question of bypassing an absolute bar on suing in contract. The rule itself is open to criticism, because it is unclear what is meant by a tort "directly connected with" or "really founded upon" contract. It is hard to see why a minor who does in fact commit a tort should not be sued in the ordinary way, irrespective of the existence of any contract. The rule appears to have affinities with that in *McLaren Maycroft & Co Ltd v Fletcher Development Co Ltd* [1973] 2 NZLR 100, barring a negligence action where there is a co-extensive liability in contract, and indications in *Rowe v Turner Hopkins & Partners* [1982] 1 NZLR 178 and *Day v Mead* [1987] 2 NZLR 443 are that the courts will abandon the latter rule when the occasion arises. No doubt the fate of the rule in respect of minors can also be left to the courts. Legislative intervention is not needed.

CONCLUSION

6.31 The Minors' Contracts Act 1969 started the trend in New Zealand contract statutes towards replacing rules by judicial discretion. In 1973 Professor Burrows suggested that until the courts had had time to build up principles for the exercise of the discretions (a

slow process), there were likely to be inconsistent decisions, something which would not inspire public confidence. In *Morrow & Benjamin Ltd v Whittington* Thorp J observed that the speed of judicial definition of principle had been even slower than the author could have contemplated. His Honour thought that the near complete absence of resort to the courts strongly suggested that the Act has proved a more effective and sufficient guide than seemed probable on first reading. There is no reason to disagree. The general scheme of the Act appears to have worked well. Even those minor difficulties identified above do not require legislative amendment.[62] Viewed broadly, the Act has been successful in simplifying the law and placing it on a rational basis.

[62] The Law Commission agrees with this conclusion and makes no recommendation for amendment to the Minors' Contracts Act (report, para 79).

7

NEW ZEALAND'S CONTRACT STATUTES: INTERNATIONAL TRANSACTIONS[63]

D J Goddard

INTRODUCTION

7.01 Provisions which deal with the application of a statute when issues of private international law arise appear to be included in New Zealand legislation somewhat haphazardly. Provisions regulating the scope of a statute appear in some Acts but not in others. For example, such provisions appear in s 3(1) Frustrated Contracts Act 1944, s 7 Credit Contracts Act 1981, and s 4 Commerce Act 1986. But there are no such provisions in the Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Contractual Remedies Act 1979, or Contracts (Privity) Act 1982. (Examples of such provisions in New Zealand, Australian and UK legislation are set out at the end of this paper). As Professor Webb has pointed out, the omission of such a provision is more common than its inclusion, even where it is clearly foreseeable that private international law issues will arise: [1979] NZLJ 442. The drafters of statutes seem to turn their minds to the question principally when the statute is based on a foreign model which contains such a provision. The provision in the Frustrated Contracts Act 1944 is derived from s 1(1) of the Law Reform (Frustrated Contracts) Act 1943 (UK), and s 4 of the Commerce Act 1986 is based on s 5 of the Trade Practices Act 1974 (Aust).

7.02 There are no reported New Zealand cases which discuss the application of New Zealand's recent contract statutes to an international transaction. However, the growing importance of foreign trade,

[63] The paper states the law at February 1991. The footnotes have been added by the Law Commission.

and other commercial relationships with overseas parties, increases the likelihood that the issue will eventually come before the courts. Indeed, until New Zealand ratifies the Vienna Convention on contracts for the international sale of goods—as recommended by the Law Commission in NZLC R23, *The United Nations Convention on Contracts for the International Sale of Goods: New Zealand's Proposed Acceptance*—every trans-Tasman sale has the potential to raise these issues. As the Convention does not deal with validity of contracts (art 4), or the effect of some misrepresentations or mistakes, such sales will continue to raise these issues even if the Convention is ratified, and legislation introduced to give effect to it.

7.03 I have had occasion to advise clients on the application of the Illegal Contracts Act 1970 and the Contractual Remedies Act 1979 in circumstances where the international aspects of transactions have raised extremely difficult issues. It is very likely indeed that, in some situations, a New Zealand court would apply provisions in our contract statutes which would not be applied by a foreign court considering the same dispute. One of the principal goals of private international law is to avoid precisely that result, as far as possible, and so increase certainty in commercial relations, and discourage forum shopping.

7.04 Two examples may illustrate the practical problems that can arise:

- A, based in New Zealand, agrees to manufacture and ship to B in New South Wales 1000 aluminium widgets for B to use in its construction business. A and B believe, erroneously, that widgets made of aluminium have the necessary strength for the use contemplated. After the widgets have been manufactured and shipped, and are in a warehouse in Sydney awaiting collection by B, B discovers that aluminium is not acceptable under the New South Wales building codes, and refuses to take delivery or pay for the widgets.
- X Ltd, a company incorporated and carrying on business in Victoria, enters into a contract with Y, resident in New Zealand, to buy a large parcel of shares in Z Ltd, a company incorporated in New Zealand. X Ltd cannot pay for the shares for one month, and Y has cashflow problems, so in order to facilitate the transaction, Z Ltd agrees to advance a sum equivalent to the share price to Y, repayable when Y is paid by X Ltd. The shares are transferred into X Ltd's name, and Z Ltd

makes the advance to Y. The value of Z Ltd's shares falls, and X Ltd refuses to pay Y, claiming that the arrangements breach s 62 Companies Act 1955 (NZ) and are illegal, and unenforceable by virtue of s 6 Illegal Contracts Act 1970 (NZ).

7.05 In the first example, A wishes to sue B for the price under the contract, and in the alternative to seek relief under the Contractual Mistakes Act 1977 in respect of costs incurred in manufacture and shipping. The proper law of the contract is probably New Zealand law, as the contract is more closely connected with New Zealand. A could begin proceedings in New Zealand, and serve them out of the jurisdiction under rule 219(b)(iii) or (iv) of the High Court Rules. If B, after obtaining legal advice, does not appear in the proceedings, a judgment for the price could be entered in New Zealand by default. However, that judgment would not be registrable in New South Wales, or enforceable at common law, as the New South Wales courts would not treat the New Zealand courts as having jurisdiction: see Dicey and Morris, 448 – 450; Sykes and Pryles, *Australian Private International Law* (3rd ed, 1991), 116. On the other hand, if A sues in the New South Wales courts, no relief will be available under the Contractual Mistakes Act, since the discretion conferred on "the Court" by s 6 may only be exercised by a New Zealand court: see the definition of "Court" in s 2, and paras 7.20 – 7.28. The problem would be still worse if the relief sought under the Contractual Mistakes Act was any form of specific relief, for example where B had possession of the widgets and A sought an order for redelivery. The relief could still not be obtained in New South Wales for the reason already mentioned. The New Zealand court order would be unenforceable in New South Wales, even if B had appeared and unsuccessfully defended the proceedings in New Zealand, since only money judgments are registrable, or enforceable by action at common law: Dicey and Morris, Rule 36; Sykes and Pryles, 118, 124 – 127.

7.06 In the second example, Y wishes to sue X Ltd. It is likely that a court would conclude that this contract was governed by New Zealand law, and, on this basis (and probably others), proceedings in the High Court of New Zealand could be served on X Ltd in Victoria without leave, under rule 219. If X Ltd does not appear, a New Zealand judgment for the contract price would not be enforceable in Victoria, since New Zealand courts would not have jurisdiction in the private international law sense. On the other hand, if Y sues X Ltd in Victoria to ensure that any judgment obtained will be enforceable,

the Victorian court is likely to apply s 6 of the Illegal Contracts Act 1970 (NZ) and determine that the contract is void and cannot be enforced. A Victorian court could probably order X Ltd to retransfer the shares to Y, but this is not what Y wants. The only "court" which can validate contracts under s 7 is a New Zealand court: see s 2 of the Illegal Contracts Act 1970, and paras 7.20 – 7.28. A Victorian court cannot therefore make the order Y seeks, even though this seems a clear case in which a New Zealand court *would* validate the contract, since that will best protect the interests of Z Ltd and its shareholders.

7.07 In each case, the New Zealand plaintiff must choose between:

- suing in New Zealand in reliance on the applicable statute and risking a non-appearance by the defendant, with the result that any money judgment obtained may be entirely useless. Any specific relief will be useless whether or not there is an appearance; or
- suing in the defendant's home jurisdiction, but with the result probably being different from, and less favourable than, the result that could be obtained in a New Zealand court.

7.08 The best result that a New Zealand plaintiff seeking specific relief under either statute could hope for would be to sue in New Zealand, have the defendant appear, obtain a constitutive order validating or varying the contract, and then bring proceedings in the relevant Australian jurisdiction on the basis of the contract as validated or varied. Clearly, it would be preferable if the whole dispute could be effectively resolved by litigation in one jurisdiction, rather than two.

7.09 The problems just discussed would not be completely resolved even if, in either case, there was a written contract containing a submission to New Zealand jurisdiction clause. If there was such a clause, a New Zealand money judgment, by default or otherwise, would normally be registrable and enforceable in New South Wales or Victoria. But if the plaintiff sought any form of specific relief, a New Zealand court order would be of no use (unless the defendant had assets in New Zealand that could be sequestrated for contempt) and the relief sought would not be available in Australia.

7.10 In this paper, the following contract statutes are considered:

- the Frustrated Contracts Act 1944;
- the Contracts (Privity) Act 1982;

- the Illegal Contracts Act 1970;
- the Contractual Mistakes Act 1977;
- the Contractual Remedies Act 1979.

7.11 A review of New Zealand's contract statutes in relation to international transactions should have two principal goals:

- to clarify for a New Zealand court dealing with an international transaction the circumstances in which each Act does or does not apply;
- to remove, as far as possible, any obstacles for a foreign court which seeks to apply a provision that a New Zealand court would apply when faced with the same dispute. While it is not possible to ensure that a foreign court will apply a New Zealand statute, its application can be facilitated.

RECURRING THEMES

7.12 Several of the statutes discussed in this paper raise similar issues. A number of these recurring themes are discussed below.

SHOULD NEW ZEALAND CONTRACT LEGISLATION APPLY TO CONTRACTS NOT GOVERNED BY NEW ZEALAND LAW?

7.13 In most of the statutes considered, it is not clear whether a New Zealand court would apply the statute to a dispute concerning a contract which does not have New Zealand law as its proper law. Nor is it clear whether the statute would be applied to a dispute concerning a contract which does not have New Zealand law as its putative proper law, ie, the law that would be the proper law of the contract if the contract was validly concluded: see Dicey and Morris *The Conflict of Laws* (11th ed, 1987) Rules 180,181. The position should be clarified by expressly stating the limits of each statute's application, to avoid unnecessary uncertainty and expense. The first question which arises, when considering such a clarification of the statute, is whether the application of the statute should be restricted to contracts governed by New Zealand law, or whether it is desirable to provide expressly that it applies in other circumstances. Such an express provision would be applied by New Zealand courts, although foreign courts could, and probably would, disregard it. Under s 27(2)(b) of the Unfair Contract Terms Act 1977 (UK), for example, an English court is obliged to disregard a choice of law clause which

would displace English law if one party deals as a consumer, is habitually resident in the UK, and the essential steps necessary for the making of the contract were taken in the UK. (See also s 17(3) of the Contracts Review Act 1980 (NSW), and Davis (1980) 54 ALJ 572.)

7.14 New Zealand law, like English law, and the laws of most other common law jurisdictions, refers the questions of:

- whether or not a contract has been formed;
- its interpretation;
- its validity;
- the nature of the obligations arising under it; and
- whether it has been discharged and whether any restitutionary obligations arise in connection with it;

to the proper law or putative proper law of the contract. Dicey and Morris *The Conflict of Laws* states the law as it stands in most common law jurisdictions in relation to these questions: see Rules 181, 184, 185, 186, 187 and 203(2)(a). (The position in relation to restitution is however far from clear, but it is submitted that the position taken by Dicey and Morris is likely to be followed in New Zealand.)

7.15 If a dispute is litigated overseas, an issue in that dispute is characterised as any of the above questions, and the proper law or putative proper law of the contract under consideration is not New Zealand law, a foreign court will almost certainly not apply New Zealand law (even if, for example, the contract was entered into in New Zealand and all the parties are resident there). New Zealand legislation will not normally be treated as affecting a contract which is not governed by New Zealand law: see, for example, *Mount Albert Borough Council v Australasian Temperance and General Mutual Life Assurance Society Limited* [1938] AC 224; *Wanganui-Rangitiki Electric Power Board v Australasian Mutual Provident Society* (1934) 50 CLR 581. If foreign courts will not apply New Zealand statutes, then because it is desirable to reach the same result if litigation takes place in New Zealand, there is a good reason for restricting the application of New Zealand contract statutes in New Zealand's courts to situations where the proper law or putative proper law is New Zealand law. The only exception would be where there are strong public policy reasons for our courts to apply a particular Act.

7.16 It is suggested that there are no policy reasons to support the wider application of the statutes considered in this paper. In each case, the legislation is law reform legislation, and is intended to improve New Zealand's law. It does not safeguard or protect important social goals in New Zealand. (Useful examples of decisions in which statutes have, for policy reasons, been held to apply to contracts governed by law other than that of the legislating jurisdiction can be found in *English v Donnelly* 1958 SC 494 (Scotland's hire purchase legislation) and *Duncan v Motherwell Bridge and Engineering Co* 1952 SC 131 (Truck Acts).) There is nothing offensive to New Zealand morals in applying, for example, the English law relating to breach of contract and remedies for breach, even though we may think ours is better: see the decision in *Loucks v Standard Oil Co of New York* 224 NY 99, 120 NE 198 (1918). The New Zealand legislature has been content to restrict the application of the Credit Contracts Act 1981, which has a far greater social policy content than the contract statutes considered in this paper, to contracts governed by New Zealand law.

7.17 However, where a contract is governed by New Zealand law, it is not possible to contract out of the Credit Contracts Act. (It has been suggested that there is an apparent conflict between these two provisions. In my view there is not: a choice of foreign law will be effective if it is bona fide and legal, as discussed in Dicey and Morris, 1171 – 1175. A choice of law clause which displaces New Zealand law as the proper law of a contract is likely to be ineffective where there is no real connection with the law chosen, and the selection of foreign law was motivated by a desire to avoid the application of the Act.)

7.18 The Law Reform Committee of South Australia expressly declined to limit the application of legislation with a social policy content to contracts governed by domestic law, in its proposals for legislation on frustrated contracts: see Report no 37 (1977), 7. The reason given was that South Australian courts should have power, in the case of frustration of a contract justiciable in South Australia, to apply South Australian law, in particular because

> recent consumer legislation in South Australia has made South Australian law applicable to goods and services supplied in South Australia and to acts done partly in South Australia for the protection of the consumer, and the proper law of the contract is not the determinant of the jurisdiction of the South Australian Courts under these Statutes but rather whether the

consumer is in South Australia or whether any act or supply in relation to which the consumer needs protection, takes place wholly or partly in South Australia. (7)

The first limb of this justification ignores the important points discussed in paras 7.14 – 7.17 and the fact that many contracts governed by the law in one jurisdiction may be justiciable in another. The second limb is misconceived: the fact that consumer statutes, which protect important social goals, are overriding statutes which apply in some circumstances to foreign law contracts, does not in any way lead to the conclusion that other statutes, which lack that policy content, should have an equally extensive application.

7.19 In general, then, it is suggested that the statutes considered in this paper should apply whenever a contract in issue is governed by New Zealand law, but not otherwise, and that a provision to this effect should be included in each statute.[64]

DEFINITION OF "COURT"

7.20 As already mentioned, it is desirable that, so far as possible, foreign courts and New Zealand courts should reach the same results in disputes concerning contracts governed by New Zealand law. Where a foreign court is considering a dispute which a New Zealand court would resolve by reference to New Zealand contract legislation, generally speaking, it is desirable for the foreign court to do so also. New Zealand legislators should facilitate this.

7.21 There is one obvious barrier to the attainment of that goal in the case of each of the statutes considered (with the exception of the Frustrated Contracts Act). Each confers a particular jurisdiction, usually involving a discretion, on "the Court". In the Frustrated Contracts Act, "Court" is defined as "meaning, in relation to any matter, the court or arbitrator by or before whom the matter falls to be determined". The definition in s 2 of the Illegal Contracts Act 1970, on which the definitions in the later statutes appear to be based, is:

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[64] This suggestion is adopted by the Law Commission which recommends that each of the statutes discussed should apply only to contracts governed by New Zealand law: report, para 86. In the case of the Minors' Contracts Act 1969, however, the problems are complex and the form of provision requires consideration as part of our work on choice of law, so no recommendation is made in this Report.

the High Court or a District Court that has jurisdiction under section 9 of this Act or a Disputes Tribunal that has jurisdiction under section 9A of this Act.

7.22 If the conclusion is that a foreign court should, where possible, be permitted to exercise a discretion conferred by any of the Acts under consideration, the definition of "Court" will need to be amended. The definition in the Frustrated Contracts Act could be used.[65]

7.23 The Law Reform Commission of British Columbia proposed, in its report on *Illegal Transactions*, that "Court" should be defined as "any court, tribunal, or arbitrator exercising its proper jurisdiction". This gloss adds little, and, to the extent that it may attempt to determine the consequences of an excess of jurisdiction by a tribunal, could be extremely inconvenient.

EXERCISE OF DISCRETION BY A FOREIGN COURT

7.24 A more difficult question is posed by the discretionary nature of some provisions in the Acts. Each of the statutes considered confers one or more broad discretions on "the Court". Even if the definitional barrier already referred to is removed, there must be some doubt about whether a foreign court would exercise such a discretion, where conferred in a "foreign" (to it) statute. There is nothing the New Zealand legislature can do to ensure that the foreign court will exercise that jurisdiction: only the legislature in the foreign jurisdiction in question could do that. Each foreign court would reach its own conclusion on this issue, taking into account the appropriateness of exercising the jurisdiction, and the difficult question of the extent to which it considers that the New Zealand legislature can confer discretionary authority on it. The existence of this issue is recognised and addressed in the Australian cross-vesting legislation of 1987, as enacted by each state, which not only permits the superior courts of other states to exercise jurisdiction under state laws, but also expressly authorises the courts of the legislating state to exercise

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[65] This recommendation is made for each of the statutes considered in Mr Goddard's paper, except the Illegal Contracts Act (paras 7.63 – 7.65). However the Law Commission recommends that the proposed definition of "Court" be adopted (report, paras 87 – 89) and extend to both the Illegal Contracts Act and the Minors' Contracts Act and to the other statutes referred to in the draft Act (draft Act, s 9; report, paras 98 – 100, paras 106 – 109).

jurisdiction conferred on them by the cross-vesting statutes of the other states.

7.25 The exercise of a discretion is more common in relation to remedies than in relation to the existence of a right. It is generally accepted in common law countries that, whatever law may govern the substantive rights of the parties, remedies are a matter for the law of the forum: see *Baschet v London Illustrated Standard* [1900] 1 Ch 73 and *Shahnaz v Rizwan* [1964] 2 All ER 993; compare *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, and, in particular, *Phrantzes v Argenti* [1960] 2 QB 19. Thus, where a remedy such as the grant of an injunction is sought, as in *Warner Bros Pictures Inc v Nelson*, the court is looking to its own law, and exercising a domestic discretion. The English High Court in *Warner Bros Pictures Inc v Nelson* was not concerned with the law of the United States in relation to injunctions. It follows that a foreign statute which confers a discretion in relation to remedies alone will not be relevant to a domestic court, so the question of whether the discretion can be exercised will not arise.

7.26 The position is different where, rather than conferring specific rights, a statute confers on a court a broad discretion to adjust the rights of the parties. Where a court in jurisdiction A considers a dispute governed by the law of jurisdiction B, and the law of B confers a broad discretion on a tribunal hearing such a dispute which allows it to determine the rights of the parties in the specified circumstances, the court in A cannot simply say "the law of B confers these rights; and these remedies which are available under the law of A are appropriate to give effect to those rights" (as in *Warner Bros Pictures Inc v Nelson*, and see *Phrantzes v Argenti*). The whole question of whether one party is entitled to anything at all, and if so, to what, is left to the court. In this situation the court in A will have to decide whether to exercise the discretion conferred on it, or to disclaim any power to do so, and refuse relief.

7.27 Surprisingly, the issue of whether a court of one jurisdiction can exercise a substantive discretion conferred by the law of another jurisdiction does not appear to be directly the subject of any reported decision in New Zealand, Australia or England. Some writers have suggested that the discretion could be exercised: see Law Reform Commission of New South Wales, *Report on Frustrated Contracts*, (LRC 25, 1976), 61; Falconbridge (1945) 23 Can Bar Rev 43 – 58, 60; P B Carter, BYBIL 1960, 414; McNair (1944) 60 LQR 160, 161 – 162. The only case I am aware of where a court has approved

the exercise of such a discretion is *Municipal Council of Johannesburg v D Stewart & Co Ltd* 1909 SC (HL) 53, in which the House of Lords, sitting on a Scottish appeal, sent the case back to the Court of Session to consider whether or not to stay, under the English Arbitration Act 1889, proceedings brought in breach of an arbitration agreement governed by English law. The case was cited with apparent approval on this point in *Heyman v Darwins Ltd* [1942] AC 356, 380, 401. The Court in *Kornatzki v Oppenheimer* [1937] 4 All ER 133 was prepared to exercise a judicial discretion, exercisable on established principles, arising under German law. (See also Webb (1960) 23 MLR 446, 449 – 450.)

7.28 While I am not confident that the judicial discretion could be exercised, it certainly seems sensible to remove any unnecessary barriers to the exercise of such a discretion, where that is, in principle, desirable from a New Zealand point of view. A foreign court could, of course, hear evidence about the principles on which any such discretion is exercised by the New Zealand courts, so the discretion would not be an unguided one. (See, in a slightly different context, *National Mutual Holdings Pty Ltd v Sentry Corp* (1987) 87 ALR 539, 556.)

7.29 In New South Wales, s 5(5) of the Frustrated Contracts Act 1978 provides:

> It is the intention of Parliament that, except to the extent that the parties to a contract otherwise agree, a court other than a court of New South Wales may exercise the powers given to a court by Part III in relation to the contract.

7.30 In recommending a provision of this kind, the NSW Law Reform Commission commented:

> It is useful to have subsection (5) in order to give grounds for the exercise, by foreign courts and courts exercising federal jurisdiction outside New South Wales, of powers like those given by the Bill to the courts of New South Wales. (Report on Frustrated Contracts, 61)

7.31 It is suggested that such a provision adds little to the proposed definition of "Court". The New South Wales provision was considered and rejected as undesirable by the Law Reform Committee of South Australia (Report No 71, 1983, 19). The reasons given were the "obvious constitutional difficulties" of the provision, and the danger of "tinkering with the law of conflicts on a piecemeal basis" (citing the British Columbia Law Reform Commission). The first reason

does not apply in New Zealand. The second is puzzling: it is hardly "tinkering" to set out the scope of a statute expressly, rather than leave the courts to divine it. The provision is not undesirable: it is simply not necessary.

7.32 The uncertainty regarding the definition relates not so much to the intention of the New Zealand Parliament as to the question of whether the foreign court will conclude that it can give effect to that intention. In any event, in jurisdictions where preparatory materials may be taken into account in construing a statute, (or in a jurisdiction which permits an expert witness on New Zealand law to refer to New Zealand preparatory materials when construing New Zealand law, since that is permitted in New Zealand) such a provision would add nothing to the explanation of a change in the definition of "contract", which might be expected in the explanatory note of any Bill introduced to give effect to such recommendation, or indeed in any Law Commission report recommending such a change.

7.33 Other methods of ensuring that New Zealand legislation is more likely to be applied by a foreign court in these situations would be:

- to express the broad discretion as a broad right, for example, to "such relief as may be just or equitable"; or
- to deem contracts to include a term in which the parties agree that, in the relevant circumstances, they shall have such rights as a tribunal may consider just and equitable; or
- to prescribe in considerably greater detail the consequences of, for example, the cancellation of a contract or other matters dealt with by the statutes.

7.34 The first method would not, in my view, solve the problem. A discretion would remain, and the foreign court would still need to consider whether or not to exercise it: cf *Kornatzki v Oppenheimer* [1937] 4 All ER 133. The second option does not cure this defect, for many foreign courts, like New Zealand courts, will not accept that the parties can confer on a court by contract any jurisdiction or powers that the court does not otherwise have.

7.35 The third method would certainly be more effective. If detailed consequences were prescribed, a foreign court would be much more likely to give effect to them. A residual discretion could be retained, but because it would be relevant less often than the current broad discretion, difficulties in identifying when it would apply would be of

practical relevance in fewer cases. This course is, however, fundamentally inconsistent with the underlying policy of New Zealand's contract legislation, which has avoided such detailed specification quite consciously and deliberately.

FRUSTRATED CONTRACTS ACT 1944

THE APPROACH OF THE NEW ZEALAND COURTS

7.36 Section 3(1) of the Frustrated Contracts Act 1944 provides:

> Where a contract governed by the law of New Zealand has become impossible of performance or being otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section 4 of this Act, have effect in relation thereto.

7.37 A New Zealand court dealing with a case of alleged frustration would determine the proper law of the contract under consideration. There can be no doubt that the expression "a contract governed by New Zealand law" means "a contract of which the proper law is New Zealand law": see in relation to the English Act, (1944) 60 LQR 160, 162. If the proper law is New Zealand law, the court would consider whether, at New Zealand law, the supervening circumstances frustrate the contract and discharge the parties from further performance: Dicey and Morris Rule 187, especially, 1243, 1244. If the contract has been frustrated, the court will apply the Act.

7.38 On the other hand, if the proper law of the contract is not New Zealand law, the Act will not apply. An inescapable inference is that the New Zealand courts will look to the "foreign" proper law to determine the effect on the contract of the alleged frustrating circumstances and also, probably the existence and extent of any right to compensation or restitution arising out of the discharge: see Dicey and Morris Chapter 34, and in particular Rule 203(2)(a) and the commentary, 1352–1353. (This situation might provide a context in which a New Zealand court would be called upon to determine whether or not it would exercise a discretion under a foreign statute. For example, suppose that a contract governed by English law is the subject of litigation in New Zealand, and the question of frustration arises. The English legislation confers exactly the same discretion as to remedy on the courts as does the New Zealand Act: a New Zealand

court will need to determine whether or not it will exercise that discretion.)

THE APPROACH OF A FOREIGN COURT

7.39 A foreign court is likely to look to New Zealand law to determine whether or not a contract governed by New Zealand law is discharged by supervening circumstances: see Dicey and Morris Rule 187.

7.40 The foreign court may characterise the subsequent issues of compensation or restitution as contractual, in which case they are likely to be referred to New Zealand law as the proper law, or as restitutionary. There is little authority on the law which governs restitutionary obligations, but, if the approach suggested by Dicey and Morris is accepted, New Zealand law would also be applied as the law governing the contract in connection with which the issue arises: Rule 203(2)(a).

7.41 There is nothing in this Act to prevent a foreign court from exercising the discretion conferred by s 3 of the Frustrated Contracts Act, if it is willing to do so. The existence of similar legislation in many other Commonwealth jurisdictions might well incline the courts of those jurisdictions to exercise the discretion.

RECOMMENDATIONS

7.42 No changes to this Act are suggested. The Act expressly sets out its application in a manner that is helpful to both New Zealand and overseas courts.

7.43 This recommendation is made notwithstanding the fact that the reference to contracts "governed by English law" in the English Act was criticised by some writers. Glanville Williams described it as a "juristic blunder" in *The Law Reform (Frustrated Contracts) Act, 1943,* 19, and as "unfortunate" in (1944) 7 MLR 66, 69, on the grounds that the provision did not state what system of law the English courts should apply if the contract was not governed by English law, and that restitutionary consequences of frustration are normally governed by the law of the place where the benefit is conferred. However Dr Morris did not find it easy to agree with these criticisms. The second, in particular, appears to be incorrect: see Dicey and Morris Rule 203 and commentary. Dr Morris did think

that the words were unnecessary, because the same result would be reached in any event, and criticised the Act's failure to deal with the question of which law should be applied by an English court when the contract is governed by foreign law: see (1946) 62 LQR 170. Dr Morris' conclusion was that general choice of law clauses are preferable to particular choice of law clauses, and that the words should be deleted.

7.44 It is respectfully suggested that the approach favoured by Professor Webb ([1979] NZLJ 442), of expressly dealing with the application of each Act in that Act, should be preferred today. It is consistent with the contemporary trend to attempt to make statutes accessible: it is more helpful to state a rule than to leave it out in reliance upon the reader's knowledge of the conflict of laws. It is also more helpful to a foreign court considering the statute to have that statute state its limits. Such provisions are now common and, it is suggested, generally accepted.

CONTRACTS (PRIVITY) ACT 1982

THE APPROACH OF THE NEW ZEALAND COURTS

7.45 This Act clearly allows a third party beneficiary of a contract governed by New Zealand law to sue on a promise in a New Zealand court, in accordance with ss 4 and 8. If, however, the contract which purports to confer a benefit on the third party is governed by foreign law, it is suggested that a New Zealand court probably would not apply the Act. It seems clear that a New Zealand court will treat the proper law of a contract as governing the nature and extent of obligations arising under the Act. Logically, the proper law should also determine to whom those obligations are owed: this was the approach adopted by the House of Lords in *Hartmann v König* (1933) 50 TLR 114. The considerations discussed in paras 7.14 and 7.15 in relation to reform of the law are also relevant for a court construing this statute in order to determine whether it should be applied to a contract governed by foreign law. The desirability of reaching the same result as a foreign court, and the absence of strong policy reasons for a New Zealand court to apply the Act where it would not be applied elsewhere, point in the direction of not permitting the third party to sue in New Zealand in reliance on the Act. This is so even if the parties are all present in New Zealand. There can be no policy reason to disregard the choice of foreign law, since the parties could avoid

the Act, if they so wished, by stating expressly that the obligation should not be enforceable by the third party.

7.46 Because the Act makes no reference to its application to contracts governed by foreign law, there is considerable scope for uncertainty and unnecessary litigation. It would be helpful if this matter was clarified.

THE APPROACH OF A FOREIGN COURT

7.47 If a contract is governed by New Zealand law, and a third party promisee sues in a foreign court on a promise contained in the contract, there is a reasonable likelihood that the foreign court will entertain the action based on the statutory right created by New Zealand law. (I have encountered contracts entered into on this assumption, and in particular one financing agreement which was governed by English law, with the exception of one clause expressly stated to be governed by New Zealand law, invoking the Contracts (Privity) Act. The contract also contained a submission to English jurisdiction clause, and it was almost certain that any resulting litigation would take place in London.) In most common law countries, the absence of a similar right in the foreign law would not preclude the action: see *Loucks v Standard Oil Co of New York* 224 NY 99, 120 NE 198 (1918); *Phrantzes v Argenti* [1960] 2 QB 19.

7.48 If, on the other hand, a contract is not governed by New Zealand law, it is most improbable that a foreign court would permit the third party promisee to sue in reliance on the Act.

7.49 More difficult issues arise in relation to the dispensing jurisdiction conferred on the court by s 7. Section 7 permits an obligation governed by New Zealand law to be discharged or varied. This could not be done by a foreign legislature (Dicey and Morris, 1244 – 1245) and there is some conceptual peculiarity in such a power being exercised by a foreign court. On the other hand, the English courts appear to be willing to vary or revoke trusts under the Variation of Trusts Act 1958 (UK), even where the trust is not governed by English law, and have not been inhibited by conceptual niceties in this area: Dicey and Morris Rule 158, 1081 – 1083.

7.50 It is clear from the Act that the dispensing jurisdiction is not restricted to New Zealand judges: it may be exercised by arbitrators. From a New Zealand policy point of view, if it is acceptable for a

foreign arbitrator to exercise the dispensing power, there can hardly be any objection to a foreign court doing so.

7.51 In order to permit this (subject, as always, to the question of the approach of foreign courts to the exercise of such discretions), it is desirable to redefine "Court" by adopting the Frustrated Contracts Act definition. The Act could then be simplified by making consequential amendments to ss 10 and 11.

RECOMMENDATIONS

7.52 It is suggested that:

- the definition of "contract" in s 2 should be amended to refer to a contract *governed by New Zealand law;*[66]
- the definition of "Court" should be replaced with the definition in the Frustrated Contracts Act, and consequential amendments should be made to ss 10 and 11.

ILLEGAL CONTRACTS ACT 1970

THE APPROACH OF THE NEW ZEALAND COURTS

7.53 The scope of this Act is uncertain in a number of respects. Not only is it necessary to inquire whether the contract is governed by New Zealand law or not, it is also necessary to consider whether the illegality consists of a contravention of New Zealand law, or the law which is the proper law of the contract, or a foreign law which is in force in the place where the contract was, or must be, performed.

7.54 Issues relating to essential validity (in the sense of whether the contract was formed or not) or to the discharge of a contract are determined by reference to the putative proper law or proper law respectively. Clearly, whenever a contract is governed by New Zealand law, a New Zealand court will apply New Zealand law to decide whether it is illegal.

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[66] The Commission has taken a slightly different approach to the drafting in its treatment of this recommendation (also made in respect of the Illegal Contracts Act, the Contractual Mistakes Act, and the Contractual Remedies Act—see paras 7.66, 7.72 and 7.85). The Commission has in mind that particular parts of contracts may be intended by the parties to be governed by some law other than the "proper law" of the contract (see para 7.47). If the other law happens to be the law of New Zealand, then the contract statutes should apply to that part.

7.55 If a contract governed by New Zealand law is illegal because its formation or performance is contrary to New Zealand law or public policy, the Act clearly applies. If the contract becomes illegal because performance is contrary to a New Zealand enactment, taking into account the provisions of s 5, the Act will apply.

7.56 If a contract governed by New Zealand law has been or must be performed in a place outside New Zealand where, by local law, that performance is unlawful, it is well established that the New Zealand courts will not enforce that contract: Dicey and Morris, 1218 – 1225. However, it is not clear that the contract is "illegal", as such. A number of commentators, including Professor Furmston, have pointed out that there are degrees of illegality, voidness and unenforceability resulting from contraventions of the law, and it is far from clear that a court would describe the contract as "illegal" in all of these circumstances: see "The Illegal Contracts Act, 1970—an English view" (1972) 5 NZULR 151, 159, and Harris and Zuckerman [1971] ASCL 613, 639. Where foreign law is contravened, the traditional formulation appears to be that the contract is unenforceable for reasons of public policy and international comity: it might well be held not to be "illegal" within the meaning of the Act. The Court in *Foster v Driscoll* [1929] 1 KB 470 (the well-known Prohibition case) did not describe the contract as illegal. Indeed, it has been suggested that, where the illegality is supervening illegality under the law of the place of performance, that is simply one factor for a domestic court to take into account in judging whether performance has become impossible, with the result that the contract is frustrated: Dicey and Morris, 1220. The Law Reform Commission of British Columbia was sufficiently concerned about these categories of unenforceable contract, which may or may not be illegal, that in its 1983 report on illegal transactions it recommended a much broader definition of "illegal transaction" which embraced transactions that

> in their formation, existence or performance are null, void, illegal, unlawful, invalid, unenforceable, or otherwise ineffective, or in respect of which no action or proceeding may be brought, by reason of an enactment or of a rule of equity or common law respecting transactions that are contrary to public policy . . .
> (Law Reform Commission of British Columbia, *Report on Illegal Transactions*, LRC 69, November 1983, 64 – 70, and clause 1 of the draft British Columbia Illegal Transactions Act, 114)

7.57 It seems that a New Zealand court could come to either view of the meaning of "illegal contract" in s 3 of the Act. It may well be that, in adopting the "fair, large and liberal" construction enjoined by the Acts Interpretation Act 1924, a court today would not permit itself to be unduly hampered by the nice distinctions and refinements discussed by Professor Furmston.

7.58 Whatever result a court might reach on the statute as presently drafted, it is suggested that the Act should apply where there is illegality under the law of the place of performance. It would be odd if a New Zealand court were able to grant relief from the consequences of illegality or validate a contract, where the contract contravenes New Zealand law, but could not do so where New Zealand law renders the contract unenforceable because it contravenes a foreign law. It is a rule of *New Zealand* law which provides for the consequences of the illegality in the place of performance, and there is therefore nothing inappropriate or inconsistent in New Zealand law permitting relief to be granted from those consequences.

7.59 This approach is open to the objection that it is an ad hoc extension of the Illegal Contracts Act to one particular category of void or unenforceable contract, when there are many others. It is suggested, however, that there is a sufficient similarity between the situations clearly dealt with by the Act, and those which may already be covered—and which this extension would clearly embrace—to justify the amendment.

7.60 If a contract considered by a New Zealand court is not governed by New Zealand law, a New Zealand court will refer questions as to its essential validity or discharge to the putative proper law or proper law, as the case may be. A foreign court would certainly not apply New Zealand law in these circumstances, and the arguments in paras 7.14 – 7.16 above suggest that a New Zealand court should not do so. A suggestion that New Zealand courts should be able to grant relief where the problem stems from a contravention of New Zealand law, as the law of the place of performance, is at first sight attractive. This would enable relief to be granted in a case like *Klatzer v Caselberg & Co* (1909) 28 NZLR 994, where a contract arguably governed by Dutch law was treated as void by the New Zealand court, and not enforced, as it was made in contemplation of resale of the subject matter in New Zealand contrary to the Adulteration Prevention Act 1880. Such an interpretation of the statute is possible, as it is presently drafted. However, it is very unlikely that a foreign

court would apply the New Zealand statute in this way, even if the point was dealt with expressly. The "same result" principle suggests that the Act should not apply in these circumstances, and to avoid uncertainty this should be made clear on the face of the statute.

THE APPROACH OF A FOREIGN COURT

7.61 A foreign court considering a contract the proper law of which is New Zealand law is likely to look to New Zealand law to determine the essential validity of that contract, whether it has been discharged, and any restitutionary consequences of invalidity or discharge. Thus, where a contract is governed by New Zealand law, a foreign court is likely to apply ss 5 and 6 of the Act, which deal with the illegality of a contract at New Zealand law because performance contravenes an enactment, and the consequences of illegality in relation to the obligations imposed by a contract.

7.62 Sections 7 and 8 confer broad discretions on "the Court". As that term is defined, a foreign court would not be entitled to exercise these discretions.

7.63 There are strong arguments which suggest that a foreign court should not be permitted to exercise the discretion conferred by the Illegal Contracts Act to validate a contract. The power to validate is slightly anomalous, even when it is exercised by a New Zealand court. Such a power was rejected by the British Columbia Law Reform Commission: *Report on Illegal Transactions,* 74 – 76. Unlike the discretions conferred by the Contractual Mistakes Act or the Contractual Remedies Act, the discretion in this Act is, to some extent, a dispensing power from New Zealand's legislature. Before the dispensing power may be exercised, the court must engage in a balancing exercise in which the policy and significance of the statute contravened are weighed: s 7(3), and see *Harding v Coburn* [1976] 2 NZLR 577, *Re AIC Merchant Finance Limited (in receivership)* [1990] 2 NZLR 385, especially per Richardson J. It is not without significance that the Illegal Contracts Act is the only statute considered in this paper under which an arbitrator does not have power to exercise the discretion conferred by the statute. This, it is suggested, reflects the important public interest in the exercise of the discretion. An express provision in an arbitration agreement conferring such a power on an arbitrator would not be effective, as any award made by the arbitrator in exercise of those powers would create obligations founded upon an illegal contract, and therefore

would itself be illegal, unless validated by the Court. Rather, an arbitrator may refer any question about illegality to the court under s 7(2)(b): this was the express intention of the CCLRC: see *Report on the Law governing Illegal Contracts* (1969), para 15.

7.64 It is also inappropriate that the parties to an illegal contract should be permitted to refer their dispute to the courts of another forum, obtain an order validating the contract, and then treat it as enforceable and sue on it in New Zealand, with the New Zealand courts precluded from refusing to enforce the contract or imposing conditions on its enforcement.

7.65 It is tentatively suggested that the powers conferred by this Act should be reserved for New Zealand courts, and that the definition of "Court" should not be amended[67]. If a party sought validation of a contract governed by New Zealand law, it would be necessary to bring proceedings in New Zealand first, and then sue on the contract in a foreign jurisdiction where that was necessary in order to obtain an enforceable judgment.

RECOMMENDATIONS

7.66 It is suggested that s 3 of the Act should be amended to provide:

- that an illegal contract, for the purposes of the Act, must be a contract governed by New Zealand law;[68] and
- that a contract is an illegal contract for the purposes of the Act whether the illegality arises from a contravention of New Zealand law or the law of any other jurisdiction where the contract has been, or must be, performed.

CONTRACTUAL MISTAKES ACT 1977

THE APPROACH OF THE NEW ZEALAND COURTS

7.67 Once again, there can be no doubt that a New Zealand court will apply the Act to any contract governed by New Zealand law, or any contract that would, if formed, have been governed by New Zealand law but was not formed because of the mistake in question.

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[67] The Law Commission has not adopted this view either in relation to foreign courts or to arbitrators: see report, paras 93 – 97, 99 – 100.

[68] See note to para 7.52

For the reasons canvassed in paras 7.14 – 7.17, it is suggested that the Act should not apply to any other contracts.

7.68 It is submitted that the better view is that this is the scope of the Act as it stands. Section 5(1) provides that the Act has effect

> in place of the rules of the common law and of equity governing the circumstances in which relief may be granted, on the grounds of mistake, to a party to a contract or to a person claiming through or under any such party.

That is, the Act only replaces the *New Zealand law* relating to mistake. It might, however, be argued that the reference to the rules of common law and equity governing relief for mistake includes the rules of common law and equity which refer the question of the effect of a mistake on a contract to a foreign law, that is, the choice of law rules relating to mistake. The Act should be amended to make it clear that it applies in relation to contracts putatively governed by New Zealand law, but not otherwise.

7.69 The position then would be that where a New Zealand court was considering a contract governed by foreign law, such as New South Wales law, the court would look to New South Wales law to determine whether or not a contract had been formed. If the contract was for the sale of goods located in New South Wales when the contract was entered into, New South Wales law would determine whether or not property had passed: Dicey and Morris Rule 119, 943 – 945. If the goods were in New Zealand, New Zealand law would determine whether or not property had passed, and that would depend on whether or not there was a contract. Section 8 of the Contractual Mistakes Act would have no relevance here, as it only restricts the orders that can be made under that Act, which does not apply. Nor would the court have any power to grant relief from the consequences of the mistake. Although this may seem harsh, it is a consequence of the fact that New South Wales law has been chosen by the parties, or has the closest connection with the transaction, and that law produces that result. That is how the rights of the parties would be adjusted before a New South Wales court, and the same should be done here.

THE APPROACH OF A FOREIGN COURT

7.70 If a contract is, or would if formed be, governed by New Zealand law, a foreign court is likely to refer the questions of whether

a mistake prevented formation or rendered the contract liable to be set aside to New Zealand law. The Act does not expressly deal with such matters, although a view on certain aspects of the law relating to mistake is implicit in its provisions. The Act appears to treat the question of whether a contract was formed as of no importance, given the discretionary power in s 7.[69] Even in relation to a domestic dispute, this may give rise to some difficulty and uncertainty of result: McLauchlan (1983) 10 NZULR 199; Cheshire Fifoot & Furmston (7th New Zealand Edition), 253 – 254. Similar difficulties may arise in the international context. For example, suppose that the question of whether property in goods has passed, under a contract governed by New Zealand law, arises for determination in a New South Wales court. This depends on the law of the place where the goods are situated. If the goods were in New Zealand at the time of "contracting", the New South Wales court faces the same difficulties as would a New Zealand court in a domestic transaction, as discussed by Professor McLauchlan. If the goods were in New South Wales at the relevant time, a New South Wales court would enquire whether a contract was formed. It would refer this question to New Zealand law, and find that it was not a simple one! However, the issue is not principally a conflict of laws problem: the international context simply provides another instance of the difficulties posed by the statute. For this reason, the issue is not addressed further here.

7.71 A foreign court that accepts the position of Dicey and Morris on the law governing restitutionary claims will refer questions of restitution in these circumstances to New Zealand law. If the definition of "Court" is amended, a foreign court that is willing to exercise the s 7 discretion could then give full effect to the Act.

RECOMMENDATIONS

7.72 The following amendments are suggested:

- the insertion of a new subsection in s 12, which would read:

  "This Act applies in relation to any contract which is, or would if it had come into existence have been, governed by the law of New Zealand.";[70]

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[69] See paras 2.13 – 2.15

[70] See note to para 7.52

- the replacement of the definition of "Court" with the definition used in the Frustrated Contracts Act. Consequential amendments could then be made to ss 9 and 10.

CONTRACTUAL REMEDIES ACT 1979

THE APPROACH OF THE NEW ZEALAND COURTS

7.73 Of all the statutes discussed, the Contractual Remedies Act raises the most complex questions in relation to its application to international transactions. The Act deals with a range of issues, and it is necessary to consider the application of each distinct provision separately. It is possible for different provisions in the same Act to apply in different circumstances. One provision might apply only to New Zealand law contracts, but another to any contracts considered by a New Zealand court.

7.74 Section 4 of the Act deals with provisions which attempt to prevent the Court from inquiring into questions concerning representations or terms not recorded in a written contract, or questions of authority or agency. A New Zealand court would certainly apply s 4 in considering a contract governed by New Zealand law. As the section is presently drafted, it might also be applied to contracts governed by foreign law, as:

- the provision could be classified as procedural, and therefore a matter for the law of the forum; and
- in cases where New Zealand law would have applied but for a choice of law clause in the contract, and under the selected foreign law a "no representations" clause would be conclusive, the factors listed in s 4(1) may also be seen as relevant to whether the parties can fairly be held to the choice of law, with all its consequences.

7.75 Whether or not the section should apply to contracts governed by foreign law raises difficult questions of policy. In substance, s 4 renders certain terms ineffective, or ineffective unless they are fair and reasonable. The reasons considered in paras 7.14 – 7.16 suggest the section should not apply, but considerations of fairness will also have some impact. It may well be that a New Zealand court could give effect to these concerns at the choice of law stage. Otherwise, if foreign law applies, and there is no reason to disregard any express choice of law provision, s 4 should not apply.

7.76 Section 6 is intended to assimilate the law on misrepresentation and breach of warranty as between parties to a contract. There are a number of possible fact situations. They are summarised in the table below, with the conclusions a New Zealand court might reach in those circumstances.

	Contract governed by NZ law	Contract governed by foreign law
Misrepresentation in NZ	section 6; no action in tort	action in tort alone
Misrepresentation elsewhere	section 6; no action in tort	action in tort alone

7.77 These conclusions are likely because the touchstone of s 6 is the contract: the section applies only between contracting parties, and effectively incorporates pre-contractual misrepresentations into the contract. Where a contract is not governed by New Zealand law, New Zealand law should not be read as dealing with the scope of obligations under it. An action in tort will be available instead.

7.78 It is not absolutely clear that s 6(1) applies where misrepresentations which result in a New Zealand law contract are not made in New Zealand: a New Zealand court could decide otherwise. (The question of where a representation is made is itself a difficult one: see Dicey and Morris, 1382 – 1387, especially 1385.) Given the nature of s 6, it seems appropriate that it should apply and incorporate the representation as a term in the New Zealand law contract. This should be made clear.

7.79 Sections 7 to 9 will be applied by a New Zealand court if a contract is governed by New Zealand law. Section 7 provides, as does s 5 of the Contractual Mistakes Act, that it has effect "in place of the rules of the common law and of equity . . .". For the reasons discussed in relation to the Contractual Mistakes Act, in para 7.68, it is suggested that a New Zealand court would not apply ss 7 – 9 to a contract governed by foreign law. However, it would be helpful if this limitation were set out in the Act.

7.80 As s 4 stands, it could not be applied by a foreign court. Redefinition of the term "Court" would assist. However, some difficulties would remain as it would still be arguable, in an Australian federal or state court for example, that s 4 regulates procedure and admissibility of evidence, both of which are matters for the law of the forum.

7.81 Section 4 is, in effect, a substantive provision: it would be better if it were expressed in that way. Subsections (1) and (2) could be redrafted as follows:

(1) A provision in a contract or any other document which purports to preclude a Court from inquiring into or determining the question—

(a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) Whether, if it was so made or given, it constituted a representation or a term of contract; or

(c) Whether, if it was a representation, it was relied on—

shall be void and of no effect, unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject matter and value of the transaction, the respective bargaining strengths of the parties, and the question of whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

(2) A provision in a contract or any other document which purports to preclude a Court from inquiring into or determining the question of whether any person had actual or ostensible authority of a party to make or give any statement, promise, or undertaking shall be void and of no effect.

This revision of s 4 would also remove the doubt raised by Somers J in *Ellmers v Brown* (1990) 1 NZ ConvC 190,568 (CA) about the

factors that can be taken into account in deciding what is fair and reasonable.[71]

7.82 Section 6 raises more difficult issues. The following table summarises conclusions that a foreign court could well reach.

	Contract governed by NZ Law	Contract governed by foreign law
Misrepresentation in NZ	section 6 or tort (A)	tort, not section 6; (C)
Misrepresentation elsewhere	section 6 or tort (B)	tort, not section 6; (D)

(A) If a plaintiff sues in reliance on s 6(1)(a), the foreign court is likely to entertain the action, treating the provision either as incorporating the representation into the contract, or as creating a statutory right of action which there is no reason to refuse to give effect to: compare para 7.47. If the plaintiff sues in England in tort in circumstances where the misrepresentation was negligent or fraudulent, for example, the High Court would probably adopt the approach set out in Dicey and Morris (Rules 204 and 205). The misrepresentation would be actionable in England if it was made there: the question is whether it is also actionable in New Zealand. First, the foreign court would need to decide whether s 6 applies to misrepresentations made outside New Zealand. If not, then the misrepresentation would clearly be actionable. If the foreign court found that s 6 did apply, it would need to decide whether the misrepresentation was "actionable" in the relevant sense, given that civil actions can be brought under s 6(1)(a), but s 6(1)(b) expressly precludes an action for damages for negligence or deceit. The answer would probably be in the affirmative, since there is some form of civil liability: Dicey and Morris, 1372. But, as Professor Webb put it, "Heaven help the overseas conflict lawyers"!

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[71] Professor Burrows considered the difficulties raised by the decision in *Ellmers v Brown* but recommended no change to s 4 (para 1.05). The Law Commission has adopted Mr Goddard's recommendations regarding the substantive operation of the section, which also has the effect of overcoming the difficulties discussed by Professor Burrows (see s 3, draft Act and report, paras 21 – 23).

(B) If, in the example in (A), the misrepresentation had been made in England, an English court would almost certainly treat a tort action as an ordinary negligence action governed by English law. The fact that the contract was governed by New Zealand law would be quite irrelevant to the cause of action. The English court would not treat s 6(1)(b) as extinguishing a right of action arising under English domestic law. On the other hand, if the plaintiff chose to sue in reliance on s 6(1)(a), claiming a contractual measure of damages, that would probably be successful: the English court would give effect to the effective incorporation of the representation as a term under New Zealand law, in a contract governed by that law. The plaintiff would have a choice.

(C) In these circumstances, an English court would probably reach the same result on the application of s 6(1)(a) as a New Zealand court, for similar reasons. The Dicey and Morris test would probably be applied in relation to a tort claim, with the difficulties discussed in the example in (A).

(D) In this case an English court would have no reason to refer to the New Zealand Act, and would not do so.

7.83 A foreign court would be likely to apply ss 7 and 8 to determine whether, and when, a contract governed by New Zealand law had been cancelled. It would be most unlikely to look to the Act, in connection with the termination of a contract not governed by New Zealand law.

7.84 The discretion conferred by s 9 would be approached in the same manner as the discretion under the Contractual Mistakes Act. If the definition of "Court" is replaced, a foreign court which was willing to exercise such a discretion could do so. It is desirable that, so far as possible, foreign courts should be able to exercise the discretion, and the definition of "Court" should be amended accordingly.

RECOMMENDATIONS

7.85 The Contractual Remedies Act should be amended as follows:

- the definition of "Court" in s 2 should be replaced with the Frustrated Contracts Act definition;

- a new subsection providing that the Act only applies to contracts governed by New Zealand law should be inserted in s 16;[72]
- section 4 should be redrafted as indicated in para 7.81;
- in s 6, the words "and whether made in New Zealand or elsewhere" should be inserted after the words "whether innocent or fraudulent", or alternatively "misrepresentation" should be defined in s 2 to include misrepresentations made outside New Zealand.

[72] See note to para 7.52

ANNEX

STATUTORY CONFLICTS OF LAWS PROVISIONS
(para 7.01)

NEW ZEALAND

Credit Contracts Act 1981

7 Conflict of Laws

Nothing in this Act shall apply in respect of a credit contract, or part of a credit contract, if the contract or part is not governed by the law of New Zealand.

Commerce Act 1986

4 Application of Act to conduct outside New Zealand—

(1) This Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in New Zealand to the extent that such conduct affects a market in New Zealand.

(2) Without limiting subsection (1) of this section, section 36A of this Act extends to the engaging in conduct outside New Zealand by any person resident or carrying on business in Australia to the extent that such conduct affects a market, not being a market exclusively for services, in New Zealand.

Simultaneous Deaths Act 1958

4 Application of Act—

(1) This Act shall apply in respect of—

(a) All property of any person that devolves according to the law of New Zealand:

(b) All appointments of trustees where the appointments have to be made according to the law of New Zealand.

(2) This Act shall so apply whether the deaths occurred in New Zealand or elsewhere.

5 Extended Application of Parts IV and V

5 (1) Parts IV and V extend to the engaging in conduct outside Australia by bodies corporate incorporated or carrying on business within Australia or by Australian citizens or persons ordinarily resident within Australia.

(1A) In addition to the extended operation that section 46A has by virtue of subsection (1), that section extends to the engaging in conduct outside Australia by:

(a) New Zealand and New Zealand Crown corporations; or

(b) bodies corporate carrying on business within New Zealand; or

(c) persons ordinarily resident within New Zealand.

(2) In addition to the extended operation that sections 47 and 48 have by virtue of subsection (1), those sections extend to the engaging in conduct outside Australia by any persons in relation to the supply by those persons of goods or services to persons within Australia.

(3) Where a claim under section 82 is made in a proceeding, a person is not entitled to rely at a hearing in respect of that proceeding on conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(4) A person other than the Minister or the Commission is not entitled to make an application to the Court for an order under subsection 87(1) or (1A) in a proceeding in respect of conduct to which a provision of this Act extends by virtue of subsection (1) or (2) of this section except with the consent in writing of the Minister.

(5) The Minister shall give a consent under subsection (3) or (4) in respect of a proceeding unless, in the opinion of the Minister—

(a) the law of the country in which the conduct concerned was engaged in required or specifically authorised the engaging in of the conduct; and

(b) it is not in the national interest that the consent be given.

Frustrated Contracts Act 1978 (NSW)

5 Interpretation

(5) It is the intention of Parliament that, except to the extent that the parties to a contract otherwise agree, a court other than a court of New South Wales may exercise the powers given to a court by Part III in relation to the contract.

Contracts Review Act 1980 (NSW)

Effect of this Act not limited by agreements, etc

17 (3) This Act applies to and in relation to a contract only if—

(a) the law of the State is the proper law of the contract;

(b) the proper law of the contract would, but for a term that it should be the law of some other place or a term to the like effect, be the law of the State; or

(c) the proper law of the contract would, but for a term that purports to substitute, or has the effect of substituting, provisions of the law of some other place for all or any of the provisions of this Act, be the law of the State.

UNITED KINGDOM

Law Reform (Frustrated Contracts) Act 1943

1 Adjustment of rights and liabilities of parties to frustrated contracts

(1) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have effect in relation thereto.

Unfair Contract Terms Act 1977

27 Choice of law clauses

(1) Where the law applicable to a contract is the law of any part of the United Kingdom only by choice of the parties (and apart from that choice would be the law of some country outside the United Kingdom) sections 2 to 7 and 16 to 21 of this Act do not operate as part of the law applicable to the contract.

(2) This Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the United Kingdom, where (either or both)—

(a) the term appears to the court, or arbitrator or arbiter to have been imposed wholly or mainly for the purpose of enabling the party imposing it to evade the operation of this Act; or

(b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the United Kingdom, and the essential steps necessary for the making of the contract were taken there, whether by him or by others on his behalf.

APPENDICES

APPENDIX A

Frustration of Contract[73]

J F Burrows

THE PRESENT LAW 1982

INTRODUCTION AND DEFINITION

A.01 Contracts, particularly long-term contracts, are at the mercy of circumstance. The circumstances which prevail when some of the obligations come to be performed may be quite different from those which pertained when the contract was entered into. This is particularly so in times of rapid inflation. Basically, the English (and New Zealand) law of contract holds parties to the letter of the contract they have made whatever the injustice or inconvenience. Contract-making involves risk-taking.

A.02 The only important exception to this is the doctrine of frustration of contract. This operates to terminate a contract when some

[73] The paper, which states the law at 1982, was written by Professor Burrows for the CCLRC. There are two parts to the paper, which examines the options for reform of the present law governing the doctrine of frustration of contract. The first part deals with the doctrine of frustration.'The doctrine continues to be governed by common law rules, articulated in the House of Lords decision, *Davis Contractors Limited v Fareham Urban District Council* [1956] AC 696. Since Professor Burrows' paper was written, there have not been a substantial number of opportunities for the courts to consider the doctrine. But there have been developments in the application of the doctrine; note the comments of Professor Burrows himself in his recent New Zealand Law Society Seminar "Update on Contract" April/May 1991, where he suggested that the lowering of the threshold necessary to establish frustration signalled by the decision in *Codelfa Construction Limited v NSW Rail Authority* (1982) 149 CLR 337 may have become more firmly established in the recent decisions he refers to in that paper. The second part of the paper considers the Frustrated Contracts Act 1944.

supervening event beyond the control of either party renders further performance substantially impossible. The doctrine was a fairly late addition to the law, and developed as an exception to the basic rule that contractual promises are absolute. The language in which the doctrine is expressed is comfortably vague, and different judicial tests, while amounting to much the same thing in the end, do put it in different ways. (This is inevitable when one considers the variety of possible kinds of frustrating event and the different classes of contract which the formulae must attempt to encompass. Similar vagueness has long characterised many areas of contract law—for example, mistake and cancellation for breach.) Probably the most quoted statement in recent years has been that of Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696:

> . . . [F]rustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.

A.03 Lord Simon of Glaisdale, in the most recent House of Lords decision, *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, put the matter in rather similar terms:

> Frustration of a contract takes place when there supervenes an event . . . which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in new circumstances. (700)

A.04 This second formulation, with its reference to "injustice" may seem to require a rather lower threshold than the threshold in the *Davis* case, but there is probably very little difference in fact, and it is rare for a finding of frustration to be made. There are other recent indications that the courts might be softening a little in their attitude to frustration. In *Panalpina* itself the doctrine was held applicable to leases, although on the facts of the case a finding of frustration was not made; in *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] AC 854, it was held that long mutual delay could frustrate an arbitration clause; and see *Pioneer Shipping Co v BTP*

Tioxide [1982] AC 724, where it was held that in some circumstances strikes may cause frustration.

A.05 But, however the doctrine is expressed, it has three salient features.

- The threshold for frustration is very high: performance must have become impossible, or "totally different"; the contract must have been "fundamentally altered".
- With a few exceptions, which are difficult to reconcile, frustration operates in an all-or-nothing fashion. If the contract is not frustrated it remains on foot and both parties remain liable for its non-performance; if it is frustrated it fails completely and both parties are excused. The Frustrated Contracts Act 1944 then allows some restitutionary relief.
- Frustration is not dependent on the election of either of the parties. It operates automatically.

These three features will now be discussed in turn.

THE HIGH THRESHOLD

A.06 Only the most disastrous intervention in a contract serves to frustrate it. The fact that performance has become more expensive or more onerous is not enough to excuse a person from contractual obligations. There are doubtless two reasons for this. The first is simply the strong adherence of English law to the sanctity of promises. Some Continental systems recognise that, in respect of some promises parties are only obliged to do their best; at common law the promisor's obligation is absolute, and the promisor must perform or pay damages: Nicholas "Rules and Terms—Civil Law and Common Law" (1974) 48 Tulane LR 946. Exceptions to this rule are countenanced only in the very strongest cases. Secondly, as long as complete termination of the contract (a drastic solution) is the consequence of frustration it is natural that the courts will wish to find that there has been frustration only in extreme cases. If lesser forms of relief—say variation—were available, a court might be more willing to hold that less extreme events excused strict compliance with the contract: see the discussion in Waddams *The Law of Contracts* ch 12, especially 227 – 229.

A.07 This "high threshold" can have striking consequences, and at times apparent hardship is caused. Some examples follow.

A.08 Contracts may make provision for specified monetary payments which, as a result of inflation, appear ridiculously low when they fall to be paid. Conversely, the cost of providing services under a contract may have escalated out of all proportion to the price to be paid for them by the time they have to be performed. Obviously, the older the contract the greater the problem; for a striking example, see the history of the Westinghouse case outlined by Joskow in "Commercial Impossibility, the Uranium Market and the Westinghouse Case", 6 J Legal Studies (1977) 119 et seq which involved price increases for uranium which would result in a loss to Westinghouse of two billion dollars on various contracts. The principle of nominalism, to which the common law has always adhered, directs that a dollar means a dollar at all times and in all circumstances, and the loser under such a contract is likely to be told that the bargain was improvidently made, but must be performed to the letter: see Lang, *Inflation as it affects Legal and Commercial Transactions*, West Publishing, Sydney 1974, 16. No doubt careful drafting of a fluctuation clause in the contract can overcome the problem, and, in this day and age, a solicitor who does not include one in contracts which could be susceptible to monetary fluctuations might well be guilty of negligence. But such clauses are very hard to draft with sufficient clarity and precision: see Lang, (1974) 2 Aust Bus L Rev 273. Furthermore, if the contract is an old one, entered into when the problem was not as all-pervading as it is today, it may well contain no such clause at all.

A.09 The courts can sometimes provide relief in such a case. There are a few dicta that in cases of great price discrepancy the contract might be held to be frustrated, but this would be so only in the most extreme cases: see *Société Franco-Tunisienne d'Armement-Tunis v Sidermar SPA* [1961] 2 QB 278, 312 per Pierson J; *Brauer & Co v James Clark Ltd* [1952] 2 All ER 497, 501 per Denning LJ, and *Corbin on Contracts*, 1111. Likewise, a court might be able to imply a term that the contract is terminable on certain contingencies, as was done recently in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 3 All ER 769, where a contract to supply water made in 1929 provided for a ludicrous payment of 7d per thousand gallons. The courts occasionally cope with inflation in other ways: eg, by assessing damages at a time later than the date of breach; *Johnson v Agnew* [1980] AC 367; or by holding a builder liable when his "quote" becomes out-of-date as in *Abrams v Ancliffe* [1981] 1

NZLR 244. But normally such devices are not available, and real hardship is suffered by one party.

BUILDING CONTRACTS

A.10 Building contracts are particularly susceptible to external difficulties, both environmental and economic. Normally, such difficulties are within the contemplation of the parties, and are taken into account in the quoted price. But sometimes the difficulties exceed anything which could reasonably have been contemplated. *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 might itself be regarded as such a case. As a result of labour shortages, a contract to build council houses for £92 000 in eight months took 22 months to complete at a cost to the builder of £115 000. There was held to be no frustration. Likewise in *Wilkins & Davies Construction Co Ltd v Geraldine Corporation* [1958] NZLR 985, a contract to sink a tank and pump chamber below ground where the nature of the subsoil and the volume of water encountered rendered it impossible to excavate by machine, and the original design of the tank had to be abandoned and a new design adopted, the contract was held not to be frustrated.

A.11 Some standard form building contracts now make provision for such cases, and provide for adjustments of the contract price in the event of risks which could not reasonably have been foreseen by an experienced contractor: for example, NZSS 623, cl 8.2. In the absence of such a clause, should the law itself provide relief? To say that it should would involve a very substantial inroad into established notions of sanctity of contract.

SPECIFIED MODE OF PERFORMANCE

A.12 Supervening impossibility of the contemplated mode of performance does not frustrate a contract unless the contract specifies only the one possible mode of performance. Thus, in *Tsakiraglou & Co v Noblee Thorl GmbH* [1962] AC 93, the closing of the Suez Canal in 1956 did not frustrate a contract for the sea carriage of goods, even though the alternative route round the Cape of Good Hope was three times longer and far more costly. If the route through the Canal had been specified in the contract as the only route, the decision would probably have been different (as it might have been if the cargo had

been perishable, or if the date of delivery was of the essence): see Hamson, [1961] Camb LJ 151.

A.13 In the same way, a contract for the sale of unascertained goods will almost never be held to be frustrated, because if the contemplated source of supply disappears, the seller is at liberty to fulfil the contract with goods obtained from elsewhere. This finding has even been made where the seller, when the contemplated source had failed, was unable to find supplies elsewhere: see *Blackburn Bobbin Co v Allen* [1918] 2 KB 467; compare *In re Badische Co Limited* [1921] 2 Ch 331.

A.14 One wonders whether the fate of the seller should depend on whether a contract (probably unread) happens to contain a clause that the goods are to be obtained only from a specified place. That distinction might appear casuistic to the layperson.

REVALUATION OF CURRENCY

A.15 Sometimes revaluation of the currency in which payment is to be made under the contract can cause heavy losses.

A.16 Many exporters who had stipulated that payment was to be made in $US have had their margins of profit stripped off by the depreciation of the currency of payment to such an extent that if they could get out of the contract they would happily do so. All too often they find that they are held to the agreement. (Opas, "What Happens When the Contract Becomes Unprofitable?" (1973) 1 Aust Bus L Rev 59)

A.17 Thus, the present "high threshold" for frustration can cause hardship. Whether anything can or ought to be done about this will be discussed later under the heading "Reform". The answer to that question is very far from simple, and one must beware of any solution which could involve such an inroad on accepted notions of sanctity of contract that it would be unacceptable to the business community.

THE "ALL OR NOTHING" PRINCIPLE

A.18 Under the current law of frustration, the contract normally either stands or falls as a whole. Either it is frustrated, in which case both parties are excused from further performance, or else it is not, in which case both parties must continue to perform in accordance with

the contract or pay damages in default. Thus in *Aurel Forras Pty Ltd v Graham Karp Developments Pty Ltd* [1975] VR 202 it was held that certain penalty clauses in a larger contract could not be frustrated by strikes; there is no such thing as "selective frustration".

A.19 Writers have sometimes commented that there is no logical reason to support the general rule: the impossibility of one party's promise does not necessarily mean that the whole contract should stand or crumble. Indeed, the present doctrine has been stigmatised by Nicholas (see para A.06) as a "characteristically sloppy ... ellipse."

A.20 Nevertheless the present position is not quite as black and white as it appears. There are a few cases in which something which one might describe as "partial frustration" has been allowed.

- In a few cases, a contract (usually one involving personal services) has been held to be suspended because of some temporary impediment to performance. The party in such cases has not been liable for failure to perform because the event was beyond that party's control; nor was the contract terminated: see, for example, *Minnevitch v Cafe de Paris* (1936) 52 TLR 413.
- In other cases, because of a destructive event for which one party was not responsible, that party has been held excused from one of the contractual obligations. The other party, however, has been held obliged to perform the obligations entered into to the full, even though that party was getting less than expected.

A.21 In *Leiston Gas Company v Leiston-Cum-Sizewell Urban District Council* [1916] 2 KB 428, a gas company agreed to provide, for a minimum of five years, column lanterns, burners and other plant, to connect the lamps to their mains, to supply gas for public lighting, and to maintain the plant and keep it in repair. The defendants agreed to pay a certain sum per annum on a quarterly basis. Under wartime regulations the lighting of lamps in the council district was prohibited. It was held that, while the regulations absolved the company from performing part of their obligation, it was obliged to perform the rest, and the council must continue to pay the full quarterly instalments. This outcome was scarcely satisfactory; it is a result of the common law's inability to apportion consideration. (The fact that the impossibility of performance was caused by illegality may

have been relevant: compare *Scanlan's New Neon Ltd v Tooheys Ltd* (1942) 67 CLR 169).

A.22 The well known rule that the risk passes to the purchaser on a contract for the sale of land may perhaps also be viewed from this angle. If there is an accidental fire between contract and settlement the vendor is relieved from the obligation to transfer all the vendor has promised (ie, land plus fixtures), but the purchaser remains liable to pay the full purchase price.

A.23 A case which appears to stand alone is *Sainsbury Ltd v Street* [1972] 1 WLR 834:

> The defendant farmer agreed to sell the plaintiff merchants 275 tons of barley to be grown on his farm that summer at a price of £20 per ton. Through no fault of the farmer the harvest was a poor one, and produced only 140 tons. McKenna J assumed, consistently with the plaintiff's abandonment of his claim for tonnage not produced, that it was an implied condition of the contract that the defendant would be excused if he failed, without fault, to produce the whole tonnage contracted for. But he refused to hold that the defendant was therefore excused from providing anything: he remained liable to sell the 140 tons that he had actually produced if the plaintiffs were willing to accept it.

A.24 The precedent value of the case is perhaps limited, due to its dependence on the construction of the particular contract. But the result is sensible and satisfactory, and may well be capable of extension, by statute, to other similar cases. It may often make sense to say that, even though a party cannot perform all the obligations under a contract, that party should be obliged to perform the remainder of it if the other party wishes to receive that part performance. In some of these cases, however, (for example, in the *Leiston* type of situation), it would be desirable to have some provision enabling the abatement or apportionment of consideration.

THE AUTOMATIC NATURE OF FRUSTRATION

A.25 A frustrating event ends the contract automatically. Thus, unless the parties subsequently agree to a variation, the life of the contract is independent of their wishes. This may have certain unfortunate effects.

A.26 First, the parties may be uncertain whether the event which has happened is sufficient to frustrate their contract, and may thus be left in a state of suspense. This is particularly true of cases where the external event (eg, requisition of a ship) has caused delay which is, initially, of uncertain duration. The parties apparently have to make an educated guess there and then:

> The question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause and the probabilities of the delay and had to decide what to do ... The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. (*Bankline v A Capel & Co* [1919] AC 435, Lord Sumner, 454)

A.27 Some uncertainty is inevitable in this type of situation. Even if the law provided that either party could terminate such a contract, questions would still arise as to whether, in the circumstances, either party was justified in terminating the contract. But is the present automatic termination the best solution?

A.28 Secondly, frustration brings the contract automatically to an end, even if the party who will suffer from the frustrating event wants the contract to continue. In *Tamplin SS Co v Anglo-Mexican Petroleum Co* [1916] 2 AC 397, the charterer whose ship was removed from service by government requisition was perfectly prepared to continue paying his freight while he waited for the ship to become available again. (He was no doubt motivated so to do by the large amount the Government was paying him for the use of the vessel).

A.29 Thirdly, the situation could arise where a party, unaware of the degree of interference with the contract, lays out money on the assumption that the contract is still in existence. The Frustrated Contracts Act does not expressly provide for the recovery of such money.

THE NEED FOR REFORM

A.30 The Committee should consider whether it wishes to allow greater relief to a party whose contract has become onerous. This relief, as will shortly be suggested, could take a variety of forms: among them, a court power to vary contracts; an obligation between the parties to attempt to negotiate fresh terms; and a kind of "partial" or "selective" frustration. Any such solution, however, raises some very large questions about sanctity of contract. Any attempted reform

of the law on frustration must bear in mind the following disadvantages.

A.31 On the traditional view, the whole point of a contract is to fix in advance the risk of changes in circumstance. In *Larrinaga & Co v Société Franco-Americaine* (1923) 29 Com Cas 1, 18, Lord Sumner said:

> All the uncertainties of a commercial contract can ultimately be expressed, though not very accurately, in terms of money, and rarely, if ever, is it a ground for inferring frustration of an adventure, that the contract has turned out to be a loss or even a commercial disaster for somebody .... No one can tell how long a spell of commercial depression may last; no suspense can be more harassing than the vagaries of foreign exchanges, but contracts are made for the purpose of fixing the incidence of such risks in advance, and their occurrence only makes it the more necessary to uphold a contract and not to make them the ground for discharging it.

This is the view of contract which still dominates the common law, and it will not be easy to alter such patterns of thinking, even if one decides one wishes to do so. Yet it should be pointed out that it is not a *necessary* view. It is not held in other systems—in Japan, for example.

A.32 However, the idea of a contract as an acceptance of risk has another aspect. Although the main judicial formulations of the tests for frustration suggest that the only relevant consideration is whether performance has become "totally different" from that contracted for, this is probably misleading. Another important consideration seems to be whether the *risk* of the disruptive event should be borne by one or other of the parties. Several factors are relevant in determining this: longstanding custom in that type of contract; whether one party is better placed to anticipate and guard against the risks; whether one party should be taken to have voluntarily assumed them. Thus the rule that a contract to buy land is not frustrated by the destruction of the dwelling, or the alteration of its character before settlement, is due to the ancient rule that the *risk* lies on the purchaser from the time of contract, rather than to any finding that the destructive event has not sufficiently changed the nature of the subject matter. Sometimes, indeed, that event has changed the subject matter very much—as in *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 WLR 164, where a government designation order

reduced the value of the property from £1 700 000 to £200 000. The true ratio of the case, it is submitted, is found in the judgment of Buckley LJ at 173:

> It seems to me that the risk of property being listed as property of architectural or historical interest is a risk which inheres in all ownership of buildings ... But it is a risk, I think, which attaches to all buildings and it is a risk that every owner and every purchaser of property must recognise that he is subject to.

In other words, in contracts for the purchase of land, the risk of diminution in value must lie on someone: custom dictates that it is the buyer. In that certain knowledge (at least in the case of fire) insurance may be arranged.

A.33 The building contract cases may have gone the way they did because, out of builder and client, the builder is the better able to foresee the risk involved and take steps to minimise it. The builder's quote is supposed to take into account the risks as they are calculated.

A.34 In other cases the decision as to whether a contract has been frustrated has turned in part upon the question of whether the parties foresaw, or ought to have foreseen, the disaster. If they did, and failed to provide for it, the inference may be drawn that the party on whom the loss will fall is tacitly agreeing to bear it: see, for example, *Hawkes Bay Electric-Power Board v Thomas Borthwick & Sons (Australia) Ltd* [1933] NZLR 873. (A promise in which the promisor undertakes to accept the risk may be described as an "absolute" promise. The following example was given in *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 CLR 169, 200 by Latham CJ: a woman orders a wedding dress from a dressmaker, both parties knowing it is required for a wedding between the customer and a particular man. The wedding is cancelled without default by the woman. "No one would suggest that the lady is under no liability to pay for the dress, or even that she was entitled to cancel the order if the dress was only partly made .... The true position, all would agree, is that the promise to pay is absolute ..."). The inference of agreement to bear the risk is by no means inevitable however, and the cases on the point are not easy to reconcile.

A.35 It may be that the vague formulations of the tests for frustration in cases like *Davis Contractors Ltd v Fareham UDC* [1956] AC

696 tell only half the story. Any attempted reforms must bear this in mind.

A.36 If contracting parties know that the courts will come to their rescue if they strike trouble during performance, this may induce laxness at the outset in negotiating and pricing contracts, and in their drafting. It may encourage the making of unrealistic long term contracts, and it could lead to failure to adopt procedures to minimise loss. How real this fear is, is difficult to say. If there is merit in such a view, it may simply be an argument for saying that any power to grant relief should be sparingly exercised, rather than that the power should not exist at all.

A.37 Any relaxation of the doctrine of frustration will lead to a lack of certainty. (The notion of certainty in contract, insofar as it means anything more than that a contract fixes in advance the risk of changes in circumstances, has been little analysed. Even under present law, contracts are so much at the mercy of circumstance that it is difficult to say one can predict with certainty the course of their performance or the profit one will make at the end of them. Fancied notions of "certainty" meant nothing to the builder in *Davis v Fareham*.)

A.38 These are the arguments against changing the present law. The argument in favour of change is that the present law can cause great injustice. In many cases sharing the loss caused by the external events would have been more satisfactory than allowing it to lie entirely on one party. An even stronger argument is that not all businesspeople would agree with the hard-and-fast rule of the common law. It is not uncommon for parties to enter into major deals on the basis of "letters of intent" or the vaguest oral understandings, leaving matters to be sorted out reasonably if and when difficulties arise during performance: see Opas, cited in para A.16.

A.39 In a paper entitled "Whither Contract", delivered to the 1981 NZ Law Conference, Dr Barton has spoken of the frequent divergence between the legal interpretation of a contract and the reasonable expectations of the parties to it:

> The commercial character of contracts rests in many cases on the assumption that each of the parties will play his part in the relationship in accord with the reasonable expectations of the others. That is why parties to continuing supply contracts, where price and supply are the subjects of written agreement,

> expect and reasonably receive a sympathetic response from their counterparts when the cost of performing their obligations is affected by a sudden rise in prices of raw materials or by a dramatic change in exchange rates. To the lawyer the written contractual formula ends all argument: to the businessman it merely provides the base for a further round of negotiation in the sure faith that he will not be bound by the letter of the agreement.

A.40 If that is correct, one wonders whether the law should be reformed so that it is more in accord with the expectations of its subjects. Several possible avenues of reform are now put forward. It is emphasised that they are for discussion purposes only.

POSSIBLE AVENUES OF REFORM

LOWERING THE THRESHOLD

A.41 One possible course of action would be merely to lower the present high threshold for frustration: ie, to formulate a statutory criterion for frustration which would be easier to meet than that presently adopted.

A.42 Something of the kind has been attempted in the US Uniform Commercial Code, s 2 – 615. Under that section, a seller of goods is excused for non-delivery:

> if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made ....

A.43 Although there was some support for this formulation in earlier case law, the section is generally seen as a deliberate departure from the common law concept of "impossibility" in favour of the less demanding test of "impracticability". Yet the evidence to date in the US case law has been that the new terminology has made very little difference. The courts have been just as reluctant as before to hold a seller discharged. The closing of the Suez Canal was held not to render a contract commercially impracticable although it led to vastly increased cost; likewise with the disastrous effects of the OPEC oil boycott and energy crisis on a price escalation clause. In the words of one commentator:

> Notwithstanding the Code's announced purpose to loosen up on the tight restraints imposed by the common law, there is

> little sign of any judicial appetite to use section 2 – 615 to jeopardise the certainty of contractual duties on which parties have a right to rely. (Duesenberg (1977) 32 The Business Lawyer 1089)

(See also comment in (1974) 50 Notre Dame Law 297; (1978) 72 Northw LR 103; (1978) 51 Temple LQ 518.)

A.44 Moreover, the courts do not employ s 2 – 615 when they find that the risk which has materialised is one which one of the parties has assumed; as in the common law doctrine of frustration, foreseeability of the event has been regarded as evidence that one party has assumed the risk of its occurrence.

A.45 A similar fate has overtaken the Louisiana code, which provides that a party is excused from the contract if that party is "hindered" in the performance of it; here too, something approaching impossibility is required by the courts: see commentary by Hopkins, (1975) 49 Tulane LR 605.

A.46 The lesson to be learned from this is that attempts to impose lower thresholds for frustration are unlikely to succeed—at least if frustration continues to result in total discharge of one or both parties. If the consequences were less drastic—variation or partial discharge, for instance—the lower threshold may well work more satisfactorily. Even then, there will be definitional difficulties; whichever term one uses ("impracticable", "unduly onerous") will involve a question of degree which will be difficult to apply in practice. It is interesting to note that, in New Zealand, s 21 of the Matrimonial Property Act 1976 provides that an agreement made between husband and wife is void in any case where a court is satisfied that it would be unjust to give effect to it; a court, in deciding this question, may have regard to changes of circumstance since the making of the contract. This section, relating as it does to personal rather than commercial contracts, is perhaps of doubtful value as a precedent.

COURT POWER TO VARY, RELEASE

A.47 A possible avenue of reform is to enact a provision that, when a contract has become unduly onerous for one party, the consequence shall not be automatic total discharge. Rather, the courts should have power to grant just relief in the form of variation or cancellation of particular terms; performance with compensation by one party; or total discharge on conditions. This would move the court's discretion

in the direction suggested by Denning LJ in his well-known judgment in *British Movietonews Ltd v London & District Cinemas Ltd* [1951] 1 KB 190; [1952] AC 166, (which was later disapproved in the House of Lords):

> In these frustration cases ... the court really exercises a qualifying power—a power to qualify the absolute, literal or wide terms of the contract—in order to do what is just and reasonable in the new situation.

A.48 A similar power exists in some Continental jurisdictions. In Germany, for example, the courts have developed a power to alter terms in contracts in the event of drastic changes of circumstance. They have, for instance, permitted a landlord, who was obliged by his lease to furnish steam for industrial purposes, to refuse to supply it unless a reasonable price was paid; and adjusted a large contract for the sale of cotton when the purchaser stood to lose a large sum as a result of currency changes. However, the power is not lightly exercised. A similar doctrine (imprevision) applies in France, enabling the courts to adjust a contract if circumstances have changed so greatly that a reasonable person could not have foreseen the new situation. However, this doctrine is very limited in scope: it is a public doctrine applied only by the administrative courts, and does not apply if the contract is essentially of a speculative kind. Comparative studies may be found in Aubrey (1963) 12 ICLQ 1165; Cohn (1946 – 1948) 28 J Comp Leg 15; David (1946 – 1948) 28 J Comp Leg 1; Smit (1958) 58 Columbia LR 288.

A.49 As the common law has for so long been rooted in the notion of absolute promise, there will doubtless be resistance to such a move. The arguments already put forward will doubtless be used with some force, and any attempt to thus reform the law will be seen as moving to the total destruction of certainty in contractual relationships.

A.50 The following additional arguments may be used against such a reform:

- Any attempt to give courts an absolving power could detrimentally affect insurance.
- If the courts are to be given an unfettered power to vary contracts, judges are, in effect, being asked to become economists; for they must be able to calculate not only the effect of their

decisions on the parties but also the long term effects of the decisions on contracts of that type, and on industrial practices.

- There are already a number of recent New Zealand statutes on contract which give the courts fairly wide-ranging discretions. It may be argued that, until these have had a chance to bed down and be thoroughly tested, it is too early to add yet another to their number. This is a view which is probably held by a large section of the profession.

A.51 However, the following arguments support such a discretionary power:

- If suitable restrictions were placed on its use, such a discretionary power would allow for better and more flexible justice than the present doctrine of frustration permits. As one simple example, a court would be empowered, as in *Leiston Gas Company v Leiston-Cum-Sizewell Urban District Council* [1916] 2 KB 428, to reduce the amount of the periodic instalments during the period when the other side was performing less than its full obligations. Frustration under the present law is a very blunt instrument (softened a little by the provisions of the Frustrated Contracts Act): a discretionary power vested in the court would allow less extreme measures.
- New Zealand law already allows discretionary relief if parties have entered into a contract under a common mistake of fact. The distinction between common mistake and frustration is often somewhat tenuous, and may depend on whether a drastic turn of events occurred before or after the date the contract was formed. For instance, when the coronation of Edward VII was postponed in 1902, with consequent disruption of contracts for the letting of rooms on the procession route, the matter was dealt with as one of frustration if the contract was entered into before the cancellation (*Krell v Henry* [1903] 2 KB 740), and as one of mistake if afterwards (*Griffiths v Brymer* (1903) 19 TLR 434). It may seem odd that such a distinction should turn on a coincidence of time. It would seem to be logical to match the tests for, and the legislation regulating, frustration and mistake.
- The statutes which currently allow judicial interference with contracts on the ground that they are oppressive (eg, the Credit Contracts Act 1981), or harsh and unconscionable (eg, the Minors' Contracts Act 1969), are confined to situations where

the contract was oppressive at the date it was entered into. It is not a long stretch of principle to grant such a power where the contract has become so after its making.

- Some building contracts (for example, NZSS 623, cl 13.1) allow very wide power to the supervising engineer to vary the contract during the course of performance. What is here being suggested would lead to no more uncertainty than this.

A.52 Thus, the Committee may wish to consider the granting of a judicial discretion. If it wishes to go this far, it will obviously be of crucial importance to formulate the conditions in which the discretion can be exercised. The following would seem to be a minimum:

- An event must have occurred which has rendered further performance of the original contract impracticable or unjustly burdensome to one party;
- The risk of the event must not have been assumed by either party; and
- The event must not have been caused through the fault of either party.

NEGOTIATION

A.53 A solution which could be examined, although it is difficult to see how it could be enforced, other than by making it a precondition to other forms of relief, is a statutory obligation on parties whose contract has been seriously affected by changes of circumstance to attempt to negotiate a satisfactory modification of their contract.

A.54 No doubt this happens now between reasonable parties, as Dr Barton points out in the passage cited earlier. (However, if the event which has occurred is one which is not sufficient to frustrate the contract, the ensuing agreement to vary price, or waive certain obligations, could possibly run into theoretical difficulties for want of consideration.) Moreover, it is apparently a growing practice in Australia to enter into certain types of contract by means of letters of intent—which leave the parties free to negotiate reasonable solutions to problems as they arise: see Opas, cited in para A.16. The fact that such practices exist casts doubt, as has already been stated, on the theory of contract as an absolute determinant of risk.

A.55 In Japan this practice has apparently become the norm: see Opas; Igarishi and Rieke (1968) 43 Washington LR 445. In that

country a contract may be rescinded if a change of circumstance (such as a currency change) has made further performance of the contract unconscionable or contrary to good faith. But notice must be given of rescission and the practice has developed of the promisor proposing a modified contract before exercising the option to rescind. Citizens of common law countries trading with Japanese interests no doubt find this procedure a little unusual, but, because of the difficulty of enforcing strict performance against someone resident abroad, they normally comply and get around the negotiating table.

A.56 As already stated, an obligation to negotiate would not be enforceable on its own. The simplest solution would be to make negotiation a precondition of any power in the court to vary the contract or declare it discharged.

"PARTIAL" FRUSTRATION

A.57 If the Committee does not wish to go as far as the possible reforms so far suggested, it may wish to consider legislating for a type of "partial frustration" in certain situations.

A.58 If further performance of a major part of the contract has been rendered impossible, the promisee might be given the option of terminating the contract or, alternatively, affirming it and requiring performance of that part of the obligation which it is still possible to perform. This would regularise the type of case exemplified by *Sainsbury Ltd v Street* [1972] 1 WLR 834. In such a case it would be necessary to give the court power to apportion consideration. (In some cases this would, no doubt, come very close to allowing the court power to vary the contract.) Such a solution has been suggested for sale of goods cases by the New South Wales Law Reform Commission. The Commission has recommended a new s 12A of the Sale of Goods Act 1925:

> (1) Where, after the making of a contract for the sale of goods ... the whole or a material part of the goods so deteriorates in quality as to be substantially changed in character, or part of the goods perish, in either case without any fault in the part of the seller or of the buyer, the buyer may at his option either treat the contract as discharged by frustration or accept the goods.

(3) If ... the buyer accepts the goods, he shall be entitled to a reasonable allowance from the price for the deficiency in quantity or deterioration in quality of the goods, but without any further right against the seller.

A.59 Consideration might also be given to the possibility of prorating in the case where a seller has committed himself to several contracts, and his source of supply partly fails: see Hudson "Prorating in the English Law of Frustrated Contracts" (1968) 31 MLR 535.

A.60 If performance of a minor part of the contract is rendered impossible, either temporarily or permanently, the court could be given power to absolve the promisor from this part of the obligation, and reduce the consideration during the period when performance is impossible. This would provide a more satisfactory result than that in the *Leiston* case, discussed earlier.

A.61 A statutory precedent is found in s 106 of the Property Law Act 1952, which provides for the abatement of rent in a lease where part of the property is damaged by fire during the currency of the lease. Consideration might, indeed, be given to extending the concept of s 106 to permit a suspension of a continuing obligation on the part of one party (say, the making of periodic payments) when counter-performance by the other party is temporarily held up for any reason (a charter party where performance is interrupted but not frustrated by requisition, as in *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, would be an example).

A.62 While reforms of this kind are well worth considering, any resulting statutory provision will be very difficult indeed to draft. It would have to be framed to cover not just cases where the provision which is rendered impossible can be severed from the remainder of the contract, but also cases, like *Sainsbury v Street*, where there is partial performance of a single obligation.

A.63 Again, giving the promisee the option of terminating or affirming the contract will come very close to making the termination of a contract for frustration not automatic, but at the option of the party affected. Some would advocate such a reform; but it will not be easy to implement, for in some cases it is not entirely clear who "the party affected" is. For instance, if one can imagine a case like *Davis v Fareham*, but where the changes in obligation are extreme enough to allow frustration, who, as the affected party, would have the right to

terminate—the builder because of the increased cost, or the owner because of the delay?

A.64 Further, giving the court power to absolve the promisor could give rise to difficulty when a very minor detail of the contract became impossible to perform. An example would be where a particular type of material specified under a building contract became unavailable. The term "impossibility" would have to be very carefully defined in such cases.

A.65 It is believed that any such statutory provision would have to take account of so many variables that the "honest open-ended vagueness" of the statutory discretion envisaged under the heading, *Court power to vary, release* (para A.47) might be best after all.

INFLATION

A.66 If the Committee is unwilling to adopt any of the possibilities so far discussed, it may wish to consider whether specific provision should be enacted to deal with extreme cases of injustice caused by inflation. In cases such as *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] 3 All ER 769, no one could seriously contend that it is fair and reasonable to enforce the contract according to its letter. Nor is it satisfactory to say that the parties must pay the penalty of not including a fluctuation clause in their contract. The omission of such a clause may be the fault of the parties' advisers rather than the parties themselves, or the contract may have been drawn up at a time when significant currency shifts were not reasonably foreseeable.

A.67 Logically there is little to mark inflation off from other interventions in contract, but the manifestations of inflation are perhaps the most dramatic and, in these times, the most common.

A.68 There is precedent in New Zealand for statutory intervention of this kind. In 1932, during the Depression, the Mortgagors and Tenants Relief Act 1932 was passed conferring power on the courts to grant relief to mortgagors and tenants. The relief which could be granted included remission of arrears and reduction of rent, but the court had a general power, in respect of tenants, to "make such order for relief as it thinks fit".

A.69 There are doubtless several possible variants of the relief which could be given. The affected party could be given power to

cancel the contract when it becomes unconscionable; or the court could do so; or the court could provide "just relief" by, say, varying price. There would be a problem in defining the point at which the effects of inflation have become so extreme that some relief is required. This would carry with it what some might see as an anomaly, in that, once this point was reached, the party would suffer no hardship at all because relief had been granted, whereas if the point was not quite reached the party would have to live with a bargain which had become hard without being unconscionable.

THE FRUSTRATED CONTRACTS ACT 1944

THE PRESENT POSITION

A.70 If the Committee does not wish to take any of the steps suggested it may still wish to examine the Frustrated Contracts Act, which provides for adjustments between the parties after the contract has been frustrated. Even if some of the earlier suggestions are adopted, it will still be necessary to provide for adjustment in those cases where the contract is cancelled. An amended Frustrated Contracts Act could also serve as a basis here.

A.71 The Frustrated Contracts Act, virtually identical to the Law Reform (Frustrated Contracts) Act 1943 (UK), has been the subject of much criticism: see for example, Treitel, *The Law of Contract*, (5th ed) ch 20; Glanville Williams, *The Law Reform (Frustrated Contracts) Act 1943*; and Goff and Jones, *The Law of Restitution* (2nd ed), Appendix. The fact that there have been very few cases on the legislation (none reported in New Zealand) is testimony to the rarity of frustration rather than to any ambiguity in the Act.

A.72 The philosophy of the Act does not appear to be one of loss sharing, but rather that neither party is to be unjustly enriched at the expense of the other. Thus any prepayments made must, with certain exceptions, be refunded, and if one party has received a valuable benefit from the other that party must pay the other a just sum for it. Yet this simple philosophy is somewhat complicated by the way in which provision is made for the recoupment of expenses incurred by one or both the parties in performing the contract; in some circumstances these are allowed, in others not. The Act is not capable of providing a completely satisfactory answer in all circumstances. In

the analysis of the main provisions which follows, the major emphasis will be placed on ss 3(2) and (3), which contain the major principles of the Act.

A.73 Subsection 3(1) gives rise to little difficulty, although it is not as clear as it could be whether the subsection applies to certain situations: for instance, to subsequent illegality (probably the term "otherwise frustrated" covers this); to those rare cases where only one party is discharged (as, for instance, in the *Leiston* case); or to cases where the contract has been discharged by the operation of a force majeure clause in the contract.

A.74 In subs 3(2), the basic principle is that any money paid before discharge can be recovered (the restitution principle). If, however, the recipient has incurred expenses in performing the contract, that party may be allowed to retain some of the money by way of reimbursement.

A.75 The subsection is open to a number of criticisms.

- First, the only moneys recoverable, and the only expenses for which allowance may be made, are those paid or incurred *before* the time of discharge.

  Not only may this time sometimes be difficult to fix with precision (eg, at precisely what moment of time was the contract frustrated in the coronation cases like *Krell v Henry*?) but no provision is made for relieving the party who pays money or incurs expenses after the date of the frustrating event and without knowledge of it. Perhaps, in this latter situation, relief may sometimes be available by classifying such a payment as one made under mistake, but it is untidy to have to rely on another branch of the law to solve a case such as this.

- Secondly, it is not entirely clear whether the section allows recovery of expenses incurred before the contract was entered into, but in anticipation of it. If a contract is broken damages may sometimes be awarded for such expenditure: see for example, *Anglia Television Ltd v Reed* [1972] 1 QB 60. However it is not clear whether an analogy can or should be drawn in this situation.

- Thirdly, if prior expenditure is recoverable in this way, the Act is not clear as to what happens if the expenditure has occurred in a large number of contracts. Take, for example, the cancellation of the Waikato-South African rugby match in 1981.

Assuming the contracts between the Rugby Union and the spectators were frustrated, no doubt the Union would have to refund the ticket money to the spectators. Could it, however, set off against the total amount refundable to the spectators expenditure, perhaps begun before ticket sales even commenced, incurred in advertising and preparing the ground?

- Fourthly, even if the money was paid or the expenses incurred a long time ago (assuming the contract is a long term one), there is no provision for inflation. Robert Goff J made this point in *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783:

> No provision is made in the subsection for any increase in the sum recoverable by the plaintiff, or in the amount of expenses to be allowed to the defendant, to allow for the true value of money. The money may have been paid, or the expenses incurred, many years before the date of frustration; but the cause of action accrues on that date, and the sum recoverable under the Act as at that date can be no greater than the sum actually paid, though the defendant may have had the use of the money over many years, and indeed may have profited from its use.

- Fifthly, this subsection, like the one following, does not appear to allow for the restitution of property, other than money, in specie. At times such a provision could be useful.
- Sixthly, the subsection provides that money payable before discharge ceases to be payable. It perhaps does not say clearly enough that all other obligations cease as well.

A.76 These criticisms are all relatively minor. Much more substantial is the objection, to be dealt with more fully after a consideration of the other parts of s 3, that it is difficult to see the logic behind confining the right to recover expenses to persons who have received, or become entitled to, a prepayment. Apparently the reasoning of the Commission which proposed the Act was that a stipulation in a contract requiring a prepayment, or progress payments, demonstrates that the payee has addressed the possibility of failure of the contract and requires protection against that risk. If the contract is silent, it is possible to infer that the party is prepared to take the risk of losing money laid out in performing the contract. As many commentators have pointed out, this assumption is, at the very least, questionable.

Prepayments may be stipulated for many reasons which have nothing to do with the allocation of risk; they may be simply to keep the performing party afloat financially. If it is thought desirable for a party to a frustrated contract to be able to recover expenses, it is difficult to see why this right should be limited in this way.

A.77 The essence of subs 3(3) is that, if one party receives a valuable benefit as a result of the other's effort, that party must pay a just amount for it. This just amount need not be the value of the benefit (although it cannot be more). Rather, it will be a just recompense to the performer for the effort expended and the expense incurred in performing his part.

A.78 Subsection 3(3) has also occasioned a certain amount of criticism. Much of this has been directed at the ambiguity of the term "benefit", which could be taken as meaning either the services performed by the other party or the end product of those services. To put it another way, there is a difference between the work done and the actual benefit that that work confers on the obligor. It has been decided, both in Canada (*Parsons Bros Ltd v Shea* (1965) 53 DLR (2d) 86 (Nfld SC)), and the United Kingdom (*BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783), that the latter of these interpretations is correct: that it is the end product of the services which constitutes the "valuable benefit", and which therefore sets the limit of the recoverable amount. It may be an understandable philosophy (depending on the view one takes of unjust enrichment), that a person should not have to pay for more than has been received. Nevertheless, this philosophy may lead to injustice in a number of cases, for, as Robert Goff J in *BP Exploration Co (Libya) Ltd v Hunt (No 2)*, has put it: a small service may confer a large benefit, a large service a small benefit (803). One instance of injustice would be where the work and expense undertaken by A, at the time of the frustrating event, was totally out of proportion to the "benefit" which at that time had been conferred on B. For instance, several million dollars could be expended by a prospecting company on the land of a property owner without, at the time the contract is terminated, having actually struck oil. (In some cases it might be possible to say that the prospecting company had "accepted the risk" of this in the original contract; in others not.) Another example would be the case where an expensive chattel in the course of construction was completely destroyed before it could be delivered to the purchaser. While it may be "just" for the would-be recipient of the benefit not to have to pay

for more than has been actually received, it is certainly not "just" to the performer of the services who may have incurred considerable expense; the frustrating event has deprived the performer of the possibility of reimbursement.

A.79 There are other minor uncertainties about the operation of subs 3(3). First, the section does not make it entirely clear at what time the valuable benefit is to be valued if it was conferred (for example, under a building contract), some substantial time before the frustrating event. Presumably the relevant date is the date of the frustrating event. Secondly, the "just sum" is left to be fixed in the court's discretion. Presumably, such factors as the contract rate of payment are relevant, so that the performer receives a rateable part of that price. It might have been desirable, and more in accord with modern practice, if the Act had laid down guides for the exercise of this discretion. Thirdly, there is considerable doubt as to the operation of para (a) of subs 3 in the scheme of things. Are the expenses incurred by the benefited party to be deducted from the value of the benefit, or from the just sum? In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* Robert Goff J concluded the former:

> Accordingly ... the proper course is to deduct the expenses from the value of the benefit, with the effect that only in so far as they reduce the value of the benefit below the amount of the just sum which would otherwise be awarded will they have any practical bearing on the award (804).

A.80 Little objection can be taken to subs 3(4), except to note that the term "overhead expenses" is perhaps unfortunate, for some overheads would have been incurred whether the contract in question had been entered into or not; the subsection probably contemplates only overheads which are directly related to this contract. Moreover, the term "personally" could be dropped from the section without losing anything: it is inappropriate where, for instance, the contracting party is a company.

A.81 Subsection 3(5) expresses the traditional view that insurance is res inter alios acta. But the Committee may wish to consider whether this section should be retained in exactly this form. The fact that one party has insured against the very loss that has occurred may be evidence that it was the intention of the parties that the insuring party had accepted the risk of that happening.

Conclusion on section 3

A.82 While an improvement on the common law of *Chandler v Webster* [1904] 1 KB 493, s 3 does not go far enough. In its emphasis on restitution it fails to give adequate redress in all cases to the party who has incurred expenses in performing part of the contract. It limits the recovery of such expenses to cases where the party incurring them has:

- received or stipulated a prepayment or progress payment;
- conferred a benefit on the other party; or
- incurred a benefit.

A.83 There is no sound logic behind these limitations, and there can be situations where deserving cases go without remedy.

A.84 For instance, cases like *Appleby v Myers* (1867) LR 2 CP 651, in which there was no remedy at common law, would probably still go unremedied under the Act. The plaintiffs agreed, for a price of £459, to build machinery on the defendant's premises. When the machinery was nearly complete a fire destroyed the premises, including all the work so far done. The engineer failed in his claim to recover £419 for work done and materials supplied. He would seem to be in no better position today. He had neither received nor stipulated for any payments before the date of the frustrating event, so would not be covered by subs 3(2). Nor had he conferred a "benefit", in the sense in which that word has been interpreted, on the purchaser before the date of frustration within the terms of subs 3(3). The whole of the loss would thus fall on him, whereas it would not have done if he had stipulated for progress payments as the work proceeded. There is not much logic in that distinction. Moreover, under the Contractual Remedies Act 1979, a party who has performed part of his obligation has the right to ask the court for a reasonable sum for work done even if the contract is cancelled due to that party's default. It seems insupportable that there should be no such right on frustration.

A.85 Several further useful examples are given in the NSW Law Reform Commission *Report on Frustrated Contracts*. The examples, cases 1 – 3, can be found in the Annex at the end of this paper.

A.86 Moreover, the Act gives no power to the court, in a case of frustration, to grant restitution of specific property other than money. In some situations restitution would be most desirable, allowing as it

does for the parties to be restored to their original positions with the minimum of hardship. There is provision for such specific restitution in cases of cancellation for breach under the Contractual Remedies Act.

A.87 Section 4 deals with a variety of matters relating to the application of the Frustrated Contracts Act. Although the purport of subs 4(4) could perhaps be clarified by improved drafting, the only subsection of this section which has received serious criticism is subs (5).

A.88 There has been much discussion of the desirability of maintaining the three exceptions in subs 4(5).

- Paragraph (a) recognises the long-established commercial understanding that if cargo does not arrive at its destination, freight is not apportionable. If prepaid, the shipowner retains it all; if it is payable on delivery none of it is payable. Thus, the arrangement the parties make for freight fixes absolutely the risk of non-arrival of the vessel. The majority of the commentators and law reform bodies which have investigated this rule in the context of the Frustrated Contracts legislation do not recommend any change to s 4(5)(a), relying principally on the specialised nature of shipping, the fact that the rule is well understood by businesspeople and is the basis of insurance arrangements, and the desirability of retaining uniform shipping laws within the Commonwealth. (And see the reports on frustrated contracts of the NSW Law Reform Commission and the Law Reform Committee of South Australia; and the study paper prepared for the Nova Scotia Law Reform Advisory Commission).
- Paragraph (b) has not met with such unanimity, but again, the weight of opinion seems to be in favour of retaining the exception for insurance contracts. Such contracts are entirely speculative, and as the NSW Law Reform Commission's report states, "the insurer takes not only the risk but also the advantage of future events" (43). Thus, a premium once paid is irrecoverable. However, insurers do quite commonly make refunds of part of the premium on other contingencies (sale, etc), and the argument for retaining this special exception in the Act seems to have less force than in para (a). In the end, uniformity with other Commonwealth legislation may be the deciding factor: the insurance exception appears in the legislation of all other Commonwealth countries.

- Paragraph (c), which creates an exception for contracts for the sale of goods, has received a less enthusiastic reception, and there is fairly general support among commentators and Law Reform Committees for abolishing it. There is no particular reason for distinguishing in this regard between specific and unascertained goods (in those rare cases where contracts for the sale of unascertained goods can be frustrated); nor for confining the exception to goods which have *perished* as distinct from goods which have been affected in some other way—say, by theft. Moreover, as Treitel points out,

One might well ask why contracts for the sale of goods were singled out for separate treatment at all. As a matter of abstract justice, there seems to be no reason why the powers of restitution and apportionment provided by the Act should apply to a contract to build a house but not to a contract to supply a specific piece of machinery. The only reason which can be given for not applying the Act to contracts for the sale of goods is that in such contracts certainty is more important than justice. The rules of risk are meant to provide this certainty .... But on this view contracts for the sale of goods should have been wholly excluded from the operation of the Act of 1943. Their partial exclusion does not satisfy the requirements of either convenience or justice. (*The Law of Contract*, (7th ed) 711).

REFORM OF THE FRUSTRATED CONTRACTS ACT 1944

A.89 If reform of the consequences of frustration, rather than the application of the doctrine, is all that is desired, there still remains the question as to how this should be done. There would seem to be four possibilities.

- *Tinkering.* The first is simply to amend the drafting of the Frustrated Contracts Act to remove the worst of the anomalies outlined.

- *Discretionary relief.* The court could be given a broad discretion to make such order as it thinks just as to restitution, compensation, or other order, as appropriate. Criteria to be taken into account would include

  — the expense incurred by one party;
  — the amount by which one party has been enriched at the expense of the other;

— the degree to which the frustrating event has reduced the value of the enrichment.

Such an approach would be in accord with the recent New Zealand legislation on contract. Indeed it is difficult to justify an approach to a contract discharged by frustration which is different from that which applies to a contract cancelled because of breach or mistake. Any argument that distribution of loss in the latter two situations is a more complex undertaking which must take account of degrees of blame, ignores the great variety of factors which can complicate doing justice in frustration cases (acceptance of risk, ability to minimise loss, etc).

Yet, if this discretionary approach is to be followed, it may be desirable to wait a little until the courts have had time to shape the discretion in relation to the other recent New Zealand statutes. There is some evidence that too rapid an adoption of yet another discretion, before the others have had time to bed down, will not be greeted favourably by the profession.

- *The British Columbia solution.* The Frustrated Contracts Act 1974 (BC) adopts a principle of loss sharing. This type of scheme has also been recommended for New Brunswick. (A copy of the Act can be found in the Annex at the end of this paper.) The basic scheme is as follows:
  - Each party is entitled to restitution from the other for "benefits" conferred by that party's performance.
  - A "benefit" is something done in the fulfilment of contractual obligations, whether or not the person for whom it was done received the benefit.
  - If the frustrating event causes a loss in the value of the benefit to the party required to make restitution, that loss is to be apportioned equally between the parties (unless one party is required to accept the risk of it by virtue of an implied term, or trade custom, or a course of dealing between the parties).
  - The amount payable by way of restitution must take account of any benefits remaining in the hands of the party who is receiving restitution, and is also to take account of any property returned in specie to the performer. Insofar as the claim is based on expenditures incurred in performing the contract the amount recoverable will include only reasonable expenditures.

A.90 Comment may be made as follows:

(i) It is not entirely clear what the term "benefit" means. Clearly, it is not the value of performance to the prospective recipient, for the Act specifically envisages that the prospective recipient may never receive it. "Benefit" must thus mean either the *cost* of performance to the performing party, or the current market *value* of what that party has done.

(ii) Whichever of these two meanings "benefit" has, it is somewhat confusing when taken in conjunction with the fact that the *loss* which is to be *shared* is the loss in the value of the benefit *to the potential recipient*. The loss in value to this person may not always be easy to calculate. For instance, in *Appleby v Myers* what was the loss in value of the benefit to the recipient when the partly completed machine, which had never been of any use to him, was destroyed by fire: a rateable part of the contract price? The market value of the partly completed machine?

(iii) A party is entitled to restitution for benefits created by that party's performance. The Act imposes no criteria for calculating the sum to be awarded: but surely this sum should never exceed a rateable part of the contract price?

A.91 Despite these minor criticisms, the concept of the British Columbia Act—equal loss-sharing—is an interesting one which deserves further consideration. The other attractive feature of the Act is its recognition in s 6 of acceptance of risk—not in the sense of preventing frustration altogether, but of allocating loss once the contract has been frustrated. The "acceptance of risk" section of the Act is in broad enough terms (particularly in its reference to an implied term of the contract) to allow considerable flexibility.

THE NEW SOUTH WALES SOLUTION

A.92 The notion of loss-sharing occurs again in the Frustrated Contracts Act 1978 (NSW), although this time the "loss" to be shared is of a different kind. (A copy of Parts I-III of the Act can be found in the Annex at the end of this paper.) The statutory scheme is also rather more complicated than the British Columbia scheme. It may be summarised as follows:

- Money paid at the date of frustration must be repaid;
- If one party has received part performance from the other, that party must pay a rateable part of the contract price for it. But

against that must be set off the amount by which the frustrating event has reduced the value of the received performance;

- However, if the cost reasonably incurred by one party in producing part performance exceeds the rateable price which the recipient must pay, the excess should be shared equally between the parties. (In other words, if one party has reasonably incurred costs which exceed the value of what that party has produced, those costs are pure loss, which should be shared equally between the parties.)
- Likewise, if one party has incurred costs which have not resulted in any performance being received by the other party, the other party should reimburse half the amount of those costs. Thus, in the *Appleby v Myers* situation, where costs are incurred in building a machine which is destroyed before it can be delivered, the wasted costs are shared equally between the parties.
- If the terms of the contract or the events which have occurred are such that the preceding rules are manifestly inadequate or inappropriate, or would cause manifest injustice, or would be excessively difficult or expensive to apply, the court may order that the above rules should not apply, and may make such adjustments as it thinks fit.

A.93 The NSW Law Reform Commission, in the report which recommended this legislation, gave examples of the way the above rules will operate. These appear as cases 4, 5 and 6 in the Annex at the end of this paper.

A.94 While loss-sharing is the essence of the New South Wales Act, as it is of the British Columbia Act, it is a different kind of "loss" which is shared. In the British Columbia Act, it is a loss in the *value of the benefit to the recipient*; in the New South Wales Act it is the *costs incurred by the performing party*. The latter seems the more rational approach. Out-of-pocket expenses seem to be the true measure of the loss which is caused by the frustrating event. It should, surely, be these which are shared if the loss-sharing philosophy is to be accepted.

A.95 There are those who would argue that the doctrine of equal loss-sharing is not always justice: that there are cases where, even though a contract is frustrated, one party should bear the loss entirely just because the contract allocates it; or because, due to the nature of

the business, that party is better able to absorb and spread it. The arguments are set out in an article by Posner and Roenfield, 6 J Legal Studies (1977) 83; an interesting discussion of risk allocation can be found in Reiter & Swan, *Studies in the Law of Contract*, ch 7 (Swan). Despite these arguments, "economic analysis" of the problem has not, to date, made much impact in the common law countries.

A.96 An interesting feature of the NSW legislation is its recognition that the formal rules it lays down may not be adequate for all cases, and its consequent "fall back" on a broad judicial discretion. Such are the conditions which enable the discretion to be used, however, that it is clearly regarded as the exception.

A.97 Two other features of the NSW legislation are worthy of mention, for they correct omissions in the present New Zealand Act which have already been the subject of comment. Section 7(1) provides that all unperformed promises (not just promises to pay money as in the New Zealand Act) are discharged by the frustration. Section 5(4) provides that where an act is done after the time of frustration, but without knowledge of the circumstances giving rise to the frustration, the Act has effect as if done before the time of frustration. Any New Zealand reforms could well follow these provisions.

CONCLUSION

A.98 This paper is for purposes of discussion only, and its aim is to outline the available options for reform without advocating any one above the others. The options range from some which may seem extreme to those brought up in the common law of contract, to others which involve only minor tinkering with the Frustrated Contracts Act 1944. Before any firm recommendations are made, it is suggested that there be very full consultation and discussion with those who may be affected.

ANNEX

Examples from New South Wales Law Reform Committee's Report on Frustrated Contracts (para A.85)[74]

Case 1

There is a contract for the manufacture and delivery by an engineer to a customer of machinery to the customer's design. The terms of payment are that the customer shall pay the price on delivery. The machinery is partly built, at considerable cost to the engineer, but none of it has been delivered, when the contract is frustrated. On these facts neither limb of the adjustment for cost under the English Act applies. There was, before frustration, no payment to the engineer which, by the proviso to subsection (2), he may be permitted by the court to retain up to the amount of the cost he incurred. Nor has he received any benefit from anything done by the customer in or for the purpose of performing the contract. There is thus no occasion for him to have an allowance for his cost under subsection (3) against the value of a benefit received. In the result, the customer, who has got nothing, but has done nothing, pays nothing. But the engineer also gets nothing — although he has incurred substantial cost in partly building the machinery. He still has the machinery, but it may have only a scrap value or some value less than its cost. This result comes about because on the facts assumed, neither limb of the adjustment for cost under the English Act applies.

Case 2

This is a case where the first limb of the adjustment for cost under the English Act does apply. Assume, again, a contract for the manufacture and delivery by an engineer to a customer of machinery to the customer's design. Assume that the price is $10,000 ($1,000 payable on the making of the contract and the balance payable on delivery); that the $1,000 is paid; that the engineer partly builds the machinery but does not make any delivery; that the cost he incurs in what he has done to build the machinery is $5,000; that frustration occurs; and

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[74] The Law Commission gratefully acknowledges the consent of the New South Wales Law Reform Commission to the publication of the following extracts from *Frustration of Contract* (LRC 25 1976).

that the value of the partly-built machinery is $1,000. On these facts the first limb of the adjustment applies. It applies because there has been a payment of money to the engineer before frustration: against the repayment of that money he may be permitted an allowance for his expenses under the proviso to subsection (2). It may be taken that, as his expenses ($5,000) exceed the amount of the money paid to him before frustration ($1,000), he would not have to repay any of that money. So he keeps the $1,000. But that still leaves him with a loss of $4,000. Against that loss he has only the value ($1,000) of the partly-built machinery. In all, he loses $3,000. The customer, on the other hand, has not incurred any expenses and pays nothing beyond the initial payment of $1,000. Is this just between the parties? We do not think that it is.

Case 3

This is a case where the second limb of the adjustment for cost under the English Act applies. This is the limb embodied in subsection (3), which applies where a party who has incurred expenses has also obtained a benefit from what has been done by another party in or for the purpose of performing the contract. Say there is a contract between a builder and a sawmiller by which the builder is to pre-fabricate and erect a new sawmill in exchange for supplies of milled timber from the sawmiller. Some of the timber is to be supplied before erection of the new mill: the balance is to be supplied on completion. The contract is frustrated when the builder has partly pre-fabricated the new mill, at a cost of $10,000, but has not delivered any of it to the site. Before frustration, the builder has received all the timber which the miller was bound by the contract to supply to him before erection. The value of the timber so received was $1,000. The value of the partly pre-fabricated mill left on the builder's hands is $5,000. On these facts the second limb of the English adjustment for cost applies. It applies because the builder has obtained a benefit (supply of timber) from what the sawmiller has done for the purpose of performing the contract but has himself incurred expenses (the cost of $10,000 in partly pre-fabricating the new mill). The builder is bound under subsection (3) to pay for the benefit he has received such sum as is reasonable having regard to the expenses which he incurred. As his expenses were $9,000 more than the value of the benefit he obtained, it may be taken that the builder would not have to pay anything under subsection (3). But that still leaves him with the loss

of $9,000 off-set only to the extent of $5,000, the value of the partly pre-fabricated mill. In all his loss is $4,000. On the other hand, the sawmiller pays nothing. He has not obtained any benefit. His only loss is the $1,000 worth of timber which he supplied to the builder before frustration. Is this disparity justified? We think not.

Examples from New South Wales Law Reform Committee's Report on Frustrated Contracts (para A.93)

Case 4

Assume that the attributable cost[75] is $1,000. What is left of the contract-related price ($10,000) after taking away the lost value ($7,000) is $3,000. The receiving party pays this sum. But, because the attributable cost is less than what is left of the contract-related price after taking away the lost value, no adjustment is made in respect of the attributable cost. The receiving party, therefore, pays only the $3,000. He incurs no loss in making only this payment. The performing party, however, makes a profit of $2,000, since he receives the $3,000 although the attributable cost incurred by him is $1,000. This profit is part of the profit which he would have made if the contract had been fully performed.

Case 5

Assume that the attributable cost is $5,000. The receiving party pays $3,000 (the contract-related price less the lost value). But as the attributable cost ($5,000) exceeds the $3,000 (the contract-related price less the lost value), there is also an adjustment in respect of the attributable cost. The amount of the excess is $2,000. The receiving party pays half of this excess. He pays, therefore, a further $1,000. In all, the receiving party pays $4,000. He thereby bears a loss of $1,000, because the contract-related price of what he got, less the lost value, is

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[75] An explanation of the term "attributable cost" can be found in the Report:

> By attributable cost we mean so much of the cost of the received performance as remains after taking away from it the value of any property or improvement to property which the performing party acquired or derived by incurring the cost of the received performance and which remains in his hands. (para 7.24)

In referring to "received performance" in the report, the Commission was concerned with the amount to be paid for performance which a party has received, rather than the benefit obtained.

only $3,000. On the other hand, the performing party also bears a loss of $1,000, because he receives only $4,000 although he incurred the attributable cost of $5,000. There is equality between the parties in the amount of the loss each bears.

Case 6

Assume that the attributable cost is $9,000. The receiving party pays $3,000 (the contract-related price less the lost value). But as the attributable cost ($9,000) exceeds the $3,000 (the contract-related price less the lost value), there is also an adjustment in respect of the attributable cost. The amount of the excess is $6,000. The receiving party pays half of this excess. He pays, therefore, a further $3,000. In all, the receiving party pays $6,000. He thereby bears a loss of $3,000, since the contract-related price of what he has got, less the lost value, is only $3,000. On the other hand, the performing party also bears a loss of $3,000, since he receives only $6,000 although he incurred the attributable cost of $9,000. As in Case [5], there is equality between the parties in the amount of the loss each bears.

CHAPTER 37

Frustrated Contracts Act

[Assented to 3rd May, 1974.]

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Application.

1. (1) Subject to subsection (2), this Act applies to every contract
   (a) from which the parties thereto are discharged by reason of the application of the doctrine of frustration; or
   (b) that is avoided under section 13 of the *Sale of Goods Act*.

(2) This Act does not apply
   (a) to a charterparty or a contract for the carriage of goods by sea, except a time charterparty or a charterparty by demise; or
   (b) to a contract of insurance; or
   (c) to contracts entered into before the date of coming into force of this Act.

Idem.

2. This Act applies to a contract referred to in section 1 (1) only to the extent that, upon the true construction of that contract, it contains no provision for the consequences of frustration or avoidance.

Crown bound.

3. The Crown and its agencies are bound by this Act.

Act applicable to part of contract.

4. Where a part of any contract to which this Act applies is
   (a) wholly performed before the parties are discharged; or
   (b) wholly performed except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract,

and that part may be severed from the remainder of the contract, that part shall, for the purposes of this Act, be treated as a separate contract that has not been frustrated or avoided, and this Act, excepting this section, is applicable only to the remainder of the contract.

Adjustment of rights and liabilities.

5. (1) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by his performance or part performance of the contract.

(2) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustration or avoidance but were not performed, except insofar as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.

(3) Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (1), that loss shall be apportioned equally between the party required to make restitution and the party to whom such restitution is required to be made.

(4) In this section, a "benefit" means something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit.

Exception.

6. (1) A person who has performed or partly performed a contractual obligation is not entitled to restitution under section 5 in respect of a loss in value, caused by the circumstances giving rise to the frustration or avoidance, of a benefit within the meaning of section 5, if there is

(a) a course of dealing between the parties to the contract; or

(b) a custom or a common understanding in the trade, business, or profession of the party so performing; or

(c) an implied term of the contract,

to the effect that the party so performing should bear the risk of such loss in value.

(2) The fact that the party performing such an obligation has in respect of previous similar contracts between the parties effected insurance against the kind of event that caused the loss in value is evidence of a course of dealing under subsection (1).

(3) The fact that persons in the same trade, business, or profession as the party performing such obligations, on enterting into similar contracts, generally effect insurance against the kind of event that caused the loss in value is evidence of a custom or common understanding under subsection (1).

Calculation of restitution.

7. Where restitution is claimed for the performance or part performance of an obligation under the contract other than an obligation to pay money,

(a) insofar as the claim is based on expenditures incurred in performing the contract, the amount recoverable shall include only reasonable expenditures; and

(b) if performance consisted of or included delivery of property that could be and is returned to the performer within a reasonable time after the frustration or avoidance, the amount of the claim shall be reduced by the value of the property returned.

Idem.

8. In determining the amount to which a party is entitled by way of restitution or apportionment under section 5, no account shall be taken of

(a) loss of profits; or

(b) insurance money that becomes payable

by reason of the circumstances that give rise to the frustration or avoidance, but account shall be taken of any benefits which remain in the hands of the party claiming restitution.

Limitations.

9. (1) No action or proceeding under this Act shall be commenced after the period determined under subsection (2) of this section.

(2) For the purposes of subsection (1), a claim under this Act shall be deemed to be a claim for a breach of the contract arising at the time of frustration or avoidance, and the limitation period applicable to that contract applies.

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1974

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New South Wales

ANNO VICESIMO SEPTIMO

ELIZABETHÆ II REGINÆ

* *

Act No. 105, 1978 (1), as amended by Act No. 62, 1980 (2).

Note.—The symbol § indicates that further information concerning the relevant provision is contained in the note on p. 11.

An Act to amend the law relating to frustrated contracts.

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

Short title.

1. This Act may be cited as the "Frustrated Contracts Act, 1978".

P 94952J

(1) Frustrated Contracts Act, 1978, No. 105. Assented to, 20th December, 1978. Date of commencement, secs. 1 and 2 excepted, 1st May, 1979, sec. 2 and Gazette No. 55 of 20th April, 1979, p. 1883.
(2) Frustrated Contracts (Petty Sessions) Amendment Act, 1980, No. 62. Assented to, 28th April, 1980. Date of commencement of sec. 3, 1st June, 1981, sec. 2 (2) and Gazette No. 67 of 8th May, 1981, p. 2536.

2,104 [50c]

Commencement.

2. **(1)** This section and section 1 shall commence on the date of assent to this Act.

(2) Except as provided in subsection (1), this Act shall commence on such day as may be appointed by the Governor in respect thereof and as may be notified by proclamation published in the Gazette.

Arrangement.

Am. 1980 No. 62, s. 3 (a).

3. This Act is divided as follows:—

Act binds the Crown.

4. This Act binds the Crown, not only in right of New South Wales but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

Interpretation.

5. **(1)** In this Act, except to the extent that the context or subject-matter otherwise indicates or requires—

"agreed return", in relation to performance of a contract by a party, means such performance of the contract by another party as is contemplated by the contract as consideration for the first-mentioned performance;

"court", in relation to any matter, means the court or arbitrator before whom the matter falls to be determined;

"frustration" includes avoidance of an agreement under section 12 of the Sale of Goods Act, 1923;

"party" includes the assigns of a party;

"performance", in relation to a contract, means—

(a) performance, wholly or in part, of a promise in the contract; or

(b) fulfilment, wholly or in part, of a condition of or in the contract.

(2) Where performance of a contract is referred to in a provision of this Act—

(a) a reference in the provision to the performing party is a reference to the party to the contract by whom the performance was, or was intended to be, given; and

(b) a reference in the provision to the other party to the contract is a reference to the party by whom performance of the contract is contemplated by the contract as consideration for the performance referred to in the provision.

(3) For the purposes of this Act, performance of a contract is given and received if received as contemplated by the contract, whether received by a party to the contract or not.

(4) For the purposes of this Act, where a contract has been frustrated and a thing is done or suffered under the contract after the time of frustration but before the party who does or suffers that thing knows or ought to know of the circumstances (whether matters of fact or law) giving rise to the frustration, that thing has effect as if done or suffered before the time of frustration.

(5) It is the intention of Parliament that, except to the extent that the parties to a contract otherwise agree, a court other than a court of New South Wales may exercise the powers given to a court by Part III in relation to the contract.

Act does not apply to certain contracts.
Am. 1980 No. 62, s. 3 (b).

6. **(1)** This Act—

(a) does not apply to a contract made before the commencement of this Act;

(b) does not apply to a charter-party, except a time charter-party and except a charter-party by way of demise;

(c) does not apply to a contract (other than a charter-party) for the carriage of goods by sea;

(d) does not apply to a contract of insurance; and

(e) does not apply to any other contract in so far as the parties thereto have agreed that this Act does not apply to the contract.

(2) This Act does not apply to a contract embodied in or constituted by the memorandum or articles of association or rules or other instrument or agreement constituting, or regulating the affairs of, any of the following bodies—

(a) a company within the meaning of the Companies Act, 1961;

(b) an unregistered company within the meaning of Division 5 of Part X of the Companies Act, 1961;

(c) a credit union registered under the Credit Union Act, 1969;

(d) a society registered under—

(i) the Building and Co-operative Societies Act, 1901;

(ii) the Co-operation Act, 1923;

(iii) the Friendly Societies Act, 1912; or

(iv) the Permanent Building Societies Act, 1967;

(e) a trade union registered under the Trade Union Act 1881;

(f) a partnership within the meaning of the Partnership Act, 1892; or

(g) any association which, on a proper case arising, is liable to be wound up or dissolved by order of the Supreme Court of New South Wales,

in any case in which the circumstances alleged to give rise to frustration of the contract furnish a case for the winding up or dissolution of the body.

(3) Where a contract is severable into parts and one or more but not all parts are frustrated, this Act does not apply to the part or parts not frustrated.

PART II.

EFFECT OF FRUSTRATION OF CONTRACT.

Promise not performed.

7. (1) Where a promise under a frustrated contract was due to be, but was not, performed before the time of frustration, the promise is discharged except to the extent necessary to support a claim for damages for breach of the promise before the time of frustration.

(2) Subsection (1) does not affect a promise due for performance before frustration which would not have been discharged by the frustration if it had been due for performance after the time of frustration.

Damages assessed after frustration.

8. Where a contract is frustrated and a liability for damages for breach of the contract has accrued before the time of frustration, regard shall be had, in assessing those damages after that time, to the fact that the contract has been frustrated.

PART III.

ADJUSTMENT ON FRUSTRATION OF CONTRACT.

DIVISION 1.—*Adjustment where performance (excluding payment of money) received.*

Interpretation.

9. In this Division "performance" in relation to a contract does not include—

(a) performance, wholly or in part, of a promise in the contract to pay money; or

(b) fulfilment, wholly or in part, of a condition of or in the contract that money be paid.

Adjustment where whole performance received.

10. Where a contract is frustrated and the whole of the performance to be given by a party under the contract has been received before the time of frustration, the performing party shall be paid by the other party to the contract an amount equal to the value of the agreed return for the performance.

Adjustment where part performance only received.

11. (1) In this section—

"attributable cost", in relation to performance received under a frustrated contract, means—

(a) where there is no incidental gain to the performing party, and except as provided by paragraph (c)—an amount equal to the reasonable cost of the performance;

(b) where there is an incidental gain to the performing party, and except as provided by paragraph (c)—such part of the reasonable cost of the performance as is equal to an amount calculated by deducting from the reasonable cost of the performance the value of that incidental gain; or

(c) where the amount referred to in paragraph (a) or (b) exceeds the proportionate allowance for the performance—such part of the reasonable cost of the performance as is equal in amount to that proportionate allowance;

"attributable value", in relation to performance received under a frustrated contract, means an amount equal to the value of the proportionate allowance for that performance reduced by the lost value of that performance;

"incidental gain", in relation to a party to a contract who suffers a detriment referred to in the definition of "reasonable cost", means any property or improvement to property acquired or derived by that party as a consequence of doing or suffering the acts or things that caused him to suffer the detriment, except to the extent that the property or improvement so acquired or derived is comprised in any performance given by that party under the contract or is expended or disposed of in giving any such performance;

"lost value", in relation to performance received under a frustrated contract, is a reference to the amount (if any) by which the value of that performance was reduced by reason of the frustration of the contract, that value being assessed as at the time immediately before the frustration of the contract and on the basis that the contract would not be frustrated;

"proportionate allowance", in relation to performance received under a frustrated contract, means such part of the value of the agreed return for complete performance of the contract by the performing party as is appropriate to be charged to the other party for the performance received, having regard to the extent to which the performance received is less than the whole of the performance contracted to be given by the performing party;

"reasonable cost", in relation to performance received under a frustrated contract, is an amount that would be fair compensation to the performing party for any detriment suffered by him in reasonably paying money, doing work or doing or suffering any other act or thing to the extent to which the detriment was suffered for the purpose of giving the performance so received.

(2) Where a contract is frustrated and part, but not the whole, of the performance to be given by a party under the contract has been received before the time of frustration, the performing party shall be paid by the other party to the contract—

(a) an amount equal to the attributable value of the performance, except where the attributable cost of the performance exceeds its attributable value; or

(b) where the attributable cost of the performance exceeds its attributable value—an amount equal to the sum of—

(i) the attributable value of the performance; and

(ii) one-half of the amount by which the attributable cost of the performance exceeds its attributable value.

DIVISION 2.—*Other adjustments.*

Return of money paid.

12. Where a contract is frustrated and a party to the contract has paid money to another person (whether or not a party to the contract) as, or as part of, an agreed return for performance of the contract by another party (whether or not that other party is the person to whom the payment was made and whether or not there has been any such performance) that other party shall pay the same amount of money to the party who made the payment.

Adjustment of certain losses and gains.

13. (1) Where a contract is frustrated and, by reasonably paying money, doing work or doing or suffering any other act or thing for the purpose of giving performance under the contract (not being performance which has been received) the performing party has suffered a detriment, the performing party shall be paid by the other party to the contract an amount equal to one-half of the amount that would be fair compensation for the detriment suffered.

(2) Where a performing party referred to in subsection (1) has, as a consequence of doing or suffering the acts or things that caused him to suffer the detriment so referred to, acquired or derived any property or improvement to property, he shall pay to the other party so referred to one-half of the value of the property or improvement so acquired or derived.

DIVISION 3.—*Recovery of money payable.*

Recovery of money as a debt.

14. A person entitled under Division 1 or 2 to be paid an amount of money by another person may recover the amount from that other person as a debt in a court of competent jurisdiction.

DIVISION 4.—*Adjustment by the court.*

Adjustment by the court.

15. (1) Where the court is satisfied that the terms of a frustrated contract or the events which have occurred are such that, in respect of the contract—

(a) Divisions 1 and 2 are manifestly inadequate or inappropriate;

(b) application of Divisions 1 and 2 would cause manifest injustice; or

(c) application of Divisions 1 and 2 would be excessively difficult or expensive,

the court may, by order, exclude the contract from the operation of Divisions 1 and 2 and, subject to subsection (8), may, by order, substitute such adjustments in money or otherwise as it considers proper.

(2) Orders which the court may make under subsection (1) include—

(a) orders for the payment of interest; and

(b) orders as to the time when money shall be paid.

(3) In addition to its jurisdiction under subsections (1) and (2), the Supreme Court or the District Court may, for the purposes of this section, make orders for—

(a) the making of any disposition of property;

(b) the sale or other realisation of property;

(c) the disposal of the proceeds of sale or other realisation of property;

(d) the creation of a charge on property in favour of any person;

(e) the enforcement of a charge so created;

(f) the appointment and regulation of the proceedings of a receiver of property; and

(g) the vesting of property in any person.

(4) Sections 78 and 79 of the Trustee Act, 1925, apply to a vesting order, and to the power to make a vesting order, under subsection (3).

(5) Section 78 (2) of the Trustee Act, 1925, applies to a vesting order under subsection (3) as if subsection (3) were included in the provisions of Part III of that Act.

(6) In relation to a vesting order of the District Court, sections 78 and 79 of the Trustee Act, 1925, shall be read as if "Court" in those sections meant the District Court.

(7) Subsections (2) to (6) do not limit the generality of subsection (1).

(8) This section does not authorise a court of petty sessions to give a judgment otherwise than for the payment of money.

APPENDIX B

The Contract Statutes

ANALYSIS

1979, No. 11

An Act to reform the law relating to remedies for misrepresentation and breach of contract

[*6 August 1979*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Contractual Remedies Act 1979.

(2) This Act shall come into force on the 1st day of April 1980.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Cancel", in relation to a contract, means cancel in accordance with section 7 of this Act; and "cancelled" and "cancellation" have corresponding meanings:

"Court" means—

(a) The High Court; or

(b) A District Court that has jurisdiction under section 12 of this Act; or

(c) A Disputes Tribunal that has jurisdiction under section 13 of this Act.

3. Act to bind the Crown—This Act shall bind the Crown.

4. Statements during negotiations for a contract—(1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question—

(a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or

(b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or

(c) Whether, if it was a representation, it was relied on—

the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

(2) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question whether, in respect of any statement, promise, or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it, the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining that question.

(3) Notwithstanding anything in section 56 or section 60 (2) of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods.

(4) In any proceedings properly before a Disputes Tribunal, this section shall not limit the powers of the Tribunal under section 18 (7) of the Disputes Tribunals Act 1988.

5. Remedy provided in contract—If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision.

6. Damages for misrepresentation—(1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—

(a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and

(b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation.

(2) Notwithstanding anything in section 56 or section 60 (2) of the Sale of Goods Act 1908, but subject to section 5 of this Act, subsection (1) of this section shall apply to contracts for the sale of goods.

7. Cancellation of contract—(1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

(2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

(3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—

(a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or

(b) A stipulation in the contract is broken by another party to that contract; or

(c) It is clear that a stipulation in the contract will be broken by another party to that contract.

(4) Where subsection (3) (a) or subsection (3) (b) or subsection (3) (c) of this section applies, a party may exercise the right to cancel if, and only if,—

(a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the stipulation is essential to him; or

(b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) Substantially to reduce the benefit of the contract to the cancelling party; or

(ii) Substantially to increase the burden of the cancelling party under the contract; or

(iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

(5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

(6) A party who has substantially the same interest under the contract as the party whose act constitutes the repudiation, misrepresentation, or breach may cancel the contract only with the leave of the Court.

(7) The Court may, in its discretion, on application made for the purpose, grant leave under subsection (6) of this section, subject to such terms and conditions as the Court thinks fit, if it is satisfied that the granting of such leave is in the interests of justice.

8. Rules applying to cancellation—(1) The cancellation of a contract by a party shall not take effect—

(a) Before the time at which the cancellation is made known to the other party; or

(b) Where it is not reasonably practicable to communicate with the other party, before the time at which the party cancelling the contract evinces, by some overt means reasonable in the circumstances, his intention to cancel the contract.

(2) The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. It shall not be necessary to use any particular form of words, so long as the intention to cancel is made known.

(3) Subject to this Act, when a contract is cancelled the following provisions shall apply:

(a) So far as the contract remains unperformed at the time of the cancellation, no party shall be obliged or entitled to perform it further:

(b) So far as the contract has been performed at the time of the cancellation, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract.

(4) Nothing in subsection (3) of this section shall affect the right of a party to recover damages in respect of a misrepresentation or the repudiation or breach of the contract by another party.

9. Power of Court to grant relief—(1) When a contract is cancelled by any party, the Court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.

(2) An order under this section may—

(a) Vest in any party to the proceedings, or direct any such party to transfer or assign to any other such party or to deliver to him the possession of, the whole or any part of any real or personal property that was the subject of the contract or was the whole or part of the consideration for it:

(b) Subject to section 6 of the Act, direct any party to the proceedings to pay to any other such party such sum as the Court thinks just:

(c) Direct any party to the proceedings to do or refrain from doing in relation to any other party any act or thing as the Court thinks just.

(3) Any such order, or any provision of it, may be made upon and subject to such terms and conditions as the Court thinks fit, not being in any case a term or condition that would have the effect of preventing a claim for damages by any party.

(4) In considering whether to make an order under this section, and in considering the terms of any order it proposes to make, the Court shall have regard to—

(a) The terms of the contract; and

(b) The extent to which any party to the contract was or would have been able to perform it in whole or in part; and

(c) Any expenditure incurred by a party in or for the purpose of the performance of the contract; and

(d) The value, in its opinion, of any work or services performed by a party in or for the purpose of the performance of the contract; and

(e) Any benefit or advantage obtained by a party by reason of anything done by another party in or for the purpose of the performance of the contract; and

(f) Such other matters as it thinks proper.

(5) No order shall be made under subsection (2) (a) of this section that would have the effect of depriving a person, not being a party to the contract, of the possession of or any estate or interest in any property acquired by him in good faith and for valuable consideration.

(6) No order shall be made under this section in respect of any property, if any party to the contract has so altered his position in relation to the property, whether before or after the cancellation of the contract, that, having regard to all relevant circumstances, it would in the opinion of the Court be inequitable to any party to make such an order.

(7) An application for an order under this section may be made by—

(a) Any party to the contract; or

(b) Any person claiming through or under any such party; or

(c) Any other person if it is material for him to know whether relief under this section will be granted.

10. Recovery of damages—(1) Subject to sections 4 to 6 of this Act, a party to a contract shall not be precluded by the cancellation of the contract, or by the granting of relief under section 9 of this Act, from recovering damages in respect of a misrepresentation or the repudiation or breach of the contract by another party; but the value of any relief granted under section 9 of this Act shall be taken into account in assessing any such damages.

(2) Any sum ordered to be paid by any party to the contract to any other such party under section 9 (2) of this Act may be set off against any damages payable by him to that other party.

11. Assignees—(1) Subject to this section, if a contract, or the benefit or burden of a contract, is assigned, the remedies of damages and cancellation shall, except to the extent that it is otherwise provided in the assigned contract, be enforceable by or against the assignee.

(2) Except to the extent that it is otherwise agreed by the assignee or provided in the assigned contract, the assignee shall not be liable in damages, whether by way of set-off, counterclaim, or otherwise, in a sum exceeding the value of the performance of the assigned contract to which he is entitled by virtue of the assignment.

(3) Unless it is otherwise agreed between the assignor and the assignee, the assignee shall be entitled to be indemnified by the assignor against any loss suffered by the assignee and arising out of—

(a) Any term of the assigned contract that was not disclosed to him before or at the time of the assignment; or

(b) Any misrepresentation that was not so disclosed.

(4) This section shall be read subject—

(a) In the case of a mortgage of land, to section 104 of the Property Law Act 1952:

(b) In the case of a hire purchase agreement within the meaning of the Hire Purchase Act 1971, to section 18 of that Act.

(5) Nothing in this section shall affect the law relating to negotiable instruments.

12. Jurisdiction of District Courts—(1) A District Court shall have jurisdiction to exercise any power conferred by any of the provisions of sections 4, 7 (6), 7 (7) and 9 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of civil proceedings (other than an application made for the purposes of section 7 (6) or section 9 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any party to the contract is not more than $200,000; or

(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to determine the application.

(2) For the purposes of section 43 of the District Courts Act 1947, an application made to a District Court under section 7 (7) or section 9 of this Act shall be deemed to be an action.

13. Jurisdiction of Disputes Tribunals—(1) A Disputes Tribunal established under the Disputes Tribunals Act 1988 shall have jurisdiction to exercise any power conferred by any

of the provisions of sections 4, 7 (6), 7 (7) and 9 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to subsection (3) of this section, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.

(2) Subject to subsection (3) of this section, an order of a Disputes Tribunal under section 9 of this Act shall not—

(a) Require a person to pay an amount exceeding $3,000:

(b) Declare a person not liable to another for an amount exceeding $3,000:

(c) Vest any property exceeding $3,000 in value in any person:

(d) Direct the transfer or assignment or delivery of possession of any property exceeding $3,000 in value—

and an order of the Tribunal that exceeds any such restriction shall be entirely of no effect.

(3) Where, in respect of any proceedings properly before a Disputes Tribunal, the jurisdiction of the Tribunal has been extended under an agreement made pursuant to section 13 of the Disputes Tribunals Act 1988, subsections (1) and (2) of this section shall be read as if every reference in those subsections to $3,000 were a reference to $5,000.

14. Amendments and repeals—(1) The Sale of Goods Act 1908 is hereby amended—

(a) By omitting from section 13 (3) the words "or where the contract is for specific goods the property in which has passed to the buyer":

(b) By inserting in section 37, after the words "that he has accepted them, or", the words "(except where section 36 of this Act otherwise provides)".

(2) The Second Schedule to the Arbitration Act 1908 is hereby amended by inserting, after clause 10A (as inserted by section 11 of the Contractual Mistakes Act 1977), the following clause:

"10B. Subject to section 5 of the Contractual Remedies Act 1979, the arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by sections 4, 6, 7 (6), 7 (7) and 9 of that Act."

(3) The Hire Purchase Act 1971 is hereby amended—

(a) By omitting from sections 11 (a) and (b), 12 (1), 13 (1), 14 (1) (a) and (b), and 14 (2) the words "(a condition)":

(b) By omitting from section 11 (c) the words "(a warranty)":

(c) By inserting in section 18 (3) (b) and in section 18 (5), after the words "to rescind" in each case, the words "or cancel":

(d) By repealing sections 38 and 39.

(4) Section 66 of the Real Estate Agents Act 1976 is hereby repealed.

15. Savings—Except as provided in sections 4 (3), 6 (2) and 14 of this Act, nothing in this Act shall affect—

(a) The law relating to specific performance or injunction:

(b) The law relating to mistake, duress, or undue influence:

(c) The doctrine of *non est factum*:

(d) The Sale of Goods Act 1908:

(e) The Frustrated Contracts Act 1944:

(f) The Limitation Act 1950:

(g) Sections 117 to 119 of the Property Law Act 1952 (which relate to relief against forfeiture under leases):

(h) Any other enactment so far as it prescribes or governs terms of contracts or remedies available in respect of contracts, or governs the enforcement of contracts.

16. Application of Act—This Act shall not apply to any contract made before the commencement of this Act.

This Act is administered in the Department of Justice.

The Contractual Remedies Act 1979 has been revised as follows:

- On the title page under the heading "Analysis" the reference to "District Court" was inserted in substitution for "Magistrate's Court"; District Courts Amendment Act 1979, s 18(2).
- On the title page under the heading "Analysis" the reference to "Disputes Tribunals" was inserted in substitution for "Small Claims Tribunals"; Disputes Tribunals Act 1988, s 88.
- In the definition of "Court" in s 2, "High Court" was inserted in substitution for "Supreme Court"; Judicature Amendment Act 1979, s 12.
- In the definition of "Court" in s 2, "District Court" was inserted in substitution for "Magistrate's Court"; District Courts Amendment Act 1979, s 18(2).
- Section 4(4) was amended pursuant to the Disputes Tribunals Act 1988, s 67.
- In s 12, the references to "District Court" were inserted pursuant to the District Courts Amendment Act 1979, s 18(2).
- Section 12(1)(b) was amended pursuant to the District Courts Amendment Act 1991, s 19(1).
- In s 12(1)(c) the reference to the "District Courts Act 1947" was inserted pursuant to the District Courts Amendment Act 1979, s 2(3).

- In s 12(2) the reference to the "District Courts Act 1947" was inserted pursuant to the District Courts Amendment Act 1979, s 2(3).
- Section 13 was inserted by the Disputes Tribunals Act 1988, s 68.

Reproduced as at September 1992

ANALYSIS

1977, No. 54

An Act to reform the law relating to the effect of mistakes on contracts [*21 November 1977*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Contractual Mistakes Act 1977.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

"Court" means the High Court or a District Court that has jurisdiction under section 9 of this Act or a Disputes Tribunal that has jurisdiction under section 10 of this Act:

"Mistake" means a mistake, whether of law or of fact.

(2) For the purposes of this Act, and without limiting the meaning of the term "mistake of law", but subject to section 6 (2) (a) of this Act, a mistake in the interpretation of a document is a mistake of law.

(3) There is a contract for the purposes of this Act where a contract would have come into existence but for circumstances of the kind described in section 6 (1) (a) of this Act.

3. Act to bind the Crown—This Act shall bind the Crown.

4. Purpose of Act—(1) The purpose of this Act is to mitigate the arbitrary effects of mistakes on contracts by conferring on Courts and arbitrators appropriate powers to grant relief in the circumstances mentioned in section 6 of this Act.

(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.

5. Act to be a Code—(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, 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 or an arbitrator of the power to exercise its or his discretion to withhold a decree of specific performance in any case.

6. Relief may be granted where mistake by one party is known to opposing party or is common or mutual—(1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act 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 one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); 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 one 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 section 7 of this Act 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.

7. Nature of relief—(1) Where by virtue of the provisions of section 6 of this Act the Court has power to grant relief to a party to a contract, it may grant relief not only to that party but also to any person claiming through or under that party.

(2) The extent to which the party seeking relief, or the party through or under whom relief is sought, as the case may require, caused the mistake shall be one of the considerations to be taken into account by the Court in deciding whether to grant relief under this section.

(3) The Court shall have a discretion to make such order as it thinks just and in particular, but not in limitation, it may do one or more of the following things:

(a) Declare the contract to be valid and subsisting in whole or in part or for any particular purpose:

(b) Cancel the contract:

(c) Grant relief by way of variation of the contract:

(d) Grant relief by way of restitution or compensation.

(4) An application for relief under this section may be made by—

(a) Any person to whom the Court may grant that relief; or

(b) Any other person where it is material for that person to know whether relief under this section will be granted.

(5) The Court may by any order made under this section vest any property that was the subject of the contract, or the whole or part of the consideration for the contract, in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

8. Rights of third persons not affected—(1) Nothing in any order made under this Act shall invalidate—

(a) Any disposition of property by a party to a mistaken contract for valuable consideration; or

(b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this subsection applies—

if the person to whom the disposition was made was not a party to the mistaken contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, a mistaken contract and otherwise acts in good faith.

(2) Nothing in any order made under this Act shall affect the operation of section 130 of the Property Law Act 1952.

(3) In this section—

"Disposition" has the meaning assigned to it by section 2 of the Insolvency Act 1967; and

"Mistaken contract" means a contract entered into in the circumstances described in section 6 (1) (a) of this Act.

9. Jurisdiction of District Courts—(1) A District Court shall have jurisdiction to exercise any of the powers conferred by section 6 or section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purpose of obtaining relief under section 7 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any party to the contract is not more than $200,000; or

(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to hear and determine the application.

(2) For the purposes of section 43 of the District Courts Act 1947, an application made to the District Court for the purpose of obtaining relief under section 7 of this Act shall be deemed to be an action.

10. Jurisdiction of Disputes Tribunals—(1) A Disputes Tribunal established under the Disputes Tribunals Act 1988 shall have jurisdiction to exercise any of the powers conferred by section 6 or section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to subsection (3) of this section, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.

(2) Subject to subsection (3) of this section, an order of a Disputes Tribunal under section 6 or section 7 of this Act shall not—

(a) Require a person to pay an amount exceeding $3,000:

(b) Declare a person not liable to another for an amount exceeding $3,000:

(c) Vest any property exceeding $3,000 in value in any person:

(d) Direct the transfer or assignment or delivery of possession of any such property—

and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

(3) Where, in respect of any proceedings properly before a Disputes Tribunal, the jurisdiction of the Tribunal has been extended under an agreement made pursuant to section 13 of the Disputes Tribunals Act 1988, subsections (1) and (2) of this section shall be read as if every reference in those subsections to $3,000 were a reference to $5,000.

11. Amendment to Arbitration Act 1908—The Second Schedule to the Arbitration Act 1908 is hereby amended by inserting, after clause 10 (as added by section 9 of the Arbitration Amendment Act 1938), the following clause:

"10A. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 6 or section 7 of the Contractual Mistakes Act 1977."

12. Application of Act—This Act shall not apply to contracts entered into before the commencement of this Act.

This Act is administered in the Department of Justice.

The Contractual Mistakes Act 1977 has been revised as follows:

- On the title page under the heading "Analysis" the reference to "District Court" was inserted in substitution for "Magistrate's Court"; District Courts Amendment Act 1979, s 18(2).
- On the title page under the heading "Analysis" the reference to "Disputes Tribunals" was inserted in substition for "Small Claims Tribunals"; Disputes Tribunals Act 1988, s 83.
- Section 2(1) was amended pursuant to the Disputes Tribunals Act 1988, s 64.
- In s 9, the references to "District Court" were inserted in substitution for "Magistrate's Court"; District Courts Amendment Act 1979, s 18(2).
- Section 9(1)(b) was amended pursuant to the District Courts Amendment Act 1991, s 19(1).
- In s 9, the references to the "District Courts Act 1947" were inserted pursuant to the District Courts Amendment Act 1979, s 2(3).
- Section 10 was inserted by the Disputes Tribunals Act 1988, s 65.

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ANALYSIS

THE ILLEGAL CONTRACTS ACT 1970
1970, No. 129

An Act to reform the law relating to illegal contracts

[*1 December 1970*

1. Short Title—This Act may be cited as the Illegal Contracts Act 1970.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Act" means any Act of the [Parliament of New Zealand]; and includes any Act of the Parliament of England, of the Parliament of Great Britain, or of the Parliament of the United Kingdom, which is in force in New Zealand:

"Court" means the High Court or a District Court that has jurisdiction under section 9 of this Act or a Disputes Tribunal that has jurisdiction under section 9A of this Act:

"Enactment" means any provision of any Act, regulations, rules, bylaws, Order in Council, or Proclamation; and includes any provision of any notice, consent, approval, or direction which is given by any person pursuant to a power conferred by any Act or regulations:

"Property" means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property.

"Act": The reference to the Parliament of New Zealand was substituted for a reference to the General Assembly by s. 29 (2) of the Constitution Act 1986.

3. "Illegal contract" defined—Subject to section 5 of this Act, for the purposes of this Act the term "illegal contract" means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not.

4. Act to bind Crown —This Act shall bind the Crown.

5. Breach of enactment—A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

The provisions of this section apply to contracts made in contravention of the Credit Contracts Act 1981, see s. 44 of that Act.

6. Illegal contracts to be of no effect—(1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract:

Provided that nothing in this section shall invalidate—

(a) Any disposition of property by a party to an illegal contract for valuable consideration; or

(b) Any disposition of property made by or through a person who became entitled to the property under a disposition to which paragraph (a) of this proviso applies—

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

(2) In this section the term "disposition" has the meaning assigned to that term by section 2 of the Insolvency Act 1967.

The provisions of this section apply to unenforceable contracts under s. 128 (1) of the Gaming and Lotteries Act 1977, see s. 128 (2) of that Act.

7. Court may grant relief—(1) Notwithstanding the provisions of section 6 of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to—

(a) Any party to an illegal contract; or

(b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or

(c) Any person claiming through or under any such party—

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) An application under subsection (1) of this section may be made by—

(a) Any person to whom the Court may grant relief pursuant to subsection (1) of this section; or

(b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

(3) In considering whether to grant relief under subsection (1) of this section the Court shall have regard to—

(a) The conduct of the parties; and

(b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and

(c) Such other matters as it thinks proper,—

but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

(5) The Court may by any order made under subsection (1) of this section vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

(6) Any order made under subsection (1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

(7) Subject to the express provisions of any other enactment, no Court shall, in respect of any illegal contract, grant relief to any person otherwise than in accordance with the provisions of this Act.

Power to grant relief under this section does not extend to unenforceable contracts under s. 128 (1) of the Gaming and Lotteries Act 1977, see s. 128 (3) of that Act.

For the powers of the Equal Opportunities Tribunal under the Human Rights Commission Act 1977, see s. 38 (6) (e) and (f) of that Act.

8. Restraints of trade—(1) Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may—

(a) Delete the provision and give effect to the contract as so amended; or

(b) So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or

(c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract.

(2) The Court may modify a provision under paragraph (b) of subsection (1) of this section, notwithstanding that the modification cannot be effected by the deletion of words from the provision.

9. Jurisdiction of District Courts—(1) A [District Court] shall have jurisdiction to exercise any of the powers conferred by any of the provisions of sections 7 and 8 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purposes of subsection (1) of section 7 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any party to the contract is not more than $200,000; or

(c) The parties agree in accordance with section 37 of the [District Courts Act 1947], that a [District Court] shall have jurisdiction to hear and determine the application.

(2) For the purposes of section 43 of the [District Courts Act 1947], an application made to a [District Court] pursuant to subsection (1) of section 7 of this Act shall be deemed to be an action.

Throughout this section the references to a District Court were substituted for references to a Magistrate's Court by s. 18 (2) of the District Courts Amendment Act 1979, and in the reference to the District Courts Act 1947 the word "District" was substituted for the word "Magistrates" by s. 2 (3) of the District Courts Amendment Act 1979.

[9A. Jurisdiction of Disputes Tribunals—(1) A Disputes Tribunal established under the Disputes Tribunals Act 1988 shall have jurisdiction to exercise the powers conferred by any of the provisions of section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to subsection (3) of this section, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.

(2) Subject to subsection (3) of this section, an order of a Disputes Tribunal under section 7 of this Act shall not—

(a) Require a person to pay an amount exceeding $3,000:

(b) Declare a person not liable to another for an amount exceeding $3,000:

(c) Vest any property exceeding $3,000 in value in any person:

(d) Direct the transfer or assignment or delivery of possession of any such property—

and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

(3) Where, in respect of any proceedings properly before a Disputes Tribunal, the jurisdiction of the Tribunal has been extended under an agreement made pursuant to section 13 of the Disputes Tribunals Act 1988, subsections (1) and (2) of this section shall be read as if every reference in those subsections to $3,000 were a reference to $5,000.]

10. Application of Act —This Act shall apply to contracts whether made before or after the commencement of this Act:

Provided that nothing in section 6 of this Act shall apply to contracts made before the commencement of this Act.

11. Savings—(1) Except as provided in section 8 of this Act, nothing in this Act shall affect the law relating to:

(a) Contracts, or provisions of contracts, which are in restraint of trade; or

(b) Contracts, or provisions of contracts, which purport to oust the jurisdiction of any Court, whether that Court is a court within the meaning of this Act or not.

(2) *Repealed by s. 6 (7) of the Domestic Actions Act 1975.*

(3) Nothing in this Act shall affect the rights of the parties under any judgment given in any Court before the commencement of this Act, or under any judgment given on appeal from any such judgment, whether the appeal is commenced before or after the commencement of this Act.

The Illegal Contracts Act 1970 is administered in the Department of Justice.

The Illegal Contracts Act 1970 has been revised as follows:

- On the title page under the heading "Index" the reference to the "Disputes Tribunals Act 1988" was inserted pursuant to the Disputes Tribunals Act 1988, s 83 and the sections thereunder were amended accordingly.
- On the title page under the heading "Index" the references to "Small Claims Tribunals Act 1976" and "Judicature Amendment Act 1979" were omitted pursuant to the Disputes Tribunals 1988, s 77.
- On the title page under the heading "Index" the reference to "s 16(1)" of the District Courts Amendment Act 1979 was omitted and the reference to "s 19(1)" of the District Courts Amendment Act 1991 was inserted pursuant to the later section.
- On the title page under the heading "Analysis" the reference to "Disputes Tribunals" was inserted in substitution for "Small Claims Tribunals" pursuant to the Disputes Tribunals Act 1988, s 83.
- In s 2, the definition of "Court" was inserted by the Disputes Tribunals Act 1988, s 77.

- Section 9(1)(b) was amended pursuant to the District Courts Amendment Act 1991, s 19(1).
- Section 9A was inserted by the Disputes Tribunals Act 1988, s 78.

[94A. Recovery of payments made under mistake of law—(1) Subject to the provisions of this section, where relief in respect of any payment that has been made under mistake is sought in any Court, whether in [[civil proceedings]] or by way of defence, set off, counterclaim, or otherwise, and that relief could be granted if the mistake was wholly one of fact, that relief shall not be denied by reason only that the mistake is one of law whether or not it is in any degree also one of fact.

(2) Nothing in this section shall enable relief to be given in respect of any payment made at a time when the law requires or allows, or is commonly understood to require or allow, the payment to be made or enforced, by reason only that the law is subsequently changed or shown not to have been as it was commonly understood to be at the time of the payment.]

In subs. (1) the words "civil proceedings" were substituted for the former words by s. 11 (1) of the Judicature Amendment Act (No. 2) 1985.

As to the application of subs. (1) to the Energy Resources Levy Act 1976, see s. 31 (5) of that Act.

As to the application of the Contractual Mistakes Act 1977 to this section, see s. 5 (2) (d) of that Act.

[94B. Payments made under mistake of law or fact not always recoverable—Relief, whether under section 94A of this Act or in equity or otherwise, in respect of any payment made under mistake, whether of law or of fact, shall be denied wholly or in part if the person from whom relief is sought received the payment in good faith and has so altered his position in reliance on the validity of the payment that in the opinion of the Court, having regard to all possible implications in respect of other persons, it is inequitable to grant relief, or to grant relief in full, as the case may be.]

Ss. 94A and 94B were inserted by s. 2 of the Judicature Amendment Act 1958.

As to the application of s. 94B to the Superannuation Schemes Act 1976, see s. 7 (8) of that Act.

As to the application of the Contractual Mistakes Act 1977 to s. 94B, see s. 5 (2) (d) of that Act.

Reproduced as at September 1992

ANALYSIS

1982, No. 132

An Act to permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person [*16 December 1982*

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Contracts (Privity) Act 1982.

(2) This Act shall come into force on the 1st day of April 1983.

2. Interpretation—In this Act, unless the context otherwise requires,—

"Benefit" includes—

(a) Any advantage; and

(b) Any immunity; and

(c) Any limitation or other qualification of—

(i) An obligation to which a person (other than a party to the deed or contract) is or may be subject; or

(ii) A right to which a person (other than a party to the deed or contract) is or may be entitled; and

(d) Any extension or other improvement of a right or rights to which a person (other than a party to the deed or contract) is or may be entitled:

"Beneficiary", in relation to a promise to which section 4 of this Act applies, means a person (other than the promisor or promisee) on whom the promise confers, or purports to confer, a benefit:

"Contract" includes a contract made by deed or in writing, or orally, or partly in writing and partly orally or implied by law:

"Court" means—

(a) The High Court; or

(b) A District Court that has jurisdiction under section 10 of this Act; or

(c) A Disputes Tribunal that has jurisdiction under section 11 of this Act:

"Promisee", in relation to a promise to which section 4 of this Act applies, means a person who is both—

(a) A party to the deed or contract; and

(b) A person to whom the promise is made or given:

"Promisor", in relation to a promise to which section 4 of this Act applies, means a person who is both—

(a) A party to the deed or contract; and

(b) A person by whom the promise is made or given.

3. Act to bind the Crown—This Act shall bind the Crown.

4. Deeds or contracts for the benefit of third parties—Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:

Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

5. Limitation on variation or discharge of promise—(1) Subject to sections 6 and 7 of this Act, where, in respect of a promise to which section 4 of this Act applies,—

(a) The position of a beneficiary has been materially altered by the reliance of that beneficiary or any other person on the promise (whether or not that beneficiary or that other person has knowledge of the precise terms of the promise); or

(b) A beneficiary has obtained against the promisor judgment upon the promise; or

(c) A beneficiary has obtained against the promisor the award of an arbitrator upon a submission relating to the promise,—

the promise and the obligation imposed by that section may not be varied or discharged without the consent of that beneficiary.

(2) For the purposes of paragraph (b) or paragraph (c) of subsection (1) of this section,—

(a) An award of an arbitrator or a judgment shall be deemed to be obtained when it is pronounced notwithstanding that some act, matter, or thing needs to be done to record or perfect it or that, on application to a Court or on appeal, it is varied:

(b) An award of an arbitrator or a judgment set aside on application to a Court or on appeal shall be deemed never to have been obtained.

6. Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge—Nothing in this Act prevents a promise to which section 4 of this Act applies or any obligation imposed by that section from being varied or discharged at any time—

(a) By agreement between the parties to the deed or contract and the beneficiary; or

(b) By any party or parties to the deed or contract if—

(i) The deed or contract contained, when the promise was made, an express provision to that effect; and

(ii) The provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and

(iii) The beneficiary had not materially altered his position in reliance on the promise before the provision became known to him; and

(iv) The variation or discharge is in accordance with the provision.

7. Power of Court to authorise variation or discharge—(1) Where, in the case of a promise to which section 4 of this Act applies or of an obligation imposed by that section,—

(a) The variation or discharge of that promise or obligation is precluded by section 5 (1) (a) of this Act; or

(b) It is uncertain whether the variation or discharge of that promise is so precluded,—

a Court, on application by the promisor or promisee, may, if it is just and practicable to do so, make an order authorising the variation or discharge of the promise or obligation or both on such terms and conditions as the Court thinks fit.

(2) If a Court—

(a) Makes an order under subsection (1) of this section; and

(b) Is satisfied that the beneficiary has been injuriously affected by the reliance of the beneficiary or any other person on the promise or obligation,—

the Court shall make it a condition of the variation or discharge that the promisor pay to the beneficiary, by way of compensation, such sum as the Court thinks just.

8. Enforcement by beneficiary—The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

9. Availability of defences—(1) This section applies only where, in proceedings brought in a Court or an arbitration, a claim is made in reliance on this Act by a beneficiary against a promisor.

(2) Subject to subsections (3) and (4) of this section, the promisor shall have available to him, by way of defence, counterclaim, set-off, or otherwise, any matter which would have been available to him—

(a) If the beneficiary had been a party to the deed or contract in which the promise is contained; or

(b) If—

(i) The beneficiary were the promisee; and

(ii) The promise to which the proceedings relate had been made for the benefit of the promisee; and

(iii) The proceedings had been brought by the promisee.

(3) The promisor may, in the case of a set-off or counterclaim arising by virtue of subsection (2) of this section against the promisee, avail himself of that set-off or counterclaim against the beneficiary only if the subject-matter of that set-off or counterclaim arises out of or in connection with the deed or contract in which the promise is contained.

(4) Notwithstanding subsections (2) and (3) of this section, in the case of a counterclaim brought under either of those subsections against a beneficiary,—

(a) The beneficiary shall not be liable on the counterclaim, unless the beneficiary elects, with full knowledge of the counterclaim, to proceed with his claim against the promisor; and

(b) If the beneficiary so elects to proceed, his liability on the counterclaim shall not in any event exceed the value of the benefit conferred on him by the promise.

10. Jurisdiction of District Courts—(1) A District Court shall have jurisdiction to exercise any power conferred by section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of civil proceedings properly before the Court; or

(b) The value of the consideration for the promise of the promisor is not more than $200,000; or

(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to determine the application.

(2) For the purposes of section 43 of the District Courts Act 1947, an application made to a District Court under section 7 of this Act shall be deemed to be an action.

11. Jurisdiction of Disputes Tribunals—(1) A Disputes Tribunal established under the Disputes Tribunals Act 1988 shall have jurisdiction to exercise any powers conferred by section 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to subsection (3) of this section, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.

(2) Subject to subsection (3) of this section, a condition imposed by a Disputes Tribunal under section 7 (2) of this Act shall not require the promiser to pay an amount exceeding $3,000 and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

(3) Where, in respect of any proceedings properly before a Disputes Tribunal, the jurisdiction of the Tribunal has been extended under an agreement made pursuant to section 13 of the Disputes Tribunals Act 1988, subsections (1) and (2) of this section shall be read as if every reference in those subsections to $3,000 were a reference to $5,000.

12. Amendments of Arbitration Act 1908—The Second Schedule to the Arbitration Act 1908 is hereby amended by inserting, after clause 10B (as inserted by section 14 (2) of the Contractual Remedies Act 1979), the following clause:

"10C. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 7 of the Contracts (Privity) Act 1982."

13. Repeal—Section 7 of the Property Law Act 1952 is hereby repealed.

14. Savings—(1) Subject to section 13 of this Act, nothing in this Act limits or affects—

(a) Any right or remedy which exists or is available apart from this Act; or

(b) The Contracts Enforcement Act 1956 or any other enactment that requires any contract to be in writing or to be evidenced by writing; or

(c) Section 49A of the Property Law Act 1952; or

(d) The law of agency; or

(e) The law of trusts.

(2) Notwithstanding the repeal effected by section 13 of this Act, section 7 of the Property Law Act 1952 shall continue to apply in respect of any deed made before the commencement of this Act.

15. Application of Act—Except as provided in section 14 (2) of this Act, this Act does not apply to any promise, contract, or deed made before the commencement of this Act.

The Act is administered in the Department of Justice.

The Contracts (Privity) Act 1982 has been revised as follows:

- On the title page under the heading "Analysis" the reference to "Disputes Tribunals" was substituted for "Small Claims Tribunals" pursuant to the Disputes Tribunals Act 1988, s 83.
- In the definition of "Court" in s 2, subparagraph (c) was amended pursuant to the Disputes Tribunals Act 1988, s 62.
- Section 10(b) was amended pursuant to the District Courts Amendment Act 1991, s 19(1).
- Section 11 was inserted by the Disputes Tribunals Act 1988, s 63.

Reproduced as at September 1992

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ANALYSIS

THE MINORS' CONTRACTS ACT 1969
1969, No. 41

An Act to restate and reform the law relating to minors' contracts [*29 September 1969*

1. Short Title and commencement—(1) This Act may be cited as the Minors' Contracts Act 1969.

(2) This Act shall come into force on the 1st day of January 1970.

2. Interpretation—(1) In this Act, unless the context otherwise requires,—

"Court" means the High Court or a District Court that has jurisdiction under section 14 of this Act or a Disputes Tribunal that has jurisdiction under section 14A of this Act:

"Property" means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property.

(2) In Sections 5, 6, 9, 10 and 12 of this Act the term "minor" does not include a minor who is or has been married.

3. Act to bind the Crown—This Act shall bind the Crown.

Contractual Capacity of Minors

4. Married minors—(1) Subject to section 16 of this Act, a minor who is or has been married shall have the same contractual capacity as if he were of full age.

(2) Subject to section 16 of this Act, any compromise or settlement of a claim agreed to, and any discharge or receipt given for any purpose, by any such minor shall have effect as if the minor were of full age.

5. Contracts of minors of or over the age of 18 years, certain contracts concerning life insurance, and contracts of service—(1) Subject to the provisions of this section, every contract which is—

(a) Entered into by a minor who has attained the age of 18 years; or

(b) Entered into pursuant to section 66B of the Life Insurance Act 1908 by a minor who has attained the age of 16 years; or

(c) A contract of service entered into by a minor;

shall have effect as if the minor were of full age.

(2) If the Court is satisfied in respect of any contract to which subsection (1) of this section applies that, at the time the contract was entered into,—

(a) The consideration for a minor's promise or act was so inadequate as to be unconscionable; or

(b) Any provision of any such contract imposing an obligation on any party thereto who was a minor was harsh or

oppressive, it may, in the course of any proceedings or on application made for the purpose, cancel the contract, or decline to enforce the contract against the minor, or declare that the contract is unenforceable against the minor, whether in whole or in part, and in any case may make such order as to compensation or restitution of property under section 7 of this Act as it thinks just.

(3) For the purposes of subsection (2) of this section, the Court may receive evidence of commercial practice in contracts of the same kind.

(4) Nothing in subsection (2) of this section shall apply to—

(a) Any contract of apprenticeship to which the Apprenticeship Act 1983 applies; or

(b) Any indenture of apprenticeship to which section 29 of the Shipping and Seamen Act 1952 applies; or

(c) Any indenture of apprenticeship entered into under [Section 51 of the Defence Act 1971], [section 222A] of the Post Office Act 1959, [section 82 of the New Zealand Railways Corporation Act 1981], section 175B of the Coal Mines Act 1925, or section 70 of the State Services Act 1962; or

(d) Any agreement entered into under section 4A of the Maori Housing Amendment Act 1938.

(5) Nothing in this section shall apply to—

(a) Any contract approved by a District Court pursuant to section 9 of this Act; or

(b) The compromise or settlement of any claim for money or damages made by or on behalf of any minor (whether alone or in conjunction with any other person).

In subs. 4 (c), s. 51 of the Defence Act 1971, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed s. 10A of the New Zealand Army Act 1950, the expression "section 222A" was substituted, as from the commencement of this Act, for the expression "section 22A" by s. 2 of the Minors' Contracts Amendment Act 1974.

6. Contracts of minors below the age of 18 years—(1) Subject to the provisions of this section, every contract (other than a contract to which paragraph (b) or paragraph (c) of subsection (1) of section 5 of this Act applies) entered into by a minor who has not attained the age of 18 years shall be unenforceable against the minor but otherwise shall have effect as if the minor were of full age.

[(2) The Court may, in the course of any proceedings or on application made for the purpose, inquire into the fairness and

reasonableness of any contract to which subsection (1) of this section applies at the time the contract was entered into and—

(a) If it finds that any such contract was fair and reasonable at that time it shall not be obliged to make any order but it may in its discretion—

(i) Enforce the contract against the minor:

(ii) Declare that the contract is binding on the minor, whether in whole or part:

(iii) Make such order entitling the other parties to the contract, on such conditions as the Court thinks just, to cancel the contract:

(iv) Make such order as to compensation or restitution of property under section 7 of this Act as it thinks just; and

(b) If it finds that any such contract was not fair and reasonable at that time it shall not be obliged to make any order but it may in its discretion—

(i) Cancel the contract:

(ii) Make such order entitling the minor, on such conditions as the Court thinks just, to cancel the contract:

(iii) Make such order as to compensation or restitution of property under section 7 of this Act as it thinks just.]

(3) In exercising its discretion under subsection (2) of this section the Court shall have regard to—

(a) The circumstances surrounding the making of the contract:

(b) The subject-matter and nature of the contract:

(c) In the case of a contract relating to property, the nature and the value of the property:

(d) The age and the means (if any) of the minor:

(e) All other relevant circumstances.

(4) Nothing in this section shall apply to—

(a) Any contract approved by a District Court pursuant to section 9 of this Act; or

(b) The compromise or settlement of any claim for money or damages made by or on behalf of any minor (whether alone or in conjunction with any other person).

(5) Nothing in this section shall limit or affect section 20 of the Trustee Act 1956.

Subs. (2) was substituted for the original subs. (2) by s. 2 of the Minors' Contracts Amendment Act 1971.

7. Compensation or restitution—(1) Where the Court exercises any of the powers conferred on it by subsection (2) of section 5 of this Act or where it may exercise any of the powers conferred on it by subsection (2) of section 6 of this Act (whether or not it exercises any of those powers), the Court may grant to—

(a) Any party to the contract; or

(b) A guarantor or indemnifier under a contract of guarantee or indemnity relating to a contract to which subsection (1) of section 5 or subsection (1) of section 6 of this Act applies; or

(c) Any person claiming through or under or on behalf of any such party, guarantor or indemnifier,

such relief by way of compensation or restitution of property as the Court in its discretion thinks just.

(2) The Court may by any order made pursuant to subsection (1) of this section vest the whole or any part of any property that was the subject of, or the whole or any part of the consideration for, the contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings.

8. Applications under section 5 or section 6 of this Act—(1) An application under subsection (2) of section 5 or subsection (2) of section 6 of this Act may be made by—

(a) Any person to whom the Court may grant relief pursuant to section 7 of this Act; or

(b) Any other person where it is material for that person to know whether the Court will exercise the powers granted to it by the subsection.

(2) Any order made under subsection (2) of section 5 or subsection (2) of section 6 or pursuant to section 7 of this Act, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit.

9. Minor may enter into contract with approval of District Court—(1) Every contract entered into by a minor shall have effect as if the minor were of full age if, before the contract is entered into by the minor, it is approved under this section by a District Court.

(2) An application to a District Court under this section may be made—

(a) By the minor or any other person who will be a party to the proposed contract; or

(b) By a guardian of the minor.

(3) The Court may, in its discretion, refer any such application to a guardian of the minor, or, where the Court deems it necessary for the purposes of the application, to a solicitor nominated by the Court, or to the Public Trustee or Maori Trustee, or to any other person, and may make such order as it thinks fit for the payment of the reasonable costs and expenses of any person to whom the application is so referred.

(4) Any person to whom any such application is referred under subsection (3) of this section may file a report in the District Court setting out the results of his consideration and examination of the application and making in respect thereof such recommendations as he thinks proper, and may appear and be heard at the hearing of the application; but no such person shall be under any obligation to consider or examine any such application until his reasonable costs and expenses have been paid or secured to his satisfaction.

[(5) A District Court shall not approve a contract under this section where the contract relates to property held on trust and the Court is of the opinion that it is a case in which it would be more appropriate for an application to be made under section 64 or section 64A of the Trustee Act 1956.]

Cf. 1908, No. 86, s. 12A; 1951, No. 81, s. 14

Subs. (5) was added by s. 2(1) of the Minors' Contracts Amendment Act 1970.

Miscellaneous Provisions

10. Guarantees and indemnities—Every contract of guarantee or indemnity whereby any person (other than a minor) undertakes to accept liability in the event of the failure of a minor to carry out his obligations under a contract shall be enforceable against that person (in this section hereinafter referred to as "the surety") to the extent that it would be if the minor had been at all material times a person of full age, and that liability shall not be affected by any other provision of this Act or by any order made pursuant to any other provision of this Act; but the liability of the minor to the surety and the surety's right of subrogation against the minor may be affected by the other provisions of this Act or by any order made under

subsection (2) of section 5 or subsection (2) of section 6 or pursuant to section 7 of this Act.

11. *Repealed by s. 6 (6) of the Domestic Actions Act 1975.*

12. Settlement of claims by minors—(1) Where any money or damages are claimed by or on behalf of a minor (whether alone or in conjunction with any other person) then—

[(a) If the claim is not the subject of proceedings before any Court in New Zealand, any agreement for the compromise or settlement of the claim entered into by the minor, or on his behalf by a person who in the opinion of a Court of competent jurisdiction is a fit and proper person to do so, shall be binding on the minor if it or a release of the claim is in writing and is approved by a Court of competent jurisdiction; and]

(b) If the claim has not been [compromised or settled in accordance with] paragraph (a) of this subsection, and has become the subject of proceedings before any Court in New Zealand, no settlement, compromise, or payment and no acceptance of money paid into Court, whenever entered into or made, shall so far as it relates to that minor's claim be valid without the approval of the Court.

(2) An application for the approval of the Court under subsection (1) of this section may be made by or on behalf of the minor or any other party to the agreement or proceedings.

(3) The Court, in its discretion, may refuse any application for its approval under subsection (1) of this section or may grant its approval either unconditionally or upon or subject to such conditions and directions as it thinks fit, whether as to the terms of the agreement or of the compromise or settlement, or as to the amount, payment, securing, application, or protection of the money paid, or to be paid or otherwise.

(4) Without limiting subsection (3) of this section, where the Court directs that the whole or any part of [any money or damages awarded to a minor in any cause or matter or of any money to which a minor is entitled under an agreement, compromise, or settlement approved under subsection (1) of this section] shall be held on trust for the minor under this subsection by the Public Trustee or any other person then, except so far as the Court directs any immediate payment

therefrom or otherwise orders, and subject to any directions or conditions given or imposed by the Court—

(a) The amount shall be invested and held by the trustee upon trust—

(i) To make such payment (if any) to the minor out of the income and capital of the amount as the Court may specify; and

(ii) To apply the income and capital of the amount or so much thereof as the trustee from time to time thinks fit for or towards the maintenance or education (including past maintenance or education) or the advancement or benefit of the minor:

(b) The minor shall have no power, either by himself or in conjunction with any other person or persons, to terminate the trusts upon which the amount is held or to modify or extinguish those trusts:

(c) The interest of the minor in the income and capital of the amount shall not, while it remains in the hands of the trustee, be alienated, or pass by bankruptcy, or be liable to be seized, sold, attached, or taken in execution by process of law.

(5) Upon any minor attaining the age of [20] years or marrying under that age while any amount is held on trust for his benefit under subsection (4) of this section, the balance of that amount and of the income therefrom remaining in the hands of the trustee shall be paid to the minor except in so far as the Court may have ordered before the payment is made that the whole or any part of that amount shall continue to be held on trust under that subsection:

Provided that where the trustee has made an application or received notice that an application has been made to the Court for such an order he shall not make any payment under this subsection until the application has been disposed of.

(6) Where the trustee appointed by an order under this section is the Public Trustee [subsection (7)] of section 66 of the Public Trust Office Act 1957 shall apply in respect of all money paid to him pursuant to the order as if it were money paid to him pursuant to the said section 66.

(7) For the purposes of this section the expression "Court of competent jurisdiction" means a Court (other than a Disputes Tribunal) in which proceedings could be taken to enforce the claim or, in the case of a claim that could not be the subject of

proceedings in New Zealand, a Court in which proceedings could be taken to enforce a similar claim in New Zealand.

(8) Nothing in this section shall limit or affect—

(a) The Deaths by Accidents Compensation Act 1952; or

(b) Section 50 of the District Courts Act 1947; or

(c) The Workers' Compensation Act 1956.

Cf. 1945, No. 40, s. 35; 1957, No. 36, s. 66

In subs. (1), para. (a) was substituted for the original para. (a) by s. 3(1) of the Minors' Contracts Amendment Act 1970, and in para. (b) the words in square brackets were substituted for the words "the subject of an agreement approved under" by s. (3) (2) of that Act.

In subs. (4) the words in square brackets were substituted for the words "the money to which the minor is entitled under the agreement, compromise, or the settlement" by s. 3 (3) of the Minors' Contracts Amendment Act 1970. See s. 3 (4) of that Act.

In subs. (5) the figures "20" were substituted for the word "twenty-one" by s. 6 of the Age of Majority Act 1970.

In subs. (6) the words "subsection (7)" were substituted for the words "subsection (3)" by s. 2 (2) (a) of the Public Trust Office Amendment Act 1972.

13. Variation of certain orders made under section 12—(1) The Court may at any time vary any order made by it under section 12 of this Act or under section 35 of the Statutes Amendment Act 1945 or in respect of a minor under section 66 of the Public Trust Office Act 1957, whether or not the order has been varied under this section, in so far as the order relates to the payment, investment, or application of money held on trust or the income therefrom.

(2) Any order under this section may be made by the Court of its own motion or on an application made by:

(a) The minor; or

(b) The trustee; or

(c) Any other person who adduces proof of circumstances which in the opinion of the Court make it proper that he should make the application.

14. Jurisdiction of District Court—(1) A District Court shall have jurisdiction to exercise any of the powers conferred by any of the provisions of sections 5 to 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purposes of subsection (2) of section 5 or subsection (2) of section 6 of this Act) properly before the Court; or

(b) The value of the consideration for the promise or act of any minor under the contract is not more than $200,000; or

(c) The parties agree, in accordance with section 37 of the District Courts Act 1947, that a District Court shall have jurisdiction to hear and determine the application.

(2) For the purposes of section 43 of the District Courts Act 1947, an application made to a District Court pursuant to subsection (2) of section 5 or subsection (2) of section 6 of this Act shall be deemed to be an action.

[**14A. Jurisdiction of Disputes Tribunals**—(1) A Disputes Tribunal established under the Disputes Tribunals Act 1988 shall have jurisdiction to exercise the powers conferred by any of the provisions of sections 5 to 7 of this Act in any case where—

(a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and

(b) Subject to subsection (3) of this section, the total amount in respect of which an order of the Tribunal is sought does not exceed $3,000.

(2) Subject to subsection (3) of this section, an order of a Disputes Tribunal under section 7 of this Act shall not—

(a) Require a person to pay an amount exceeding $3,000:

(b) Declare a person not liable to another for an amount exceeding $3,000:

(c) Vest any property exceeding $3,000 in value in any person:

(d) Direct the transfer or assignment or delivery of possession of any such property—

and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

(3) Where, in respect of any proceedings properly before a Disputes Tribunal, the jurisdiction of a Tribunal has been extended under an agreement made pursuant to section 13 of the Disputes Tribunals Act 1988, subsections (1) and (2) of this section shall be read as if every reference in those subsections to $3,000 were a reference to $5,000.]

15. Act to be a code—(1) The provisions of this Act shall have effect in place of the rules of the common law and of

equity relating to the contractual capacity of minors and to the effect, validity, avoidance, repudiation, and ratification of contracts entered into by minors and to any contract of guarantee or indemnity in respect of any such contract.

(2) This Act shall apply only to contracts made, compromises and settlements agreed to, and discharges and receipts given, after the commencement of this Act.

(3) Nothing in this Act shall limit or affect any provision of any other enactment whereby a contract is made binding on a minor and nothing in section 5 or section 6 of this Act shall apply to any such contract.

(4) Nothing in this Act shall limit or affect the rule of law whereby a minor is not liable in tort for procuring a contract by means of fraudulent representations as to his own age or any other matter, but the Court shall take any such representations into account in deciding whether to exercise any of its powers under subsection (2) of section 5 or subsection (2) of section 6 or section 7 of this Act.

[**16. Agreements relating to trusts**—(1) Nothing in this Act shall entitle—

(a) A trustee to pay money or deliver property to a minor otherwise than in accordance with the terms of the trust:

(b) A minor to enter into an agreement whereby a trust is extinguished or the terms of a trust are varied:

Provided that nothing in this subsection shall prevent any contract approved pursuant to section 9 of this Act or subsection (2) of this section from having effect according to its tenor.

(2) Every agreement entered into by a minor who is or has been married whereby a trust is extinguished or the terms of a trust are varied shall have effect as if the minor were of full age if, before the agreement is entered into by the minor, it is approved under this subsection by a District Court.

(3) An application to a District Court under subsection (2) of this section may be made by the minor or any other person who will be a party to the proposed agreement, or by the trustee or trustees of the trust.

(4) Subsections (3) to (5) of section 9 of this Act, with any necessary modifications, shall apply to applications under this section.]

This section was substituted for the original s. 16 (as amended by s. 2 (2) of the Minors' Contracts Amendment Act 1970) by s. 3 (1) of the Minors' Contracts Amendment Act 1974.

17. *Repealed by s. 11 (e) of the Insurance Law Reform Amendment Act 1985.*

18. Consequential amendments—The enactments specified in the First Schedule to this Act are hereby amended in the manner indicated in that Schedule.

19. Repeals and revocation—The enactments specified in the Second Schedule to this Act are hereby repealed.

SCHEDULES

FIRST SCHEDULE

Section 18

ENACTMENTS AMENDED

Enactment Amended	Amendment
1908, No. 168—The Sale of Goods Act 1908 (1983 Reprint, Vol 11, p. 281)	By omitting from the proviso to subsection (1) of section 4 the words "an infant or minor or to". By omitting from subsection (2) of section 4 the words "such infant or minor or other", and substituting the word "the".
1947, No. 16—The [District] Courts Act 1947 (1980 Reprint, Vol 5, p. 1).	By inserting in subsection (2) of section 50, after the word "minor", the words "who is or has been married or is".

Parts of this Schedule have been repealed by s. 2 (2) (b) of the Public Trust Office Amendment Act 1972 and by s. 57 (1) of the Matrimonial Property Act 1976.

SECOND SCHEDULE

Section 19

ENACTMENTS REPEALED

1945, No. 40—The Statutes Amendment Act 1945: Section 35. (1957 Reprint, Vol. 6, pp. 597, 614.)

1948, No. 78—The Finance Act (No. 2) 1948: Section 59. (1957 Reprint, Vol. 13, pp. 248, 266.)

1951, No. 81—The Statutes Amendment Act 1951: Section 14. (1957 Reprint, Vol. 6, pp. 596, 615.)

The Minors' Contracts Act 1969 is administered in the Department of Justice.

The Minors' Contracts Act 1969 has been revised as follows:

- On the title page under the heading "Index" the reference to the "Disputes Tribunals Act 1988" was substituted for the "Small Claims Tribunals Act 1976" pursuant to the Disputes Tribunals Act 1988, ss 82 and 83.
- On the title page under the heading "Analysis" the references to "District Court" were substituted for "Magistrate's Court" pursuant to the District Courts Amendment Act 1979, s 18(2).
- On the title page under the heading "Analysis" the reference to "Disputes Tribunals" was substituted for "Small Claims Tribunals" pursuant to the Disputes Tribunals Act 1988, s 83.
- In s 2(1), the definition of "Court" was amended pursuant to the Disputes Tribunals Act 1988, s 79.
- Section 5(1)(b) was amended pursuant to the Insurance Law Reform Act 1985, s 10.
- The Apprenticeship Act 1983, which was inserted in s 5(4)(a) in substitution for the Apprenticeship Act 1948 pursuant to the Apprenticeship Act 1983, s 58; was repealed by the Industry Training Act 1992, s 14(1).
- The New Zealand Railways Corporation Act 1981, s 82 which was substituted for the Government Railways Act 1949, s 83B pursuant to the New Zealand Railways Corporation Act 1981, s 120(1), was repealed by the State Services Conditions of

Employment Amendment Act 1981, s 20(3)(c) which was itself repealed by the State Sector Act 1988, s 88(1).

- In s 5(5)(a) the reference to "District" was substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- In s 6(4)(a) the reference to "District" was substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- In s 9 the references to "District" were substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- Section 12(7) was amended pursuant to the Disputes Tribunals Act 1988, s 80.
- In s 12, the references to "District" were substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- In s 14, the references to "District" were substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- Section 14(1)(b) was amended pursuant to the District Courts Amendment Act 1991, s 19(1).
- Section 14A was amended pursuant to the Disputes Tribunals Act 1988, s 81.
- In s 16, the references to "District" were substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- In the First Schedule, the reference to "District" was substituted for "Magistrate's" pursuant to the District Courts Amendment Act 1979, s 18(2).
- In the Second Schedule, the reference to the "Infants Act 1908" was omitted pursuant to the Infants Act Repeal Act 1989, s 2(1).

ANALYSIS

THE FRUSTRATED CONTRACTS ACT 1944
1944, No. 20

An Act to amend the law relating to the frustration of contracts [*5 December 1944*

1. Short Title—This Act may be cited as the Frustrated Contracts Act 1944.

Nothing in this Act is affected by the Contractual Mistakes Act 1977 (see s. 5 (2) (e) of that Act), or by the Contractual Remedies Act 1979 (see s. 15 (e) of that Act).

2. Interpretation—In this Act the expression "Court" means, in relation to any matter, the Court or arbitrator by or before whom the matter falls to be determined.

3. Adjustment of rights and liabilities of parties to frustrated contracts—(1) Where a contract governed by the law of New Zealand has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section 4 of this Act, have effect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as the time of discharge) shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the Court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last preceding subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the Court considers just, having regard to all the circumstances of the case and, in particular,—

(a) The amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last preceding subsection; and

(b) The effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the Court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the Court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the Court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

Cf. Law Reform (Frustrated Contracts) Act 1943, s. 1 (U.K.)

4. Application of this Act—(1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the 1st day of November 1944, but not to contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the Court shall give effect to the said provision and shall only give effect to the last preceding section of this Act to such extent (if any) as appears to the Court to be consistent with the said provision.

(4) Where it appears to the Court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect of that part of the contract of sums which are or can be ascertained under the contract, the Court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the last preceding section of this Act as only applicable to the remainder of that contract.

(5) This Act shall not apply—

(a) To any charter party, except a time charter party or a charter party by way of demise, or to any contract (other than a charter party) for the carriage of goods by sea; or

(b) To any contract of insurance, save as is provided by subsection (5) of the last preceding section; or

(c) To any contract to which section 9 of the Sale of Goods Act 1908 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

Cf. Law Reform (Frustrated Contracts) Act 1943, s. 2 (U.K.)

As to contracts affected by the Wool Industry Act 1977, see s. 60 of that Act.

The Frustrated Contracts Act 1944 is administered in the Department of Justice.

APPENDIX C

Select Bibliography[76]

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