able title that interest has properly passed to the purchaser.[37] The extent to which the English courts will relax the firm grip of the *lex situs* on title issues in such cases is uncertain, but where, as in *Winkworth* v *Christie, Manson & Woods Ltd,* the *lex situs* of the goods chooses in pursuit of its own policies to confer a paramount title upon a purchaser it appears inevitable that such title will be recognised to defeat an existing title recognised by the common law.

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THE CONTRACTUAL REMEDIES ACT 1979

A. General.

This Act, which came into force on 1 April 1980 and applies to all contracts made on or after that date, is the result of two reports of the Contracts and Commercial Law Reform Committee presented in 1967 and 1978 respectively. It is the most important and far reaching of that Committee's reforms in the field of general contract. Earlier legislation, such as the Illegal Contracts Act 1970 and the Contractual Mistakes Act 1977, cover situations which are relatively uncommon. The new Act will virtually become a practitioner's working manual, for it concerns misrepresentation and breach of contract. Allegations that one party has committed one or the other of these are at the heart of most contract disputes.

The law on misrepresentation and breach was ripe for codification. The old rules about misrepresentation were enormously complicated, and involved the courts in drawing distinctions which at times seemed to have very little to commend them as a matter of logic; they also occasionally led to unjustifiable anomalies. The law about discharge for breach was likewise a morass; the courts had over the years developed a confusing number of alternative tests, variously expressed, for determining whether one party could treat the contract as discharged because of the other's breach. It can of course be argued that in this situation, as in the case of misrepresentation, the very complexity of the law provided the courts with a well stocked armoury of equipment for arriving at the right result. There is something in this. In not many of the common law cases could one quibble with the justice of the result reached; it was rather that the route to that result was often tortuous and unnecessarily long. Occasion-

[37] The problem will arise e.g. where the lex situs does not recognise a property interest reserved under a *Romalpa* clause, credit sale, or by chattel mortgage. The problems inherent in multiple assignments and intervening changes in the situs of the goods are considered in detail by Sykes & Pryles, *Australian Private International Law* (1979) at pp.393-414. See also Morris 22 B.Y.I.L. 239. Similar problems have come before the Canadian courts, e.g. *Century Credit Corporation* v *Richard* (1962) 34 D.L.R. (2d) 291, *Price Mobile Home Centres* v *National Trailer Convoy of Canada* (1974) 44 D.L.R. (3d) 443, *Re Fuhrmann and Miller* (1977) 78 D.L.R. (3d) 284. See also *A. J. Smeman Car Sales* v *Richardson Pre-Run Cars* (1969) 63 Q.J.P.R. 150, *Taylor* v *Lovegrove* (1912) 18 A.L.R. (CN) 22. These cases recognise that a later *lex situs* may properly only derogate from an earlier title by a paramount title provision.

ally, however, the old rules did fail to provide justice as well: for example, the rule that damages did not lie for innocent misrepresentation could lead to an unfortunate result in the hands of a less bold judge,[1] and so could the rule that one who abandoned an entire contract in course of performance got nothing for his labour.[2]

So the object of this codification had to be to simplify the law and provide direct routes to justice. This the new Act does, and provided it is accorded a sympathetic and liberal interpretation by the courts, it should succeed in its purpose. However codifiers of the common law tend to be a sorry lot, for their efforts normally run into some degree of initial difficulty, and normally there will be a transitional period where those who have to use this new Act will complain that it creates as many problems as it solves. The dangers of codification can be summed up as follows.

First, just because its object is to simplify, the new statute will not contain within it the richness of resource that the common law did. At common law there was, for virtually every problem, a precedent of some kind; and even if the law as a whole was a dreadfully disordered heap, there was (almost) everything in that heap that one needed. The statute, however, because it operates in terms of brief principle, will not contain that richness. That alone should not matter, provided it is expressed in flexible enough terms for one to be able to reason to a satisfactory result. However there is always the danger that economy of expression could lead to certain solutions which were available at common law not being available under the Act. The fairly literal approach to statutory interpretation which our courts have traditionally espoused could exacerbate this, for whereas a court at common law has at its command the devices of distinguishing and of extension of principle by analogy, a court interpreting a statute is confined by the very words the legislature has used. For this reason any effort to make a contract statute too starkly simple could result in some difficult situations going unprovided for. The Contractual Remedies Act seems to be flexible enough to provide satisfactory answers to most problems. Time will tell whether amendment will be needed.

Secondly, partial codifications, such as the Contractual Remedies Act is, can sometimes have unforeseen effects on the uncodified residue of the law, particularly in a subject like contract whose component parts interlock tightly. Sometimes these effects turn out on examination to be less extensive than was at first feared, but until their extent is settled there can be a period of uncertainty. For example, because of its wide definition of "mistake" the Contractual Mistakes Act 1977 may, at least in some cases, have implications in the fields of pre-incorporation contracts made by company promoters and of ultra vires contracts. It is because of this syndrome that some people believe that one either codifies the whole of the law of contract, or else codifies none of it. This is as may be. In New Zealand total codification is, in the short term (and even longer than that), an unrealisatic aspiration. If, therefore, part of the whole is in urgent need of reform the only sensible possibility is to attend to that part by

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[1] E.g. *Whittington* v *Seale Hayne* (1900) 16 T.L.R. 181.

[2] E.g. *Sumpter* v *Hedges* [1898] 1 Q.B. 673.

legislation, even though it may have a few side-effects that were not entirely foreseen.

Thirdly, a related difficulty is that partial codes can have somewhat uneasy relationships with other statutes on the same or similar topics. The subject of inconsistent legislation is of course endemic in any system like ours which has no complete code but legislates piecemeal, and already in this country there is a growing body of case-law dealing with the reconciliation of inconsistent legislation and the establishment of priorities should reconciliation not be possible. The Contractual Remedies Act 1979 seems unlikely to avoid this difficulty entirely; its precise relationship with the Sale of Goods Act 1908 is probably going to cause a few initial doubts, even though the new legislation gives the lead by stating that nothing in it is to affect the Sale of Goods Act,[3] and even though certain sections are expressly made to apply to contracts for the sale of goods.

Fourthly, in cases in which businessmen and lawyers are constantly involved practices grow up around understandings of the law. If the law is codified, particularly if there is a possibility that the code may effect same change in the law, the old understandings are likely to be upset and the established practices will probably be thrown into confusion. It may well be, for instance, that the Contractual Remedies Act will necessitate a change in, or at least a rethinking of, the practice of serving notices making time of the essence in land contracts. In fact the new legislation is probably going to necessitate a fair amount of relearning and reassessment by the profession. That temporary inconvenience will be justified if the long-term results of the legislation are, as its framers believe, an improvement of the law in terms of simplicity and rationality. To argue inconvenience as a reason against change is effectively to argue that the status quo, however unsatisfactory, should remain forever.

The net result of these considerations is that the new Act may well take a little while to settle in; it is virtually inevitable that there will be some initial problems. That will no doubt be hard on those unfortunate enough to lend their names to test cases in the interim, but that is going to happen in any area of the law where change is taking place, be it by common law or statute. The litigation which has followed cases like *Hedley Byrne* v *Heller* and statutes like the Matrimonial Property Act 1976 bears witness to that.

B. The Effect of the Act.

1. *Misrepresentation.*

Before the Act the position in relation to misstatements inducing a contract was complex and unsatisfactory. It had first to be determined whether the misstatement was a "mere representation" or a contractual term; this involved an often artificial inquiry into some supposed intention of the contracting parties. If it was a "mere representation" damages would not lie unless it was fraudulent or (in some circumstances) negligent; in the normal case, even where the representation was a fairly minor one, the only remedy was rescission, although the right to this remedy was easily lost. If, however, the statement was a contractual term damages would always lie; if it had the status of a condition, or if the effect of it

[3] Section 15.

was to deprive the innocent party of substantially the entire benefit under the contract,[4] the contract could be discharged, but otherwise not.

The new Act has gone for the clean cut by providing[5] that if a party is induced to enter a contract by any misrepresentation whether innocent or fraudulent: (a) he will be entitled to damages as if that representation were a contractual term and (b) he will not be entitled to an action in deceit or negligence.

The new provision is certainly simple. For any misrepresentation inducing a contract there will be contract damages. This has frightened some people. One gathers that some members of the engineering profession, who often give pre-contract site information, subsoil data and plans to builders, are among them. If a person is now to be liable in damages for every inaccuracy in pre-contract information, a possible result could be the drying up of such information, and that would not be in the interests of anyone.

Although it may well be easier now than it used to be to claim damages for pre-contract statements, it seems unlikely that drastic consequences will follow. Pre-contract representations differ greatly in seriousness. There are some on which the maker would be prepared to "give his word" if asked, there are others of a much more tentative kind. As one approaches the latter end of the scale, one finds cases where it would be quite unjust to burden the maker of the statement with liability in damages, particularly if the measure is to be the heavy expectation measure which is usual in contract. (Indeed sometimes the expectation measure can be harder on the defendant than the old "giving back and taking back" of rescission.) This differentiation between statements is no doubt what the common law was trying to achieve, although its "intention of the parties" criterion was often amorphous and difficult to apply. One suspects that under the new legislation the results achieved may in many cases not be very different from those arrived at at common law, although the reasoning to this result will mercifully be more direct; if it would be unjust to impose damages in a particular case the courts, in time honoured style, will probably find a way of not imposing them. It may be suggested that the more tentative a pre-contract statement is the more likely a court will be to hold either (i) that it is a statement of opinion and not a *representation* at all or (ii) that the representee cannot be heard to say he was *induced* by it. In *Oscar Chess Ltd* v *Williams*[6] it was held, under the old law, that Williams, the seller of a second hand car to a dealer, was not responsible for describing it, erroneously, as a 1948 model when the log book showed that date; his statement was found to be a mere representation and not a warranty. If those facts were to recur today it could well be held that since Williams had only the log book to rely on he was doing no more than state his opinion; indeed in the *Oscar Chess* case itself Denning L.J. came close to basing himself on that ground.[7] It would also be open in such a

[4] The test in *Hongkong Fir Shipping Co Ltd* v *Kawasaki Kisan Kaisha Ltd* [1962] 2 Q.B. 26.

[5] Section 6.

[6] [1957] 1 All E.R. 325.

[7] Ibid at 329. "He must have been relying on the registration book . . . The most that he would do would be to state his belief, and then produce the registration book in verification of it."

case to find as a fact that the dealer-purchaser was *induced* to purchase, not by the representation, but by the statement in the log book. Again, Denning L.J. seems to have regarded this as relevant in *Oscar Chess.*[8] "It seems to me clear that the motor dealers who bought the car relied on the year stated in the log book." What the new legislation does is to enable such reasoning to be resorted to directly and simply without the need to discuss the "representation/warranty" distinction, and all the artificial talk of intention which could so cloud the issue.

The Act will in this regard, however, make one important substantive difference: if damages are not available in respect of a pre-contract statement, then the remedy of rescission or restoration of the status quo will not be either. Under the old law that was sometimes an alternative possibility.

In one respect the new Act may require care. Often the giver of pre-contract information attempts to exclude liability for error. It may be that some of the traditional exclusion clauses will require rethinking if one is to be sure of protection. A clause to the effect that the recipient of information relies on his own inspection and not on the information will no longer be watertight as a result of section 4 of the Act, which provides that such a provision will not preclude the court from inquiring into the true facts, unless it considers that the provision is fair and reasonable between the parties.[9] A provision that the maker of the statement does not give any warranty as to its accuracy may also be suspect, because the whole point of the new Act is that a representation is redressable by damages even though it is not a warranty; however such a provision may well lead a court to say that the statement is one of opinion only or that it cannot have induced the representatee to enter the contract. (It should, however, be noted that section 6 expressly provides that the representatee must have been "induced" to enter the contract by the representation. A case may have to decide some day whether this imports a completely subjective test, or whether the reliance on the representation must have been reasonable in the circumstances.) A clause which simply provides that damages will not lie for any false representation may be effective, although it must be said that the wording of section 5 of the Act, to be discussed later, is less than crystal clear in this respect.

By providing that damages will not lie for deceit or negligence in respect of pre-contract representations, the Act has again opted for conceptual simplicity. If one enters a contract as the result of false inducements by the other party one gets the contract measure of damages, no more and no less. This will commonly be the expectation measure (the measure which will put the plaintiff in the position he would have been in if the promise had been performed or if the representation had been true), although contract damages are flexible enough to redress other interests of the plaintiff as well, in particular the reliance interest if he has expended money and worsened his position in reliance on the contract.[10] The amount recoverable in contract may at times differ from that which would have been available in a tort action, for the tests of remoteness are expressed somewhat differently in negligence, deceit and contract.

[8] *Ibid* at 330.
[9] See *infra.*
[10] See for instance *McRae* v *Commonwealth Disposals Commission* (1950) 84 C.L.R. 377.

In contract the test is what may reasonably be supposed to have been in the contemplation of the parties; in tort it is what is reasonably foreseeable;[11] in fraud it appears that all actual damage directly flowing from the fraudulent inducement may be recovered.[12] In addition, punitive damages may occasionally be available in tort, but (apparently) never in contract.[13] For this reason some may wish that the Legislature had retained the possibility of a tort action, at least in the case of deceit, to give a plaintiff his chance of recovering a larger amount than contract will give him. But the situation was not crystal clear even before the Act (particularly in relation to whether punitive damages could be claimed for fraud inducing a contract[14]), and if the contract measure of damages can succeed reasonably in its aim of placing the plaintiff in the situation he contemplated when he made the contract it can surely be argued that the quality of the representation (innocent, fraudulent or negligent) should be irrelevant to the question of *compensation.*

2. *Cancellation.*

At common law there was a galaxy of tests to determine when the innocent party could treat a contract as discharged by the breach of the other. Some of these tests depended on the status of the term broken (for instance the condition/warranty dichotomy) others on the seriousness of the state of affairs resulting from the breach.[15] The Contractual Remedies Act 1979 again provides a simple framework of principle which may be summarised as follows.

One party to a contract may cancel it if (i) another party repudiates the contract; (ii) the party purporting to cancel has been induced to enter the contract by a misrepresentation; (iii) a stipulation in the contract is broken by another party; (iv) it is clear that a stipulation in the contract will be broken by another party.[16] But in the last three instances a party may exercise the right to cancel if and only if[17]

(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.

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[11] The distinction between tort and contract damages is discussed in *The Heron II* [1969] 1 A.C. 350.

[12] *Doyle* v *Olby (Ironmongers) Ltd.* [1969] 2 Q.B. 158. cf. however Treitel, "Law of Contract" 4th ed. at 237.

[13] Treitel, *op cit* at 622.

[14] Cf.*Mafo* v *Adams* [1970] 1 Q.B. 548 and *Cassell and Co. Ltd.* v *Broome* [1972] A.C. 1027 at 1076 and 1131.

[15] See Coote [1970] C.L.J. 221.

[16] Section 7(3).

[17] Section 7(4).

Cancellation is, basically, achieved by notifying the other party in terms which evince an intention to cancel.[18] The result of cancellation is that the contract comes to an end for the future: no party is obliged or entitled to perform it further, but insofar as it has been performed already the cancellation does not divest a party of any property or money which has passed.[19] Upon cancellation damages for breach are available to the innocent party,[20] and the court has in addition a power in its discretion to grant relief by ordering one party to transfer property to the other, to pay money to the other, or to do or refrain from doing anything the court thinks just.[21]

These provisions compress into a mere four pages of the statute book a branch of the law which was formerly spilled over dozens of pages in the contract text books. A number of comments may be made.

First, it is perhaps in this area more than any other that the complaint will be made by some that by striving for the simple statement the Legislature has deprived the courts of the great armoury of equipment for doing justice which was available to them at common law. Before a party can cancel he will now have to bring his case within one of the stark categories set out above, and there is the possibility that in an unusual deserving case one may have to strain the statutory words a little do do so. However the language of the Act is by no means inflexible, and the categories are thus far from rigid. For instance the notions of "substantially reducing the benefit of a contract" and "substantially increasing the cancelling party's burden under it" scarcely impose straitjackets. However one or two situations familiar at common law may need a little rethinking.

One is the familiar situation in contracts for the sale of land where time is not of the essence, but where one party has delayed more than reasonably beyond completion date. Notices making time of the essence are not clearly covered by the Act, and it may be that before the innocent party can cancel or threaten to cancel in such a case he will have to demonstrate either that the delay amounts to a repudiation or that the effect of it is or will be substantially to affect the benefit or burden of the contract to him.[22] However the common law on this topic was scarcely clear either, having fluctuated somewhat in recent years,[23] and having been subjected to a major shift in theory by the House of Lords.[24]

Secondly, the Act does away with the old concept of rescission for misrepresentation which involved *restitutio in integrum*. The statutory remedy of cancellation (which is essentially the same as the old discharge for breach terminating the contract de futuro) is now to apply in the case of both serious misrepresentations and serious breaches. Thus, cancellation of a contract for misrepresentation will not automatically involve the revesting of property in the original transferor; any such revesting will depend on the discretion of the court under section 9.

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[18] Section 8(1).

[19] Section 8(3).

[20] Section 10.

[21] Section 9.

[22] As *per* section 7(2) and (4).

[23] See the casenote by McMoreland (1978) 8 N.Z.U.L.R. 66.

[24] *United Scientific Holdings Ltd* v *Burnley Borough Council* [1978] A.C. 904 noted by Dawson (1979) 8 N.Z.U.L.R. 281.

Thirdly, the Act provides, in section 8, that a cancellation will not take effect before the time at which the cancellation is made known to the other party, or, 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.[25] It is clear from this, and indeed from the cancellation sections generally, that under the Act a serious breach of contract does not end the contract automatically; rather the contract continues in existence until the innocent party notifies his cancellation. Ealier contract theory, heavily influenced by the concept of condition precedent, did not always take that view,[26] although by the time of *Heyman* v *Darwins*[27] in 1942 it was generally accepted. However occasionally it has been suggested that there may still be exceptional situations where the breach per se ends the contract. Among them are cases, such as *Harbutt's Plasticine*,[28] where the effect of the breach is so cataclysmic that it destroys the subject matter of the contract and makes further performance impossible; it has also occasionally been said, although not with universal agreement, that the wrongful dismissal of an employee has the effect of immediately terminating the contract of employment.[29] The new Act would seem to indicate that even in these situations there is now no immediate termination. In the *Harbutt* kind of case that could lead to a somewhat futile situation, although of course it will seldom arise. In the case of wrongful dismissal the non-availability of the remedy of specific performance, the refusal of the law to allow the dismissed employee to claim wages for the period after his dismissal, and the sheer futility of the employee trying to hold the employer to his contract, render the continuance of the contract little more than academic.

The provision that cancellation does not take effect till made known to the guilty party[30] is basically reasonable. However it is capable of causing difficulty in the case of a layman who does not realise the existence of the requirement, and who (say) resells the subject matter of the broken contract without first notifying the guilty party. There will no doubt also be the occasional case where the court will have to determine the precise meaning of "making known" the cancellation. Must this be actively communicated to the other party, or is it enough that he finds out indirectly? Is a registered letter to the last known address of the contract breaker a sufficient making known even if there is no proof that it has been read?

Fourthly, the key to the Act's concept of cancellation is contained in section 8(3)(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." This is an attempt to capture the essence of the common law concept of discharge by breach as it eventually emerged from the morass

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[25] Section 8(1).

[26] The deviation cases caused a particular problem: see the variety of views in *Hain S.S. Co.* v *Tate and Lyle Ltd.* [1936] 2 All E.R. 597.

[27] [1942] A.C. 306.

[28] *Harbutt's Plasticine Ltd.* v *Wayne Tank and Pump Co. Ltd.* [1970] 1 Q.B. 447.

[29] E.g. *Sanders* v *Ernest A. Neale Ltd.* [1974] I.C.R. 565 at 571 *per* Donaldson P. cf. *Thomas Marshall Ltd.* v *Guinle* [1978] 3 W.L.R. 116.

[30] Section 8(1).

of cases where it had been confused with rescission. Yet even in the modern cases the concept has been very variously described. To Lord Porter in *Heyman* v *Darwins Ltd*[31] *"the injured party* is thereby absolved from future performance of his obligations under the contract." To Lord Wilberforce in *Photo Production Ltd* v *Securicor Transport Ltd*[32] "what is meant is no more than that *the innocent party or, in some cases, both parties,* are excused from further performance." To Lord Diplock in the same case,[33] where a breach deprives a party of substantially the whole benefit under the contract, "the party not in default may elect to put an end to all primary obligations *of both parties* remaining unperformed." This variety of description indicates that discharge by breach, like many other common law concepts, was not logically perfect. (It is one of the strengths of the common law that many of its concepts are better described as "notions" or "approximations".) So, although discharge was sometimes said to bring the contract to an end, some terms of the contract in fact survived it—in particular arbitration clauses, liquidated damages clauses and terms conferring exemptions on one or more of the parties.[34] Moreover it is clear that even after discharge certain obligations could remain on the guilty party: for example a covenant in restraint of trade could survive termination of an employment contract if it was obviously intended to.[35] It is here that one perceives one of the great differences between common law and statute. The new Act states unequivocally and apparently without exception that on cancellation neither party is *obliged* or *entitled* to perform the contract further. If that proposition had been laid down by a judge, a later court could, by distinguishing, create exceptions to it to meet hard cases. But since it has here been laid down by statute there is no such power in the courts; any limiting of the scope of the section must be achieved by a legitimate process of interpreting words. It seems likely, however ,that the words of the Act are flexible enough to allow the survival of some terms beyond discharge. It may be said, for instance, that section 8(3)(a), in referring to performance of the contract, is referring to performance of the primary obligations under it; since liquidated damages clauses regulate the secondary obligations which accrue after breach there can surely, then, be no objection to their being enforced after termination. The same would seem to be true of arbitration clauses, which, far from creating primary obligations, merely set up a machinery for determining disputes about those obligations. It is only with artificiality that we could speak of the observance of such clauses as "performing the contract." For reasons to be discussed below exemption clauses probably also survive. However the case of the dismissed employee whose contract contains a covenant in restraint of trade poses more difficulty (as, be it noted, it did at common law too). Although it may appear that this employee is no longer "obliged to perform" his covenant, a satisfactory solution will normally be found by applying section 5 of the Act. If the covenant in restraint of trade makes it clear that it is to apply after any termination

[31] [1942] A.C. 356 at 399.

[32] [1980] 1 All E.R. 556 at 562.

[33] *Ibid* at 566.

[34] The topic is best discussed in the *Securicor* case, *supra.*

[35] E.g. *Printers and Finishers Ltd* v *Holloway* [1965] 1 W.L.R. 1.

of the employment, it can surely be said, in terms of section 5, that that clause expressly provides for a matter to which section 8 relates, so that section 8 must be read subject to it. Alternatively, the court would surely at least have a discretion under section 9(2)(c) to direct the former employee to perform his covenant.

Fifthly, cancellation does not itself have the effect of divesting any property transferred or money paid: it is cancellation de futuro only. That is so even of cancellation for misrepresentation. The old "rescission" for misrepresentation has gone.

Sixthly, however, the court has a discretion under section 9, if it is just and practicable to do so, to make an order directing one party to transfer property or pay money to the other, or to do anything the court thinks just. This is a beneficial provision which will doubtless help to avoid the injustice which could arise in the past. For instance a person forced to abandon an entire contract in mid-stream may now be awarded something for his trouble. However there may well be some who will argue that the breadth of this discretion, limited only by a short list of very broad criteria to be taken into account (section 9(4)), is unreasonable, and that the Legislature should have laid down more specific rules. This is to re-open an old debate. Sufficient to say that New Zealand seems to have committed itself, in the contract area, to the idea of the discretion, and that so far, at least in the case of the Illegal Contracts Act (the only act in respect of which it has been much tested), it seems to be working tolerably well. This discretionary power to order the payment of money opens some interesting possibilities in respect of deposits. It may well be that a court could now order the repayment of a deposit in a deserving case, although before so doing it would have to have regard to the terms of the contract.[36] (Could it be that the very use of the word "deposit" necessarily involves that the parties intend forfeiture on breach by the payer? If so, section 5 may entail that that intention will prevail.)

3. *Exemption clauses*

It is now established at common law that clauses exempting one party from liability are effective even after discharge of contract provided that on their true construction they apply to the kind of breach and the kind of damage which have in fact happened.[37] The Contractual Remedies Act 1979 contains at least three provisions which could have relevance to exemption clauses. Some of their implications have already been mentioned in passing, but there may be some merit in summarising them again.

Section 4 deals with the type of clause which attempts to preclude a court from inquiring (a) whether a statement or promise was made in pre-contract negotiations; or (b) whether, if so made, it was a representation or a contractual term; or (c) whether, if it was a representation, it was relied on. Such clauses are not to preclude a court from inquiring into and determining such issues unless the Court considers it fair and reasonable that the provision should be conclusive, having regard to all the circumstances. Likewise, a clause cannot preclude a court from inquiring

[36] Section 9(4)(a).

[37] The *Securicor* case, *supra.*

into and determining the question of whether a person had the actual or ostensible authority of a party to make a statement or promise; this time the rule is absolute and contains no "fair and reasonable" exception. These provisions will severely limit the effectiveness of a type of exemption clause which is presently sometimes used in contracts for the sale of land.

Section 5 provides as follows:

> 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.

This section preserves the autonomy of the contracting parties. If they wish to provide their own private code of remedies for breach, or their own private rules about the consequences of termination of contract, it is their privilege to do so, and their private code will prevail over the Act. Thus, forms like the Auckland District Law Society and Real Estate Institute's contract for the sale of land, and the N.Z.S.S. 623 Conditions for Building and Civil Engineering Construction, will continue to have validity, and the new Act will be read subject to them.

Section 5, whose wording was subjected to fairly substantial change as the Bill went through the House, is less than clear in its application to exemption clauses, but probably does not affect their efficacy. The phrase "if a contract expressly provides for a remedy .. . " could be taken to suggest that while clauses which limit damages will be effective those which provide that in respect of certain types of contract there will be no remedy at all will not. However this is an unlikely construction. For one thing, the section does not clearly state that the common types of exemption clause are to be ineffective; and if such a drastic change from the common law was contemplated one would expect to find it stated in clear words. For another, many so-called exemption clauses are not concerned so much with remedy as with defining the scope of the parties' primary obligations; such clauses are relevant in the assessment of what conduct amounts to a breach of contract in the first place, and there can be no suggestion that anything in section 5 touches that inquiry.

Section 8(3)(a), providing that on cancellation "no party shall be obliged or entitled to perform it [the contract] further", would not seem to give cancellation the effect of annulling exemption clauses. (This, of course, was the effect that discharge by breach at common law was said to have in the *Harbutt* case, since overruled by the House of Lords). Insofar as an exemption clause defines the scope of the parties' primary obligations it must be read in the context of the whole contract to determine whether there has been a breach justifying cancellation at all; it is difficult to see how it would be affected by a statutory provision prescribing what happens after cancellation has taken place. An exemption clause which limits the remedies available (for example a limitation of damages clause) is, like a liquidated damages clause, a term regulating secondary obligations; it has been argued above that section 8(3)(a) should not be construed as extending to such clauses.

4. *Application to sale of goods.*

The application of the Act to contracts for the sale of goods may need

some working out. The major problem is that the Sale of Goods Act 1908 is itself in need of overhaul, and its "condition/warranty" approach to breach has begun to cause difficulties in its relationship with the common law (e.g. *Cehave N.V.* v *Bremer Handelsgesellschaft m.b.H.*[38]) let alone with a new statute.

Section 15 of the Contractual Remedies Act, the savings section, provides that (except as provided in sections 4(3), 6(2) and 14) nothing in the Act is to affect the Sale of Goods Act 1908. This means that the Sale of Goods Act's condition/warranty dichotomy, and its rules about acceptance and rejection of goods, continue to apply to contracts for the sale of goods to the exclusion of any inconsistent principles in the Contractual Remedies Act. But what will have to be decided is whether the provisions of the Contractual Remedies Act are to apply to sale of goods insofar as they are not inconsistent with the Sale of Goods Act. Whichever answer is given to this question, there will be a little difficulty.

It is expressly provided that section 4 (on contractual provisions purporting to preclude courts inquiring into certain pre-contract statements) and section 6 (on damages for misrepresentation) do apply to contracts for the sale of goods. Application of the principle of construction *expressio unius exclusio est alterius* would thus suggest that sections 7 to 9 on cancellation do not apply. If that is right, cancellation under the Act will not lie for misrepresentation in a contract for the sale of goods, the representee having only his rights of rescission at common law and equity, which in view of *Riddiford* v *Warren*[39] are limited in any event. This answer would mean that in contracts for the sale of goods it would still be necessary to draw the term/representation distinction.

However it is possible to argue that the Contractual Remedies Act does apply generally to contracts for the sale of goods except where it is inconsistent with the Sale of Goods Act. After all, section 15 of the new Act says only that it will not affect *the Sale of Goods Act*, not that it does not apply to *contracts for the sale of goods*. If that is so it would be possible to find, in relation to sale of goods, that cancellation does lie for misrepresentation, and also that cancellation (in the sense of the Act) lies for breaches the effect of which is substantially to increase or decrease the innocent party's burden or benefit under the contract. If that is right, some breach problems would be resolvable in terms of rescission under the Sale of Goods Act, and sme in terms of "cancellation" (and its statutory consequences) under the Contractual Remedies Act.

Probably revision of the Sale of Goods Act is the ultimate answer, but given New Zealand's resources this is a long-term project.

In conclusion, it should be pointed out that the Act amends the Sale of Goods Act most beneficially in one respect. Sections 13(3) and 37 have been amended so that a purchaser of specific goods does not lose his right to reject them immediately the contract is made, but only when he has accepted them.

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[38] [1976] Q.B. 44.

[39] (1901) 20 N.Z.L.R. 572.