



FRUSTRATED CONTRACTS ACT, 1988

No. 11 of 1988

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ELIZABETHAE II REGINAE

A.D. 1988

No. 11 of 1988

An Act to reform the law relating to frustrated contracts.

[Assented to 10 March 1988]

The Parliament of South Australia enacts as follows:

- Short title.** 1. This Act may be cited as the "Frustrated Contracts Act, 1988".
- Commencement.** 2. This Act will come into operation on a day to be fixed by proclamation.
- Interpretation.** 3. (1) In this Act, unless the contrary intention appears—
- "association" includes a company or other body corporate:
- "contract" includes a severable part of a contract:
- "contractual benefit", in relation to a contract, means—
- (a) a benefit received by a party under the contract;
- (b) a benefit that is received by a party otherwise than under the contract but—
- (i) at a cost to the party that is taken into account under this Act in calculating the value of the contractual performance of that party;
- or
- (ii) in circumstances in which the receipt of the benefit constitutes part of the contractual performance of that party:
- "contractual performance" or "performance", of a party to a contract, means the performance by the party of contractual obligations and includes anything done by the party preparatory to the performance of a contractual obligation:
- "contractual return", of a party to a contract, means the figure (which may be positive, zero, or negative) obtained by subtracting from the value of the contractual benefits of that party the value of the contractual performance of that party:

“court” includes an arbitrator:

“frustration”, in relation to a contract for the sale of goods, includes avoidance of the contract under section 7 of the Sale of Goods Act, 1895:

“party”, to a contract, does not include a person who is a party to the contract only in the capacity of a guarantor or indemnifier.

(2) A reference in this Act to the value of the contractual performance of a party to a contract is—

- (a) where the performance consists of a monetary payment—a reference to the amount of the payment;
- (b) where the contract itself places a value on the performance or such a value can be deduced from the contract—that value;
- (c) in any other case—a reference to an amount calculated as follows:
 - (i) the costs incurred by the party in carrying out, or preparatory to carrying out, contractual obligations (including, in addition to actual expenditures, a reasonable allowance for work done by the party) will be calculated;

and

- (ii) if it appears that the party would, assuming that the contract had been fully performed, have made a profit or loss, the percentage profit or loss will be estimated, and the amount arrived at under subparagraph (i) increased or reduced by that percentage,

(and for the purposes of this paragraph it is immaterial that the other parties to the contract may have received no benefit from the performance referred to above).

(3) Where a contract is frustrated by an event that affects the value of contractual benefits received under the contract, that effect on value will be taken into account in any valuation of those benefits made for the purposes of this Act.

(4) Where an event occurring before, or resulting in, the frustration of a contract diminishes the value of a contractual benefit and—

- (a) the event consists of, or arises from, a negligent act or omission for which a particular party to the contract is responsible;
- (b) the risk of the event occurring is, by law or custom, to be borne by a particular party to the contract or is a risk against which a particular party to the contract should, in accordance with ordinary prudence or good business practice, have insured;
- (c) that event consists of, or arises from, an act or omission for which a particular party to the contract is responsible but which is extraneous to the contract,

that party will, for the purposes of this Act, be taken to have received a contractual benefit (in addition to any benefits actually received) equivalent to the amount of that diminution of value.

4. (1) Subject to subsection (2), this Act applies to a frustrated contract—

Application of
this Act.

(a) irrespective of whether there is, in consequence of the frustration, a total failure of consideration under the contract;

but

(b) subject to any provision made in the contract itself as to the consequences of frustration.

(2) This Act does not apply to—

(a) a contract made before the commencement of this Act;

(b) a charter-party (not being a time charter-party or a charter-party by way of demise);

(c) a contract (other than a charter-party) for the carriage of goods by sea;

(d) a contract of insurance;

(e) a contract under which an association is constituted or rules governing the administration of, or rights of membership in, an association are laid down;

or

(f) a partnership agreement.

(3) This Act binds the Crown.

Frustration of part does not necessarily entail frustration of the whole.

5. A contract is not wholly frustrated by the frustration of a particular part of the contract if that part is severable from the remainder of the contract.

Effect of frustration on contractual obligations.

6. (1) Subject to subsection (2), the frustration of a contract discharges the parties from all contractual obligations (including obligations that should have been, but were not, performed before the date of frustration).

(2) The frustration of a contract does not affect—

(a) an obligation that is, according to the proper construction of the contract, to survive frustration;

or

(b) a right of action, that arose before frustration, for damages for breach of contract (but, in the assessment of any such damages, the fact that the contract has been frustrated and any consequential adjustment, or right to an adjustment, under this Act will be taken into account).

Adjustment of losses on frustration of contract.

7. (1) Where a contract is frustrated, there will be an adjustment between the parties so that no party is unfairly advantaged or disadvantaged in consequence of the frustration.

(2) Subject to this section, for the purposes of the adjustment referred to in subsection (1)—

(a) the value of contractual benefits received up to the date of frustration by each party to the contract will be assessed as at the date of frustration and those values aggregated;

(b) the value of the contractual performance, up to the date of frustration, of each party to the contract will be calculated and those values aggregated;

(c) the aggregate amount arrived at under paragraph (b) will be subtracted from the aggregate amount arrived at under paragraph (a), and the remainder notionally divided between the parties in equal shares;

(d) an adjustment will be made between the parties so that there is an equalization of the contractual return of each at the figure attributed under paragraph (c).

(3) Where the contractual performance of a party to a contract is referable to a number of separate contracts, the value of that contractual performance will, for the purposes of this section, be apportioned between the various contracts in such proportions as may be just.

(4) Where, in the opinion of a court, there is, in the circumstances of a particular case, a more equitable basis for making the adjustment referred to in subsection (1) than the one set out in subsection (2), the court may make an adjustment on that basis rather than on the basis of subsection (2).

(5) For the purpose of giving effect to an adjustment under this section, a court may make orders for—

(a) the payment of money (including interest);

(b) the disposition, sale or realization of property;

(c) the creation of a charge on property;

(d) the appointment and powers of a receiver;

(e) any incidental or ancillary matter.

(6) Where—

(a) a party to a contract purportedly performs a contractual obligation, or an act preparatory to the performance of a contractual obligation, after frustration of the contract;

but

(b) the party did not know, and could not reasonably be expected to have known, that the contract had been frustrated,

the value of the performance (and of any consequent contractual benefits) will be brought into account for the purposes of an adjustment under this section as if it had occurred before frustration of the contract.

(7) Where two or more persons are jointly parties to a contract in the same capacity, those parties will be grouped together and treated as a single party to the contract for the purposes of this section.

8. An action for an adjustment under this Act, and for consequential orders to give effect to such an adjustment, may be commenced before a court as if it were an action under the contract that arose at the time of frustration of the contract.

Action for adjustment assimilated to action on the contract.

In the name and on behalf of Her Majesty, I hereby assent to this Bill.

D. B. DUNSTAN, Governor