

CONTRACTUAL REMEDIES BILL

EXPLANATORY NOTE

THE main purpose of this Bill is to modify the law of contract by giving substantially the same remedies for misrepresentation inducing the making of a contract and for the repudiation or breach of a contract.

The principal effect of the Bill is that—

- (a) Damages may be claimed for innocent misrepresentation as well as for fraudulent misrepresentation, but in each case the damages will be assessed as if the representation were a broken contractual term (*clause 6*):
- (b) A contract may be cancelled (instead of “rescinded”) (*clauses 7 and 8*) if—
 - (i) It is repudiated by the other party; or
 - (ii) It has been induced by a misrepresentation; or
 - (iii) There has been a breach by the other party of a stipulation in the contract:
- (c) Except in the case of repudiation, a party may cancel (*clause 7*) only if—
 - (i) It has been agreed that the truth of the representation or the performance of the contract is essential to him; or
 - (ii) The effect of the misrepresentation or breach is substantially to deprive him of the benefit of the contract or increase his burden under it or to make the benefit or burden substantially different from that represented or contracted for:
- (d) As a result, in the case of a breach, the right to cancel will no longer depend (except where the express provisions of the Sale of Goods Act 1908 apply) on whether the broken term is classified by the Courts as a “condition” giving the right to cancel or as a “warranty” giving only the right to claim damages:
- (e) On a cancellation, the Courts (or an arbitrator) will have power to grant relief (*clause 9*):
- (f) The parties to a contract will be free to contract out of the above provisions (*clause 5*). A party may still in any case recover damages after cancellation (*clause 10*).

The provisions of the Bill have the approval of the Contracts and Commercial Law Reform Committee. They are based on that Committee’s report on Misrepresentation and Breach of Contract (March 1967) as supplemented by its further report of January 1978.

No. 104—1

Clause 1 is the Short Title of the Bill.

Clause 2 is an interpretation clause.

Clause 3: The new Act will bind the Crown.

Clause 4: The general effect of this clause is that the Court is not precluded by an exception provision in a contract from determining whether a statement was made during the negotiations for a contract, and whether it was a representation inducing the contract or became a term of the contract. The power given to the Court is discretionary. Also, as the clause applies only to a provision contained in a contract or in a document, it does not otherwise affect the operation of the rule (known as the parol evidence rule) under which extrinsic evidence is generally not admissible to add to, subtract from, vary, or contradict the terms of a written contract.

Subclause (1): If a contract, or any other document, contains a provision whose effect would be directly or indirectly to preclude a Court from determining—

- (a) Whether a statement, promise, or undertaking was made or given during the negotiations leading to the contract; or
 - (b) If it was, whether it was a representation or a term of the contract; or
 - (c) If it was a representation, whether it was relied on—
- the Court is not to be precluded from making such a determination unless it thinks 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 particular matters specified in the subclause.

Subclause (2): If a contract, or any other document, contains a provision whose effect would be directly or indirectly to preclude a Court from determining whether a person had the actual or ostensible authority of a party to make such a statement, promise, or undertaking, the Court is not to be precluded from making such a determination.

Subclause (3) preserves the wider jurisdiction of a Small Claims Tribunal to disregard a provision excluding or limiting liability.

Clause 5 allows parties to a contract to expressly contract out of *clauses 6 to 10*.

Clause 6: Under the present law, a party induced to enter into a contract by a misrepresentation may (generally) rescind it, but may not claim damages if the representation was an innocent one. If however the representation was fraudulent he may claim damages for deceit under the law of tort.

This clause provides that damages may be claimed, whether the representation was innocent or fraudulent, in the same manner and to the same extent as if the representation were a term of the contract that has been broken. The damages will thus be ascertained in accordance with the law of contract and not with the law of tort. In the case of a fraudulent representation, or an innocent one made negligently, there will be no right to damages for deceit or negligence in respect of that contract.

Clause 7 provides a code governing the right to cancel a contract.

Subclause (1): The clause replaces 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.

Subclause (2): A party to a contract may cancel it if, by words or conduct, the other party repudiates it by making it clear that he does not intend to perform his obligations under it, or to complete such performance.

Subclause (3): Subject to the restrictions set out below, 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; or
- (b) A stipulation in the contract is broken by another party.

Subclause (4): The right to cancel given by *subclause (3)* may be exercised by a party only if—

- (a) The parties have agreed that the truth of the representation or the performance of the stipulation is essential to him; or
- (b) The effect of the misrepresentation or breach is substantially to deprive him of the benefit of the contract, or substantially to increase his burden under it, or to make the benefit or burden substantially different from that represented or contracted for.

Subclause (5): A party may not cancel if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract. Affirmation may be by any words or conduct unequivocally indicating an intention to affirm. The fact that after acquiring such knowledge the party allows a substantial time to elapse without taking any step to cancel may be evidence of affirmation.

Subclause (6): A party may not cancel if the repudiation or misrepresentation or breach is the act of another party who has substantially the same interest under the contract as he has.

Clause 8 provides how a contract may be cancelled by a party, and sets out the effect of a cancellation.

Subclause (1): The cancellation does not take effect until it is made known to the other party; but if it is not reasonably practicable to communicate with him it will take effect when the party cancelling the contract evinces his intention to do so by some overt means reasonable in the circumstances.

Subclause (2): The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. No particular form of words is necessary.

Subclause (3): When a contract is cancelled—

- (a) So far as it is unperformed at the time of cancellation, no party is obliged or entitled to perform it further;
- (b) So far as it has been performed at any time, no party is, by reason only of the cancellation, divested of property transferred or money paid pursuant to the contract.

Subclause (4): This preserves the right of a party to recover damages.

Clause 9 provides for the granting of relief by the Court after cancellation by a party.

Subclause (1): When a contract is cancelled by a party, the Court may make an order or orders granting relief.

Subclauses (2) and (3): Any such order may—

- (a) Vest property that was the subject of or the consideration for the contract in any party to the proceedings, or direct its transfer or delivery:

(b) Direct the payment of money by one party to another—
and may be made subject to conditions, but not so as to prevent a claim for damages.

Subclause (4): In considering whether to make an order, and what order to make, the Court is to have regard to—

- (a) The terms of the contract:
- (b) The extent to which a party to the contract was or would have been able to perform it in whole or in part:
- (c) Expenditure incurred by a party in performance of the contract:
- (d) The value of work or services performed:
- (e) Any benefit or advantage obtained by a party from anything done in performance of the contract:
- (f) Such other matters as it thinks proper.

Subclause (5): No order is to deprive a third party of property acquired by him in good faith and for valuable consideration.

Subclause (6): No order is to be made in respect of any property if a party to the contract has so altered his position in relation to the property that it would in the Court's opinion be inequitable to make an order.

Subclause (7): An application for an order may be made by a party to the contract, or anyone claiming through or under him, or any other person if it is material for him to know whether relief will be granted.

Clause 10: Subject to *clauses 4 to 6*, a party is not precluded by the cancellation of the contract, or by an order under *clause 9*, from recovering damages for a misrepresentation or the repudiation or breach of contract. A sum ordered to be paid under *clause 9* may be set off against such damages.

Clause 11 deals with the position of assignees of a contract.

Subclause (1): If a contract is assigned, the remedies of damages and cancellation are enforceable by or against the assignee, except to the extent that the contract otherwise provides.

Subclause (2): Except as otherwise agreed by the assignee or provided in the contract, the assignee is not to be liable in damages for more than the value of the performance of the contract to which he is entitled under the assignment.

Subclause (3): Unless otherwise agreed between the assignor and the assignee, the assignee is entitled to be indemnified by the assignor for loss suffered by the assignee and arising out of a contractual term, or a misrepresentation, not disclosed to him before or at the time of the assignment.

Subclause (4): The clause is subject to section 104 of the Property Law Act 1952 (which relates to the liability of a purchaser of land to a mortgagee), and section 18 of the Hire Purchase Act 1971 (which relates to the liability of a vendor's assignee to a purchaser under a hire purchase agreement).

Subclause (5): Nothing in the clause affects the law relating to negotiable instruments.

Clauses 12 and 13 confer on Magistrates' Courts and Small Claims Tribunals the jurisdiction of a Court under *clauses 4 and 9*, subject to the usual limits.

Clause 14 amends other Acts as a result of the provisions of this Bill.

Subclause (1) amends the Sale of Goods Act 1908. The effect of the amendment to section 13 (3) made by *paragraph (a)* is that in future a breach by a seller of a condition of the contract of sale will not be reduced to the status of a breach of warranty (giving only the right to claim damages) merely because the property in the goods has passed to the buyer. The buyer will only lose his right to reject the goods, and treat the contract as repudiated, if he has accepted the goods in whole or in part.

The effect of the amendment made by *paragraph (b)* is that where goods are delivered to a buyer, which he has not previously examined, any acts by him that would constitute the acceptance of the goods within the meaning of section 37 of the Act will not do so until he has had a reasonable opportunity of examining them to see whether they conform to the contract.

Subclause (2) amends the Arbitration Act 1908 so that in an arbitration under a contract the arbitrator may, within his terms of reference, exercise the powers of the Court under *clauses 4, 6, and 9* of the Bill.

Subclause (3) amends the Hire Purchase Act 1971. *Paragraphs (a) and (b)* remove references to "condition" and "warranty" that will now be unnecessary by reason of the Bill. *Paragraph (c)* inserts in section 18 references to the remedy of cancellation given by the Bill. *Paragraph (d)* repeals section 17 (3) (which relates to the action for damages for deceit) as a result of *clause 6 (b)* of the Bill; and also repeals sections 38 and 39, which are in similar terms to *clause 4* of the Bill.

Subclause (4) repeals section 66 of the Real Estate Agents Act 1976, which is in similar terms to *clause 4* of the Bill.

Clause 15 is a savings clause. The Bill is not to affect the law concerning other remedies arising out of contract, or (subject to the amendments made by *clause 14*) the provisions of the Acts referred to in the clause (including the Sale of Goods Act 1908).

Clause 16: The new Act will not apply to a contract made before the date of the Act's commencement.

Hon. Mr Thomson

CONTRACTUAL REMEDIES

ANALYSIS

Title	8. Rules applying to cancellation
1. Short Title	9. Power of Court to grant relief
2. Interpretation	10. Recovery of damages
3. Act to bind the Crown	11. Assignees
4. Statements during negotiations for a contract	12. Jurisdiction of Magistrates' Courts
5. Contracting out	13. Jurisdiction of Small Claims Tribunals
6. Damages for misrepresentation	14. Amendments and repeals
7. Cancellation of contract	15. Savings
	16. Application of Act

A BILL INTITULED

An Act to reform the law relating to remedies for misrepresentation and breach of contract

BE IT ENACTED by the General Assembly of New Zealand
5 in Parliament assembled, and by the authority of the same,
as follows:

1. **Short Title**—This Act may be cited as the Contractual Remedies Act 1978.

2. **Interpretation**—In this Act, unless the context otherwise
10 requires,—

“Cancel”, in relation to a contract, means cancel in
accordance with section 7 of this Act; and “cancelled”
and “cancellation” have corresponding meanings:

15 “Court” means—

(a) The Supreme Court; or

(b) A Magistrate's Court that has jurisdiction under section 12 of this Act; or

(c) A Small Claims Tribunal that has jurisdiction under section 13 of this Act.

3. Act to bind the Crown—This Act shall bind the Crown. 5

4. Statements during negotiations for a contract—(1) If a contract, or any other document, contains a provision whose effect would be directly or indirectly 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 10

(b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or 15

(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. 20 25

(2) If a contract, or any other document, contains a provision whose effect would be directly or indirectly 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. 30 35

(3) In any proceedings properly before a Small Claims Tribunal, this section shall not limit the powers of the Tribunal under section 15 (5) of the Small Claims Tribunals Act 1976.

5. **Contracting out**—Sections 6 to 10 of this Act shall not apply so far as they are inconsistent with the express provisions of a contract.

5 **6. Damages for misrepresentation**—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—

10 (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

15 (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 contract.

20 **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.

25 (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.

30 (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; or

35 (b) A stipulation in the contract is broken by another party.

(4) Where subsection (3) (a) or subsection (3) (b) of this section applies, a party may exercise the right to cancel if, and only if,—

40 (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 substantially to deprive the cancelling party of the benefit of the contract, or substantially to increase his burden under it, or to make the benefit or burden of the contract substantially different from that represented or contracted for. 5
- (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. For the purposes of this subsection— 10
- (a) Affirmation may be by any words or conduct unequivocally indicating an intention to affirm:
- (b) The fact that after acquiring such knowledge the party allows a substantial time to elapse without taking any step to cancel the contract may be evidence of affirmation. 15
- (6) A party shall not be entitled to cancel the contract if the repudiation or misrepresentation or breach is the act of another party who has substantially the same interest under the contract as he has. 20

8. Rules applying to cancellation—(1) The cancellation of a contract by a party shall not take effect until it is made known to the other party; but if it is not reasonably practicable to communicate with the other party the cancellation shall take effect when the party cancelling the contract evinces his intention to do so by some overt means reasonable in the circumstances. 25

(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. 30

(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: 35
- (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. 40
- (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
5 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
10 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) Direct any party to the proceedings to pay to any other such party such sum as the Court thinks just.

15 (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.

20 (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

25 (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

30 (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;
35 and

(f) Such other matters as it thinks proper.

40 (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. 5

(7) An application for an order under this section may be made by—

- (a) Any party to the contract; or 10
- (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 15 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. 20

(2) Any sum ordered to be paid by any party to the contract to any other such party under section 9 (2) (b) 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, 25 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 30 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. 35

(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 dis- 40 closed 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:

5 (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.

10 **12. Jurisdiction of Magistrates' Courts—**(1) A Magistrate's Court shall have jurisdiction to exercise any power conferred by any of the provisions of sections 4 and 9 of this Act in any case where—

15 (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 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 \$3,000; or

20 (c) The parties agree, in accordance with section 37 of the Magistrates' Courts Act 1947, that a Magistrate's Court shall have jurisdiction to determine the application.

25 (2) For the purposes of section 43 of the Magistrates' Courts Act 1947, an application made to a Magistrate's Court under section 9 of this Act shall be deemed to be an action.

30 **13. Jurisdiction of Small Claims Tribunals—**(1) A Small Claims Tribunal established under the Small Claims Tribunals Act 1976 shall have jurisdiction to exercise any power conferred by any of the provisions of sections 4 and 9 of this Act in any case where—

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

(b) The value of the consideration for the promise or act of any party to the contract is not more than \$500.

40 (2) An order of a Small Claims Tribunal under section 9 of this Act shall not—

(a) Require a person to pay money exceeding \$500; or

- (b) Declare a person not liable to another for a sum exceeding \$500; or
 - (c) Vest any property exceeding \$500 in value in any person; or
 - (d) Direct the transfer or assignment or delivery of possession of any property exceeding \$500 in value— 5
- and an order of a Tribunal that exceeds any such restriction shall be entirely of no effect.

14. Amendments and repeals—(1) The Sale of Goods Act 1908 is hereby amended— 10

- (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)”. 15

(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: 20

“10B. Subject to section 5 of the Contractual Remedies Act 1978, the arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by sections 4, 6, and 9 of that Act.”

(3) The Hire Purchase Act 1971 is hereby amended— 25

- (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 17 (3), 38, and 39.

(4) Section 66 of the Real Estate Agents Act 1976 is hereby repealed. 35

15. Savings—Except as provided in section 14 of this Act, nothing in this Act shall affect—

- (a) The law relating to specific performance or injunction;
- (b) The law relating to *quantum meruit* or to actions for money had and received: 40

- (c) The law relating to mistake, duress, or undue influence:
- (d) The doctrine of *non est factum*:
- (e) The Sale of Goods Act 1908:
- 5 (f) The Frustrated Contracts Act 1944:
- (g) The Limitation Act 1950:
- (h) Sections 117 to 119 of the Property Law Act 1952 (which relate to relief against forfeiture under leases):
- 10 (i) Any enactment prescribing or governing terms of contracts or remedies available in respect of contracts, or governing the enforcement of contracts.

16. Application of Act—This Act shall not apply to any contract made before the commencement of this Act.