

[AS REPORTED FROM THE STATUTES REVISION COMMITTEE]

House of Representatives, 23 May 1979.

Words struck out are shown in italics within bold round brackets, or with black rule at beginning and after last line; words inserted are shown in roman underlined with a double rule, or with double rule before first line and after last line.

[AS REPORTED FROM THE COMMITTEE OF THE WHOLE]

House of Representatives, 25 July 1979.

Words inserted are shown in roman underlined with a triple rule.

Hon. Mr McLay

CONTRACTUAL REMEDIES

ANALYSIS

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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:

Struck Out

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

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New

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.

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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:

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“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*) 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 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*) 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. 30 35

New

(2A) Notwithstanding anything in section 56 or in section 60 (2) of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods.

(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.

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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.

New

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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.

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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—

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(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

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(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)* misrepresentation.

New

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(2) Notwithstanding anything in section 56 or in 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.

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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 govern-

ing 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. 5

(3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if— 10

- (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 15
- (b) A stipulation in the contract is broken by another party to that contract; or

New

(c) It is clear that a stipulation in the contract will be broken by another party to that contract. 20

(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 25

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Struck Out

(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. 30

New

“(b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,— 35

- (i) Substantially to reduce the benefit of the contract to the cancelling party; or

New

5 (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.

10 (5) A party shall not be entitled to cancel the contract
 if, with full knowledge of the repudiation or misrepresenta-
 tion or breach, he has affirmed the contract.

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For the purposes
 of this subsection—

(a) Affirmation may be by any words or conduct un-
 equivocally indicating an intention to affirm:
 15 (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.

20 (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.

New

25 (6) A party who has substantially the same interest under
 the contract as the party whose act constitutes the repudia-
 tion, misrepresentation, or breach may cancel the contract
 only with the leave of the Court.

30 (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—

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35 (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 practic-
 able to communicate with the other party the cancellation
 shall take effect when the party cancelling the contract
 40 evinces his intention to do so by some overt means reason-
 able in the circumstances.

New

(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 this Act, direct any party to the proceedings to pay to any other such party such sum as the Court thinks just.

New

(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.

5 (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.

10 (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

15 (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

20 (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

25 (f) Such other matters as it thinks proper.

30 (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.

35 (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.

40 (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) (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, 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 Magistrates' Courts**—(1) A Magistrate's 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—

- 5 (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
- 10 (b) The value of the consideration for the promise or act of any party to the contract is not more than \$3,000; or
- 15 (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.

(2) For the purposes of section 43 of the Magistrates' Courts Act 1947, an application made to a Magistrate's Court under section 7 (7) or section 9 of this Act shall be deemed to be an action.

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, 7 (6), 7 (7), and 9 of this Act in any case where—

- 25 (a) The occasion for the exercise of the power arises in the course of proceedings properly before that Tribunal; and
 - 30 (b) The value of the consideration for the promise or act of any party to the contract is not more than \$500.
- (2) An order of a Small Claims Tribunal under section 9 of this Act shall not—
- 35 (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— 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— 5

(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)” 10

(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: 15

“10B. Subject to section 5 of the Contractual Remedies Act (1978) 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.” 20

(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 25 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. 30

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

15. Savings—Except as provided in (section) sections 4 (2A), 6 (2), and 14 of this Act, nothing in this Act shall affect— 35

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

(c) The law relating to mistake, duress, or undue influence: 40

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

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