Law Reform Commission

REPORT 25 (1976) - FRUSTRATED CONTRACTS

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Preface

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are-

Chairman: The Honourable Mr Justice C. L. D. Meares.
Deputy Chairman: Mr R. D. Conacher.
Mr D. Gressier.
Professor J. D. Heydon.
Mr J. M. Bennett is Executive Member of the Commission.

The offices of the Commission are in the Goodsell Building, 8-12 Chifley Square, Sydney. But letters to the Commission should be addressed to its Secretary, Box 6, G.P.O., Sydney 2001.

This is the twenty-fifth report of the Commission on a reference from the Attorney General. Its short citation is L.R.C. 25.

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Report on Frustrated Contracts

REPORT 25 (1976) - FRUSTRATED CONTRACTS

Part 1 - Introduction

1.1 We make this report under our reference “To consider the Law Reform (Frustrated Contracts) Act 1943 of the United Kingdom for the purpose of recommending whether it is suitable for adoption in New South Wales and, if it is suitable, what modification of it would be necessary and incidental matters.”

1.2 The Law Reform (Frustrated Contracts) Act 1943 appears as Appendix C. The Act applies only to contracts governed by English law [1] and it will be convenient to call it “the English Act” in this report. It provides for adjustment between the parties to a contract where the contract is frustrated.

1.3 Before examining the English Act we state briefly what, in law,, is frustration of a contract [2] and indicate the consequences of a common law of frustration. [3] In New South Wales there is no general legislation for adjustments where a contract is frustrated. [4] The consequences of frustration are therefore those of the common law.

1.4 On the question whether our draft Bill should exclude some charter-parties, other contracts for the carriage of goods by sea, and contracts of insurance, we have had valuable help from-

Australian Chamber of Shipping.
The Council of Marine Underwriters of the Commonwealth of Australia.
The Institute of London Underwriters.
The Life Offices Association of Australia.
The Maritime Law Association of Australia.
Mr E. Niven, Deputy General Manager, Government Insurance Office of New South Wales.
The Non-Tariff Insurance Association of Australia.
N.R.M.A. Insurance Ltd.
Oversea Shipping Representatives Association.
Mr A. T. Scotford, Solicitor.

1.5 We note with gratitude the valuable work on this subject done by Professor K. C. T. Sutton as Commissioner of this Commission before the expiry of his term of office in May, 1975, and by Mr C. R. Allen before he ceased to hold office as a Commissioner on his appointment in April, 1976, as a Master of the Supreme Court.

FOOTNOTES

1. Law Reform (Frustrated Contracts) Act 1943, s.1 (1).
2. Part 2.
3. Parts 3, 4 and 5.
4. The Partnership Act, 1892, may apply where a contract of partnership is frustrated. Likewise provisions of other particular legislation may apply where a particular type of contract is frustrated. For example, the winding up provisions of the Companies Act, 1961, may apply to a contract embodied in the memorandum and articles of association of a company. We are not here concerned with such particular cases. They are discussed in Part 8.

Part 2 - Frustration Generally

2.1 We are not aware of any entirely satisfactory definition of frustration. It is sufficient to quote two judicial statements. The first is that "frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination, owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement, and as entirely beyond what was contemplated by the parties when they entered into the agreement". [1] The second is that "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it athing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do." [2]

2.2 We give some examples of frustration. If the main object of a contract, as distinct from some subsidiary provision, cannot be carried out because it becomes illegal further to perform the contract at all, or to perform some promise essential to the main purpose of the contract, the contract is frustrated. [3] Again, if the main purpose of the contract, as distinct from some subsidiary purpose, is defeated because the subject matter of the contract is destroyed or so seriously damaged as to be fundamentally different, the contract is frustrated. [4] Again, where a contract is a personal contract, such as a contract of service, frustration occurs if the servant dies or becomes permanently incapacitated. [5] Again, where the contract makes a particular method of performance fundamental to its objects, the contract is frustrated if that method becomes impossible. [6] Again, a contract is frustrated where, beyond the control of the parties, an event occurs which would indefinitely delay performance, so that the fulfilment of the contract would involve the parties in something commercially quite different from what the contract contemplated. As Lord Wright put it: "If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period." [7]

2.3 It will be seen that the question whether frustration has occurred turns in large measure upon the degree to which the supervening event has defeated the parties' reasonable expectations of performance, founded on the contract. Not all disappointments lead to frustration. Hardship to a party is not enough. Frustration occurs only where the supervening event is such that the substance of the obligation, considered as a whole, cannot be performed or the event has effected such a change in the significance of the obligation that what has been undertaken would, if performed, be a different thing from that contracted for. Thus in *Davis Contractors Ltd v. Fareham U.D.C*. [8] the House of Lords considered a contract to build houses for a fixed price within 6 months. Owing to an unexpected shortage of skilled labour the job was greatly delayed. It took not 6 but 22 months, through no fault of the builder. The builder claimed that the shortage of Tabour had frustrated the contract. The House of Lords held that it had not. As Lord Reid put it, the most that could be said was that the delay was greater in degree than was to be expected; the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract. [9]

2.4 Frustration does not depend upon an election by a party to determine the contract by reason of the frustrating event. Indeed it occurs even if all the parties are unaware of the frustrating event. Thus if a contract is frustrated by a subsequent law which prohibits the performance of the contract, the contract is frustrated immediately the law takes effect. Frustration is not deferred until the parties, or any of them, becomes aware that performance of the contract has become illegal.

2.5 A party cannot rely upon an event he himself has brought about as a frustrating event. [10] A Canadian case on appeal to the Privy Council is an example. The contract was for the charter of the St Cuthbert, a fishing trawler fitted with an otter trawl and usable only with an otter trawl. The use of an otter trawl was an offence unless under a government licence. The charterer had four other trawlers with otter trawls. The government would give the charterer licences for only three trawlers. The charterer nominated three of its other trawlers and licences were given for them. There being no licence for the St Cuthbert, the charterer claimed that the contract was frustrated. The claim failed because the want of a licence was the result of the deliberate act of the charterer. [11]

2.6 Where a contract is severable, part only of the contract may be frustrated. This follows from the nature of a severable contract. A severable contract is one which, although in form a single contract, is reducible in substance to a number of separate, although related, constituent contracts. [12] Frustration of one of the constituent contracts can occur without frustration of the others. Thus a contract between a newsagent and a householder for regular delivery of a morning newspaper is reducible in substance to a series of contracts day by day. A strike by printers which makes it impossible for the newsagent to get papers for one day would frustrate the contract for delivery on that day. But it would not frustrate the contract for delivery on days when the newsagent is able to get papers.

FOOTNOTES

1. Cricklewood Property and Investment Trust Ltd v. Leighton's investment Trust Ltd [1945] A.C. 221, 228, Viscount Simon L.C.
2. Davis Contractors Ltd v. Fareham U.D.C. [1956] A.C. 696, 729, Lord Radcliffe.
3. For example, the contract provides for performance in a place which afterwards becomes enemy territory (Tlie Teittoizia (1871) L.R. 3A. & E. 394; Ertel Bieber & Co. v. Rio Tinto Co. Ltd [1918] A.C. 260; Fibrosa Spolka Akcyjtza v. Fairbairn Lawson Combe Barbour Ltd [1943] A.C. 32) or legislation enacted after the making of the contract prohibits the carrying out of transactions of the type promised (Denny, Mott & Dickson Ltd v. James B. Fraser & Co. Ltd [1944] A.C. 265).
4. For example a contract for the carriage of dates was frustrated when, without any of the parties being to blame, the dates were so damaged by misadventure as to become "for business purposes something else" even though not rendered entirely valueless (Asfar v. Blundell [1896] 1 Q.B. 123, 128, Lord Esher M.R.).
5. For example a contract to write a book would be frustrated if the author died or suffered a stroke which so impaired his mind as to render him incapable of writing the book.
6. For example if a contract for the carriage by sea on a long voyage of raw meat for human consumption provides that the meat must be stored on the vessel in a refrigerated place, the contract would be frustrated if it becomes impossible to store it in such a place.
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7. Denny, Mott & Dickson Ltd v. James B. Fraser & Co. Ltd [1944] A.C. 265, 8 [1956] A.C. 696.
9. At p. 724.
10. Bank Line Ltd v. Arthur Capel & Co. [1919] A.C. 435, 452.
11. Maritime National Fish Ltd v. Ocean Trawlers Ltd [1935] A.C. 524.
12. A more formal test of severability has been framed along the following lines. A contract is not severable if the consideration is one and entire, that is, if no consideration is to pass from one party until the whole of the obligations of the other party have been performed; but if that is not the effect of the contract, and the contract resolves itself into a number of considerations for a number of acts (as for example a contract to deliver goods by instalments, the price being fixed per instalment) the contract may be severable, or it may constitute a series of separate contracts (Halsbury's Laws of England, 4th ed. Vol. 9 (1974) para. 473)

Part 3 - Discharge by Frustration

3.1 Frustration "brings the contract to an end forthwith, without more and automatically". [1] "It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract." [2]

3.2 Although a contract is brought to an end by frustration, the effect of frustration is not to avoid the contract from the beginning so that the parties have the rights which they would have had if they had not made the contract. What was done under the contract before frustration does not become something done under a supposed contract which did not exist. It was done under a contract then in force. Again, where a payment was due under the contract before frustration, it remains due; and breach of a promise, to the extent that the breach occurred before frustration, remains compensable in damages. A contract, when frustrated, comes to an end in this sense only, that the parties are excused from giving any performance which did not become due before frustration. The contract comes to an end in the same sense as that in which a contract comes to an end where one party commits a fundamental breach and the breach is accepted by the other party as a repudiation of the contract. "There is . . . this point of contact between the two cases. Though a party [where the other has committed a fundamental breach] may exercise his right to treat the contract as at an end, as regards obligations de future, it remains alive for the purpose of vindicating rights already acquired on either side. So with frustration. Though the contract comes to an end on the happening of the event, rights and wrongs, which have already come into existence, remain, and the contract remains too, for the purpose of giving effect to them." [3] It is customary to say that frustration discharges a contract, even though by the common law frustration discharges a contract only as regards future obligations. By "future obligations" we mean obligations which, but for the frustration, would have fallen due for performance after the time of frustration.

3.3 Before considering the consequences to the parties of frustration we note one exception, and the possibility of other exceptions, to the rule of the common law that frustration absolves the parties from performance of a future obligation. The exception, if it is truly an exception, is that, where the ' contract contains an arbitration clause, the clause as a rule continues to apply to disputes within its ambit in respect of rights and wrongs, which had come into existence before frustration, whether or not the dispute between the parties in respect of them arose before frustration. [4]

3.4 There may be other exceptions which will evolve in the common law. Thus, perhaps a servant who promises by his contract of service not to disclose trade secrets remains boundary the promise notwithstanding frustration of the contract of service. Again, perhaps an agent, who under his contract of agency is bound to account for money received at periodic intervals, remains bound to account for money he receives before the agency contract is frustrated, notwithstanding that the time for accounting fixed by the contract is after the time of frustration. It does not appear that any such case has fallen for judicial decision. [5] But, whatever particular exceptions the common law may evolve to deal with special cases, the general rule remains ,that where a contract is frustrated the parties are by law excused from performance of future obligations.

FOOTNOTES

1. Hirji Mulii v. Cheong Yue Steamship Co. Ltd [1926] A.C. 497, 505.
2. Denny, Mott & Dickson Ltd v. James B. Fraser & Co. Ltd [1944] A.C. 265, 274, Lord Wright. It has been suggested by G. D. Goldberg ((1972) 88 L.Q.R. 464) that where some performance remains possible the party for whose benefit the performance would be can elect to waive the frustration and

insist on that performance. This view, however, has no support in any judicial pronouncement. The case on which he relies, H.R. and Y Sainsbury Ltd v. Street [1972] 1 W.L.R. 834, was not one in which the court held that frustration had occurred. It was one in which the court held that the contract, construed in the light of the subject matter in respect of which the parties made the agreement, provided what the rights of the parties were to be iri the events which happened.

3. Hirli Malil v. Cheong Yue Steamship Co. Ltd [1926] A.C. 497, 510.

4. Heyman v. Darwins Ltd [1942] A.C. 356. This was a case not of frustration but of repudiation and rescission. But the House of Lords considered that the principles discussed were equally applicable to cases of frustration nothwithstanding the earlier contrary decision of the Privy Council in Hirji Mulji v. Cheang Yue Steamship Co. Ltd [1926] A.C. 49-7. The Privy Council has since applied Heyman v. Darwins Ltd in F. J. Bloemen Ply Ltd v. Gold Coast City [1973] A.C. 115, although this latter case also was one of repudiation and rescission. We think that the reasoning in Heyman v. Darwins Ltd is likely to be applied ‘m Australia in preference to that in the Hirji Mulji Case.

5. It may be that consistently with the common law rule that frustration discharges a future obligation, adequate relief could be obtained in equity not on the basis of continuance of the contractual obligation but on other bases such as fiduciary duty. The courts may not be constrained to evolve exceptions to the rule.

Part 4 - Remedies Under The Contract

4.1 We shall consider the consequences of frustration under two heads. The first concerns the remedies which the parties have under the contract. The second concerns the remedies which the parties have outside the contract. We discuss the first head in this Part and the second in Part 5.

4.2 As we have noted, the contract, despite frustration, remains in force in respect of a promise due for performance before frustration. Thus if money was payable under the contract before frustration but was not paid, it remains payable. [1] Again, if by the contract a party promised to render services and that the services would be of some standard of quality, and the services were due and were rendered before frustration, but were not of that standard, the promisee might recover damages for the breach notwithstanding the frustration. In all such cases the right to recover money promised, or the right to recover damages for breach, are rights flowing from the contract. They are remedies provided by law to give effect to the contract.

4.3 But the contract may be, and commonly is, inadequate to ensure that the burden due to frustration falls evenly upon the parties. The burden may fall on one of them; and the other party may get a windfall. Sometimes the burden may fall on both parties, but not to an equal extent. Consider the following cases-

Case 1. A manufacturer agrees to make a machine to a customer's special design and to deliver the machine to him. The contract provides for payment in full on delivery. The manufacturer makes the machine, but has not delivered it when the contract is frustrated. Here the customer does not have to pay the manufacturer anything under the contract. No payment became due before the contract was frustrated. The manufacturer has the machine on his hands. But because of its special design, he may not be able to sell it to anyone else for anything like its cost. The customer has no obligation under the contract to share in the manufacturer's loss, even though the manufacturer, like the customer, was not to blame for the frustration. The customer neither receives anything nor pays anything.

Case 2. A builder agrees with an owner of land to build a brick house on the land. The contract provides for payments to be made at stages of the work, the first stage being completion of brickwork. The builder has almost completed the brickwork when the contract is frustrated. On these facts he cannot recover anything under the contract from the owner, because no payment became due under the contract before the frustration. But the landowner has a windfall. He has the value of the brickwork, so far as done before frustration, but is not obliged under the contract either to contribute to the cost incurred by the builder or to pay him anything for the value of the brickwork.

Case 3. A housewife enters into a contract with a kitchen remodeller to remodel her kitchen. The contract requires her to pay the price in advance of performance. She does so. Before any part of the remodelling work becomes due under the contract, the contract is frustrated. On these facts she cannot sue under the contract for recovery of what she has paid. She was obliged by the contract to make the payment. But frustration discharged the contract so far as concerns future obligations. So the kitchen remodeller commits no breach of the contract by keeping the money and doing nothing in return. This is not the end of the story for, as will be shown in Part 5, she has a remedy outside the contract for recovery of the money paid.

Case 4. An engineer invents a new moulding process for plastics that depends upon unique equipment. The engineer makes a contract with a manufacturer to supply and install the equipment and, when this has been done, to instruct staff of the manufacturer in the new process. The contract provides for payment of $25,000 on making the contract and a further $75,000 on completion of the instruction. Without instruction the staff cannot use the equipment for moulding purposes and it has no value for any other purpose. The engineer alone has the knowledge. He supplies the equipment and almost has it fully installed when the contract is frustrated. The cost he has incurred is $30,000. He therefore suffers a

loss because of the frustration. On these facts he is not entitled under the contract to anything more than the $25,000 which was payable on the making of the contract. If he has received the $25,000, he gets nothing more. If he has not received it, he can recover it, for payment was due before frustration. In either case his loss is $5,000 (cost of $30,000, made good to the extent of $25,000). On the other hand the manufacturer suffers a greater loss. He has paid, or remains liable to pay, $25,000 under the contract. He has received the equipment but it is valueless unless he receives also instruction in how to use it. The engineer does not have to give him that instruction. [2] His obligation to do so under the contract was not an obligation which became due for performance before frustration. When frustration occurred the engineer was excused by law from performing it. The manufacturer therefore has received for his $25,000 useless and valueless equipment. He is entitled under the contract to nothing more. His loss therefore is $25,000-whereas the engineer's loss is $5,000.

4.4 These cases show that rights under a contract which has been frustrated may be inadequate to achieve a just result between the parties in relation to-

(a) cost incurred by a party for the purpose of performance;
(b) performance which a party has received; or
(c) money paid to a party pursuant to the contract.

4.5 In this part we have considered what remedies the parties may have under the contract. In Part 5 we shall consider what other remedies they may have. We refer to the latter remedies as remedies outside the contract.

FOOTNOTES

1. Unless indeed the consideration wholly fails, as it may by reason of the frustration: Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd [1943] A.C. 32, 53. See paragraph 5.9 below.
2. He may not be able to-for example, where the contract is frustrated by his death.

Part 5 - Remedies Outside The Contract

5.1 Where a contract is frustrated, the common law gives no remedy outside the contract by which a party can recover all or any of the cost he has incurred for the purpose of performing the contract. Where a person pays money at the request of another the inference from the circumstances often is that, although the person who made the request did not expressly say he would reimburse the payer, he impliedly promised to do so. In that case there is a contract implied from the circumstances, pursuant to which the person who made the req ‘ uest is obliged to reimburse the payer. But things done by parties to a contract for the purpose of performing the contract cannot ground an inference of some other implied contract. [1] It follows that, where a contract is frustrated, cost which a party has incurred before frustration, for the purpose of performing the contract, cannot be recovered from another party on the footing that the other party impliedly promised to make reimbursement of that cost.

5.2 It also seems that, where a party has received something under a contract, and the contract is afterwards frustrated, the common law gives no remedy outside the contract by wluch the party can be made to pay for what he has received. Again, the things that have been done have been done under the contract afterwards frustrated: those things therefore cannot ground an inference of some other implied contract under which the receiving party could be made liable to pay for what he has received. [2]

5.3 The common law, however, does provide some redress outside the contract in respect of money paid under the contract. There is a principle of the common law that where a party to a contract has paid money to another party in return for some performance to be given by that other party and the contract is discharged without the payer having received any part of that performance, so that the consideration for the payment has wholly failed, he is entitled to a refund of the money. For an illustration, not being one in which a contract is frustrated, consider the following case. A customer orders groceries to be delivered to his home and pays for them. The grocer accepts the order but does nothing to fulfil it and, when pressed to stand by the contract, refuses ,to do so. That is a repudiation by the grocer of the contract. The customer, because of the repudiation, is entitled to rescind the contract. If he does so, he is entitled to his money back-because the consideration for the payment he made has wholly failed. We are not concerned here with any right he may have to damages for breach of contract.

5.4 The right to recover the money is a quasi-contractual right, a right based, not upon any implied promise by the other party to repay, but upon an obligation imposed upon him by law irrespective of whatever he may be taken to have promised. It is an obligation imposed by law to prevent unjust enrichment.

5.5 There is no basis for denying this quasi-contractual right where the failure of consideration arises on the discharge of a contract, not by rescission in consequence of repudiation, but by frustration. But until the decision of the House of Lords in 1942 in Fibrosa v. Fairbairn, [3] the right was denied in the case of a contract discharged by frustration. [4] The basis for the denial was that, as frustration does not discharge a contract from the beginning, the consideration for any payment made under the contract before discharge cannot be said to have wholly failed. The error in this was exposed by Viscount Simon L.C. in Fibrosa v. Fairbairn. [5] His Lordship said-

> This conclusion seems to be derived from the view that, if the contract remains good and valid up to the moment of frustration, money which has already been paid under it cannot be regarded as having been paid for a consideration which has wholly failed. The party that has paid the money has had the advantage, whatever it may be worth, of the promise of the other party. That is true, but it is necessary to draw a distinction. In English law, an enforceable contract, may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act . . . and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-

> contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of that promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled. [6]

5.6 What is meant by a total failure of consideration, for the purpose of the quasi-contractual remedy, is well illustrated by the facts in Fibrosa v. Fairbairn. [7] There the contract was between an English company, which carried on the business of manufacturing machinery, and a Polish company. The Polish company ordered machines of a special type and the English company contracted to supply them and to ship them to Gdynia in Poland. The contract provided for an initial payment by the Polish company and payment of the balance on its receiving the shipping documents. The Polish company made the initial payment. The English company commenced manufacture of the machines but, before they were shipped, the contract was frustrated by the occupation of Gdynia by German forces. The Polish company claimed repayment of the initial payment on the basis that, as it had received nothing under the contract, there had been a total failure of the consideration for the initial payment. The House of Lords upheld the claim. It is to be noted that this was not a case in which the English company had done nothing: it had partly manufactured the machines. But the Polish company had not received anything in return for the initial payment: it had received neither possession of nor title to the machines. As Lord Russell of Killowen put it: "no-part of the consideration for which part of the price of the machines was paid ever reached the appellants. There was a total failure of the consideration for which the money was paid." [8]

5.7 The High Court has not decided whether it will follow Fibrosa v. Fairbairn. [9] It is not bound to follow decisions of the House of Lords, but it could well be that it will do so. [10]

5.8 The common law as declared by the House of Lords in Fibrosa v. Fairbairn [11] is a solution of part only of the difficulties that arise where a party has paid money to another party under a contract which is afterwards frustrated. The payer can recover the money where there has been a total failure of consideration. But there is no common law remedy for recovery of part of the money where the failure of consideration, although substantial, is not total. The absence of such a remedy can lead to injustice. Take this case. A theatrical producer engages an actor to perform in a play for 3 months for a fee. The producer agrees to pay half the fee on the making of the contract, and does so. After the artist has given one performance the contract is frustrated. On these facts the producer cannot recover anything under the common law as declared in Fibrosa v. Fairbairn. [12] The failure of consideration was not total. The producer received one performance.

5.9 The reasoning which allows recovery of money paid where there is a total failure of consideration has a further consequence, relevant to Part 4 of this report rather than this part. If money was due but unpaid at the time of frustration, and the consideration for the payment wholly fails, the failure is a defence to an action on the contract for the money. [13]

5.10 Before we consider the English Act of 1943 we summarize what we have said about common law remedies outside the contract. There is no redress to a party who has incurred cost for the purpose of performing the contract. Again, a party who has received some performance of the contract is not obliged to pay for what he has received. If, however, a party has received a payment of money under the contract, and the consideration for the payment has wholly failed, he is obliged to return the money: but, if the consideration for the payment has only partly failed, he may keep all the money. All this, of course, is against the background that contractual rights accrued before frustration remain enforceable, except where there has been a total failure of consideration. It was to meet these inadequacies of the common law that the English Act was passed.

FOOTNOTES

1. Britain v. Rossiter (1879) 11 Q.B.D. 123.

2. Cutter v. Powell (1795) 6 Term Rep. 320; 101 E.R. 573; Appleby v. Myers (1867) L.R. 2 C.P. 651. It is possible that the common law may evolve • remedy which is not one based upon the inference that the party who received performance impliedly promised to pay for it but which is one based upon a duty imposed by law upon the receiving party, irrespective of what he may have promised, to make restitution for unjust enrichment. Such a remedy would be quasi-contractual. It has been said that where a remedy for recovery of a fair price for services rendered is quasi-contractual "the proper ground of the claim is not in contract at all, but in restitution. It is money which, in justice, ought to be paid for the services rendered." (James v. Thomas H. Kent & Co. Ltd [1951] 1 K.B. 551, 556, Denning L.J.) But there is not, in the common law, any general rule that restitution must be given where otherwise there would be an unjust enrichment. For example, as we note later in this part, the law provides a quasi-contractual remedy for the recovery of money paid where the consideration for the payment has wholly failed, yet provides no such remedy for recovery of any part of money paid where the consideration, although it has substantially failed, has not failed wholly.
3. Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] A.C. 32.
4. Chandler v. Webster (1904) 1 K.B. 493.
5. Paragraph 5.5, note 3, above.
6. At p. 48.
7. Loc. cit. note 5.
8. At p. 56.
9. Loc. cit. note 5.
10. We hold this view notwithstanding that Fibrosa v. Fairbairn is inconsistent with the earlier decision of the High Court in In re The Continental C. and G. Rubber Co. Pty Ltd (1919) 27 C.L.R. 194. We do not share the doubt expressed in Cheshire and Fifoot, Law of Contract, Third Australian Edition, (1974) at pp. 698-700. Fibrosa v. Fairbairn has been followed in New Zealand (Bray v. Anderson [1956] N.Z.L.R. 347) and is accepted in Canada as a correct statement of the common law (Robbins v. Wilson & Cabeldu Ltd [1944] 4 D.L.R. 663).
11. Loc. cit. note 5.
12. Ibid.
13. Fibrosa v. Fairbairn (paragraph 5.5, note 3, above) at p. 53.

Part 6 - The English Act

6.1 The English Act has evoked a great deal of critical comment, [1] but there are no reported decisions on it. Our comments are therefore in some degree tentative.

6.2 The substance of the Act's adjustments is as follows. Money paid to a party under a contract [2] afterwards frustrated is recoverable from him. [3] This is so whether or not there has been a total failure of the consideration for the payment.

6.3 Where a party has obtained a valuable benefit [4] by reason of anything done by another party in or for the purposes of performing the contract, he must pay to that other party such sum [5] (if any) as the court considers just having regard to all the circumstances of the case. [6] In effect, what he must pay is the fair value of the benefit he has received. But where the value of the benefit has been reduced by the frustrating event, the amount he has to pay may be reduced accordingly. [7] This follows because the Act provides that the circumstances of the case, to which the court shall have regard in fixing the amount (if any) to be paid for the benefit obtained, include "the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract". [8] It may be assumed that, generally, the court would exercise its discretion so that the party who received the benefit pays the value of the benefit as reduced, where it is reduced, by the frustrating event.

6.4 So far the scheme of the English Act is clear. Each party gets back any money he has paid to another party; but he pays the value, as reduced by the frustrating event, of any bene-fit he has obtained by what has been done by another party in or for the purpose of performance. The scheme, therefore, makes good two deficiencies of the common law. These two deficiencies are, first, limitations on the recovery of money paid under the contract and, secondly, the absence of a right to recompense for the value of performance received. A remaining deficiency of the common law is that it does not allow recovery of the cost which a party has incurred in or for the purpose of performing the contract.

6.5 There clearly is a case for an adjustment for cost which a party has incurred before frustration, in or for the purpose of performing the contract. Where a party has incurred cost in this way, a provision that a party obtaining a benefit by what the first party has done must pay the value of that benefit, as affected by the frustrating event, may be of little or no worth to him. It may be that no other party has obtained any benefit from what he has done. Thus if the contract was ,to make and deliver machinery to a customer, no benefit is obtained by the customer where, before frustration, the machinery was partly made but was not delivered. [9] Again, a party by whose performance another party has obtained some benefit may find that the value of that benefit, as affected by the frustrating event, is less than the cost. On the other hand, there is no loss to a party in paying only the value, as affected by the frustrating event, of what he has obtained. Is this disparity just?

6.6 The English Act does make some provision for cost incurred by a party in or for the purpose of performing the contract. [10] In so doing the English Act goes beyond the principles of restitution of the common law as it has developed in the United States, [11] of Scots law [12] and of the main systems of the civil law [13] - that is, that a party who has received a benefit from what has been done under a contract, before frustration, should not be permitted to derive an unjust enrichment by receiving that benefit, and therefore should be required to account for its value. The authors of the English Act must have considered that where a party has incurred cost in or for the purpose of performing a contract, and the contract is frustrated, the principle of restitution may be inadequate to do justice. We agree. But we consider that the adjustment for cost under the English Act is itself not adequate. In providing at all for that cost the English Act made a bold innovation. But it is time for another step.

6.7 We pass to the adjustment for cost under the English Act. lit is both limited and indirect. It has two, limbs. The first limb is a proviso to the requirement for repayment of money paid. [14] The proviso is that the court may [15] allow the party liable to repay to deduct from the amount of the repayment the whole or part of any expenses which he has incurred in or for the purpose of performing the contract. [16] Thus if, before frustration, a party has received $10,000 but has incurred expenses of $7,000 in or for the purpose of performing the contract, he may have to repay not the whole $10,000 but only $3,000. [17]

6.8 The second limb affects the amount payable for a valuable benefit obtained from what another party has done in or for the purpose of performing the contract. [18] The second limb requires the court, in fixing the amount to be paid for the benefit obtained, to consider "the amount of any expenses incurred before the -time of discharge by the benefited party in, or for the purpose of, the performance of the contract . . ." [19] Thus if a party has obtained a benefit which, having regard to th e effect of the frustrating event, has a value of $10,000, but has incurred expenses of $7,000 in or for the purpose of performing the contract on his part, the court may order him to pay in respect of that benefit not $10,000 but $3,000.

6.9 We make two main comments on the adjustment for cost under the English Act. The first is that there is a more straightforward way of taking the cost into account. The second is that the provision, in our view, does not go far enough. Consider the following three cases.

Case 1. There is a contract for the manufacture and delivery by an engineer to a customer of machinery to the customers design. Ile terms of payment are that the customer shall pay the price on delivery. The machinery is partly built, at considerable cost to the engineer, but none of it has been delivered, when the contract is frustrated. On these facts neither limb of the adjustment for cost under the English Act applies. There was, before frustration, no payment to the engineer which, by the proviso to subsection (2), he may be permitted by the court to retain up to the amount of the cost he incurred. Nor has he received any benefit from anything done by the customer in or for the purpose of performing the contract. There is thus no occasion for him to have an allowance for his cost under subsection (3) against the value of a benefit received. In the result, the customer, who has got nothing, but has done nothing, pays nothing. But the engineer also gets nothing-although he has incurred substantial cost in partly building the machinery. He still has the machinery, but it may have only a scrap value or some value less than its cost. This result comes about because, on the facts assumed, neither limb of the adjustment for cost under the English Act applies.

Case 2. This is a case where the first limb of the adjustment for cost under the English Act does apply. Assume, again, a contract for the manufacture and delivery by an engineer to a customer of machinery to the customer's design. Assume that the price is $10,000 ($1,000 payable on the making of the contract and the balance payable on delivery); that the $1,000 is paid; that the engineer partly builds the machinery but does not make any delivery; that the cost he incurs in what he has done to build the machinery is $5,000; that frustration occurs; and that the value of the partly-built machinery is $1,000. Can these facts the first limb of the adjustment applies. It applies because there has been a payment of money to the engineer before frustration: against the repayment of that money he may be permitted an allowance for his expenses under the proviso to subsection (2). It may be taken that, as his expenses ($5,000) exceed the amount of the money paid to him before frustration ($1,000), he would not have to repay any of that money. So he keeps the $1,000. But that still leaves him with a loss of $4,000. Against that loss he has only the value ($1,000) of the partly-built machinery. In all, he loses $3,000. Ile customer, on the other hand, has not incurred any expenses and pays nothing beyond the initial payment of $1,000. Is this just between the parties? We do not think that it is.

Case 3. This is a case where the second limb of the adjustment for cost under the English Act applies. This is the limb embodied in subsection (3), which applies where a party who has incurred expenses has also obtained a benefit from what has been done by another party in or for the purpose of performing the contract. Say there is a contract between a builder and a sawmiller by which the builder is to pre-fabricate and erect a new sawmill in exchange for supplies of milled timber from the sawmiller. Some of the timber is to be supplied before erection of the new mill: the balance is to be supplied on completion. The contract is frustrated when the builder has partly pre-fabricated the new mill, at a cost of $10,000, but has not delivered any of it to the site. Before frustration, the builder has received all the

timber which the miller was bound by the contract to supply to him before erection. The value of the timber so received was $1,000. The value of the partly pre-fabricated mill left on the builder's hands is $5,000. On these facts the second limb of the English adjustment for cost applies. It applies because the builder has obtained a benefit (supply of timber) from what the sawmiller has done for the purpose of performing the contract but has himself incurred expenses (the cost of $10,000 in partly pre-fabricating the new mill). The builder is bound under subsection (3) to pay for the benefit he has received such sum as is reasonable having regard to the expenses which he incurred. As his expenses were $9,000 more than the value of the benefit he obtained, it may be taken that the builder would not have to pay anything under subsection (3). But that stih leaves him with the loss of $9,000 off-set only to the extent of $5,000, the value of the partly pre-fabricated mill. In all his loss is $4,000. On the other hand, the sawmiller pays nothing. He has not obtained any benefit. His only loss is the $1,000 worth of timber which he supplied to the builder before frustration. Is this disparity justified? We think not.

6.10 The effect of the adjustment for cost under the English Act is that the cost is not taken into account unless the party incurring the cost himself received [20] a payment before frustration or himself obtained a benefit from what another party has done in or for the purpose of performing the contract. Further, even if before frustration he did receive a payment or did obtain such a benefit, his cost is taken into account only to the amount of the payment (as an allowance against repayment of the advance payment) and the value of the benefit (in reduction of the amount to be paid for the benefit).

6.11 We do not see the justification for these limitations. [21] Indeed, we do not see that the fact that the party who incurred the cost did or did not receive a payment before frustration is relevant to the adjustment which should be made for his cost. [22] They are distinct matters.

6.12 Again, we do not see that the fact that the party who incurred the cost did or did not himself obtain any benefit from what another party has done is relevant to the adjustment which should be made for his cost. They, too, are distinct matters. An adjustment for his cost should take into account any benefit he has thereby conferred on another party, because the other party must pay him for that benefit. But this is a quite different consideration from treating as relevant to the adjustment any benefit which the party who incurred the cost himself obtained from what another party has done.

6.13 We think that the adjustment for cost under the English Act, although an improvement upon the common law, does not go far enough. It may be said that, for the sake of uniformity with the law of England and of New Zealand and of Victoria, the scheme of the English Act, including that Act's adjustment for cost, should be adopted in this State. But the deficiencies of the English Act are, so widely recognized that we cannot be confident that adoption in New South Wales of the scheme of that Act would lead to enduring uniformity between this State and the other countries we have mentioned. It is a real question whether a law-reforming body in England would today recommend a simple perpetuation of the English Act. Moreover, it seems unlikely that the scheme for adjustments which the Act provides will be generally adopted in countries which have inherited the common law. The English Act has been in force for more than 30 years. That is long enough to see how far it is likely to be adopted elsewhere.

6.14 New Zealand has adopted the scheme of the English Act [23] but, in Australia, Victoria alone has done so. [24] The other States have not legislated on frustrated contracts. In Canada there has been a change. In 1948 the Conference on Uniformity of Legislation in Canada recommended for adoption a uniform Act following closely the substance of the English Act. This uniform Act has been adopted in six of the Provinces and in the territories. [25] But in 1973 the Conference adopted a new uniform Act. [26] It closely follows a draft recommended by the Law Reform Commission of British Columbia [27] in 1971. An Act has now been passed [28] in British Columbia substantially in terms of that draft. [29] The scheme of adjustment [30] under the British Columbia Act [31] and recommended in the 1973 Uniform Act is markedly different from the scheme of the English Act. In the United States of America, the common law has been much developed so as to provide for adjustments on frustration. [32]

6.15 We think that considerations of uniformity do not justify implementation in New South Wales of the scheme of adjustment provided by the English Act. But there should be legislation in this State which provides a fair scheme of adjustment.

6.16 In the following part of this report we recommend a scheme for New South Wales. Before we go to that scheme in detail, we indicate our general approach and briefly compare it with the scheme of the English Act. That Act makes provision, as we have said, for three major deficiencies of the common law. It provides for the repayment of money paid to a party before frustration. This clears the way for adjustment for benefits conferred upon a party by what another party has done pursuant to the contract and for costs incurred by a party. It is a sound approach and we follow it.

6.17 The English Act also provides that a party who has obtained a benefit from what another party has done pursuant to the contract should pay for it. [33] This, too, is a sound approach and we follow it. [34]

6.18 The English Act also makes provision for expenses incurred in or for the purpose of performing the contract. But to us, this provision is not satisfactory. Our approach is as follows. As we have said, a party should pay for a benefit he has obtained through another party's performance. The amount of this payment should be taken into account in making an adjustment for the cost incurred by the performing party in giving that performance. Further, before the adjustment is made, there must be deducted from the cost the value of any property or improvement to property which the performing party acquired [35] by incurring the cost and which remains on his hands. What is left is the net relevant cost incurred by the performing party. The adjustment which we consider should be made is that if the net relevant cost exceeds what the receiving party has to pay to the performing party for the benefit of the performance, the amount of the excess shall be shared equally. [36]

6.19 Applying that approach to-

(a) repayment of money paid;
(b) payment for benefit received; and
(c) sharing of any excess of cost,

results in equality of loss between the parties. Take the following illustration. An engineer agrees to build and deliver to a customer several pieces of machinery. The price is $10,000, $1,000 payable on the making of the contract and the balance on delivery. The price is a single price for all the pieces of machinery. The customer pays the $1,000, and the engineer builds many of the pieces, at a cost of $7,000, but delivers only some of them before the contract is frustrated. The value, after frustration, of the pieces which remain undelivered, is $2,000.

6.20 On these facts, our approach produces an equal loss for both the engineer and the customer. The engineer repays the $1,000. Neither party loses from the fact that the payment was made before frustration. For the pieces delivered to the customer, he pays a rateable part of the price for the whole. Assume that the amount of this payment is $1,500. Neither party loses because of this payment: the customer has these pieces, and the engineer is paid for them.

6.21 Then we come to the adjustment for the cost incurred by the engineer. First one deducts from the cost ($7,000), the value of the pieces remaining on his hands, that is, $2,000. The balance of $5,000 we describe as his net cost. One then sees whether his net cost is greater than the sum paid by the customer for the pieces delivered. It is greater, the customer having paid $1,500 for them. The excess of $3,500 is shared equally.

6.22 Consider the final result. There is no loss to either party except in respect of the cost which the engineer incurred. The adjustment to be made for that loss shares the burden equally between the engineer and the customer. The engineer's position is this. On the debit side his net cost was $5,000. On the credit side he has the value of the undelivered pieces, $2,000, and also receives $1,750 from the customer towards his cost. The total on the credit side is $3,250. His final loss is therefore $1,750. This also is the final loss of the customer. It is the amount he pays to the engineer in respect of the cost which the engineer incurred. This equality of loss does not depend on the particular figures we have assumed. No matter what figures are taken, equality results.

6.23 Should there be equality of loss between the parties? We think so. Frustration occurs because the basis of the contract is destroyed by events which have overtaken the parties, events which none of them has brought about. This being so, it seems to us that justice is to be found in equality.

6.24 We have stated in broad outline our general approach to a scheme for adjustment where a contract is frustrated. We now proceed to the scheme which we recommend.

FOOTNOTES

1. For comment on the English Act see particularly Glanville Williams, The Law Reform (Frustrated Contracts) Act, 1943, (1944); Goff and Jones, The Law of Restitution, (1966), 325-339; Cheshire and Fifoot, The Law of Contract, 8th edn., (1972), 553-562; Treitel, The Law of Contract, 4th edn., (1975), 604-616.

2. The English Act excludes from its operation some types of contract (S. 2 (5)). We discuss these exclusions in Part 8.

3. Money due for payment at the time of frustration, but unpaid, ceases to be payable (s. 1 (2)). We deal later with a qualification concerning an allowance for expenses.

4. Other than payment to him of money.

5. Not exceeding the value of the benefit.

6. S.1 (3).

7. S.1 (3).

8. S.1 (3) (b).

9. The manufacturer's loss is reduced by the value of the partly-built machinery because his promise to complete it, and deliver it, is discharged by the frustration of the contract. But the machinery, so far as built, may have only a scrap value or otherwise have a value much less than its cost.

10. Discussed in paragraphs 6.7 to 6. 10 below.

11. Section 468 of the American Restatement of Contracts provides-

(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he had rendered can be and is returned to him in specie within a reasonable time.

(3) The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price.

12. See Lord Cooper "Frustration of Contract in Scots Law" (1946) 28 Journal olf Comparative Legislation and International Law (3rd series), Parts 3 and 4, page 1; Watson & Co. v. Shankland (1871) 10 Macp. 142; Cantiare San Rocco S.A. v. Clyde Shipbuilding and Engineering Co. Ltd [1924] A.C. 226.

13. See Appendix A to Seventh Interim Report of the English Law Revision Committee (1939) Cmd. 6009 p. 9; Zepos, “Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946” (1948) 11 M.L.R. 36, 42, 45.

14. S.1 (2). See paragraph 6.2 above.

15. “having regard to all the circumstances of the case”.

16. S.1 (2), proviso. “Expenses” may include a sum for overhead and a sum for work or services performed personally by the party: s. 1 (4). 17. The proviso also deals with the case where money was due to a party before frustration, but was not received by him. If the party has incurred expenses he may recover the whole or part of them, as the court thinks just, from the party who should have made the payment to him. This puts him in the same position as he would have been in if the payment had been made because s.1(2) provides that the amount that was payable to him ceases to be payable. It may be taken that, in the exercise of its discretion, the court would limit the amount which it allows to be recovered for expenses so that the amount recovered does not exceed the amount of the payment that was due before frustration.

18. S.1(3). See paragraph 6.3 above.

19. S.1(3)(a). The expenses include so much of any advance payment made to another party as that other party is permitted to retain under the proviso to subsection (2) for his own expenses. Where the advance payment was due to the other party before frustration but was not made, the expenses include also the amount which that other party can recover under that proviso for his own expenses.

20. The effect of the adjustments provided by the English Act is the same, where the payment was due but not paid, as it is where it was paid, before frustration. See paragraph 6.2, note 3; paragraph 6.7, note 17; and paragraph 6.8, note 19, above. To avoid repetition we refer in the text only to the case where the payment was made before frustration.

21. The limitations are explicable as being a compromise. The case for adjustment being made in respect of cost was recognized. But the party who incurred the cost was given the benefit of that cost only as a shield against payments he otherwise would have to make in refunding any payment which he received before frustration or paying for any benefit which he obtained from another party before frustration. The cost was not treated as a matter calling for adjustment in its own right.

22. The Law Revision Committee in its Seventh interim Report (1939) Cmd. 6009 suggested that it is “reasonable to assume that in stipulating for pre-payment the payee intended to protect himself against loss under the contract” (p. 7). This is an assumption of very doubtful validity. There may be many other reasons for the contract having provided for an advance payment. The parties may have recognized, for example, that the payee would be unable to perform the contract without further capital. Even if the assumption suggested by the Law Revision Committee is valid, it does not follow that no adjustment for cost incurred by a party should be made unless the party has stipulated for an advance payment or has received a benefit from what another party has done.

23. Frustrated Contracts Act 1944.

24. Frustrated Contracts Act 1959.

25. Proceedings of the 56th Annual Meeting of the Uniform Law Conference of Canada, (1974), P. 232.

26. Proceedings of the 55th Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, (1973), p. 27; Proceedings of the 56th Annual Meeting of the Uniform Law Conference of Canada, (1974), p. 28.

27. Report on the Need for Frustrated Contracts Legislation in British Columbia, (1971).

28. In 1974.

29. Frustrated Contracts Act (British Columbia).

30. Some comments by us on the scheme appear as Appendix D.

31. The Act appears as Appendix E.

32. Williston on Contracts, Revised edn., Vol. 6 (1938), Chapter 58; Corbin on Contracts, Vol. 6 (1962), Chapter 78.

33. In determining the amount of the payment regard is to be had to "the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract" (s. 1 (3) (b)).

34. We consider, however, that the amount of the payment should be related to what the receiving party would have had to pay under the contract for a full performance. We discuss this in paragraph 7.6 below. We also consider that the relevant deduction, if any, to be made in the amount of the payment, because of the effects of frustration upon the value of the performance which has been received, is the loss of value caused by the fact that the right to further performance is destroyed rather than any loss of value caused by the particular events which frustrated the contract. We discuss this in paragraphs 7.7 to 7 . 15 below and in Appendix F.

35. Or derived.

36. To the extent that a party has incurred cost for the purpose of performing the contract but did not incur the cost for the purpose of giving some performance which has been received by another party, he does not receive payment for a benefit conferred by what he has done. In the nature of the case no benefit has been conferred, because the performance has not been received. We consider that, in this case, all that should be provided is that the cost shall be shared equally between the party who incurred it and the party who was to receive the performance. On the other hand it should also be provided that these parties shall also share equally the value of any asset which the party who incurred the cost has thereby acquired or derived. These adjustments produce equality between the parties. We discuss them more fully in paragraph 7.33 below.

Part 7 - Scheme Recommended

7.1 The elements of the scheme which we recommend for adjustments on frustration of a contract are those we have discussed in relation to the English Act, namely-

(a) provision for repayment of any payment made before frustration;
(b) provision for payment for any benefit [1] which a party has obtained from what another party has done under the contract; and
(c) provision for cost which a party has incurred for the purpose of performing the contract.

We consider these elements in that order.

7.2 On the first of these elements, we recommend that it be provided that money paid under the contract to a party shall be repaid and that money which, at the time of frustration, was due for payment shall cease to be payable. This clears the way for adjustments for benefits received and for costs incurred.

7.3 The second element of our scheme is an adjustment for any benefit obtained from what a party has done under the contract. The expressions “benefit” and “obtained” are used in the English Act and, to this point, we have adopted them for convenience. We are, however, concerned with the amount to be paid for performance which a party has received. From this point on, therefore, we speak of “performance received” rather than “benefit obtained”. The concept of performance received is not novel. It is fundamental, for example, to the quasi-contractual remedy for recovery of money paid for a consideration which, no part of the promised performance having been received, has wholly failed. Thus, as we have noted, in Fibrosa v. Fairbairn [2]where a contract required an English company to manufacture and deliver machines to a Polish company, the Polish company did not, for the purpose of that quasi-contractual remedy, receive any performance by the mere manufacture of the machines. They remained the property of the English company and the Polish company did not obtain delivery of them. As Lord Russell of Killowen put it, no part of the consideration ever reached the Polish company. [3]

7.4 We consider it self-evident that a party who has received some performance from another party should pay for it. But how much should he pay? We could follow the English Act and recommend that he shall pay “such sum (if any) ... as the court considers just, having regard to all the circumstances of the case . . .” [4] We do not do that because the parties to a frustrated contract should not need to go to court to ascertain the amount required by law to be paid. So far as possible they should be given a test which they can apply for themselves.

7.5 The test we recommend for ascertaining the amount to be paid for a received performance has two stages.

7.6 The first stage is that the party who received the perf ormance (“the receiving party”) shall pay that proportion of what he promised to pay (or of the value of what he promisedto do) in return for a complete performance which the received performance bears to a complete performance. Thus, to take a simple case, if the contract provided for receipt by the receiving party of 1,000 tons of shale for a price of $100,000, and he receives only 100 tons (which is one-tenth of complete performance), he pays $10,000 (which is one-tenth of the $100,000 he agreed to pay for full performance). [5] The amount which the receiving party must pay is related to the contract price. If he has made a good bargain in that he bought cheaply, he should have the benefit of that bargain. To require him to pay a higher price to the performing party would be unjust to him and would confer, as a consequence of frustration, a windfall upon the performing party. The converse applies if he made a bad bargain. We shall henceforward refer

to the appropriate proportion of the contract price for a complete performance as the “contract-related price”.

7.7 The second stage of our test for ascertaining the amount to be paid for a received performance is concerned with the possibility that the value of the performance received may have been diminished or destroyed because the frustration has ended the receiving party’s entitlement to further performance of the contract. We shall hence-forward refer to such a diminution in or destruction of the value of a received performance as the “lost value” of the performance. [6]

7.8 We give a simple example of lost value of performance. Consider a contract for sale and delivery of a pair of matched earrings. The value of one of the earrings, as part of the pair, is likely to be more than its value by itself. Suppose that the contract is frustrated when the receiving party, the buyer, has had delivery to him of only one of the earrings. The lost value of that performance is the difference between the value of the earring he received as part of the pair and its value as a single unmatched earring. By reason of the frustration he has lost the right to receive the other earring. Without that right, the value of the earring which he has received is diminished.

7.9 We give a further illustration. Assume a contract under which the performing party is to install special machinery of his own design, which can be used by a process known only to him, and to give instruction in that process. Suppose that the contract is frustrated when the performing party has installed the machinery but has not given instruction in the process. The lost value of the received performance is the difference between the value of the machinery with the right to instruction in the process and the value of that machinery without that right. The lost value of the performance received may be substantial.

7.10 We recommend that where a performance has been received, but the value of that performance has been diminished (or destroyed) by reason of the frustration, the lost value of the performance should be set-off against the contract-related price for that performance. Thus the receiving party would pay only so much (if any) of the contract-related price for the received performance as remains after taking away the lost value of that performance.

7.11 The effect of this is not that the receiving party pays the value which the received performance has after frustration. He pays the contract-related price, which may be more or less than the value of the received performance would have been if there were no frustration, less the extent to which that value has been diminished by the discharge of the contract.

7.12 It may be helpful to illustrate this distinction. We do so by reference to our example of a contract to sell and deliver a pair of matched earrings. Assume these further facts. The contract price was $200. It was a bad bargain for the buyer because the pair of earrings would have had a resale value on the ordinary market of only $100. The contract is frustrated when only one of the earrings has been delivered. The resale value of the single earring delivered, sold without its mate, is only $20.

7.13 Under what we have recommended, the buyer as receiving party must pay the contract-related price less the lost value of the performance he received. The contract-related price is $100 (one-half of the contract price of $200 for the pair). We must now ascertain the lost value of the received performance. The value of the single earring which he received as part of the matched pair was $50 (one-half of $100). Its value after frustration is only $20. The lost value of the received performance, therefore, is $30. This must be set-off against the contract-related price ($100) for the received performance.

7.14 The receiving party therefore pays to the performing party $70. This is $50 more than the value after frustration of the single earring delivered to the receiving party. That value is only $20. We consider that it would be unjust to the performing party if the receiving party were to pay to him only $20. The performing party would, if that were the case, be deprived, in respect of the performance which the receiving party got, of the benefit of his good bargain as seller.

7.15 It is true, of course, that the receiving party, under what we have recommended, pays $70 for something which, after frustration, is worth only $20 and so he suffers a loss of $50 on the single earring which he received. But this is a loss which flows from his own bad bargain. It is not a loss caused by the

frustration. If the contract had been fully performed, the receiving party would have paid $200 for a pair of earrings worth $100 and so he would have incurred a loss of $100. We have chosen an example in which the receiving party made a bad bargain. But the same principle of justice applies where the receiving party made a good bargain. If he made a good bargain he should not be deprived of it in respect of so much of the promised performance as he received.

7.16 We go now to the third of the elements of our scheme-namely, provision for the cost which a party has incurred for the purpose of performing the contract. Before coming to our recommendations on this element we consider the nature of that cost. It includes money which the party has paid out for the purpose of performing the contract. For example, wades which the performing party has paid to staff engaged solely in work in performance of the contract are part of the cost. So too is money paid for the purchase of materials to be used solely for performing the contract.

7.17 But the cost incurred by the performing party should not be limited to expenditure of this type. It is common for a workman to be engaged during any one pay period on several of his master's contracts. Again, where a businessman orders materials it is common to order them in bulk so that he will have stocks for whatever contracts he has on hand. In many cases it would be difficult, perhaps impossible, fairly to apportion to any particular contract an appropriate part of this kind of expenditure by the performing party.

7.18 Moreover, the performing party may have incurred cost in other ways. He may, for example, have drawn materials from stock on hand before he made the contract. He may have himself done work for the purpose of performance of the contract. Further, there are the general overheads of his business. [7]

7.19 The cost incurred by a party to perform a contract may have many elements. A precise calculation of the cost of each of them may be difficult or impossible. We consider that that cost should be defined so that a fair sum for it can be ascertained without excessive investigation of each item of cost. We recommend that that cost be taken to be such amount as is fair compensation to the performing party for the burden he has incurred, acting reasonably, by paying money, doing work or doing or suffering any other thing, for the purpose of giving the performance. Precise identification, analysis and apportionment of each item of cost should not be necessary.

7.20 We now consider in what circumstances there should be an adjustment for the cost incurred by a party for the purpose of performing the contract, and what that adjustment should be.

7.21 We take, first, the case where there has been a received performance for which the receiving party must pay the performing party. Here we must ascertain the extent to which the cost incurred by the performing party was incurred for the purpose of giving the received performance [8] as distinct from performance which was not received. We refer to the cost incurred to this extent as the cost of the received performance.

7.22 It is necessary to ascertain the cost of the received performance because the performing party is entitled to be paid by the receiving party for the received performance. The amount of that payment is clearly relevant to the questions whether any adjustment should be made for the cost of the received performance and if so, what that adjustment should be.

7.23 Further, account must be taken of any property or improvement to property which the performing party has acquired or derived by incurring the cost of the received performance. The value of such property or such an improvement must be taken into account to the extent that it remains in the hands of the performing party-that is, to the extent that it was not comprised in the received performance or expended or exhausted in givinz the received performance. A manufacturer of chemicals, for example, may have on his hands, after making delivery of some of the product which he promised to deliver, valuable by-products from the manufacture of the product delivered. We take these remaining assets into account by setting off their value against the cost of the received performance.

7.24 For convenience, we coin another expression: "attributable cost". By attributable cost we mean so much of the cost of the received performance as remains after taking away from it the value of any

property or improvement to property which the performing party acquired or derived by incurring the cost of the received performance and which remains on his hands.

7.25 Where the attributable cost of a received performance does not exceed what the receiving party must pay to the performing party for that performance, we think that there should not be an adjustment for the attributable cost. Unless the attributable cost does exceed what the receiving party must pay for the received performance, the performing party does not ircur any loss in respect of the received performance. Indeed, if the attributable cost is less than what the receiving party must pay him for the received performance, the performing party makes a profit.

7.26 The receiving party, for his part, has no cause for complaint at the performing party making this profit. The receiving party is required to pay for the received performance only the residue of the contract-related price for that performance after taking away the lost value of the performance. If the performing party does make some profit, it is because he made a good bargain. So far as he makes a profit because of his good bargain from giving a performance which has been received, he should be allowed to keep it.

7.27 But where the attributable cost of the received performance does exceed what the receiving party must pay for that performance, the excess is a loss to the performing party and an adjustment should be made. We recommend that the burden of this loss should be shared equally between the performing party and the receiving party. In respect of this loss, justice is equality.

7.28 However the receiving party should not suffer because of wastefulness or extravagance on the part of the performing party. There is some protection against this in our recommendation [9] that the measure of the cost incurred by the performing party shall be fair compensation to him for the burden he has sustained in acting reasonably for the purpose of giving the received performance. But we consider that, for the purpose of ascertaining the amount of the excess to be shared by the parties of the attributable cost over what the receiving party must pay for the received performance, an upper limit should be set on the amount of attributable cost. The upper limit we recommend is the amount of the contract-related price for the received performance. If the attributable cost exceeds the contract-related price, it is because the performing party made a bad bargain. He alone should bear that excess.

7.29 It is convenient to summarize here our recommendations for adjustment for performance received and for cost incurred by the performing party in respect of that performance. In substance we recommend that-

> (a) the receiving party must pay to the performing party so much, if any, of the contract-related price as is left after taking away the lost value of the performance; and
> (b) if the attributable cost, reasonably incurred by the performing party, of that performance, but limited to the contract-related price, exceeds the amount so payable for the received performance, the excess must be shared equally between the performing party and the receiving party.

The consequences are these. Where the attributable cost, so limited, does not exceed the amount payable for the received performance, then, in respect of that performance, neither party suffers a loss caused by the frustration. The receiving party has part of the performance he bargained for. What he pays for it is only the contract-related price for that performance less any loss in the value of that performance caused by the frustration. Nor does the performing party suffer any loss in respect of that performance. What the receiving party pays him is not less than the attributable cost. But where the attributable cost does exceed the payment to be made for the received performance that excess is a loss and, on the principle of equality, that loss is shared.

7.30 We illustrate the operation of our recommendations by the following cases. In each of them it as assumed that the contract-related price is $10,000 and that the lost value of received performance is $7,000. The difference between the cases lies in the amount assumed for the attributable cost.

Case 1. Assume that the attributable cost is $1,000. What is left of the contract-related price ($10,000) after taking away the lost value ($7,000) is $3,000. The receiving party pays this sum. But, because the attributable cost is less than what is left of the contract-related price after taking away the lost value, no

adjustment is made in respect of the attributable cost. The receiving party, therefore, pays only the $3,000. He incurs no loss in making only this payment. The performing party, however, makes a profit of $2,000, since he receives the $3,000 although the attributable cost incurred by him is $1,000. This profit is part of the profit which he would have made if the contract had been fully performed.

Case 2. Assume that the attributable cost is $5,000. The receiving party pays $3,000 (the contract-related price less the lost value). But as the attributable cost ($5,000) exceeds the $3,000 (the contract-related price less the lost value), there is also an adjustment in respect of the attributable cost. The amount of the excess is $2,000. The receiving party pays half of this excess. He pays, therefore, a further $1,000. In all, the receiving party pays $4,000. He thereby bears a loss of $1,000, because the contract-related price of what he got, less the lost value, is only $3,000. On the other hand, the performing party also bears a loss of $1,000, because he receives only $4,000 although he incurred the attributable cost of $5,000. There is equality between the parties in the amount of the loss each bears.

Case 3. Assume that the attributable cost is $9,000. The receiving party pays $3,000 (the contract-related price less the lost value). But as the attributable cost ($9,000) exceeds the $3,000 (the contract-related price less the lost value), there is also an adjustment in respect of the attributable cost. The amount of the excess is $6,000. The receiving party pays half of this excess. He pays, therefore, a further $3,000. In all, the receiving party pays $6,000. He thereby bears a loss of $3,000, since the contract-related price of what he has got, less the lost value, is only $3,000. On the other hand, the performing party also bears a loss of $3,000, since he receives only $6,000 although he incurred the attributable cost of $9,000. As in Case 2, there is equality between the parties in the amount of the loss each bears.

7.31 No matter what the amount of the attributable cost, limited to the contract-related price, there is equality between the parties in the amount of the loss each bears, wherever the attributable cost exceeds what is left of the contract-related price after taking away the lost value.

7.32 These three cases are taken at random. They indicate the principles of the adjustment for the cost of a received performance. If the attributable cost does not exceed what the receiving party must pay for the received performance, there is no occasion for adjustment. There is no relevant loss. If, however, the attributable cost does exceed what the receiving party must pay for the received performance, there is a relevant loss. The burden of that loss is shared equally between the receiving party and the performing party. No matter what is the amount of the attributable cost, limited to the amount of the contract-related price, the adjustment gives the parties equality.

7.33 So far we have provided for cost incurred by a party only where that cost is the attributable cost of a received performance. But a party may have incurred cost which is not such an attributable cost. For example he may have incurred cost in partly building machinery which he promised to make and deliver yet, before frustration, he may not have delivered any of it. In respect of cost which a party has incurred for the purpose of performing any promise to another party but which is not such an attributable cost we consider that the principle of equality should apply and that, accordingly, the cost should be shared between those parties. We so recommend. On the other hand the party who incurred that cost may thereby have gained by acquiring or deriving property or an improvement to property. We recommend that the value of such a gain be shared between the parties who share the cost. Here again, it seems to us, justice is equality.

7.34 This scheme of adjustments for payments before frustration, for received performance, and for cost incurred for the purpose of performance is self-executing in the sense that the adjustments do not depend on a judicial discretion. In this respect our scheme stands in contrast to the scheme of the English Act. But our scheme would not be adequate, just, and reasonably practicable in every conceivable case. The field of contract is vast. It is not possible to devise any formula for adjustments which will be adequate and appropriate for every possible contingency and will necessarily be just in every conceivable case. Further, unusual cases may occur in which application of the scheme would be excessively difficult or expensive, or orders otherwise than for the payment of money will be needed.

7.35 In the following part of this report we recommend the exclusion from the scheme of a small number of classes of contract. There are special considerations that make it inappropriate to apply the scheme

to them. We are confident that, for the vast majority of other contracts, the scheme is adequate, just, and practicable. But something must be done for those rare cases in which the scheme would be inadequate, unjust or impracticable. In such cases there is a need for flexibility. The practical way of achieving this flexibility is to give to the court an overriding discretion, even though occasion for exercise of the discretion may rarely arise.

7.36 We recommend that where the court is satisfied that the terms of the contract or the events which have occurred are such that the self-executing scheme for adjustments is manifestly inadequate or inappropriate, would cause manifest injustice, or would be excessively difficult or expensive to apply, the court should be authorized to order that the scheme shall not apply and to substitute such adjustments in money or otherwise as it considers proper. We further recommend that the orders which the court may make should include-

(a) orders for the delivery or redelivery of any property;
(b) orders for the payment of interest; and
(c) orders as to the time when money shall be paid.

7.37 We give an illustration of a contract so special that the self-executing scheme would be unjust. A grazier agrees to sell and deliver to his son a mob of sheep. The father and the son realize that the son cannot pay for the sheep until he gets the proceeds of the sale of their wool and progeny for 3 years. The contract, accordingly, provides that payment shall not be made by the son until 3 years after the sheep are delivered. Some of the sheep are delivered on the day the contract is made, but later on the same day the contract is frustrated. The self-executing scheme requires the son to pay to his father the contract-related price for the sheep delivered. But it makes no provision for postponement of the time of that payment. Accordingly, if the scheme were applied, the son would have to pay for the sheep immediately upon frustration occurring, notwithstanding that under the contract he did not have to pay anything for 3 years. This would be unjust to the son. It is an appropriate case for exercise of a judicial discretion. It may be expected that an order would be made deferring the time when the son must pay for the sheep delivered to him.

FOOTNOTES

1. Other than money.
2. [1943] A.C. 32.
3. At p. 56.
4. S.1(3).
5. We have taken a case in which the assessment of the appropriate proportion of the contract price is merely a matter of arithmetic. In other cases assessment of the appropriate proportion may call for judgment. But experience in the United States indicates that the test is practicable. Section 468 of the American Restatement of the Law of Contracts provides that the receiving party shall pay for the “benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable proportion of the contract price” (emphasis added). It does not appear that the concept of a “ratable proportion of the contract price” has been unduly difficult to apply.
6. We discuss this concept more fully in Appendix F and compare it with the provision of the English Act that regard is to be had to the effect, in relation to a benefit obtained of “the circumstances giving rise to the frustration of the contract” (s.1(3)(b)).
7. S.1(4) of the English Act provides that “in estimating . . . the amount of any expenses incurred by any party to the contract, the court may . . . include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party”.
8. It may be, of course, that all the cost was incurred to this extent. Assume, for example, that the contract was for the manufacture and delivery of shirts, that some of the shirts were manufactured and delivered before frustration, and that the manufacturer had not started making the other shirts. In this case it may well be that the manufacturer has not incurred any cost other than that of manufacturing and delivering the shirts which were delivered before frustration.
9. Paragraph 7.19 above.

Part 8 - Excluded Contracts

8.1 We recommend that some classes of contract should remain governed by the present law and should therefore be excluded from the scheme of adjustment which we recommend for contracts generally.

8.2 The first class of excluded contracts comprises contracts made before the commencement of an Act founded on our draft Bill. The English Act was retrospective in that it applied to contracts whenever made, if frustration ocurred after a date about a month before the passing of the Act. But the English Act was passed in wartime and problems of frustration were frequent. As a rule changes in the law should not apply to cases arising before the law is changed. The present circumstances in New South Wales do not call for a departure from the rule. An Act founded on our draft Bill should therefore not apply to contracts made before the commencement of the Act.

8.3 We recommend that an Act founded on our draft Bill should follow the English Act in excluding from its application some charter-parties and other contracts for the carriage of goods by sea. Our draft Bill would, however, like the English Act, apply to a time charter-party and to a charter-party by way of demise.

8.4 A charter-party is a contract by which all or part of a ship is let for a specified voyage or a specified time. If for a specified voyage it is a voyage charter-party; if for a specified time a time charter-party. A charter-party may pass the possession and control of the ship to the charterer: if so, it is a charter-party by way of demise. A letting by charter-party is usually for the purpose of the carriage of goods but may be for the purpose of the carriage of passengers or for some other purpose, for example, towage, salvage, scientific research, prospecting for minerals. [1]

8.5 The exclusion we recommend of some charter-parties and of contracts (other than charter-parties) for the carriage of goods by sea accords not only with the English Act but also with the Acts of New Zealand, Victoria and British Columbia, and both Canadian uniform Acts. The Law Revision Committee in England drew attention to the common law regarding freight for sea cargo where, without fault of cargo owner or shipowner, the cargo is not delivered at the stipulated place: if the freight has been prepaid, none of it is recoverable; if the freight is payable on delivery, none of it is payable. However unfair this might seem, the Committee did not recommend any change: the rules were so firmly fixed that it would be undesirable to alter them. Time charter-parties, however, were different: as a rule they provided for an adjustment of hire if the ship were lost or became inefficient. It was probably an oversight that a like provision was not made in case of frustration. The Committee applied their general recommendations only to time charter-parties. It did not discuss charter-par-ties by way of demise.

8.6 Arguments for and against what has now become an established exclusion were considered by the Law Reform Commission of British Columbia. We have made our own inquiries in shipping circles in Sydney. As we see it, the arguments for adopting the exclusion are these-

(a) Uniformity of shipping laws with the law of England and of other common law countries in the Commonwealth of Nations is valuable.
(b) The risks of parties to the contracts in question are well understood by businessmen and are the basis of settled practices, particularly in relation to insurance.
(c) Shipping law is a specialized field. If reform is needed, it should be the subject of a special study, not as an incident of general reform of an aspect of the, law of contract.
(d) Shipping law is much controlled by federal and foreign statutes. The impact of applying frustrated contracts legislation to these contracts would raise difficult questions.
(e) If New South Wales alone applied its frustrated contracts legislation to these contracts, fears of unpredictable consequences (not the judicial discretions in our draft Bill), and difficult questions in the conflict of laws, would lead businessmen either to contract out of the legislation or to see that

their contracts were governed by some other system of law. The first course would add to the verbiage of shipping documents, the second would have a tendency to send business away from New South Wales.
(f) If frustrated contracts legislation were applied to these contracts, difficult questions of general average adjustment may arise between the three interests of ship, freight and cargo.

8.7 As we see it, the arguments for dropping the exclusion of these shipping contracts are these-

(a) The common law rules mentioned in paragraph 8.5 are unf air. Further, the law of other major trading countries of the. world are in this respect at variance with the common law.
(b) An exclusion of particular classes of contract from general legislation to the law of contract not only calls for special justification but also would give rise to awkward borderline cases. If a carrier contracts to move goods by surface transport from Broken Hill to Auckland, is the contract one for the carriace of goods by sea?

8.8 The arguments in paragraph 8.7 are attractive to a law reformer, but we think that the arguments the other way are overwhelming. Further, every one of those in shipping circles (both shippers and shipowners) in Sydney who, on invitation, gave us their views was in favour of adopting the exclusions. We recommend that the exclusions of shipping contracts be adopted.

8.9 We recommend that an Act founded on our draft Bill should not apply to a contract of insurance. All the Acts of other places, that is, those of the United Kingdom, New Zealand, Victoria, British Columbia, and both Canadian uniform Acts, make a like exclusion. All those who on invitation gave us their views, that is, certain organizations with insurance and shipping interests, thought that New South Wales should exclude contracts of insurance from frustrated contracts legislation. The people we consulted did not evenly represent both sides to contracts of insurance, but we can make good that unevenness by our own experience in legal practice and as holders of insurance policies.

8.10 The exclusion is of all kinds of contract of insurance. Thus life policies, personal accident policies and other policies not of indemnity are excluded, as well as indemnity policies such as marine policies, fire policies and third party liability policies. The common law deals well enough with cases where the policy is frustrated before the risk attaches. Suppose, for example, that a man whose life is insured dies before the risk attaches, or a house insured against fire bums down before the risk attaches. In such cases there is a total failure of consideration and the policy holder is entitled to repayment of the premium. This right to repayment can be taken away by a stipulation in the policy, but it is not usual to do so.

8.11 The real problem concerns a frustration of the policy after the risk has attached. It may be contended, for example, that a sickness policy (without death benefit) is frustrated if the assured dies during the term of the insurance, or that a fire policy on a house is frustrated if the house is destroyed by flood during the term of the insurance. It is a question whether these events would in law work a frustration. Death is a certainty, only its time is uncertain: its possibility during the term of the policy will be within the contemplation of the insurer and ought to be within the contemplation of the assured. ne destruction of the house by flood is outside the risk of the policy and precludes the possibility of destruction by fire and hence precludes a claim under the policy, but it is only one of many events which would preclude a claim. In both cases the assured gets all he contracted for, that is, protection against the risk of sickness or of fire. There is much to be said for the view that a subsequent event which takes away the risk does not frustrate the contract. We are concerned, however, not with the events which may work a frustration, but with the consequences of frustration.

8.12 Assuming that the doctrine of frustration has some significant application to contracts of insurance, the question is whether the consequences of frustration should be those of the common law or those provided for by the draft Bill. Since the premium is almost always prepaid, by the common law there is a case for repayment of the premium only if there is a total failure of consideration, that is, only if the contract is frustrated before the insurer is at risk.

8.13 As we see it, the arguments in favour of applying the draft Bill to contracts of insurance are-

(a) an exclusion of any class of contract from the general scheme ought not to be made unless there is a clear affirmative case for the exclusion;
(b) where an uncontemplated event relieves the insurer of his risk, that relief should not be a windfall profit to the insurer at the expense of the assured.

8.14 As we see it the arguments against applying the draft Bill to contracts of insurance are-

(a) The common law provides a clear and simple rule which is well understood, does not complicate the fixing of premium rates, and generally facilitates business, to the advantage of both sides.
(b) To speak of a windfall profit to the insurer is merely to indulge in rhetoric. It is of the essence of insurance that the assured buys protection from uncertainties and the insurer takes not only the risk but also the advantage of future events. [2]
(c) There are advantages in the uniformity which now prevails throughout England, Australia, Canada, New Zealand and other places which retain the common law.
(d) The question is really only concerned with the return of part of the premium. Premiums are small compared to the amount of claims when risks eventuate. The price of applying the scheme, in the shape of complexity and uncertainty, is too high in comparison with the sums involved.
(e) Insurers prefer the common law and, if the scheme is applied, will contract out of it or will see that their contracts are governed by some foreign law.
(f) Insurance business is a special field of business and is much regulated by statute. The statutes assume the existence of the common law. The law should not be changed except as part of a review of insurance law generally.

8.15 We are persuaded by the arguments in paragraph 8.14 that contracts of insurance should be excluded from the draft Bill.

8.16 The English and New Zealand Acts also exclude some contracts for the sale of goods. The Acts of Victoria and British Columbia do not. The reason for not having such an exclusion, with which we concur, are well stated in the British Columbia report. [3] Briefly, the wording of the relevant provision is obscure, it draws unnecessary distinctions, and there is no reason why contracts for the sale of goods should be treated differently from the generality of other contracts.

8.17 We recommend that an Act founded on our draft Bill should not apply to contracts constituting and regulating societies and corporations, where the alleged frustrating event furnishes a case for the winding up or dissolution of the society or cowration under the existing law. [4]

FOOTNOTES

1. See generally Halsbury's Laws of England, 3rd edn., Vol. 35 (1961), p. 248; Carver's Carriage by Sea, 12th edn., Vol. 1 (1971), paras. 318-325; Scrutton on Charterparties and Bills of Lading, 18th edn. (1974), pp. 45-50.
2. Larrinaga & Co. Ltd v. Sociiti Franco-Amdricaine des Phosphates de Uedulta, Paris (1923) 29 Com. Cas. 1, 18, 19.
3. Pages 35-37.
4. See In re Lead Company's Workmen's Fund Society [1904] 2 Ch. 196.

Part 9 - Conclusion

9.1 The draft Bill in Appendix A expresses our recommendations in legislative form. It is based on the law as it was on the 1st of January, 1976. Notes on the draft Bill appear in Appendix B.

Approved by the Commission in meeting on 23rd June, 1976.

C. L. D. MEARES,
Chairman.

R.D.CONACHER,
Deputy Chairman.

25th June, 1976.

Appendix A - Draft Bill

ARRANGEMENT

PART V.-AMENDMENT OF ACTS

Section 24-Amendment of Acts.

SCHEDULE-AMENDMENT OF ACTS

A DRAFT BILL FOR AN ACT

To amend the law relating to frustrated contracts; and to amend the Limitation Act, 1969, the Courts of Petty Sessions (Civil Claims) Act, 1970, and the District Court Act, 1973.

BE it enacted etc.

PART I.-PRELIMINARY.

1. This Act may be cited as the “Frustrated Contracts Act, 1976”. Short title.

2. This Act shall commence on the 1st of January, 1977. Commencement.

3. This Act is divided as follows- Division of Act.

PART I.-PRELIMINARY-SS. 1-6.
PART II.-EFFECT OF FRUSTRATION-SS. 7-9.
PART III.-ADJUSTMENT ON FRUSTRATION-SS. 10-18.

DIVISION l.-Application-s. 10.

DIVISION 2.-Adjustment for performance received-ss.11-14.

DIVISION 3.-Other adjustments-ss. 15-17.

DIVISION 4.-Adjustment by the court-s. 18.

PART IV.-ACTION IN PETTY SESSIONS: REMOVAL INTO DISTRICT COURT-SS. 19-23.
PART V.-AMENDMENT OF ACTS-S. 24.

SCHEDULE

4. This Act binds the Crown, not only in right of New South Wales, but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities. The Crown. 1943 c.40 s.2(2).

5. (1) In this Act, except in so far as,.the context or subject-matter otherwise indicates or requires- Interpretation.

“agreed return”, in relation to performance of a contract by a party, means performance by another party contemplated by the contract as consideration for the firstmentioned performance;

“court”, in relation to any matter, means the court or arbitrator by or before whom the matter falls to be determined; 1943 c.40 s.3(2).

“frustration” includes avoidance under section 12 of the Sale of Goods Act, 1923;

“party”, in relation to a contract, means a party to the contract and includes the assigns of a party to the contract;

“paying party” has the meaning given by subsection (2);

“performance”, in relation to a contract, means-

(a) performance, wholly or in part, of a promise in the contract; or
(b) fulfilment, wholly or in part, of a condition of or in the contract;

“performing party” has the meaning given by subsection (2).

(2) Where, by a contract, performance by a party has an agreed return and the agreed return is performance by another party, then, in this Act, in relation to the performance by the first party, but except in so f ar as the context or subject-matter otherwise indicates or requires-

“performing party” means the first party;

“paying party” means the other party.

(3) For the purposes of this Act, performance is given and received if received as contemplated by the contract, whether received by a party or by anoither person.

(4) For the purposes of this Act, but except in so far as the context or subject-matter otherwise indicates or requires, a thing done, suffered or received by a party to a contract which has been frustrated, after the time of frustration but before he knows or ought to know of the circumstances (whether of fact or law) giving rise to the frustration, has effect as if done, suffered or received before the time of frustration.

(5) It is the intention of Parliament that, except so far as otherwise agreed, a court may exercise the powers given to a court by Part III of this Act, or like powers, in proceedings properly within its jurisdiction, notwithstanding that the court is not a court of New South Wales.

6. (1) This Act does not apply to- Application.

(a) a contract made before the commencement of this Act; B.C. Act, 1974 c.27 s.1(2)(c).

(b) a charter-party, except a time charter-party and except a charter-party by way of demise; 1943 c.40, s.2(5)(a).
(c) a contract (other than a charter-party) for the carriage of goods by sea; or 1943 c.40, s.2(5)(a).
(d) a contract of insurance. 1943 c.40, s.2(5)(d).

(2) This Act does not apply to a contract embodied in,or constituted by the memorandum or articles of association or rules or other instrument or other agreement, constituting, or regulating the affairs of any of the forowingbodies-

(a) a company within the meaning of the Companies Act, 1961;
(b) a credit union registered under the Credit Union Act, 1969;
(c) a society registered under-
(i) the Building and Co-operative Societies Act, 1901;
(ii) the Co-operation Act, 1923;
(iii) the Friendly Societies Act, 1912; or
(iv) the Permanent Building Societies Act, 1967;
(d) a trade union registered under the Trade Union Act, 1881;
(e) a partnership within the meaning of the Partnership Act, 1892; or
(f) any association which, on a proper case arising, is liable to be wound up or dissolved by order of the Supreme Court of New South Wales-

in any case in which the circumstances alleged to give rise to frustration of the contract furnish a case for the winding up or dissolution of the body.

(3) Where a contract is severable into parts and one or more but not all parts are frustrated, this 1943 c.40, s.2(4).

Act does not apply to the part or parts not frustrated.

PART II.-EFFECT OF FRUSTRATION.

7. This Part applies where a contract is frustrated, except so far as otherwise agreed — Application.

8. (1) Where a promise in the contract is due for performance but has not been performed before the time of frustration, the promise shall ibe discharged, save so far as is necessary to support a claim for damages forbreach of the promise before the,time of frustration. — Promise not performed.

(2) Subsection (1) does not affect a pronuse which would not be discharged by the frustration if it were due for performance after the time of frustration.

9. (1) Subject to subsection (2), frustration of a contract does not,affect a liability for damages for breach of the contract which has accrued before the time of frustration. — Damages for breach before discharge.

(2) Where a liability for damages for breach of contract has accrued before the time of frustration, and after the time of frustration there is occasion to assess damages for that liability, regard shall be had in assessing damages to the fact that the frustration has occurred.

PART III.-ADJUSTMENT ON FRUSTRATION.

DIVISION 1.-Application.

10. This Part applies where a contract is frustrated, except so far as otherwise agreed. — Application.

DIVISION 2.-Adjustment for performance received.

11. This Division applies where all or part of the performance to be given by a performing party has been received before the time of frustration. — Application.

12. (1) Where all of the performance to be given under the contract by the performing party has been received before the time of frustration, the paying party shall pay to the performing party an amount equal to the value of the agreed return. — Payment for performance received.

(2) Where part but not all of the performance to be given under the contract by the performing party has been received before the time of frustration, the paying party shall pay to the performing party an amount equal to a part of the value of the agreed return proportionate to the extent to which that performance has been so received.

(3) Subsection (2) is subject to section 13.

13. (1) Where- — Loss of value of performance.

(a) but for this section an amount would be payable under section 12 (2); but
(b) the value of the performance received has been reduced by reason of the frustration-

there shall be payable under section 12 (2) only so much if any of that amount as remains after taking away the amount of that reduction.

(2) For the purpose of this section, the value of performance received shall be assessed as at a time just before the time of frustration and on the basis that the frustration will not happen.

14. (1) Where section 13 (1) applies, the paying party shall pay to the performing party an amount equal to one half of the amount if any which remains of the attributable cost after taking away the amount if any payable under section 12 (2) pursuant to section 13 (1). — Allowance for cost.

(2) For the purpose of subsection (1), attributable cost shall be assessed as follows-

(a) the attributable cost shall be no more than the amount mentioned in section 12 (2); and
(b) subject to paragraph (a), the attributable cost shall be such amount if any as remains of a reasonable cost after taking away the value of any incidental gain.

(3) For the purpose of subsection (2) (b)

(a) “reasonable cost” means an amount which is fair compensation to the performing party for any burden incurred by him, acting reasonably, by paying money, doing work or doing or suffering afty other thing, to the extent incurred for the purpose of giving the performance received; and
(b) “incidental gain” means any property or improvement to property acquired or derived by the performing party by incurring that burden to that extent, except so far as the property or improvement so acquired or derived is comprised in the performance received or is expended or exhausted in giving the performance received.

DIVISION 3.-Other adjustments.

15. Where- Money paid.

(a) a party has paid a sum of money to a party or to another person in performance of the contract; and
(b) the payment is or is part of an agreed return for performance by a party-

the lastmentioned party shall pay a like sum to the party who paid the sum as mentioned in paragraph (a).

16. (1) Where a performing party, acting reasonably for the purpose of any performance, has incurred a burden by paying money, doing work or doing or suffering any other thing, the paying party shall pay to the performing party half of an amount which is fair compensation to the performing party for the burden so incurred. Cost not for performance received.

(2) Subsection (1) does not apply to a burden incurred to the extent to which the party incurred the burden for the purpose of performance which has been received.

17. Where a performing party has acquired or derived any property or improvement to property, by incurring a burden to which section 16 (1) applies, the performing party shall pay to the paying party half of the value of the property or improvement so acquired or derived. Derivative gain.

DIVISION 4.-Adjustment by the court.

18. (1) Where the court is satisfied that the terms of the contract or the events which have occurred are such that, in respect of the contract- Adjustment by the court.

(a) Divisions 2 and 3 are manifestly inadequate or inappropriate;
(b) application of Divisions 2 and 3 would cause manifest injustice; or
(c) application of Divisions 2 and 3 would be excessively difficult or expensive-

the court may order that Divisions 2 and 3 shall not apply in respect of the contract and, subject to subsection (8), may, by order, substitute such adjustments in money or otherwise as it considers proper.

(2) Orders which the court may make under subsection (1) include-

(a) orders for the payment of interest; and
(b) orders as to the time when money shall be paid.

(3) In addition to its jurisdiction under subsections (1) and (2), the Supreme Court or the District Act No.60, 1970,

Court may, for the purposes of this section, make orders for- s.37(6).

(a) the making of any disposition of property;
(b) the sale or other reahsation of property;
(c) the disposal of the proceeds of sale or other realisation of property;
(d) the creation of a charge on property in favour of ,any person;
(e) the enforcement of a charge so created;
(f) the appointment and regulation of the procdedings of a receiver of property; and
(g) the vesting of property in any person.

(4) Sections 78 and 79 of the Trustee Act, 1925, apply to a vesting order, and to the power to make a vesting order, under subsection (3). Act No.60, 1970, s.37(9).

(5) Section 78 (2) of the Trustee Act, 1925, applies to a vesting order under subsection (3) as if subsection (3) were included in the provisions of Part III of that Act. Act No.60, 1970, s.37(10).

(6) In relation to a vesting order of the District Court, sections 78 and 79 of the Trustee Act, 1925, shall be read as if “Court” in those sections meant the District Court.

(7) Subsections (2) to (6) do not limit the generality of subsection (1).

(8) This section does not authorise a court of petty sessions to give a judgment otherwise than for the payment of money.

PART IV.-ACTION IN PETTY SESSIONS: REMOVAL INTO DISTRICT COURT.

19. In this Part, “proclaimed place” and “nearest proclaimed place” have the meanings which they have in the District Court Act, 1973. Interpretation.

20. (1) Where an action for the recovery of money under Part III of this Act is pending in a court of petty sessions, the District Court may, on application by a party to the action, order that the action be removed into the District Court sitting at such proclaimed place as the District Court may specify in the order. Removal generally. Act No.9, 1973, s.143(1), (2).

(2) Subject to section 23 (6), the District Court may make an order under subsection (1) upon such terms as to payment of costs, giving of security for any amount claimed or for costs, or otherwise, as the District Court thinks fit. Act No.9, 1973, s.145.

(3) An order of removal under subsection (1) shall take effect on service of a copy of the or-der on the registrar of the court of petty sessions or on earlier notification of the order to the registrar of the court of petty sessions in such manner as the District Court may direct. Act No.9, 1973, s.145(2).

(4) Subject to section 23 (5), an order for removal under subsection (1) shall not affect the validity of any order made or other thing done in the action before the order for removal takes effect. Act No.9, 1973, s.147(1), (2)(a).

(5) Where the District Court has made an order for removal under subsection (1), -the applicant for the order shall, within 10 days after the making of the order or within such other time as the District Court may direct, and, if the applicant defaults, any other party may, lodge with the registrar of the District Court for the place specified in the order for removal a copy of each document filed in the,action in the court of petty sessions. Act No.11, 1970, s.12(3); Act, No.9, 1973, s.144(1)(a), (2)(a).

21. (1) Where an application is pending in the District Court for an order under section 20 for removal of an action in a court of petty sessions, the District Court may make orders for a stay of proceedings in the action. Stay of proceedings in petty sessions. Act No.9, 1973, s.146(1).

(2) An order under subsection (1) for a stay of proceedings shall take effect on service of a copy of the order on the registrar of the court of petty sessions or on earlier notification of the order to the Act No.9, 1973, s.146(2).

registrar of the court of petty sessions in such manner as the District Court may direct.

Place for application for removal or stay.

22. (1) Proceedings in the District Court for an order under section 20 for removal of an action in a court of petty sessions, or for a stay under section 21 of proceedings in an action in a court of petty sessions, shall be commenced at the nearest proclaimed place to the court of petty sessions.

Act No.9, 1973, s.136.

(2) Where proceedings to which subsection (1) applies are commenced at a proclaimed place that is not a place at which they ought, under subsection (1), to have been commenced, the District Court may, on the application of a party to the proceedings or without any such application-

(a) order that the proceedings be continued in the District Court notwithstanding that they were commenced at that place;
(b) order a change of venue of the proceedings, under section 40 of the District Court Act, 1973, to such other proclaimed place as the District Court thinks proper;or
(c) strike out the proceedings.

Proceedings after removal.

23. (1) This section applies on the taking effect of an order under section 20 for the removal of an action in a court of petty sessions into the District Court.

(2) The action shall be removed out of the court of petty sessions into the District Court.

(3) The action shall continue-

(a) as proceedings in the District Court under section 134A of the District Court Act, 1973; and
(b) as if the action had been commenced as proceedings in the District Court-

Act No.11, 1970, s.12(4); Act No.9, 1973, s.144(1)(b), (2)(b).

(i) at the place specified in the order for removal; and
(ii) on the date on which the plaint commencing the action was filed in the court of petty sessions.

(4) Subsection (3) has effect subject to-

(a) the District Court Act, 1973, and the rules made under that Act; and

Act No.11, 1970, s.12(4).

(b) any order of the District Court as to procedure.

Act No.9, 1973, s.147(1)(c), (2)(b).

(5) Any order made in the action by the court of petty sessions shall be liable to be set aside or varied, and shall be subject to appeal, as if made by the District Court.

(6) Any costs payable under the District Court Act, 1973, or under an order of the District Court, in respect of any step in the action in the court of petty sessions shall be limited as may be prescribed by rules made under the Courts of Petty Sessions (Civil Claims) Act, 1970.

PART V.-AMENDMENT OF ACTS.

Amendment of Acts. Schedule.

24. Each Act specified in Column 1 of the Schedule is amended in the manner set forth opposite that Act in Column 2 of the Schedule.

SCHEDULE.
AMENDMENT OF ACTS.

Sec.24

Year and number of Act.	Short title of Act.	Amendment.

1969, No.31	Limitation Act, 1969.	Section 14A- After section 14 insert:- 14A. An action on a cause of action arising under Part III of the Frustrated Contracts Act, 1976, by virtue of the frustration of a contract, is not maintainable if brought after the expiration of a limitation period of six years running from the date of the frustration.	Frustrated contract.
1970, No.11	Courts of Petty Sessions (Civil Claims) Act, 1970	Section 12(1A)- After section 12 (1) insert:- (1A)Subject to this Part, a court shall have jurisdiction to hear and determine actions for the recovery of money under Part III of the Frustrated Contracts Act, 1976, in which the amount claimed is not more than five hundred dollars, whether on a balance of account or after an admitted set-off or otherwise. Section 84 (1) (fa)- After section 84 (1) (f), insert:- (fa) prescribing limits of costs for the purposes of section 23 (6) of the Frustrated Contracts Act, 1976;	
1973, No.9	District Court Act, 1973	Section 3- In the matter relating to Part III, Division 8, Subdivision 2, omit *"and equity",* insert instead *"equity and other".* PART III, DIVISION 8, *Subdivision 2*- In the heading, omit *"and equity",* insert instead *", equity and other".* Section 134A- After section 134, insert:- 134A. The Court shall have the same jurisdiction as the Supreme Court, and may exercise all the powers and authority of the Supreme Court, in proceedings under Part III of the Frustrated Contracts Act, 1976, where the claim does not exceed $20,000 in amount or value, as determined by the Court. Section 135 (3)- After section 135 (2), insert:- (3) Proceedings in the Court under Part III of the Frustrated Contracts Act, 1976, shall be commenced- (a) where a defendant is resident or carries on business at a place in New South Wales-at the nearest proclaimed place to that place; or (b) where paragraph (a) does not apply at Sydney.	Frustrated contract.

Appendix B - Note on the Draft Bill

Section 5-Interpretation

1.1 Subsection (1) - “agreed return”. By speaking of “performance by another party contemplated by the contract as consideration”, the definition adopts the sense of consideration which the word has in the law relating to the total failure of consideration. [1]

1.2 Subsection (1) - “performance”. The purpose of paragraph (b) of the definition is to make it clear that the scheme for adjustments extends to fulfilment of a condition which is not also a promise. Thus, to take a trivial example, a man who gains entrance to the spectators’ area at a sports ground through a coin-operated turnstile to see a football game makes some sort of contract with those conducting the game. But he has made no promise to pay his entrance money: payment is a mere condition of what is promised by the other party. The adjustments to be made where frustration occurs should be the same as if he paid the entrance money in performance of a promise in the contract to do so.

1.3 Subsections (2) and (3). It may be helpful if we illustrate the concepts in these subsections. If I make a promise to you that I shall give you two dozen lemons from my tree in return for vou polishing my car, then, so f ar as concerns the gift of the lemons, I am the “performing party”, the “agreed return” is the polishing of my car, and you are the “paying party”’ But it does not matter whether I promised you that I would give the lemons to you or to someone else. Thus if what I promised you I would do is to give the two dozen lemons to X, I am still “the performing party”, the “agreed return” is still the polishing of my car, and you are still the “paying party”. If the contract is frustrated when I have given some of the lemons to X, it is you who should make the appropriate payment to me for them-not X. Subsection (3) leaves you with no argument that although, in giving some of the lemons to X, I gave some performance of our contract, this was not a performance which you received.

1.4 Subsection (4). A contract is frustrated immediately upon the occurrence of the frustrating events. Discharge is not postponed until the parties become aware of what has happened. Difficult problems [2] can arise as to the rights and liabilities of the parties in respect of things which one of them does after the contract has been frustrated, in the reasonable but mistaken belief that the contractual obligations are still in force. Subsection (4) implements the view which we take that the fair thing to do is to put the parties in the position in which they would have been if what has been done had been done before the contract was frustrated.

1.5 Subsection (5). It is beyond the legislative powqr of the State to give powers to a foreign court or a court exercising federal jurisdiction. But there is the further question how far a foreign court applying the English rules of the conflict of laws would, in a case governed by the laws of New South Wales, exercise powers similar to the powers given to the courts of New South Wales by the law of New South Wales. The reported cases are few, but the better view may be that the foreign court would do so unless it appeared that the law of New South Wales intended that the powers would be special to the courts of New South Wales or some of them. [3] A court exercising federal jurisdiction outside New South Wales would be in a position similar to that of a foreign court, [4] and a court exercising federal jurisdic tion in New South Wales would have powers like those of a New South Wales court in a like case. [5] It is useful to have subsection (5) in order to give grounds for the exercise, by foreign courts and courts exercising federal jurisdiction outside New South Wales, of powers like those given by the Bill to the courts of New South Wales.

Section 7-Application of Part II

2.1 Where a contract contains provisions for the adjustment of the obligations of the parties if performance of other provisions of it becomes impossible by reason of supervening events or if the agreed basis for performance of those other provisions is destroyed by supervening events, the contract is not frustrated by the occurrence of those events. The Bill does not apply to the contract. It applies only to contracts which have been frustrated.

2.2 Section 7 is directed to another possibility. It is that the parties to a contract which has been frustrated, may, by the same or a separate contract, whether made before or after the frustration, have agreed on the consequences, or some of the consequences, of the frustration. The effect of section 7 is that the Bill does not override such an agreement.

Section 8-Promise not performed

3.1 We agree with the British Columbia Law Reform Commission that since "the purpose of frustrated contracts legislation is to provide a fair formula for adjusting the overall positions of the parties once the doctrine of frustration becomes applicable, the legislation should deal with obligations that were due to be performed before the frustrating event occurred, but which were unperformed." [6] We consider that, subject to the qualifications noted below, it should be provided that a promise due for performance before the time of discharge, but not performed, shall be discharged. If an obligation due for performance before frustration were to remain binding notwithstanding the frustration, prima facie that obligation ought to be performed. That performance would itself call for adjustment. It is better that such an obligation be discharged and the fact of discharge taken into account in the adjustments for performance before frustration.

3.2 There are two qualifications. The first is that such a promise should be kept on foot so far as is necessary to support a claim for damages for breach of the promise before the time of discharge. Thus, for example, if the promise was to deliver an urgently needed machine part forthwith, but the part had not been delivered when frustration afterwards occurred, and the party who was to receive the machine part suffers damage by reason of the failure, which endured to the time of frustration, to deliver the part, frustration should not bar recovery by him of damages in respect of that failure.

3.3 There is another qualification. Section 8 is directed only to an obligation due for performance before frustration. It is not directed to a future obligation. The rule of the common law is that frustration discharges a future obligation. Statutory provision for such an obligation is not necessary. We have noted, [7] however, the possibility of common law exceptions to the rule that frustration discharges a future obligation. For example, an obligation not to reveal trade secrets may not be discharged. If a contract which is frustrated contains a promise of such an exceptional kind, it is desirable for conformity that such a promise due for performance before frustration should not be discharged by section 8 (1). Section 8 (2) is intended to have this effect.

3.4 We do not know to what extent the common law will evolve exceptions of the type referred to in the last paragraph. Section 8 (2) merely takes account of the possibility. We recognize that, in relation to any such exception, justice may require some recompense to be made for performance after frustration of the promise concerned. The Bill does not make specific provision for recompense. It may be that the common law will give an appropriate remedy to the performing party. But if it does not do so, the performing party will be able to seek redress under section 18 of the draft Bill.

Section 9-Damages for breach before frustration

4.1 It may be helpful if we illustrate the need for subsection (2). We do so by reference to the illustration which we gave in the notes to section 8 of a contract for the delivery forthwith of an urgently needed machine part. Upon frustration of the contract, the supplier ceased to be bound to deliver the part. The damages recoverable by the party who should have obtained the delivery before the contract was frustrated must take this into account. The damages should not include loss referable to failure to deliver the part after frustration occurred.

Section 13-Loss of value of performance

5.1 This section provides for adjustment for any reduction, caused by the frustration, of the value of performance received before frustration. To fix the amount of the reduction it is necessary, flrst, to ascertain what was the value of the received performance immediately before it was reduced by reason of the frustration. Subsection (2) so provides.

5.2 The subsection also provides that the assessment of the value before frustration shall be on the basis that the frustration win not happen. This makes clear the concept of a reduction of value caused by frustration: that reduction is the loss of value of the received performance which flows from the fact that because of the frustration, the paying party is not entitled to performance of the promises made to him. Thus if the contract was to deliver a pair of matched earrings but only one of the earrings was delivered before frustration, the value of the received performance is the value of the one earring with the right to the other. The loss of value of this received performance is the difference between the value of the one earring with the right to the other and the value of that earring without the right to the other.

5.3 The section applies whether the value of the performance was lost wholly or in part. But it takes no account of the extent, if any, to which the performance received is, by reason of the frustration, not an asset but a burden. It may be helpful if we illustrate the point. Take this case. A builder agrees with the owner of a house to add a storey to the house. This involves demolishing the existing roof. When the builder has demolished the roof, the contract is frustrated by a change in the law by which the addition of a storey is prohibited. In this case the demolition of the roof is a burden rather than an asset to the owner.

5.4 We do, not consider that any adjustment should be made between the parties in respect of such a burden, as distinct from an adjustment for total loss of the value of the received performance. Such an adjustment would go beyond reasonable expectation of what the law would provide. For example, in the case we have just discussed we consider that the builder would be entitled to feel outraged if he found that the law required him to contribute to the cost of restoring the roof.

Sections 19-23-Action in petty sessions: removal into District Court

6.1 Proceedings under an Act founded on the draft Bill may be complex, or some relief may be claimed which is beyond the powers of a court of petty sessions. [8] We have therefore put in provisions for removal of proceedings, from a court of petty sessions into the District Court. There are already sufficient powers of transfer between the Supreme Court andthe District Court. [9]

FOOTNOTES

1. See paragraph 7.3 of the report.
2. For example, if the frustrating event is the making of a regulation under an Act, and one of the parties, in ignorance of the fact that the regulation has been made, pays to the other party money which but for the frustration of the contract would have been payable under it, it may be that he cannot recover the money because the money was paid under a mistake of law rather than a mistake of fact.
3. Kornatzki v. Oppenheimer [1937] 4 All E.R. 133, 138F-139A; Phrantzes v. Argenti [1960] 2 Q.B. 19, 35. And see Johannesburg Municipal Council v. D. Stewart & Co. (1902) Ltd 1909 S.C. (H.L.) 53, 47 Sc-L.R. 20; Heyman v. Darwins Ltd [1942] A.C. 356, 380. See also Dicey & Morris: The Conflict of Laws, 8th edn (1967), p. 1073; Nygh: Conflict of Laws in Australia, 2nd edn (1971), P. 296; McNair (1944) 60 L.Q.R. 160, 161, 162; Falconbridge in (1945) 23 Can. Bar Rev. 60; Webb (1960) 23 M.L.R. 446, 450, note 14; Carter (1960) 36 B.Y.B.I.L. 414.
4. Judiciary Act 1903, s. 79; Nygh: Conflict of Laws in Australia, 2nd edn (1971), at pp.777-784.
5. Judiciary Act 1903, s. 79; Huddart Parker Ltd v. The Ship Mill Hill (1950) 81 C.L.R. 502, 507, 508.
6. Report of the British Columbia Law Reform Commission, p. 33.
7. Report paragraphs 3.3, 3.4.

8. See section 18 of the draft Bill, especially subsection (8). See also the Schedule to the draft Bill, amendments to the Courts of Petty Sessions (Civil Claims) Act, 1970, and to the District Court Act, 1973.
9. District Court Act, 1973, ss. 143-147.

Appendix C - The English Act

CH. 40. Law Reform (Frustrated Contracts) Act 1943. 6 & 7 GEO. 6.

CHAPTER 40.

An Act to when the law relating to the frustration of contracts. [5th August, 1943.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

Adjustment of rights and liabilitites of parties to frustrated contracts.

1.-(l) Where a contract governed by English law has become impossible of performance or been otherwise frustrated, and the parties thereto have for that reason been discharged from the further performance of the contract, the following provisions of this section shall, subject to the provisions of section two of this Act, have eff ect in relation thereto.

(2) All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.

(3) Where any party to the contract has, by reason c anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular-

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained of recoverable by that party under the last foregoing subsection, and
(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

(4) In estimating, for the purposes of the foregoing provisions of this section, the amount of any expenses incurred by any party to the contract, the court may, without prejudice to the generality of the said provisions, include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the said party.

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract,

become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

(6) Where any person has assumed obligations under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court may, if in all the circumstances of the case it considers it just to do so, treat for the purposes of subsection (3) of this section any benefit so conferred as a benefit obtained by the person who has assumed the obligations as aforesaid.

Provision as to application of this Act.

2.-(1) This Act shall apply to contracts, whether made before or after the commencement of this Act, as respects which the time of discharge is on or after the first day of July, nineteen hundred and forty-three, but not to contracts as respects which the time of discharge is before the said date.

(2) This Act shall apply to contracts to which the Crown is a party in like manner as to contracts between subjects.

(3) Where any contract to which this Act applies contains any provision which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the said provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision.

(4) Where it appears to the court that a part of any contract to which this Act applies can properly be severed from the remainder of the contract, being a part wholly performed before the time of discharge, or so performed except for the payment in respect -of that part of the contract of sums which are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract and had not been frustrated and shall treat the foregoing section of this Act as only applicable to the remainder of that contract.

(5) This Act shall not apply-

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or
(b) to any contract of insurance, save as is provided by subsection (5) of the foregoing section; or
(c) to any contract to which section seven of the Sale of Goods Act, 1893 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale, or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

56 & 57 Vict. c.71.

Short title and interpretation.

3.-(1) This Act may be cited as the Law Reform (Frustrated Contracts) Act, 1943.

(2) In this Act the expression “court” means, in relation to any matter, the court or arbitrator by or before whom the matter falls to be determined.

Appendix D - Note on the British Columbia Report

1. We discuss here those elements of the scheme of the British Columbia Law Reform Commission which bear upon what is to be paid by a party where another party has performed, or partly performed, a promise to him under the contract. We are concerned with the substance of the proposals as they are expounded in the report rather than with the language of the Frustrated Contracts Act (British Columbia) which was enacted in consequence of the report. [1]

2. The substance of the proposals, as we understand them, is as follows. The promisee pays money to the promisor in restitution for what the promisor has done by way of performance or part performance of the promise. For the purpose of determining the amount of this restitution, it is not relevant to see whether the promisee received any benefit from what the promisor did in performance or part performance. [2] This means that it is not relevant to see whether the whole or any part of what was done reached [3] the promisee.

3. Restitution is on the basis of the expenditure incurred in performance. [4] On the other hand, account should be taken of any benefits which remain in the hands of the promisor. [5] This means, as we understand it, that the promisee pays to the promisor so much of the cost incurred by the promisor in performance as remains after taking away from it the value of any benefits, such as goods the promisor made before frustration but did not deliver, which remain in the hands of the promisor after the frustration. In short, the promisee pays the promisor the net cost incurred by the promisor in performance. [6]

4. There is, however, a further adjustment which is to be made wherever, owing to the circumstances that gave rise to the frustration, [7] what the promisor has done in performance of the promise is of no value to the promisee or is less in value than the amount which the promisee must pay the promisor in restitution for what the promisor has done. If what the promisor has done is, owing to these circumstances, of no value to the promisee, the loss to the promisee is the whole amount of what he pays in restitution. If what the promisor has done is of some value to the promisee, but less than the amount which the promisee must pay in restitution, the promisee's loss is the difference between these amounts. The loss is apportioned equally between the promisor and the promisee. [8]

5. It it noteworthy that the whole of the net cost reasonably [9] incurred by the promisor in performance of his promise is taken into account. It is not limited by reference to such considerations as whether the promisor has received, or was entitled to receive, a payment from the promisee before frustration or whether the promisor has himself received any performance by the promisee of some promise made by the promisee. The British Columbia scheme treats such considerations as irrelevant. We agree.

6. We have benefited greatly from study of the report of the British Columbia Law Reform Commission. We do not, however, wholly adopt the approach made by it. It seems to us that the approach has two main drawbacks.

7. The first is that as the basis of the scheme is, in substance, reimbursement for cost, the amount paid by the promisee for the performance given by the promisor is not directly related to what he promised to pay for a complete performance by the promisor. This could lead to results which, to us, seem unjust. For example, the contract may have been a good bargain by the promisor in that his costs would have been low in comparison with the price for complete performance. Assume that the contract was nearly fully performed by the promisor before frustration occurred. We do not think it just to limit the amount which the promisee must pay the promisor to the relatively small amount of cost incurred by the promisor. [10]

8. The second main drawback is that, although the scheme makes comprehensive provision for cost incurred in performance, it does not, as we understand it, make any provision for cost incurred, not in performance, but for the purpose of giving performance.

9. It may be helpful if we illustrate the distinction. If the contract is to build a machine, every nut and bolt fitted to the machine is something done in performance. of the promise and the promisee must make restitution for it. On the other hand, suppose there is a contract to make metal pressings and for the sole purpose of making the pressings the promisor buys special dies. The acquisition by the promisor of these dies is not a part performance of the promise to supply the pressings, even though the dies were purchased solely for the purpose of enabling the promisor to make the pressings. For the purposes of the British Columbia scheme, as we understand it, no account would be taken of the cost incurred by the promisor in buying the dies. It seems to us that a scheme of adjustment should take into account not only cost incurred in performance of a promise but also cost incurred for the purpose of giving performance of the promise.

FOOTNOTES

1. The Act appears as Appendix E below.
2. See particularly pages 29, 32 and 34 of the report and s. 5 (4) of the Act.
3. cf. *Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbotir Ltd* [1942] A.C. 32, 56, Lord Russiil of Killowen.
4. Page 29 of the report. See also page 34 of the report and s. 7 (a) of the Act.
5. Page 34 of the report. See also s. 8 of the Act.
6. We use “cost” as covering not only money directly paid out but indirect cost such as the burden to the promisor of having spent his own time in the performance given. In so far as the expenses are not made up of direct expenditure, a fair assessment of the worth in money of the cost would have to be made.
7. For example, a fire which destroys a building in which machinery is being installed pursuant to a contract. The machinery, so far as installed, may be damaged or destroyed.
8. Page 34 of the report. Compare s. 5 (3) of the Act.
9. See page 34 of the report and s. 7 of the Act.
10. We consider that what the promisee must pay should be related to the contract price. An alternative approach is to require the promisee to pay the value of the part performance. But this is not what the British Columbia scheme requires him to pay. It requires him to pay the cost incurred by the promisor in performance. This cost may be less than the value of the part performance. This is not just, in our view, to the promisor. The British Columbia scheme, however, does have the practical advantage that, in making the measure of the payment to be made for performance the cost incurred in giving that performance, it makes it unnecessary to decide whether, in addition to making some payment for performance or part performance of the promise to him the promisee should contribute to cost incurred by the promisor which exceeds that payment.

Appendix E - The British Columbia Act

CHAPTER 37
Frustrated Contracts Act

[Assented to 3rd May, 1974.)

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Application.

1. (1) Subject to subsection (2), this Act applies to every contract

(a) from which the parties thereto are discharged by reason of the application of the doctrine of frustration; or
(b) that is avoided under section 13 of the Sale of Goods Act.

(2) This Act does not apply

(a) to a charterparty or a contract for the carriage of goods by sea, except a time charterparty or a charterparty by demise; or
(b) to a contract of insurance; or
(c) to contracts entered into before the date of coming into force of this Act.

Idem.

2. This Act applies to a contract referred to in section 1 (1) only to the extent that, upon the true construction of that contract, it contains no provision for the consequences of frustration or avoidance.

Crown bound.

3. The Crown and its agencies are bound by this Act.

Act applicable to part of contract.

4. Where a part of any contract to which this Act applies is

(a) wholly performed before the parties are discharged; or
(b) wholly performed except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract,

and that part may be severed from the remainder of the contract, that part shall, for the purposes of this Act, be treated as a separate contract that has not been frustrated or avoided, and this Act, excepting this section, is applicable only to the remainder of the contract.

Adjustment of rights and liabilities.

5. (1) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by his performance or part performance of the contract.

(2) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustration or avoidance but were not performed, except in so far as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.

(3) Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss

in value of abenefit to a party required to make restitution under subsection (1), that loss shall be apportioned equally between the party required to make restitution and the party to whom such restitution is required to be made.

(4) In this section, a “benefit” means something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit.

Exception.

6. (1) A person who has performed or partly performed a contractual obligation is not entitled to restitution under section 5 in respect of a loss in value, caused by the circumstances giving rise to the frustration or avoidance, of a benefit within the meaning of section 5, if there is:

(a) a course of dealing between the parties to the contract; or
(b) a custom or,a common understanding in the trade, business, or profession of the party so performing; or
(c) an implied term of the contract,

to the effect that the party so performing should bear the risk of such loss in value.

(2) The fact that the party performing such an obligation has in respect of previous similar contracts between the parties effected insurance against the kind of event that caused the loss in value is evidence of a course of dealing under subsection (1).

(3) The fact that persons in the same trade, business, or profession as the party performing such obligations, on entering into similar contracts, generally effect insurance against the kind of event that caused the loss in value is evidence of a custom or common understanding under subsection (1).

Calculation of restitution.

7. Where restitution is claimed for the performance or part performance of an obligation under the contract other than an obligation to pay money,

(a) in so far as the claim is based on expenditures incurred in performing the contract, the amount recoverable shall include only reasonable expenditures; and
(b) if performance consisted of or included delivery of property that could be and is returned to the performer within a reasonable time after the frustration or avoidance, the amount of the claim shall be reduced by the value of the property returned.

Idem.

8. In determining the amount to which a party is entitled ,by way of restitution or apportionment under section 5, no account shall be taken of

(a) loss of profits; or
(b) insurance money that becomes payable

by reason of the circumstances that give rise to the frustration or avoidance, but account shall be taken of any benefits which remain in the hands of the party claiming restitution.

Limitations.

9. (1) No action or proceeding under this Act shall be commenced after the period determined under subsection (2) of this section.

(2) For the purposes of subsection (1), a claim under this Act shall be deemed to be a claim for a breach of the contract arising at the time of frustration or avoidance, and the limitation period applicable to that contract applies.

Appendix F - Note on Frustration Loss

1. Where before frustration a party has received part but not all of what was promised to him, the value of the performance which he has received may be reduced or destroyed by the fact that, the contract having been frustrated, he is not entitled to the remainder of what was promised. This reduction in value is caused by the frustration. Our scheme calls for an adjustment for such a reduction in or destruction of value.

2. The English Act makes provision for the effect upon the value of the received performance of the circumstances giving rise to the frustration of the contract. [1] This is a different concept. Take this case. An Australian company agrees to buy cases of canned fish from a company resident in country X. The Australian company receives some of the cases but the contract is frustrated by the outbreak of war between Australia and country X. Assume that the value of the cases received before frustration is not reduced by reason that the Australian company no longer has a contractual right to delivery of the remaining cases.

3. On this assumption, there is no reduction, by reason of the frustration, in the value of the cases received. There is, therefore, no reduction in value to which our scheme applies. But the frustrating circumstance, namely the outbreak of war between Australia and country X, may affect the value of the cases received. The outbreak of war may raise the value of them, because the goods are available only from country X and hence, on war breaking out, are in short supply on the Australian market. On the other hand, the outbreak of war may reduce the value, because of consumer resistance to buying produce of the enemy country. Should this increase or reduction in the value of the received cases, caused by the outbreak of war, be taken into account in adjusting the amount to be paid for them? We do not think so.

4. We think that a statutory scheme of adjustment ought to be a scheme on which the parties might reasonably have agreed if they had thought of the question when framing their contract. We can visualize a party to a contract agreeing that if the contract is frustrated while partly performed by him so that, since performance cannot be completed, the value of the part performance is reduced, some financial adjustment shall be made.

5. But we cannot visualize the same party agreeing to bear part of any reduction in value from any of a multitude of conceivable frustrating events, the existence and magnitude of that reduction possibly affected by all sorts of circumstances otherwise of no concern to him. Nor can we visualize the other party to the contract agreeing to pay more for the value of what he received, before frustration, as augmented by any of a multitude of such conceivable events.

6. We give another illustration. An electrician agrees to rewire a house. He has done only some of the rewiring when the house is destroyed by fire and the contract is thus frustrated. The rewiring, so far as done, is destroyed. Surely what he should be paid for the rewiring, so far as done, should not be reduced because of the effect of the fire.

7. It does not follow that if, as we recommend, the only reduction in the value of a received performance which is to be taken into account is the reduction caused by the frustration, there are no cases in which the frustrating circumstances are relevant.

8. The frustrating circumstances may be relevant to the magnitude of the reduction in value caused by the frustration. The reduction in the value of the received performance must be assessed in the light of all the circumstances which exist upon the contract being frustrated and which affect the extent to which that value is reduced by reason that the party who received the performance is no longer entitled to

further performance under the contract of what was promised to him. The events which gave rise to the frustration of the contract may themselves be such circumstances. The f act that they are the circumstances which gave rise to the frustration does not make them less relevant, or more relevant, for that purpose than if the contract had been frustrated by other circumstances.

9. Consider this case. A German company agrees to build in Sydney, for an Australian company, a plant for the manufacture of petrol from coal. Operation of the plant requires knowledge of a secret process known only to a number of companies in Germany, of which the particular German company is one. The contract provides that the German company will supply the necessary information of the process. The Germany company builds the plant but the contract is frustrated before it has supplied the information. It is frustrated because Germany bans disclosure to non-German companies of the information.

10. The German ban renders the Australian company unable to obtain the promised information from any source. Clearly this inability is relevant to the extent of reduction in value of the plant caused by the incapacity of the German company to perform by supplying the promised information.

FOOTNOTES

1. S.1(3)(b).

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