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SOUTH AUSTRALIA

SEVENTY-FIRST REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY GENERAL

RELATING TO THE DOCTRINE OF FRUSTRATION IN THE LAW OF CONTRACT

1983

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
THE HONOURABLE MR. JUSTICE WHITE, *Deputy Chairman.*
THE HONOURABLE MR. JUSTICE LEGOE, *Deputy Chairman.*
M. F. GRAY, Q.C., S.-G.
P. R. MORGAN.
D. F. WICKS.
A. L. C. LIGERTWOOD.
G. F. HISKEY.

The Secretary of the Committee is Miss J. L. Hill, c/- Supreme Court, Victoria Square, Adelaide 5000.

SEVENTY-FIRST REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE DOCTRINE OF FRUSTRATION IN THE LAW OF CONTRACT

To:

The Honourable K. T. Griffin, M.L.C.,
Attorney-General for South Australia.

Sir,

The Acting Attorney-General referred to us for further consideration the reform of the law relating to the doctrine of frustration in the law of contract. This Committee in its Thirty-Seventh Report, relating to the doctrines of frustration and illegality in the law of contract, recommended adoption, with specified amendments, of legislation similar to the English Law Reform (Frustrated Contracts) Act 1943, 6 and 7 Geo. VI c.40. The English statute was enacted following the recommendations detailed in the seventh interim report of the English Law Reform Committee. The English legislation has provided the model for subsequent statutes enacted in Victoria (the Frustrated Contracts Act No. 6539 of 1959), New Zealand (the Frustrated Contracts Act No. 20 of 1944) and Canada (The Uniform Act [Frustrated Contracts Act] recommended in 1948). However it was pointed out (see page 7 of the Thirty-Seventh Report of the Law Reform Committee of South Australia) that our Committee preferred the solutions chosen by the British Columbia Law Reform Commission and embodied in the Frustrated Contracts Act 1974 Chapter 37 of that Province. That Act departs substantially from the concepts in the English Act but, on the assumption that it was preferable to promote uniformity of legislation, the Committee then made recommendations based on the English Act.

The Law Reform Commission of New South Wales has examined this area of law in its report on Frustrated Contracts—L.R.C. 25—in 1976, and as a result of the Commission's suggestions the Frustrated Contracts Act No. 105 of 1978 has been enacted in New South Wales. This represents a considerable departure from both the English Act and the British Columbia Act. In view of this the Committee agrees that it is desirable to consider both these enactments prior to recommending a final solution for adoption in this State. In the light of the New South Wales report, desirability of uniformity is no longer a constraining factor. Accordingly the Committee felt free to place greater emphasis on the British Columbia solution, with which, after further consideration, they are still in general, disposed to agree.

We shall deal firstly with a brief history of the common law of frustration. For a more detailed analysis we refer to the Thirty-Seventh Report of this Committee pages 1-6. The law stems from the theory of absolute obligation whereby a person is absolutely bound to perform any obligation which he has undertaken. It was explained by the Court in the well-known case of *Paradine v. Jane (1647) Aleyn 26 at 27:—*

> "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it."

This attitude developed from the hesitancy with which the judiciary approached any plea for interference by them in circumstances where

parties have committed to writing the obligations and duties each has chosen to undertake. As pointed out in our initial Report this theory is still apparent in maritime law, although the parties may expressly provide in their contract against such risks (see page 4). *Taylor v. Caldwell (1863) 122 E.R. 309* served to mitigate the harshness of the rule as to absolute contracts by launching the doctrine of frustration. It was held that if the contract is brought to a halt by some unavoidable, extraneous cause, for which neither party is responsible, the contract terminates forthwith and the parties are discharged from further performance of their obligations. The Court based the doctrine on an implied condition in the contract (see: *Cheshire & Fifoot 4th Australian Edition Law of Contract page 611).*

The most renowned instances of the application of this doctrine were contained in the so-called Coronation cases arising out of the illness of King Edward VII (see for example: *Krell v. Henry (1903) 2 K.B. 740*). However, in *Chandler v. Webster [1904] 1 K.B. 493* the rule that "the loss lies where it falls" was established and the apparent injustice of this rule has resulted in the need for legislation defining the rights of the parties. Briefly, the facts were that the defendant agreed to let to the plaintiff a room for £141.15s.0d. for the purpose of viewing the Coronation procession. The plaintiff paid a deposit of £100. Owing to the sudden illness of the King, the procession was cancelled and the plaintiff claimed the return of his deposit from the defendant. The Court of Appeal held that the plaintiff was not entitled to recover his deposit and the defendant was entitled to payment of the balance as his right to the payment had accrued prior to the cancellation of the procession.

Needless to say the case has been the subject of much criticism. For our purposes it will suffice to repeat the oft-quoted remarks of two of the Law Lords in *Cantiare San Rocco S.A. v Clyde Shipbuilding & Engineering Co. Ltd. (1924) A.C. 226.* At page 248 Lord Dunedin referred to the different angle of approach that is taken to this question in Scotland. He concluded by saying, "For the purpose of this case it is sufficient say, as I unhesitatingly do, that *Chandler v. Webster (supra)*, if it had been tried in Scotland, would have been decided the other way". A more vigorous denunciation was voiced by Lord Shaw of Dunfermline who, at page 259, said, "That maxim works well enough among tricksters, gamblers and thieves; let it be applied to circumstances of supervenient mishap arising from causes outside the volition of parties: under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England. I am not able to affirm that this is any part, or every was any part, of the law of Scotland."

Fortunately, the English decision of the House of Lords in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32* went a small part of the way towards reducing the severity of the above maxim. In July 1939 the respondent, an English company, agreed to sell machinery to the appellant, a Polish company; one-third of the purchase money to be paid with the order. Delivery was to be made in three to four months from settlement of the final details, the goods to be packed and delivered c.i.f. Gdynia, Poland. The sale was made subject to certain conditions. Clause 7 of the contract stated that, "should dispatch be hindered or delayed . . . by any cause whatsoever beyond our reasonable control, including . . . war . . . a reasonable extension of time shall be granted." War broke out between Germany and the United Kingdom and Poland and Gdynia was occupied by the Germans. At this time less than one-third of the agreed price had been paid.

The appellant argued that clause 7 governed the contract and that, therefore, there was no room for the application of the doctrine of frustration. It was held by the House of Lords that "a reasonable extension of time" related to a minor delay as distinguished from "a prolonged and indefinite interruption of prompt contractual performance which the present war manifestly and inevitably brings about." (see per Viscount Simon L.C. at page 40).

The other issue before the Court was whether, when the contract became frustrated, the appellant could claim back from the respondent the money which it had paid when placing the order. To decide in the appellant's favour would involve reconsidering the rule in *Chandler v. Webster (supra)*. The Court prefaced its decision by emphasizing that the matter must be looked at within the perimeters of the terms of the contract itself. The Court referred to the criticism generated by the application of the maxim and pointed out the hardships caused by rigid adherence to it. It was unanimously agreed by the House of Lords that the appellants could recover their payment on the basis that the right to recover money back "arises from the fact that the impossibility of performance has caused a total failure of the consideration for which the money was paid." (see: per Lord Russell of Killowen at page 55).

In England the rationale behind the implementation of the doctrine has undergone a number of changes. The prevailing view is that pronounced by the House of Lords in *Davis Contractors Ltd. v. Fareham Urban District Council [1956] A.C. 696* which requires an interpretation of the terms of the contract in the light of the nature of the contract and the relevant surrounding circumstances, and an inquiry whether those terms are wide enough to meet the new situation. (see: *Halsbury's Laws of England (4th Edition) Volume 9 para. 450*). In that case contraitors entered into a building contract to build a number of homes for a local authority for a fixed sum within eight months. Owing to unexpected circumstances, and without the fault of either party, adequate supplies of labour were not available and the work took twenty-two months to complete. The plaintiff claimed (inter alia) that the contract had been frustrated. The House of Lords held that in these circumstances there was no frustration. At pages 720-1 Lord Reid in the course of his speech said:—

> "It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract and the relevant surrounding circumstances when the contract was made."

Lord Radcliffe at page 729 stated that:—

> "So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises 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 a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do."

Lord Radcliffe also said:—

> "The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, *ex facie* binding, are no longer enforceable against the parties. The description of the

circumstances that justify the application of the rule, and consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law."

Thus it remains for the Court to determine in each particular situation whether the doctrine applies. The formulation of the test as to when frustration occurs propounded by Lord Radcliffe, has been applied in two recent decisions of the House of Lords: *National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] A.C. 675* and *Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. [1981] 3 W.L.R. 292*. In the latter case Lord Diplock said at page 304:—

"The legal concept of frustration, as my noble and learned friend Lord Roskill points out, can be expressed in the short and simple language used by Lord Radcliffe"

in *Davis Contractors*. The final view, therefore, appears to be generally accepted as the "radically different" test.

This State inherited the general law of contract in 1836 (see the judgments of Barton J. and Isaacs J. in *Hirsch v. The Zinc Corporation Ltd. (1917) 24 C.L.R. 34 at 53 and 57 respectively*) but at present the precise delineation of the application of the doctrine of frustration remains uncertain. As we pointed out at page 6 of our Thirty-Seventh Report, it is uncertain whether the amelioration given by the *Fibrosa Spolka case (supra)* applies in Australia because *Chandler v. Webster (supra)* was expressly applied by the High Court in *In re The Continental C. & G. Rubber Co. Pty. Ltd. (1919) 27 C.L.R. 194* and the High Court has ruled that where any principle of law has been expressly laid down by the High Court, it is not for a State court to assume that a later decision of the House of Lords or Privy Council affects a previous pronouncement of the High Court of Australia on the law. It is for the High Court to say whether the law is to be altered.

We refer again to the wellknown decision on the doctrine of frustration by the High Court of Australia in *Scanlan's New Neon Ltd. v. Tooheys Ltd. (1943) 67 C.L.R. 169*, particularly in the judgment of Latham C. J. Our previous discussion of the criticisms of theories of frustration made by Latham C. J. at pages 5 and 6 of our Thirty-Seventh Report are applicable here and we emphasize these but have not detailed them again to avoid repetition.

However, Stephen J., with whom Murphy J. agreed, considered the application of the doctrine of frustration in the recent High Court decision of *Brisbane City Council v. Group Projects Pty. Ltd. (1979) 54 A.L.J.R. 25*. The facts in this case were that the respondent was the owner of land which it wished to subdivide. It entered into a deed with the appellant city council whereby the city council would make application for re-zoning of the land as residential and, in the event of this being approved, the respondent agreed to provide numerous facilities fom the land. The land was accordingly re-zoned but one month prior to this happening, the Crown resumed the land for the purposes of a school. Wilson J., with whom Gibbs C. J. and Mason J. concurred, decided the matter as one of statutory interpretation in Crown proceedings. Stephen J. however considered whether the respondent would be in breach of its obligations under the deed if it failed to perform them or whether it could instead invoke the doctrine of frustration so as to bring the deed to an end (see page 27). Stephen J. noted at the outset two features of the case: namely, that it was not the usual case of a contract between two parties, as the principal obligation of the council was the performance of the act of applying for re-zoning, and to induce it to do that the respondent undertook materially to assist

in the providing of amenities, which are normally the concern of the council; and, secondly, most of the contractual obligations could be performed separately from the acquired land and therefore, if frustration was to apply, its application could be accommodated very comfortably within any theory of frustration said to be based upon such a "change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for" (see per Lord Radcliffe in the *Davis Contractors' case (supra)* at page 729.). Stephen J. found that the acquisition of the land had wholly destroyed the respondent's purpose in undertaking any obligations at all. On an examination of the deed His Honour concluded that the re-zoning of the land was fundamental to the incurring of obligations on the part of the respondent. Finally, he held that the approach of Lord Reid and Lord Radcliffe in the *Davis Contractors' case (supra)* was applicable to the approach taken in the case at hand. Thus, there had arisen a fundamentally different situation from that contemplated when the contract was entered into.

Stephen J.'s reasoning was considered by the other members of the High Court in *Codelfa Construction Pty. Ltd. v. State Rail Authority of New South Wales (1982) 56 A.L.J.R. 459.* In this case Mason J. at page 465 said that he agreed with Stephen J.'s acceptance of the approach of Lord Reid and Lord Radcliffe in Davis Contractors, but emphasized that the acceptance of that view should not cast doubt on the authority of the earlier decisions. His Honour referred to the decision of *Krell v. Henry (supra)* and said that this decision reinforced the reception of extrinsic evidence of relevant surrounding circumstances. Mason J. concluded at page 467 that:—

> "The critical issue then is whether the situation resulting from the grant of the injunction is fundamentally different from the situation contemplated by the contract on its true construction in the light of the surrounding circumstances."

Although Brennan J. disagreed on the facts that the case supported a finding of frustration, the High Court indicated a firm acceptance of the test of Lord Radcliffe in *Davis Contractors (supra)*. Aickin J. referred to the two more recent decisions of the House of Lords (*National Carriers Ltd. v. Panalpina (Northern) Ltd. and Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (supra)*) which confirmed the formulation of the test in *Davis Contractors.* His Honour said that while the High Court is not bound to follow the decisions of the House of Lords they provide valuable guidance on the topic. Aickin J. approved Lord Radcliffe's formulation and considered it to be flexible and adaptable to a variety of situations.

Turning to the consideration of suitable legislation on frustration for South Australia, we preface our discussion by considering the solutions adopted in other Commonwealth countries, and the recommendations we should make arising from these. This does not mean that we are satisfied with the doctrine as presently formulated. The variations in the tests which are applied in the various cases indicate the need for reform (see: also criticisms in *Cheshire & Fifoot (4th Australian Edition) Law of Contract Chapter 25 page 626 para. 2525)*. We note too that the courts themselves have gone some of the way towards the development of the doctrine. This is some justification for allowing further development and rationalization to remain in the hands of the courts. We do not suggest any change to the doctrine itself. Our solution is aimed at resolving the conflict arising after frustration of the contract has taken place. However, while the doctrine of frustration itself could be the subject for

a further remit to this Committee, it is not our concern at present, as we feel that such a review could be better done in a general review of the law of contract.

In addition, we emphasize that the parties may still, if they choose, expressly provide against any contingencies that may arise in the course of the contract by incorporating terms for such contingencies into the contract. In that event, if the contingency provided for actually occurs, a court will not look beyond the terms that the parties have specifically stipulated will either govern the performance of the contract in such an event or will treat the contract as at an end on the happening of the contingency except for such adjustments as the contract itself provides for.

Our extended examination of the legislation in this area will be assisted by a brief summary of the consequences of the application of the doctrine according to the common law and the inadequacies resulting from such application. (For a similar appraisal see New South Wales Law Reform Commission Report No. 25 pages 16-22 and British Columbia Law Reform Commission Report No. 8 at page 17).

CONSEQUENCES RESULTING FROM THE APPLICATION OF THE DOCTRINE OF FRUSTRATION

1. The contract is discharged from the moment the frustrating event occurs.
2. The parties are released from performing any obligations that accrued after the time of discharge; but any obligations that accrued prior to the frustrating event remain in force. Therefore the contract is valid and binding for the period before the frustration.
3. As a result of the *Fibrosa Spolka case (supra)* where money is due under a contract but unpaid at the time of discharge by frustration and there has been a total failure of consideration for that payment, the failure of consideration is a defence to a demand for payment. However, as previously stated, it is not entirely clear that this case will be followed in Australia.
4. Under the principle of unjust enrichment, where a party has paid money to another party for the performance of an obligation under a contract but no part of the performance has taken place and the contract is discharged, the party is entitled to reimbursement of his money as the consideration for his payment has wholly failed.

INADEQUACIES EXISTING UNDER THE COMMON LAW

1. There is no redress or reimbursement where there has been a partial failure of consideration; the *Fibrosa Spolka (supra)* reasoning, if applicable in Australia, will give relief only where there has been a total failure of consideration.
2. There is no redress or reimbursement for a party who has incurred cost for the purpose of performing the contract.
3. Contractual rights accrued before frustration remain enforceable.

The Committee, therefore, proposes to recommend principles which it is hoped will provide the fairest possible way of adjusting the positions of parties to a frustrated contract. To avoid unnecessary repetition we will not repeat our criticisms of the English Act and the Victorian and New

Zealand legislation modelled upon it, but rather refer to our previous Report, the Thirty-Seventh Report, pages 7-17 where a detailed analysis of this legislation is set out and we incorporate those remarks into this Report. Recent cases will be referred to later in this Report.

Although we have noted the United States' approach to questions of frustration in the Restatement, this approach appears to be of too limited a nature and therefore we have not discussed it further in this report.

The difference between the approach taken in British Columbia and that taken in New South Wales is one of principle and is set out at pages 69-71 of the report of the New South Wales Law Reform Commission. We have preferred in general the approach taken in British Columbia as will be seen from the remainder of this report. We think that the concept of benefit (as something done for the purposes of contractual obligations) is preferable to the attempt to achieve the same result by the complex definitions of attributable value and cost of performance which the New South Wales legislation adopts.

As the English legislation has been in existence since 1943, there has been opportunity for academic criticism to be levelled at it, while the British Columbia and New South Wales enactments are of more recent vintage and to date there has been very little comment on them either judicially or in learned articles.

Turning to the Report by the British Columbia Law Reform Commission at page 28, it sets out the three problems which must be covered by the legislation, and we adopt these as the foundation of our recommended enactment: —

1. the problem of restitution for obligations performed;
2. the problem of relief from liability for obligations unperformed but which were due to be performed prior to the time of frustration;
3. the question of apportionment of loss.

Their report then sets out the basic principles on which they consider the law should be altered. They are as follows: —

> "1. Every party to a frustrated contract should be entitled to restitution for the performance or part performance of any of his contractual obligations.
>
> 2. Each party should be relieved from fulfilling obligations that were due to be performed before the frustrating event but which were not performed, provided that no right to damages for consequential loss which accrued prior to frustration shall be affected.
>
> 3. If restitution were to be made, and if the party required to make it would suffer a loss because, owing to the circumstances that gave rise to the frustration, he has no benefit or the benefit is less in value than the amount payable by way of restitution, the loss should be apportioned equally between the party required to make restitution and the party to whom restitution is required to be made.
>
> 4. A person should not be entitled to restitution in respect of a loss in value of a contractual benefit, where that benefit was created by the performance or part

performance of a contractual obligation, if there was

(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 performing; or

(c) an implied term of the contract,

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

We recommend that the basis of our enactments be that provided by the British Columbia report whereby every party to a frustrated contract is entitled to restitution for the performance, total or partial, of any of his contractual obligations, and under which there is apportionment of loss of benefit by a party equally between the party required to make restitution and the party to whom restitution is required to be made. However that does not mean that we think that the draftsman should be tied to the *ipsissima verba* of the British Columbia statute. The references to that statute are merely to illustrate the principles we think should be adopted and the general way in which they should be tackled.

The main impact of the British Columbia Frustrated Contracts Act, 1974, is contained in Section 5 of the Act. Section 5(1) provides that every party to a contract to which the 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. Section 5(2) relieves the parties from fulfilling obligations required to be performed prior to the frustration but which have not been performed except with regard to any claim for damages for consequential loss which accrued before frustration occurred. Section 5(3) provides for the apportionment equally between the parties of any loss in value of the benefit promised. Section 5(4) is the definitive section. It states a "benefit" is something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit.

We submit that this is the most equitable solution to the problem of distribution of loss following the frustration of a contract. We suggest that the words "in fulfilment of" be read as equivalent to "for purposes of" and include expenditure reasonably incurred by a party preparing to undertake his contractual obligations having regard to the nature of the contract. Understood in this way, Section 5 provides solutions to the problems listed under our heading "inadequacies in the common law".

Section 5 must be read in conjunction with Section 7 and Section 8. While Section 5(1) allows a party restitution for benefits, Section 7 provides for the calculation of that restitution other than an obligation to pay money. In the first place, Section 7(a) limits recovery of expenditure to "only reasonable expenditures". In this way one party will not have to bear the cost of an indulgent, extravagant or wasteful other party. From the amount recoverable a deduction should be made for any advantage one party has gained from performance or part-performance of an obligation (e.g. the acquisition of machinery that has an indefinite use). This point is stated in Section 8 of the statute.

Section 7(b) permits recovery of property which consists of or is part of the performance of a contractual obligation. Where the property is returned "within a reasonable time after the frustration or avoidance", the amount of the claim for restitution shall be reduced by the value of

the property returned. The parties are, therefore, able to take into account such property although any loss in value of the property can be included in the final apportionment of loss between parties (see Section 5(3)).

Section 8 sets out the basis for calculation of the amount to which a party is entitled by way of restitution or apportionment under Section 5. Section 8(a) states that no account shall be taken of loss of profits. Section 8(b) specifies that no account shall be taken of insurance money that becomes payable. Again, we recommend the adoption of these for two reasons: firstly, a court should be slow to interfere in a contract between two parties even if one of the parties is also a party to the contract being litigated before the courts, and secondly where one party exercises business acumen by covering himself against such frustrating events and pays an indemnity for this, he should not be penalised for doing so. The latter part of Section 8 enables account to be taken of any benefits that result from the contract but remain in the hands of the party claiming restitution. A party is therefore not "unjustly enriched" by acquiring and retaining a valuable benefit to the disadvantage of the other party.

We consider that this method of reconciling the positions of parties to a frustrated contract alleviates any burden that may be placed on one party while preventing unjust enrichment by either party. Apportionment of loss of benefit equally between the parties also seems to us to be the fairest way of distributing loss. However, the New South Wales Frustrated Contracts Act, 1978, provides an interesting comparison because it is an attempt to provide a means of precisely calculating the proportion of loss of each party.

In the New South Wales Law Reform Commission Report 25 at pages 22-23, the Commission states that the English Act of 1943 remedies two deficiencies of the common law with respect to the doctrine of frustration: namely, the problem of the 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 by the other party. However, at page 24 the Commission points out that the English Act may not always allow the recovery of the cost which a party has incurred in or for the purpose of performing the contract. As well, 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.

Thus, at page 29, the Commission concluded that the English enactment should be followed in two instances. Firstly, where it provides for repayment of money paid to a party before frustration. This clears the way for the adjustment of benefits conferred upon a party by what another party has done pursuant to the contract and for the inclusion of costs incurred by a party. Secondly, where it provides that a party who has obtained a benefit from the performance by the other party of obligations pursuant to the contract should pay for it.

However, the New South Wales Commission's suggestions depart from the English Act in respect of the provisions for expenses incurred for the purpose of performing the contract. The reasoning is as follows: 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. 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 or derived by incurring the cost and which remains in his hands. What is left is the net relevant cost incurred by a performing party. The adjustment that 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 should be shared equally.

The resulting statute follows closely the suggestions of the Commission. Part I of the Act deals with preliminary matters which will be mentioned later in this Report. Part II relates to the effect of the frustration of the contract. Section 7 provides, contrary to the common law rule, that where a promise was due to be, but was not, performed before the time of frustration, it is discharged except to the extent necessary to support a claim for damages for breach of the promise before the time of frustration. Further, damages must be assessed with regard being paid to the fact that the contract has been frustrated (Section 8). This means that a defendant could successfully argue that his breach merely entitles the plaintiff to nominal damages in view of subsequent events (see: *Cheshire & Fifoot, Law of Contract (4th Australian Edition) page 630*).

The substance of these sections is contained in Section 5(2) of the British Columbia Act and encompassed within the far-reaching principle of restitution in Section 5(1). As well, the British Columbia Section 5(2) protects another party to the contract who has become entitled to damages for consequential loss as a result of the avoidance of the contract. We recommend enactment of a provision similar to the British Columbia Act.

Part III of the New South Wales Act contains a scheme for adjustment formulated to meet all cases of frustration. The scheme is designed to enable the parties themselves to adjust the rights between them without judicial intervention. Division I (Sections 9-11) provides for adjustment where performance, excluding payment of money, has been received. Section 10 relates to the situation where the whole of one party's performance has been received, so that the frustration has prevented only performance by the other party. The performing party is entitled to be paid by the receiving party an amount equal to the value of the "agreed return". Agreed return is defined in Section 5(1), and, briefly, it is the other party's performance which is contemplated by the contract as consideration for the first-mentioned performance. It is the policy of the law to promote settlements between disputants without recourse to the Courts and provided the New South Wales sections are limited to this purpose in our Statute, the provisions are, we think, useful. This however does not detract from our views as to what the principles of adjustment should be if the parties are unable to arrive at an amicable settlement.

Section 11 of the New South Wales Act refers to the more complex situation where part performance only has been received. Section 11 is prefaced by six definitions of phrases used to provide the final formula for adjustment. It is useful to note that the basis for the definitions and adjustments is the original contract price as formulated by the parties. The definitions provide a formula for calculating any "incidental gain" by a party through his performance of the contract and the amount of compensation to which a party becomes entitled is based on the "reasonable cost" of performance under the contract. While these definitions assist in simplifying the eventual formula for adjustment in Section 11(2), we are not convinced that this avoids the difficulties to the parties of understanding the definitions themselves. In addition, like

most formulas, it will inevitably fail to meet factual situations not envisaged by the draftsman.

Cheshire & Fifoot (supra) at pages 630-31 explain the formulation in Section 11(2) and we adopt their examples of its working:—

> "Where a contract is partly performed by one party and that performance has already been received by the other party at the time of the frustrating event, the performing party . . . is able to recover compensation according to a complicated formula set out in Section 11. The most important feature of Section 11 is that it provides for a sharing of an overall loss if such eventuates from the frustrating event. Thus, where a building is half built and is then burned down, the builder is not able to get the whole of what he has expended but only half, an allowance being made for an incidental gains, such as materials acquired by him which can be used on another job, and an allowance being made for any residual value, e.g. scrap, which may accrue to the other party. If there is no overall loss as a result of the frustrating event, the builder's client, in the above example, receives value for which he must pay the proportionate price.
>
> Another interesting aspect of Section 11 is that, if the builder has made a bad bargain (his costs exceed his price), he cannot be relieved of this in the event of an overall loss being suffered because of the frustrating event. In assessing how this loss should be shared between the parties, the measure for doing this is the price asked not the costs incurred. If, on the other hand, the builder has not made a bad bargain then the measure for loss sharing is the costs incurred, as outlined above."

We suggest that while this formula may ultimately achieve a just result, the provisions are complicated and the actual calculations the parties must make themselves are far from easy. We prefer the solution achieved by the application of Sections 5, 7 and 8 in the British Columbia Act. We accordingly recommend that the South Australian enactment be more flexible and follow the relevant sections of the British Columbia Act. We recognize the desirability of apportioning any loss in value of a performance by one party, but this is achieved simply in Section 5(3) of the British Columbia statute which states that any loss in value of a benefit "shall be apportioned equally between the party required to make restitution and the party to whom such restitution is required to be made."

Division 2 of the New South Wales statute relates to other adjustments. Section 12 requires the return of all pre-paid money and Section 13 provides for the interesting situation where a party has "reasonably" incurred cost or suffered a detriment for the purpose of giving performance under the contract, not being performance which has been received, then there is to be a sharing of cost. The other party to the contract is to reimburse the party who incurred cost "an amount equal to one-half of the amount that would be fair compensation for the detriment suffered. Any property or improvement to property acquired or derived by the performing party is to be brought into account (see Section 13(2)).

> *Cheshire & Fifoot (supra)* comment on this section that: "Section 13 does not apparently cater for the bad bargain. The performing party may claim half his costs—"fair compensation"—for

the work done rather than half of the proportionate price. Perhaps the word "fair" would prevent the performing party claiming costs which were very high, given the price quoted by him."

This point is covered in the British Columbia Act, firstly in Section 7(a) which allows the recovery of "only reasonable expenditures" and secondly, Section 8(a) prevents loss of profit being included in a calculation for restitution or apportionment of loss.

Division 3, Section 14, provides for recovery of any amount made payable under Division 1 or 2 as a debt in a court of competent jurisdiction. Under our suggested scheme this provision would be unnecessary.

Cheshire & Fifoot (supra) comment at page 530 that:— "It must be said that the adjustment provisions of the Act are complicated and may be open to varying interpretations, particularly if accountant expert witnesses were called in aid. This seems to be recognized in the Act itself."

Division 4 provides for adjustment by the court where the Court is satisfied that the provisions in Divisions 1 and 2 are "manifestly inadequate or inappropriate" or their application would cause "manifest injustice" or be "excessively difficult or expensive". Instead, the court may by order, substitute "such adjustments in money or otherwise as it considers proper". The section then lists further orders which the court may make in this event which include orders for disposing of property or proceeds from the sale of property, creation of or enforcement of a charge on property and orders for the payment of interest. The powers conferred on the Supreme Court and the District Court are wider than those conferred on courts of Petty Sessions (see Section 15(8)).

While we accept that it is desirable for parties to realise fully what adjustments and orders can be made in the event of frustration of a contract, we suggest that in many cases the situation will be so complex that it will be necessary for the courts to determine the rights of the parties. In any event, we prefer the simpler adjustment achieved by the British Columbia enactment. We feel that the British Columbia solution provides a suitable *via media* between the complicated scheme of adjustment in the New South Wales Act and the remedy in the English Act which relies on the unfettered discretion of a Court to achieve a just solution.

The New South Wales Law Reform Commission pointed to what they considered were the two main drawbacks of the British Columbia approach (see pages 70-71). First, it stated that as the basis for the scheme is, in substance, reimbursement for cost, the amount paid by the promisee for performance given by the promisor is not directly related to what he promised to pay for a complete performance by the promisor. The Commission considered this could be unjust because 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, but the amount he can receive is limited to the amount of costs incurred by the promisor in performance. The Commission preferred the approach that what the promisee must pay should be related to the contract price. The Commission noted, however, that the British Columbia scheme does have the practical advantage that as costs incurred are the measure for payment "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

costs incurred by the promisor which exceeds that payment." (page 70). We prefer the approach of the British Columbia scheme for the additional reason that we are reluctant to interfere in the adjustment process beyond our stated principle of restitution and the adjustment of losses sustained by the parties without taking into account good bargains and loss of profits. A Court will almost certainly take expectation damages into account, at least in a general way, in making its order. If the parties can be placed in a position where both have expended as little as possible for no result we feel that this is preferable.

Secondly, the New South Wales Law Reform Commission said that the British Columbia scheme fails to make provision for cost incurred, not in performance, but for the purpose of giving performance. With respect, we do not agree. Section 5(4) defines "benefit" as something done "in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit". As we have pointed out "in fulfilment of" can be read as "for the purpose of" and we add that if this remains unclear it would be simple to include the words "for the purpose of" in the definition section.

As is pointed out in an article *"Restitution After Frustration"* by F. Rose in 131 L.J.N. 955, judicial guidance on the application of the frustrated contracts statutes has been slight. The scope of the English Act was considered for the first time recently in the case of *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1979] 1 W.L.R. 783* (Robert Goff J.); *[1981] 1 W.L.R. 232* (C.A.). (See also discussion in *Cheshire & Fifoot: Law of Contract (10th Edition) page 530*).

The facts in this case are complex and we state them only very briefly. Hunt owned a Libyan oil concession. He entered into a "farm-in" agreement with a B.P. subsidiary whereby he transferred a one-half share in the concession to B.P. Arrangements were made by which B.P. was to undertake the exploration of the oil field and provide the finance necessary to develop and produce the oil. Once the oil came on stream, the parties would be entitled to half the oil produced and would from then on share the costs of production. Further arrangements were made for Hunt to reimburse B.P. for its initial expenditure. Nearly five years later the Libyan Government nationalized B.P.'s interest in the concession and then at a later date Hunt's interest was expropriated. Both parties entered into separate agreements with the Libyan Government for compensation for the facilities but no compensation was included for the loss of the concession itself. Both B.P. and Hunt thereafter claimed restitution under the 1943 Act.

The trial judge, Robert Goff J., considered that the fundamental principle underlying the Act is the prevention of unjust enrichment. The Court of Appeal, however, held that no help could be derived from words not used in the statute and that the Act provides no guidelines for the exercise of the Judge's discretion in applying its specific provisions.

Robert Goff J. outlined the approach of a trial Judge to the problem of restitution. After completing all the steps required by the Act it is for the Judge to assess a just sum. This case provides an excellent example of the complex steps facing a Judge where the final determination rests solely in his discretion.

We suggest that adoption of an enactment similar to that of British Columbia whereby loss of benefit proved is shared equally between the parties will help minimize the uncertainty of this type of litigation. We recommend that the South Australian enactment contain provisions generally along the lines of Sections 5, 7 and 8 of the British Columbia Frustrated Contracts Act.

Distribution of loss of benefit equally:

We turn now to consider Section 6 of that Act. This section is a result of the proviso to the recommendation of the British Columbia Law Reform Commission that the distribution of loss of benefit shall be equal. Following advice from commercial institutions, the Commission considered it "imperative that an exception be made when it was understood that the risk of loss should be borne by one of the parties to the contract". (see page 32). The Commission pointed out that there are certain situations in which business practice and commercial understanding have arrived at the position where the parties contemplated payment by results only. Until the contract is completely performed, both parties intend or contemplate that any loss or damage shall lie exclusively on the performer.

It was acknowledged that in this situation it is open to the parties to expressly provide in the contract itself for the bearing of risk by one party. We agree that this is the most desirable solution.

It is also necessary to consider cases where the parties have in their contract envisaged and made provision for a situation which is similar to but not identical with the situation of frustration which actually occurred. There may well be cases where the difference is so minor that the parties should be held to the loss resolution clause to which they have agreed and that the doctrine of frustration should not apply to such a contract.

However, as was pointed out (see page 33), the problem arises when no such provision has been made. Rather than leave it for the court to imply a term as to the common course of dealing and bearing of risk between the parties, the section specifies exceptions to Section 5 in three instances. Section 6 states: —

> "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."

Section 6 read in this way must be treated as a qualification to the general proposition stated in Section 2 of the British Columbia Statute.

With respect, we agree that this provision is necessary. It would be regrettable if this enactment impinged on normal business procedures but the onus must be on the party who wishes to prove a custom for a particular party to bear the loss.

In conclusion, we will briefly summarise our attitude with respect to the means of adjusting the rights between parties following frustration of the contract. The English Law Reform (Frustrated Contracts) Act, 1943 has received wide academic criticism and leaves much of the adjustment process to the discretion of the Court as it considers just. In sharp contrast, the New South Wales Frustrated Contracts Act, 1978, provides

a comprehensive scheme for adjustment to meet all cases of frustration. It is a formula which the parties themselves can apply. However, it is complicated and may be open to varying interpretations. We recommend implementation of the legislation similar to that contained in Sections 5-8 of the British Columbia Frustrated Contracts Act, 1974. We feel that the last mentioned Act provides a firm base and guidelines to ensure that the Court can apportion loss equally between the parties. We consider that this is the most appropriate solution for the adjustment of any loss. However the New South Wales provisions are useful so far as they may help to promote out of court settlements.

We turn now to consider additional points arising from the statutes.

1. **Crown bound by the Act:**

In order to avoid any potential litigation, we consider that it is necessary to specify that the Crown shall be bound by the intended legislation. In England, Victoria and New Zealand similar terms are used to bind the Crown. Section 2(2) of the English Act states that: –

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

As we pointed out in our Thirty-Seventh Report, this provision is too narrow (see pages 13-14). It is possible that this wording would not cover a great many cases where contracts are entered into by a Crown agency or instrumentality and, therefore, as the Crown is not actually a party to the contract the provision would not apply.

It would seem that the New South Wales and the British Columbia Law Reform Commissions recognised this as their respective legislation refers particularly to agencies of the Crown (see British Columbia Frustrated Contracts Act Section 3) and the Crown in its other capacities (see New South Wales Frustrated Contracts Act Section 4). We abide by the recommendation we made in our Thirty-Seventh Report that the time-honoured expression "This Act shall bind the Crown" be used. As we said, if that be inserted the instrumentalities which claim the privileges of the Crown can only have the same rights as the Crown would have had and no point can be taken that their contracts are outside the purview of the statute.

2. **Time of Application of Act:**

The English, Victorian and New Zealand Acts have the same section providing for the application of the Act (see Section 2(1) English Frustrated Contracts Act). The provisions make the legislation applicable to contracts made before or after the commencement of the Act, although the time of discharge, that is the frustration, must have occurred after the legislation comes into force. We said in our Thirty-Seventh Report that we had no comment to make (see page 13). However, we agree with the attitude taken by the British Columbia Law Reform Commission who consider that it would not be proper to make the legislation apply to existing contracts.

At page 46 of their report they state: –

"Although the purpose of the proposed legislation is to provide a fairer solution than now exists, there is an element of retroactivity in the [Canadian and English]

provisions that the Commission believes should be avoided.

Although the [Canadian and English] Acts only come into operation if there has been frustration after the legislation came into force, their statutes, nevertheless, may apply to contracts entered into prior to their enactment. This may have the effect of imposing on parties to a contract an adjustment of their positions which would be materially different from what they might have contemplated when the contract was entered into. If the legislation had been in effect at the time they entered into the contract, they might have expressly provided for the consequences of the frustrating event, and so avoided the application of the statute."

With respect we adopt this reasoning and note, also, that a similar application provision is in the New South Wales enactment. We, therefore, recommend that the Act shall "not apply to a contract made before the commencement of this Act" (see New South Wales Section 6(1) (a) and British Columbia Section 1 (2) (c)).

3. **Events that occur after frustration:**

At page 11 of our previous report we dealt with the problem that the wording in Section 1(2) and Section 1(3) of the English Act restricted the application of the Act to events that occurred "before the time of discharge". We pointed out that a party may well do acts or incur expenses after what the law regards as the time of discharge either because he does not know of the frustrating event or because he does know of it but does not know of their legal quality. While he may recover his loss in the first instance he would not in the second because it is a mistake of law. The line is a fine one and the act constituting frustration may also be unclear.

The British Columbia Law Reform Commission examined this question at pages 30-31 of their report. The Commission recognized that there is an argument for providing for events that occur after frustration but considered that such occurrences would be very unlikely. The Commission's view was that such events should be settled under the existing law of restitution and no provision should be made in the legislation.

We recommend adoption of a provision dealing with events after frustration. The New South Wales legislation provides a good example of this. Section 5(4) states that "For the purpose of this Act, where a contract has been frustrated and a thing is done or suffered under the contract after the time of frustration but before the party who does or suffers that thing knows or ought to know of the circumstances (whether matters of fact or law) giving rise to the frustration, that thing has effect as if done or suffered before the time of frustration."

4. **Contracts to which Act is applicable:**

Section 1(1) of the English Act makes the Act applicable where the contract "has become impossible of performance or been otherwise frustrated". We refer to our previous criticism of this wording at page 8 of our former Report. On a strict construction the Act would not apply to contracts originally

impossible of performance. The Victorian Act has avoided this by stating that "where a contract becomes impossible of performance . . . .".

We refer briefly to the point made also at page 8 that our intended legislation should apply to contracts that have been avoided by Section 7 of the Sale of Goods Act 1895, and with additional reference to Section 6. This has been done with the equivalent Sale of Goods legislation in the British Columbia Act Section 1(1) (b) and in the New South Wales statute Section 5(1) where the definition of frustration "includes avoidance of an agreement under Section 12 of the Sale of Goods Act 1923". We refer to page 16 of our previous Report and repeat that there should not be an exemption in relation to sale of specific goods.

5. **Conflict on Laws Question:**

This matter was initiated by the inclusion in the English Act in Section 1(1) of the words "where a contract governed by English law . . . . ". We discussed this at page 7 of our previous Report. We recommended that it would be better to omit all reference to the words "governed by" and we concluded that the determinants of jurisdiction for the purpose of the intended legislation should be the same as those which now obtain in relation to consumer legislation in this State. Thus, if the contract is justiciable in South Australia, then the Courts should have the power to apply South Australian law.

When discussing this issue the British Columbia Law Reform Commission at page 44 concluded that:—

> "Any attempt at private law reform by statute raises the problem of conflict of law. Only a very few statutes contain a choice of law provision, but the question whether to include one is relevant to many statutory reforms, particulary those with obvious international implications. However, there are dangers in tinkering with the law of conflicts on a piecemeal basis."

We agree with this. We note also that there is no governing provision included in the New South Wales Act.

However, Section 5(5) of the New South Wales Act states:—

> "It is the intention of Parliament that, except to the extent that the parties to a contract otherwise agree, a court other than a court of New South Wales may exercise the powers given to a court by Part III in relation to the contract."

This section was incorporated 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 Act to the Courts of New South Wales (see page 61 New South Wales Law Reform Commission Report 25). The provision has obvious constitutional difficulties and we do not recommend any like section in our Act.

The problems of conflict of laws in relation to this projected Act are so fraught with difficulty that it may be a good reason for confining the courts having jurisdiction to the Supreme Court or at most to the Supreme Court and the District Court but the Act must of course apply equally to an arbitrator conducting an arbitration.

6. **Definitions:**

At pages 16-17 of our previous report we recommended the inclusion of definitions adopted from Section 2 of the Victorian Act. While we have covered the necessity for defining "time of discharge" by using the British Columbia Section 1, we recommend inclusion of a definition of "court" and note that the New South Wales Act has provided for this in Section 5(1). We recommend that the definition is: —

> " 'Court' in relation to any matter, means the court or arbitrator before whom the matter falls to be determined."

7. **Exemptions:**

Excluded contracts are dealt with at pages 39-41 of the New South Wales Law Reform Commission Report and pages 35-41 of the British Columbia Report. In relation to the English and similar Acts we refer to page 15 of our previous Report. The exemption provisions have been very fully analysed in all the above and we do not propose to repeat all the arguments. There is, however, uniform acceptance of the following exemptions.

(i) A charterparty except a time charterparty or a charterparty by way of demise; (see British Columbia Section 1(2) (a); New South Wales Section 6(1) (b); English Section 2(5) (a)).

(ii) A contract, other than the specified charter parties, for the carriage of goods by sea; (see British Columbia Section 1(2) (a); New South Wales Section 6(1) (c); English Section 2(5) (a)).

(iii) A contract of insurance; (see British Columbia Section 1(2) (b); New South Wales Section 6(1) (d); English Section 2(5) (b)).

For the sake of uniformity, we therefore recommend that these exemptions be included in our intended legislation. These classes of contract will remain governed by the existing law.

One exemption that has not been canvassed in the preceding discussions is the exemption in Section 6(2) of the New South Wales Act. This section exempts a "contract embodied in or constituted by by the memorandum or articles of association or rules or other instrument or agreement constituting, or regulating the affairs of, any of the following bodies: —

(a) a company within the meaning of the Companies Act 1961;

(b) an unregistered company within the meaning of Division 5 of Part X of the Companies Act 1961;

(c) a credit union registered under the Credit Union Act, 1969;

(d) a society registered under —

  (i) the Building and Co-operative Societies Act 1901;

  (ii) the Co-operation Act 1923;

  (ii) the Friendly Societies Act 1912; or

  (iv) the Permanent Building Societies Act 1967;

(e) a trade union registered under the Trade Union Act 1881;

(f) a partnership within the meaning of the Partnership Act 1892; or

(g) an association which, on a proper case arising, is liable to be wound up or dissolved by order or the Supreme Court of New South Wales,

This exemption is included because the specified bodies have already provision in their respective Acts for distribution of the assets of the body and there is no need to apply the adjustment scheme formulated in the Frustrated Contracts Act. The association specified in Section 6(g) is one that is not expressly provided for in an enactment. However, in the New South Wales Report at page 44 the case *In re Lead Company's Workmen's Fund Society [1904] 2 Ch. 196* is cited. It is the authority for the proposition that the court exercising its equitable jurisdiction has power to interfere and wind up a society, which is not one incorporated under a statute, and to ascertain the rights of all the persons beneficially interested in the assets. In this case Warrington J. referred the matter into Chambers to settle the scheme for the equitable distribution of the remaining funds. The following South Australian Acts would be relevant in this provision.

1. Industrial and Provident Societies Act, 1923-1974.
2. Building Societies Act, 1967-1972.
3. Credit Unions Act, 1976.
4. The Companies (South Australia) Code 1980.
5. Friendly Societies Act, 1919-1975.
6. Partnership Act, 1891-1975.
7. Industrial Conciliation and Arbitration Act, 1972-1975.
8. The Associations Incorporation Act, 1956.

We point out that a further category is also relevant here. In *Federal Commissioner of Taxation v. Blakely (1951) 82 C.L.R. 388,* the High Court permitted the appropriation by shareholders of assets of a company in an informal liquidation. Provision should be made for this situation. However, whilst we have referred to this exemption we make no recommendation on it.

8. **Severability:**

The British Columbia, English and New South Wales legislation all contain provisions for severing a part of the contract where the obligations of the parties have been wholly performed except for the payment of an ascertainable sum of money before the discharge of the contract by frustration. We repeat the recommendation we made at pages 14-15 of our previous Report, that the wording in the British Columbia section is clear and should be adopted. We refer to the one amendment we suggested and abide by it, namely that the word "justly" be inserted between "may" and "be severed" in the eighth line of the proposed section.

In support of the recommendation that there be a six year time limit for bringing action, the majority note that the recommended calculations of the adjustments to be made after frustration are not really new rights but rather new adjustments of losses and expenses following upon frustration. The report does not recommend any change in the law of frustration. That law remains unaltered. If we were to recommend in this report a time limit of one year, that would constitute a reduction of five years in the time limit of six years ordinarily allowed for parties to bring action for breach and presently allowed for parties to rely upon the doctrine of frustration (whether as plaintiffs by claim, as defendants or as plaintiffs by counter-claim). It would constitute, in the view of the majority, a major erosion of existing rights under the law of contract.

The applicability or otherwise of the doctrine to a particular contract usually depends upon a very fine analysis of the provisions of the contract and the factual background against which the contract was made. See, for example, *Codelfa's case (supra)*. A time limit of one year could mean that, in some circumstances, the question of frustration would not be raised at the same time as questions of breach and implied terms were being raised. For example, a party entitled to claim that a contract has been frustrated, and therefore entitled to ask for the recommended consequential relief, might not wish to bring action within one year. He might think that litigation could be avoided. He might be under the impression (not induced by the other party) that the other party does not intend to bring an action for damages for breach of contract. He might be on reasonably good terms with the other party. On the other hand, the other party might intend to bring action for breach of contract in due course. As soon as twelve months elapsed, the other party could bring action free of any defence that the contract had been frustrated and free of the obligation to make the recommended adjustments. The other party would have the unfair advantage of a further five years in which to sue for breach, free of questions of frustration and adjustment which the first party might not have wished to raise in the first year for a variety of reasons.

The minority note that there is a trend towards a one year time limit in international contracts, a trend which might eventually force itself upon Australian contract law by way of treaties as in *Koowarta's case (infra)* or by force of Acts of the Federal Parliament giving effect to treaties. The majority say that, notwithstanding this trend and possible future development of the law, the doctrine and frustration is as much part of the law of contract as action for breach. If a contract is frustrated, the recommended adjustments ought to apply to all kinds of contracts—intra-state contracts, inter-state contracts, and contracts with an international party bound by our law. The minority suggestion of a one year time limit would apply to purely intra-state contracts and to inter-state contracts, as well as to contracts having one or more international parties. The majority concede that the trend noted by the minority may one day result in the general shortening of time limits by force of Section 109 of the Constitution.

If it is thought to be desirable to reassure the international business community having deals with South Australian

businessmen, this could be achieved by including in the proposed legislation a clause along the lines of Section 29(2) of the Trustee Act which permits any party to serve notice on another party requiring the latter to commence proceedings for relief within a reasonable time barred by a Judge if the proceedings were not initiated within the time specified. Such a provision would be likely to reassure international businessmen who are accustomed to short time limits, as well as overcome any complications arising under string contracts under which time limits were partly governed by the State limit of six years and partly by international custom of one year. It would be competent for the international party to use the notice machinery to shorten the long time limit available to the South Australian parties to the contract.

10. **Extent of Application:**

We mentioned in the beginning of this Report that the proposed legislation was only to have effect where the parties had not themselves provided for any contingencies arising in the course of the contract. The New South Wales Frustrated Contracts Act, 1978, Section 6(1) (e) and the British Columbia Frustrated Contracts Act, 1974, Section 2 deal with this very simply. We refer to page 14 of our previous Report where we analysed Section 2(3) of the English Act and recommended the enactment of a similar section but with an added sub-clause. The wording is as follows: —

> "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 sections of this Act to such extent, if any, as appears to the court to be consistent with the said provision."

11. **Leases and Tenancies:**

We recommended at page 17 of our previous Report that a section should be inserted to make it clear that the doctrine of frustration applies to leases and tenancies, and also to agreements creating an interest in land of which a Court will decree specific performance. Until recently, it was a controversial question whether the doctrine of frustration could be applied to a lease of land. The view that leases were outside the scope of the doctrine was based on the argument that a lease creates not merely a contract, but also an estate. (see: *London and Northern Estates Co. v. Schlesinger [1916] 1 K.B. 20*). Conflicting opinions were expressed by the House of Lords in *Cricklewood Property and Investment Trust Ltd. v. Leighton's Investment Trust Ltd. [1945] A.C. 221*. However the recent decision of the House of Lords in *National Carriers Ltd. v. Panalpina (Northern) Ltd. [1981] 1 All E.R. 161*, has resolved the conflict. In this case it was decided by a majority of four to one that, as a matter of law and principle, the doctrine of frustration can apply to a lease of land. However, it

was emphasized by their Lordships that the cases in which the doctrine of frustration can properly be applied to a lease of land must be extremely rare.

The British Columbia Law Reform Commission at page 16 of their report recommended that the enactment specifically include leases. However, in both the British Columbia and New South Wales Acts there is no specific mention of leases although they are not inserted in the section detailing those instances to which the Act does not apply. In view of the House of Lords decision in the *Panalpina case* we believe that we should assume the application of the doctrine to leases without necessarily expressly providing for it. We therefore make no recommendation in this area.

12. **Multiple Contracts:**

Commercial transactions frequently involve more than two parties and incorporate more than one contract. The performance of duties and obligations expressed in a contract can influence the performance of other duties and obligations in a related contract. Thus, the completion of a contract can be bound or dependent on the completion of another contract. We recommend that the proposed legislation take into account the rights of the parties involved in the string contracts. No other frustrated contracts legislation has provided for this. We suggest the insertion of a section requiring either party to an action under the proposed legislation to give notice to parties to any dependent contracts of the impending action. Provision should accordingly be made for such parties to appear at the hearing and determination of rights claimed under the intended legislation and where necessary, for such parties to be joined as parties to the action.

13. **Multiple party contracts:**

One problem which has not been dealt with in other reports is that not all parties to a contract may be equally interested in its performance. In addition it is customary, both because English law knows no jus quaesitum tertio and because of the difficulties inherent in the concept of consideration, to make persons parties to the principal contract who are either not directly parties to the performance thereof at all or who are only interested in the performance of a small segment of the contract. Examples are: guarantors to a limited extent, sub-suppliers and sub-contractors. It would be completely unjust to make such persons contribute to an equal adjustment of loss of benefits if the contract should turn out to be frustrated. We think that there should be a section in the proposed legislation giving power to a Judge in his direction to exempt persons in such a position, either wholly or partly as the justice of the case may require, from being called upon to bear the apportioned loss of benefit under the frustrated contract.

In this report we have drawn substantially on the analyses of the British Columbia Law Reform Commission in its Project No. 8 and the work of the New South Wales Law Reform Commission in its Twenty-Fifth Report. We have received valuable assistance from each of these. We have preferred the solution adopted by the British Columbia Law Reform Commission and note that such solution follows the

recommendation of Goff and Jones. We attach a copy of the New South Wales Act and the British Columbia Act as appendices to this Report.

The Committee expresses its thanks to the Honourable Mr Justice Bouck of the Supreme Court of British Columbia for his kindness in answering our questions as to the use made of the British Columbia legislation in the Courts of that Province.

We have the honour to be

Howard Zelling

J. M. White

Christopher J. Legoe

M. F. Gray

D. F. Wicks

A. L. C. Ligertwood

G. Hiskey

Law Reform Committee of South Australia

1983

NOTE: The Chairman, Mr Justice Legoe and the Solicitor-General have signed the report subject to their dissent on one point which is appended hereto.
Mr P. R. Morgan did not sign the report.

DISSENT

The Chairman, Mr Justice Legoe, and the Solicitor-General join in dissenting from the recommendation that the limitation period for taking proceedings under the new Act should be six years.

In our view the proper period should be one year. Our reasons for so thinking are as follow: –

1. The usual cases calling for the application of the doctrine of frustration are commercial contracts, often multi-party, and of substantial complexity, and frequently having further contracts depending for their completion on the contract said to be frustrated. Today expedition is essential to commercial reality.
2. The international commercial community have always subscribed to the view that the law's delays are a positive hindrance to commercial trading. Prices of commodities go up or down almost overnight and exchange rates frequently fluctuate greatly and often rapidly. Parties who have entered into subsequent contracts on the faith of the goods or services being delivered or rendered as the case may be, under the contract being impugned for frustration, are left completely uncertain when, if ever, their rights and liabilities will be sorted out. For it must be emphasized that if the period of limitation be six years, one has then to add on the period from writ to trial and judgment, not to speak of two possible appeal periods. We cannot think that the Australian commercial community would view the matter any differently from their overseas counterparts.
3. The new international codes on sale and other transfer of goods all have short limitation periods, precisely for the reasons given above. Australia has been represented at the discussions on the codes and some have already been completed and made the subject of international conventions. These codes, as Australia subscribes to them and they have the requisite number of countries adhering to them so as to bring them into operation, may in all probability be law of their own force in Australia. Even if the recent decision of the High Court in *Koowarta v. Bjelke-Petersen and Others* (judgment delivered 11th May, 1982) turns out to be more circumscribed in its application than some of the judgments would suggest, a short Act of the Commonwealth Parliament is all that is needed to bring them into operation in this country.

If South Australia wants to play its proper part in international trade as we hope it will, it would be a real disincentive to such trade if international buyers who are "buying on" from a purely South Australian first contract, find that they can be tied up for many years whilst the litigation under the head contracts winds its way to completion and they themselves are subject to short periods of limitation under international codes.

Howard Zelling
Christopher J. Legoe
M. F. Gray

9th September, 1983.

APPENDIX A

(New South Wales)

A DRAFT BILL FOR AN ACT

To amount 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".

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

3. This Act is divided as follows—

PART I.—Preliminary—*ss.* 1-6.

PART II.—Effect of Frustration—*ss.* 7-9.

PART III.—Adjustment on Frustration—*ss.* 10-18.

Division 1.—*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.

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

"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;

"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 far 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 another 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—

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

(b) a charter-party, except a time charter-party and except a charter-party by way of demise;

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

(d) a contract of insurance.

(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 following bodies—

(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 partership 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 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.

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 be discharged, save so far as is necessary to support a claim for damages for breach of the promise before the time of frustration.

(2) Subsection (1) does not affect a promise 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.

(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.

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.

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.

(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—

(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).

(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 any 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 perfomance received or is expended or exhausted in giving the performance received.

DIVISION 3.—*Other adjustments.*

15. Where—

(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.

(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.

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—

(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 Court may, for the purposes of this section, make orders for—

(a) the making of any disposition of property;

(b) the sale or other realisation 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 proceedings of a receiver of property; and

(g) the vesting of property in any person.

(4) Sections 78 and 79 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.

(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.

(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.

Section 4 of the British Columbia Act reads as follows: —

"Act applicable to part of contract. — Where 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 purpose 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."

A severability section is desirable as it is then possible for a court to give effect to the intention of the parties in as many circumstances as possible. However, the common law rule is that the doctrine of frustration operates only in relation to the whole of a contract and not part only thereof (see: *Aurel Forras Pty. Ltd. v. G. Karp [1975] V.R. 204*). Thus, it is necessary to expressly provide for severability.

Some members of the Committee preferred the New South Wales section on severability. The consensus however was that there was not sufficient difference to make a firm recommendation on the point. The real question was to make sure that a severability section was included in our Act.

9. **Limitation of Actions:**

In our previous report we drew attention to the fact that although there is no English provision, the Victorian Section 5 deals with limitation of actions and we recommended a similar provision. The basis of this was that the matter should be regarded as a simple contract express or implied within the meaning of Section 35(a) of the South Australian Limitation of Actions Act, 1936-1975 and, as such, any action arising from the proposed legislation should be commenced within six years from the time the cause of action arose. The Victorian provision goes on to specify the cause of action as having accrued at the time of discharge.

The New South Wales legislation does not provide for a limitation period but the British Columbia Act does. Section 9 provides that the limitation period should be the same as the period for a breach of the particular contract that has been frustrated and that the limitation period should begin to run from the time of frustration.

We agree that since the proposed legislation intends to create new rights, there should be a limitation period for the bringing of actions to enforce those rights. There was an acute difference of opinion on the period of limitation of action. The Committee by a 5-3 majority decided to recommend that the period be six years, to assimilate the provisions of the new Act to those contained in relation to contracts in the Limitation of Actions Act 1936. The minority dissent strongly from this view and are of the opinion that the period should be one year. Their dissent is appended to this report.

(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.

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.

(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.

(3) An order of removal under subsection (1) 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 registrar of the court of petty sessions in such manner as the District Court may direct.

(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.

(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.

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.

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

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.

(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.

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—

(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

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

(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.

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.

AMENDMENTS OF ACTS.

Column 1.		Column 2.
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.
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.

APPENDIX B

LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943
(U.K.)

THE ENGLISH ACT

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

CHAPTER 40.

An Act to amend 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: —

1. (1) 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 effect 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 of 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 benefitted 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 or 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.

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 forgoing 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.

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 C

FRUSTRATED CONTRACTS ACT

BRITISH COLUMBIA

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:

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.

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.

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

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.

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 insofar 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 a benefit 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.

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 vlaue, 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).

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.

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.

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.

D. J. WOOLMAN, GOVERNMENT PRINTER, SOUTH AUSTRALIA