

THE CONTRACTUAL REMEDIES ACT 1979 – SIX YEARS ON

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The Contractual Remedies Act 1979 has been in force now for over six years, and the cases are now being decided in sufficient quantity to justify some tentative conclusions about the Act's impact. Unfortunately, the majority of the judgments are as yet unreported, and no doubt many of them will remain so. While one is normally reluctant to place weight on unreported judgments (especially if they are oral), it is felt that an exception can legitimately be made in this instance, given the importance of the new legislation and the desirability of developing patterns of decision being made known with reasonable promptitude.

I SECTION 6 – DAMAGES FOR MISREPRESENTATION

Section 6 of the Act provides that if a party to a contract has been induced to enter into it by a misrepresentation made to him by or on behalf of another party to that contract, he is entitled to damages from that other party as if the representation were a term of the contract that has been broken.

The aim was to simplify the old law which had drawn complicated distinctions between "terms of the contract" which gave rise to liability in damages and "mere representations" which did not. There were fears that the rule laid down in the new section might be too simple, and create too great a risk of liability for those giving pre-contract information. Certainly there have already been a comparatively large number of cases under the section, and in nearly all of them liability has been held to exist. But it is likely that liability would have existed under the pre-existing law on the same facts: it was not difficult under that law to find that the making of a pre-contract statement was accompanied by contractual intent and was thus a term of the contract or, in more recent times, that it was in breach of a tortious duty of care. In other words, the main effect of the new section may have been to allow the courts to arrive at the same results by a simpler line of reasoning. Nevertheless the section, with its shift of focus, does have the potential to blur certain distinctions and thus to lead to changes of theory.

1 *A misrepresentation*

Unlike section 7, section 6 does not provide that it is a code. "Misrepresentation" is not defined in the Act, and presumably, therefore, bears its common law meaning.¹ However, the context of the inquiry may now

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1 This was assumed in *Ware v Johnson* [1984] 2 NZLR 518 at 537 per Prichard J and in *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984 at 54 per Barker J.

be somewhat different, for whereas in the past the question of whether a statement was a misrepresentation was often relevant only for the purpose of rescission in equity, its major relevance now is in determining liability in damages.

(a) Statement as to present or past fact

A representation is a statement as to *present* or *past* fact, as distinct from a statement of *intention* or *future* fact. That was so under the earlier law, and the post-Act cases say that it is still so.² However, if a statement which is ostensibly about the future *implies* a statement as to present fact, it may be held to be a misrepresentation. Thus, in *Ware v Johnson*³ a statement that a kiwifruit orchard would produce in two years' time was held to be a misrepresentation in that it implied that the present state of the orchard was such as to justify such a prediction; and in *New Zealand Motor Bodies Ltd v Emslie*⁴ a "budget forecast" for a company was held to imply that the present state of the company was such that the forecast "followed logically".

An element in both these decisions may have been the relative knowledge of the parties, the maker of the statement being in a better position to know the facts than the recipient. In *Emslie* this factor was expressly noted;⁵ it was clearly present in *Ware v Johnson* too. In other words, in each case the recipient of the statement was clearly *relying* on the information supplied by the other. This point will be discussed later.

The apparent logic of the future/present distinction may not be as clear as it first seems, for just as statements apparently about the future can imply statements as to the present, so the main value of some statements ostensibly about the past is that they imply that the state of affairs thus represented will continue into the future. The seller who misrepresents the turnover of a business, for instance, is really influencing the buyer's estimate of what he will make from it in future; if, however, it is made quite clear to the buyer that circumstances have changed and that the past lack of turnover may well not continue, it is hard to see that he would have a cause of action. Indeed in *ME Torbett v Keirlor Motels Ltd*⁶ Casey J recognised this point:

I agree with Mr Vickerman that the representations about turnover and gross profit applied only to the previous 21 weeks and were not intended nor understood to be *representations* or *warranties* about what the business would achieve in the future However, I regard the understatement of wages as being more than a representation of past history; implicit in the figure for wages certified by Mr Gaskin was the assertion that this item would continue at that level if the business was run in the same way and with the same staff

2 *Ware v Johnson* [1984] 2 NZLR 518 at 537 per Prichard J and *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984 at 54 per Barker J.

3 [1984] 2 NZLR 518.

4 *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/84, 6 June 1984, Barker J.

5 *Ibid* at 54.

6 High Court Auckland A539/83, 30 March 1984, Casey J.

It may well be that this present/future borderline will prove to be a fruitful area of controversy. This may be more likely now under the new legislation than it was at common law, for once it has become the law that statements of fact which are relied upon are actionable as representations without the necessity of proving contractual intent, may there not be greater pressure to argue (however doctrinally novel) that non-contractual *promises* and *statements of intent* which are relied upon should similarly be actionable? That line of reasoning has already borne fruit in the law of torts in *Meates v Attorney-General*.⁷

There are signs of a blurring of the distinction in at least one case under section 6. In *McLeod and Bailey v Davis*,⁸ the vendor of a lease purported to sell with it certain chattels that he did not own, having disposed of them some time previously when he had sold a business which had been carried on on the premises. A list of the chattels was read out over the telephone before the contract, and was later included in writing in the contract document itself. The telephoned list was held to be a misrepresentation within section 6. Yet the most natural interpretation of the telephoned message is that it was a simple *promise* to transfer the listed items upon settlement; they were part of the subject-matter of the sale. If one is to justify this in traditional terms as a statement of fact, it would have to be done by saying that the vendor impliedly represented they were his to sell. That is no doubt acceptable reasoning, but what is more interesting is that the court did not regard it as necessary even to make a finding as to the category (ie promise or statement of fact) into which it fell.

(b) Statements of opinion

The traditional stance of the common law has been mentioned in another context in the cases under the new section: a statement of opinion, as distinct from a statement of fact, is not actionable as a misrepresentation. But again the relative knowledge of the parties is important, and if the facts are not equally known to both sides,⁹

. . . then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion.

Thus, in the *Emslie* case (*supra*) the budget forecast, although arguably a statement of opinion only, was held to imply a statement about the present

⁷ [1983] NZLR 308.

⁸ *McLeod and Bailey v Davis*, High Court Palmerston North A37/83, 11 June 1984, Eichelbaum J. In *Aotearoa International Ltd v Scancarriers A/s* [1985] 1 NZLR 513 at 531, Wallace J at first instance noted that "dichotomies between facts, opinions and intentions may be regarded as too neat". He found, however, that the statement in this case amounted merely to "an indication concerning the likely future position" falling short of a misrepresentation. See also *Grand Arcade Jewellers Ltd v Moonshine Enterprises Ltd*, High Court Wellington A193/80, 10 December 1985, Quilliam J, a case decided at common law.

⁹ *Smith v Land and House Property Corporation* (1884) 28 Ch D 7 at 15 per Bowen LJ cited by Barker J in *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/84, 6 June 1984, at 54.

state of the company. In *Perring v V R Wood Ltd*,¹⁰ likewise, a statement that the tread of a tractor had about 50% life left, although arguably an opinion in that it contained an element of judgment, was held to be a statement of fact, Eichelbaum J noting that it was a “deliberate assertion by a knowledgeable person”.¹¹ This type of reasoning produced an interesting, and significant, result in *A E McDonald Ltd v Adams*¹² where an estimate by a firm for recontouring land turned out to be very wrong — a not too unusual occurrence in all trades and businesses these days. An argument that the estimate was actionable as a misrepresentation under section 6 failed on the ground that the clients themselves had considerable knowledge in the type of undertaking. They must have been aware that there was no reliable basis on which the estimate could have been based, and that it was merely “a guesstimate” or “a seat-of-the-pants judgement”.

This “relative knowledge” factor has been emphasised expressly in all the post-Act cases on the opinion/fact borderline. As we have seen, it seems to have played its part in the future fact/present fact cases also, albeit not as explicitly. In other words, underlying the apparent logic of this part of the law is the notion that the courts are not slow to compensate a person who, because of his lack of knowledge, *relies* on information supplied by another more knowledgeable person. It is particularly significant that this “relative knowledge” was relevant, and was even described as decisive,¹³ at common law in deciding whether a pre-contract statement was a term or a mere representation; it also underlay many of the decisions on whether a tortious duty of care existed for the purposes of the *Hedley Byrne* doctrine. All this suggests that however rules of law on this subject are actually framed, the reliance factor will make its appearance somewhere. And it may well be that cases which at common law would have been decided on the basis that a statement was a mere representation and not a term will, under the Act, be decided on the basis that the statement was one of opinion, and thus not a representation at all. *Oscar Chess Ltd v Williams*¹⁴ may well be an example.

(c) Half truths

Statements may be misrepresentations if, although they are true as far as they go, matter is omitted in such a way as to distort the truth of what is said. This principle has been illustrated several times in cases under the Act. Thus, a statement to the purchaser of a lunch bar that the nearest competition was half a mile away was held to be a misrepresentation; although literally true at that time, it omitted to state that a new bar would be opened just down the road shortly.¹⁵ Likewise, an accurate statement about the past turnover of a business was held to be a misrepresentation

10 *Perring v V R Wood Ltd*, High Court Nelson A31/83, 30 June 1984, Eichelbaum J.

11 *Ibid* at p15.

12 *A E McDonald Ltd v Adams*, High Court Wellington A318/82, 22 March 1985, Eichelbaum J.

13 *De Lassalle v Guildford* [1901] 2 KB 215 at 221 per A L Smith LJ (criticised as too strong by Lord Moulton in *Heilbut Symons and Co v Buckleton* [1913] AC 30 at 50).

14 [1957] 1 WLR 370.

15 *Wakelin v R H and E A Jackson Ltd*, High Court Auckland A1131/83, 6 August 1984, Henry J.

in that it failed to inform the buyer that that turnover had depended to the extent of about 30% on a line of business which had since been discontinued.¹⁶

The cases are not entirely clear on what ingredients must be proved to constitute a misrepresentation of this kind. If reliance by the representee is as important as has been suggested above, it might be thought that all that need be proved is that the statement was objectively misleading, and that the representee was induced by it to enter the contract. A literal construction of the Act would certainly not require any other conclusion. But the cases have not looked at the matter in quite that way. Influenced to some extent by statements in Spencer Bower and Turner on *Actionable Misrepresentation*¹⁷ they have tended to regard the "half truth" type of misrepresentation as involving breach of a duty of full disclosure, and it has thus been regarded as important whether or not the representor, perceiving the effect his partially true statement was having on the representee, "studiously withheld" the additional information. Thus in *Sturley v Manning*, the "turnover" case just referred to, Prichard J found that the omission of the relevant information was "deliberate", and that the non-disclosure amounted to concealment.¹⁸ So, in *Ware v Johnson*,¹⁹ where the buyer of the kiwifruit orchard had been told that certain named sprays had been used, it was held not to be a misrepresentation to omit the fact that another (harmful) spray had been used. This was because the question depended on "whether the representor appreciates that what he said, in conjunction with what he has not said, has misled or will mislead the representee, unless the necessary correction is made".²⁰ In the circumstances of the conversation in question this had not been appreciated by the representor.

Thus the cases seem to require a kind of wilful non-disclosure, in circumstances where the representor realises the effect his half-truth is having on the representee. In that it requires a mental state akin to fraud, this requirement would seem somewhat alien to the spirit of section 6, and also to the overriding importance of reliance evinced by the other cases. In other words, should it not be the actual effect on the representee which is important rather than the perception of that effect by the representor?

2 *Made by or on behalf of another party*

It is clear that a party is liable for misrepresentations made by his agents acting within their real or apparent authority. There had been a decision before the Act to the effect that a land agent has apparent authority to make representations to prospective buyers, although not to give them contractual warranties.²¹ Dawson and McLauchlan suggest that this distinction

16 *Sturley v Manning*, High Court Auckland A611/82, 19 December 1984, Prichard J.

17 3rd ed 1977 at paras 83 and 86-87.

18 *Sturley v Manning*, High Court Auckland A611/82, 19 December 1984, at 16 per Prichard J.

19 [1984] 2 NZLR 518.

20 *Ibid* at 539.

21 *McClure v Barth and Smith*, High Court Christchurch A278/77, 21 September 1979, Casey J cited by Dawson and McLauchlan, *The Contractual Remedies Act 1979*, 23.

has ceased to be significant since the Act.²² The post-Act cases certainly bear this out. In a number of them vendors have been held liable in damages for their land agent's pre-contract representations.²³

The alternative requirement that a misrepresentation be made "by" the party himself will normally give rise to no difficulty. But *Perring v V R Wood Ltd*²⁴ provides an indication that even here all may not be plain sailing. Perring, a dealer, made a statement to the prospective buyer of a tractor about its remaining track life. Perring had no personal knowledge of the vehicle, but was relying on information relayed to him by one Croucher who was acquainted with it. Perring read the information to the purchaser from his diary; he was present later when Croucher confirmed it to the purchaser. It is not too difficult to see in such circumstances that the representation was "made by" Perring, and the court did hold him liable under section 6. But one can imagine variants of the facts where the answer might not have been so clear. For instance, could there be any circumstances where silence by X, who is present when Y makes a statement, amounts to a misrepresentation attributable to X? (Already in one District Court decision it has been held that silence in the face of a buyer's patent self-deception amounted to acquiescence in that deception, and thus to misrepresentation.)²⁵ Again, what if Perring, rather than positively providing the information for his buyer, had merely showed him his diary entry, making it clear that he, Perring, had no personal knowledge of the matter?²⁶ And what of the vendor who, in response to a purchaser's question, simply shows him a copy of a manufacturer's brochure? It can hardly be said in such cases that the vendor is assuming responsibility for the truth of the statement, but that may be less relevant to liability under section 6 than it was under the pre-existing common law where contractual intent was the essence of liability.

3 *Made to him*

Before a plaintiff can succeed in an action for damages for misrepresentation he must show that the representation was made *to him*. This expression would appear to be wide enough to encompass misrepresentations made to a group of which the plaintiff is a member, or even to the general public through a medium such as a newspaper advertisement or a brochure. In *Baker v McKechnie*²⁷ the vendor of a house was held liable for falsely representing that the house had a heating and air conditioning unit when in fact there was no air conditioning side to the unit. The original source of the misrepresentation was an advertisement in the *NZ Herald*. It was not clear whether the land agent or the vendor expressly confirmed

22 Ibid.

23 For instance, *Wakelin v R H and E A Jackson Ltd*, High Court Auckland A1131/83, 6 August 1984, Henry J, and *ME Torbett Ltd v Keilor Motels Ltd*, High Court Auckland A539/83, 30 March 1984, Casey J.

24 High Court Nelson A31/83, 30 July 1984, Eichelbaum J.

25 *Witham v MacPherson* (1982) 1 DLR 431.

26 Cf *Oscar Chess v Williams* [1957] 1 WLR 370 at 376 per Denning LJ.

27 *Baker and Milne v McKechnie*, High Court Auckland A885/83, A553/83, 26 October 1984, Hillyer J.

this in their discussions with the buyers, although Hillyer J thought that was likely. But the judge held that:²⁸

I do not think it matters because clearly the plaintiffs, having seen the advertisement, had the impression that the unit was . . . an air conditioning unit, and certainly nothing was done to disabuse them of that opinion.

It is also the case that a representation made to a person with knowledge on the representor's part that the person is the agent of an undisclosed principal is effective as a representation made to the principal — provided that it is relayed to the principal, and induces him.²⁹

4 *Induced to enter into the contract*

A plaintiff must show that the misrepresentation *induced* him to enter into the contract. In this respect section 6 appears to differ in two ways from the common law. First, it is no longer necessary to show that the representation was material. In practice, however, this will make little difference, for materiality meant no more than "having a tendency to induce": most representations in fact induce because they have a tendency to do so.

Secondly, there is authority that under the Act it is not necessary that the defendant intended to induce the contract by his representation, it being enough that his representation did in fact do so.³⁰ This would seem clearly to follow from the wording of the section. At common law such an intention was necessary, at least in the view of Spencer Bower.³¹

With these exceptions, the post-Act cases hold that the common law authorities are still relevant. It is enough that the misrepresentation is *an* inducement to contract; it does not have to be the only one. Thus, in the *Emslie* case,³² the favourable budget forecast was only one factor in the plaintiff's decision to buy all the shares in an industrial company. A "certain degree of keenness" to buy was apparent for other reasons too, particularly the desire for rationalisation in the industry and the desire to take over a competitor. The misrepresentation contained in the forecast was actionable nonetheless. Nor does it have to be shown that in its absence the representee would not have entered into the contract,³³ although the case is obviously stronger if that can be shown.³⁴ The proximity in time of the representation to the entry into the contract is relevant in demon-

28 *Ibid* at 2-3.

29 *Ware v Johnson* [1984] 2 NZLR 518 at 537 per Prichard J.

30 *Ibid* at 538.

31 Spencer Bower and Turner on *Actionable Misrepresentation* 3rd ed at para 117.

32 *New Zealand Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, Barker J. See also *Baker and Milne v McKechnie*, High Court Auckland A885/83, A553/83, 26 October 1984, at 5 per Barker J and *Perring v V R Wood Ltd*, High Court Nelson A31/83, 30 July 1984, at 12 per Eichelbaum J.

33 *Perring v V R Wood Ltd*, High Court Nelson A31/83, 30 July 1984, Eichelbaum J.

34 For instance, *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, at 6 per Hardie Boys J; *McLeod and Bailey v Davis*, High Court Palmerston North A37/83, 11 June 1984, at 14 per Eichelbaum J.

strating that it was an inducement.³⁵ So, it would seem, is the now familiar factor that the representee had less knowledge than the representor;³⁶ this consideration has raised its ubiquitous head in this context too. And, finally, it does not matter that the plaintiff had the means of checking the truth of the representation but did not do so.³⁷

5 *Against the other party*

It is only the other party to the contract who can be sued under section 6. No action lies against an agent. By the same token, section 6(1)(b), which abolishes the tortious action for deceit and negligence against the other party, has no application vis-à-vis an agent. Agents have in two cases been successfully sued in tort for misrepresentation since the Act.³⁸

6 *As if the representation were a term of the contract*

The plaintiff in a misrepresentation case is entitled to damages from the other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken. Three comments may be made about this.

(a) "As if it were a term"

The section does not purport to *abolish* the distinction between representations and terms; it merely provides that for the purposes of awarding damages a representation is to be treated *as if* it were a term. However, the context of the award of damages was by far the major one in which the distinction used to be drawn at common law, and the virtual assimilation of the two concepts for that purpose may be leading the courts to gloss over the other distinctions which used to be important. First, it appears to have been the rule at common law that if a misrepresentation inducing a contract was later embodied in writing as a term of the contract, the misrepresentation lost any independent force, and only the term could thereafter be relied upon as a ground of relief. In other words, the misrepresentation merged in the term.³⁹ However, in a number of cases since the Act, a plaintiff has successfully relied on a misrepresentation even though its substance later appeared as a written warranty in the contract itself.⁴⁰ Indeed it appears now to be acceptable in such a circumstance for plaintiffs to plead the misrepresentation and the warranty as alternatives;

35 *Perring v V R Wood Ltd*, High Court Nelson A31/83, 30 July 1984, at 12 per Eichelbaum J.

36 *Ibid* at 14.

37 *New Zealand Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, at 58 per Barker J, *Young v Hunt* [1984] 2 NZLR 80 at 85-86.

38 *Wakelin v R H and E A Jackson Ltd*, High Court Auckland A1131/83, 6 August 1984, Henry J; *M E Torbett Ltd v Keirlor Motels Ltd*, High Court Auckland A539/83, 30 March 1984, Casey J.

39 *Pennsylvania Shipping Co v Compagnie Nationale de Navigation* [1936] 2 All ER 1167.

40 For instance, *McLeod and Bailey v Davis*, High Court Palmerston North A37/83, 11 June 1984, Eichelbaum J; *Sturley v Manning*, High Court Auckland A611/82, 19 December 1984, Prichard J.

in *McLeod and Bailey v Davis* they succeeded on both grounds.⁴¹ Since section 6 renders a misrepresentation a ground of damages, that development is perhaps not surprising.

Secondly, in *Young v Hunt*⁴² the purchaser of a coffee lounge who had wrongly cancelled the contract for "misrepresentation" was nevertheless held entitled to compensation for that misrepresentation. Holland J throughout his judgment refers to the case as being one of misrepresentation, although the inaccurate statement was in fact an express warranty in the written contract; at one point the judge speaks of the "representation" as "forming part of the contract itself".⁴³ Likewise, in *Burns v Jordan*⁴⁴ the judgment under appeal found that the description of a goat as an Angora was both a condition of the contract *and* a misrepresentation. Damages were awarded under section 6; the correctness of this was not challenged on appeal. These cases come close to applying the very converse of section 6: they treat a *term* as if it were a *representation*. Normally this will not matter, but there are times when such an approach could have certain dangers. For if a statement is an express warranty and thus a contractual term, it should be actionable per se if it is broken, without the necessity of proving that it induced the contract. To assume it is covered by section 6 would involve the necessity of proving inducement.⁴⁵

Finally, there are dicta which go the length of saying, not just that a misrepresentation is to be treated *as if* it were a breach of a term, but that it actually *is* a breach of a term:⁴⁶

That then [the finding of misrepresentation inducing the contract] amounts to a finding that there has been a breach of contract

and:⁴⁷

The defendants were guilty of misrepresentation when Mr Melville forwarded on their behalf the budget forecasts . . . ; in terms of section 6 of the Act, *it became a term of the contract* that the state of ECI's business was such that the budget forecasts for the 6 months from 1st July 1980 were realistic, reasonable and attainable.

Yet a misrepresentation and breach of a term are still not exactly the same in all respects because a misrepresentation does not require contractual intent. And there are at least three possible differences in consequence. The first is that adverted to earlier: it should not be necessary for a plaintiff to prove inducement if he is relying on an express term. Secondly (at least in theory), if the contract is one required by law to have all its terms in writing, an oral *term* will render it unenforceable; while an oral

41 High Court Palmerston North A37/83, 11 June 1984, Eichelbaum J.

42 [1984] 2 NZLR 80.

43 *Ibid* at 86 per Holland J.

44 High Court Napier M86/82, 9 November 1984, Gallen J.

45 Cf *Young v Hunt* [1984] 2 NZLR 80 at 84 and 86.

46 *Baker and Milne v McKechnie*, High Court Auckland A885/83, A553/83, 26 October 1984, at 5 per Hillyer J.

47 *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, at 58 per Barker J.

misrepresentation should not, for the simple reason that it is not contractual. However, this difference is in the realms of theory, for an oral term in such a case would very likely be construed by the courts as a collateral contract in any event. And, thirdly, if the contract is one for the sale of goods any question of its cancellation or rescission because of a misstatement will be determined, in the case of a term by reference to the provisions of the Sale of Goods Act 1908,⁴⁸ and in the case of an innocent misrepresentation (it would seem) by the common law as expounded in the line of cases following *Riddiford v Warren*.⁴⁹

In at least two post-Act cases the persisting difference between a term and a representation has been recognised. In *Buttimore v Bell*,⁵⁰ Sinclair J held that a case which had been pleaded in the District Court on the basis of misrepresentation could not be dealt with in the High Court as a case of breach of warranty. He said there was "the world of difference between a warranty and a representation A representation and a warranty are not synonymous. That is patently obvious when one has a look at the provisions of the Sale of Goods Act and the Contractual Remedies Act."⁵¹ And in *Perring v V R Wood Ltd*⁵² it was held that the statement by the vendor of a tractor that it had a track life of 50% remaining was not a term of the contract:⁵³

It was not a matter brought up by Mr Wood when describing his requirements but raised gratuitously by Mr Perring at a later stage. In my opinion it was no more than a representation.

Damages were awarded in respect of that representation.

(b) Damages

It is clearly established that the measure of damages for a misrepresentation is the contract and not the tort measure.⁵⁴ Normally, this measure will be the difference between the value of the subject matter as it is and the value as it would have been had the representation been true. This is on the basis that the purpose of damages in contract is to put the plaintiff in the position in which he would have been had the contract been performed. Consequential losses may also be recoverable if they fall within the standard tests of remoteness.⁵⁵

48 See *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519.

49 (1901) 20 NZLR 572. This is because the Sale of Goods Act 1908 *itself* preserves the common law so far as it is not inconsistent with it: see *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519.

50 High Court Auckland M1481/82, 3 February 1984, Sinclair J.

51 *Ibid* at 4.

52 High Court Nelson A31/83, 30 July 1984, Eichelbaum J.

53 *Ibid* at 11.

54 *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, at 60 per Barker J; *McLeod and Bailey v Davis*, High Court Palmerston North A37/83, 11 June 1984, at 15 per Eichelbaum J; *Burns v Jordan*, High Court Napier M86/82, 9 November 1984, at 5 per Gallen J.

55 The best summary of the applicable principles is to be found in *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, at 59-62 per Barker J.

However, damages is a more flexible remedy than many of the writings on the subject give it credit for. Instead of the "difference in value" measure the court may decide to award a measure based on loss of profit. That was done in *Ware v Johnson*,⁵⁶ the case of the kiwifruit orchard; Prichard J, however, expressed the view that in the end it would not produce a very different result.⁵⁷ Moreover there are indications from Barker J in the *Emslie* case that if the contract measure were to be inappropriate in a particular case the court would "probably resort to granting the tortious measure".⁵⁸ It is a matter of particular interest that in the two post-Act cases where the court has found liability against both a party to the contract and his agent, the measure of damages has been the same against both, despite the fact that the liability of the party was in contract and that of the agent in tort.⁵⁹

There is likewise flexibility as to the date at which damages are assessed. While the normal time is the date at which the loss was suffered, namely the date when the representation was acted upon, that date is not immutable. "It is a presumption and not an invariable rule."⁶⁰ Thus, in *Burns v Jordan*,⁶¹ damages for a misrepresentation that a goat was a pure bred Angora were calculated as at the date of the trial.

Pragmatic considerations are just as relevant as rules in calculations of this kind.

(c) The parol evidence rule

The parol evidence rule is merely a shadow of its former self; it has not posed serious problems for litigants for a long time.⁶² There has, however, been much speculation as to how the rule has been affected by the Contractual Remedies Act. To date, it has been suggested in two cases that it operates to preclude reliance on a misrepresentation which is inconsistent with an express warranty in the contract. Thus, in *Young v Hunt*,⁶³ the contract expressly warranted that the turnover of a coffee lounge was \$600 per week. It was held that an earlier oral estimate of \$700 could have "no contractual significance" because of the provisions of the express clause, by which the judge appears to mean that it was overridden by that express clause. In *Wakelin v R H and E A Jackson Ltd*⁶⁴ the plaintiffs amended

56 [1984] 2 NZLR 518.

57 Ibid at 542.

58 High Court Dunedin A93/82, 6 June 1984, at 60 per Barker J.

59 *M E Torbett Ltd v Keirlor Motels Ltd*, High Court Auckland A539/83, 30 March 1984, Casey J, and *Wakelin v R H and E A Jackson Ltd*, High Court Auckland A1131/83, 6 August 1984, Henry J. See also *Ware v Johnson* [1984] 2 NZLR 518 at 541 per Prichard J: "I am of the view that in this case it makes no difference to the proper quantum of damages whether the award is on a contractual basis . . . or a tort basis." In *Wakelin v R H and E A Jackson* (supra) the measure settled upon seems to have been the tort measure: difference between the price paid and the true value.

60 *NZ Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82, 6 June 1984, at 61 per Barker J.

61 High Court Napier M86/82, 9 November 1984, Gallen J.

62 See however *Donovan v Northlea Farms Ltd* [1976] 1 NZLR 180; cf *A M Bisley & Co Ltd v Thompson* [1982] 2 NZLR 696.

63 [1984] 2 NZLR 80 at 84 per Holland J.

64 High Court Auckland A1131/83, 6 August 1984, Henry J.

their claim for a misrepresentation as to turnover from \$7000 to \$6000, which was the figure contained in an express warranty in the contract. As Henry J said:⁶⁵

The amendment recognises that it is not possible to adduce oral evidence to contradict such an express provision.

7 Section 4

Section 4 provides that the court can go behind the common form clause which recites that a purchaser relies on his own judgment and not on any statement made by the vendor. The court is entitled to find, despite such a clause, that such a statement was made, and was relied on. However, the court may allow reliance on such a clause if it considers it "fair and reasonable that the provision should be conclusive between the parties". This section has been mentioned in three cases, and the overriding impression is that the courts are not ready to find it fair and reasonable that such a clause be conclusive. In *M E Torbett Ltd v Keirlor Motels Ltd* such a clause appeared in a contract for the sale of a coffee lounge. Casey J did not permit reliance on it:⁶⁶

The subject matter was important and there was a large amount of money involved Both parties had solicitors acting for them, but this did not help Mr Torbett because he was unable to get Mr Gaskin's agreement to the warranty his solicitor wanted

It was also treated as relevant that the misrepresentation was deliberate.

In the *Emslie* case, which involved the sale of shares in a business enterprise between two commercial organisations, no attempt was made to rely on the clause in the contract, but Barker J intimated that if such an attempt had been made "no doubt section 4(1) of the Act would be unhelpful to the defendants in this regard".⁶⁷

The section was cited, however, in one other case where it contributed to a finding that a party to a compromise agreement was not entitled to reopen an earlier agreement, which was the subject of the compromise, on the ground of misrepresentation.⁶⁸

II CANCELLATION FOR BREACH — SECTIONS 7-9

1 The tests for cancellation — section 7

Section 7 expressly provides that it is a code, and that it replaces the common law rules about cancellation and rescission for breach and misrepresentation. The tests it lays down for cancellation in respect of breach, however, are very similar to the old common law rules. Nevertheless, it must be remembered that the tests are now statutory, and all cases of cancellation must be fitted within the words of the section. There is a natural

65 *Ibid* at 3.

66 High Court Auckland A539/83, 30 March 1984, at 11 per Casey J.

67 High Court Dunedin A93/82, 6 June 1984, at 53 per Barker J.

68 *Baillie v CBA Finance Ltd*, High Court Auckland A821/84, 22 November 1984, Sinclair J.

temptation in cases involving specific problems which had been well traversed at common law to deal with the matter on the basis of the common law authorities and to treat the statute as secondary. That temptation must be resisted.

(a) Repudiation

Section 7(2) provides that repudiation by one party is a ground for cancellation by the other. This simply repeats the common law.

(b) Essential term

Section 7(4)(a) requires that the parties must have *impliedly or expressly* agreed that the truth of the representation, or the performance of the stipulation,⁶⁹ is essential to the cancelling party. It is not enough merely that that party gives evidence that he would not have contracted had he known a representation was not accurate;⁷⁰ the parties must have *agreed* on its essentiality. Obviously, it is the possibility of implied agreement which gives rise to the difficulty. The cases so far assume that the tests which are to be applied for that purpose are the same as are normally used to determine whether a term can be implied in a contract (for example, is the implication "necessary for business efficacy?");⁷¹ and that in making this determination one is entitled to have regard to the express terms of the contract, the circumstances in which it was made, and what was said between the parties at the time of making it.⁷²

So far it has been held that an express warranty on the sale of a business that turnover was \$600 a week was not essential, because there was no evidence that the parties had agreed that it should be so.⁷³ Nor was a term in a leasing agreement that the finance company would obtain the best possible price on resale of a computer.⁷⁴ However, a clause in a financing agreement that the borrower would discount hire purchase agreements with the lender was held to be essential. An advance at 21% instead of 23% "is rendered more attractive on the understanding that hire purchase dis-

69 In *Gallagher v Young* [1981] 1 NZLR 734 Greig J took the word "stipulation" in the Act itself to mean an important term. Tompkins J, however, in *Watson v Tennent*, High Court Auckland A135/85, 2 April 1986, disagreed, holding that "stipulation" means simply "term". It is submitted, with respect, that the view of Tompkins J is to be preferred. He left open the question whether an implied term is a "stipulation".

70 *Young v Hunt* [1984] 2 NZLR 80 at 86. Holland J considers that "the use of the word 'essential' in subs (4)(a) must mean that the party would not proceed with the contract unless the representation were accurate"; he finds, however, that on the facts there was no agreement between the parties to that effect.

71 For instance, *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 6 June 1984, at 6 per Quilliam J.

72 *Young v Hunt* [1984] 2 NZLR 80 at 86.

73 *Idem*.

74 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 14 May and 6 June 1984, Quilliam J. See also *Watson v Tennent*, High Court Auckland A135/85, 2 April 1986, Tompkins J, where a promise to do alterations to a house the subject of a sale and purchase agreement was held not to be essential. Among other things, an arbitration clause indicated that the parties contemplated only monetary compensation in the event of breach.

counting will be continuously coming in at 25% or 27%".⁷⁵ It was also found to be an essential term of a comprehensive contract involving the lease of a farm that the lessees would care for the lessor (an elderly and unwell man), let him live in the premises and provide transport for him.⁷⁶ Likewise, a term that a deposit be paid "immediately on acceptance of this offer" was held to be essential, so that failure to comply with it justified cancellation.⁷⁷

It is, however, a matter of note that in some of the cases where the stipulation was held to be essential, it was found that the innocent party could equally well have based his cancellation on the substantial consequences of the breach within section 7(4)(b). In other words, there are traces in these decisions of the sort of reasoning which permeated the common law cases on conditions: a tendency to work back from consequences to presumed intention.

(c) Essential breach

Under section 7(4)(b), cancellation is justified if the effect of the misrepresentation or breach is substantially to increase the cancelling party's burden under the contract, or substantially to reduce the benefit of the contract to him, or to make the benefit of the contract substantially different in relation to him. These tests permit reference to the consequences of the breach as well as to the breach itself.⁷⁸ As framed, the tests seem to contain a number of small points of difference from the common law. First, the test of substantiality appears slightly less severe than at least some versions of the test for discharge by breach at common law: in the *Hong Kong* case⁷⁹ Diplock LJ spoke of a breach which substantially deprives the innocent party of the *whole* of the contracted benefit. That difference has already been noted in the cases.⁸⁰ Secondly, the section arguably focuses attention exclusively on the effects of the breach *on the innocent party*; one wonders if this rules out possible considerations of relative hardship.⁸¹ Thirdly, the section, by referring to the benefit *of the contract* and burden *under the contract*, could be taken to suggest that changes in incidental or collateral benefits and burdens are irrelevant. In taking this view, Hardie Boys J has given the statute one of its few literal interpretations. He held that a misrepresentation making it difficult to raise the required finance for a house purchase did not affect a burden *under the contract*, because the contract was not subject to finance.⁸²

While it has already become apparent that the courts will not be attempting to define the term "substantial" closely, Hardie Boys J has

75 *Auckland Waterbed Co Ltd v Progressive Finance Ltd*, High Court Christchurch A31/84, 11 April 1984, at 21 per Chailwell J.

76 *Loe v Tylee*, High Court Hamilton A58/84, 13 August 1984, Vautier J.

77 *NZ Tenancy Bonds Ltd v Mooney*, CA 85/85, 12 December 1985.

78 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 6 June 1984, at 8 per Quilliam J.

79 *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

80 For instance, *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 6 June 1984, at 9 per Quilliam J.

81 See Dawson & McLauchlan, *The Contractual Remedies Act 1979*, 106.

82 *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, at 7 per Hardie Boys J.

indicated⁸³ (with the later agreement of Thorp J⁸⁴) that while it means more than trivial or minimal, it is not necessary that the consequences of the breach be so serious as to alter the very nature of the contract. Nevertheless, it has been said that the result of the breach must leave the parties in a position materially different from that which they intended.⁸⁵ Each case must be considered on its own facts.⁸⁶

In a house purchase, recognition must be given to the fact that values, and hence benefits, are not capable of precise assessment and are likely to be affected by a range of extraneous factors *both objective and subjective*.

In the light of the necessarily amorphous nature of the statutory test, it comes as no surprise that at least one judge has found it helpful to refer back to the common law for guidance:⁸⁷

I think it is inescapable that the Courts will be guided by the common law and equitable principles which the Act was designed to replace.

This is despite the "code" nature of the section, and the possibility of slight differences between the common law and statutory tests. If the courts do make reference to the common law in this way, they will merely be doing what courts have done for decades in respect of codes which do little more than restate the common law. The courts seek precedents, and in applying a new statute like this there is only one place to find them. All this suggests that in the end the statutory tests will prove just as malleable as the common law ones, and will lead to much the same results.

It has been held that a breach or misrepresentation was substantial enough to justify cancellation where:

- * the existence of local authority requirements led to a purchaser being liable to spend a substantial sum to modify a house which he had bought for \$44,000;⁸⁸ and
- * the turnover of a business was effectively misstated by about 30% in that the vendor omitted to tell the purchaser that a profitable line had been discontinued.⁸⁹

By contrast, the breach (or misrepresentation) was *not* substantial enough to justify cancellation where:

- * a misstatement of the government valuation of a house as \$21,000 rather than \$15,000 led to the purchaser paying approximately 11% more than market value;⁹⁰

83 *Ibid* at 8.

84 *Stine v Maiden*, High Court Auckland M269/84, 8 November 1984, at 3 per Thorp J.

85 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 6 June 1984, at 8 per Quilliam J.

86 *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, at 8 per Hardie Boys J.

87 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 6 June 1984, at 7 per Quilliam J.

88 *Gallagher v Young* [1981] 1 NZLR 734.

89 *Sturley v Manning*, High Court Auckland A611/82, 19 December 1984, Prichard J.

90 *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, Hardie Boys J.

- * the turnover of a coffee bar was represented as \$600 per week when in fact it was \$563 per week;⁹¹
- * the vendor caused damage to a property before settlement by allowing machinery through (the repairable damage having been made good before settlement date);⁹²
- * a finance company sold a computer the subject of a leasing arrangement at a lesser price than could have been obtained (the judge noting that this was a breach which was readily redressable in money);⁹³ and
- * agreed alterations to a house the subject of a sale and purchase agreement were not done according to specification, but the cost of setting the matter right would be only \$3,000, a small sum in proportion to the purchase price of \$325,000.⁹⁴

(d) The statutory tests

As has been emphasised above, these statutory tests are now the only tests, and they govern cancellation for breach of all types of contract (except those specifically regulated by other statutes). This may require some adjustment of thinking, particularly in relation to those specific types of contract where common law and equity had over the centuries worked out detailed rules for cancellation (or rescission as it was then called). One such area is the set of rules about failure to settle in time, and making time of the essence, in contracts for the sale of land. While it seems clear that section 7 of the Contractual Remedies Act 1979 has not required any real changes of principle or practice in such situations,⁹⁵ one must nevertheless be careful to reason in terms of section 7 rather than the common law. Thus a party who fails to comply with a notice making time of the essence may be deemed to have repudiated in terms of section 7(2).

2 Cancellation and affirmation — Section 8(1) and (2) and Section 7(5)

(a) Time of cancellation

As *Gallagher v Young*⁹⁶ shows, cancellation may take place even after settlement if a misrepresentation or breach is not discovered until after that date. In such a case the cancellation will often have little immediate effect, for both parties may well have performed their outstanding obligations, and cancellation does not in itself effect a divestment of property.

91 *Young v Hunt* [1984] 2 NZLR 80.

92 *Stine v Maiden*, High Court Auckland M269/84, 8 November 1984, Thorp J.

93 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 14 May and 6 June 1984, Quilliam J.

94 *Watson v Tennent*, High Court Auckland A135/85, 2 April 1986, Tompkins J.

95 In *Parker v Emco Group Ltd*, High Court Wellington A144/84, 24 April 1986, at 8 Eichelbaum J said that the exposition of the law in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 and *Louinder v Leis* (1982) 56 ALJR 433 “remains unaffected, in principle, by the enactment of the Contractual Remedies Act 1979”. See also *Prisk v McKenzie*, High Court Christchurch M378/83, 10 September 1985, where Hardie Boys J was required to apply the provisions of the Act, especially section 7(5), to a case where there was a failure to settle in time when time was of the essence.

96 [1981] 1 NZLR 734.

It serves in such a case as little more than a prelude to relief under section 9 of the Act.

(b) Notification of cancellation

Except in unusual circumstances,⁹⁷ cancellation does not take effect before it is made known to the other party. In most of the cases so far decided this has been done by letter, although in one, *Auckland Waterbed Co Ltd v Progressive Finance Ltd*,⁹⁸ it was done by a verbal communication in a face-to-face meeting to the effect that the party was going to stop his cheque; in the circumstances that was held to be sufficiently unequivocal.

The requirement of notification of cancellation existed at common law also, although there is doubt as to whether it was quite as rigid there as the Act has now made it.⁹⁹ The drastic consequences of failing to notify cancellation are well demonstrated in *Schmidt v Holland*.¹ This was a case decided on common law principles, although the judge was clear that the same result would follow under the Act. The purchasers repudiated a contract for the sale of a house. The vendors, taking them at their word, resold. It was held that the contract had not been cancelled, even by the sale, because the vendors had not notified the purchasers of the cancellation. The result was that the necessary basis for a claim in damages against the purchasers had not been established, and the vendors' claim thus failed. This result is so hard that one is tempted to wonder whether some kind of estoppel or waiver could not have been pleaded against the purchasers: they, by persisting in their repudiation, had led the vendors to abandon their readiness to perform. There are hints in some recent cases that such a plea might on occasion be available,² although a court would need to be satisfied that in allowing the plea it was not contravening the purpose of the section. The question may also be raised some day whether the section's requirement of notification is a requirement imposed solely for the benefit of the party in breach so that he can waive it.

(c) Election to cancel

The election to cancel must be clear and unequivocal. However, once a contract has clearly been cancelled, subsequent conduct apparently inconsistent with the cancellation will not serve to negative its effect. In

97 As specified in section 8(1)(b).

98 High Court Christchurch A31/84, 11 April and 24 May 1984, Chilwell J.

99 See, for example, *Holland v Wiltshire* (1954) 90 CLR 409.

1 [1982] 2 NZLR 406.

2 For instance, in *Holt v Tew* [1984] 1 NZLR 570 at 577 Barker J said "Even if I am wrong in this view, it would be quite unjust to allow the purchasers, who themselves had attempted to cancel the contract . . . to rely in the circumstances on the failure of the vendors properly to cancel". See also *Auckland Waterbed Co Ltd v Progressive Finance Ltd*, High Court Christchurch A31/84, 24 May 1984, where at 8 Chilwell J said "In the event of a finding that the contract had been affirmed it was further contended that the plaintiff was in breach subsequently . . ., by so doing it cancelled the contract [sic] and is now estopped from asserting its existence . . . In view of my finding on the essential issue it is not necessary to determine this estoppel point."

3 High Court Auckland A611/82, 19 December 1984, Prichard J.

*Sturley v Manning*³ the purchaser of a business, after sending a letter of cancellation, continued to pay rent for the premises, assigned the lease to a third person, and permitted that person to dispose of some of the stock. It was held that these actions were not so inconsistent with the notice of cancellation as to amount to an election to keep the contract on foot. Indeed, since section 9 of the Act provides that cancellation does not divest property, such conduct by the purchaser is understandable. Likewise, in the *Auckland Waterbed* case,⁴ the financier, after cancelling the contract, nevertheless proceeded to register a security under it. It was held that since the cancellation was clear and unequivocal, his subsequent conduct, although occurring immediately afterwards, was of no effect. It was not an instance of a person having “the egg and the halfpenny too”;⁵ the later conduct was legally ineffective and did not deprive the cancellation of effect. Chilwell J did, however, indicate that if the cancellation had not been so clearly stated, the subsequent conduct would have been very relevant for the purpose of ascertaining the inferences to be drawn from equivocal language.⁶

In some circumstances, however, there will be a natural reluctance to hold that the innocent party has elected to cancel. That will particularly be so when a vendor of land is faced with a choice as to what to do about a defaulting purchaser. In that circumstance, it has been held that a mere threat by the vendor to resell, and even an intimation that he was pursuing another purchaser, did not amount to a final election which would deprive him of his primary right to enforce performance from the first purchaser.⁷ In *Stine v Maiden*⁸ a vendor in this situation who relisted his property for sale and at the same time issued a writ for specific performance was held to be merely covering his options, or “suspending judgment”.

(d) Affirmation

If a party affirms the contract in full knowledge that a breach has occurred, he will not then be permitted to cancel in respect of that breach. There is no requirement that affirmation be notified, but there must be unequivocal conduct. In *Jolly v Palmer*⁹ affirmation was held to have been constituted (i) by the purchasers, after discovery of a misrepresentation, applying for loan finance and telling the other side that they would proceed; and (ii) by the vendors, after a repudiation by the purchasers, filing a writ for specific performance and writing a letter to the purchasers.

In *Prisk v McKenzie*¹⁰ Hardie Boys J noted that whether particular words or conduct amount to an election to affirm can be a matter of some difficulty. It is easier, he said, to state the test of unequivocal conduct than apply it. In that case, his Honour found that purchasers had affirmed after

4 High Court Christchurch A31/84, 24 May 1985, Chilwell J.

5 Ibid at 10.

6 Idem.

7 *McLachlan v Taylor*, CA59/84, 3 October 1984.

8 High Court Auckland M269/84, 8 November 1984, Thorp J.

9 High Court Dunedin A99/82, 1 March 1984, Hardie Boys J.

10 High Court Christchurch M378/83, 10 September 1985, Hardie Boys J.

their vendor failed to settle on due date, time being of the essence; among other things they had sent a memorandum of transfer, requested keys and offered to purchase another flat on the same property. This, in the circumstances, was held to amount to a clear intimation that the purchasers intended to proceed.

However, once again there will in certain circumstances be a natural reluctance to find that conduct amounts to a final affirmation, for if it does the innocent party will be unable to change his mind and cancel in respect of that breach. Thus, although the issue of a writ for specific performance was held in the circumstances to be an affirmation in *Jolly v Palmer*,¹¹ it will not always be so. In *Stine v Maiden*,¹² for instance, it is fairly clear that the vendor was keeping all options open by issuing his writ and at the same time relisting the property.

He may suspend judgment, and anything said or done whilst that is the situation will not be regarded as the exercise of his election. For unequivocal acts or conduct are needed¹³

Indeed, there is growing evidence that the courts will often be inclined to find that the innocent party, despite initial appearances that he is holding the contract breaker to his bargain, is in fact postponing his election. In *Oldham Cullens and Co v Burbery Finance Ltd*,¹⁴ for instance, a computer firm supplying services to a legal office repudiated the contract by switching off the computer. It was held that the legal firm did not affirm the contract by applying for, and being granted, an interim injunction requiring the computer to be switched back on. At most, the purpose of the application was to avert chaos while the firm made up its mind what to do about the contract. Likewise, in *NZ Tenancy Bonds Ltd v Mooney*¹⁵ a very long delay by a vendor after non-payment of a deposit by his purchaser was held in the circumstances not to amount to affirmation. In some circumstances, of course, delay might be evidence tending to support an affirmation¹⁶ especially if it prejudices the other party's position.¹⁷

*Prisk v McKenzie*¹⁸ is an interesting example of fitting the law on non-compliance with a time stipulation into the framework of section 7 of the Contractual Remedies Act. As noted above, the vendor in a contract where time was of the essence failed to complete on due date. Hardie Boys J had to consider whether the purchasers had affirmed, in which case the essentiality of time in the original contract was waived and could only be restored by notice; or whether they had simply given an extension of time,

11 High Court Dunedin A99/82, 1 March 1984, Hardie Boys J. The writ was accompanied by a letter to the defaulting party.

12 High Court Auckland M269/84, 8 November 1984, Thorp J.

13 *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, at 10 per Hardie Boys J.

14 High Court Christchurch A368/83, 4 October 1985, Heron J.

15 CA 85/85, 12 December 1985.

16 *Ibid* at 11.

17 See *Prisk v McKenzie*, High Court Christchurch M378/83, 10 September 1985, at 6 per Hardie Boys J.

18 High Court Christchurch M378/83, 19 September 1985, Hardie Boys J.

in which case they were merely “refraining from electing either way” until the new date. On the facts, the former was held to be the case.

However, as *Jolly v Palmer*¹⁹ shows, even if there has been affirmation, the innocent party may still cancel if there is a further serious breach or repudiation after the affirmation. In the case of a repudiating purchaser, therefore, a vendor will seldom prejudice himself if his first response is to affirm, for refusal to perform is normally a continuing state, and is likely to be demonstrated by further acts of repudiation from the purchaser after the affirmation; *Jolly v Palmer* holds that the vendor may cancel in respect of those further repudiations.

3 Consequences of cancellation: Section 8(3)

Cancellation for breach and misrepresentation entails that, so far as the contract has already been performed, no party shall, by reason only of the cancellation, be divested of any property transferred or money paid pursuant to the contract. In respect of misrepresentation this is new, for the old remedy of rescission for misrepresentation used to entail *restitutio in integrum*. Thus, if a deposit or other payment has been paid, the cancellation does not of itself entitle the purchaser to recover it, even if he was not in the wrong;²⁰ he must await the concurrence of the other party or a court order. *Mayall v Weal*²¹ is an interesting illustration of this: it was held that an innocent purchaser had no right after cancellation for misrepresentation to an injunction to stop the vendor dealing with moneys he had been paid. Section 8(3) contributed to the conclusion that the purchaser did not have the necessary proprietary interest in the moneys.

Section 8(3) can doubtless pose problems on the sale of a business. If plant, stock in trade etc have vested in the purchaser before he cancels and walks out, for example because of a misrepresentation, the cancellation does not divest him of the property. In *Young v Hunt*²² Holland J raised the interesting question of whether, to mitigate loss, such a purchaser should sell wasting property. Even the vendor in such situations would incur some degree of risk in re-entering and attempting to sell property which he does not own unless, presumably, he first secures the consent of the purchaser. In *Sturley v Manning*,²³ as we have already seen, the cancelling purchaser solved his problem by assigning the lease which had vested in him and by continuing to dispose of stock even after cancellation. Indeed by the time the matter came to court, the assets of the business (which was concerned with gifts and novelty items) were “scattered to the four winds”.

4 Relief – Section 9

Under section 9 the court has the widest imaginable discretion to grant relief after cancellation has been effected. This discretion is still controversial. It will take a long time for patterns of decision to develop, and the courts are naturally reluctant to lay down principles at this early stage.

19 High Court Dunedin A99/82, 1 March 1984, Hardie Boys J.

20 *Worsdale v Polglase* [1981] 1 NZLR 722.

21 [1982] 2 NZLR 385.

22 [1984] 2 NZLR 80 at 87.

23 High Court Auckland A611/82, 19 December 1984, Prichard J.

The common law contained a multitude of precedents, not all of them consistent, on the redistribution of assets after discharge for breach. There will be a natural tendency for the courts to refer back to these as they venture into the new realms of the discretion. This was conceded by Prichard J in *Sturley v Manning*, although he warned that:²⁴

... [T]he remedies under the Act are wider and more flexible than those at common law, and the matters which the Court has to consider are stated in broad terms.

In *Worsdale v Polglase*²⁵ Davison CJ, in refusing to order the refund of a deposit to a defaulting purchaser, referred extensively to the earlier authorities in equity on forfeiture of deposits and part payments; the principle he eventually applied was precisely that which those authorities had established.

Although the cases are not yet numerous, the following instances will give some idea of the range of possible orders:

- * In *Gallagher v Young*²⁶ a purchaser of a house who cancelled, justifiably, after settlement was granted full restitution of the purchase price with interest;
- * In *Sturley v Manning*²⁷ the purchaser of a business was, after cancellation, awarded a sum equivalent to the unpaid balance of the purchase price (\$32,000); he was allowed to retain the property which had already vested in him (worth about \$25,000), and the vendor was permitted to retain the part payment already made prior to cancellation (\$25,000);
- * In *Young v Hunt*²⁸ a buyer of a business who had wrongfully repudiated was held able to recover the amount of the purchase price he had paid (\$11,300) less a sum to compensate the vendor for her loss on resale and rent, rates and insurance paid by her after repudiation (\$8,868) plus a sum to compensate the purchaser for a misrepresentation by the vendor. The purchaser was thus awarded \$5,000. The cancellation itself relieved the purchaser of the obligation to pay \$2,000 of the purchase price still outstanding; and
- * In *Loe v Tylee*²⁹ the lessor in a complex arrangement involving the lease of a farm was on cancellation awarded \$36,000 comprising a sum for rent and profits, the outstanding balance owed on a livestock purchase and damages for breaches of contract by the lessees while they had been in possession less a sum in respect of improvements by the lessees.

One of the most interesting questions is the relationship between section 9, which empowers the court to award a just sum to be paid, and common law damages which are retained by section 10. It is plain that there can be a substantial overlap; indeed in some of the awards already made under

24 Ibid at 19.

25 [1981] 1 NZLR 722. See also *Parker v Emco Group Ltd*, High Court Wellington A144/84, 24 April 1986, Eichelbaum J.

26 [1981] 1 NZLR 734.

27 High Court Auckland A611/82, 19 December 1984, Prichard J.

28 [1984] 2 NZLR 80.

29 High Court Hamilton A58/84, 13 August 1984, Vautier J.

section 9 the sum awarded has been increased or decreased by a sum representing damages in one form or other.³⁰ In *Gallagher v Young Greig J* made the interesting comment:³¹

Under that section [section 9] it is no longer a question of applying the strict rules as to damages and it appears from the effect of section 10 that the just order may replace an inquiry into damages altogether.

It is not clear how far this will be taken. If pressed to its limits it could result in compensatory awards, even awards compensating expectation loss, being made without reference to the rules governing contract damages at common law. In *Young v Hunt*³² something not unlike this happened: the defaulting purchaser was awarded “compensation” under section 9 for a misrepresentation by the vendor even though at common law his own wrongful repudiation would have disentitled him to damages at all. At the very least, the inevitable “mixing” of compensatory and restitutionary elements in the fixing of the just sum (as clearly seen in *Loe v Tylee*³³ and *Young v Hunt*³⁴) could well lead to a tendency to eschew fine calculations and deal in round figures as “justice” requires.

III MISCELLANEOUS

1 Section 5

Section 5 establishes that if a contract expressly provides for a remedy in respect of misrepresentation, repudiation or breach or makes express provision for any of the other matters to which sections 6-10 relate, those sections shall have effect subject to that provision.

The word “expressly” in this section means what it says: it is not enough if a clause in the contract makes implied provision to this effect. Thus, a deposit clause in a contract of sale does not “expressly” provide that the deposit is to be forfeited to the vendor in the event of the purchaser’s default, even though that may be the normal understanding of it; the court’s discretion under section 9 is thus not excluded.³⁵

Most of the discussion concerning section 5 has centred around the provisions of the Agreement for Sale and Purchase approved by the Real Estate Institute and the Auckland District Law Society (the “Auckland form”). Clause 8 of the most recent version of that form provides for a settlement notice, and consequent remedies, when one party fails to settle on settlement date. If a party serves a settlement notice in the circumstances defined by the clause he will normally be deemed to be acting under the clause, and it will govern to the exclusion of the Contractual Remedies Act.³⁶ In

30 For instance, *Young v Hunt* [1984] 2 NZLR 80; *Loe v Tylee*, High Court Hamilton A58/84, 13 August 1984, Vautier J.

31 [1981] 1 NZLR 734 at 740.

32 [1984] 2 NZLR 80.

33 High Court Hamilton A58/84, 13 August 1984, Vautier J.

34 [1984] 2 NZLR 80.

35 *Worsdale v Polglase* [1981] 1 NZLR 722 at 728.

36 For instance, *Tweedie v Fear* [1982] 2 NZLR 388 and *Plowmen v Dillon* [1985] 2 NZLR 312. See also *Hunt v Hyde* [1976] 2 NZLR 453 at 458 per Casey J.

Holt v Tew,³⁷ for instance, it was held that a vendor cancelling under the power given in clause 8 does not on its true construction need to make that cancellation known to the purchaser as he would have done had he been cancelling under the Act.

However, it should be noted that the clause covers a narrow range of circumstances and, further, that the parties' remedies are expressly declared to be without prejudice to any other rights or remedies available at law or in equity. Thus, there are many situations in which the cancellation provisions of the Contractual Remedies Act will be available even where parties have used the Auckland form. If, for example, one party repudiates, the other may cancel under the Act.³⁸ It was also held, under an earlier version of the Auckland form, that failure to pay a deposit promptly when it was required justified cancellation under the Act.³⁹

*Young v Hunt*⁴⁰ establishes an important point. If clauses in a contract which otherwise would have prevailed over the Act are penal in effect and thus unenforceable, the provisions of the Act apply simply because there is nothing to which they can be read subject.

2 *The interpretation of the Act*

The Act is a piece of reform legislation, and it would be unfortunate if it were to be stultified by too strict or literal a construction. There is no sign that that is happening. Apart perhaps from one decision,⁴¹ the courts appear to be giving liberal effect to it in accordance with its spirit. In two cases, they did not hesitate even to refer to the report of the Contracts and Commercial Law Reform Committee which recommended the legislation: not just to discover the mischief the provision was passed to remedy, but apparently to ascertain the intention of that Committee and hence of the provision itself.⁴² That is going further than has been thought acceptable in the past, but is, with respect, entirely sensible.

In areas where the Act does little more than re-enact the common law (albeit with slight variations), and also where it leaves the courts without much guidance (as in the case of the discretion under section 9), the courts

37 [1984] 1 NZLR 570.

38 For instance, *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, Hardie Boys J; *Schmidt v Holland* [1982] 2 NZLR 406. See also *Gallagher v Young* [1981] 1 NZLR 734 where at 740 Greig J said: "Section 5 of the Act has no application in this case because the agreement for sale and purchase does not provide expressly for a remedy for the breach of contract or cancellation which has occurred."

39 *Yock v Moffat*, High Court Christchurch A71/82, 29 April 1982, Casey J. The present version of the Auckland form makes express and detailed provision for the vendor's remedies on non-payment of deposit.

40 [1984] 2 NZLR 80 at 89.

41 *Jolly v Palmer*, High Court Dunedin A99/82, 1 March 1984, Hardie Boys J in respect of the expression "burden under the contract" (see above at n82).

42 *Young v Hunt* [1984] 2 NZLR 80 at 86; *Worsdale v Polglase* [1981] 1 NZLR 722 at 726.

have tended to look back to the common law for analogies.⁴³ This is to be expected, and can at times be helpful; it would be a pity if the mere enactment of new legislation were to mean that the rich storehouse of common law precedent, providing examples of most imaginable fact situations, would no longer be accessible. But it must be borne in mind that there are dangers in such an approach, and it must not be allowed to blind one to the differences introduced by the statute, nor to the fact that in some areas the very point of the legislation was to get away from the common law because it was not working satisfactorily.

3 *The old and the new*

In some respects the Act has changed the law little. It is thought, for example, that the criteria for cancellation for breach under section 7 will seldom lead to different results from those which pertained at common law. Nor is it likely that section 6 will lead to a much greater number of successful claims for damages for misrepresentation; but the reasoning will now be mercifully more direct, and may lead to a different rationalisation of concepts.

On the other hand, in some areas the Act has made far-reaching changes: most notably in the exclusion of the tort remedy against another party for misrepresentation, in the new discretions to grant relief after cancellation, and in the power given the court by section 4 to override exemption clauses.

However, it is the more subtle changes which are in some ways the most important to bear in mind, for they are so easily forgotten by one trained in the common law. For instance:

- (i) Cancellation always requires notice to the other party except in the unusual circumstances specified in section 8(1)(b). This was probably not so rigid in all situations at common law;
- (ii) Cancellation for misrepresentation is now, in line with cancellation for breach, *de futuro* only;
- (iii) The treatment of misrepresentation "as if it were a term" for purposes of damages is likely to lead to an assimilation of those two concepts for other purposes; and
- (iv) With the exception of contracts containing express provisions as to remedies, and contracts governed by other statutes (such as the Sale of Goods Act⁴⁴), the justification for cancelling a contract for breach or misrepresentation must in all cases be found within the confines of section 7. There are no longer any special rules applicable to special sorts of contract.

43 *Ansell v New Zealand Insurance Finance Limited*, High Court Wellington A434/83, 14 May and 6 June 1984, Quilliam J; *Worsdale v Polglase* [1981] 1 NZLR 722. Compare with *Gallagher v Young* [1981] 1 NZLR 734 in which Greig J at 739 deliberately interpreted the word "stipulation" without any reference to the common law, believing that the word was chosen by the legislature with the intention of departing from the common law; see n69 *supra*.

44 See *Finch Motors Ltd v Quin (No 2)* [1980] 2 NZLR 519.

UNREPORTED JUDGMENTS

- 1 *Yock v Moffat*, High Court Christchurch A71/82 29 April 1982 Casey J.
- 2 *Buttimore v Bell*, High Court Auckland M1481/82 3 February 1984 Sinclair J (oral judgment).
- 3 *Jolly v Palmer*, High Court Dunedin A99/82 1 March 1984 Hardie Boys J (now reported [1985] 1 NZLR 658).
- 4 *M E Torbett Ltd v Keirlor Motels Ltd*, High Court Auckland A539/83 30 March 1984 Casey J.
- 5 *Auckland Waterbed Co Ltd v Progressive Finance Ltd*, High Court Christchurch A31/84 11 April 1984 (oral judgment) and 24 May 1984 Chilwell J.
- 6 *Ansell v NZ Insurance Finance Ltd*, High Court Wellington A434/83 14 May and 6 June 1984 Quilliam J.
- 7 *New Zealand Motor Bodies Ltd v Emslie*, High Court Dunedin A93/82 6 June 1984 Barker J (now reported [1985] 2 NZLR 569).
- 8 *McLeod and Bailey v Davis*, High Court Palmerston North A37/83 11 June 1984 Eichelbaum J.
- 9 *Perring v V R Wood Ltd*, High Court Nelson A31/83 30 July 1984 Eichelbaum J.
- 10 *Wakelin v R H and E A Jackson Ltd*, High Court Auckland A1131/83 6 August 1984 Henry J.
- 11 *Loe v Tylee*, High Court Hamilton A58/84 13 August 1984 Vautier J.
- 12 *McLachlan v Taylor*, Court of Appeal CA59/84 3 October 1984 (now reported [1985] 2 NZLR 277).
- 13 *Baker and Milne v McKechnie*, High Court Auckland A885/83 A553/83 26 October 1984 Hillyer J (oral judgment).
- 14 *Baillie v CBA Finance Ltd*, High Court Auckland A821/84 22 November 1984 Sinclair J.
- 15 *Stine v Maiden*, High Court Auckland M269/84 8 November 1984 Thorp J.
- 16 *Burns v Jordan*, High Court Napier M86/82 9 November 1984 Gallen J.
- 17 *Sturley v Manning*, High Court Auckland A611/82 19 December 1984 Prichard J.
- 18 *A E McDonald Ltd v Adams*, High Court Wellington A318/82 22 March 1985 Eichelbaum J (oral judgment).
- 19 *Prisk v McKenzie*, High Court Christchurch M378/83 10 September 1985 Hardie Boys J.
- 20 *Oldham Cullens & Co v Burbery Finance Ltd*, High Court Christchurch A368/83 4 October 1985 Heron J.
- 21 *Grand Arcade Jewellers Ltd v Moonshine Enterprises Ltd*, High Court Wellington A193/80 10 December 1985 Quilliam J.
- 22 *NZ Tenancy Bonds Ltd v Mooney*, Court of Appeal CA85/85 12 December 1985.
- 23 *Watson v Tennent*, High Court Auckland A135/85 2 April 1986 Tompkins J.
- 24 *Parker v Emco Group Ltd*, High Court Wellington A144/84 24 April 1986 Eichelbaum J.