The Law Commission

Working Paper No 65

Law of Contract

Pecuniary Restitution on Breach of Contract

LONDON
HER MAJESTY'S STATIONERY OFFICE
95p net

This Working Paper, completed for publication on 22nd September 1975, is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1st July 1976.

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First published 1975

ISBN 0 11 730096 9

THE LAW COMMISSION 30-26-05

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Item I of the First Programme

LAW OF CONTRACT

PECUNIARY RESTITUTION ON BREACH OF CONTRACT

PART I - INTRODUCTION

1. In our First Programme[1] we recommended that the law of contract be examined with a view to codification, and in our First Annual Report, 1965-1966,[2] we stated that our intention was not merely to reproduce the existing law but to reform as well.

2. After much work had been done towards the preparation of a draft contract code, we came to the conclusion that the publication of such a code, however fully annotated, would not be the best way of directing public attention to particular aspects of the law of contract which might be in need of amendment or of promoting examination and discussion of those aspects in depth.[3] Work on the production of a contract code has, therefore, been suspended and we now intend to publish a series of working papers on particular aspects of the English law of contract with a view to determining whether,

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1 Law Com. No. 1 (1965), Item I.

2 Law Com. No. 4 (1966), para. 31.

3 Eighth Annual Report, 1972-1973, Law Com. No. 58 (1973), paras. 3-5.

and if so, what amendments of general principle are required. This will be in line with our method of dealing with most subjects and has the advantage of concentrating public discussion on particular problems.

3. This is one of several working papers which we expect to publish to initiate consideration of a number of aspects of the general principles of the law of contract. We are extremely grateful to Mr. H.G. Beale, Lecturer in Law at the University of Bristol, for his help in preparing it.

4. This paper deals with certain problems arising on breach of contract. One party performs, or purports to perform, his part of the contract but his performance is incomplete or defective. Nevertheless the other party has received some benefit as a result. The first problem we are concerned with is whether the party in breach ought to be entitled to receive payment for the benefit he has conferred where the contract does not so provide. The second problem is where the other party has paid in advance: should he be able to recover the money he has paid, or a proportion of it, or should he be confined to a claim for damages? The third problem to be considered arises where the contract is one of sale of goods, and the failure to perform is a failure to transfer title to the goods sold. The buyer can refuse to pay, or may recover back the price if he has already paid it. If he has benefited from the use of the goods, should he be obliged to pay anything for that benefit?

The first problem: entire contracts

5. The first problem with which we are concerned is where, in the present state of the law, the party in breach is not entitled to any payment under the contract

for the benefit conferred because he has failed to perform the contract completely. Such a situation is sometimes described as an "entire contract" or a "lump sum contract" or a contract which requires complete performance as a condition precedent to payment.[4] We shall, for convenience, use the expression "entire contract" as applying to all such situations where the party in breach has no remedy under the contract for the benefit conferred by incomplete or defective performance. The facts of Bolton v. Mahadeva[5] show how the existing law is applied in practice:-

> Mr. Bolton agreed with Mr. Mahadeva to install a combined heating and hot water system in Mr. Mahadeva's house for £560. He purported to carry out the work but broke the contract by installing a system that did not heat adequately and gave out fumes; although he was requested to remedy the defects he did not do so. The cost of putting the system into satisfactory working order was £174.50.

The Court of Appeal held that Mr. Bolton was not entitled to the contract price nor any part of it. The result, in practical terms, was that Mr. Mahadeva was allowed to retain the benefit of the work that Mr. Bolton did without having to pay anything for it.

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4 For a recent analysis of these and related problems see Anthony Beck, "The Doctrine of Substantial Performance: Conditions and Conditions Precedent", (1975) 38 M.L.R. 413.

5 [1972] 1 W.L.R. 1009. Cf. Sumpter v. Hedges [1898] 1 Q.B. 673.

The second problem: recovery of money paid

6. It was established in Whincup v. Hughes[6] that where a party to a contract has received the contract price and has performed the contract partially, the other party may not rely on the failure to perform the contract completely as a ground for recovering the money paid nor a proportion of it. This is because there is said to be no total failure of consideration, and money paid cannot be recovered for a partial failure of consideration. The following hypothetical set of facts shows how this principle might be applied in practice:-

> X engages a builder to do certain work for £5,000 which he pays him at the outset. He has made a bad bargain, as a reasonable price for the work would have been £2,000. The builder does half the work and then leaves the site, so X engages another builder to do the rest of the work and pays him £1,000.

On the facts just given X may not recover the £5,000 nor any proportion of it. If the first builder has acted in breach of contract in leaving the site X may sue him for damages but, as we shall see,[7] the damages would probably be assessed at £1,000 (the cost of having the work completed) thus allowing the first builder to retain the same profit as he would have made if he had completed the contract himself. In order to make the point as clearly as possible we have taken a fact situation in which there is a very wide gap between the contract price and the reasonable price. An example where the contract price was £5,000 and the reasonable price £4,000 would produce a less

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6 (1871) L.R. 6 C.P. 78.

7 See paras. 52-55, below.

startling result on the figures but would lead to the same general conclusion, namely, that the contractor whose price is unreasonably high and who is paid in advance can do better for himself, under the existing law, by breaking the contract than by performing it.

The third problem: possession without title

7. Where a seller, in breach of contract, sells and delivers goods which he has no right to sell, the buyer may reject them and recover in full the price that he has paid, on the ground that there has been a total failure of consideration. The money may be recovered in full even where, prior to rejection, the buyer has benefited from having the use of the goods delivered. This was established in Rowland v. Divall.[8] The facts of Butterworth v. Kingsway Motors[9] show how this principle works in practice:-

> Mr. Butterworth purchased a car from Kingsway Motors for £1,275. A previous hirer of the car had sold it without paying off the balance due to the finance company so, although Kingsway Motors did not know it, the car still belonged to the finance company at the time of Mr. Butterworth's purchase. Kingsway Motors were therefore in breach of contract in purporting to sell the car. Nearly a year after taking delivery of the car Mr. Butterworth discovered the defect in his title to the car and gave Kingsway Motors notice by letter that he rejected the car and wanted the purchase price of £1,275 to be returned to him. The car was by then worth about £800. Later, but before Mr. Butterworth had started proceedings, the finance company's

8 [1923] 2 K.B. 500.

9 [1954] 1 W.L.R. 1286.

claim was settled by the original hirer so there was no longer any risk that Mr. Butterworth might be sued by the finance company for the delivery up of the car or for damages for conversion.

The court held that Mr. Butterworth was entitled to the return of the full £1,275 as the breach of contract by Kingsway Motors amounted to a total failure to perform the contract. Mr. Butterworth thus recovered the price in full without any allowance being made for the fact that he had been in possession of the car and had had the use of it for nearly a year.

The scheme of the paper

8. The main purpose of this working paper is to consider whether the law should be changed so that the party in breach who has conferred a benefit on the other may, in certain circumstances, obtain "pecuniary restitution", or, in other words, may have the right to be paid (or, as the case may be, to retain) a sum of money related to the value of the benefit conferred. However, these are not the only matters for discussion and the scheme of the paper is as follows:-

Part II - Pecuniary restitution for benefits conferred

In this Part we consider the various situations in which a party to a contract confers a benefit (other than a payment of money) by partial or defective performance of the contract.

Part III - Claims for the recovery of money paid

Here we consider the situation in which one party makes a payment in anticipation of complete performance that exceeds the value of the part in fact performed by the other, but may not sue for the return of the difference because there has not been a total failure of consideration.

Part IV - Pecuniary restitution in respect of possession without title

Most of the problems considered in this Part are raised by the facts and decision in Butterworth v. Kingsway Motors.[10]

Part V - Provisional Recommendations

We end the paper by setting out our provisional recommendations for changes in the present law.

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10 [1954] 1 W.L.R. 1286.

PART II - PECUNIARY RESTITUTION FOR BENEFITS CONFERRED

(A) The present law

9. As we explained in Part I[11] a party's failure to complete the performance of his obligations under an "entire contract" may result in the other party's obtaining a benefit from partial performance for which he is not liable to pay anything. If, however, the contract provides for money to be paid in stages or in respect of such part of the contract as may be performed, the party performing may recover what is due to him for what he has done even where he is in breach. A familiar example is the building contract which provides expressly for stage payments to be made as the work progresses. A less familiar example may be found in a contract for the carriage of goods by sea where the freight charge is reckoned by the weight of the cargo carried; if some but not all of the cargo is delivered at the proper destination freight is payable on the cargo delivered, calculated at the rate on which the contract price is based.[12]

Substantial performance

10. The contract may provide that no payment is to be due until the contract has been performed exactly,[13] but if there is no such provision in the contract the courts may allow a party to recover the price payable on completion

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11 See para.5, above.

12 Ritchie v. Atkinson (1808) 10 East 295; 103 E.R. 787.

13 Eshelby v. Federated European Bank Ltd. [1932] 1 K.B. 423.

as long as the contract has been substantially performed. If the performance is only incomplete in some comparatively minor respect a counterclaim for damages may be made for breach of contract, and the damages awarded may be set off in reduction of the sum otherwise due. The doctrine of substantial performance, as it is known, is most usually relied on in building or decorating contracts. For example, in Hoenig v. Isaacs[14] the plaintiff agreed to redecorate and furnish a flat for £750 and purported to carry out the work. However, the contract had been broken in a few minor respects and the cost to the flat-owner of having the defects put right by someone else was £55. It was held that since the contract had been substantially performed, the decorator should be awarded the contract price less the cost of making good the defects. It may be noted that in Bolton v. Mahadeva[17] the trial judge had held that the work done by Mr. Bolton in installing the heating and hot water system amounted to the substantial performance of the contract, but the Court of Appeal reversed his decision, having regard to the amount of work that still had to be done to put the system into proper working order.

Other remedies for partial performance

11. Even where the contract is entire and the doctrine of substantial performance cannot be invoked, the party who has only performed in part may sometimes still have a right

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14 [1952] 2 All E.R. 176.

15 [1972] 1 W.L.R. 1009. See para.5, above.

of redress. In particular, remedies are available

(a) where it is the other party's breach that prevents complete performance;

(b) by the provisions of the Law Reform (Frustrated Contracts) Act 1943;

(c) by the provisions of the Apportionment Act 1870;

(d) where the benefit conferred by partial performance is one which the other party was able to reject but which he has elected to retain.

Each of these situations needs further explanation.

(a) Breach by the party who promised the money

12. A party who performs only some of his obligations under an entire contract is entitled to compensation if it is the other party's breach that prevents complete performance. For example, if a builder is turned off the site by the other party, in breach of contract, he may claim damages for breach of contract or a reasonable sum for the value of the work that he has done.[16] In a later working paper we propose to examine further the nature and extent of the remedies so provided but, for present purposes, we need say no more than that they exist.

(b) The Law Reform (Frustrated Contracts) Act 1943

13. The Law Reform (Frustrated Contracts) Act 1943 provides for the adjustment of rights and liabilities of parties to contracts (other than certain contracts that are

16 Chandler Bros. Ltd. v. Boswell [1936] 3 All E.R. 179.

specifically excepted[17]) that have been discharged by the common law doctrine of frustration. In particular, the Act provides[18] that the court may order one party to pay the other such sum as it considers just in respect of any valuable benefit obtained by reason of the other's part performance of the frustrated contract.

(c) The Apportionment Act 1870

14. The Apportionment Act 1870 provides[19] that rents, annuities (including salaries), dividends and other periodical payments in the nature of income are to be considered for certain purposes as accruing from day to day, so if a salaried clerk receiving a yearly salary were to die half way through a year his estate would probably be entitled under the Apportionment Act to half a year's salary. It is, however, doubtful whether a salaried employee who has left in breach of contract or been lawfully dismissed for misconduct may rely on the Apportionment Act as giving him a statutory right to be paid for the period down to his departure or dismissal.[20]

(d) Returnable Benefits

15. The retention of the benefit conferred may, in certain circumstances, involve the party receiving it in a liability to pay a reasonable sum, quantum meruit. The

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17 By s. 2(5); see Appendix A.

18 By s. 1(3); see Appendix A.

19 Section 2.

20 Moriarty v. Regent's Garage and Engineering Co. Ltd. [1921] 1 K.B.423, 434-5, per Lush J.

agreement to pay a reasonable sum will only be implied where the party receiving the benefit has the opportunity to reject it, so it will only arise where the benefit is, in its nature, returnable. A clear example of a benefit that is not returnable is building work carried out by the party in breach on the other party's land. It was decided in Munro v. Butt[21] that the defendant, on whose land the plaintiff had started to build, was not obliged to pay for the value of the part-finished work, even after retaking possession of the land and the building; he had no choice but to accept that which had been affixed to his land by the builder so a promise to pay for the partly finished work could not be implied from the mere fact of resuming possession.

16. Sumpter v. Hedges[22] provides an example of a returnable benefit for which the party benefited may be required to pay. The facts were as follows:-

> Mr. Sumpter agreed to carry out a building contract for Mr. Hedges for an agreed sum. After he had carried out part of the work he told Mr. Hedges that he had run out of money; he abandoned the work, leaving some of his materials on the site. Mr. Hedges completed the work himself, using the materials that had been left behind.

Mr. Sumpter sued for the value of the work that he had done before leaving the site but his claim was dismissed because the contract was entire and had not been completely performed. He was however awarded a reasonable sum in respect of the materials that Mr. Hedges had used, because a promise to pay a reasonable sum for them was to be implied from the appropriation.

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21 (1858) 8 E. & B. 738; 120 E.R. 275.

22 [1898] 1 Q.B. 673.

Summary

17. The party to an entire contract who has acted in breach by failing substantially to perform his obligations may only recover payment for a benefit conferred where the benefit could have been rejected by the other party but has in fact been retained. Otherwise the other party may retain the benefit without paying anything for it. We shall consider hereafter whether the law should be changed so as to give the party in breach the right, in certain circumstances, to be paid for the benefit he has conferred. There will, however, be no further discussion of the various situations, outlined above,[23] in which legal redress in respect of the benefit conferred is already provided under the existing law.

(B) Justification of the present law

18. The justification of the present law as it applies to entire contracts is that "it holds men to their contracts."[24] The contractor who has agreed to do a job for an all-in price, to be paid when the work is completed, may not then insist on payments on account; much less may he break the contract by leaving the work half-finished and recover payment for what he has done.

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23 Paras. 10-16, above.

24 Munro v. Butt (1858) 8 E. & B. 735, 754; 120 E.R. 275, 280, per Campbell C.J.

By refusing him redress except as provided by the contract the law gives him an incentive to see the job through. It may be argued that this incentive would be greatly reduced if he were to be entitled to payment otherwise than under the contract in respect of benefits conferred by partial performance. The contractor would, it may be said, do as much work under the contract as suited him and then claim payment for the benefit conferred; indeed he might take on contracts that he intended from the outset to break. Two points may therefore be made in favour of maintaining the rule on entire contracts in its present form. First a relaxation of it could lead to a lowering of standards of commercial morality which would be against the public interest. Second the removal of the hardship that the present rule may cause to some could result in more serious and more general hardship to others whom it benefits.

(C) Criticisms of the present law

19. The principal criticism of the rule on entire contracts is its lack of flexibility. In some situations the application of the rule prevents injustice. For example, it prevents the contractor who has stipulated for an all-in price, payable on completion, from insisting on payments being made on account while the contract is still on foot. It also works satisfactorily where the damage caused by the breach of contract exceeds the value of the benefit conferred by partial performance: no "net" benefit has been conferred so there is no injustice in leaving the party in breach without a remedy. There are however situations in which the party in breach is unable to complete the work required of him - whether because this is a physical impossibility or because the other party has accepted his breach as a repudiation of the contract - and the value of

the benefit conferred by partial performance is greater than the damage caused by the breach. Here the application of the rule on entire contracts allows the party on whom the benefit has been conferred to make and to keep a profit at the expense of the party in breach; he gets something for nothing. This is, arguably, an injustice. Where the net value of the benefit is small the injustice that the present law causes to the party in breach may be slight. Where however the benefit conferred by partial performance is out of all proportion to the damage caused by the breach the forfeiture of "the fruit of his labour"[25] may appear penal. The court's jurisdiction to relieve against penalties may have some relevance here. Let us say that a building contract provides that money is payable when certified due by a named architect but that the other party may nevertheless withhold all payment if he has a counterclaim against the builder for damages for breach of contract. The court would probably hold the latter provision to be unenforceable as a penalty in which case the damages recoverable on the counterclaim would be set off against the sum certified due and the builder would be entitled to the difference.[26] Yet the effect of the rule on entire contracts is to allow the party receiving a benefit from partial (but not substantial) performance to withhold all payment where the builder is unable to perform further even though no loss or damage has resulted from his breach.

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25 The phrase is taken from the judgment of Campbell C.J. in Munro v. Butt (1858) 8 E. & B. 738, 752; 120 E.R. 275, 280.

26 Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd. [1974] A.C. 689.

20. Another criticism of the present law on entire contracts is that it leads to different results in given situations depending on whether money happens to have been paid to the party in breach before the benefit has been conferred. The party in breach may not claim payment for the benefit conferred, but, if he has in fact been paid, and provided that the other party has obtained a benefit from the partial or defective performance of the contract, the money so paid does not have to be returned.[27] For example, in Sumpter v. Hedges[28] Mr. Sumpter had in fact received part payment before he left the site: Mr. Hedges did not counterclaim for the repayment of what he had paid but if he had done so his claim would have failed. He might have counterclaimed for damages for breach of contract but if Mr. Hedges had been able to complete the work without incurring further expense damages would probably have been assessed at a purely nominal figure. To take another example, in Bolton v. Mahadeva[29] the contractor, Mr. Bolton, failed to recover anything for the work that he did under the contract. If, however, the contract price had been paid to him at the outset and Mr. Mahadeva had brought an action for damages, Mr. Bolton would have been liable to pay as damages the cost of having the work completed[30] but would have been allowed to retain the balance. In Part III we shall have more to say about the recovery of monies paid

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27 Cf. Whincup v. Hughes (1871) L.R. 6 C.P.78; see paras. 51-55, below.

28 [1898] 1 Q.B. 673; see para. 16, above.

29 [1972] 1 W.L.R. 1009; see para. 5, above.

30 Together with an award of general damages in respect of the physical inconvenience caused by the breach.

and the scope of the remedy in damages, but the point we are making now is that the present law on entire contracts can produce anomalous results: the party in breach who has already received payment is in a markedly better position, in fact and in law, than the party who has not. It may be argued, in support of a change in the present law, that the rights and remedies of the party in breach ought to be broadly the same in either case.

(D) A new remedy for the party in breach

21. Our provisional conclusion after examining the injustices which may be caused by the present rule and the dangers that are implicit in its reversal, is that a new restitutionary remedy should be provided for the party in breach where he has conferred a valuable benefit on the other by his incomplete or defective performance of an entire contract. There are, however, three important conditions that should, in our provisional view, accompany the introduction of a new remedy of this character. First, the right of the other party to claim damages for breach of contract should be preserved. We consider later in the paper[31] how the proposed new remedy of the party in breach and the other party's right to damages might be integrated. Second, the remedy should not be available so long as the contract is still on foot; this is considered further in the next paragraph. Third, the remedy should not be available where the parties have agreed that it should be excluded. This is considered later[32] under the heading "Contracting out".

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31 Paras. 34 - 35, below.

32 Paras. 22-23, below.

22. A party who has agreed to perform an entire contract for an all-in price, payable on completion, may not, under the present law, insist on payments being made to him as work proceeds. The other party is entitled to refuse to make payments except as provided in the contract.[33] It would, in our provisional view, be most undesirable to allow a party to an entire contract to insist on stage payments in respect of the value of benefits conferred by partial performance while the contract is still on foot. The remedy which we are proposing is intended to compensate the party in breach who is unable to complete the work required of him, either because his breach has made further performance impossible or because the other party has terminated the contract by accepting the breach as a repudiation. As an example of the former situation, take the case of a learner driver who arranges to take his driving test on a certain day and books a course of 10 lessons, for an all-in figure, to be given by a driving instructor prior to a stated date, the date of the test. If the instructor were to break the contract by failing to give the last two lessons but the customer were to pass the driving test nonetheless, it would no longer be possible for the instructor to perform his contract completely. Sumpter v. Hedges[34] provides an illustration of the latter situation: at the time of bringing his claim Mr. Sumpter was unable to finish the building work because he had abandoned the work in breach of his contract and

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33 Unless the provision on which he relies as justifying the refusal is a penalty. See para. 19, above.

34 [1898] 1 Q.B.673; see para. 16, above.

it had been finished by Mr. Hedges. Our provisional conclusion is that the new restitutionary remedy for the party in breach that we propose should only be available where the party in breach is unable, for one or other of the above reasons, to finish the work. It should be noted that if a party is unable to finish the contract work because the contract has been frustrated he may have a remedy under the Law Reform (Frustrated Contracts) Act 1943;[35] such a party is, in any event, not a "party in breach" for the purpose of the proposed new remedy.

Contracting out

23. If a new remedy were to be provided for the party in breach, should its availability be subject to the contrary intention of the parties? In other words, should "contracting out" be permitted? Let us suppose that a person is about to engage a building contractor. He doubts whether the contractor will finish the work in time, and it is important to him that the proposed date for completion is met. The contractor may admit that the time allowed would be short but promises that he will finish the work in time, provided that the contract price is set high enough. They then negotiate a contract for an unusually high price to be paid on completion of the work by a certain date but with the express proviso that nothing should be paid if the work is not completed in time. If "contracting out" were not allowed, the proposed new remedy for the party in breach would give the contractor the best of both worlds; if he were to do the work in the time allowed by the contract he would be entitled to a figure made unusually high

35 See Appendix A.

by the risk that he was taking of getting nothing; if he failed to do the work on time he would - unless "contracting out" were allowed - be able to resile from the agreement on which the price was based and to claim payment for the value of the work that he in fact did. This would appear to be unjust. If the party in breach were given a right to payment otherwise than under the contract, then, should it not be one that the parties are permitted to exclude by the terms of their agreement?

24. It may be said, in answer, that if "contracting out" were allowed, a clause excluding the new remedy would be included in every agreement as a matter of course; people would therefore go on as before and such apparent injustice as the new remedy might be designed to meet would still be there. This may be so, but we doubt it. There are, in any event, no circumstances here that would, in our provisional view, justify a limitation upon the parties' freedom of contract. The person against whom such an exclusion clause would operate would not be a "consumer"[36] but, in the ordinary way, would be someone supplying a service in the course of a business. If a contract were proposed that made his remuneration depend upon complete performance and excluded any remedy in respect of partial performance he would be able to decide whether the burden of such provisions was commercially acceptable having regard to the price that the other party was willing to pay. The remedies provided by the

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36 Cf. the Supply of Goods (Implied Terms) Act 1973 and the Consumer Credit Act 1974.

Law Reform (Frustrated Contracts) Act 1943 may be excluded by agreement,[37] as may most of the remedies provided by the Sale of Goods Act 1893,[38] and our provisional conclusion is that such remedies as may be devised to meet the problems considered in this part of the paper ought not to be available where the parties have agreed to exclude them.

The main proposal

25. It may be helpful, at this stage, to summarise the main characteristics of the proposed new remedy which should, in our provisional view, be available for the party in breach. They are as follows. Where he has conferred a valuable benefit on the other party by incomplete or defective performance of a contract but is unable to perform the contract completely, either because further performance is no longer possible or because the other party has justifiably treated the contract as at an end, the party in breach should, unless the contract otherwise provides, be entitled to be paid by the other party for the benefit that he has conferred. The other party's right to sue or counterclaim for damages for breach of contract should continue to be regulated by the existing law. Further limitations that may be set upon the scope of the proposed new remedy are discussed in the paragraphs that follow but the acceptance of its main characteristics, as set out above, will be assumed. It will be referred to hereafter as "the main proposal" and comments upon it would be welcomed.

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37 Section 2(3); see Appendix A.

38 Section 55, but note the changes made by the Supply of Goods (Implied Terms) Act 1973.

The benefit and its valuation

26. The gist of liability under our main proposal is the conferment of a benefit. If no benefit is conferred the question of paying for it does not arise. If, for example, a writer who has agreed to write a book for a publisher, writes half of it, then tears up the manuscript and refuses to do further work, there would be no justice in requiring the publisher to make pecuniary restitution: he has received no benefit so he should not have to pay. There may also be situations in which a benefit has been conferred but it is so slight that a cash value cannot be put upon it. The phase "valuable benefit" is used in section 1(3) of the Law Reform (Frustrated Contracts) Act 1943 and our provisional view is that the idea it expresses would be an appropriate one for us to adopt for the purposes of our main proposal. Readers may feel that we should go further and say that the benefit should be not only "valuable" but "substantial" so as to prevent litigation over trifling sums.[39] Views are invited.

27. A party who has conferred a benefit but broken his contract is liable to pay damages to the other party in respect of losses caused by his breach and we shall, at a later stage,[40] consider how his liability in damages ought to be reconciled with our main proposal that he should be paid for the benefit conferred. First, we must consider, in greater detail, what valuable benefits are within our main proposal and how they should be valued.

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39 Cf. Matrimonial Proceedings and Property Act 1970, s.37.

40 See paras. 34-35, below.

28. So far we have only considered benefits conferred under the contract and there is a point here which needs further examination. A builder who carries out work over and above that required by the contract may not make an additional charge under the present law, unless the extra work has previously been agreed to or, at least, requested by the other party. Our main proposal would not entitle a builder to payment for unrequested extras even where they amount to a "valuable benefit". Nor, for that matter, would our main proposal render a party liable to pay for benefits that were radically different from those for which he contracted. For example, if a builder were to contract to build a greenhouse and built a garage instead he would not, under our main proposal, be entitled to payment for the benefit that he had conferred. It may not always be easy to decide in the particular case on which side of the line the benefit falls, but our provisional conclusion is that our main proposal should only apply to valuable benefits that are not radically different from those required by the contract. Comments are invited.

29. We come now to the various possible approaches to valuation of the benefit conferred. One is that the benefit from part performance of the contract should be valued by taking the contract price and deducting from it the cost of having the work completed. This would seem to work conveniently in cases such as Bolton v. Mahadeva[41] where most of the work had been done and it was known how much it would cost to have the work completed. There are however at least two difficulties with this approach. One is that in some cases the completion of the work may be impracticable or, indeed, a physical impossibility. There would in such

41 [1972] 1 W.L.R. 1009. See para. 5, above.

situations be no way of assessing the cost of completion and thus of deducing the value of the benefit. Another difficulty is that such a method of assessment would work to the disadvantage of the party receiving the benefit if he had made a bad bargain by agreeing in the first place to an excessively high contract price. Let us suppose that X were to engage a builder to do work for £5000 for which the reasonable market price would have been £2000. The builder does half the work and leaves the site, so X engages another builder to finish the job for £1000. As we mentioned earlier,[42] where the builder has been paid £5000 at the outset a problem may arise which we shall consider in Part III. For present purposes, let it be assumed that the builder has not been paid anything. Would it be fair to assess the value of the first builder's work at £4000? This is the answer to which the "cost of completion" approach would lead. It would mean that the defaulting builder would make the same profit out of doing half the job as he would make by doing it all. Our provisional conclusion is that this would be so unjust a result that the "cost of completion" approach could not provide the basis of a general rule.

30. Another possible approach is to ignore the cost of completing the unfinished work and to provide instead for a reasonable sum to be payable for the benefit conferred by part performance, the reasonable sum being calculated by reference to market rates and prices within the relevant trade or profession. This would mean that, in the problem posed in the preceding paragraph, the builder who did half the work would only be entitled to £1000, which would seem to be a fairer outcome than that he should have £4000.

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42 See para. 6, above.

However a difficulty could arise if this method were applied when the builder had contracted to do the work for an excessively low figure. The builder would in such a situation be able to claim more by pecuniary restitution than he would be entitled to under the contract. Let us say, for example, that he agrees to do work for £2000 for which a reasonable market price would have been £5000. He does half the work and no more. Should he be allowed to claim £2500 as being a reasonable sum for the benefit conferred by part performance? Our provisional view is that this would be no more satisfactory an outcome than that produced in the converse situation by the "cost of completion" approach. We are therefore inclined to reject the "reasonable sum" test in so far as it leaves out of account the sum that would have been payable under the contract had the contract been performed.

31. This brings us to a third possible method of assessment which is to value the benefit as that proportion of the contract price that the part performed bears to the whole. By this test, if a quarter of the work were done, the benefit should be valued at a quarter of the contract price. This would be consistent with the rule that already applies to contracts for the carriage of goods by sea where the freight is based on the tonnage of the cargo: if some but not all of the cargo is delivered at the proper destination the amount due for freight is reduced proportionately to the tonnage delivered.[43] The same test might sometimes be conveniently applied to situations which are at present caught by the general rule governing entire contracts. Let us say, for example, that contractors make

43 Ritchie v. Atkinson (1808) 10 East 295; 103 E.R. 787.

an entire contract with a land-owner to harvest 1000 acres of wheat at so much an acre. If they were only to harvest 250 acres, it would, on the face of it, seem reasonable to quantify the benefit of the work done at a quarter of the total price. Even here, however, there may be difficulties. The contractors may have done the hardest quarter first, taking, let us say, three days, whereas the remaining three quarters could be finished in six. In such a case a fairer proportion of the price might be something nearer a third than a quarter. The task of working out what proportion the part performed bears to the whole will of course be even more complicated where the work done includes items that were not in the contract which ought therefore to be ignored,[44] and other items which were executed so badly that they need to be redone. Nevertheless the principle of gearing the valuation to the contract price seems to us to be sound and to offer a more satisfactory approach than the other two possible methods. We should welcome the views of readers on this provisional conclusion and on any other possible methods of valuation that we may not have mentioned.

32. Whilst finding the third approach more attractive than the other two we nonetheless recognise that it would be extremely difficult and sometimes impossible to apply in practice if the court were obliged in every case to apportion the price according to an inflexible mathematical formula. Our provisional conclusion is that the courts should have considerable latitude in assessing the value of the benefit and should be allowed to look at all the circumstances of the particular case in determining what sum would be

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44 See para. 28, above.

reasonable. We do however make the provisional recommendation that the court should, in making its valuation, pay particular regard in every case to the price that would have been due had the contract been completely performed and the extent to which the contract has in fact been performed.

The benefit conferred on a third party

33. The circumstances that we have been considering so far are those in which the benefit has been conferred by one party on the other. It could however happen that the benefit was conferred on someone who was not a party to the contract. For example, an indulgent father might engage a builder to carry out improvements to his son's house. If the builder conferred a benefit on the son by doing part of the work it would seem fair that the builder should be in no worse position vis-à-vis the father than if it had been the father's house and the father who benefited. Here again some flexibility is required because there would be no justice in making the father pay for benefits conferred by the builder on third parties such as subcontractors except to the extent that the subcontractors in turn improved the house. In exercising its power to make an award under section 1(3) of the Law Reform (Frustrated Contracts) Act 1943 the court may take into account a benefit conferred on "any other person, whether a party to the contract or not ... if in all the circumstances of the case it considers it just to do so." We think that this could be conveniently adapted to fit in with our main proposal. Our provisional recommendation is that a benefit conferred on a non-contracting party in part performance of the contract should, for the purposes of our main proposal, be treated as having been conferred on the other party if this would be reasonable in all the circumstances.

The liability in damages of the party in breach

34. A party who breaks his contract is liable to pay damages to the other party to compensate him for the loss caused by the breach. In this paper we propose no alteration in the rules on the measure of damage recoverable nor on remoteness of damage; nor do we intend, by our main proposal, to reduce the amount that the party to an entire contract may recover by an action for damages. The situation with which we are concerned is that in which the value of the benefit conferred by the party in breach exceeds the loss caused by his failure to discharge all his obligations: here an action for damages is not worth bringing against the party in breach because only nominal damages will be awarded. The effect of our main proposal is to entitle the party in breach to the value of the benefit conferred by part performance; however if he has caused loss by his breach, justice requires that this loss should be brought into account, so that the party in breach only recovers the balance.

35. Our provisional recommendation is that the sum payable to the party in breach by our main proposal should be reduced or, as the case may be, extinguished by the damages to which the other party may be entitled in respect of the breach of contract. The following example shows how our proposals might be applied in practice:-

> X, a builder, makes a contract with Y, the owner of a boarding house, for the installation in Y's house of two bathrooms for £2,000. He installs one but not the other and, in breach of contract, refuses to do further work: he has been paid nothing in advance. Y engages another builder to install the other bathroom and has to pay him £1,250. The work is held up until the second builder is able to start and Y suffers loss of rents of £350 in the meantime. Under our main proposal X would be entitled to be paid approximately £1,000 for the bathroom that he installed. Against this the owner, Y, would be

entitled to set the extra sum that he had to pay the second builder, £250, and the loss of rents, £350. At the end of the day X's entitlement would be reduced from £1,000 to £400 and this is the figure that Y would have to pay.

Exceptions

(a) Carriage of goods by sea

36. Most of the examples that we have taken so far in this paper have been about building contracts but our main proposal is not intended to be confined to building contracts only. Our provisional view is that, with certain exceptions, it should be of general application to entire contracts whatever their nature or subject-matter. One group of exceptions concerns the carriage of goods by sea. A contract to carry goods for freight payable at the agreed destination is a contract to do the entire work for a specified sum. Accordingly where the shipowner delivers the goods to the merchant short of the port of destination, he can only claim freight proportional to the amount of voyage completed (known as freight pro rata itineris peracti, or freight pro rata) if an express or implied agreement to that effect exists with the merchant. The factors that determine whether in the particular case such an agreement may be implied are complicated[45] but well-established. Further complications arise out of the rule that a provision for "advance freight" requires the merchant to pay the freight in full if the goods are not delivered to the agreed destination by reason of excepted perils.[46] In their

45 Scrutton on Charterparties and Bills of Lading (18th ed., 1974), pp. 341-345.

46 Ibid., 331-336.

Seventh Interim Report[47] in 1939 the Law Revision Committee concluded that these rules were so firmly established in the business practice of ship-owners and insurers that any interference with them would be undesirable. As a result contracts for the carriage of goods by sea and charterparties of certain kinds were excepted from the ambit of the Law Reform (Frustrated Contracts) Act 1943. We have been led by the same considerations to the provisional conclusion that our main proposal should not apply to the contracts specified in section 2(5)(a) of the Law Reform (Frustrated Contracts) Act 1943. We should welcome comments.

(b) Sale of goods

37. There may be incomplete or defective performance of a contract for the sale of goods, as where the seller delivers goods in the wrong quantity or goods of the wrong quality or where he delivers the goods he contracted to sell mixed with goods of a different description not included in the contract. The buyer is usually entitled in such circumstances to reject all the goods delivered and, where the goods are rightly rejected, the buyer is not obliged to pay anything for them. If, however, he accepts them, or part of them, he must pay for the ones he accepts at the contract rate, although he may set up a claim for damages in diminution or extinction of the price.[48] The only situation in which he may obtain a valuable benefit from the seller's incomplete or defective performance without having to pay anything - this being the situation to which our main proposal is directed - is where the buyer has obtained a benefit from his temporary possession of the goods before

47 Cmd. 6009, (Rule in Chandler v. Webster).

48 Sale of Goods Act 1893, s. 53(1).

justifiably rejecting them. This can give rise to difficulties where the seller has supplied goods which he was not entitled to sell.[49] However, this is because the delivery of goods which the seller is not entitled to sell is regarded as total non-performance of the contract; this raises a particular problem which is considered in Part IV. Otherwise the benefit of temporary possession of the goods delivered is likely to be very trivial because the right of rejection is lost if, after he has had a reasonable opportunity of examining the goods, the buyer does any act in relation to them which is inconsistent with the ownership of the seller.[50]

38. We shall consider later[51] what provision might be made for the situation where the seller has delivered goods that he had no right to sell. Otherwise where there has been incomplete or defective performance of a contract of sale and the buyer has justifiably rejected the goods our provisional conclusion is that the seller should not be entitled to payment by the buyer for the benefit of temporary possession between delivery and rejection. We accordingly make the provisional recommendation that our main proposal should not apply to contracts for the sale of goods.

The cynical contract-breaker

39. So far nothing has been said about the motivation of the party in breach nor about the quality of his conduct.

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49 Butterworth v. Kingsway Motors [1954] 1 W.L.R. 1286. See para. 7, above.

50 Sale of Goods Act 1893, ss. 11(1)(c) and 35.

51 In Part IV.

He may have been compelled to break the contract by events that he did not foresee and could not have foreseen at the time of making it. He may, on the other hand, have broken the contract for no other reason than that the breach of it would yield him a better financial return than further performance. Or the circumstances of the breach may lie somewhere between the two extremes. Our main proposal applies to each situation in the same way. We must therefore consider whether the proposed new remedy should be qualified to prevent its being exploited by the person whom we shall call "the cynical contract-breaker".

40. The problem is serious and difficult but it will only arise where a number of conditions are fulfilled. First the remedy must not have been excluded by the agreement of the parties.[52] Second the recoverable loss caused by the breach must not exceed the value of the benefit conferred.[53] Third the party in breach must not have been paid nor be entitled, under the terms of the contract, to be paid a sum in excess of that payable under our main proposal. Let us, therefore, suppose the following facts:-

> A builder agrees to carry out certain building work for £5000. The contract does not provide for stage payments and does not exclude the remedy contained in our main proposal. He abandons the contract when the work is half done, having received no payment in advance or on account. The other party then engages other builders to finish the work and pays them £2500.

On such facts the builder would, by our main proposal, be entitled to about £2500 as the value of the benefit conferred by his incomplete performance of the contract.

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52 See paras. 23-24, above.

53 See paras. 34-35, above.

41. Let us suppose that the builder has shown a cynical disregard for his contractual obligations: his only reason for abandoning the contract is that he can make a larger profit by performing another contract for someone else. Should he, in such circumstances, be entitled to £2500 for the benefit conferred under the contract which he has abandoned? Should he be entitled to nothing? Should the court have a discretion to allow or disallow the claim in whole or in part depending on his conduct in all the circumstances of the particular case? We shall consider three possible approaches to the problem under the following heads:-

(a) the American Restatement,
(b) unforeseen circumstances,
(c) a judicial discretion.

(a) The American Restatement

42. The new remedy for the party in breach, outlined in our main proposal, has much in common with a remedy that has already been developed by the courts in the United States of America. The Restatement of the Law of Contracts, which was adopted by the American Law Institute in 1932, defines the scope and content of the American remedy and section 357, which is the relevant section, is reproduced at the end of this working paper as Appendix B. Section 357 provides that the party in breach must generally[54] prove that his "breach or non-performance is not wilful and deliberate"[55] in order to qualify for the right of redress provided by that section. The purpose of the requirement

54 Except in the situation provided in section 357(1)(b), which is primarily concerned with "returnable benefits". See para. 15, above.

55 Section 357(1)(a).

is revealed by the official commentary on section 357 in the American Restatement. It contains the following passage:-[56]

> "A breach may be committed knowingly and yet not be wilful and deliberate. Such is the case if it is the result of mere negligence or error of judgment or mistake of fact or law, or is due to hardship, insolvency or circumstances that tend appreciably toward moral justification."

It seems, therefore, that the purpose of the requirement that the breach must not be "wilful and deliberate" is to disqualify the person who breaks his contract without any shade of moral justification; the cynical contract-breaker in our hypothetical example would have no remedy.

43. Whilst sympathising with the aim of the American Restatement we doubt whether the terminology of "wilful and deliberate" breach is appropriate for English law. The word "wilful" was considered in re Young & Harston's Contract[57] and Bowen L.J. said:-[58]

> "It generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will."

If, therefore, it were provided that our main proposal should not benefit the person whose breach was "wilful and deliberate" the cynical contract-breaker of our example would be excluded but so would others whose claims might appear more meritorious. Take the case of the contractor who is obliged, by circumstances beyond his control, to choose which of two contracts to perform, he being able to perform one or the

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56 Restatement of the Law of Contracts (1932) Vol. II, Ch.12, p.626.

57 (1885) 31 Ch.D. 168.

58 Ibid., at p.175.

other but not both.[59] The decision to perform one would necessarily involve a deliberate and (giving the word its usual meaning in English law) "wilful" breach of the other, yet this is the sort of situation in which the party in breach should, in our provisional opinion, have a remedy under our main proposal.

44. Another example may be provided by the circumstances of Sumpter v. Hedges.[60] Mr. Sumpter apparently decided to abandon his work part-finished because he had insufficient money to enable him to continue. The decision may have been taken reluctantly and he may have acted with the best of motives yet his decision would seem to have been "wilful and deliberate". Should he, on this account alone, be disqualified from claiming in respect of the benefit conferred? Our provisional view is this might in some circumstances be unjust. Our tentative conclusion is that the terminology of "wilful and deliberate" breach is not apt to describe the sort of conduct that should disqualify the party in breach from the benefit of our main proposal. Comments are invited.

(b) Unforeseen circumstances

45. Another approach might be to require the party in breach to prove, as a condition of entitlement under our main proposal, that his breach of contract was caused by unforeseen circumstances beyond his control. It may be said, in support of this approach, that its effect would be to exclude from the benefit of our main proposal the party who intended to break the contract all along and the party

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59 Cf. Maritime National Fish Ltd. v. Ocean Trawlers Ltd. [1935] A.C. 524.

60 [1898] 1 Q.B.D. 673; see para. 16, above.

who abandoned the contract when he could without inconvenience or hardship have performed it. This would, no doubt, be so. However it could also exclude claims by persons who were unable to finish the work they had started because of their own improvidence or errors of commercial judgment. Let us take the typical situation of the contractor whose reason for leaving the contract work unfinished is that he has run out of money. He might be able to show that this event was not in fact foreseen by him when he made the contract but would he be able to show that it was beyond his control? The financial difficulties would as like as not be due to his inefficient management of things within his control. And what if he unwisely takes on more contracts than he can perform? He can carry out some of them but only by stopping work on the rest. His decision to perform some contracts and to break the others would not be due to circumstances beyond his control but it might seem hard to leave him without a remedy for benefits in fact conferred under the contracts that he decided to break. Our provisional view is that a requirement that breach should be caused by unforseen circumstances beyond the control of the party in breach would be unduly restrictive in its effect but comments would be welcomed.

(c) A judicial discretion

46. A third possible approach to the problem might be to allow the court a discretion to disallow a claim by the party in breach having regard to his conduct in all the circumstances of the case. The court's task in exercising such a discretion would not always be easy because a variety of factors may contribute to the decision to break the contract. For example, a contractor may decide to break his contract with A in order to perform a contract made with B, because the contract with B is more lucrative

or because B is a personal friend or because B is a valued customer or for all three reasons. He may, on the same set of facts, be unable to perform the contract with A as well as the contract with B due to circumstances that he could not have foreseen at the time of making the contracts. Since the motivation of the party in breach and the quality of his conduct would be relevant to the exercise of the court's discretion all the circumstances outlined above would have to be considered. There is some force in the criticism that this might make the outcome of litigation somewhat less certain than would be the case if no such discretion were introduced.

47. It may be contended, on the other hand, that if the court is to have a discretion at all it should not be limited to allowing or refusing the claim by the party in breach but should also extend to the fixing of the amount, if any, to be awarded. The court would then be able to award the contract-breaker more or less depending on the quality of his conduct in all the circumstances; in the case of a cynical breach a token award might be made or the claim might be refused in its entirety. Our provisional view is that this would be going too far. It would make the outcome of litigation unduly uncertain and would place the party receiving the benefit at a serious disadvantage. He would have no basis for calculating how much to tender before action nor, if proceedings were started, would he know how much to pay into court. However, a narrower discretion, limited to the making or refusing of an award, would, in our provisional opinion, produce an effective safeguard against the exploitation of our main proposal by the cynical contract-breaker without making the availability of the remedy too uncertain. There are other remedies in the law of contract that the court has a discretion to refuse because of the plaintiff's conduct. For example, the

remedies of specific performance and rescission may be refused where the plaintiff does not come to the court with "clean hands". We accordingly make the provisional recommendation that the court should have a discretion to disallow a claim by the party in breach where this would be appropriate having regard to his conduct in all the circumstances of the case. Comments would be welcomed.

PART III - CLAIMS FOR THE RECOVERY OF MONEY PAID

48. In Part II we were concerned with the situation where the party in breach has failed substantially to perform the contract but has conferred a valuable benefit by defective or incomplete performance. The question we considered was whether the party receiving the benefit should be liable to make pecuniary restitution in respect of it; our provisional conclusion was that in certain circumstances he should. In Part III we discuss the converse situation where the party receiving the benefit has made a payment in anticipation of complete performance that exceeds the value of the benefit conferred. We are again concerned with cases where the party in breach has failed substantially to perform the contract but has conferred a valuable benefit by incomplete or defective performance.

49. We are not concerned here with providing a further remedy for the party in breach: money that he has paid may, under the present law, be forfeited as a consequence of his breach but this problem has been fully discussed in an earlier working paper.[61] We are confining our attention, in Part III, to the remedies that are or should be available to a party who is not in breach and who has made a payment which he wishes to recover.

Total failure of consideration

50. Where the party receiving the money does nothing in performance of his obligations under the contract, or does

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61 Penalty Clauses and Forfeiture of Monies Paid (1975), Working Paper No. 61.

nothing that is of benefit to the other party, there is said to be a total failure of consideration. The non-performing party may be required to return any money that he has received in anticipation of performance, whether or not the non-performance amounts to a breach of contract.[62] Provided that the failure of consideration is total, the liability to make a refund of the monies paid is total.

Partial failure of consideration

51. Although all the money that has been paid may be recovered where the failure of consideration has been total, none may be recovered where the failure is partial, that is to say where the party making payment has received some benefit from incomplete or defective performance.[63] His remedy is to claim damages. We do not propose in this paper to examine the law on assessment of damages for breach of contract but the classical view of the purpose of an award is as follows:-

> "...as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed."[64]

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62 Subject to a deduction in respect of expenses incurred, where the contract is discharged by frustration. Law Reform (Frustrated Contracts) Act 1943, s.1(2).

63 Whincup v. Hughes (1871) L.R. 6 C.P.78. This principle does not apply to sale of goods where the seller has been paid in full but has made a short delivery; the buyer may accept the goods delivered and recover part of the price in respect of those not delivered: Biggerstaff v. Rowatt's Wharf Ltd. [1896] 2 Ch. 93, Behrend & Co. Ltd. v. Produce Brokers Co. Ltd. [1920] 3 K.B. 530, Ebrahim Dawood Ltd. v. Heath (Est. 1927) Ltd. [1961] 2 Lloyd's Rep. 512.

64 British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd. [1912] A.C. 673, 689 per Viscount Haldane L.C.

52. Although this principle no doubt produces a fair result in the majority of cases it can lead to injustice if applied to the situation of a plaintiff who has made a bad bargain by agreeing to pay a price in excess of the market price and has paid the money in full in anticipation of full performance. Because the court seeks to put the plaintiff in the position he would have been in if the contract had been performed, he cannot escape his bad bargain by claiming damages.[65] We may, for an example, return to the hypothetical case posed in Part I:-

> X engages a builder to do certain work for £5,000 which he pays him at the outset. He has made a bad bargain, as a reasonable price for the work would have been £2,000. The builder does half the work then leaves the site, so X engages another builder to do the rest of the work and pays him £1,000.

What is the measure of X's loss or damage?

53. If we follow the classical approach, the answer to the problem must be that X may recover as damages no more than £1,000, this being the sum that he has to spend to put him in "as good a situation as if the contract had been performed." This, however, seems to be unjust as it allows the first builder to keep £4,000 and thus to make the same profit as if he had completed the job instead of doing only half.

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65 See Dutch v. Warren (1721) 1 Str. 406; 93 E.R. 598: considered and applied by Lord Mansfield C.J. in Moses v. Macferlan (1760) 2 Burr. 1005, 1010-1011; 97 E.R. 676, 680.

54. If the first builder had failed totally to perform the contract X could have escaped his bad bargain and recovered all the money paid. If on the other hand the first builder had not been paid at all but had done half the work, our main proposal in Part II would entitle him to be paid for the benefit conferred[66] and our provisional recommendation on the valuation of the benefit is that particular regard should be had to the price payable on complete performance and the extent to which the contract has in fact been performed.[67] Thus, under our main proposal, the first builder would be entitled to be paid about £2,500. Should the party in breach who has received payment in anticipation of complete performance be entitled to retain a larger sum than he would recover under our main proposal if no payment had been made?

55. There are several sound commercial reasons for seeking payment in advance of performance. First, this removes the risk that payment may not be forthcoming later, perhaps because of bankruptcy. Second, the payment gives the recipient the use of the money and helps his "cash-flow". Third, if there is later a dispute over the adequacy of the work done under the contract or there are other complaints of breach of contract, the party who has already been paid does not have the onus of starting legal proceedings. We do not challenge these reasons, but should the party in breach have the additional advantage of being allowed to keep more of the money paid than his work is worth? Our provisional conclusion is that he should not. We make the provisional recommendation that where the party in breach has not

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66 Para. 25, above.

67 See para. 32, above.

substantially performed the contract, the plaintiff should be entitled, as an alternative to a claim in damages, to claim restitution, from the party in breach, of the difference between the amount paid and the value of the benefit received. However, we would except from this general proposition (a) situations in which the parties have provided by contract that such a remedy should not be available[68] and (b) contracts excepted from our main proposal.[69] Our provisional view is that where, for the purposes of the remedy proposed, the benefit of part performance has to be valued, the court should have the same duties and powers as if the valuation were being made for the purposes of our main proposal.[70]

56. This brings us back to the case of the cynical contract-breaker. In Part II we made the provisional recommendation that where he has not been paid the court should have a discretion to allow or disallow him payment under our main proposal, as might be appropriate having regard to his conduct in all the circumstances of the case.[71] We are now considering the situation where the contractor has already received payment but has abandoned the contract for the sole reason that he can make a larger profit by performing another contract for someone else. Should the court have the power to order him to hand back what he has received without allowing him to retain the

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68 See paras. 23 - 24, above.

69 See paras. 36 - 38, above.

70 See paras. 26 - 33, above.

71 See paras. 39 - 47, above.

value of the benefit conferred by his incomplete or defective performance? The court has a discretion, under the existing law, to order rescission of the contract and restitution in full of the money paid where the cynical conduct of the defendant includes misrepresentation, duress or undue influence, although the general rule is that the plaintiff can only get back what he gave under the contract if he can give back what he got.[72] Our provisional view is that it would not be appropriate to introduce cynical breach of contract, without more, as a new ground for ordering rescission of the contract and restitution in full of the money paid. We accordingly make the provisional recommendation that the court should have the power to order restitution by the party in breach of the difference between the value of the benefit and the amount of the payment, but not restitution of all the money paid except where such a remedy is already available under the existing law. Comments are invited.

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72 G.H. Treitel, The Law of Contract (3rd ed., 1970), p. 320.

PART IV - PECUNIARY RESTITUTION IN RESPECT OF POSSESSION WITHOUT TITLE

57. Under the present law, where goods are delivered in purported performance of a contract of sale or hire-purchase, but the party making delivery has (in breach of contract) no right to sell, the party receiving the goods may reject them and insist on a total refund of the money paid on the ground that there has been a total failure to perform the contract. Where the party receiving the goods has had no benefit from the use of them it seems reasonable that he should recover all that he has paid; we do not question the justice of this. Where, however, the party receiving the goods has benefited from having the use of them over an appreciable period of time it is arguable that he should give credit for the value of the benefit obtained, when seeking a refund of the money paid. This, however, is not the present law; he need not, as a general rule, account for the benefit that he has derived from the temporary possession of the goods and anything paid may be recovered in full. The decided cases by which these general propositions have come to be established in the present law are, in chronological order, Rowland v. Divall,[73] Karflex Ltd. v. Poole,[74] Warman v. Southern Counties Car Finance Corporation Ltd.[75] and Butterworth v. Kingsway Motors.[76]

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73 [1923] 2 K.B. 500.

74 [1933] 2 K.B. 251.

75 [1949] 2 K.B. 576.

76 [1954] 1 W.L.R. 1286.

Rowland v. Divall

58. The facts of Rowland v. Divall[77] were as follows:-

> Mr. Rowland, who was a car dealer, purchased a car from Mr. Divall for £334. He repainted it and put it in his showroom. About two months later he sold it for £400 and, about two months after the sale, the car was recovered by the police as it was stolen property. Mr. Rowland repaid £400 to his customer and sued Mr. Divall for the return of the £334.

The trial judge held that since Mr. Rowland had had the use of the car he could not recover the price but was limited to claiming damages. The Court of Appeal reversed the decision on the ground that there had been a total failure of consideration: the buyer had not got what he paid for - namely a car to which he would have title - and his use of the car was "quite immaterial."[78] Mr. Divall was accordingly ordered to return the £334. The basis of the decision may be questioned but the result itself seems fair. Mr. Rowland had had very little use out of the car after buying it, but he spent money on repainting it and probably increased its value. Indeed if he had sued Mr. Divall for damages instead of for the return of the price he might well have recovered more than £334, perhaps £400.[79]

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77 [1923] 2 K.B. 500.

78 Ibid., p. 504 per Bankes L.J.

79 Cf. Southern Counties Car Finance Corporation Ltd. v. W.J. Ameris Car Sales, the third party proceedings in Warman's case [1949] 2 K.B. 576, 583-4.

Karflex Ltd. v. Poole

59. The facts of Karflex Ltd. v. Poole[80] were as follows:-

> Mr. Poole made a hire-purchase agreement with Karflex Ltd., whereby he was to acquire a car on hire-purchase terms for a little over £300. He was to make an initial payment of £95 "in consideration of the option of purchase hereinafter contained" and to pay the balance by monthly instalments with an option of purchasing the car for £1 when all the other money had been paid. He paid £95 and took delivery of the car but failed to pay the first monthly instalment. Karflex Ltd. therefore terminated the agreement, repossessed the car and brought proceedings against him. It transpired that at the time of delivering the car to Mr. Poole Karflex Ltd. were not the true owners, although they perfected their title after repossessing the car.

Karflex Ltd. were ordered to repay the £95 to Mr. Poole on the grounds that the consideration for which it had been paid had wholly failed. However, in his judgment Goddard J. said:-

> "I am expressing no opinion as to what might be the position if a person who was not in fact the owner, but who honestly believed he was the owner of property let out on hire-purchase, was faced with a counterclaim by a hirer who had enjoyed the use of the property, we will say, for half the time that the hire-purchase agreement was contemplated to run, to recover all the money he had paid without making some allowance for the use of the chattel. It will be time enough to decide that when the question arises...."[81]

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80 [1933] 2 K.B. 251.

81 Ibid., pp. 265, 266.

Warman v. Southern Counties Car Finance Corporation Ltd.

60. The point left open in Karflex Ltd. v. Poole came up in Warman v. Southern Counties Car Finance Corporation Ltd.[82] which was also a hire-purchase case about a car to which the finance company had no title. The facts were as follows:-

> In September 1947 Mr. Warman took delivery of a car on hire-purchase terms. He made an initial payment of £155 and agreed to pay the balance by twelve instalments; he was granted the option of buying the car for £1 when all the instalments had been paid. In April 1948 he paid off all the instalments and exercised his option to purchase. On the same day he was sued by the true owner and he surrendered the car in May, after about seven months' use. He then sued the finance company for damages comprising the full hire-purchase price and also expenses incurred (a) in effecting insurance (b) in carrying out minor repairs and (c) in meeting the legal claim made by the true owner.

Finnemore J. held that the claim should succeed in full and based his decision on two grounds:-

> (a) He held that the finance company's inability to make good title to the car rendered the agreement valueless to the hirer.[83]

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82 [1949] 2 K.B. 576.

83 Ibid., p. 582. "...the whole object of [a hire-purchase agreement] is to acquire the option to purchase the chattel when certain payments have been made. Now, I think it might well be right to say if at any stage the option to purchase goes, the whole value of the agreement to the hirer has gone with it."

(b) He held that the finance company could not claim to have conferred a benefit by hiring out something to which they had no title.[84]

The court did not consider how much it would have cost Mr. Warman to have acquired a replacement car after seven months' use but it seems probable that the car he had been using was going down in value and that the sum awarded by the court would have bought him a better replacement than the car he had had to surrender.

Butterworth v. Kingsway Motors

61. We set out the facts of Butterworth v. Kingsway Motors[85] in Part I.[86] In short, Mr. Butterworth bought a car for £1,275 and used it for nearly a year before discovering that the person from whom he had purchased it was not the true owner. A replacement of the car delivered could by then have been bought for about £800 but it was held that Mr. Butterworth was entitled to a refund of the full £1,275.

Criticism of the present law

62. Where goods are delivered in purported performance of a contract of sale or hire-purchase, but the party making delivery has (in breach of contract) no right to sell, the party receiving the goods may reject them and recover the price in full on the ground of total failure of consideration,

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84 Ibid., p. 582 "I do not think that the plaintiff in any circumstances could be called on to pay to the defendants hiring money for a car which belonged to somebody else."

85 [1954] 1 W.L.R. 1286.

86 Para. 7, above.

his use of the goods being, for these purposes, quite immaterial. This principle of law may be criticised for being unrealistic in its approach to the facts and unjust in its results. It seems unrealistic to hold that the contract has not been performed at all where the buyer has benefited from the use of the goods for which he contracted, yet this seems to be the basis of the decisions cited above. The courts take a different attitude to breaches of contract which do not relate to title but which may seem, for practical purposes, no less fundamental. Where, for example, a finance company, in breach of contract, lets an unroadworthy car on hire-purchase terms and later repossesses it, the hirer may recover what he has paid but must give credit for such benefit as he has had from the use of the vehicle.[87] Yet where the breach of contract concerns title, although the benefit from use may be greater it is left entirely out of account. The result is that, on facts such as occurred in Butterworth's case, the plaintiff appears to be over-compensated. He gets back more than he has lost and this would seem to be unjust.

Earlier proposals for changes in the law and comments on them

63. In their Report on the Transfer of Title to Chattels[88] the Law Reform Committee commented on the buyer's right to recover the purchase price in full where the seller's right proved to be defective and recommended[89] that the buyer should be able to recover no more than his actual loss, giving credit for any benefit that he might have had from the goods while they were in his possession. In their consultative document

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87 Charterhouse Credit Co. Ltd. v. Tolly [1963] 2 Q.B. 683; Farnworth Finance Facilities Ltd. v. Attryde [1970] 1 W.L.R. 1053.

88 Twelfth Report of the Law Reform Committee (1966) Cmnd. 295

89 Ibid., para. 36.

on the amendment of sections 12 to 15 of the Sale of Goods Act 1893[90] the Law Commission and the Scottish Law Commission expressed their agreement with the recommendation of the Law Reform Committee[91] and canvassed a provisional proposal[92] that section 12 of the Sale of Goods Act 1893 should be amended accordingly. This proposal met with a mixed reception and in their First Report on Exemption Clauses in Contract: Amendments to the Sale of Goods Act 1893,[93] the two Law Commissions mentioned[94] some of the criticisms of the proposal that had been received. They concluded[95] that the practical problems implicit in the Law Reform Committee's proposal could not be dealt with satisfactorily by amendment of section 12 of the Sale of Goods Act until a study has been carried out of the rules relating to the law of restitution.

64. The problems with which we are concerned in this Part are not confined to sale; as we have seen, they can arise in exactly the same way where the contract is one of hire-purchase. Nevertheless we shall, in the rest of this Part, adopt the terminology of sale, that is to say "buyer" and "seller" when describing the parties to the relevant transaction. This is done for convenience; we intend whatever we say about the rights and remedies of the buyer to apply equally to the rights and remedies of someone who takes delivery of goods under a hire-purchase agreement. Equally

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90 (1968) Law Commission Published Working Paper No. 18; Scottish Law Commission Memorandum No. 7.

91 Ibid., para. 11.

92 Ibid., para. 79(a).

93 (1969) Law Com. No. 24; Scot. Law Com. No. 12.

94 Ibid., para. 15.

95 Ibid., para. 16.

when we refer to the rights and remedies of the seller we intend to cover the rights and remedies of the person who lets goods out on hire-purchase. The proposal by the Law Reform Committee was confined to contracts of sale but the comments made on it are no less relevant to wider proposals that apply to hire-purchase too. The most important comments may be grouped under four main headings:-

(a) The buyer's right to damages
(b) The rights of the true owner
(c) The dishonest seller
(d) The valuation of the benefit of possession and use.

(a) The buyer's right to damages

65. One suggestion that was made to us for the reform of this part of the law was that the delivery of possession without title should no longer be treated as total non-performance; it should be regarded as partial performance and the buyer should not be allowed to sue for the return of the price but for damages only. Before commenting on this suggestion we should make it clear that the buyer already has a right to damages under the existing law and that where his recoverable damages exceed the amount of the price this would be the more appropriate remedy.[96] One could imagine situations, in which it would be the only remedy. For example if X bought a car without acquiring ownership but were to resell it in market overt so that the person

96 See, for example, Bowmaker (Commercial) Ltd. v. Day [1965] 1 W.L.R. 1396.

who bought it from him acquired a good title,[97] we doubt whether the court would hold that X could recover the price paid to the original seller, although if he were to be sued by the true owner in the tort of conversion he would no doubt have a remedy in damages. To take another example, if the subject-matter of the sale were seed that the buyer planted or whisky that the buyer drank we doubt whether he would be able to recover the price from the seller on the ground that he had no right to sell.[98] We do not intend, by our proposals, to deprive the buyer of the right to claim damages that he has under the existing law nor to cover the situation in which he has, on the existing law, no right to the return of the price that he has paid.

66. Coming now to the merits of the suggestion that the buyer who obtains possession without title should have no remedy but damages, we have two comments to make upon it. The first is that the action for the return of the price is easy to formulate and, where the defect in title is clear, the plaintiff's case is easy to prove. It is, procedurally, a more attractive remedy than damages. If the claim is for damages then even where there is no defence to the claim the buyer has to go to court to have his damages assessed; he cannot sign judgment for the amount he claims in default of defence or appearance, as he can for a liquidated sum. When he goes to court he has the burden of proving the extent of his loss, and there is therefore some delay and some extra expense. These are important factors if the person sued is of doubtful solvency.

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97 Bishopsgate Motor Finance Corporation Ltd. v. Transport Brakes Ltd. [1949] 1 K.B. 322. See also the protection given to the bona fide private purchaser of a motor vehicle by Part III of the Hire Purchase Act 1964.

98 Cf. Linz v. Electric Wire Co. of Palestine Ltd. [1948] A.C. 371.

67. Our second comment is that it should not be assumed that if the buyer sues for damages rather than for the return of the money paid the court will require him to give credit for the benefit of the use and possession that he has had. The opposite was decided in Warman v. Southern Counties,[99] so the suggestion does not meet the main problem. Our provisional view is that, as long as the remedy of restitution can be adapted to prevent over-compensation in cases such as Butterworth's case, the right to the recovery of the money paid should be retained.

(b) The rights of the true owner

68. The failure by the seller to make good title on the sale and delivery of the goods exposes the buyer to claims by the true owner for the delivery up of the goods and also for damages in the tort of conversion. The damages recoverable in such an action are, in general, the value of the goods at the date of the conversion;[100] however, where the true owner has let the goods out on hire-purchase the amount by which their value exceeds the unpaid balance of the hire-purchase price is irrecoverable.[101] Where the goods are surrendered to the true owner, the liability in damages is reduced by the value of the goods at the date of the surrender, but is not necessarily discharged altogether. For example, a man who buys a car for £2,000 and uses it for a year before it is repossessed by the true owner may be liable to pay the true owner the difference between the value of the car as repossessed and

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99. [1949] 2 K.B. 576. See para. 60, above.

100. Salmond on Torts (16th ed., 1973), pp. 579-581.

101. Wickham Holdings Ltd. v. Brooke House Motors Ltd. [1967] 1 W.L.R. 295.

£2,000, as damages for conversion.[102] It was suggested to us that if the seller of the car were to be entitled to be paid for the benefit conferred in the form of the year's use, the right of the true owner to claim damages should not be left out of account. Otherwise the buyer might pay the seller for the benefit of the use and then have the benefit wiped out by an action in tort brought against him by the true owner. This would seem to be unjust.

69. In Butterworth's case and in Karflex Ltd. v. Poole[103] the seller's title had been perfected by the time the case came to court and in each case the true owner, a finance company, had been willing to settle its claim for the payment of the balance of the hire-purchase price without requiring the delivery up of the goods. The suggestion was made to us that the seller should, in certain circumstances, be given an opportunity to perfect his defective title before the buyer proceeded to rescind the contract. However, this opportunity would only be helpful where the true owner was not insisting on the delivery up of his goods and, although attractive in theory, it would be difficult to work out in practice. If a short period only were allowed it might be unfair to the seller who needed more time to complete negotiations with the true owner. If a longer period were prescribed it would impose a hardship on the buyer, at least in the case where the seller had no real intention of trying to perfect his title. It is, in any event, part of the larger problem whether, and if so when, a party in breach of contract should be given a chance of remedying

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102 Cf. Douglas Valley Finance Co. Ltd. v. S. Hughes (Hirers) Ltd. [1969] 1 Q.B. 738.

103 [1933] 2 K.B. 251. See para. 59, above.

his breach before the other may resort to his legal remedy. We shall say no more about it in the present paper, although we hope to consider it in detail in a later working paper.

70. Another, and in our provisional view more satisfactory, way of providing for the claim by the true owner would be by making the seller's right to payment for the benefit of temporary possession conditional upon the satisfaction of the true owner's claim, whether by the act or payment of the seller or of the buyer or of some third party. Such a requirement would mean that the buyer would not have to account to the seller for the benefit of temporary possession until the true owner's claim against him were out of the way; this would seem to be fair from everyone's point of view. We therefore make the provisional recommendation that whatever rights the seller should have against the buyer in respect of the benefit of temporary possession of the goods delivered should be conditional upon the true owner's claim against the buyer being satisfied.

(c) The dishonest seller

71. In each of the decided cases that we have considered so far,[104] the seller made the sale in the honest but mistaken belief that he was the true owner of the goods that he was selling. However, situations may arise in which the seller acts in bad faith, knowing that his title or authority to sell is defective. He may indeed be the thief of the goods that he is purporting to sell. Should he be

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104 See paras. 58-61, above.

entitled to make or keep a profit out of stolen goods or goods that have been disposed of dishonestly? The suggestion was made to us that the answer should be "No" and with this we agree. We do not intend that our proposals in this Part should apply where the seller has sold stolen goods knowing or believing them to be stolen. However it may be that a sufficient safeguard against unmeritorious claims of this character is already provided by the rule of public policy that

> "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."[105]

As was said in another case,

> "If a plaintiff cannot maintain his cause of action without showing, as part of such a cause of action, that he has been guilty of illegality, then the courts will not assist him in his cause of action."[106]

If, for example, a person were to dispose of goods in circumstances that constituted an offence under the Theft Act 1968, such as "theft" or "handling stolen goods", he would probably not be able to bring civil proceedings that were based upon such a transaction. We do not intend our proposals to inhibit the courts from applying this principle of public policy wherever it may be appropriate.

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105 Holman v. Johnson (1775) 1 Cowp. 341, 343; 98 E.R. 1120, 1121 per Lord Mansfield.

106 Scott v. Brown, Doering, McNab & Co. [1892] 2 Q.B. 724, 734 per Smith L.J.

(d) The valuation of the benefit of possession and use

72. The Law Reform Committee's recommendation was that the buyer should give credit for any benefit he may have had from the use of the goods while they were in his possession.[107] This raises a most difficult question on which we received many comments - "How is the financial value of the 'benefit' derived by the buyer from the possession of goods to be calculated?"[108] The theoretical justification for ordering the seller to repay the price to the buyer is that this restores the buyer to his pre-contract position. In fairness therefore the buyer who gets back the price ought to restore the use that he has made of the goods while in his possession, but this is intangible. If he is to account for the benefit that he has had from temporary possession it must be by making "pecuniary restitution", that is to say by converting the benefit into money and making a payment, or, if the price has already been paid, by allowing a deduction to be made from the sum otherwise returnable. But by what formula is the conversion of the benefit into money to be achieved?

73. The wrong done to the buyer who obtains only temporary possession of the goods he contracted to buy is that, after a period of temporary possession, the goods have to be surrendered to the true owner. To right this wrong the buyer needs goods to replace those of which he has been deprived. If the goods are of a kind for which there is, in the Sale of Goods Act sense, "an available market",[109]

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107 Twelfth Report (1966) Cmnd. 2958, para. 36.

108 (1969) Law Com. No. 24, Scot. Law Com. No. 12, para. 15 (c).

109 Sale of Goods Act 1893, ss. 50(3) and 51(3); and see W.L. Thompson Ltd. v. Robinson (Gunmakers) Ltd. [1955] Ch. 177; Charter v. Sullivan [1957] 2 Q.B. 117.

it should be possible to determine how much it would cost the buyer to obtain a suitable replacement for the goods surrendered or rejected. If, at the time of surrender or rejection of the original goods, the cost of a suitable replacement exceeds the original contract price there is no net benefit to the buyer in having had only temporary possession of the original. If, however, a suitable replacement may be obtained for less than the original contract price the difference might be thought to represent the benefit. This would be a comparatively simple way of deciding how much the seller should be allowed to keep[110] when the buyer seeks to recover the price. If it were applied in Butterworth's case,[111] the sellers would be required to return about £800, this being the cost of a replacement car of the same age, make and condition, and allowed to keep the difference between this sum and the contract price of £1,275, as representing the value to Mr. Butterworth of the temporary possession of the original car.

74. This approach would, we think, work satisfactorily where the original contract price was itself a fair price in accordance with the prevailing level of values. It is for consideration whether it would be appropriate where the buyer had agreed to pay more for the goods than they were worth at the time of contract, as may indeed have been the position in Butterworth's case.[112] The approach we have suggested would diminish the distinctions between the

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110 Subject to the satisfaction of the true owner's claim, para. 70, above.

111 [1954] 1 W.L.R. 1286. See para. 7, above.

112 Mr. Butterworth bought the car for £1,275 but earlier in the month of purchase it had been sold and resold on three occasions for £1,000, £1,015 and £1,030.

restitution claim and a damages claim since the effect would not be to put the parties into their pre-contract position but would rather tend to put the buyer into a position closer to that in which he would have been had the contract been performed - though without compensation for other loss. This may be to the disadvantage of a buyer who has paid an excessive price. The present rule permitting him to recover his price in full enables him to escape his bad bargain.[113] If he has to give credit for the benefit of temporary possession the result of basing the value of the benefit on the cost of obtaining a replacement might be to increase the "value" of his benefit by the whole of the "bad bargain" element in the original contract price.

75. A numerical example may help to make this clear, and to suggest a modification of the approach outlined in paragraph 73. Suppose that the buyer wishes to buy a second-hand car. The prevailing price would be £1,000, but he unwisely contracts at a price of £1,500. He has possession of the car for three months, but then has to restore it to its true owner. In the present state of the law he is entitled to the return of his £1,500 in full. If the value of the benefit is to be set against the £1,500, the approach outlined in paragraph 73 would suggest that the value of the benefit should be deduced from the fact that he can now obtain an identical car for, say, £950. However, it would seem unjust simply to deduct the £950 from the original contract price of £1,500 and to say that the benefit to the buyer should be valued at £550. A fairer solution might, in this case, be to calculate the benefit by reference not to the original contract price but

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113 See para. 54, above.

to the market price of the goods in question at the time of the time of the original purchase, and to value the benefit at the amount by which the market price fell during the period of the buyer's possession. Thus, in the example just given, the party in breach would be entitled to set a sum of £50 against the price of £1,500 and the buyer would be entitled to the return of the balance, £1,450.

76. Where the buyer has made a bad bargain the method of valuation just proposed works to his advantage. However it would work to his disadvantage if he had made a good bargain. For example, if he bought the original car for £900 rather than £1,500 - the prevailing price for cars of such an age, make and condition being £1,000 - and over the period that it was in his possession, say one year, the value of such cars fell to £800, it would seem unfair for the buyer to have to allow the seller £200 for the benefit of temporary possession. This would leave the buyer with only £700 which would not be sufficient to buy him a replacement. He would no doubt be awarded a higher sum if he claimed damages instead but he may have sound practical reasons for preferring to claim the return of his money.[114] Here it would be fairer to adopt the method of valuation first proposed, taking the value of the benefit as the difference between the cost of a replacement and the original contract price, £100. As neither method of valuation works satisfactorily in all cases the interests of justice would seem to require that the two methods of valuation should be combined. Accordingly we make the provisional recommendation that the value of the benefit of temporary

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114 See para. 66, above.

possession should be either the difference between the original contract price and the price of a suitable replacement[115] or the amount by which the market value of the goods in question has fallen during the period of the buyer's possession,[116] whichever may be the less.

77. Our provisional conclusion is that the formula just outlined would provide a satisfactory way of valuing the benefit obtained by the buyer from the temporary possession of goods which the seller had no right to sell. However, it will be remembered that it can only work where the goods are of a kind for which suitable replacements can be obtained. This still leaves the problem of valuing the benefit derived from the temporary possession of goods that are unique or not reasonably replaceable. Take, for example, the case of the buyer who purchases an original painting for £1,000 and discovers, a year later, that the seller had no title to it: the painting is recovered by the true owner and the buyer claims the return of the £1,000. He has, no doubt, derived some pleasure from looking at the painting whilst it was in his possession and showing it to his friends but is this a benefit for which he should be required to pay? Our provisional opinion is that in such a case the buyer has not been enriched by the temporary possession of the goods in a way that is measurable in cash terms. We accordingly make the provisional recommendation that where the goods are irreplaceable the buyer should be entitled to the return of the purchase price without deduction. Comments are invited.

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115 Para. 73, above.

116 Para. 75, above.

Summary

78. Our provisional conclusion is that once the buyer is no longer at risk of being sued by the true owner he should be required to account to the seller for the benefit conferred in the form of temporary possession if he elects to claim the repayment of the price. However, the temporary possession should be regarded as having no value unless the buyer can reasonably be expected to obtain a replacement of the goods delivered at less than the original contract price. If so, the sum due to the seller in respect of the benefit should be the difference between the original contract price and the price of the replacement or the amount by which the market value of the goods in question has fallen over the period of temporary possession, whichever may be the less. In most cases the question will be whether the seller should be allowed to retain something out of the purchase price, and it is our provisional view that the seller should have the same right whether the buyer seeks to recover the price as a liquidated sum, as in Butterworth's case,[117] or as part of a claim for damages, as in Warman's case.[118] Where the seller has not been paid, however, or has had to refund the price before settling the true owner's claim, he should have the right to claim the same sum in respect of the benefit conferred as our proposal would entitle him to retain from the money paid.

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117 [1954] 1 W.L.R. 1286. See para. 7, above.

118 [1949] 2 K.B. 576. See para. 60, above.

PART V - PROVISIONAL RECOMMENDATIONS

79. The provisional recommendations that follow are not concluded views, but are intended as the basis for a discussion of the reform of the law of contract. We should welcome comment and criticism on all the problems with which this paper is concerned but, in particular, on the proposals for changes in the law that are set out below.

1. Pecuniary restitution for benefits conferred: a new remedy for the party in breach

(a) Where the party in breach has, by incomplete or defective performance of a contract, conferred a valuable benefit on the other party but is unable to perform the contract completely, either because further performance is no longer possible or because the other party has justifiably treated the contract as at an end, the party in breach should, subject to the proposals below, be entitled to be paid by the other party for the benefit that he has conferred (paras. 9-25).

(b) No remedy should be available under (a) where the parties have agreed to exclude it (paras. 23-24).

(c) The sum payable under (a) should be such sum as may be reasonable in all the circumstances, particular regard being paid to

(i) the price that would have been payable had the contract been performed completely, and

(ii) the extent to which the contract has in fact been performed (paras. 26-32).

(d) A benefit conferred on a non-contracting party in part performance of the contract should be treated as having been conferred on the other contracting party if this would be reasonable in all the circumstances (para. 33).

(e) The sum payable under (a) may be reduced or, as the case may be, extinguished, by the damages to which the other party may be entitled in respect of the breach of contract (paras. 34-35).

(f) The above proposals should not apply to contracts for the carriage of goods by sea which are excluded from the Law Reform (Frustrated Contracts) Act 1943 nor to contracts for the sale of goods (paras. 36-38).

(g) The court should have a discretion to disallow a claim under (a) where this would be appropriate having regard to the conduct of the party in breach in all the circumstances of the case (paras. 39-47).

2. Claims for the recovery of money paid

The following proposals should apply where the party in breach has failed substantially to perform the contract but has conferred a valuable benefit on the other party by incomplete or defective performance and has been paid the contract price, or part of it, by the other party:-

(a) The party who has made the payment should be entitled, as an alternative to damages, to the restitution of the money paid in excess of the value of the benefit conferred (paras. 48-56).

(b) The remedy of restitution should not be available under (a) where the parties have agreed to exclude it (para. 55).

(c) The benefit conferred by the party in breach should be valued in accordance with proposal 1(c) and should take into account benefits conferred on third parties to the extent provided by proposal 1(d) (para. 55).

(d) The above proposals should not apply to contracts for the carriage of goods by sea which are excluded from the Law Reform (Frustrated Contracts) Act 1943 nor to contracts for the sale of goods (para. 55).

3. Pecuniary restitution in respect of possession without title: Sale

Proposals (a) - (d), below, should apply where a seller has, in breach of contract, delivered and purported to sell goods which he has no right to sell and the buyer has, under the present law, the right to have the price, if paid, returned:-

(a) If he has conferred a valuable benefit on the buyer by the delivery of possession of the goods, the seller should be entitled to be paid (or as the case may, to retain) the value of the benefit so conferred (para. 57-67).

(b) The seller should be regarded as having conferred a valuable benefit on the buyer for the purposes of (a) where - but only where - a suitable replacement for the goods delivered may reasonably be obtained by the buyer at less than the original contract price, in which event the value of the benefit should be the difference between the original contract price and the price of the replacement or the amount by which the market price of the goods in question has fallen during the period of the buyer's possession, whichever may be the less (paras. 72-77).

(c) The seller's entitlement under (a) should be conditional upon the satisfaction of the true owner's claims against the buyer (paras. 68-70).

(d) Proposal (a) should not apply where the seller has sold stolen goods knowing or believing them to be stolen (para. 71).

Where the relevant transaction is one of hire-purchase

(e) Proposals (a) to (d) above should apply, with the necessary amendments, to the situation in which the relevant agreement is not one of sale but of hire-purchase (para. 64).

APPENDIX A

THE LAW REFORM (FRUSTRATED CONTRACTS) ACT 1943

1. Adjustment of rights and liabilities of parties to frustrat contracts

(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 o 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 discharge (in this Act referred to as "the time of discharge") shall, in the case of sums so paid, be recoverable from him as money rece 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 or for the purpose of, the performance of the contract, the cou 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 incur

(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 benefi (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular,-

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained 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 frustratio 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 aforesaid.

2. Provision as to application of this Act

(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 forego 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 charterpart 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 provi 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 contract for the sale of specific goods which perish before the risk has passed to the buyer) appli or to any other contract for the sale, or for the sale and delivery, of specific goods, wher the contract is frustrated by reason of the fa that the goods have perished.

3. Short title and interpretation

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

(2) In this Act the expression "court" means, in relatio to any matter, the court or arbritrator by or before whom the matter falls to be determined.

APPENDIX B

Section 357 of the American Restatement of the Law of Contracts

RESTITUTION IN FAVOUR OF A PLAINTIFF WHO IS HIMSELF IN DEFAULT

(1) Where the defendant fails or refuses to perform his contract and is justified therein by the plaintiff's own breach of duty or non-performance of a condition, but the plaintiff has rendered a part performance under the contract that is a net benefit to the defendant, the plaintiff can get judgment, except as stated in Sub-section(2), for the amount of such benefit in excess of the harm that he has caused to the defendant by his own breach, in no case exceeding a ratable proportion of the agreed compensation, if

(a) the plaintiff's breach or non-performance is not wilful and deliberate; or

(b) the defendant, with knowledge that the plaintiff's breach of duty or non-performance of condition has occurred or will thereafter occur, assents to the rendition of the part performance, or accepts the benefit of it, or retains property received although its return in specie is still not unreasonably difficult or injurious.

(2) The plaintiff has no right to compensation for his part performance if it is merely a payment of earnest money, or if the contract provides that it may be retained and it is not so greatly in excess of the defendant's harm that the provision is rejected as imposing a penalty.

(3) The measure of the defendant's benefit from the plaintiff's part performance is the amount by which he has been enriched as a result of such performance unless the facts are those stated in Sub-section (1b), in which case it is the price fixed by the contract for such part performance, or, if no price is so fixed, a ratable proportion of the total contract price.

Printed in England for Her Majesty's Stationery Office by Product Support (Graphics) Limited, Derby
Dd 290573 K24 10/75

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ISBN 0 11 730096 9