

The Law Commission

(LAW COM. NO. 121)

LAW OF CONTRACT

PECUNIARY RESTITUTION ON BREACH OF CONTRACT

*Laid before Parliament by the Lord High Chancellor
pursuant to section 3(2) of the Law Commissions Act 1965*

*Ordered by the House of Commons to be printed
19th July 1983*

LONDON
HER MAJESTY'S STATIONERY OFFICE
£5·10 net

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman*

Mr. Stephen M. Cretney

Mr. Brian Davenport, Q.C.

Mr. Stephen Edell

Dr. Peter North

The Secretary of the Law Commission is Mr. J. G. H. Gasson and its offices are at Conquest House, 37-38 John Street, Theobalds Road, London WC1N 2BQ.

PECUNIARY RESTITUTION ON BREACH OF CONTRACT

CONTENTS

	<i>Paragraphs</i>	<i>Page</i>
PART I: INTRODUCTION	1.1-1.13	1
The first matter: entire contracts	1.3-1.5	1
The second matter: recovery of money paid	1.6-1.8	2
The third matter: possession without title.	1.9-1.12	3
Arrangement of the report	1.13	4
PART II: PARTIAL PERFORMANCE OF ENTIRE CONTRACTS	2.1-2.84	5
A. THE PRESENT LAW	2.1-2.23	5
(i) Introduction	2.1-2.6	5
(ii) The general rule	2.7-2.8	6
(iii) Qualification to the general rule	2.9	6
(iv) Application of the general rule	2.10-2.11	6
(v) Incomplete performance and defective performance contrasted	2.12	7
(vi) Exceptions to the general rule	2.13-2.22	8
(a) the doctrine of substantial per- formance	2.14-2.18	8
(i) the doctrine	2.14-2.15	8
(ii) the basis of the doctrine	2.16-2.18	8
(b) frustration	2.19	9
(c) performance prevented by other party in breach of contract	2.20	10
(d) Apportionment Act 1870	2.21	10
(e) returnable benefits.	2.22	10
(vii) Cases where there is no breach of contract	2.23	11
B. THE MERITS AND DEMERITS OF THE PRESENT LAW.	2.24-2.36	11
C. OUR PROPOSED NEW REMEDY	2.37-2.88	14
(i) Our proposed remedy in outline.	2.37-2.40	14
(ii) Where the contract is still on foot	2.41-2.44	15
(iii) Where the present law provides a remedy	2.45	17
(iv) The scope of our proposed remedy	2.46-2.49	17
(v) Valuation of the benefit	2.50-2.55	18
(vi) The time at which the benefit should be valued	2.56-2.57	20

	<i>Paragraphs</i>	<i>Page</i>
(vii) The cynical contract-breaker	2.58–2.60	21
(viii) The extent of the liability of the other party to pay damages	2.61–2.65	21
(ix) Contracting out of the new remedy	2.66–2.69	23
(x) Cases where there is no breach of contract	2.70–2.75	24
(xi) Severable parts of a contract	2.76–2.82	26
(xii) Returnable benefits	2.83	27
(xiii) Types of contract excepted from our recommendations	2.84–2.87	28
(a) sale of goods	2.84–2.86	28
(b) carriage of goods by sea	2.87	29
(xiv) Miscellaneous matters.	2.88	29
PART III: CLAIMS FOR THE RECOVERY OF MONEY PAID	3.1–3.11	30
(i) Introduction	3.1	30
(ii) Total failure of consideration	3.2	30
(iii) Partial failure of consideration	3.3–3.4	30
(iv) The case for a new remedy	3.5–3.7	31
(v) The case against a new remedy	3.8–3.10	32
(vi) Our conclusion	3.11	33
PART IV: SUMMARY OF RECOMMENDATIONS	4.1–4.2	34
Note of Dissent		36
Appendix A Draft Bill and Explanatory Notes.		38
Appendix B List of persons and organisations who sent comments on Working Paper No. 65		54
Appendix C The Law Reform (Frustrated Contracts) Act 1943		55

THE LAW COMMISSION
(Item I of the First Programme)

LAW OF CONTRACT
PECUNIARY RESTITUTION ON BREACH OF CONTRACT

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H.,
Lord High Chancellor of Great Britain*

PART I

INTRODUCTION

1.1 In September 1975 we published our working paper on Pecuniary Restitution on Breach of Contract¹ as part of our work of examining particular aspects of the English law of contract with a view to determining whether, and if so, what reforms of general principle are required.²

1.2 This paper dealt with three matters arising on breach of contract in the following situation. 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 question with which we were concerned was whether the party in breach ought to be entitled to receive payment for the benefit he has conferred where the contract provides that he is not to be paid till completion. The second question arises where the other party has paid in advance. We asked whether he should be able to recover the money he has paid, or a proportion of it, or whether he should be confined to a claim for damages. The final matter we considered concerns the failure in a contract for the sale or hire-purchase of goods to transfer title to the goods sold. Under the present law the buyer can refuse to pay, or may recover the price if he has already paid it. We asked whether, if he has benefited from the use of the goods, the buyer should be obliged to pay anything for that benefit. We invited comments on these three matters and the provisional conclusions we reached in respect of them. We are grateful for the assistance received on consultation. A list of those who sent us comments appears in Appendix B to this report.

The first matter: entire contracts

1.3 Under the present law³ the party in breach may not be 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 "entire obligation" or "lump sum contract". We shall, for convenience,⁴ use the expression "entire contract" as applying to all such situations where the party in breach has no remedy for the benefit conferred by incomplete or by defective performance.

¹ Working Paper No. 65.

² First Programme, Law Com. No. 1 (1965), Item I; Eighth Annual Report, 1972-1973, Law Com. No. 58 (1973), paras. 3-5.

³ See paras. 2.1-2.23, below.

⁴ In our view it is more accurate to refer to "entire obligations"—see para. 2.17, below. Since, for the purpose of this report, nothing turns on the difference, we have decided that it is convenient to use the more generally used phrase "entire contract".

1.4 The facts of *Bolton v. Mahadeva*⁵ show how the present 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.

1.5 In relation to such entire contracts we reached the main provisional conclusion in our working paper that the party in breach should be given a new remedy which would entitle him to be paid by the other party for the benefit he had conferred.⁶ On consultation, although a small minority argued that the present law relating to entire contracts had the desirable effect of encouraging parties to honour their contracts,⁷ most commentators supported our provisional view.

The second matter: recovery of money paid

1.6 It was established in *Whincup v. Hughes*⁸ 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.⁹ This is because there has been no total failure of consideration, and money paid cannot be recovered on a partial failure of consideration. If there has been a breach of contract, the remedy of the other party is to sue for damages.

1.7 The following hypothetical example shows how the remedy of damages can produce a different result from the one that would be produced if the party not in breach was entitled to recover a proportion of the money paid:

X engages a builder to do certain work for £5,000 which he pays him at the outset. He has made a bad bargain, in that 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 these facts 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 which are likely to be assessed at £1,000 (the cost of having the work completed). Such a measure of damages would allow the first builder to retain the same profit as he would have made if he had completed the contract himself. There may, however, be additional damages such as those for delay.

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

⁶ Working Paper No. 65, para. 25.

⁷ See paras. 2.25—2.26, below for a fuller discussion of this view.

⁸ (1871) L.R. 6 C.P. 78.

⁹ For a fuller discussion see paras. 3.3 and 3.4, below.

1.8 In our working paper we considered whether in such a case the party not in breach should be able to escape in part from his bad bargain and, instead of being confined to the remedy of damages, be able to sue for a proportion of the money paid. Our provisional conclusion was that he should in certain circumstances be so entitled and given, as an alternative to damages, a new restitutionary right to recover the money paid in excess of the value of the benefit.¹⁰ However the majority of those who commented upon this proposal were opposed to it and saw no reason why he should in such a case be enabled to escape from his bad bargain.

The third matter: possession without title

1.9 Where a seller, in breach of contract, purports to sell and deliver 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 the buyer has benefited from having the use of the goods delivered. No allowance is made for his use and possession of the goods.¹¹

1.10 In our working paper we criticised this situation. It seemed to us to be unrealistic to hold, as the courts have done, that the contract has not been performed at all where the buyer has benefited from the use of the goods for which he contracted. It also seemed to us that, because the buyer is under no obligation to give any allowance for his use or possession of the goods, the present law was capable of producing an unjust result in that the buyer may be overcompensated. He may get back more than he has lost.

1.11 On consultation there was general agreement with our criticism of the present law and with our provisional recommendation that, where the seller has, in breach of contract, delivered and purported to sell goods which he has no right to sell, the buyer should continue to be entitled to the return of the purchase price¹² but should also be obliged to give credit to the seller for his use and possession of the goods.¹³

1.12 Your predecessor referred to us a number of matters in the field of supply of goods, including sale and hire-purchase.¹⁴ Part of this reference involves a consideration of the remedies that should be available to a buyer or hire-purchaser after a breach by the supplier of one of the statutory implied terms. We think that these remedies for breach of all the statutory implied terms, including the term as to title, should be discussed in the same working paper. Accordingly, it would seem to be premature to publish at this stage any recommendations as to reform in this area of the law. We therefore intend to deal with the remedies that should be available after a breach of the implied terms as to title in our forthcoming working paper on the supply of goods.

¹⁰ Working Paper No. 65, para. 79. We also made the following subsidiary proposals: (i) the new remedy should not be available where the parties have agreed to exclude it; (ii) the benefit conferred by the party in breach should be valued in the same way as that proposed for benefits conferred under entire contracts and should similarly take into account benefits conferred on third parties; (iii) the new remedy should not apply to contracts for the carriage of goods by sea nor to contracts for the sale of goods.

¹¹ *Rowland v. Divall* [1923] 2 K.B. 500.

¹² Working Paper No. 65, para. 67.

¹³ *Ibid.*, para. 79.

¹⁴ On 25 January 1979.

Arrangement of the report

1.13 This report is arranged as follows:

PART II

PARTIAL PERFORMANCE OF ENTIRE CONTRACTS

In this part we consider the various situations where a party to a contract confers a benefit (other than a payment of money) by partial or defective performance of the contract. We examine the need for reform. A majority of us (Mr. Brian Davenport Q.C. dissenting) conclude that reform is desirable and make recommendations for legislation. The reasons for Mr. Davenport's dissent are set out at the end of this report.

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. We discuss whether in this situation the party not in breach should be entitled to a remedy other than damages. We make no recommendations for legislation.

PART IV

SUMMARY OF RECOMMENDATIONS

We end with a summary of our recommendations.

Appendix A Draft Bill and Explanatory Notes.

Appendix B List of persons and organisations who sent comments on Working Paper No. 65.

Appendix C The Law Reform (Frustrated Contracts) Act 1943.

PART II

PARTIAL PERFORMANCE OF ENTIRE CONTRACTS

A. THE PRESENT LAW

(i) Introduction

2.1 A contract is an “entire contract” if complete performance by one party is a condition precedent to the other’s liability to pay the agreed price or to render any other agreed counter-performance.¹⁵ In general a contract will also be considered to be an entire contract where the consideration provided by one party is a promise to pay a lump sum,¹⁶ by which we mean a sum payable on and only on completion of performance, and there is no provision for setting off a portion of this consideration against a portion of the performance to be rendered by the other party.¹⁷

2.2 Entire contracts differ from “severable contracts”. In a severable contract there is an express or implied agreement for payment in proportion to the extent of performance, or payment under the contract is due from time to time as performance of specified parts of the contract is rendered.¹⁸

2.3 The question as to whether or not a contract is an entire contract is a question of construction,¹⁹ depending on the intention of the parties.²⁰

2.4 Where a party to an entire contract has incompletely performed his obligations under the contract the question arises as to the extent, if any, to which he is entitled to recover in respect of his partial performance.

2.5 The situation with which we are concerned is succinctly stated in Halsbury’s *Laws of England*:

“Contracts are indivisible or entire when the consideration is one and entire; that is where, on the proper construction of the contract, no consideration is to pass from one party unless and until the whole of the obligations of the other party have been performed. Thus a party who has not completely performed can not demand performance by the other party.”²¹

We would point out that consideration need not only consist in promising to pay a sum of money but may also consist in promising to do some other act or to forbear from doing something.

¹⁵ *Hoening v. Isaacs* [1952] 2 All E.R. 176, 180–181; *Chitty on Contracts* 25th ed., (1983) Vol. 1, para. 1399; Glanville Williams, “Partial Performance of Entire Contracts”, (1941) 57 L.Q.R. p. 373.

¹⁶ Or other entire consideration.

¹⁷ Goff and Jones, *The Law of Restitution* 2nd ed., (1978) p. 367 and Glanville Williams, “Partial Performance of Entire Contracts”, (1941) 57 L.Q.R. p. 373 and p. 490, which must now be read subject to the Law Reform (Frustrated Contracts) Act 1943.

¹⁸ *Chitty on Contracts* 25th ed., (1983) Vol. 1, para 1399.

¹⁹ *Appleby v. Myers* (1867) L.R. 2 C.P. 651; *Hoening v. Isaacs* [1952] 2 All E.R. 176.

²⁰ Glanville Williams, “Partial Performance of Entire Contracts”, (1941) 57 L.Q.R. pp. 373–374.

²¹ 4th ed., (1974) Vol. 9, para. 473.

2.6 An analogous situation can occur where the contract is severable but a severable part is entire in the sense that payment for each part is not due until that part has been completely performed. An example of such a contract is a building contract with progress payments. In such situations the rule for entire contracts does not apply to the whole contract but does apply to each part.²²

(ii) The general rule

2.7 The general rule is that a party who has not completely performed his obligations under an entire contract cannot demand performance by the other party or anything at all. The question as to whether or not performance by one party to a contract is complete assumes importance only after the time for performance has passed or after the contract has otherwise been brought to an end. Thus the general rule cannot apply whilst the contract is still on foot.

2.8 The general rule gives rise to the position that where a non-returnable benefit is conferred on the innocent party as a result of the partial performance the party who has conferred the benefit can recover nothing in respect of it.²³ However, where the benefit consists of goods which could have been returned, retention of those goods will normally give rise to an implied contract to pay a reasonable price in respect of those goods.²⁴

(iii) Qualification to the general rule

2.9 We have seen²⁵ that a party who has only partly performed his obligations under an entire contract is not normally entitled to demand performance by the other party or anything at all in respect of any benefits he has conferred. However, the position is different where the innocent party sues the party in breach for damages. The general principle of the law of damages is that where the plaintiff claims damages the court looks at his whole position and takes account of any benefits which he has received. When applied to cases where there has been partial performance of an entire contract this will lead to the result that the damages of the innocent party will be reduced by an amount which takes into account the benefit conferred by the party in breach.

(iv) Application of the general rule

2.10. As the question whether or not a contract is entire depends on the construction of the contract, one would expect it to be determined by the intention of the parties as expressed in the contract. No difficulty arises if there is specific provision in the contract making complete performance a condition precedent to recovery: no recovery will be allowed in respect of partial performance. In *Cutter v. Powell*²⁶ a seaman agreed to serve on a ship bound from Jamaica to Liverpool on the terms that he was to be paid 30 guineas after the ship arrived at Liverpool, provided that he continued

²² *Hudson's Building and Engineering Contracts* 10th ed., (1970), p. 244.

²³ See *Cutter v. Powell* (1795) 6 T.R. 320.

²⁴ This in fact occurred in *Sumpter v. Hedges* [1898] 1 Q.B. 673 where the plaintiff failed to recover from the defendant a *quantum meruit* in respect of unfinished work, but he did recover the value of materials left on the defendant's land by the plaintiff and retained by the defendant: see para. 2.22, below.

²⁵ At para. 2.7, above.

²⁶ (1795) 6 T.R. 320.

to do his duty until the ship reached the port. He died before the ship reached Liverpool and it was held that his administratrix could recover nothing for the work that he had done before he died. Lord Kenyon C.J. said:

“Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month when the party is paid in proportion to the time he serves: and that this voyage is generally performed in two months. Therefore, if there had been no contract between these parties, all that the intestate could have recovered on an *quantum meruit* for the voyage would have been eight pounds; whereas here the defendant contracted to pay thirty guineas provided that the mate continued to do his duty as mate during the whole voyage in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed; it was a kind of insurance.”²⁷

2.11 However, in the reported cases²⁸ the courts have extended this principle and have adopted a general rule that in a lump sum contract, no part of the price is to be recovered without complete performance by the other party.²⁹ Thus it appears³⁰ that the postponement of payment can lead to the result that there is no liability at all upon one party until the other has rendered complete performance.

(v) Incomplete performance and defective performance contrasted

2.12 If complete performance by A is a condition precedent to the liability of B, then if A has performed defectively, it would seem to follow that B should be under no liability to pay. However, the courts have not reached this conclusion and a distinction seems to be drawn between cases of misfeasance and cases of non-feasance. Thus where a painter completely decorates a room, albeit only to a low standard, he may recover the contract price for the job, subject to a claim against him in respect of bad work. For example, if in *Cutter v. Powell*³¹ the seaman had completed the voyage but had performed his duty badly, then it seems that he would have been able to recover his wages, subject to a claim against him for his poor work.³² However, a misfeasance may be so serious as to amount to mere partial performance and the court will then hold that there should be no recovery at all.³³

²⁷ *Ibid.*, at p. 324. See also *Jesse v. Roy* (1834) 1 Cr. M. & R. 316.

²⁸ See *Appleby v. Myers* (1867) L.R. 2 C.P. 651, 660-661; *The Madras* [1898] P. 90; *Sumpter v. Hedges* [1898] 1 Q.B. 673; *Forman and Co. Proprietary Limited v. The Ship "Liddlesdale"* [1900] A.C. 190. It is, of course, always necessary to bear in mind that the decisions in some of the cases decided before 1943 might have been affected by the application of the Law Reform (Frustrated Contracts) Act 1943 had it been in force; see para. 2.19, below.

²⁹ See the cases cited in n. 28, above.

³⁰ Cf. *Hoening v. Isaacs* [1952] 2 All E.R. 176, 180 where Denning L.J. suggested that the mere fact that a contract is a lump sum contract does not necessarily mean that entire performance is a condition precedent to payment.

³¹ (1795) 6 T.R. 320.

³² *Hoening v. Isaacs* [1952] 2 All E.R. 176, 179.

³³ *Bolton v. Mahadeva* [1972] 1 W.L.R. 1009.

(vi) Exceptions to the general rule

2.13 There are various exceptions to the rule that a party who has partially performed an entire contract cannot recover anything in respect of the benefits which have been conferred as a result of the partial performance. In particular, remedies are available:

- (a) where the doctrine of substantial performance applies;
- (b) where the contract has been frustrated;
- (c) where it is the other party's breach that prevents complete performance;
- (d) under the provisions of the Apportionment Act 1870;
- (e) in certain circumstances where the benefits are returnable.

We shall deal briefly with each of these exceptions.

(a) *The doctrine of substantial performance*

(i) The doctrine

2.14 Chitty states that by virtue of this doctrine "a failure to complete only an unimportant part of the plaintiff's obligation does not prevent his claim for the agreed price, subject to a counterclaim for damages which will go in diminution of the price".³⁴ Thus in *Hoenig v. Isaacs*³⁵ the plaintiff agreed to redecorate and furnish a flat for £750. He purported to carry out the work but he had broken the contract in a few minor respects and the cost to the flat-owner of having the defects remedied was £55. It was held that the contract had been substantially performed and that the decorator should be awarded the contract price less the cost of making good the defects. On the other hand, in *Bolton v. Mahadeva*³⁶ the defects in the work done were held to be such that the contract had not been substantially performed and, accordingly, the plaintiff was not entitled to the contract price or any part of it.

2.15 The parties may exclude the doctrine of substantial performance by an express provision in the contract. In relation to such provisions it has been said that, "each case turns on the construction of the contract"³⁷ and "it is, of course, always open to the parties by express words to make entire performance a condition precedent".³⁸

(ii) The basis of the doctrine

2.16 We now pause to consider the inter-relation between the general rule governing partial performance of entire contracts and the doctrine of substantial performance. For convenience we shall summarise the law as we have outlined it. The position in law seems to be that it is a question of construction whether a contract is entire or severable, though there is a tendency to the view that in every lump-sum contract there is an implied term that no part

³⁴ *Chitty on Contracts* 25th ed., (1983), para. 1402.

³⁵ [1952] 2 A11 E.R. 176. Although this may be considered to be a case concerning defective performance (as to which see para. 2.12, above) it nevertheless illustrates how the doctrine of substantial performance can operate.

³⁶ [1972] 1 W.L.R. 1009.

³⁷ [1952] 2 A11 E.R. 176, 178.

³⁸ *Ibid.*, at p. 181.

of the price is to be recovered without complete performance. One important exception to this rule is the so-called doctrine of substantial performance where the plaintiff has failed to complete only an unimportant part of his obligation. This exception may be excluded by express provision or by making entire performance a condition precedent.

2.17 This analysis does not appear to be entirely satisfactory and has attracted criticism.³⁹ The correct analysis is suggested⁴⁰ to be that a contract may impose entire *obligations* when it provides for complete performance by one party of such obligations before the other party is to pay. Thus references to entire contracts are misleading. Where one party fails to complete performance of an entire obligation, the other party is entitled to refuse to pay even though he may have suffered little or no prejudice as a result of the non-performance. According to this analysis, the basis of *Hoenig v. Isaacs*⁴¹ is that the builder, even if he was under an entire obligation as to the *quantity* of the work to be done, was under no such obligation as to its quality and that, therefore, defects of quality fall to be considered under the general requirement of substantial failure of performance.⁴² Thus to say that an obligation is entire means that it must be completely performed and in relation to entire obligations there is no scope for any doctrine of "substantial performance".

2.18 Although this analysis is attractive, we will not be concerned in this report with the cases where a party *is* entitled to claim a lump-sum although he has not completely performed. The question as to whether or not there has been complete performance may depend on whether the condition precedent related to the quantity or the quality of performance and whether the breach was in respect of quantity or quality. In time the courts may well reformulate what is now known as the doctrine of substantial performance. However, neither the correctness of this analysis nor its usefulness is relevant to the mischief which we have identified. This mischief arises where, by virtue of having only partially performed his contract (or his obligation), and whether the defect in performance of his contract (or obligation) is on the construction of the contract a matter of quality or of quantity, the party in breach is entitled to recover nothing. Thus we intend to refer in this report to the more generally accepted analysis that the doctrine of substantial performance applies to entire *contracts*.

(b) *Frustration*

2.19 The Law Reform (Frustrated Contracts) Act 1943 provides for the adjustment of the rights and liabilities of parties to contracts that have been discharged by the common law doctrine of frustration.⁴³ Section 1(3) provides that the court may order one party to pay the other such sum as it considers just in respect of any valuable benefit⁴⁴ obtained by reason of the partial performance by the other of the frustrated contract.

³⁹ See G.H. Treitel, *The Law of Contract* 5th ed., (1979), pp. 597-600.

⁴⁰ *Ibid.*, pp. 599-600.

⁴¹ [1952] 2 All E.R. 176.

⁴² For a discussion of this general requirement, see G.H. Treitel, *The Law of Contract* 5th ed., (1979), pp. 583-593.

⁴³ Certain contracts are specifically excepted from the 1943 Act: see s.2(5) of the Act.

⁴⁴ Payments of money are dealt with by s. 1(2) and are excepted from s. 1(3) of the 1943 Act.

(c) *Performance prevented by other party, in breach of contract*

2.20 A party who only partially performs his obligations under an entire contract is entitled to compensation if complete performance by him is prevented by the other party's breach. Thus, if a builder is turned off the site by the other party, in breach of contract, he may claim damages for that breach or a reasonable sum for the value of the work that he has done or both where appropriate.⁴⁵

(d) *Apportionment Act 1870*

2.21 Section 2 of the Apportionment Act 1870 provides 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. Thus if a salaried employee who was paid annually were to die half-way through a year his estate would probably be entitled under the Apportionment Act to half a year's salary.⁴⁶ Even if that Act does not apply, the common law doctrine of frustration and hence the Law Reform (Frustrated Contracts) Act 1943 would apply in such a case. However, it is doubtful whether such an employee who has been lawfully dismissed for misconduct, or who has left in breach of contract, may rely on the Apportionment Act as giving him a statutory right to be paid for the period up to his dismissal or departure.⁴⁷ Even if the Apportionment Act does not apply, there would seem to be very few entire contracts of employment today and correspondingly few disputes in this area of the law. Contracts of employment usually provide for short periods of payment and indeed may provide expressly that remuneration "shall be deemed to accrue from day to day".⁴⁸

(e) *Returnable benefits*

2.22 If the circumstances justify the inference that the parties have made a fresh contract, under which the innocent party agrees to accept and pay for partial performance of the original contract, he will be liable on a *quantum meruit* to pay a reasonable price for the work actually done or the goods actually supplied.⁴⁹ The mere receipt of a benefit under the original contract is insufficient to justify the inference of such a fresh contract, unless the innocent party had an opportunity to accept or reject it.⁵⁰ In such cases any goods supplied must be capable of being returned by the innocent party. Where a builder abandoned a partially completed building on the innocent party's land, the mere fact that the latter completed the building did not amount to an implied promise by him to pay for the value of the work already

⁴⁵ *Planché v. Colburn* (1831) 8 Bing. 14; *Chandler Bros. Limited v. Boswell* [1936] 3 All E.R. 179

⁴⁶ For an argument as to why the Act may not apply in this situation, see Paul Matthews "Salaries in the Apportionment Act 1870" (1982) 2 Legal Studies 302.

⁴⁷ *Moriarty v. Regent's Garage and Engineering Co. Ltd.* [1921] 1 K.B. 423, 434-5, per Lush J.; contrast *ibid.*, at pp. 448-449 per McCordie J.

⁴⁸ See Companies Act 1948, Table A, para. 76.

⁴⁹ *Chitty on Contracts* 25th ed., (1983) Vol. 1, para. 1404; *Christy v. Row* (1808) 1 Taunt. 300. In the case of the sale of goods, where the seller delivers a quantity of goods less than he contracted to sell, the buyer, if he accepts the goods, must pay for them at the contract rate—see s. 30(1) of the Sale of Goods Act 1979. Thus there is a remedy under the present law. This will remain the position under our scheme because contracts for the sale of goods will be excluded from the ambit of our proposed remedy: see paras. 2.84-2.86 below.

⁵⁰ *Sumpter v. Hedges* [1898] 1 Q.B. 673.

done by the builder under an entire contract;⁵¹ the innocent party was in possession of his own land and he was not expected to abandon it or to keep the building unfinished. However the builder left materials on the site and it was held that he could recover a reasonable sum for the value of those materials when the innocent party used them to complete the building.⁵²

(vii) **Cases where there is no breach of contract**

2.23 It is convenient to mention at this stage that the fact that there has been only partial performance of an entire contract does not necessarily mean that there has been a breach of contract. For example, a failure to perform completely may be due to circumstances which are covered by an exception clause in the contract or occur in circumstances in which the doctrine of frustration does not apply. It may be due to the illness of a party to a contract for personal services who has started performing his obligations. Nevertheless the general rule will apply and the party who has failed to perform completely can recover nothing in respect of his partial performance.⁵³

B. THE MERITS AND DEMERITS OF THE PRESENT LAW

2.24 We have seen⁵⁴ that, even though the question as to whether or not a contract is entire depends on the construction of the contract, it seems as though the courts have adopted the rule that the postponement of payment until completion of performance leads to the result that there is no liability at all upon one party until the other has rendered complete performance.⁵⁵

2.25 The principal justification of the present law as it applies to entire contracts is that "it holds men to their contracts".⁵⁶ 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. By refusing him redress except as provided by the contract the law gives him an incentive to complete the job. 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.

2.26 The present law may also be justified on the basis that the drastic consequences for the contractor who fails to complete the work to be done under the contract place the other party in a strong bargaining position. It may be argued that this encourages the settlement of disputes in favour of the party not in breach of contract and that in consequence the removal of the hardship that the present law may cause to some could result in more serious and more general hardship to others whom the law now benefits. Finally the present law, whatever its defects, has the merit of being reasonably

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ See, for example, *Cutter v. Powell* (1795) 6 T.R. 320 and *Hopper v. Burness* (1876) 34 L.T. 528.

⁵⁴ At para. 2.3, above.

⁵⁵ For example, see *Cutter v. Powell* (1795) 6 T.R. 320 and *Jesse v. Roy* (1834) 1 Cr. M. & R. 316.

⁵⁶ *Munro v. Butt* (1858) 8 E. & B. 735, 754, per Lord Campbell C.J.

certain and therefore may be said to have the desirable effect of discouraging litigation.

2.27 However, although both parties may intend that the innocent party should not have to pay any amount in respect of a benefit obtained by him as a result of partial performance of the contract by the party in breach, it is arguable that such a result has a penal flavour and that accordingly it should not lightly be assumed that the parties so intend. The mere postponement of payment of a lump-sum by one party until after the other party has completely performed is a normal provision and it is arguable that it should not have such penal overtones.

2.28 In our working paper⁵⁷ we considered that this type of provision should not *by itself* preclude the party in breach from recovering an amount which reflects any enrichment which the innocent party has obtained as a result of having had a benefit conferred upon him under the contract by the partial performance. It was this aspect of the present law that in our view constituted a mischief. We came to the provisional conclusion that a new remedy should be provided for the party in breach where he had conferred a benefit on the other party by his incomplete or defective performance of an entire contract. On consultation most commentators supported this provisional conclusion. A small minority of commentators argued in favour of retaining the present law, on the grounds set out in paragraphs 2.25 and 2.26 above.

2.29 In considering whether the present law should be retained we have taken into account another factor, namely that in the great majority of contracts, involving substantial sums of money, there will be provision for stage payments.⁵⁸ It might therefore be argued that any change in the present law would, in general, only affect contracts between jobbing builders and householders and that in such cases the bargaining position of the parties makes undesirable any such change. However, a number of points may be made in this regard.

2.30 The first point is that, in our view, the mischief we have identified in the present law may arise even in relation to contracts involving substantial sums of money. Not all such contracts will provide for stage payments and even where the parties have made such provision, they will not always have considered or provided for the situation where a stage is not completed.⁵⁹ The second point is that many lump sum contracts between householders and jobbing builders involve not insignificant sums—contracts of this type involving several thousand pounds are far from unknown. Accordingly, the mischief which we have identified in the present law may well arise when considerable sums are at stake.

2.31 The final point concerns the bargaining position of the householder and his jobbing builder. Although any alteration in the present law will weaken

⁵⁷ Working Paper No. 65, para. 21.

⁵⁸ See paras. 2.76–2.82 below.

⁵⁹ See para. 2.76 below.

the bargaining position of the householder, the extent of any such weakening should not be exaggerated. The householder is entitled not only to damages for losses caused by the failure to complete but also to damages for inconvenience.⁶⁰ This latter entitlement is a recent development in the law which has occurred since the rule relating to entire contracts was established. In the light of his entitlement to damages in respect of both loss and inconvenience the householder will be in a position where his claim in damages may well exceed whatever the builder is entitled to. Accordingly, any change in the present law which would entitle the builder to make a claim in respect of the work he has done would, in effect, only entitle him to recover money from the householder where the latter has received a significant benefit which exceeds the loss which he has suffered as a result of the breach.

2.32 We considered the justification of the present law but we think that it loses some of its force in view of the fact that the mischief which we have identified is not that the parties can require complete performance before any counter-performance is due, but that under the present law they may, and usually will, be held to have done so merely by providing for postponement of payment.⁶¹ In our view the present law leads to a result which was not necessarily the one which the parties in all cases would have contemplated as flowing from their agreement solely by reason of the postponement of payment.

2.33 Accordingly we consider that our provisional conclusion was correct and recommend that a new remedy should be provided for the party in breach (including, of course, his assignees) where he or a third party acting on his behalf has conferred a benefit on the innocent party⁶² by his incomplete or defective performance of an entire contract. We recommend that this new remedy should apply whether the consideration to be furnished by one party for the completion of something to be done by the other consists in promising to pay a sum of money or in promising either to do some other act or to forbear from doing something. We discuss this remedy in detail later in this report,⁶³ but it is convenient to make two preliminary comments.

2.34 First, since the mischief which we have identified arises mainly⁶⁴ in relation to entire contracts, our proposed new remedy will apply, in such cases, only where there has been partial performance. In other words, the contract must have provided either for the payment by one party of a sum of money or for some other consideration to pass on the completion of something to be done by the other and the party who was to do that thing has failed to complete it. Thus the question as to whether or not a contract is entire will be unaffected by our recommendation and will remain a matter of construction of the contract. We merely intend that if a contract is, as

⁶⁰ *Rawlings v. Rentokil Laboratories* [1972] E.G.D. 744.

⁶¹ In paras. 2.66–2.69, below, we propose that the parties should be entitled to “contract-out” of the new remedy but that in order to do so they will have to make it plain that this is their intention.

⁶² Or, in appropriate cases, on a third party; see para. 2.47, below.

⁶³ See paras. 2.37–2.88, below.

⁶⁴ It can also arise in relation to entire severable parts of a contract, see para. 2.76, below.

a matter of construction, an entire contract then in certain circumstances⁶⁵ a party who partially performs the contract should be entitled to a remedy in respect of benefits obtained by the innocent party as a result of that partial performance.

2.35 Secondly, we should repeat that we do not intend to prevent the parties from agreeing that the party in breach should have no remedy before complete (or substantial) performance. We merely think it necessary that they should make it clear that they intend the risk of non-completion to be borne by the party in default.⁶⁶ The mere postponement of payment should no longer have this effect.

2.36 We have so far been dealing with the mischief which arises where the failure to perform completely constitutes a breach of contract. However the same mischief can arise where the failure to perform completely does not constitute a breach of contract because, as we have seen,⁶⁷ the partial performer is ordinarily entitled to recover nothing even though he is not in breach of contract. We shall consider first how the law should be changed where there has been a breach of contract and we shall then turn to consider the position where there has not. In the event our recommendations regarding non-breach cases do not differ from those in respect of breach cases.⁶⁸

C. OUR PROPOSED NEW REMEDY

(i) Our proposed remedy in outline

2.37 Before discussing our new remedy in detail, we think it convenient at this stage to summarise our proposals. The party who has conferred the benefit shall be entitled as against the other party to such sum as represents the value of what he has done under the contract to the person who has the benefit of it. The remedy will not be available either where the contract is still on foot or, subject to one exception which we discuss in paragraph 2.83, below, where the party who has failed to complete has a remedy under the present law. The party in breach can, of course, only have a remedy in respect of work done under the contract, though the person who benefits from this work will not necessarily be the other party to the contract. The benefit obtained by the innocent party must be a benefit obtained *in terms of* the contract. The sum payable pursuant to the remedy should not exceed the sum representing the proportion that what has been done under the contract bears to what was promised to be done. The normal rules relating to remoteness of damage and mitigation of damages should continue to apply with regard to any set-off (or counterclaim) which the innocent party makes against the party in breach. It should be open to the parties to exclude the new remedy but in order to do so it will be necessary to show that the parties both adverted to the possibility of less than complete performance and provided for it.

⁶⁵ We discuss in paras. 2.41–2.45, below the circumstances in which our proposed remedy will not apply. Briefly it will not apply where either the contract is still on foot or where under the present law the party *can* recover a sum in respect of his partial performance of the entire contract (but see para. 2.83, below for one exception to this) or where it has been expressly or by implication excluded by the parties.

⁶⁶ For a fuller discussion of contracting-out of the remedy, see paras. 2.66–2.69, below.

⁶⁷ At para. 2.23, above.

⁶⁸ See paras. 2.70–2.75, below.

2.38 The new remedy should apply in the same way to cases where there is no breach of contract. Where the contract is not entire but is severable into parts, our remedy should apply to any of the severable parts which are themselves entire.⁶⁹

2.39 We have considered an alternative method of curing the mischief which we have identified in the present law. This approach would simply involve the removal of the present presumption that the mere postponement of payment until the completion of performance leads to no liability at all being imposed on one party until the other has rendered complete performance. The attraction of such an approach lies in its simplicity. However we have concluded that it would not be desirable to adopt such an approach. We think it would fail adequately to protect the innocent party. For example, there would be no provision, such as we recommend later in this report,⁷⁰ that to the extent that the innocent party seeks to set-off his damages for breach of contract against a claim made by the other party pursuant to our new remedy, any clauses which would otherwise limit or exclude those damages should not be given effect to. In our view a provision of this type is essential if justice is to be done between the parties, but the simple approach which we have just outlined would not include this or any other balancing factor.⁷¹

2.40 Another alternative method of curing the mischief which we have identified in the present law would be to adopt the principles of section 1(3) of the Law Reform (Frustrated Contracts) Act 1943.⁷² In our view such a course would not be desirable for one important reason. Our proposals and the 1943 Act are intended to achieve different objectives in different types of cases. An obvious example of where this difference “bites” is that, for the reasons given in paragraph 2.39 above, the 1943 Act would fail adequately to balance the interests of the innocent party with those of the partial performer. We shall now examine in more detail the specific elements of our proposed new remedy.

(ii) Where the contract is still on foot

2.41 The mischief which we have identified arises where one party has performed only part of his obligations under an entire contract and he is therefore normally entitled to recover nothing. We pointed out in our discussion of the present law that the question as to whether or not the performance by one party to a contract is complete assumes importance only after the time for performance has passed or after the contract has otherwise been brought to an end. The general rule cannot apply whilst the contract is still on foot. Thus clearly the mischief can arise only when the contract is at an end. We think that our remedy should only apply either after the innocent

⁶⁹ See para. 2.6, above.

⁷⁰ Para. 2.64, below.

⁷¹ There would, for example, be no ceiling placed upon the claim of the guilty party such as the one we recommend in para. 2.53, below.

⁷² The 1943 Act is set out in Appendix C to this Report.

party has elected to terminate the contract⁷³ or if the contract has been brought to an end by the operation of an automatic termination clause. We therefore recommend that our remedy should apply only if the obligations of the parties to perform the contract are brought to an end either at the election of the party to whom completion is due or by the operation of a provision of the contract (whether or not the event justifying the election or bringing that provision into operation is the failure to complete the contract). We do not intend, however, that our remedy should automatically apply whenever the contract is at an end. Later in this Part⁷⁴ we shall set out the circumstances under which the contract may be at an end and yet our remedy will *not* apply. It is convenient first to pause here and consider very briefly the circumstances in which a contract may be at an end otherwise than as a result of its having been fully performed.

2.42 A contract might be at an end because both parties have agreed to terminate it. In such circumstances the payment for any benefit conferred will be determined in accordance with the terms of the agreement and our remedy will not apply.

2.43 A contract may be brought to an end where one party has committed a fundamental breach (or breach of a fundamental term)⁷⁵ and the other party, by words or conduct, has elected to treat the contract as being at an end as regards future performance.⁷⁶ The innocent party may also elect to bring the contract to an end in the following circumstances: if there has been a repudiation amounting to an anticipatory breach,⁷⁷ where the party in breach has failed to perform an entire contract,⁷⁸ if the contract contains an express provision for cancellation in the event of breach,⁷⁹ and where the breach is of a term which the courts treat as a "condition".⁸⁰ A contract may also be at an end because it has been frustrated.⁸¹

2.44 In all the circumstances mentioned above the innocent party would be entitled to treat the contract as at an end.⁸² As we have said,⁸³ it is only when the contract is at an end that our proposed new remedy can apply.

⁷³ For a general analysis of the election to terminate the contract see *Photo Productions Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827, 849–850, *per* Lord Diplock.

⁷⁴ See para. 2.45, below.

⁷⁵ For an exposition of the law relating to discharge by breach generally see *Chitty on Contracts* 25th ed., (1983) paras. 1591–1632; for an explanation of the principle of "fundamental breach" see, in particular, paras. 883–890.

⁷⁶ An express assertion of the right to avoid is *not* always necessary: see *Photo Production Ltd. v. Securicor Transport Ltd.* [1980] A.C. 827.

⁷⁷ *Chitty on Contracts* 25th ed., (1983) para. 1604.

⁷⁸ *Ibid.*

⁷⁹ *Chitty on Contracts* 25th ed., (1983), paras. 1619–1621 and G.H. Treitel, *The Law of Contract* 5th ed., (1979) pp. 593–594.

⁸⁰ See generally *Bunge v. Tradax Export* [1981] 1 W.L.R. 711; G.H. Treitel, *The Law of Contract* 5th ed., (1979) pp. 600–601.

⁸¹ See para. 2.19, above.

⁸² In certain circumstances the fact that the breach was deliberate might be a relevant factor in considering whether or not that breach gives rise to the right of termination: *Chitty on Contracts* 25th ed., (1983), para. 1624. Where this is the case, we intend that our proposed remedy should apply if the innocent party does elect to bring the contract to an end. For a discussion as to whether our proposed remedy should be available to a "cynical contract-breaker" see paras. 2.58–2.60, below.

⁸³ See para. 2.41, above.

(iii) Where the present law provides a remedy

2.45 However, the remedy which we propose will not always be available merely because the contract is at an end. Our proposed new remedy is intended to apply where under the present law the party in breach of an entire contract who has partially performed can recover nothing. Thus we recommend that our remedy should not apply in circumstances where, under the present law, the party who has failed fully to perform has a remedy in respect of his partial performance.⁸⁴ This is the position where:

- (a) the doctrine of substantial performance applies;
- (b) the contract has been frustrated;
- (c) the Apportionment Act 1870 applies;
- (d) where the defendant wrongfully prevented complete performance.

(iv) The scope of our proposed remedy

2.46 Assuming that none of the situations mentioned in paragraphs 2.41 to 2.45, above exists, we must now consider the scope of our proposed remedy. In our working paper⁸⁵ we pointed out that we did not intend to render a party liable to pay for benefits that were radically different from those for which he had contracted. There was no disagreement on consultation with this self-evident proposition, whose adoption we recommend. However, it seems to us more appropriate to say that the benefit obtained by the innocent party must be a benefit obtained in terms of the contract. Accordingly we recommend that the benefit conferred must have been conferred under the contract. We think that in the vast majority of cases the courts will have little difficulty in determining whether any benefit has been obtained in terms of the contract and the only problem will be one of evaluation.

2.47 The innocent party must have obtained a benefit from the partial performance of an entire contract by the party in breach. However, as we pointed out in our working paper,⁸⁶ the benefit may have been conferred on someone who was not a party to the contract. We gave the example of an indulgent father who 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 seemed to us that he should be in no worse a position *vis-à-vis* the father than if it had been the father's house and the father who benefited. Our provisional recommendation was that a benefit conferred on a non-contracting party in part performance of the contract should, in the context of partial performance of entire contracts, be treated as having been conferred on the other party if this would be reasonable in all the circumstances. On consultation there was general approval of this provisional recommendation and we have no reason now to change our minds. However, we have come to the conclusion that, since our proposed remedy should be available when a person has been benefited by what has been done under

⁸⁴ There should, in our view, be one exception to this recommendation. This concerns the situation in which the benefit obtained by the innocent party consists of returnable goods which, if retained, may involve that party in a liability to pay a reasonable sum upon a *quantum meruit*. We discuss this exception in para. 2.83, below.

⁸⁵ Working Paper No. 65, para. 28.

⁸⁶ *Ibid.*, para. 26.

the contract, we should make provision for this expressly rather than in terms of reasonableness. Therefore, we recommend that a party who has failed to complete shall be entitled to our proposed remedy when he has, by what he has done under the contract, conferred a benefit on the person to be benefited under the contract even if that person is not a party to the contract.

2.48 In our working paper⁸⁷ we suggested that our proposed new remedy should apply only where the benefit concerned was a “valuable” benefit. We also invited comments as to whether the remedy should apply only where the benefit was “substantial”. We received very mixed comments on consultation ranging from support for a requirement that the benefit should be “substantial” to suggestions that there was no need even to require the benefit to be “valuable”. We are aware that the term “valuable benefit” appears in the Law Reform (Frustrated Contracts) Act 1943 and have considered whether it would be appropriate to incorporate it into our new remedy. It is unclear what meaning the term has under the 1943 Act. It is, however, possible that the term might acquire a meaning similar to that of “substantial”. In our next paragraph we decide against making provision to this effect. In our view therefore the present uncertainty as to the meaning of the term “valuable” and the possibility that it might be interpreted as being akin to “substantial” make it undesirable to provide that the benefit should be a “valuable” benefit.

2.49 We also consider it unnecessary to provide that the benefit must be a “substantial” benefit. In our view, actions by the party in breach for trifling sums of money may be uneconomic to pursue because he is unlikely to be able to recover most of his expenses even if he succeeds in establishing his claim. If, however, he chooses to use the small claims procedure⁸⁸ in the county court to sue for such small sums of money, we see no reason why he should not be entitled to do so.

(v) Valuation of the benefit

2.50 We must now consider how the benefit obtained by the innocent party is to be valued. In our working paper⁸⁹ we suggested various methods of valuation: by deducting the cost of having the work completed from the contract price; by the payment of a reasonable sum for the benefit conferred by part performance; by pro-rating the value of the part performance to the contract price. In the end our provisional conclusion⁹⁰ was that the court should have considerable latitude in assessing the value of the benefit and that the sum payable should be such sum as may be reasonable in all the circumstances, particular regard being paid to the price that would have been payable had the contract been performed completely and the extent to which

⁸⁷ *Ibid.*, para. 26.

⁸⁸ See, e.g. *The County Court Practice* (1982), notes to O. 38 r. 3: if a claim not exceeding £500 has been referred to arbitration, no solicitor's charges are allowed between party and party except (a) the cost of the summons, (b) the costs of enforcement, and (c) such costs certified to have been incurred through the unreasonable conduct of the opposite party in relation to the proceedings or claim. This rule is intended to assist the prosecution and defence of small claims and to discourage legal representation where the amount of the claim does not justify its cost: *Hobbs v. Marlowe* [1978] A.C. 16, 28.

⁸⁹ Working Paper No. 65, paras. 26–32.

⁹⁰ *Ibid.*, para. 79(1)(c).

the contract had in fact been performed. On consultation, there was general disagreement with our provisional recommendation regarding this method of valuation but there was no general consensus about what method of valuation ought to be adopted. There were comments in favour of—and against—each of the alternative approaches which we canvassed. As a result of this consultation we have reconsidered the whole question of valuation.

2.51 We have reached the conclusion that elaborate provisions are not required in regard to the valuation of the benefit but two things appear to us to be important. First, since the court will be asked to value varying degrees of part performance in an infinite variety of circumstances, we believe that the method of valuation must be flexible enough to be applicable in all cases.

2.52 The second matter of importance is that where the cost of the services is greater than the value of the end product there is a loss, and the question arises as to who should bear this loss. Where there is a breach of contract⁹¹ it seems right that the loss should be borne by the party in breach. Thus only the value of the end product should be recoverable. Where the end product is worth more than the cost of the services there should be an upper limit so that the party in breach cannot be better off as a result of partial performance than he would have been had he completely performed the contract. It should be made absolutely clear that what is being valued is the benefit obtained by the innocent party: *viz* the extent to which he has been enriched. Since our purpose in providing a remedy is to reflect the enrichment of the innocent party, it is this which is the relevant measure of compensation and the value of the benefit should not be based on the contract price.⁹²

2.53 These considerations lead us to recommend that the party who has conferred the benefit shall be entitled, as against the other party, to such sum as represents the value of what he has done under the contract to the person who has the benefit of it. To this we recommend that there should be one proviso. We do not consider that the party in breach should be able to recover more than the pro-ratable proportion of the contract price. Accordingly, the sum payable pursuant to our new remedy shall not exceed such proportion of the sum payable on completion as is equal to the proportion that what has been done under the contract bears to what was promised to be done.

2.54 It may be helpful to provide a simple example which illustrates the consequences of our recommendation as to how the courts should value the benefit obtained by the innocent party. There is a contract to re-develop a building for £5,000. Of this total sum £2,000 is specified by the contract to be spent on the conversion of the ground floor into a shop, the remaining £3,000 is to be spent on the conversion of the three rooms over the shop into a flat. The contractor completes the work on the shop but then, in breach of contract, fails to complete the work on the flat upstairs. The other party then terminates the contract as he is entitled to do and the contractor seeks payment for the value of the work of construction. The work done to the

⁹¹ We deal later with the situation where there is no breach of contract: see paras. 2.70–2.75, below.

⁹² Except in one respect which we discuss at para. 2.53, below.

shop part is valued at £3,000. However, the contractor is entitled to no more than the £2,000 since this figure reflects the proportion of the contract price which the work done bears to the full contract work. He will not be entitled to recover the extra £1,000. We appreciate that in many cases the situation will be more complex than in our example. However we consider that the essential mechanics of the situation will continue to apply and will be both relevant and satisfactory in policy terms in all cases.

2.55 We should add for the sake of completeness that the party who has failed to complete must, by what he has done under the contract, have conferred a benefit on the person to be benefited under the contract. Thus if the benefit is destroyed by reason of a defect in the work done or by reason of the non-performance, then no benefit should be deemed to have been conferred and our new remedy should not apply.

(vi) The time at which the benefit should be valued

2.56 In our working paper⁹³ we made a provisional recommendation that the sum payable to the party in breach in accordance with the new remedy which was proposed 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. On consultation there was no disagreement with this provisional recommendation.⁹⁴ Such a recommendation seems to follow naturally from the provision of a new remedy for the party in breach and we make the same recommendation here. However, this does give rise to one difficulty namely the specifying of a time by which the value should be assessed. There appear to be four alternatives:

- (a) the date of breach;
- (b) the date when the innocent party accepts the breach as terminating the contract;
- (c) the date of the hearing;
- (d) that no date should be specified.

2.57 Since our remedy is not available to the party in breach until the contract has come to an end, the date of breach would be an inappropriate date. On the other hand, the date of hearing might give rise to unsatisfactory results where there is a rising or falling market. A more appropriate date might be the date when the innocent party accepts the breach. But even this date may not be suitable in every case. It seems to us that only different dates for the assessment of damages can fit the different facts of particular cases and that no single date can always produce the right result. This policy was recently expressed by Lord Wilberforce in the decision of the House of Lords in *Johnson v. Agnew*.⁹⁵ Referring to the general rule in contracts of sale that damages are assessed as at the date of the breach, he said "But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances". We recommend that no date for the assessment of damages should

⁹³ Working Paper No. 65, para. 35.

⁹⁴ Other matters relating to the liability of the party in breach to pay damages are discussed in paras. 2.61-2.65, below.

⁹⁵ [1980] A.C. 367, at p. 401.

be specified and that this matter should be left to the courts to decide on the basis of the particular facts of each case.⁹⁶

(vii) The cynical contract-breaker

2.58 In our working paper⁹⁷ we considered whether the proposed new remedy should be qualified to prevent its being available to a “cynical contract-breaker”. We made the provisional recommendation that the court should have a discretion to disallow a claim where this would be appropriate having regard to the conduct of the party in breach in all the circumstances of the case.⁹⁸ On consultation there was general disagreement with this provisional recommendation. We have therefore reconsidered this matter.

2.59 For two reasons we have come to the conclusion that it is wrong to make special provision with regard to the motive or intention of the contract-breaker. Our first reason is that we consider that the task of the court in evaluating the conduct of a contract-breaker would, apart from creating unacceptable uncertainty and adding greatly to the cost of litigation, be an impossible one in many cases. For example, it would be difficult to determine whether a building contractor’s breach is “cynical” if he fails to complete his performance because he will not yield to the demands of strikers. Should the result depend on whether or not the demands of the strikers are reasonable? If so, is it the court who must determine the reasonableness of the demand?

2.60 Our second reason is that we consider that the fact that the action is merely for unjust enrichment, rather than based on an apportionment of the consideration, will ensure that the availability of the remedy will not act as an incentive to break contracts in the great majority of cases. Thus, where the end product is worth more than the cost of the services, there is to be an upper limit on the amount recoverable by the party in breach (the pro-rateable proportion of the contract price)⁹⁹ so that he cannot be better off as a result of partial performance than he would have been had he completely performed the contract. We therefore recommend that the court should not have a discretion, based on the conduct of the party in breach, to disallow or reduce a claim.

(viii) The extent of the liability of the other party to pay damages

2.61 We have mentioned¹⁰⁰ that the innocent party will be entitled to set off (or counterclaim) damages for breach of contract against the claim made by the party in breach. Under the general law of contract a claim for damages by an innocent party is limited by the rules relating to remoteness of damage¹⁰¹ and mitigation of damages.¹⁰² We now consider whether the

⁹⁶ When the party in breach has formulated his claim and instituted proceedings the other party may have a claim or counterclaim for damages for breach of contract which he is not in a position to formulate immediately. It is desirable that this claim for damages should be heard by the court in the same proceedings as the claim for unjust enrichment. We note that the court has considerable powers to extend the time for pleading or to stay actions in order to achieve this result. See R.S.C.O.3 r. 5 and O. 15 r. 5(1).

⁹⁷ Working Paper No. 65, paras. 39–47.

⁹⁸ *Ibid.*, para. 79(1)(g).

⁹⁹ See paras. 2.52 and 2.53, above.

¹⁰⁰ See para. 2.37, above.

¹⁰¹ See generally *McGregor on Damages* 14th ed., (1980) Ch. 6, paras. 175–207.

¹⁰² *Ibid.*, Ch. 7, paras. 208–259. The claim for damages may also be limited by a valid limitation clause: see paras. 2.64 and 2.65, below.

extent of his right of set-off should be limited to damages recoverable under the general law or should include all the losses which are actually suffered.

2.62 We are in no doubt that the rules relating to mitigation of damages should apply. It seems to us, both as a matter of justice between the parties and as a matter of public policy, that the innocent party should be required to do all that is reasonable to minimise the damage caused by the breach of contract and that if he fails to do so he should bear any loss which he suffers as a result of his failure to mitigate. As regards the rules relating to remoteness of damage, it seems to us sensible to adopt the line drawn by the general law unless there is some compelling reason to do otherwise. The drawing of some other line would inevitably lead to uncertainty and confusion. The present state of the general law is not unsatisfactory in the context of our present discussions. For example: B agrees to build a house for a doctor. Unknown to B, the doctor wishes to use part of the house as consulting rooms. B fails to finish building the house. It seems to us that the loss caused to the doctor as a result of it being impractical for him to use some rooms as consulting rooms is a loss which would be too remote,¹⁰³ and it should not serve to reduce the amount of B's claim.

2.63 We therefore recommend that the normal rules relating to remoteness of damage and mitigation of damages should continue to apply with regard to any set-off (or counterclaim) which the innocent party makes against the party in breach.

2.64 Just as the extent to which damages are recoverable is governed by the general rules relating to remoteness and mitigation of damages, so the extent to which the innocent party to a contract is entitled to claim damages from the party in breach may be restricted by an exemption clause or a limitation of liability clause. The question as to whether such clauses should continue to apply in relation to a set-off (or counterclaim up to the extent of the plaintiff's claim) by an innocent party against the claim made by the party in breach in respect of benefits conferred is a difficult one. On the one hand it may be argued that, since the purpose of the new remedy which we are proposing is to make the innocent party liable for benefits received, losses which he suffers should be taken into account notwithstanding the existence of an exemption clause or a limitation of liability clause: the innocent party has sustained a loss and this should be balanced against the benefit which has been conferred upon him. On the other hand, under our proposal the party in breach will never be entitled to recover more than the pro-rateable amount of the contract price¹⁰⁴ and it is arguable that the innocent party's right to abate such an amount by set-off or counterclaim for damages should similarly be limited by reference to any contractual terms exempting or limiting the liability of the party in breach. These arguments are finely balanced but we think that the former consideration outweighs the latter. The limitation of the contract-breaker's claim is essential for the protection of the innocent party. We do not think that the limitation of the amount reducing that claim is necessary for the protection of the contract-breaker where that limitation arises from the terms of the contract. We therefore recommend that to the

¹⁰³ Under the rule in *Hadley v. Baxendale* (1854) 9 Exch. 341; see generally, *McGregor on Damages* (1980) 14th ed., Ch. 6, paras. 175-207.

¹⁰⁴ See paras. 2.52 and 2.53, above.

extent that the party not in breach seeks to set-off his damages against a claim made by the other party pursuant to our new remedy, those clauses which would otherwise restrict the damages the other party is entitled to claim from the party in breach should not be given effect to for the purposes of quantifying the guilty party's claim under our proposed new remedy.

2.65 So far we have only been concerned with claims by the innocent party under the law of contract. However the party in breach may also have acted tortiously. The extent to which the innocent party is entitled to claim as a result of any tort may be restricted by a clause in the contract which excludes or restricts the liability of the guilty party (i.e. the party in breach of contract) in tort. The innocent party may be entitled to set-off his damages in tort against a claim made by the other party pursuant to our new remedy. The question therefore arises as to whether the clause excluding or restricting the tortious liability should apply in relation to a set-off (or counterclaim up to the amount of the claim) or whether it should be ignored in the same way as we have recommended ignoring such clauses relating to liability for breach of contract. We have concluded that for three reasons such clauses should be given effect to and should not be ignored. First, claims in tort may frequently be brought in circumstances where a claim in contract might lie in the alternative. In such cases, as we have recommended,¹⁰⁵ the extent to which the innocent party will be entitled to set-off his damages against a claim made by the other party under our new remedy will not be affected by any clause which would otherwise restrict the damages the innocent party is entitled to claim from the other party. Secondly, where a claim in tort arises in circumstances where a claim would not lie in contract, the innocent party will often have taken out the appropriate insurance cover, so that, even if his claim in tort is excluded or restricted by the terms of the contract, he will not be out of pocket. Finally, we consider that, if our recommendation as to contractual losses suffered by the innocent party was to be extended to cover any tortious losses he may have suffered, there would be intractable difficulties in satisfactorily identifying an appropriate connecting factor between the tortious losses and the claim made by the guilty party pursuant to our remedy.

(ix) Contracting-out of the new remedy

2.66 As we have said,¹⁰⁶ we do not intend to prevent the parties from agreeing that the party in breach should have no remedy before complete (or substantial) performance by making it clear that they intend the risk of non-completion to be borne by the party in default. For convenience we shall refer to such an agreement as "contracting-out" even though, as we shall see in the following paragraphs, the parties will not have specifically to "contract-out" to exclude the new remedy.

2.67 The postponement of payment until the other party has completely performed his obligations might be desirable for various reasons. Amongst these reasons are:

- (a) there may be a risk that the party who is to perform the contract first may become bankrupt and any payments made to him in advance of full performance may be irrecoverable;

¹⁰⁵ See para. 2.64, above.

¹⁰⁶ See para. 2.35, above.

- (b) payment after completion by the other party eases the “cash-flow” of the party who desires payment to be postponed;
- (c) the postponement of payment may be desirable to ensure compliance by the other party—i.e. the postponement of payment may be intended to be a sanctioning device.

2.68 The mischief which we have identified in the present law is that the mere postponement of payment results in there being *no* recovery in respect of partial performance by the party in breach. Thus in all lump-sum contracts¹⁰⁷ the postponement of payment seems to have the effect of being a sanctioning device even though this is only one possible reason for the postponement of payment and in any particular case may not have been an important consideration. We do not think it right that the postponement of payment should operate as a sanctioning device with penal overtones where this was not the intention of the parties. We think that our remedy should only be inapplicable where the parties have themselves provided for the possibility of incomplete performance. They may do this either by making it clear that the postponement of payment should operate as a sanctioning device and that nothing should be paid until performance is complete or by providing what is to be paid in the event of incomplete performance. Of course our remedy would also be excluded if in the contract the proposed new statute were referred to and its operation excluded.

2.69 We therefore recommend that our proposed new remedy should be available unless it appears from the terms of the contract that the parties intended that the risk of non-completion due to breach should be borne by the party in default. Such contractual terms will have to be tightly drawn to exclude the new remedy. They will have to show that the parties both adverted to the possibility of less than complete performance and catered for it. Neither the fact that the consideration is expressed as a lump-sum, nor the fact that payment is to be postponed until completion of the contract is to be regarded *per se* as showing such an intention. Accordingly, we recommend that our remedy should not be available in respect of a contract where the parties include, whether in that contract or any contract made with reference to the former contract, either a provision excluding the right or otherwise to the effect that, in the event of the thing promised to be done being only partly done, nothing should be payable or a provision for the payment, in that event, of a sum determined or determinable by or under the contract.

(x) Cases where there is no breach of contract

2.70 Thus far in this Part of the report we have dealt with cases where the failure to complete performance constitutes a breach of contract.¹⁰⁸ We must now consider to what extent the recommendations which we have made should apply equally to cases where the failure to complete performance does not constitute a breach of contract, bearing in mind that the mischief which we have identified can arise in such cases.¹⁰⁹

¹⁰⁷ That is, contracts where a lump-sum is expressed to be payable on and only on completion of performance.

¹⁰⁸ Apart, of course, from cases where the contract is frustrated.

¹⁰⁹ See para. 2.23, above.

2.71 We consider that the party who has partly performed an entire contract and who is not in breach of contract should have a remedy in respect of benefits which the other party¹¹⁰ has received as a result of the partial performance. However, as with cases where there has been a breach of contract, we consider that the remedy should be confined to situations which can give rise to injustice under the present law. Thus the remedy should not apply whilst the contract is still on foot, nor should it apply in any of the circumstances set out elsewhere in the report¹¹¹ where the remedy is excluded in cases of breach.

2.72 In our view it should be immaterial as regards the scope of the proposed remedy¹¹² whether the failure to perform the contract completely does or does not constitute a breach of the contract. The remedy should apply in certain circumstances where a benefit was conferred on a non-contracting party; it should apply only where the benefit obtained is in terms of the contract and there is no need to restrict the remedy to cases where the benefit is “substantial” or “valuable”.¹¹³

2.73 In addition, our recommendations with regard to “contracting-out” of the new remedy should apply *mutatis mutandis* to cases where there has been no breach of contract.

2.74 We now consider whether our recommendations with regard to the valuation of the benefit where there has been a breach of contract are appropriate to cases where there has been no such breach. Our recommended method of valuing the benefit, where there has been a breach of contract, was adopted¹¹⁴ partly because that method results in notional “losses” falling on the party in breach. This policy consideration does not apply to the same extent where there has been no breach of contract. Since such cases would arise largely because there was an exception clause which cut down the obligation to perform, it is arguable that the valuation of the benefit should be based on pro-rating the contract. This would give some business efficacy to the terms which the parties have agreed. However, in our view the creation of any method of valuing the performance different from that proposed for cases of breach of contract would produce needless complexity and an increased prospect of litigation. Accordingly we recommend that the same method of valuation should apply both in the case of breach and cases where there has been no breach.

2.75 We now consider what deductions (if any) should be made from this valuation of the benefit in respect of losses suffered by the recipient of the partial performance. Such losses might include the additional cost of completing the work, if for example the cost of materials has risen, and any loss of profits pending such completion. In this situation any such losses would not, of course, constitute damages because there has been no breach of

¹¹⁰ Or, in appropriate cases, a third party: see para. 2.47, above.

¹¹¹ Paras. 2.41–2.45, above. In all these situations the party who has partially performed the contract has, under the present law, a remedy in respect of benefits which the innocent party (or a third party) has received as a result of the partial performance.

¹¹² See paras. 2.46–2.49, above.

¹¹³ Paras. 2.48–2.49, above.

¹¹⁴ Para. 2.52, above.

contract and, accordingly, there will be no right of set-off or counterclaim. In our view it would be undesirable to make any specific provision for the deduction of such losses.

(xi) Severable parts of a contract

2.76 Until now we have only been concerned in this report with the situation in which a single lump sum is payable on the complete performance of the contract. In our working paper we confined our provisional recommendations to such a case. However, in their comments on this paper the Senate of the Inns of Court and the Bar pointed out that the problem which we have identified in relation to contracts for the payment of a single lump sum could equally arise where a contract provides for lump sum stage payments at various defined stages of the work.¹¹⁵ The contract may make such a provision in various ways which we will consider in turn.

2.77 The first kind of contract with which we are concerned takes two forms. Instalments may become due on the completion of specific parts of the whole work or on completion of work of a specific value. An example of such an agreement would be a contract to decorate a house with the decorator to be paid in instalments on the completion of each room, the size of each instalment reflecting the size of each room. Alternatively, the contract may stipulate that specific parts of the job be completed by specified dates with instalments to be paid on those dates. In both these cases a mischief may arise if each instalment is construed as being an entire obligation. Accordingly, we recommend that our new remedy, intended for the situation in which a single lump sum is payable on completion of the contract, should also apply in the same way to each severable but entire instalment in such contracts.

2.78 The second kind of contract is one where instalments become due on specific dates (or on the happening of specific events). The size of the instalments may be fixed regardless of the amount or value of the work done in the instalment period. In such cases the instalments are unlikely to be construed as entire obligations since there is no specific amount of work which must be completed. The builder will therefore normally be entitled to claim either a reasonable price for the work which he has done or, if the contract is held to be infinitely severable, the value of the work done will be determined by reference to the terms of contract. In neither case is our proposed remedy necessary. It would be *possible* to construe each instalment as an entire obligation¹¹⁶ and consequently nothing would be payable in respect of an "uncompleted" instalment.¹¹⁷ However, in our view this construction will be arrived at only where the parties have made it plain that this is their intention and thus no mischief will arise. Our view is therefore that our proposed new remedy need not apply in this situation.

2.79 Another method of arranging for the payment of instalments in the type of contract with which we are now dealing is to ascertain the size of the instalments by valuing the work which was actually done during the instalment period. Once again we consider it unlikely that such instalments will

¹¹⁵ See Para. 2.6, above.

¹¹⁶ Where, for example, it is clear that some minimum amount of work is contemplated as having to be done within the instalment period.

¹¹⁷ That is, where the minimum amount of work has not been done.

be construed as imposing an entire obligation; such a construction will be resorted to only where it is plain that this was the intention of the parties. Thus we again think that no mischief will arise if our proposed remedy does not apply.

2.80 Therefore we do not intend our proposed remedy to apply to severable parts of contracts where the instalments become due on specific dates (or on the happening of specific events), where the instalments are fixed regardless of the amount or value of the work done, or where the amount to be paid is related to the work which actually has been done.

2.81 Finally, we consider a further category of instalment contract under which the amount payable in each instalment does not reflect either the value of the work done or the expiry of stated periods. For example, a contract may provide that the last instalment should be larger than the others in order to encourage the contractor to complete the contract and leave the site. A contract may expressly provide for a retention fund. In such a case it is common for a percentage of each instalment to be held back and to be paid partly on the issue of an architect's completion certificate (which will usually be when the building is ready for occupation) and partly at the end of the contractual maintenance and repairs period. During such a period the occupier can (by using the building) be expected to find out whether everything has been properly completed. The purpose of a retention fund is thus to ensure that the contractor repairs the defects found during the specified period.

2.82 We think that contracts which provide for the payment of instalments on such a basis do not give rise to the mischief which we have identified in relation to the instalment contracts we examined in paragraph 2.73, above. Insofar as the parties, by means of a retention fund or similar device, have provided for payment to be withheld, they will be likely to that extent to be regarded as having catered for the possibility of partial performance. Accordingly, we envisage that neither retention funds nor unequal instalments would be apportioned back over previous instalments payable to the party in breach.

(xii) Returnable benefits

2.83 We have recommended¹¹⁸ that our remedy should not apply in circumstances where, under the present law, the party who has failed fully to perform has a remedy in respect of his partial performance. To this recommendation we think there should be one exception, namely the situation in which the benefit obtained by the innocent party consists of returnable goods which are retained in circumstances in which a fresh contract to pay for them is implied. In such a case there is imposed upon the innocent party a liability under the present law to pay a reasonable sum upon a *quantum meruit*.¹¹⁹ We recommend that for reasons of procedural convenience the party in breach should be able to claim the value of such returnable benefits either under our remedy or under the common law. In most cases we envisage that the party in breach will adopt the former course as this will be the most con-

¹¹⁸ See para. 2.45, above.

¹¹⁹ See fn. 84, above.

venient. There may be some rare cases in which such benefits will be valued differently under our rules as to valuation and under the common law.¹²⁰ In these cases, the party in breach will be able to claim the larger amount. However we envisage that any difference in the valuation of returnable benefits will be of little practical effect and that in the vast majority of cases it will make no difference whether the party in breach claims the value of such benefits under our remedy or under the common law.

(xiii) Types of contract excepted from our recommendations

(a) *Sale of goods*

2.84 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 what he accepts at the contract rate, although he may set up a claim for damages in diminution or extinction of the price.¹²¹

2.85 The only situation in which the buyer may obtain a benefit from the seller's incomplete or defective performance without having to pay anything—this being the situation to which our recommendations are directed—is where the buyer has obtained a benefit from his temporary possession of the goods before justifiably rejecting them. In our view, there are two kinds of case that need examination in this context. The first concerns the seller's title to the goods. This can give rise to difficulties where the seller has supplied goods which he was not entitled to sell.¹²² This is because the delivery of goods which the seller is not entitled to sell is regarded as total non-performance of the contract. As we explained in the introduction to this report,¹²³ we shall be considering further in our forthcoming working paper on contracts for the supply of goods the situation where the seller has delivered goods that he had no right to sell. We explained that, in view of this exercise, it would not be appropriate to recommend in this report any reforms in the area of the law relating to sale without title.

2.86 The second kind of case with which we are concerned involves all other cases of breach by the seller. In such cases the benefit to the buyer of temporary possession of the goods delivered is likely to be very trivial because the right of rejection is in most cases lost fairly quickly in accordance with the provisions of the Sale of Goods Act 1979¹²⁴ which deems the buyer to have "accepted" the goods. In such cases we provisionally concluded in

¹²⁰ Under the common law, the party in breach will be entitled to be paid a reasonable sum for any returnable benefits that are retained by the innocent party in circumstances in which a fresh contract can be implied. Under our remedy the party in breach will not be entitled to recover more than the pro-rateable proportion of the contract price. In rare cases such a proportion may be less than the reasonable sum recoverable at common law.

¹²¹ Sale of Goods Act 1979, s. 53(1)(a).

¹²² *Butterworth v. Kingsway Motors* [1954] 1 W.L.R. 1286; see para. 1.9, above.

¹²³ See para. 1.12, above.

¹²⁴ Sects. 11(4), 34 and 35.

our working paper¹²⁵ that the seller should not be entitled to payment by the buyer for the benefit of temporary possession between delivery and rejection and that accordingly our proposals should not apply to contracts for the sale of goods. On consultation the majority of commentators agreed with this provisional conclusion and we have seen no reason to change our minds.

(b) *Carriage of goods by sea*

2.87 In our working paper¹²⁶ we suggested that the new remedy we proposed should not apply to those contracts for the carriage of goods by sea which were excluded from the Law Reform (Frustrated Contracts Act) 1943.¹²⁷ On consultation this suggestion was generally approved and we see no reason to depart from it. Although the exclusion of most contracts for the carriage of goods by sea from the 1943 Act has been criticised,¹²⁸ the exclusion raises issues of policy which would require to be considered in a wider context than this report. For present purposes we think it is important that the exclusion should be consistent with that in the 1943 Act and that further anomalies should not be created.

(xiv) **Miscellaneous matters**

2.88 There are two final matters we should mention. First, we recommend that our new remedy should only apply to contracts made on or after, and not to contracts made before, the day on which the legislation to implement our recommendations in this report comes into operation. Secondly, we recommend that our new remedy should apply to contracts to which the Crown is a party as it applies to contracts between private persons.

¹²⁵ Working Paper No. 65, para. 38.

¹²⁶ Para. 36.

¹²⁷ Sect. 2(5)(a).

¹²⁸ See e.g. Goff and Jones, *Law of Restitution*, 2nd ed., (1978) p. 581.

PART III

CLAIMS FOR THE RECOVERY OF MONEY PAID

(i) Introduction

3.1 In Part II we considered the situation where the party in breach has failed fully to perform the contract but has conferred a valuable benefit by defective or incomplete performance. The question we discussed was whether the party receiving the benefit should be liable to make pecuniary restitution in respect of it; we recommended that in certain circumstances he should. In this Part we are concerned with the converse situation where the party receiving the benefit has, in anticipation of complete performance, made a payment that exceeds the value of the benefit conferred. We are again concerned with cases where the party in breach has failed fully to perform the contract but has conferred a valuable benefit by incomplete or defective performance. We consider in this part of the report 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.

(ii) Total failure of consideration

3.2 Where the party receiving the money does nothing in performance of his obligations under the contract, or does nothing that is of benefit to the other party, or does something wholly different from what was bargained for, there has been 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.¹²⁹ Provided that the failure of consideration is total, the liability to make a refund of the money paid is total.

(iii) Partial failure of consideration

3.3 Although all the money that has been paid may be recovered where the failure of consideration has been total, none of this money may be recovered where this failure is partial, that is to say where the party making payment has received some of the bargained-for benefit from incomplete or defective performance.¹³⁰ In this latter situation his remedy is to claim damages. We do not propose in this report 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.”¹³¹

¹²⁹ Subject to a deduction in respect of expenses incurred, where the contract is discharged by frustration: see the Law Reform (Frustrated Contracts) Act 1943, s. 1(2), under which the failure of consideration need not be total.

¹³⁰ *Whincup v. Hughes* (1871) L.R. 6 C.P. 78. This principle does not apply to a contract for the 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.

¹³¹ *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.* [1912] A.C. 673, 689 per Viscount Haldane L.C.

3.4 This principle lying behind an award of damages may be illustrated by returning to the hypothetical case which we posed in Part I:¹³²

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; X, therefore, 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? Following the classical approach, the answer to this question must be that X may recover as damages no more than £1,000 (together with any additional loss, such as that resulting from delay etc.) this being the sum that he had to spend to put him in "as good a situation as if the contract had been performed". The builder would be allowed to keep £4,000. An award of damages therefore will not enable X to escape from his bad bargain.¹³³

(iv) The case for a new remedy

3.5 In the working paper we argued that this illustration revealed a defect in the present law. We considered¹³⁴ that, although a fair result might be produced in the majority of cases, there could be injustice where, as in our illustration, a plaintiff 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 contract had been performed, he cannot, as we saw,¹³⁵ escape from his bad bargain by claiming damages after the builder has breached the contract by performing only part of the contract. We pointed¹³⁶ to the contrasting position where the builder has failed totally to perform the contract. The innocent party is then able to recover all the money he has paid to the builder as money paid on a consideration which has wholly failed. He is thereby enabled to escape from his bad bargain.

3.6 Where, as in our example, the innocent party is unable to escape from his bad bargain we argued¹³⁷ that it would be unjust to allow the first builder to make the same profit as if he had completed the job instead of doing only half of it. We pointed out that, if the first builder had not been paid at all but had done half the work, the main proposal in Part II of the working paper would have entitled him to be paid only for such benefit as he had conferred on the innocent party. In Part II of this report we have endorsed this proposal,¹³⁸ although we now recommend that this benefit should be valued in a way different from that suggested in the working paper. No longer is particular regard to be paid to the price that would have been payable had the contract been performed completely and to the extent to which the contract has in fact been performed. Adopting a more flexible approach, we now recommend that the work done by the party in breach should be valued

¹³² Para. 1.7, above.

¹³³ 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.

¹³⁴ Working Paper No. 65, para. 52.

¹³⁵ Para. 3.4, above.

¹³⁶ Working Paper No. 65, para. 54.

¹³⁷ *Ibid.*, para. 53.

¹³⁸ Para. 2.53, above.

simply in terms of its benefit to the other party, provided that such a valuation shall not exceed that proportion of the price payable on complete performance which reflects the extent to which the contract has in fact been performed.¹³⁹ Thus under our main recommendation, the first builder in the example in paragraph 3.4, above would be entitled to be paid for the value to the innocent party of the work he has done, provided that such a sum does not exceed £2,500. In the working paper we asked¹⁴⁰ whether the party in breach who had received payment in anticipation of complete performance should be entitled to retain a larger sum (£4,000 in our example) than he would be able to recover if no payment in advance had been made by the innocent party.

3.7 In view of the reasons put forward to substantiate a charge of injustice in the present law, our original proposal was that, where the party in breach has not fully performed the contract, the plaintiff should be entitled, as an alternative to a claim in damages, to claim from the party in breach restitution of the difference between the amount paid and the value of the benefit received. However, we excepted from this general proposition (a) situations in which the parties have provided by contract that such a remedy should not be available and (b) contracts excepted from our main proposal. Our provisional view was that where, for the purposes of the proposed remedy, the benefit of part performance has to be valued, the court should have the same duties and powers as if it were valuing the benefit of partial performance conferred on an innocent party under an entire contract.¹⁴¹

(v) The case against a new remedy

3.8 Although the proposal in Part III of the working paper received some support on consultation, the majority of those who commented upon it were opposed to it and thought that the rules of the present law were both satisfactory and more desirable. It was argued that, because the innocent party did not under the present law have an opportunity to escape from a bad bargain by claiming restitution of the contract price, except in cases involving a total failure of consideration, the absence of such an opportunity did not constitute an injustice and was not a justification for changing the law to allow the innocent party to claim more than his present remedy of damages. It was pointed out that when the party in breach completes the work specified in the contract, albeit very defectively, the other party is only entitled to damages.¹⁴² In this situation the court will not, in effect, re-open the transaction in assessing the measure of damages and allow the innocent party to claim back the amount by which the contract price exceeds the value of the benefit. It was argued that the same general principle should continue to apply when the party in breach fails to complete the work specified in the contract and that in neither situation should the court have the power to assess the value of the work at some figure different from that on which the parties had agreed, thereby providing the innocent party with a remedy additional to that which he already had in damages.

¹³⁹ *Ibid.*

¹⁴⁰ Working Paper No. 65, para. 54.

¹⁴¹ *Ibid.*, para. 55.

¹⁴² I.e. where the contractual performance by the party in breach does not amount to a total failure of consideration.

3.9 Two further points were made by those opposed to the proposal in Part III of the working paper. First, although in a case of total failure of consideration the innocent party is incidentally entitled to escape from a bad bargain because he is entitled to recover the full contract price, such a right of recovery does not have as its purpose the provision of an escape route from a bad bargain. This right does not involve the court placing a value upon the contracted performance different from that agreed by the parties and thus re-opening the transaction.

3.10 Secondly, it was pointed out that if the purpose of the main proposal relating to entire contracts was to make a new contract for the parties, in which the price was apportioned over the work as a whole,¹⁴³ then it could be argued that on this basis it would be logical to extend the same principle to a contract under which the price is paid in advance. However, such an argument would no longer appear to be valid in view of our recommendation, at paragraph 2.51 above, that the benefit conferred on the innocent party by the party in breach should, strictly, be valued without reference to the contract price, except for the purpose of placing a limit on the latter's right of recovery; although there will, of course, be cases where the valuation of the benefit coincides with the contract price. This recommendation follows from our view of the new remedy as a means by which the party in breach can recover the value of the benefit obtained by the innocent party in a situation in which under the present law he has no contractual right to compensation. This new remedy, by providing such a right of recovery, is designed to fill a gap in the present law under which the innocent party is, as a general rule, able wholly to escape from his bargain.

(vi) Our conclusion

3.11 In view of these objections to our proposal in Part III of the working paper, we have decided not to recommend any change in the existing rule under which, where the party in breach has failed fully 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, he is not entitled, as an alternative to damages, to the restitution of the money paid in excess of the benefit conferred.

¹⁴³ As was proposed in Working Paper No. 65, para. 32.

PART IV

SUMMARY OF RECOMMENDATIONS

4.1 We conclude this report with a summary of our recommendations. We are concerned with the situation where a contract provides for the payment of a sum of money by one party on its complete performance by the other party (draft Bill, clause 1(1)(a)). The latter party fails to complete performance of such a contract (draft Bill, clause 1(1)(b)). In this situation we recommend that:

- (a) Where the party who has failed to complete has either himself or by means of a third party conferred a benefit on the other party the former should have a right in respect of his partial performance of the contract. (Report, paragraph 2.33; draft Bill, clause 1(1)(d))
- (b) A right should also be available under (a) in relation to a contract under which the consideration furnished by one party for the completion of something to be done by the other consists in promising either to do some other act than paying a sum of money or to forebear from doing something. (Report, paragraph 2.33; draft Bill, clause 1(6))
- (c) No right should be available under (a) unless the obligations of the parties to perform the contract have been brought to an end either at the election of the party to whom completion is due or by the operation of a provision of the contract (whether or not the event justifying the election or bringing that provision into operation is the failure to complete the contract). (Report, paragraph 2.41; draft Bill, clause 1(1)(c))
- (d) No right should be available under (a) where under the present law, subject to (q), the party has a remedy in respect of his partial performance. (Report, paragraph 2.45; draft Bill, clause 1(7))
- (e) No right should be available under (a) unless the benefit conferred by the party in breach was conferred under the contract. (Report, paragraph 2.46; draft Bill, clause 1(1)(d))
- (f) A party who has failed to complete shall be entitled to a right under (a) where he has, by what he has done under the contract, conferred a benefit on the person to be benefited under the contract, even if that person is not a party to the contract. (Report, paragraph 2.47; draft Bill, clause 1(1)(d))
- (g) Where a right arises under (a) the party who has conferred the benefit shall be entitled as against the other party to such sum as represents the value of what he has done under the contract to the person who has the benefit of it. (Report, paragraph 2.53; draft Bill, clause 1(3))
- (h) The sum payable under (g) shall not exceed such proportion of the sum payable on completion as is equal to the proportion which that which has been done under the contract bears to what was promised. (Report, paragraph 2.53; draft Bill, clause 1(4))
- (i) No provision should be made as to the time at which the value of the performance by the party in breach should be assessed. (Report, paragraph 2.57)

- (j) The court should not have a discretion, based on the conduct of the party in breach, to disallow or reduce the claim under (a). (Report, paragraph 2.60)
- (k) The normal rules relating to remoteness of damage and mitigation of damages should apply with regard to any set-off (or counterclaim) which the innocent party makes against the party in breach. (Report, paragraph 2.63; draft Bill, clause 2(1))
- (l) To the extent that the party not in breach seeks to set-off his damages against a claim made by the other party pursuant to his right under (a), those exemption clauses, limitation of liability clauses or liquidated damages clauses which would otherwise restrict the damages which the party not in breach is entitled to claim from the other party should not be given effect to. (Report, paragraph 2.64; draft Bill, clause 2(2))
- (m) Where the party not in breach seeks to set-off his damages in tort against a claim made by the other party pursuant to his right under (a), no provision should be made to regulate the operation of any clause which restricts the damages in tort which the party not in breach is entitled to claim from the other party. (Report, paragraph 2.65)
- (n) No right should be available under (a) where the parties include, whether in the contract or any contract made with reference to the former contract, either a provision excluding the right or otherwise to the effect that, in the event of the thing promised to be done being only partly done, nothing should be payable or a provision for the payment, in that event, of a sum determined or determinable by or under the contract. (Report, paragraph 2.69; draft Bill, clause 1(2))
- (o) It should be immaterial for the purposes of the availability of the right under (a) whether the failure to perform the contract completely does or does not constitute a breach of the contract. (Report, paragraph 2.72; draft Bill, clause 1(8))
- (p) Where a contract is severable into parts and makes with reference to any severable part, provision for payment corresponding with a provision for the payment of a sum of money by one party on the completion of the thing to be done by the other, the right under (a) should be available so as to create a right in respect of a benefit conferred by the partial performance by that other party. (Report, paragraph 2.77; draft Bill, clause 1(5))
- (q) Where the benefit obtained by the party not in breach consists of returnable goods, those goods may be retained in circumstances which justify the inference that a fresh contract to pay for them should be implied. In this situation the party in breach is entitled to claim under such a contract a reasonable sum as being the value of the benefit obtained by the other party. the party in breach should continue to be entitled to make his claim in this way, notwithstanding the fact that he is also entitled to claim the value of such a benefit under (a). (Report, paragraph 2.83)
- (r) The right under (a) should not be available in relation to a contract for the sale of goods. (Report, paragraphs 2.85–2.86; draft Bill, clause 3(3)(b))

- (s) The right under (a) should not be available in relation to those contracts for the carriage of goods by sea which are excluded from the Law Reform (Frustrated Contracts) Act 1943. (Report, paragraph 2.87; draft Bill, clause 3(3)(a))
- (t) The right available under (a) should only apply to contracts made on or after the date on which the draft Bill comes into operation. (Report, paragraph 2.88; draft Bill, clause 3(1))
- (u) The right available under (a) should apply to contracts to which the Crown is a party as it applies to contracts between private persons. (Report, paragraph 2.88; draft Bill, clause 3(2)).

4.2 We do not recommend any change in the present rule under which, where a party in breach has failed fully 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, that other party is not entitled, as an alternative to damages, to the restitution of the money paid in excess of the benefit conferred. (Report, paragraph 3.11)

(Signed) RALPH GIBSON, *Chairman*
 STEPHEN M. CRETNEY
 BRIAN DAVENPORT*
 STEPHEN EDELL
 PETER NORTH

J. G. H. GASSON, *Secretary*
 9 June 1983

Note of Dissent

I have the misfortune to differ from my colleagues both as regards the principal policy conclusion reached in this report and as to the manner of its implementation. In almost all contracts of any substance today under which one party promises to carry out certain work in return for a consideration to be given by the other, the contract will make provision for stage payments of one sort or another. The facts of modern economic life have demonstrated that payments on account while the work proceeds are a necessity. Both printed and specially prepared contracts will therefore, in almost every case, provide for such payments. Where a written contract does not provide for such payments, the reason may well be that the parties intended that payment would be due if, but only if, the contractor finished the work. The so-called mischief which the report is intended to correct is therefore likely only to exist in relation to small, informal contracts of which the normal example will be a contract between a householder and a jobbing builder to carry out a particular item of work. Experience has shown that it is all too common for such

* See the Memorandum of Dissent (this page) which affects the recommendations in para. 4.1, above.

builders not to complete one job of work before moving on to the next. The effect of the report is to remove from the householder almost the only effective sanction he has against the builder not completing the job. In short, he is prevented from saying with any legal effect, "Unless you come back and finish the job, I shan't pay you a penny". In my view, the disadvantages in practice of the recommendations contained in the report outweigh the advantages to be gained from the search for theoretically perfect justice between the parties. If the report's recommendations are implemented, the jobbing builder can leave the site and, when the irate and exasperated householder finally brings the contract to an end, send in a bill for the work done up to the time when he abandoned the site. It will then be for the householder to dispute the amount and calculate his counter-claim for damages. To put the burden on the householder in this manner is, in my view, to put him in a disadvantageous position where he negotiates from a position of weakness. It must not be forgotten that it is the builder who has broken the contract, not the householder, and that the contract is one under which the parties agreed that payment would be by lump-sum only when the work was done.

At present, the courts have a good deal of flexibility in determining what the intention of the parties was and the number of reported cases on the subject do not seem to show that there is any great call for reform. The "intention of the parties" always tends to vary according as to which party is asked what his intention was. The presumed common intention, where the parties have agreed a lump-sum contract, cannot be too readily assumed to be that if the contractor, in breach of contract, fails to complete his contract the innocent party is nevertheless liable to pay him for what he has done and mount a counter-claim for his damages. It was pointed out to us on consultation that most householders in practice do not insist upon the pound of flesh and are willing to negotiate a reasonable sum. Nevertheless, this sum is negotiated against a background of legal rights which, in my view, provide a juster solution in the great majority of cases than would implementation of the report.

If the basic policy in the report were to be implemented, it would, in my view, be better that this were done by adopting the principles of the Law Reform (Frustrated Contracts) Act 1943. No doubt, that Act is not perfect but in the vast majority of cases its provisions seem to work satisfactorily, for there are almost no reported cases illustrating difficulties. To create a new, and perforce complicated, set of rules such as is contained in the draft Bill annexed to the report does not seem to me a satisfactory way of simplifying the law to achieve justice in practice, especially having regard to the fact that the draft Bill will largely have to be operated in County Courts and small claims courts.

(Signed) BRIAN DAVENPORT

9 June 1983

APPENDIX A
Law Reform (Lump Sum Contracts)

DRAFT
OF A
BILL
TO

Amend the law relating to contracts under which complete performance by one party is a condition precedent to payment or other performance by the other party.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Lump sum contracts: payment for benefit of incomplete performance.

1.—(1) Subject to the following provisions of this section and to sections 2 and 3 below, a right in respect of a benefit conferred by the partial performance of a contract arises under this section where—

- (a) the contract is one which provides for the payment of a sum of money by one party on the completion of the thing to be done by the other;
- (b) the party who is to do that thing fails to complete it;
- (c) the obligations of the parties to perform the contract are brought to an end either at the election of the party to whom completion is due or by operation of a provision of the contract (whether or not the event justifying the election or bringing that provision into operation is the failure to perform the contract completely); and
- (d) the party who has failed to complete has, by what he has done under the contract, conferred a benefit on the person to be benefited under the contract.

EXPLANATORY NOTES

Clause 1

1. This clause, which implements the main recommendations in Part II of the report, creates a right to payment for benefits conferred by partial performance of lump sum contracts. It is concerned with the nature and extent of this right and the circumstances in which it arises.

2. *Subsection (1)* identifies the circumstances that must be present in order that the right in respect of partial performance recommended in paragraph 2.33 of the report will become available. Those circumstances are defined in paragraphs (a), (b), (c) and (d).

3. The first circumstance is defined in paragraph (a). The contract must provide that a lump sum (or other consideration referred to in clause 1(6)) is payable by one party to the contract when the thing to be done under the contract by the other party has been completed.

4. The second circumstance is defined in paragraph (b). The party who is to do the thing required to be done under the contract must have failed to do it.

5. The third circumstance is defined in paragraph (c). The right will not be available unless the contract has been brought to an end either by the party who is entitled to the complete performance of the contract or by the operation of an automatic termination clause. This paragraph implements the recommendation in paragraph 2.41 of the report.

6. The fourth circumstance is defined in paragraph (d). The party who has failed to complete his performance of the contract must have conferred a benefit on the other party to the contract. This benefit must consist of work that has been done under the contract. It may, however, have been conferred on a non-contracting party. This paragraph implements the recommendations in paragraphs 2.46 and 2.47 of the report.

Law Reform (Lump Sum Contracts)

(2) No right arises under this section in respect of a contract where the parties include, whether in that contract or any contract made with reference to the first-mentioned contract, a provision of either of the following descriptions, that is to say—

- (a) a provision excluding the right or otherwise to the effect that, in the event of the thing promised to be done being only partly done, nothing should be payable; or
- (b) a provision for the payment, in that event, of a sum determined or determinable by or under the contract or one or other of the contracts.

(3) Where a right arises under this section the party who has conferred the benefit shall be entitled, subject to subsection (4) below, as against the other party, to such sum as represents the value of what he has done under the contract to the person who has the benefit of it.

(4) The sum payable under subsection (3) above shall not exceed such proportion of the sum payable on completion as is equal to the proportion that what has been done under the contract bears to what was promised to be done.

EXPLANATORY NOTES

7. *Subsection (2)* identifies the types of contractual provision which will have the effect of excluding the right. The first type of provision is described in paragraph (a). This is a provision either referring to the Bill and excluding its operation or to the effect that if the contract is incompletely performed nothing should be payable to the party who has failed to complete. The second type of provision is described in paragraph (b). It will have to provide that in the event of incomplete performance only a limited sum of money should be payable to the party who has failed to complete. This subsection implements the recommendation in paragraph 2.69 of the report.

8. *Subsection (3)* quantifies the amount recoverable pursuant to the right. The party who has conferred the benefit will have a right to be paid a sum which reflects the value to the other party of what has been done under the contract. This subsection implements the recommendation in paragraph 2.53 of the report.

9. *Subsection (4)* places a ceiling on the sum recoverable under subsection (3). The sum recoverable shall not exceed the pro-ratable proportion of the contract price. This subsection implements the proviso to the recommendation in paragraph 2.53 of the report.

Law Reform (Lump Sum Contracts)

(5) Where a contract—

(a) is severable into parts, and

(b) makes, with reference to any severable part, provision for payment corresponding with the provision specified in subsection (1) (a) above,

subsections (1) to (4) above shall apply so as to create a right in respect of a benefit conferred by the partial performance of that part corresponding with the right which would have been created by those subsections if the contract had provided for payment on (and not before) complete performance of the contract.

(6) Subsections (1) to (5) above shall apply in relation to a contract under which the consideration furnished by one party for the completion of some thing to be done by the other consists—

(a) in promising to do some other act than paying a sum of money, or

(b) in promising to forbear from doing some thing,

as they apply where the consideration consists in promising to pay a sum of money.

(7) This section does not apply—

(a) where the failure to perform the contract completely is due to its having become impossible of performance or been otherwise frustrated;

(b) where completion is, in breach of the contract, prevented by the other party;

(c) where a payment under the contract is apportionable in respect of time under the Apportionment Act 1870; or

(d) where the party who has failed to perform completely is nevertheless entitled to the contract price or, in a case falling within subsection (6) above, to demand performance by the other party (whether or not the party so entitled is himself liable to pay damages in respect of the partial performance).

1870 c.35.

EXPLANATORY NOTES

10. *Subsection (5)* extends the right to a situation where a contract is severable into parts and in relation to any such part, it is provided that a lump sum should be payable by one party to the contract when the thing to be done under that part by the other party has been completed. The right will operate in the same way on any benefit that has been conferred by incomplete performance of such a part. This subsection implements the recommendation in paragraph 2.77 of the report.

11. *Subsection (6)* provides that the right will be available in the situation where the consideration for the complete performance consists of something other than the promise to pay money. This subsection implements the recommendation in paragraph 2.33 of the report.

12. *Subsection (7)* excludes the right in a number of situations; namely where the contract has been frustrated (paragraph (a)), where the defendant has wrongfully prevented complete performance (paragraph (b)), where the Apportionment Act 1870 applies (paragraph (c)), and where the doctrine of substantial performance applies (paragraph (d)). This subsection implements the recommendation in paragraph 2.45 of the report.

Law Reform (Lump Sum Contracts)

(8) Subject to subsection (7) above, it is immaterial for the purposes of this section whether the failure to perform the contract completely does or does not constitute a breach of the contract.

EXPLANATORY NOTES

13. *Subsection (8)* makes it clear that the right applies to cases where the incomplete performance does not constitute a breach of contract. This subsection implements the recommendation in paragraph 2.72 of the report.

Law Reform (Lump Sum Contracts)

Reduction etc.
of entitlement
under section 1
on account of
irrecoverable
losses of
other party.

2.—(1) Where—

- (a) a party to a contract is entitled under section 1 above to a sum or sums in respect of a benefit conferred by his partial performance of a contract;
- (b) the party so entitled is in breach of the contract;
- (c) the other party's loss consists of or includes irrecoverable loss (as defined below); and
- (d) in a case where part of the other party's loss is recoverable, the amount of the damages in respect of recoverable loss is less than the sum or the aggregate of the sums to which the first-mentioned party is so entitled,

subsection (2) below shall apply to reduce that sum or the aggregate of those sums (in that subsection referred to as "the section 1 sum").

(2) Where this subsection applies the section 1 sum shall be reduced or extinguished as follows—

- (a) where there is no recoverable loss and the irrecoverable loss is greater than the section 1 sum, there shall be deducted from it so much of the irrecoverable loss as is equal to that sum;
- (b) where the recoverable and the irrecoverable losses amount to more than the section 1 sum, there shall be deducted from it so much of the irrecoverable loss as, when added to the recoverable loss, is equal to that sum;
- (c) in any other case, there shall be deducted from the section 1 sum the whole of the other party's irrecoverable loss.

EXPLANATORY NOTES

Clause 2

14. This clause is concerned with the circumstances in which the sum to which a party is entitled under clause 1 will be reduced or extinguished by reference to irrecoverable losses suffered by the other party.

15. *Subsection (1)* sets out in paragraphs (a), (b), (c) and (d) the circumstances that must be present in order that such a reduction may take place. The party entitled to a sum or sums under clause 1 must be in breach of the contract (paragraphs (a) and (b)). The other party's loss must consist of or include "irrecoverable loss" which is defined in clause 2(3) (paragraph (c)). The value of the other party's "recoverable loss" (defined in clause 2(3)) must be less than the value of the incomplete performance of the contract by the party in breach (paragraph (d)).

16. *Subsection (2)* provides that, if the circumstances in clause 2(1) are present, the sum in question shall be reduced or extinguished by the deduction of the amount of the irrecoverable loss that equals that sum (paragraph (a)) or of the portion of the irrecoverable loss which, when added to the recoverable loss equals that sum (paragraph (b)) or of the whole irrecoverable loss (paragraph (c)). The effect of the clause is that, to the extent that such deductions are to be made from the sum in question, the Bill will override those terms of the contract which restrict the damages which the party not in breach is entitled to claim from the party in breach. This subsection implements the recommendation in paragraph 2.64 of the report.

Law Reform (Lump Sum Contracts)

(3) In the application of this section to a contract—

“loss” means loss or damage due to a breach or breaches of the contract for which damages can be recovered at law;

“irrecoverable” denotes so much of the loss as respects which the party suffering the loss is precluded from recovering damages by reason only of a contractual provision which has the effect of excluding or restricting liability in respect of any breach or any right or remedy in respect of that liability;

“recoverable” denotes so much of the loss as is not irrecoverable; and the question whether a contractual provision does or does not have the effect referred to above shall be determined by reference to the circumstances of the case as they stand when the question falls to be determined.

EXPLANATORY NOTES

17. *Subsection (3)* provides, for the purpose of the clause, definitions of “loss”, “irrecoverable” and “recoverable”. The definition of loss reflects the normal rules relating to remoteness of damage and mitigation of damages which apply to any set-off (or counterclaim), made by the party not in breach against the party in breach. The definitions of irrecoverable and recoverable are given a specialised meaning for the purpose of this clause.

Law Reform (Lump Sum Contracts)

Application
of this Act.

3.—(1) This Act applies to contracts made on or after, but not to contracts made before, the date on which this Act comes into operation.

(2) This Act applies to contracts to which the Crown is a party as it applies to contracts between private persons.

(3) This Act does not apply—

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or

(b) to any contract for the sale of goods.

EXPLANATORY NOTES

Clause 3

18. This clause deals with the application of the Bill. The Bill will only apply to contracts made on or after the date on which it comes into operation. It will apply to contracts to which the Crown is a party. It will not apply to those 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.

19. This clause implements the recommendations made in paragraph 2.88 of the report (subsections (1) and (2)) and in paragraphs 2.85 and 2.87 of the report (subsection (3)).

Law Reform (Lump Sum Contracts)

Short title,
commence-
ment and
extent.

4.—(1) This Act may be cited as the Law Reform (Lump Sum Contracts) Act 1983.

(2) This Act shall come into operation at the end of three months beginning with the date on which it is passed.

(3) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 4

20. This clause deals with the short title, commencement and extent of the Bill.

APPENDIX B

List of persons and Organisations who sent comments on Working Paper No. 65

Professor P. S. Atiyah

Professor G. J. Borrie

Mr. Justice Donaldson

Finance House Association

Judge Norman Francis

Johnson Pearce & Co. Ltd.

The Law Society

Mr. W. A. Leitch, C.B.

Lord Chancellor's Office

Lord Justice Megaw

Multiple Shops Federation

National Farmers' Union

A Working Party set up by the Scottish Law Commission

Senate of the Inns of Court and the Bar

APPENDIX C

The Law Reform (Frustrated Contracts) Act 1943

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

Adjustment
of rights
and
liabilities of
parties to
frustrated
contracts.

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

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

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

- (a) the amount of any expenses incurred before the time of discharge by the 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 frustration of the contract.

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

(5) In considering whether any sum ought to be recovered or retained under the foregoing provisions of this section by any party to the contract, the court shall not take into account any sums which have, by reason of the circumstances giving rise to the frustration of the contract, become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment.

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

Provision
as to
application
of this Act.

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

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

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

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

(5) This Act shall not apply—

(a) to any charterparty, except a time charterparty or a charterparty by way of demise, or to any contract (other than a charterparty) for the carriage of goods by sea; or

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

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

Short title
and
interpre-
tation.

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

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

*Government publications are also available
through booksellers*

HER MAJESTY'S STATIONERY OFFICE

Government Bookshops

49 High Holborn, London WC1V 6HB
13a Castle Street, Edinburgh EH2 3AR
Brazennose Street, Manchester M60 8AS
Southey House, Wine Street, Bristol BS1 2BQ
258 Broad Street, Birmingham B1 2HE
80 Chichester Street, Belfast BT1 4JY

*Government publications are also available
through booksellers*

ISBN 0 10 203484 2