SOUTH AUSTRALIA

NINETIETH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW REGARDING ENTIRE CONTRACTS AND THE RULE USUALLY KNOWN AS THE RULE IN CUTTER V. POWELL

1986

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NINETIETH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW REGARDING ENTIRE CONTRACTS AND THE RULE USUALLY KNOWN AS THE RULE IN CUTTER V. POWELL

To:

The Honourable C. J. Sumner, M.L.C.,
Attorney-General for South Australia,

Sir,

You have referred to us for consideration the reform of the law relating to entire contracts and the rule usually known as the rule in *Cutter v. Powell.*

We have considered your remit and now report as follows:—

An entire contract is a contract "where the entire fulfilment of the promise by either party is a condition precedent to the right to call on the fulfilment of any part of the promise by the other". *(Butterworth's Words and Phrases 2nd Edition).* Such a contract is sometimes referred to as a "special contract".

Chitty on Contracts (25th Edition 1983) defines an entire contract as one which requires "complete performance by one party as a condition precedent to the liability of another". *Goff and Jones* in *The Law of Restitution (2nd Edition 1978)* at page 367 state:—

> "An entire contract is one which provides expressly or impliedly that a party must perform his part in full before he can recover any part of the price or other consideration due to him under the contract; and in particular, in the absence of anything to the contrary, a contract is held impliedly to so provide where the consideration is a lump sum or is otherwise unapportioned."

Put bluntly, the prima facie result of a contract being entire is that if the contractor does not finish the job according to the contract he gets nothing. There are some exceptions which will be discussed later.

In the notes to the *12th Edition (1929)* of *Smith's Leading Cases*, one of the editors of which was the then Mr. A. T. Denning, it is said in relation to *Cutter v. Powell (1795) 6 T.R. 319; 101 E.R. 573 (2 Sm.L.C. 1 at 9)*:—

> "Few questions are of so frequent occurrence, or of so much practical importance, and at the same time so difficult to solve, as those in which the dispute is, whether an action can be brought by one who has entered into a special contract, part of which remains unperformed."

The question of whether a contract is entire depends on the intention of the parties ascertained from the construction of the document and any evidence legally admissible on that topic. Where one party's obligation is the payment of a lump sum, the contract is usually held to be an entire contract. Many types of contract have been held to be entire including employment contracts, leases, solicitors' retainers, consultancy agreements and building contracts. Most of the modern cases involve building or construction work.

An entire contract must be distinguished from a severable or divisible contract under which different parts of the consideration may be assigned to severable parts of the performance, from a contract whereby the parties

agree to give consideration in accordance with what is done or in accordance with time spent, and from independent contracts where performance on one side is independent of performance on the other, in which case the consideration on each side is the promise, not the performance.

The rule derives its name from the case of *Cutter v. Powell (supra).* In that case a seaman agreed to work on a voyage which would normally take eight weeks in consideration of a promise by the master to pay him thirty guineas provided he continued and did his duty for the whole voyage. Thirty guineas was more than three and a half times the normal wage. The seaman died after serving for about six weeks. The Court of King's Bench held that his administratrix was entitled neither to any part of the thirty guineas nor to wages at the usual rate for the time served, on the basis that the seaman had entered into an entire contract.

The rule has been applied throughout most common law countries. It is well known and widely understood. It is simple. Disputes can often be limited to a decision on whether a contract is an entire contract or not, and whether the work has been completed according to the terms of the contract. It has the practical advantage of providing an incentive for a contractor to finish the work he has agreed to do, for if he does not finish the job according to the contract he will not be paid anything. If it were otherwise, contractors might be inclined to perform only the easy or profitable parts of their obligation and leave undone the parts likely to produce little or no profit. The theoretical basis given for the rule by some of the legal authors has been widely accepted. *Cheshire and Fifoot* in *Law of Contracts 10th Edition (1981) at page 590* say:—

> "If the parties have agreed as a term of the contract that entire performance is required by C, then C cannot sue upon a quantum meruit to recover the value of the work that he has done. The reason is that such an action is founded upon an *implied* promise by the other party to pay a reasonable sum for the work actually done. . . . Such an implication is impossible so long as the express contract to pay the full amount remains in existence. Nothing can be implied which is inconsistent with the express contract . . . Where the parties have provided that certain work shall be done for a lump sum, no Judge can assert that it was their intention that a reasonable sum should be paid for each part of the work as it was performed: Dr. G. L. Williams commenting on the Law Reform (Frustrated Contracts) Act, U.K."

Still, the application of the rule frequently results in unfairness. The decision in *Cutter v. Powell* itself may perhaps be justified on the basis that the seaman took a calculated gamble on receiving over three times the normal pay if he completed the voyage. Nevertheless the owners of the ship had the benefit of his services for three quarters of the total period and paid nothing, even though the termination of the contract was not due to any default on the part of the seaman. A case where no such calculated risk could be said to be taken and yet the rule applied was *Poussard v. Spiers (1876) 1 Q.B.D. 410* where a prima donna failed to appear at the first and early performances of her engagement through sickness, and her husband, who in those days had to sue on his wife's behalf, failed in his action.

In addition, the operation of the rule bears harshly on a plaintiff who regards the defendant as having broken his contract and therefore refuses to perform the balance of the contract on his own side, only to be met at trial with the plea that he has failed to perform an entire contract. A typical example is *Hulle v. Heightman (1802) 2 East 145; 102 E.R. 324.* In that case the plaintiff, a seaman, proved that he served on board the plaintiff's vessel from Altona in Schleswig-Holstein to London. When

the ship reached London the defendant refused to give the seamen victuals and bade them go on shore saying that he could get plenty of their fellow countrymen to go back for their victuals only, since the peace. The plaintiff went on shore and refused to return on the defendant's command, saying that he "had the law of him." The defendant proved the contract which stated that the plaintiff was hired from Altona to London and back and contained a clause by which the plaintiff agreed to demand no wages till the end of the voyage. On this the plaintiff was nonsuited by LeBlanc J. and the non-suit was upheld by the Court of King's Bench. That decision is quite unreasonable having regard to the general law maritime as to maintenance and cure of seamen and well merits the criticisms in *2 Sm.L.C. at page 23.* However this last may be, problems of this type for plaintiffs in general have manifested themselves on many occasions. However the rule is applied to contracts whether the result is fair or not.

The Courts have applied the rule regardless of:—

(a) the reasonableness of the consideration;

(b) the causes of the incomplete performance (with the exception of non-completion due to the other party's fault or where the contract has been frustrated);

(c) the proportion of the contract performed (with the exception of the doctrine in the cases to which it applies of substantial performance),

(d) the amount of benefit received by the other party from the partial performance, and

(e) whether the deficiency in performance has prejudiced the other party.

In attempts to mitigate the harshness of the rule, the Courts have allowed some exceptions to its strict application. These are:—

(1) Where A prevents C from completing performance, or has rendered himself incapable of performing his side of the contract, C is entitled to payment on a quantum meruit for his labour and on a quantum valebat for materials or goods supplied: see *Planche v. Colburn (1831) 8 Bing.14; 131 E.R. 305.* It should however be added that this is not the explanation of Planche's case given in *Hochster v. De la Tour (1853) 2 E. & B. 678; 118 E.R. 922,* but the point is put beyond doubt by the words of Blackburn J. in *Appleby v. Myers (1861) L.R. 2 C.P. 651 at 660,* see also *2 Sm.L.C. at pages 39-40 and 46-47.*

(2) Where the contract is unperformed but the Court has implied a new contract from the conduct of the parties to pay remuneration commensurate with the benefit derived from partial performance. The relevant cases are discussed in *2 Sm.L.C. at pages 26-27.* Where a party chooses to accept partial performance he must pay the other, usually on a quantum meruit or a quantum valebat. The acceptance has sometimes been treated as implying a fresh contract including a promise to pay a reasonable price and sometimes a waiver of the requirement of complete performance: see *Morrison—The Principles of Rescission of Contracts (1916) and Cooper v. Australian Electric Co. Limited (1922) 25 W.A.L.R. 66.*

(3) Where the party demanding performance has absolutely refused to perform or has incapacitated himself from performing his side of the contract, because the other party may then elect to treat himself as discharged from any further performance on his side and sue for damages for breach of contract. The relevant cases are in *2 Sm.L.C. at pages 29-31.*

(4) Where a contract has been frustrated, i.e. where as a result of supervening events which do not involve breach by either party, a contractual obligation has become incapable of performance or performance is transformed into something radically different, both parties are released from further performance.

(5) Where "the actual performance falls not far short of the required performance, and if the cost of remedying the defects is not too great in amount in comparison with the contract price": see *Anson on Contracts (24th Edition 1975) at page 457.* This is usually known as the doctrine of substantial performance. In some cases, particularly building cases, which appear to have been decided on this principle, the Courts have gone beyond the application of the de minimis rule of substantial performance: see for example *H. Dakin & Co. Ltd. v. Lee (1916) 1 K.B. 566* and *Hoenig v. Isaacs (1952) 2 All E.R. 176.* The application of this doctrine to entire contracts has been debated by *Treitel* in *The Law of Contract 5th Edition* and the editors of *Chitty on Contracts (25th Edition 1983).* Chitty regards the doctrine of substantial performance in its broadest sense as the main exception to the rule in *Cutter v. Powell.* At page 1402 it is said:—

> "But if the work is substantially completed, and it is only in some minor details that the workmanship falls below the contractual specifications, the builder may recover the agreed price, less a deduction based on the cost of making good the defects or omissions."

On the other hand Treitel says at page 560:—

> "In relation to entire obligations, there is no scope for any doctrine of substantial performance."

He gives a different explanation for the decisions in such cases as *Hoenig v. Isaacs,* namely that the defaulting party's obligations were entire as to quantity, but not as to quality. He says that the performance in each case which Chitty cites as illustrating the application of the doctrine of substantial performance in fact did not reach the required quality. A practical example of this dichotomy of views is *Dakin v. Lee (supra),* in which the Judge at first instance treated the facts as incomplete performance substantial enough to entitle the plaintiff to payment, subject to a cross claim for the cost of rectifying the deficiencies, but at page 579 Cozens-Hardy M.R. on appeal held that it was a case of negligent and bad workmanship and not a case of "abandonment of the contract" which would have disentitled him to payment subject to a cross claim for damages. The result of applying the Chitty-type version of substantial performance and the Treitel-type approach distinguishing between quantity and quality was the same in that case.

Whatever the correct theoretical answer may be, it is obvious that the Courts do not apply the rule in *Cutter v. Powell* strictly in building cases and cases generally for work and labour done where there is relatively minor incompleteness or defect in performance, not rendering the work useless, and the owner has taken the benefit of the work done under the contract—aliter where the nature of the defects and the cost of remedying them do not amount to substantial performance—see the judgment of the Court of Appeal in *Bolton v. Mahadeva (1972) 1 W.L.R. 1009.*

In addition, there are two statutory modifications of the rule:—

(1) *Part VII of the Law of Property Act, 1936* (which is based on the English Apportionment Act, 1870) provides in Section 64 that all rent, annuities including salaries, dividends, and other periodical

Solicitors' Retainers:

As a general rule a legal practitioner's retainer is an entire contract. The solicitor is not entitled to any remuneration unless he finishes the business for which he was retained. The general rule has been diluted in several ways. Each case is decided upon the express and implied terms of the particular retainer. *Cordery on Solicitors 7th Edition (1983)* summarises the present law at page 79:—

> "A retainer may be said to be an 'entire contract' where the client cannot receive the benefit of the consideration until the contract is completed. Thus, under a retainer to sue for damages for breach of contract the client cannot get any benefit until judgment has been obtained so that the solicitor should not be entitled to tax his costs until he has either obtained judgment or lost the suit for 'If a shoemaker agrees to make a pair of shoes he cannot deliver one to you and ask for half the price' . . . But where the solicitor is employed to do non-contentious work over a period on the basis that bills are to be rendered and paid as matters proceed, and the client obtains benefits from the completion of each item of work, there is no 'entire contract'."

It has generally been held that retainers to prosecute or defend civil actions and criminal and summary prosecutions are entire contracts. The retainer in a criminal or summary prosecution ceases upon conviction *(Pengilly v. Pengilly (1926) S.A.S.R. 344).* The retainer in a civil matter does not terminate until the judgment has been enforced *(Milera v. Wilson (1980) 23 S.A.S.R. 485).*

Some early authorities distinguished between common law and equitable cases and held that retainers in relation to proceedings at equity were not entire. It is doubtful whether any Court would uphold this distinction now. In *Warmingtons v. McMurray (1936) 2 A11 E.R. 745* which was followed by the Full Court in *Caldwell v. Treloar (1982) 30 S.A.S.R. 202* Goddard J. said:—

> "The distinction does not depend upon whether the action is in the nature of one at common law or in an equitable suit for administration; that of itself would afford no ground of difference. The question is whether or not the employment is one to which the doctrine of entire contract applies."

In *Warmingtons' case* it was held that a retainer to get the client, who was involved in a variety of investments and transactions, out of trouble, was a general retainer—not an entire contract. In *Caldwell's case* the client instructed the solicitors to investigate a number of her complaints relating to the administration of a deceased estate. The Full Court held that "there was a general employment of" the solicitors "to do whatever was necessary in the investigation of several different matters on which she had instructed them, and that upon concluding any one of them . . . they were at liberty to claim their costs in respect of work done in that matter". Even though all the complaints related to one estate the court treated every type of complaint as a separate "matter". In *Plenty & Anor v. Northern Newspapers Pty. Ltd.* (1984) 112 L.S.J.S. 156 the clients instructed the solicitor to act for them in three separate civil actions. Legoe J. held that there were three different retainers, each an entire contract.

When a retainer is repudiated by the client the solicitor is entitled to recover costs for the work he has done *(Whitehead v. Lord (1852) 7 Exch. 691).* Likewise, if the client dies or becomes insane, the solicitor can charge for work done.

The application of the rule to legal practitioners has been further modified by allowing a solicitor to terminate a retainer which constitutes an entire contract for "good cause" and upon giving the client reasonable notice of his intention to do so. After having lawfully terminated he may recover reasonable costs for the work he has done.

The circumstances in which a solicitor has been held to have good cause to terminate his retainer have included non-payment of disbursements *(Caldwell v. Treloar, Robins v. Goldringham (1872) L.R. 13 Eq. 440)*, failure to provide funds for anticipated reasonable disbursements, conflict of interest *(In re a Solicitor, ex parte Clowes (1968) 3 N.S.W.R. 404)*, unreasonably hindering the solicitor from conducting the action which he is still instructed to prosecute *(Plenty's Case)* and insistence that the solicitor do something dishonourable (dictum in *Underwood & Son and Piper v. Lewis (1894) 2 Q.B. 306)*.

Generally the Courts have adopted a stricter approach to retainers in litigious matters than in non-contentious matters.

Order 7 rule 4 (1) of the Supreme Court Rules provides a procedure by which a solicitor may obtain an order that he has ceased to act in a civil matter. In *Plenty's Case* it was held that an order under this rule has no effect on a solicitor's entitlement to payment.

The recommendations which we make in this report should apply just as much to entire contracts with solicitors as to any other entire contract.

PRESENT STATE IN SOUTH AUSTRALIA

1. According to advice received from the Master Builders Association of South Australia Incorporated, all major building contracts in Australia are recorded in standard form contracts prepared by the M.B.A. or jointly produced by the relevant professional and industry associations. These contracts provide for progress payments and are drawn in such a way that the rule does not apply. The standard forms of sub-contract for large jobs contain a clause that in the event of the head contractor's insolvency his obligations to the sub-contractor pass to the proprietor. The M.B.A. has advised that the rule "is not of any great concern" to its members. However, there are a number of small builders who are not members of the M.B.A. and who enter into contracts which may be found to be entire. Also entire contracts are not confined to the building industry.

2. The leading authority in South Australia on entire contracts is the judgment of Napier J. (as he then was) delivering the judgment of the Full Court in *Ettridge v. Vermin Board of the District of Murat Bay (1928) S.A.S.R. 124*. In that case the plaintiff contracted to erect a vermin proof fence about fifty-four miles long for the defendant Board. By the contract the Board was to supply and deliver the necessary materials for the fence to the nearest railway siding along the route the fence was to take and to pay for the work at the rate of £37 per mile. The Board made default in its obligations as to supply and delivery of materials but the plaintiff nevertheless went ahead and erected eleven miles of the fence. At this point a dispute arose between the parties as to the line of the fence and upon the defendant insisting that the plaintiff obey its directions as to the fence line, the plaintiff refused to proceed beyond twelve miles of fencing and the defendant thereupon had the fence completed by another contractor with an altered specification.

The plaintiff claimed in the Local Court of Port Lincoln *(a)* damages for the defendant's breach of contract, and *(b)* the balance of the money due for the twelve miles of fencing done, either under the contract or upon a quantum meruit. The defendant denied liability based on the plaintiff's discontinuance of the work being a repudiation of the contract and counterclaimed for damages.

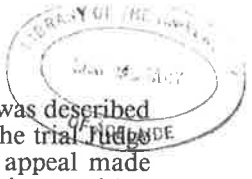
The Special Magistrate found that the defendant had made default as alleged and that the plaintiff had suffered £53.2.6 damage but held that the plaintiff's repudiation of the contract disentitled him to anything. The plaintiff appealed to the Full Court. The Full Court made the rule absolute for a new trial and Napier J. said at pages 130-131:—

> "It may assist the parties if we state shortly our view of the law applicable to this part of the case. (1) The contract is an entire contract, i.e. for the full length of the work—*Whittaker v. Dunn (1887) 3 T.L.R. 602.* The plaintiff is entitled to the 75 percent of the contract price if he has the certificate, and not otherwise. He is not entitled to anything further *on account of the price* if he has wrongfully refused to perform the contract on his part *(Sumpter v. Hedges (1898) 1 Q.B. 673).* (2) The plaintiff is, however, entitled to payment for any part of the work which is properly an extra to the contract, i.e. to the sum which has been specially agreed, then on a quantum meruit. (3) If a deviation was agreed to, or ordered, it is in any event an extra to the contract, and the plaintiff is entitled to be paid therefor, on a *quantum meruit*—the full fair value of the work—in default of any special agreement as to the price. (4) If the plaintiff accepted the order or request to deviate he was not entitled subsequently to repudiate the contract on that ground. His action in commencing any particular deviation is evidence of acceptance, but it is not conclusive if there was any protest at the time, even with respect to that deviation, and *a fortiori* with respect to any further proposed deviation. (5) If the plaintiff did not accept the order or request to deviate, the question will arise whether the action of the defendant in insisting upon the deviation amounted to a repudiation of the contract. The defendant had no right to insist upon any departure from the work specified in the contract; but the evidence, as it has been brought before this Court, is incomplete. The contract refers to the tender, which in turn refers to an advertisement, which is not exhibited. In default of any writing on the subject, the intention of the parties may be ascertainable in some other way, i.e. if there was any definite intention common to both. All that we can say is that the documents in evidence before us do not confer upon the defendant Board any right to insist upon any deviation from the agreed line, if any line was in fact agreed upon, and if the Board was insisting upon an interpretation of the contract which would enable it to withhold progress payments, if the plaintiff should refuse to follow a line which he was not obliged to follow, then *prima facie* the plaintiff was entitled to treat this attitude of the defendant as a repudiation of its contract. (6) The plaintiff has treated his attitude of the defendant as a repudiation. If he was justified in this, the contract has been properly rescinded by him, and he is entitled at his option to sue the defendant for damages or on a *quantum meruit (Appleby v. Myers (1876) L.R. 2 C.P. 651, at p.659).*"

Ultimately the plaintiff had judgment for £106.5.0 on his claim and a judgment in his favour on the counterclaim: see *(1930) S.A.S.R. 210 at 215).*

The question of entire contracts is discussed in detail in the High Court of Australia by Starke J. in *Phillips v. Ellinson Brothers Pty. Ltd. (1941) 65 C.L.R. 221 at 233-236.* His Honour's survey of the law on entire contracts agrees with the propositions set out earlier in this report.

3. There have been only five cases indexed under "Contracts" in the Law Society Judgment Scheme Reports between January 1974 and June 1984. They involved a consultancy agreement, an architect's retainer, a house building contract, and a house renovation contract. The fifth



(Odgers v. McMiken and McMiken (1974) 63 L.S.J.S. 194) was described by one Judge as "an entire contract to obtain carriage" but the trial Judge whose judgment was upheld and the other two Judges on appeal made no mention of it being entire and damages (which is inconsistent with a finding of entire contract) were awarded. Substantial performance was found in the building and renovation cases: *Barco Constructions Pty. Ltd. v. Armour Coatings (1979) 85 L.S.J.S. 363* and *Zeunert v. Loechel (1984) 112 L.S.J.S. 450.* The consultant received some payment due to the terms of the contract including provision for part payment: *Schrader-Scovill Co. Pty. Ltd. v. P.A. Consulting Services Pty. Ltd. (1981) 94 L.S.J.S. 260.* The architect received nothing—his plans were of no use: *Whitford v. Nemer (1983) 107 L.S.J.S. 286.* There have also been two cases involving solicitor's retainers. In *Caldwell v. Treloar (1982) 30 S.A.S.R. 202* the Full Court held that there was no entire contract. In *Plenty's Case* the question in issue was whether orders made by a Master under Order 7 rule 4 (1) that the solicitor has ceased to act for the Plentys in three contentious civil matters and an order that he had ceased to act in an appeal in an assault matter had been correctly made. Legoe J. on appeal found that the retainer in each matter was an entire contract, but the question of whether the solicitors were entitled to payment did not arise. The Full Court on 13th August, 1984 refused to grant leave to Mr. Plenty to appeal from the judgment of Legoe J.

CRITICISMS OF THE RULE

The problem was dealt with by Professor Ballantine in *Selected Readings on the Law of Contract (1931)* where he said:—

> "On the one hand to allow a party to stop performance when he pleases and sell his part performance at a value fixed by the jury countenances unfaithfulness and may be regarded in effect as imposing a new contract on the defendant. On the other hand to deny the party in default any recovery will often give the defendant far more than fair compensation for the non-completion of the contract and impose on the plaintiff an unjust forfeiture . . . To compel an arbitrary, mechanical, automatic forfeiture of all pay where the defendant has received and keeps the benefit of valuable services, especially where the contract is nearly completed, is crudely severe, like capital punishment for all felonies. There is no relation between the damage done to the defendant by the breach and the amount given to the employer by way of forfeiture. The longer the plaintiff serves, the more he is punished."

It must be decided whether the advantages of certainty, simplicity and encouragement to perform contractual obligations together with the theoretical integrity of the doctrine are outweighed by the need to avoid cases when the rule operates harshly and unfairly. There are no compelling social reasons for weighting the scales in favour of either party. In some cases the contractor will be an inexperienced, poor tradesman dealing with a large, wealthy company. In other cases, the recipient of partial performance will be a naive and poor person seeking the services of a wealthy contracting company.

This sometimes harsh operation of the common law is not confined to entire contracts. Some of the harshness has been mitigated by the development of the doctrine of frustration. Law reform bodies in several jurisdictions have recommended legislation empowering courts to review, set aside, rewrite or in other ways mitigate the harshness of unfair or unconscionable contracts. This Committee has recommended changes relating to the doctrine of frustration and the power of the Courts to review harsh contracts (Thirty-Seventh, Forty-Third and Seventy-First

Reports). As mentioned earlier, in England and South Australia, the operation of the rule has been modified in relation to entire contracts for the sale of goods and in relation to some periodic payments. In the United States of America changes which are discussed later have been developed at common law. The common problem behind all these attempts at mitigation and recommendations for change is that strict enforcement of the terms of the contract results in injustice.

OTHER COMMMON LAW JURISDICTIONS

The law in some other common law jurisdictions is as follows:—

1. *Australian States and Territories*:

The rule in *Cutter v. Powell* is applied with the same variations as in South Australia.

2. *New Zealand:*

The rule in *Cutter v. Powell* is applied in New Zealand in the same way as in South Australia. The enactment of the New Zealand Contractual Remedies Act, 1979 will alter the effect of the rule in any cases in which the contract has been cancelled pursuant to Section 7 of the Act. A contract can be cancelled under that section for various reasons including breach of contract and in cases where the other party repudiates the contract by making it clear that he does not intend to perform or completely perform his obligations. When a contract has been so cancelled, the Court has wide powers to make restitutionary orders including orders for payment for part performance. In deciding what orders to make, the Court is required by Section 9 (4) to have regard to:—

"*(a)* the terms of the contract; and

(b) the extent to which any party to the contract was or would have been able to perform it in whole or in part; and

(c) any expenditure incurred by a party in or for the purpose of the performance of the contract; and

(d) the value, in its opinion, of any work or services performed by a party in or for the purpose of the performance of the contract; and

(e) any benefit or advantage obtained by a party by reason of anything done by another party in or for the purpose of the performance of the contract; and

(f) such other matters as it thinks proper."

None of the reported decisions on this legislation has involved an entire contract and it is too early to know the extent (if any) to which the legislation will affect the rule in *Cutter v. Powell.*

However, the guidelines set down in Section 9 of the Act are of interest because they require the Court to take into account factors which English, New Zealand and South Australian Courts have not considered relevant to entire contracts, Unless the section is read down by future judicial pronouncement, it will be a move towards the approach advocated by Goff and Jones, the Law Commission of England and Wales in its report on Pecuniary Restitution for Breach of Contract, and the developing law of restitution in the United States of America.

3. *United States of America:*

The common law rule as to entire contracts also applies in the United States of America. However, at least in some States, the doctrine of substantial performance is given a very liberal interpretation. Also a new and wider remedy which is known as "Restitution" and which is based

on the notions of unjust enrichment, has been developing over the last fifty years and particularly since the 1937 Restatement of Restitution.

"Restitution" is not a form of action but a general description of a type of relief. The basis of restitution is that if one person has benefited at the expense of another and it would be unfair for him to retain that benefit for nothing, he must make restitution either specifically or by the payment of the money value of the benefit he has received. Dobbs: Remedies (1973) at page 225 said that the old common law forms of, for example a count for money had and received, for contracts implied at law, and the equitable devices of constructive trusts and equitable liens, obscure the general principle against unjust enrichment which underlies them. He says:—

> ". . . with some sad exceptions, Courts have often abandoned the technical and form construction of earlier days and have sought to make the law conform to this principle, without too much regard to whether the case arose in law or in equity or whether it fit the forms of action of implied assumpsit or not."

Because of the historical development of the law of contract, constructive contracts or trusts have been frequently implied as a basis for ordering payment.

Although the American Restatement of the Law of Contracts states that restitution can be available in cases of partial performance of an entire contract there is no provision in the American Uniform Commercial Code designed to implement the application of the remedy of restitution to Contracts and it appears that the American Courts have not yet achieved a consistent approach. However, the Restatement (Contracts 1981) indicates that a partial performer will normally be entitled to restitution if he can prove:—

(a) that he has performed part of his obligations under the contract;

(b) that the other party has thereby received some benefit;

(c) that the value of that benefit exceeds any losses suffered by the other party as a result of the failure to complete performance.

The comment under Article 371 states:—

> "If the benefit consists simply of a sum of money received by the party from whom restitution is sought, there is no difficulty in determining this amount. If the benefit consists of something else, however, such as services or property, its measurement in terms of money poses serious problems.
>
> Restitution in money is available in a wide variety of contexts, and the resolution of these problems varies greatly depending on the circumstances. If, for example, the party seeking restitution has himself committed a material breach . . . uncertainties as to the amount of the benefit may properly be resolved against him."

Thus there are no fixed rules about how the benefit is to be valued nor the date at which it is to be valued, althought the contract price is some evidence of the value of the benefit.

The Uniform Commercial Code also provides by Article 2.302 a model for uniform legislation empowering courts to refuse to enforce unconscionable contracts or to limit the application of unconscionable clauses so as to avoid an unconscionable result. Most if not all States have adopted the Article. There may be some entire contract disputes which could be brought within the ambit of this legislation.

4. *Canada:*

Likewise in Canada, the rule in *Cutter v. Powell* still applies. The English authorities, including *Dakin v. Lee* and the distinction between partial performance and complete (or substantial) but defective performance have been followed. However, since *Deglman v. Guaranty Trust Company (1954) 3 D.L.R. 725* (not an entire contract case) the Canadian common law seems to be graduallly absorbing the principle of restitution, no doubt influenced by developments in the United States and by the French law's acceptance of enrichissement sans cause or "the principle of equity which forbids enrichment through another's loss" *(Angas (1964) 42 Canadian Bar Review 529).* It is not yet clear whether this will gradually come to be used in Canada to modify or replace the rule in *Cutter v. Powell.*

5. *England:*

In England the Law Commission has recommended in its Report dated July 1983 entitled "Pecuniary Restitution on Breach of Contract" that the law should be changed. Its recommendations follow a working paper published in 1975 and consideration of resulting submissions and comments.

The Law Commission's recommendations:

The Commission recommends that the common law relating to the permissibility of entire contracts and to what is an entire contract should not be changed, but that legislation should be enacted changing the common law in relation to the consequences of partial performance of an entire contract. It recommends the enactment of a new remedy to be available where the contract is no longer on foot and there is no other remedy open to the partially performing party. Broadly speaking, its proposal is that the partial performer should be entitled, irrespective of whether or not he is in breach of contract, to payment for the value to the other party of his partial performance. The amount he is to be paid is to be subject to a maximum limit based on the proportion that his partial performance bears to his obligations under the contract. This limit is designed to protect the other party from opportunistic breaches of contract by a contractor who finds he can make a better profit or cut his losses by not completing performance and to give some validity to the price or other consideration the parties agreed upon.

The Law Commission has not recommended that the remedy should replace or in any way abrogate other rights to a remedy. The draft bill does not purport to exclude any other rights either common law or statutory. It gives a right to payment in circumstances in which, by virture of the rule in *Cutter v. Powell*, no other right exists. Thus a party to an entire contract would not lose any right he has at common law to a quantum meruit. In appropriate cases a partial performer could claim quantum meruit and an order under the proposed Act in the alternative.

The provisions of its draft bill are reproduced in Appendix A and can be summarised and explained as follows:—

(1) By Section 1 (1) a right is created to payment for benefits conferred by partial performance of an entire contract in the circumstances set out in that subsection and in subsection (5).

(2) That right is available only where the contract has been brought to an end in the circumstances set out in subclause *(c)* of subsection (1), and a benefit has been conferred on the person to be benefited under the contract—Section 1 (1).

(3) The right given by subsection (1) can be excluded by the parties under subsection (2) of Section 1

(4) It is not material to a party's right to claim payment whether the failure to complete performance is or is not a breach of contract (Section 1 (8)), but the amount he may claim may be affected (see subsection (7) of Section 1).

(5) The partial performer is to be entitled to "such sum as represents the value of what has been done under the contract to the person who has the benefit of it"—(Section 1 (3)), but such sum is not to exceed the proratable proportion of the contract payable on completion (Section 1 (4)).

(6) The notion of consideration is extended beyond a money consideration by subsection (6) of Section 1.

(7) The Act does not apply where *(a)* the contract has been frustrated, or *(b)* the other party has, in breach of the contract, prevented completion, or *(c)* the Apportionment Act of 1870 applies, or *(d)* the partial performer is "nevertheless entitled to the contract price or to demand performance by the other party" whether or not he is himself liable to pay damages. According to the commentary, this last exception is intended (inter alia) to exclude the operation of the Act where the doctrine of substantial performance applies. Other than where subsection (7) applies, the fact that the claimant is in breach of contract is immaterial to the operation of the Act.

(8) Where a partial performer is in breach of contract, the other party may deduct amounts due to him so that his entitlement is accordingly reduced or extinguished. In determining what amounts can be deducted in cases of breach, the terms of the contract limiting or excluding the liability are not given their full contractual force. Section 2 is in the following terms:—

"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 the 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 firstmentioned 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.

(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."

(9) The Act applies only to contracts made on or after the coming into effect of the Act.

(10) Section 3 provides that the Act applies to contracts with the Crown.

(11) By Section 3 (3) the Act does not apply to any charterparty except a time charterparty or charterparty by way of demise, to any contract (other than a charterparty) for the carriage of goods by sea or to any contract for the sale of goods. The Sale of Goods Act 1979 (the equivalent of the South Australian Act of the same name) already provides for partial performance of entire contracts for the sale of goods (see our Section 30 set out earlier in this report).

Some Possible Remedies:

1. Adopting the Law Commission's recommendations.

2. Enacting legislation based on the Law Commission's recommendations but with changes.

3. Enacting legislation based on the American law of restitution establishing in South Australia, either generally or in relation to entire contracts only, a remedy of restitution based on the doctrine of unjust enrichment.

4. Enacting legislation giving a partial performer a statutory entitlement to a quantum meruit for work done and a quantum valebat for goods or materials supplied.

Enacting legislation entitling partial performers to a quantum meruit or quantum valebat

Quantum meruit and quantum valebat are remedies available in contractual or quasi contractual situations by means of which a person who has done work or supplied goods can recover payment of the reasonable value of his work or goods. *Halsbury Vol. 9 4th Ed. para. 692 p. 473* says:—

"The terms 'quantum meruit' or 'quantum valebat' are used in three distinct senses at common law, namely as denoting: (1) a claim by one party to a contract, for example on breach of a contract by the other party, for reasonable remuneration for what he has done; (2) a mode of redress on a new contract which has replaced a previous one; (3) a reasonable price or remuneration which will be implied in a contract where no price or remuneration has been fixed for goods sold or work done."

The authors of works on contract and remedies deal with the historical development of quantum meruit, the various justifications and legal theories for the remedy, the parallel development of equitable doctrines,

and the circumstances in which a quantum meruit is available. We do not think it necessary to deal with these aspects in this report except to state some general rules as to when the remedy is available:—

(a) It is available only when the contract has been discharged.

(b) It is available only to a party who is *not* in breach of contract.

(c) As a general rule a party who has partly performed an entire contract is not entitled to a quantum meruit. The exceptions are when the other party has wrongfully repudiated the contract and when the other party has elected to accept the benefit of the part performance in circumstances which justify the implication of a new contract.

The suggested statutory entitlement to a quantum meruit or quantum valebat would supersede these common law rules in relation to entire contracts.

Rather surprisingly, the law on how a quantum meruit or quantum valebat is to be assessed is not yet settled. The textbook writers have little to say about it other than that the amount awarded is to be "reasonable recompense" or "reasonable value". This suggests that the value is to be assessed objectively. *Anson's Law of Contract 24th Ed. at p. 556* says:—

> "... the purpose of quantum meruit is to recompense him for the value of the work which he has done; i.e. to restore him to the position which he would have been in if the contract had never been made. In other words, damages are compensatory, and quantum meruit is restitutionary."

Chitty on Contract 25th Ed. para. 2048 says:—

> "Where the innocent party has made a bad bargain the damages for breach may well be less than the reasonable value of the work he has done. It is not clear whether he can secure a better measure by seeking a quantum meruit rather than damages or whether any claim for reasonable remuneration will be limited to a rateable proportion of the contract price. The weight of United States authority favours the view that the quantum meruit should not be limited in this way but the question does not appear to have been decided authoritatively in England, although the Privy Council has held that the measure of relief in a quantum meruit is the actual value of the work and that the profitability of the contract is irrelevant. Although it might be wrong to allow the innocent party to 'reverse' the contractual allocation of risks and difficult to value the benefit without regard to the contract price, it has also been argued that the contract price was agreed in the context of a contemplated complete performance and that this would not necessarily have been agreed for part performance. The presence of economies of scale may mean that it does not follow that a person who agrees to pave 10 miles of road for a specified price will agree to pave 10 yards at a prorated price. Furthermore, to allow a party in breach to reduce the award by reference to the contract price in effect awards him 'a portion of his anticipated profit on the contract despite the fact that he was the contract breaker'. Finally, the contract with claims for the recovery of money paid under contracts on the ground that there has been a total failure of consideration should be noted. In those cases the objection that recovery might reverse the contractual allocation of risks does not appear to have been taken."

Many of the reports of cases do not record the method used for assessing the quantum meruit or what factors the jury was directed to take into account. Those which do, disclose different methods and factors.

The leading case is *Lodder v. Slowey (1904) A.C. 442*. The plaintiff had entered into an entire contract with the defendant Council to do construction work. The Council wrongfully prevented the plaintiff from completing the work. There were disputes about "extras" and the unexpected collapse of a tunnel through no fault of the plaintiff. The plaintiff sued the Council in the Supreme Court of New Zealand for damages for breach of contract and alternatively for a quantum meruit. No evidence was given which would have enabled the trial judge to assess damages. The claim proceeded on the basis of quantum of quantum meruit. On appeal the Privy Council upheld the decision of the Full Court of New Zealand which had held:—

> "That the measure of damage in such an action is the actual value of the work, labour and materials, and it is immaterial whether the contractor, if he had been allowed to complete the contract, would have made a profit or loss."

An example of the sort of result that this approach can lead to is *Boomer v. Muir 24 P. 2d. 570* an American case in which $258,000 was awarded as the value of work done although only $20,000 was still due under the contract.

A different approach was taken by the High Court in *Steele v. Tardiani & Ors. (1946) 72 C.L.R. 386*. In that case the defendant employed the plaintiffs to cut wood to a specified size. The plaintiffs cut some of the wood to larger size. The defendant did not object and sold the larger wood. The plaintiffs sued for payment under their contract. The defendant pleaded the rule in *Cutter v. Powell*. The Court held that the defendant had accepted the plaintiff's performance and was obliged to pay a quantum meruit. The Full Court of the High Court agreed that the trial judge's method of assessing the quantum meruit was correct. Latham C.J. at page 394 said:—

> "The learned trial judge calculated the value of the work by making an estimate of the quantity of firewood which was in accordance with the contract and of the quantity which was not in accordance with the contract and made a deduction from the contract price in respect of the whole quantity by making an estimate of the work which would be necessary to make all the firewood accord with the contract. Such an estimate could not be precise . . ."

The Court did not attempt to work out the actual value of the work in an objective sense (i.e. the going rate). Nor did it take into account the real value to the plaintiff by, for example, taking into account the price for which he sold the oversize wood. It is submitted that it assessed the assumed value to the plaintiff by taking into account the contract price and deducting the cost of completing the contract according to the original specification.

In *Stinchcombe v. Thomas (1957) A.L.R. 1027* the Victorian Supreme Court said at page 1031:—

> "Where the assessment to be made is in respect of a type of employment for which there is no usual rate of payment, the Court may take into account the bargainings between the parties, not with a view to completing any special contract which they may have intended to make, but as evidence of the value which the parties set upon the services: *Scarisbrick v. Parkinson (1869) 20 L.T. 175; Way v. Latilla (1937) 3 A11 E.R. 759* (a decision of the House of Lords). 'In my view the principle to which I have referred is not necessarily restricted to cases where there is evidence of mutual bargaining as to the quantum of the remuneration. I think that where there is evidence of the value set upon the services by the party on whom

ultimately the burden of paying may fall, that may be looked at in determining what those services were worth, just as, in a case of this kind, payments already made by the deceased in his lifetime or benefits passing from the estate of the deceased after his death, and in fact all the surrounding circumstances, may also be taken into account in assessing the sum due to the plaintiff'."

This case indicates that subjective factors peculiar to the person receiving the benefit of the work is relevant.

Denning J. (as he then was) in *Powell v. Braun (1954) 1 W.L.R. 401* suggests a "reasonable man test".

Some cases which suggest that the price set in the contract is relevant are *Flett v. Deniliquin Publishing Co. Ltd. (1964-5) N.S.W.R. 383, Prickett v. Badger (1856) 1 C.B. (N.S.) 296: 140 E.R. 123, Mavor v. Pyne (1825) 3 Bing. 285 130 E.R. 522* and *British Bank for Foreign Trade Ltd. v. Novinex Ltd. (1949) 1 K.B. 623* although this last case indicates that the price is by no means conclusive and the Court in fact stood over the assessment of damages for further consideration.

Thus different results could be reached on the same facts depending on the method chosen to value the work. This is the same problem which was discussed in different contexts in the *U.K. Law Commisssion's Report*, in *Dobbs on Remedies (U.S.A.) at p. 27* and *Waddams in Law of Contract (Canada) at p. 448.*

We think that the weight of authority favours the view that a quantum meruit is to be valued objectively (i.e. according to "going rates", awards etc.) but the contract price is evidence relevant to the value to be allowed in cases where there is no external measure of value such as an award.

It is also not entirely clear at what date the value should be assessed, but in many cases this would be the date of the contract—as is put in statutory form in the Sale of Goods Act.

The legislation involved in this proposed remedy would be very simple and would give the Court a great degree of flexibility. However, the South Australian Courts would probably feel constrained to treat this proposed statutory entitlement to a quantum meruit as requiring them to order payment of the objective value of the part performance. Objective valuation is reasonable in cases where the paying party has broken the contract. We do not think it would be reasonable in all cases in which a partial performer seeks quantum meruit, particularly where the partial performer is in breach and the objective value is greater than either the contract price or the value to the innocent party. Such a remedy would be as harsh to some recipients of partial performance a the rule in *Cutter v. Powell* is to some partial performers. We consider that the problem would be better remedied by more specific legislation as has been suggested by the U.K. Law Commission.

Enacting a Remedy of Restitution based on the concept of unjust enrichment as developed in the United States of America:

Enactment of restitution as a remedy to be generally available is beyond the scope of the remit and would require more detailed study. As a remedy limited to entire contracts it has some immediate appeal. However, the general principle as stated in the 1937 American Restatement, namely, "A person who has been unjustly enriched at the expense of another is required to make restitution to the other" is so broad that it leaves many questions unanswered. The American courts have not achieved consistency and attempts to reduce the principle to more specific terms has resulted in much controversy. Further, it is not a complete

answer to all problems, as Dobbs points out in his textbook on *Remedies at page 27* where he says:—

> "Unexpected gains or losses by equally innocent parties . . . may not be capable of resolution by unjust enrichment principles. To the extent that the law of restitution is a law of readjustments, the principle of unjust enrichment furnishes a goal, but other principles must be sought out and established to reach solutions to many problems."

He also discusses at page 260 et seq. several different approaches taken by the Courts in measuring the benefit received, all of which would give different results on the same facts. Legislation providing a remedy for partial performance of entire contracts in terms of the American Restatement would be imprecise and would create more problems than it would solve.

The Law Commission's recommendations are influenced by the American concept of restitution, which is reflected in the draft Bill, although it is not couched in the controversial terminology of unjust enrichment. It would be preferable to use the English model rather than the American Restatement.

Adopting The Law Commission's Recommendations:

The Committee agrees with the Law Commission's approach of providing a statutory remedy by means of which the partial performer may obtain payment for the value of the benefit which he has conferred on the other party by his part performance. We agree that the remedy should be available where the partial performer is in breach of contract as well as when he is not in breach. However, in our view this right should be only a prima facie right to payment. The Court should have a wide discretion to grant or refuse an order for payment. In this regard we differ from the Law Commission's recommendation that the Court should have no discretion to refuse an order. We also disagree with some of the details of the English recommendations. Further, in our opinion, the draft English Bill is too complex.

Mr. Morgan takes the view that it is illogical to purport to preserve the concept of an entire contract and at the same time to give a *prima facie* right to payment.

He considers that the Court should have a discretion notwithstanding that a contract is an entire contract to order that compensation be paid to a part performer if it appears just that compensation should be paid. He envisages a quasi-equitable remedy. He would give a wide discretion, leaving it to the Court to work out rules. He thinks it a mistake to make the legislation complicated. The new remedy would not abrogate any existing remedy.

The majority of us set out below our recommendations for legislation.

RECOMMENDATIONS FOR SOUTH AUSTRALIA

1. *The rule in Cutter v. Powell* (supra) should be reformed by statute, which we suggest be entitled "The Entire Contracts Act".

2. Subject to the qualifications discussed below, the statute should provide that a person who has not completed performance of an entire contract be entitled to payment for the value of any benefit which he can prove he has conferred on the other party to the contract by his part performance.

3. This prima facie remedy should be available to the partial performer irrespective of whether or not he is in breach of contract. The proposed remedy is based on restitution for benefits conferred on the other party.

If that party has received a benefit then prima facie he ought to pay for it, subject to his right to damages for breach of contract.

4. The major qualification to that right should be an unfettered discretion in the Courts to refuse to order payment or to reduce the amount of the payment if it thinks just. We think this discretion is necessary to deter deliberate breaches of contract or oppressive use of the remedy and to enable the Courts to do justice in difficult cases. For example it might be unfair that the partial performer, C, be paid his full entitlement according to the proposed remedy, where he agreed to do a job for A, never intending to finish it and with the intention of delaying A so that A will thereby be prevented from entering into a venture for which the prior completion of the job to be done by C is necessary. Another situation might be where C agrees to do the job for A without intending to finish it but with the intention of preventing a competitor from getting the job and thus forcing him out of business. There may also be cases where A's right to damages from the partial performer is not adequate compensation.

5. The new remedy should supplement existing remedies. It should not abrogate any rights to a quantum meruit or quantum valebat or other remedy at common law or in equity nor to a remedy under other statute. In the event of litigation the partial performer should be entitled to plead the proposed new remedy in the alternative to any other available remedies.

6. The Law Commission recommended that the remedy should be available only when the contract is no longer on foot. As pointed out by *A. S. Burrows* in *(1984) 47 M.L.R. 76* this leaves it open to a recipient of partial performance to keep the contract open in order to avoid having to pay the other party his entitlement under the proposed Act. We *recommend* that there be no specific provision about the time at which the remedy becomes available. It should be left to the Court to decide at the time of the hearing in each case whether the plaintiff is entitled to payment.

7. We do not recommend any detailed provisions concerning the way in which the Court is to assess the value of the benefit conferred on the other party.

The facts will be so diverse that it would be impossible to lay down in legislation a set of rules which would give a fair result in every case, particularly as both parties who are in breach and "innocent parties" will be entitled to claim payment. We consider that the Courts should be permitted to apply the existing rules of common law and equity in the application of the new remedy. This view coincides with that of the U.K. Law Commission.

8. Also, we do not recommend the statutory imposition of a pro rata maximum limit on the amount to which the partial performer is entitled. The Law Commission, to whose views on this topic we have given careful consideration, came to the opposite conclusion (see clause 1 (4) of the Draft Bill annexed). However the Law Commission's recommendation is tied to an absolute right to payment and it considered that such a limit was necessary to avoid situations where the partial performer could be better off by abandoning the job than by finishing it. Our recommendation is for only a prima facie right to payment, the Court having power to refuse or reduce payment. This difference renders the imposition of a pro rata maximum limit unnecessary, although the Courts may well apply such a limit in particular cases.

9. We recommend that the proposed Act prohibit the contracting out of the rights conferred by it. But, if the parties have, by the contract,

provided for a method of determining the amount of payment in the event of incomplete or defective performance, such agreement should be given effect. This has the advantage of minimum interference with the parties' rights to set their own terms, and with the established law; for example, Section 30 of the Sale of Goods Act (supra).

10. The recipient of partial performance should be entitled to counterclaim damages or set off amounts due to him against any order for payment made under the proposed Act.

11. The recipient of partial performance may have suffered damage even though there is no breach of contract. At common law he can not claim damages because there is no breach. There may be no frustration and so he will have no remedy under the common law relating to frustration (or in the future under the proposed new Frustrated Contracts Act). However, he may have a new obligation to pay for the value of the part performance. Should any special provision be made with regard to his loss in this type of situation? The Law Commission has not dealt with this problem. If he is permitted to counterclaim damages the result would be that the contractor may have to bear losses which occurred through no fault of his own and without any breach of contract by him. If he can not counterclaim damages then the recipient of partial performance may bear losses for which he is not responsible. Neither choice would be fair in all circumstances. The plight of the parties in any case of partial performance of an entire contract without breach is very similar to the plight of parties to a frustrated contract. There are many overlapping cases; e.g. *Cutter v. Powell.* In its Seventy-First Report this Committee recommended that every party to a frustrated contract be entitled to restitution for his total or partial performance and that any loss of benefit be borne equally between the party entitled to restitution and the party required to make restitution.

We Recommend that the proposed Entire Contracts Act contain a provision entitling the recipient of partial performance to counterclaim a reasonable proportion of the value of any losses which he has incurred as a result of the failure to complete performance where there is no breach of contract by the plaintiff.

12. Section 2 of the draft English bill modifies the effect of exclusion and limitation of liability clauses in such a way that the partial performer who is in breach cannot use them to shield himself from deductions from the amount he might otherwise expect to obtain by action under the provisions of the Bill. We think that there may be some cases where limitation or exclusion of liability clauses are justified.

We *recommend* that when a counterclaim is made by the recipient of partial performance such clauses be given effect only where the Court finds that both parties are of equal bargaining power and have been separately advised, or that it is otherwise just to do so.

We recommend that the remedy under the proposed Act not be available when there is another statutory remedy available under—

(a) The Sale of Goods Act, 1895

(b) Part VII of the Law of Property Act, 1936

(c) Industrial Legislation

(d) the proposed Frustrated Contracts Act or

where the plaintiff already has a remedy at common law i.e. where

(e) the contract has been frustrated (pending enactment of a Frustrated Contracts Act)

(f) the other party has wrongfully prevented completion or rendered himself incapable of performing his part of the contract, thereby entitling the plaintiff to a quantum meruit

(g) the plaintiff is entitled to payment under the doctrine of substantial performance.

We recommend that charterparties and contracts for the carriage of goods by sea be excluded from the operation of the Act. These contracts were excluded from the English draft because the Law Commission thought it "important that the exclusion should be consistent with the exclusion in the Law Reform (Frustrated Contracts) Act, 1943 and that further anomalies should not be created" (page 29). Such contracts were excluded from the Frustrated Contracts Act because it was thought undesirable to interfere with the well-established rules developed by the shipping community and the courts in relation to such transactions. This conclusion has been criticised by Glanville Williams in *(1941) 37 Law Quarterly Review 373* and by Goff and Jones in *Law of Restitution 2nd Edition at page 581* who contend that the fact that something is well established is not a good enough reason for preserving it if it sometimes creates injustice. However, the British Columbia Frustrated Contracts Act, 1974 excludes such contracts and this Committee recommended the same exclusion in its Seventy-First Report on Frustrated Contracts. We make the above recommendation for the sake of consistency with the proposed South Australian Frustrated Contracts Act and the English, Canadian and other English based laws.

The proposed Act should bind the Crown.

We recommend that the Court be empowered to make such orders as it thinks fit, including orders other than for the payments of money, as is provided in the New Zealand Contractual Remedies Act 1979. Such other orders will probably be rare but there will be a few cases in which a fair and convenient result will be achieved by orders for, for example, the return of property or the removal of building materials.

QUESTIONS FOR CONSIDERATION:

1. Penalty Payments

An allied area of difficulty, particularly for building contractors, is the payment of penalties when performance is not completed on time. This is not confined to entire contracts. Delaying factors may be very diverse—from inclement weather to machinery break-downs, to failure of suppliers to deliver materials on time, to strikes and blackbans, to wrongful refusal of suppliers to deliver materials, or to malicious interference by third parties.

The Committee recommends that consideration be given to whether legislation should be enacted relieving contractors from penalty payments in proper circumstances. The circumstances might be where non-completion is due to:—

(a) a third party's wrongful acts or omissions; or

(b) to causes beyond his control other than those the risk for which is usually taken by the contractor; or

(c) alternatively to *(b)* to causes which are beyond the contractor's control and which were not reasonably foreseeable by him at the time of the making of the contract.

Any legislative change should be consistent with the proposed Entire Contracts Act as the circumstances giving rise to the application of the provisions of the Entire Contracts Act would be the same as those giving rise to some claims for relief from the payment of penalties.

In this type of case where relief from payment of penalties would be justified, both parties are likely to suffer loss. It may be found best that such losses be borne equally by the parties as is recommended in this Committee's Seventy-First Report relating to Frustration.

As this question is outside the scope of the rule in *Cutter v. Powell* it is not discussed in detail here but we recommend that it be formally remitted to us for consideration and report.

2. Rights of Recipient of Partial Performance against Third Parties

When a third party wrongfully prevents a contractor, C, from completing performance of a contract should the other party, A, have any right of action against the third party? The third party's conduct, rather than the contractor's, may be the real cause of A's losses but A has no contractual relationship with the third party and he may not be guilty of any tort against A.

Under the rule in *Cutter v. Powell* A can usually avoid loss by not paying C, even though C is not at fault. C is then likely to try to obtain redress against the third party. If changes are made requiring A to pay C for partial performance the old balance will be affected and it may be appropriate to give A a remedy against the third party. This is also outside the scope of this reference and we recommend that it be formally remitted to us for consideration and report.

SUMMARY:

1. We recommend that the rule in *Cutter v. Powell* relating to entire contracts be reformed.

2. This Committee therefore recommends the enacting of an Entire Contracts Act giving a person who failed to complete performance of an entire contract a prima facie right to payment for the value of any benefit he can prove he has conferred on the other party by his partial performance. The subsidiary matters are set out in pages 35 to 41 and numbered 1 to 12.

We have the honour to be:—

Howard Zelling
J. M. White
Christopher J. Legoe
M. F. Gray
P. R. Morgan
D. F. Wicks
A. L. C. Ligertwood
G. F. Hiskey

The Law Reform Committee of South Australia.

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.

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.

(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.

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.

(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;

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(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).

(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 contract.

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.

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.

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 the 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.

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.

(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.

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 or irrecoverable and recoverable are given a specialised meaning for the purpose of this clause.

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.

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)).

Short title, commencement 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.

Clause 4

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

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