Section 9 of the Contractual Remedies Act 1979: Opening Pandora's Box

Campbell T. Walker*

I: INTRODUCTION

In January 1978 the Contracts and Commercial Law Reform Committee ("the CCLRC") re-presented to the Minister of Justice its 1967 *Report on Misrepresentation and Breach of Contract*, incorporating a *Further Report* and annexing a draft Bill. That Bill eventually became the Contractual Remedies Act 1979 ("the Act").

One of the several major reforms dealt with by the Committee concerned the termination of contracts. At common law a contract could be brought to an end in two principal ways: rescission in equity, which operated *ab initio*; or discharge for breach, operating *de futuro*. The Committee proposed replacing these two modes of termination with a single new remedy of cancellation. Cancellation was modelled on the common law of discharge for breach. It operated *de futuro*, property rights being frozen at the time of cancellation.

As a corollary, a discretionary power was formulated, now contained in s 9 of the Act. It was originally conceived as a relief provision of limited scope, with three primary functions. First, to allow courts to make restitutionary orders where appropriate in a way similar to, but more flexible than, the former remedies of rescission and restitution. Second, to provide for immediate or interim relief. Third, to empower the grant of monetary compensation to defaulting applicants

* BA/LLB(Hons)

who at common law would receive nothing for their labour upon termination of the contract.

However, the courts have interpreted s 9 as a significantly broader remedial provision. They have held that s 9 empowers the court to award the equivalent of common law damages, whether calculated on a restitutionary, reliance, or expectation basis. Moreover, some judges have expressed their clear opinion that under the statutory jurisdiction they are no longer bound by the strict rules of damages law. If that view gains currency, rules such as mitigation, remoteness, causation, and the bad bargain principle will operate simply as guiding principles relevant at the court's discretion. Further, new concepts may be imported under s 9, such as the apportionment of liability for contributory fault in contract. The courts have opened a Pandora's box in the law of contract.

The courts' interpretation of s 9 is clearly contrary to the intention of the drafters of the Act, who were particularly concerned to ensure that the law of remedies was not affected beyond a limited series of reforms. Moreover, the broad view is not supportable as a matter of statutory interpretation. It is inconsistent with a purposive interpretation of the section. While the s 9 discretion is phrased in broad terms, there are strong indications within the Act that the statutory relief powers have a limited function. They are intended to relieve the consequences of cancellation only, and not to reform the law of damages.

The expansive attitude of the courts has wider ramifications. First, it affects the reform process in that courts are permitted to effect significant law reforms by an oblique route. Second, it has the potential to affect wider remedies law. It is likely that those changes made to remedies under s 9 will be carried through into the common law generally, there being no practical reason to limit the developments to contracts which have been cancelled. Third, there are implications for cost and certainty. A real danger exists that, in seeking to do individual justice in particular cases, courts will unwittingly raise the general cost of contracting to take account of the greater risk of litigation.

Only the smallest minority of contracts are formally litigated. Courts must take the greatest care that in their eagerness to do individual justice in each case, they do not cloud the clarity of principle and certainty of result which allow the majority of the community to regulate their own contractual affairs without reference to the courts.

II: THE ORIGIN AND DEVELOPMENT OF SECTION 9

In 1967 the CCLRC published its *Report on Misrepresentation and Breach of Contract*. For present purposes the Report had two significant recommendations: a party who is induced to enter into a contract by a misrepresentation, whether innocent or fraudulent, should be entitled to damages as if the misrepresentation were a term of the contract; and a new remedy of cancellation should operate

together with a power in the court to grant restitution. The original draft of the discretionary power was framed in limited terms:[1]

> Where a contract has been cancelled, the Court may on the application of either party make an order for restoration of property to the extent that restoration is just and practicable and upon such terms as the Court thinks just.

The power would not operate where a third party had acquired an interest in the property in good faith and for value; or where any party had so altered his or her position in relation to the property that it would be inequitable to order restoration.

The first Report contained little by way of exposition of the scope or purpose of this power. However, some things were certain. There was no intention to affect the remedies of specific performance, injunction, and declaration of right, which the Committee regarded as operating satisfactorily.[2] Further, the right to damages was to remain unaffected by either cancellation or an order for restoration of property.[3] On its face the power was essentially restitutionary, and subject to the normal equitable defences available to a restitutionary action.

Due to government inaction on these proposals the Committee presented a second Report in 1978, annexing a draft Bill incorporating the Committee's recommendations. The discretionary power was now contained in cl 9 of the draft Bill. A power to order the payment of money in "such sum as the Court thinks just" (the current s 9(2)(b)) was added,[4] and the clause was now drafted in the same terms as those which appear in the Act, with two exceptions. First, what is now s 9(2)(c) was absent. That provision gives the court the power to direct any party to the proceedings to do or refrain from doing "any act or thing as the Court thinks just". The Statutes Revision Committee added this provision at the instigation of the Auckland District Law Society and with the CCLRC's agreement.[5] Second, the words "[s]ubject to section 6 of this Act" in s 9(2)(b) were later added to make it clear that the power could not be used to award a monetary sum on a tortious basis greater than the contract measure provided for in s 6.[6]

The second Report articulated more clearly the envisaged role for s 9: to allow for a cancellation remedy, but at the same time give a discretionary restitutionary power as a flexible alternative to the respective *ab initio* and *de futuro* effects of rescission and discharge for breach:[7]

---

1 Contracts and Commercial Law Reform Committee, *Report on Misrepresentation and Breach of Contract* (1967) 47 n18.5(d).

2 Ibid, 43 n15.1.

3 Ibid, 47 n18.5(c)(iii); 48 n18.5(f).

4 Minutes of the 46th meeting of the CCLRC, Wellington, 4 February 1977.

5 Minutes of the 55th meeting of the CCLRC, Auckland, 23 February 1979.

6 Minutes of the 56th meeting of the CCLRC, Wellington, 27 April 1979.

7 Contracts and Commercial Law Reform Committee, *Further Report on Misrepresentation and Breach of Contract* (1978) 18-19, para (f).

> It seems to the Committee that a "cancellation" of the contract which allows an injured party to claim damages but which also enables the Court to work justice for the contract-breaker, is flexible enough to replace all the present forms of "rescission" for misrepresentation or breach.

The new power to direct the payment of money was not intended to be a substitute for the right to recover damages, preserved in cl 10. Rather it had two purposes:[8]

> (a) To enable the Court upon cancellation of a contract immediately to make orders relating to property that was the subject of the contract, so that in cases of doubt the rights and obligations of the parties in relation to such property may be speedily established.
>
> (b) To enable the Court to make an immediate order directing payment of money as between the parties to the contract, notwithstanding that a claim for damages may be in contemplation or pending. The purpose here is to enable a party to obtain immediate monetary relief where the Court is satisfied that that should be given to him. The party at fault, as well as the cancelling party, may apply for such relief, a situation which the Committee considers necessary to ensure that justice will be attained according to the nature of the case.

While major changes to contract law were planned, the CCLRC was particularly concerned to leave the law of damages intact:[9]

> The Committee has not attempted to codify or reform the law relating to the assessment of damages, and this clause is intended merely to preserve the existing law.

The Bill then went before the House and the Statutes Revision Committee. At that stage s 9(2)(c) was added, but neither the minutes of the Revision Committee nor the proceedings in the House suggest any major change in direction from the preparatory reports.[10]

III: THE COURTS' INTERPRETATION OF SECTION 9

1. Introduction

In 1981 Dawson and McLauchlan characterised s 9 as a principally restitutionary provision.[11] They recognised that types of relief available under the statutory jurisdiction would eliminate some heads of damage, particularly

8 Ibid, 22.

9 Ibid, 23.

10 B Brill 422 NZPD 77 (23 May 1979); Rt Hon J McLay 422 NZPD 625 (12 June 1979).

11 Dawson and McLauchlan, *The Contractual Remedies Act 1979* (1981).

restitutionary losses and reliance losses where expenditure was incurred by a party in or for the purpose of performance of the contract. This could lead to some overlap between s 9 and damages, in the same way that there was an overlap between *quantum meruit* and an action for damages at common law. Nevertheless they concluded:[12]

> Some heads of damage will not be recoverable under s 9. It is clear that not all reliance losses and certainly no expectation losses (i.e. damages for loss of bargain) can be claimed under s 9.

Dawson and McLauchlan's thesis was incorrect in one important respect. While s 9 clearly envisages the making of orders of a restitutionary nature, the section is not simply a statutory equivalent of the remedy of restitution. The CCLRC drafted the provision with the intention of allowing relief orders outside the traditional limits of the unjust enrichment action. In particular, the section enables courts to compensate defaulting applicants in circumstances where the defaulter's actions in performance of the contract have resulted in no benefit to the innocent party, or in a benefit the innocent party could not refuse.[13] Such relief would not be possible in the unjust enrichment action at common law.[14]

However, while the CCLRC and academic commentators saw the provision as strictly limited in its scope, in *Gallagher v Young*,[15] one of the initial cases on the Act, Greig J interpreted s 9 as giving courts a wide remedial jurisdiction to do justice between the parties:[16]

> Under that section it is no longer a question of applying the strict rules as to damages and it appears from the effect of s 10 that the just order may replace an inquiry into damages altogether. The Act makes it plain that the right to recover damages remains and there may be cases in which damages are sought in place of or in addition to the relief under s 9.

Referring to *Gallagher v Young*, Dawson and McLauchlan commented:[17]

> Section 9 was never intended to constitute a super remedy allowing the court a licence to do as it pleases so long only as it considers the criteria in section 9(4). It was intended to allow courts to unravel transactions in much the same way as they have always done. The granting of monetary relief under section 9 ought therefore to be confined to what may, for convenience, be termed the protection of the plaintiff's restitution interest. Claims for loss of bargain or consequential losses should be worked out in the ordinary way by applying the rules on damages.

Greig J's statement was made in the course of a judgment on a claim for

12 Ibid, 146-147.

13 Cf Sutton, "Commercial Notes: Contractual Remedies Act 1979" [1980] NZ Recent Law 19, 22.

14 *Sumpter v Hedges* [1898] 1 QB 673.

15 [1981] 1 NZLR 734.

16 Ibid, 740

17 Dawson and McLauchlan,"*Gallagher v Young*: The Contractual Remedies Act 1979" (1982) 10 NZULR 47, 55.

restitution of the purchase price under s 9. The danger was that it would be taken out of context. Despite the forcefulness of Dawson and McLauchlan's commentary, and much to their chagrin,[18] the High Court chose to adopt an expansive approach. In a series of cases culminating in *Newmans Tours Ltd v Ranier Investments Ltd,*[19] the courts laid the foundations for a bold new jurisdiction.[20] *Newmans* held that, provided the relevant contract has been cancelled and that it is "just and practicable to grant relief", the court has a broad remedial discretion extending to the award of the statutory equivalent of damages on an expectation basis. Moreover, under the statutory jurisdiction the court is not bound by the common law rules governing damages, such as contemplation, mitigation, or the bad bargain principle, although those might well be principles relevant to the exercise of the discretion.[21]

By the end of the first decade of the Act's operation, s 9 cases were beginning to come before the Court of Appeal. In an obiter comment in *Brown v Langwoods Photo Stores Ltd,*[22] Cooke P stated:[23]

> The Court has a wide jurisdiction under s 9 to make orders to ensure that cancellation does not have an ultimate inequitable effect. For present purposes it is enough to draw attention to this jurisdiction.

In itself this statement was unobjectionable even on the limited view of s 9. Indeed, in its emphasis on relieving the consequences of cancellation, it could be regarded as a classical exposition of the intended purpose of the provision. However, in *Thomson v Rankin,*[24] Cooke P endorsed the position taken by Fisher J in *Newmans*. The President thought that there was no difference in the case before him between the measure of common law damages and the sum it would have been appropriate to award under s 9, but that even if there were, he would have upheld the award under the statutory jurisdiction:[25]

> I agree with Fisher J in *Newmans* that in exercising the jurisdiction the Court may inter alia have regard to the various heads of compensation often classified as restitution, reliance losses, or expectation losses .... All in all the legislature has in s 9 endowed the Courts with a valuable instrument for achieving justice, of course on declared and rational principles, which need not be trammelled by common law restrictions.

---

18 McLauchlan, "The 'New' Law of Contract in New Zealand" [1992] NZ Recent Law Review 436, 458.

19 [1992] 2 NZLR 68.

20 *Young v Hunt* [1984] 2 NZLR 80; *Loe v Tylee*, High Court, Hamilton. 13 August 1984. A 58/84. Vautier J; *Burch v Willoughby Consultants Ltd* (1990) 3 NZELC 97,582; cf *Petkovich v Hunt*, High Court, Auckland. 24 August 1987. M 83/86, Sinclair J.

21 Cf *Young v Hunt,* ibid, 89, 94.

22 [1991] 1 NZLR 173.

23 Ibid, 177.

24 [1993] 1 NZLR 408.

25 Ibid, 410.

In 1993 *Newmans* itself came before the Court of Appeal. Apart from one matter not relevant for present purposes, Fisher J's judgment was affirmed. McKay J, delivering the Court's judgment, endorsed Cooke P's dicta in *Thomson v Rankin* and stated:[26]

> The Contractual Remedies Act by section 9 confers wide powers on the Court to grant discretionary relief. This includes power to direct any party to the proceedings to pay to the other "such sum as the Court thinks just". The Court is to have regard to various matters specified in the section, and to such other matters as it thinks fit. By section 10, the common law right to damages is preserved. The risk of duplication is avoided by a requirement to take account of any relief granted under section 9 when assessing any such damages. It follows that a plaintiff can at least recover the amount of the damages to which he is entitled at common law. He may obtain this amount under either or both sections. In some cases, however, he may recover more under the section than he would have recovered at common law.

2. The Rules Governing Common Law Damages

The expectation measure is the normal quantum in contract damages. Innocent parties are entitled in damages to the market value of the benefit of which they have been deprived through the breach.[27] However, it is open to innocent parties in certain circumstances to frame their suit on a different basis, and claim their out-of-pocket loss. Rather than seek to be put into the position they would have been in if the contract had been performed (the usual measure in contract), they may claim to be put in the position they would have been in had the contract never been made (the usual measure in tort).[28]

In particular, plaintiffs may take this course if it would be difficult to prove with certainty the benefit that would have accrued to them from the bargain. In *McRae v Commonwealth Disposals Commission,*[29] the defendant breached its contractual promise that a wrecked tanker it had sold to the McRaes was on a particular reef. Since there was no way of valuing the non-existent tanker, the McRaes were instead awarded as damages the money they had paid for the wreck (restitution) and the expenditure they incurred preparing to salvage it (reliance).

Plaintiffs cannot divide their claim between the two measures so as to claim loss of bargain as well as wasted expenditure.[30] Further, plaintiffs are restricted to the expectation measure if they have made a bad bargain;[31] the onus is on the defendant to show that the plaintiff is disqualified from claiming the reliance measure.[32]

---

26 Sub nom *Coxhead v Newmans Tours Ltd*, Court of Appeal. 7 April 1993 CA341/91 Richardson, Casey and McKay, JJ, p20.

27 *Walsh v Kerr* [1989] 1 NZLR 490.

28 See, for example, *Collins v Howard* [1949] 1 All ER 507.

29 (1950) 84 CLR 377.

30 *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292.

31 *C & P Haulage v Middleton* [1983] 1 WLR 1461.

32 *CCC Films (London) v Impact Quadrant Films* [1985] 1 QB 16; cf *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64.

Recent cases have begun to identify whether and how these common law principles will regulate statutory relief. At common law, when a s 9 claim is advanced on an expectation basis, proof that the claimant made a bad bargain will reduce or extinguish the damages otherwise available for reliance losses.[33] The position may be different when the claim is advanced on a restitutionary basis. At common law there is authority that when contractors sue in *quantum meruit* following rescission of a contract, they should recover the value of their materials and services irrespective of the contract price.[34] Dawson and McLauchlan suggest that the contract price should only govern if there has not been a total failure of consideration.[35]

As yet there is no definitive judicial pronouncement on the point. Fisher J considered it in *Newmans* without having to decide it, although he favoured the view that the contract price should represent the ceiling of a plaintiff's claim. Indeed, his Honour considered that the expectation measure should normally prevail where there is a contest between the expectation and restitution measures,[36] a view endorsed by the Court of Appeal.[37] Hopefully, this emphasis on the enforcement of bargains will not be overlooked when the courts apply *Newmans* in the future.

A further common law principle that has survived the Act is the principle that applicants must be consistent in classifying their claims to avoid double recovery.[38] A plaintiff cannot claim on an expectation and a reliance basis in the same action where both claims involve the same loss. Generally, if any one of the cancelling party's claims is advanced on an expectation basis, all other claims must be advanced in the same way.[39] Presumably, this would not prevent a combination of expectation, restitutionary, or reliance claims where such recovery would not constitute double compensation for the same loss.

Newmans is itself an example of a s 9 award calculated on a restitutionary and reliance basis. The case concerned the purchase of a travel business in two parts, one of which operated out of Seattle, and the other out of Honolulu. The plaintiff purchaser allowed a company associated with the Seattle business to run up $640,139 in debts to them, in the expectation that once it had acquired title, it would be able to treat these as simple intra-group debts. The plaintiff never in fact obtained title to the Seattle business, and the debtor company collapsed.

The plaintiff brought claims both for common law damages and s 9 relief. In its s 9 claim, it sought to separate the two halves of the transaction, retaining the Honolulu business but claiming restitution of expenses incurred in purchasing the Seattle business (a proportion of the total cost of goodwill and chattels, as well as

33 Supra at note 19, at 93.

34 *Lodder v Slowey* (1901) 20 NZLR 321 (CA); [1904] AC 442 (PC).

35 Supra at note 11, at 160-161.

36 Supra at note 19, at 92-94.

37 Supra at note 26, at p19.

38 Supra at note 30.

39 *Newmans Tours Ltd v Rainier Investments Ltd* , supra at note 19, at 92-93; *Coxhead v Newmans Tours Ltd,* supra at note 26, at p19.

associated professional expenses), together with compensation for the debts run up by the associated company. Since the plaintiff had failed to prove the value of the business or to make a separate claim for damages in respect of the debt, the Court had no practical option but to grant relief on a restitution and reliance basis. The plaintiff was awarded a proportion of the purchase price calculated by reference to turnover, the professional expenses incurred in purchasing the Seattle business and the $640,139 in debts, less a discount for the plaintiff's failure to mitigate its losses. The Court of Appeal affirmed Fisher J's approach, and indicated that this was a conservative measure in comparison to the expectation claim. Echoing Cooke P in *Thomson v Rankin*, the Court of Appeal stated that the same amounts as were awarded under s 9 would have been given in common law damages.[40] Therefore, in theory at least, there is only obiter dicta support for the proposition that a plaintiff may obtain more in damages under s 9 than at common law.

3. Election to Claim Under Section 9

Plaintiffs may choose to claim relief under the statute or common law damages.[41] Even if the plaintiff claims under s 9, the right to damages is the lower limit of the claimant's entitlement.[42] The Court of Appeal in *Newmans* elaborated on when claimants might receive more than their damages entitlement. There might be rare occasions when the court will award compensation under s 9 for monies spent in reliance on the contract being performed, in circumstances where such expenditure was not foreseeable by the other party at the time the contract was made, and would not be recoverable at common law.[43]

4. The New Status of Rules Governing Common Law Damages

A new flexibility in the common law rules of damages was foreshadowed in several cases,[44] but was first stated explicitly by Fisher J in *Newmans*:[45]

> [T]he more important point is that once extraneous reliance expenditure, expectation losses and other foundations for compensation are seen to be subject to the discretions conferred by s 9, the Court is freed from the rigidity of established common law rules relating to damages. Those rules govern such matters as accepted heads of damage, remoteness, mitigation and contributory negligence. The approach to those topics would not necessarily be identical under s 9 .... If the

40 Supra at note 26, at p23.

41 Supra at note 19, at 92.

42 Ibid, 89.

43 Supra at note 26, at p23.

44 *Gallagher v Young*, supra at note 15, at 740; *Burch v Willoughby Consultants Ltd*, supra at note 20, at 97, 590.

45 Supra at note 19, at 89.

> broad view of jurisdiction under s 9 prevails, it would free the Courts from those common law controls governing damages in equivalent cases.

On this view, these rules of the common law have a new status. Authorities on damages are no longer strictly binding. However, the principles involved will usually be applied because experience has proved that in the great majority of cases they produce the just and logical result.[46]

Fisher J's analysis was subsequently supported by two members of the Court of Appeal.[47] Cooke P thought that the Court "need not be trammelled by common law restrictions".[48] Anderson J was more populist in his approach:[49]

> Contractual relations are an everyday feature of human life. It is both understandable and desirable that the law relating to the consequences of breach of contract should not be trammelled by arcane or unduly technical rules which ordinary people cannot sensibly be expected to know in the conduct of their daily commerce. The assessment of recoverable loss by the application of common sense to particular facts, with consciousness of the need to achieve a just balance between the parties, is a method which appeals as just, workable and understandable to those in our community who although without legal training must conduct their ordinary commerce in a relevant legal context.

Cooke P's comments were in turn endorsed by the Court of Appeal in *Newmans*, particularly in respect of foreseeability.[50] As yet, no concrete suggestion has been offered as to the ways in which this new approach to formulating damages will work. Academic commentary has been hostile.[51]

5. Apportionment of Fault

At common law damages may be reduced to the extent that loss could have been avoided by taking reasonable steps in mitigation.[52] Under s 9 it is now likely that a plaintiff's claim for relief will also be reduced to the extent that the plaintiff's own negligence was a cause of the loss. That is, a doctrine of contributory fault will apply in contract irrespective of the Contributory Negligence Act 1947, at least when a contract has been validly cancelled.

The idea was first mooted by Fisher J,[53] and while the Court of Appeal did not comment on it on appeal, Cooke P endorsed the prospect of apportionment where

---

46 Ibid, 94.

47 *Thomson v Rankin*, supra at note 24.

48 Ibid, 411.

49 Ibid, 413.

50 Supra at note 26, at p23.

51 McLauchlan, supra at note 18, at 457.

52 *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689 per Viscount Haldane LC.

53 Supra at note 19, at 97.

the relative responsibility of the parties made it just.[54] Those dicta are consistent with his other judgments advocating a general principle of contributory fault in contract.[55]

To date there are no examples of s 9 awards taking account of contributory fault. A defendant in *Colonial Mutual Life Assurance Society Ltd v Questcorp Brokers Ltd*[56] missed his chance, pleading a defence of contributory fault generally but not referring to it in his claim for s 9 relief. It could be said that those cases which stress the totality of the circumstances are de facto examples of a similar principle.[57] More recently, in *Simms Jones Ltd v Petrochem Trading NZ Ltd*,[58] Tipping J considered the authorities on concurrent liability in tort and contract, and advocated that rather than introducing tort considerations into contract, the law would develop best by recasting rules on contributory fault in contract.[59] The point was not discussed in the appeal from that case, but it accords with the proposals of various law reform agencies.[60]

6. Assessment and Form of Relief

(a) Sequence of assessment

Section 10 of the Act provides: first, that the value of any relief granted under s 9 shall be taken into account in assessing damages, the right to recover damages not being precluded by the cancellation of the contract or the granting of relief; and second, that any sum ordered to be paid by a party under s 9(2) shall be set off against any damages payable by that party. Despite the apparent intention of the statute that discretionary relief should be assessed before calculating damages, the Court of Appeal in *Newmans* thought that it would often be preferable for courts to first assess what common law damages would be, and then consider whether justice requires some further relief.[61] Any orders for the return of property or awarding of monetary compensation would then need to be set off against subsequent damages awards.

54 Supra at note 24, at 410.

55 *Day v Mead* [1987] 2 NZLR 443 (CA); *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA).

56 High Court, Wellington. May 15 1992 CP 283/91 Master Williams QC.

57 See, for example, *Progeni Systems Ltd v Hampton Studios Ltd* , High Court, Christchurch. 11 August 1987 CP 105/86 Tipping J.

58 [1993] 3 NZLR 369.

59 See Gunasekara, "Judicial Reasoning by Analogy with Statutes: The Case of Contributory Negligence and the Law of Contract in New Zealand" [1993] Stat L R 84.

60 *Simms Jones Ltd v Petrochem Trading NZ Ltd* [1994] 2 NZLR 414n. New Zealand Law Commission Preliminary Paper 19, *Contribution in Civil Cases Report* (1992); Contracts and Commercial Law Reform Committee, *Apportionment of Civil Liability* (1983); cf English Law Commission Working Paper No 114, *Contributory Negligence as a Defence in Contract* (1989).

61 Supra at note 26.

(b) Global assessment

The current approach is that relief should be determined in a global exercise, taking into account all the performances, breaches, gains, and losses of all the parties to the contract.[62] An example of such a global assessment is *Gallagher v Young*.[63] Greig J declined to make a separate award of damages for anxiety and distress, but took account of it, as well as other expenditure incurred and disadvantage suffered by the plaintiffs, in awarding the plaintiffs return of the purchase price plus interest.

Progeni Systems Ltd v Hampton Studios Ltd[64] demonstrates the principle in its broadest form. The plaintiff company had contracted to develop a computer programme suited to the defendant's specific needs, having represented that there was no existing programme which could be adapted to the task. In fact there was, as the defendant discovered after having made an initial payment of $8,641 to the plaintiff, and after the plaintiff had done a substantial amount of work on the system. The defendant cancelled the contract. At that time, a further $16,098 was due. The plaintiff sued for that sum in debt, and the defendant counterclaimed for the return of its initial payment, relying on s 9.

Tipping J held that the defendant had properly cancelled the contract. In considering s 9(4) he took into account that the plaintiff, Progeni, would have been able to fulfil its contract, although it had induced the contract through a misrepresentation as to an essential matter. On the other hand, Progeni was taking undue time to perform its contract irrespective of the breach, and had not given the sort of service a reasonable client would expect. Counterbalancing this, the plaintiff had incurred costs in respect of work done and had introduced the defendant, Hampton, to the systems involved, although in their present state the systems were not of substantial value, and Hampton had received no clear benefit in money terms. Further, even though Hampton was justified in cancelling, if it had affirmed the contract it would have acquired a system of substantial value.

Tipping J took into account that the misrepresentation, although entitling the defendant to cancel the contract, had been made innocently and without negligence. Having assessed the benefits and detriments in a global manner, he decided to leave things where they stood, and declined to make any order, though he awarded costs to the defendant.

This global approach raises the issue whether cross-claims should be dealt with as independent causes of action, or as factors to be taken account of in determining s 9 relief. *Pendergast v Chapman*[65] and *Brown v Langwoods Photo Stores Ltd*[66] held that despite s 8(3)(a), a party is obliged to perform those obligations which

62 Supra at note 19, at 92.
63 Supra at note 15.
64 Supra at note 57.
65 [1988] 2 NZLR 177.
66 Supra at note 22.

have accrued at cancellation. In *Newmans*, Fisher J assumed that counterclaims should be dealt with as independent causes of action, rather than factors to be taken into account in the s 9 assessment, but thought that the result would differ little in either event.

There is a danger in dealing with cross-claims under the statutory jurisdiction rather than as separate actions for damages. In *Young v Hunt*,[67] the plaintiff purchaser of a business had wrongfully repudiated the contract in the mistaken belief that the defendant's misrepresentation of the turnover of the business was sufficiently substantial to justify cancellation. Under s 9, Holland J vested the assets of the business in the defendant, but made a monetary award of $5,000 to the plaintiff, partly as compensation for the misrepresentation.

His Honour believed that the plaintiff had no action for damages because by repudiating the contract he had forfeited any right he might have had to damages for misrepresentation.[68] While that is undoubtedly the position at common law, it is arguable that the effect of s 6, which treats a misrepresentation as the equivalent of a breach of a term for the purposes of damages, is that repudiating parties may maintain actions for damages for misrepresentation in the same way as they may sue for breach of contract.

In any event it is preferable that such matters be dealt with as separate causes of action, lest a tendency develop to compensate parties too readily under s 9 for matters which do not amount to causes of action. In *Progeni Systems Ltd v Hampton Studios Ltd*,[69] Tipping J took into account that the plaintiff had been tardy in performing its contract, even though there was no suggestion it was in breach of contract. Certainly there was no pleading to that effect. While s 9 clearly allows compensation for some matters not constituting causes of action, that power should be exercised in a circumscribed manner consistent with the purpose of the section.

The second danger of taking cross-claims into account in determining s 9 relief is that courts will fail to make accurate calculations of the damages suffered as a result. In *Young v Hunt*, the figure of $5,000 to compensate for the misrepresentation of turnover was an arbitrary one because there was no evidence as to the true value of the business. Moreover, in calculating the figure, Holland J took into account that the plaintiff had failed to check the books before entering into the contract and was accordingly partly at fault. That should have simply been a factor going to whether the plaintiff was induced to enter into the contract by a misrepresentation rather than to the amount of compensation.

There is a realistic concern that the s 9 jurisdiction will become a licence for courts to take account of a range of matters which have not been put in issue by the pleadings, not subjected to proper proof, and which at common law would have been considered irrelevant to the action at bar.

---

67 Supra at note 20.

68 Ibid, 89.

69 Supra at note 57.

(c) Form of relief

Once the court has determined the quantum of relief, it has a wide discretion as to the form that relief should take to give effect to the claimant's entitlement.[70] So if a particular order, such as restitution of specific property, is barred by s 9(5) or (6), the judge or arbitrator might instead award a monetary sum under s 9(2)(b). Fisher J took pains in his judgment in *Newmans* to stress the breadth of discretion as to remedy given by s 9, subject only to the traditional limits to restitutionary remedies provided for in s 9(5) and (6). Further, he suggested an addition to the stated powers in s 9(2), namely the granting of a declaration as to the incidence and value of relief followed by an adjournment to allow the parties to create their own remedial solution.[71] This bid for a new remedial jurisdiction has been criticised by Hammond J in a recent case on s 9,[72] but is likely to be sustained, given general High Court and Court of Appeal support for the ad brush approach to statutory relief.

IV: THE INTENDED FUNCTION OF SECTION 9

1. The Reordering of Property

The statutory jurisdiction was intended to solve two difficulties associated with cancellation. First, given that property rights were frozen upon cancellation under s 8(3), courts would need to have some mechanism to reorder the incidence of property where appropriate. *Gallagher v Young*[73] provides a simple example. The purchasers of a house cancelled the contract after discovering a number of outstanding requisitions against the property. Rather than claiming damages on an expectation basis, they sought return of the purchase price ($44,000) and $5,000 general damages. The effect of freezing property on cancellation was that title remained vested in the purchasers. Under s 9, Greig J revested title to the property in the vendors and awarded the purchasers the $44,000 plus interest at 11 percent, though he declined to award general damages.

Sturley v Manning[74] provides a different example, showing why the flexibility provided by s 9 in reordering property rights can be an efficient alternative to the former cumbersome rules governing termination. The case concerned the sale and purchase of a business where the vendor had made a misrepresentation as to

70 Supra at note 19, at 88, 96.
71 Ibid, 96.
72 *Crump v Wala* [1994] 2 NZLR 331.
73 Supra at note 15.
74 High Court, Auckland. 19 December 1984 A208/81 Prichard J.

turnover, causing the purchasers justifiably to cancel the contract. However, before coming to court the purchasers had disposed of $25,000 of plant and stock they had received under the contract. Nevertheless, they sought full restitution under s 9. Prichard J apparently accepted a submission of defendant's counsel that, by analogy with the common law, restitution should not be granted where, as here, substantial restitution was no longer possible.[75] Instead, he ordered that the plaintiffs retain title to the plant and stock, but that the defendant retain the $25,000 payment already made by the plaintiffs in respect of it. Further, the plaintiffs were released from their obligation to pay the remaining $32,000 owing under the contract. Prichard J's emphasis on the common law rule can be contrasted with the view that courts should not read into s 9 the limits traditionally associated with the restitutionary remedy.[76]

The wider purpose of s 9 was to overcome restrictive common law rules operating upon termination of a contract, which were perceived to be inflexible. In *Gallagher*, s 9 allowed the Court to grant rescission and restitution of money had and received, whereas at common law the purchasers would have been limited to their remedy in damages, since there was no total failure of consideration.[77] In *Newmans* the Court was able to dissect a complex transaction in a way not possible at common law. The plaintiff was allowed to retain part of the purchase price and seek restitution of the remainder, even though both related to specific items of property intended to pass under the one contract. Such a solution would not be available at common law, either because it is not possible to apportion the purchase price, or because there has not been a total failure of consideration.[78]

There is a further difficulty posed by the total failure of consideration principle which can be overcome by s 9. One of the advantages of the replacement of the old *quantum meruit* action with the statutory jurisdiction is that, contrary to the decision in *Rowland v Divall,*[79] courts now have the ability to discount a buyer's claim to take account of the benefit already obtained from using goods which have been returned on a total failure of consideration.

2. Defaulting Applicants

The CCLRC saw compensating defaulting applicants as one of the primary objectives of s 9. This is reflected in s 9(4) which details factors to be taken into account in determining whether and how to exercise the relief jurisdiction.[80] Sutton pointed out that for an innocent party the compensation provisions of s 9

75 *Spence v Crawford* [1939] 3 All ER 271.

76 Supra at note 19, at 88.

77 *Hunt v Silk* (1804) 5 East 449; 102 ER 1142.

78 Ibid; see also Dawson & McLauchlan, supra at note 11, 155-156.

79 [1923] 2 KB 500.

80 Supra at note 7, at 22; and see Coote, "Remedy and Relief Under the Contractual Remedies Act 1979 (NZ)" (1993) 6 JCL 141, 147.

seldom will be important since the right to damages is preserved in any event.[81] Some decisions prior to the Act suggested defaulting applicants might obtain relief in certain types of cases,[82] but now this form of relief has been generalised and given a statutory base.

Sumpter v Hedges[83] illustrates the traditional common law position. A builder contracted to erect certain buildings on the defendant's land. After completing a portion of the work, the builder was forced by insolvency to abandon the contract. The defendant completed the building using materials the builder had left behind. The builder could not claim the contract price because the work had not been completed. The Court held that the builder could also not claim in *quantum meruit* because there was nothing from which a new promise to pay could be implied. The defendant had no option but to take the benefit of the work done, and accordingly could not be made to pay for that benefit.

It appears that the CCLRC had little sympathy for restricting claims against an innocent party to those based on unjust enrichment,[84] hence the references in s 9(4)(c) to "expenditure incurred ... in or for the purpose of performance of the contract", and in s 9(4)(d) to "the value ... of any or services performed by a party in or for the purpose of the performance of the contract". However, in fairness to the innocent party, it was decided that the courts should also have regard to the terms of the contract itself under s 9(4)(a). Compensation would not be automatic.

Given that in most other respects Fisher J has given s 9 a scope far broader than the reformers envisaged, it is ironic that in *Newmans* he attempted to emasculate one of the few intended reforms. He stated that while the interests of both parties must be considered, the interests of the innocent party will be treated more leniently than those of the defaulting party. In concrete terms, this means that a defaulting party should recover only where the innocent party has been unjustly enriched.[85] That view cannot be justified as a matter of interpretation,[86] and its conservativeness sits awkwardly with the innovative zeal of the *Newmans* line of cases.

3. Interim Relief

A corollary to freezing property rights on cancellation is that a party may require interim relief from the court, either to protect a future position, or to ameliorate the oppressive effects cancellation has had on that party. It may also be appropriate to grant additional relief at a later stage (such as after a full hearing).

81 Sutton, supra at note 13, at 22-23.

82 *Codot Developments Ltd v Potter* noted in [1977] NZ Recent Law 64; *Weyde v Homedale Building Co Ltd* noted in [1978] NZ Recent Law 99.

83 Supra at note 14.

84 Minutes of the 50th meeting of the CCLRC, Wellington, 9 September 1977.

85 Supra at note 19, at 95.

86 See Coote, supra at note 80, at 152.

The CCLRC intended s 9 to afford such a power where necessary.[87] In contrast, at common law every remedy has to be claimed in the one action.[88] The power to give immediate relief may go part of the way to answering concerns expressed by some commentators that vendors who cancel contracts for sale and purchase after transferring title to the purchaser have no caveatable interest in the property subject to the contract.[89] The mitigating effect of immediate relief was intended by the CCLRC itself.[90]

However, this aspect of the statutory jurisdiction poses one difficulty for claimants. In *Wairau Natural Stone (East Coast Ltd) v Hales*,[91] the plaintiff purchasers had purportedly cancelled a contract for sale and purchase of a business because of alleged misrepresentations by the defendants as to turnover. The plaintiffs sought interim relief pursuant to s 9 by way of repayment of the amount of the purchase price paid. Eichelbaum J declined the application because it is a precondition to the relief jurisdiction that the contract has been validly cancelled. Since the defendants were disputing that claim, there was no basis on which the s 9 jurisdiction could be invoked in the interim.

On its facts the decision is correct, but should not be taken so far as to negate the courts' power to grant interim relief altogether. As in any interlocutory application, matters cannot be proved with absolute precision, and courts must be prepared to balance interests as they regularly do with interim injunctions.

V: CRITICISM OF THE BROAD VIEW OF SECTION 9

1. The Original Purpose of Section 9

The only major change made after the Bill left the CCLRC was the addition of the power in s 9(2)(c) to direct a party to "do or refrain from doing in relation to any other party any act". It appears from the submissions of the Auckland District Law Society, which suggested the amendment, that it was intended to give the courts greater flexibility in achieving the goals outlined in the two CCLRC reports. Certainly there is nothing in the papers of the Statutes Revision Committee of the time, or in the parliamentary debates on the Bill, to suggest that a radical new purpose had been given to s 9.

This leaves the difficulty that the current jurisprudence on s 9 bears little

87 Supra at note 7, at 22.

88 *Dillon v Macdonald* (1902) 21 NZLR 375.

89 See, for example, Burrows, "The Contractual Remedies Act 1979" in New Zealand Law Commission, *Contract Statutes Review*, NZLC R25 (1993) 61, 87 para 1.92.

90 Supra at note 7, at 22.

91 High Court, Napier. 16 February 1987 CP 109/86 Eichelbaum J.

relation to the section's original purpose. Those cases which say the equivalent of damages may be awarded under the statutory jurisdiction do not sit easily with the CCLRC's avowed intention not to codify or reform the law relating to the assessment of damages.[92] Section 10 was included with the express purpose of putting it beyond doubt that the right to damages was unaffected. Concern to ensure that remedies were saved by the Act is a consistent theme in the proceedings of the Committee.[93]

Prior to *Newmans*, Burrows pointed out this incongruity.[94] Fisher J was aware of the difficulty, but felt able to overlook it. First, he suggested that Parliament took a significantly different view of the Act.[95] It is submitted that *Hansard* demonstrates that references to the purpose and effect of s 9 were brief and largely equivocal.[96] There is no material which suggests a substantial alteration to the purpose of s 9 while the Bill was before the House.

Fisher J's principal argument, however, was that there is no need to look to extrinsic materials because the legislation is clear in its intent. The simple question, therefore, is whether the courts' broad view of s 9 is sustainable as a matter of statutory interpretation.

2. Statutory Interpretation of Section 9

(a) The intentions of the reformers

Fisher J's unwillingness to consider the intentions of the reformers as expressed in the two reports is inconsistent with other judgments on the Contractual Remedies Act in the High Court and the Court of Appeal. Smellie J had regard to the CCLRC Reports in determining whether s 9 excluded the action in *quantum meruit*.[97] More significantly, in *Brown v Langwoods Photo Stores Ltd* the Court of Appeal determined its interpretation of s 8(3) and then had regard to the CCLRC Reports to confirm its view, stating:[98]

92 Supra at note 7, at 23.

93 See, for example, Minutes of the 50th meeting of the CCLRC, supra at note 84; see also the views expressed by one former member of the Committee, Professor Coote, in "The Contracts and Commercial Law Reform Committee and the Contract Statutes" (1988) 13 NZULR 160; "Debts Unpaid at Cancellation Under the Contractual Remedies Act 1979" (1991) 14 NZULR 195; "Remedy and Relief Under the Contractual Remedies Act 1979 (NZ)", supra at note 80.

94 Burrows, *Update on Contract 1991* (New Zealand Law Society Seminar, April/May 1991) 26-27.

95 Supra at note 19, at 89-90.

96 Supra at note 10.

97 *Brown & Doherty Ltd v Whangarei County Council* [1990] 2 NZLR 63.

98 Supra at note 22, at 176 per Cooke P.

> Although [the Reports] could not of course override the Act, which must govern in the end, if they did suggest a different intention it would be necessary to reconsider whether the Act is really clear on the point.

Given the primary involvement of the CCLRC in the reforms, it would be unrealistic to ignore its reports. In any event, it is difficult to maintain that the intention of the section is clear when other High Court judges have been able to reach contrary views as a matter of construction.[99]

(b) The purposive approach

Section 5(j) of the Acts Interpretation Act 1924 enjoins judges to give legislation "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit". Further, in interpreting an Act, courts should consider the mischief or defect which the Act was intended to cure, and then construe the Act so as to suppress the mischief, and advance the remedy.[100]

The courts' current approach to s 9 cannot be sustained on this purposive approach to interpretation. Several judges have referred to the long title of the Act to divine its purpose: "to reform the law relating to remedies for misrepresentation and breach of contract". In *Newmans*, Fisher J reasoned that to perpetuate the traditional limits on remedies was inconsistent with the reforming purpose of the Act evident in its long title.[101] But the long title is not determinative, since on any view the Act reformed the law relating to remedies for misrepresentation and breach of contract. The real question is what were the content and limits of that reform.

The purpose of the Act can be found in the CCLRC Reports and in the proceedings in Parliament.[102] The Act was intended to give a remedy in damages for misrepresentation, and to provide a new flexible remedy of cancellation in place of the various common law methods of terminating contracts. It was not intended to reform the law of damages. Section 10 was expressly included to make that clear, a fact which Fisher J recognised as arguably inconsistent with the view he took of s 9, but considered outweighed by other factors.[103] Coote has pointed out that it would be anomalous for the legislation to give a discretion to grant damages at large under s 9(2)(b) but be at pains in ss 8(4), 9(3), and 10(1) to preserve damages at common law.[104] If it had been intended to give a discretion to

99 *Crump v Wala* , supra at note 72; *Petkovich v Hunt* , supra at note 20.

100 *Heydon's Case* (1584) 3 Co Rep 7a; 76 ER 637.

101 Supra at note 19, at 90.

102 In New Zealand, courts may refer to *Hansard* as an aid to interpretation: *Television New Zealand Ltd v Prebble* [1993] 3 NZLR 513 (CA).

103 Supra at note 19, at 90.

104 Coote, supra at note 80, at 148.

award damages in excess of those obtainable at common law, it would have been very easy for the Act to provide for this. Instead, s 10(2) clearly envisages that any sums awarded under s 9(2)(b) will be accounted for *in reduction of*, not in addition to, damages. The courts' broad view is not consistent with an intention to reform damages law. There simply was no such intention.

(c) An internal construction

Even if the purposes of s 9, as expressed in the CCLRC Reports and the proceedings of the House, are to be disregarded, the question remains whether Fisher J's interpretation is defensible on an internal construction of the Act.[105]

Fisher J began by recognising that there is an argument for the narrow view that ss 9 and 10 are intended to be complementary and mutually exclusive, s 9 dealing with restitution and s 10 with damages. However, he saw a range of factors militating against such an approach.

(i) The long title of the Act

Fisher J reasoned that an interpretation of the Act which limited s 9 to traditional restitutionary relief would be inconsistent with the purpose of the Act as expressed in the long title: "to reform the law relating to remedies for misrepresentation and breach of contract". He concluded that a change much broader in scope must have been intended.[106]

Fisher J proceeded on the incorrect assumption that the only alternative interpretation of s 9 to the one he adopted was that s 9 is equivalent to the remedy of restitution at common law. One of the important functions envisaged for s 9 was empowering courts to grant restitutionary relief so that property relationships could be made certain upon cancellation. However, this power is not simply the statutory equivalent of restitution. The factors listed in s 9(4) were specifically drafted to allow courts to grant relief to defaulting applicants. No limitation was made that the relief had to be restitutionary, and as s 9(4)(d) and (e) envisage, relief could be granted irrespective of benefit to the innocent party.[107] Fisher J himself realised that the factors listed in s 9(4) go beyond mere restitutionary criteria.[108]

(ii) The language of section 9

Fisher J's next argument to support the statutory damages approach is that s 9 is phrased in broad discretionary language. The section gives the courts the power to

105 Supra at note 19, at 90-98.
106 Ibid, 90.
107 Coote, supra at note 80, at 152.
108 Supra at note 19, at 90.

award "such sum as the Court thinks just", and to direct any party to do or refrain from doing "any act or thing as the Court thinks just". It may impose terms and conditions on an order "as the Court thinks fit". Under s 9(4) the courts may have regard to "such other matters as it thinks proper". The only express limitations are that the courts must respect the preservation of an absolute right to damages (ss 8(4), 9(3), and 10(1)), certain rights of third parties (s 9(5)), and certain alterations in position with respect to specific property (s 9(6)).[109]

There is no doubt that here Fisher J is on his strongest ground. As Burrows pointed out, while the CCLRC may have intended a limited purpose for the discretion, the power to direct the payment of money was expressed in the widest possible terms and did not exclude the possibility of compensation. Moreover, there is no reference in the Act to the immediacy of relief which seemed to partly underlie the Committee's thinking.[110]

Those arguments must be given due regard. Against them it can be said that there are clear indications in the statute that the discretionary powers were to have a limited function. First, it is submitted that Fisher J was wrong to pass over the preservation of the right to damages so quickly. It seems unlikely that the legislators would be so careful to preserve absolutely the right to damages, but then give the courts an unbounded power to award the equivalent of damages without reference to the rules governing their assessment. Further, if a parallel jurisdiction had been intended, one would have expected a more satisfactory exposition of the interrelationship of the two jurisdictions within the statute itself. Instead, the clear intention of ss 9 and 10 is that damages are to remain the primary remedy and are to take account of any relief granted. Moreover, the specific defences provided for in s 9(5) and (6) are the traditional defences to a restitutionary action. If the granting of relief amounting to expectation damages had been envisaged, one might have expected that the traditional defences to such a claim, such as mitigation, would also have attracted specific mention.

The most compelling point is that while the section may express the powers granted in broad terms, the relevant considerations it lists bear no relation to a power under which expectation damages may be awarded. The difficulty with which the criteria of s 9(4) can be applied to damages claims, and especially those made on an expectation basis, is frequently demonstrated in the cases. An excellent example is *Gallagher v Young*,[111] where Greig J considered every factor but found that few were relevant except for "the terms of the contract" under s 9(4)(a). On any view, the terms of the contract will always be relevant to the quantum and form of relief or remedy.

(iii) Interests represented in section 9(4)

The next step in Fisher J's reasoning was that since s 9(4) clearly refers to what

109 Ibid.

110 Burrows, supra at note 89, at 86 para 1.87.

111 Supra at note 15.

he calls "reliance performance losses" (losses incurred in performing the contract), it should also be taken to include "extraneous reliance losses" (losses incurred in reliance on the existence of a contract).[112] His Honour evades the point that there is no clear reference to extraneous reliance losses in s 9(4) by describing it as an arbitrary distinction inappropriate to a modern, reforming statute. He concluded that the factors in s 9(4) should be taken as a non-exhaustive list of examples. In effect Fisher J has engrafted onto the statute his own views of what the section should achieve, founded in his assumption that the section is remedial in nature. He consequently expends much energy explaining the absence of criteria one would expect to be present if his assumption were correct.

Unless one accepts the explanation that the drafters randomly selected possible factors to be taken into account, their failure to refer to extraneous reliance interests or expectation interests in s 9(4) leads inexorably to the conclusion that the section was never meant to empower remedies for such interests. It is not credible to say that if the drafters had intended s 9 to be a super-remedial provision they would have limited themselves to the s 9(4) factors, and not specifically incorporated the two principal interests underlying damages awards. The failure to refer to those interests, coupled with the clear statutory intention that s 9 does not affect claims to damages, suggests that s 9 and damages claims were meant to be complementary and, for the most, part mutually exclusive.

Some confusion may be avoided if a distinction is drawn between the interests that underlie damages claims and the actions for damages themselves. A defaulting applicant in an entire contract may have similar interests in seeking *relief* for labour and materials expended as does a victim of a tort such as negligent misstatement in seeking a *remedy*. Both would be described as having a reliance interest. The defaulting applicant will seek to be put back into the position in which he or she would have been if the contract had not been entered into. The victim of the tort will seek to be put back into the position he or she would have been in had the negligent misstatement not been made. It does not follow, however, that since s 9 clearly is intended to allow courts to grant relief for a defaulting applicant's acts in reliance on the contract[113] it must also give the courts a general power to make damages awards on a reliance (ie tortious) basis. Part of the difficulty with Fisher J's judgment is his assumption that because s 9 does apply to some reliance and restitutionary interests it is necessarily a full-blown remedial provision enforcing all restitutionary and reliance interests. There can be some lesser interests which justify relief but do not attract remedies.

(iv) The s 9(2)(b) monetary sum

Section 9(2)(b) requires that any sum awarded under it should be just. Fisher J found it difficult to believe that a court could be expected to exclude from the range

112 Supra at note 19, at 90.

113 Section 9(4)(c), (d), and (e).

of just sums two of the principal forms of loss. He argued that while s 9(4) does not appear to refer to expectation and extraneous reliance losses, since they are both legitimate heads of compensation there are "logical and powerful reasons" for holding that in certain circumstances an innocent party should be compensated for such losses. Accordingly, while the court will be able to make such just awards at common law if a damages claim has been made, where expectation or extraneous reliance losses have not been claimed as damages (as happened in *Newmans*), the court must be able to compensate such losses under s 9. The sums awarded would then be just.[114]

The first point in response is that it is odd to base an interpretation argument on the failings of counsel to organise their pleadings. All three types of interest are legitimate heads of compensation. However, all three are already protected in the Act by the preservation of the plaintiff's absolute right to damages. The plaintiff's right to damages renders superfluous the provision of equivalent relief under s 9. As Fisher J himself recognises, no s 9 award will be necessary when the plaintiff makes a claim for damages, because the identical interests are protected. It is difficult to see why poor pleading should be condoned or encouraged by provision of a second chance under s 9. Second, "just" is used in s 9(2)(b) in a qualified sense. The award of a just sum is predicated on the preservation of damages as a primary remedy.

The difficulty that remains if the broad view of s 9 is correct is that there is no cogent reason why the drafters of the Act omitted to provide for all three forms of interest in s 9(4). The CCLRC was clearly aware of the significance of the expectation measure of damages in drafting the Contractual Remedies Bill (ss 6 and 10(1)) and one would have expected them to refer to that measure in s 9.

(d) The s 9(4) factors

The main flaw in Fisher J's approach is that it provides no satisfactory explanation for the factors set out in s 9(4).

There are possible explanations for the apparent omissions. It is arguable that the expectation measure is referred to implicitly in s 9(4)(a) or (b). However, if s 9(4)(b), "the extent to which any party to the contract would have been able to perform it in whole or in part", was intended to import an expectation interest, it is an example of poor drafting. On any view of the scope of s 9, "the terms of the contract" (s 9(4)(a)) will be relevant to the assessment of relief.

A further possibility is that a court may legitimately regard the expectation or extraneous reliance interest under s 9(4)(f) as "such other matters as it thinks proper". In *Newmans*, the Court of Appeal held that para (f) should not be read *eiusdem generis* with the other factors in s 9(4). The only qualifications on (f) are

114 Supra at note 19, at 91.

the words "as it thinks proper", and the overall purpose of s 9(2)(b), namely to arrive at "such sum as the Court thinks just".[115]

There must, however, be a limit to what the courts can consider as relevant under s 9(4)(f), since s 9 was never intended to create a *tabula rasa* for remedies. In *Burch v Willoughby Consultants Ltd,*[116] Jeffries J considered as a relevant matter under para (f) the defendant's conduct at the trial. This begs the question: what would not be relevant to an exercise of the statutory discretion? Could a court legitimately take into account that one of the parties to a contract was a consumer, while the other was a commercially experienced trader, and hold that an exclusion clause would not apply to bar the consumer's action in damages?

What must be remembered is that the Contractual Remedies Act 1979 was not enacted to reform the law of consumer protection in contract, or the law of damages for distress in employment contracts,[117] or the law of contributory fault in civil actions.[118] Accordingly, s 9(4) does not refer to those matters as relevant, and they should not be imported into para (f). Similarly, s 9(4) does not refer to such matters as mitigation, causation, remoteness, and the bad bargain principle, for the simple reason that the Act was never meant to alter the common law rules governing the assessment of damages. Again, there is no justification for reading such considerations into para (f).

Contrary to the view expressed in *Newmans*, the list of potentially relevant considerations under s 9 must be closed at some point.[119] Section 9(4)(f) must be circumscribed by the purpose of the section, which is not simply to arrive at "such sum as the court thinks just", but to arrive at such sum *by way of relief upon cancellation of a contract* as the court thinks just. Relief from the effects of cancellation of a contract is an important concept, but a limited one, and this limitation must be recognised by the courts.

(e) Relief from the effects of cancellation

This leads to the final point of statutory interpretation telling against the broad view of s 9. The precondition to the granting of relief under that provision is that the contract concerned has been cancelled by any party. The *Newmans* approach creates an anomalous situation whereby the principles governing an award of damages may differ depending on whether or not the contract has been cancelled.[120] Parties who affirm their contracts and sue for damages for breach will

115 Supra at note 26, at p23.

116 Supra at note 20.

117 Ibid.

118 Supra at note 24.

119 Supra at note 19, at 98.

120 Dugdale & Walker, "Harmonisation of the Sale of Goods Act 1908 and the Contractual Remedies Act 1979", in New Zealand Law Commission, *Contract Statutes Review*, NZLC R25 (1993) 111, 122 para 1.178.

be subject to the ordinary common law rules of damages. Parties who cancel their contracts may be subject to the rules of damages if they bring a claim at common law, but will encounter different rules if they choose to bring their claim under s 9. No one has proffered an explanation for this anomaly.

That the s 9 relief jurisdiction depends on cancellation suggests that it is the consequences of cancellation which may necessitate relief. This is consistent with the original understanding of the provision. One of the effects of cancellation is that property rights are frozen.[121] A party may require relief from that consequence by way of an order for restoration of specific property. Similarly, a situation may arise where a party needs immediate access to money, title to which has already been transferred under the contract. Section 9 allows a court to order an immediate payment of money pending hearing of the damages claim. Additionally, in the case of a defaulting applicant in an entire contract, the common law rule is that upon termination of the contract the defaulter cannot recover for his or her labour. Under the statutory jurisdiction a court can now relieve the defaulter from that consequence when, after taking into account the factors outlined in s 9(4), it considers it just to do so.

Whatever difficulties may be perceived in the law of damages in contract, those difficulties are of general application and do not depend on cancellation.

VI: THE WIDER CONSEQUENCES OF THE BROAD VIEW OF SECTION 9

Currently the courts are using s 9 as a means to advance reform across a broad front. The flexible approach to foreseeability postulated in *Newmans* and in *Thomson v Rankin* is consistent with other developments, whereby the Court of Appeal is seeking to coalesce the concepts of foreseeability and contemplation at common law, and to characterise remoteness as a question of fact.[122] Indeed, it is easy to see parallel developments under s 9 and at common law. The use of s 9 to apportion liability between parties is one part of a wider movement to establish a doctrine of contributory fault in contract. Ultimately, the more radical developments under s 9 may be outpaced by broader changes in the common law, rendering the s 9 debate academic.

Other areas in which the courts have foreshadowed a more flexible approach under s 9 are damages for distress, the ordinary measure of damages, mitigation, and the bad bargain principle. It may be that these areas are in need of reform. It is questionable whether such reform should be conducted under the auspices of s 9. To be effective, reform needs to be carried out candidly by confronting the complexities of the subject. It should not be introduced obliquely by way of a statutory provision never intended to fulfil that purpose. The current approach to

121 Section 8(3)(b).

122 See, for example, *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39.

s 9 allows judges with a strong agenda to introduce significant change by a useful but not necessarily satisfactory route.[123] The words of the CCLRC's initial Report are apposite:[124]

> Our law of contract derives from the law of England. It can therefore draw upon centuries of litigation and exposition. This vast experience has known every artifice of the cunning and every muddlement of the dolt. Therefore it is to be respected. Changes should be made only after mature consideration and upon plain proof of need.

1. Section 9 and the Law of Remedies

The broad view of s 9 also has an effect on remedies generally. The problem areas of the law of damages which the courts are using s 9 to ameliorate are unrelated to cancellation. If the law on foreseeability and remoteness is considered so unsatisfactory as to need modification under s 9, there is no reason in principle why the same modification should not be made generally at common law.

Inevitably, as more common law rules are treated as relevant principles under s 9, a similar flexibility will be introduced into remedies in general. While this may be a good outcome, courts should be aware of the process. An idea of the potential s 9 has to change the law of remedies is given by Fisher J. He discusses in *Newmans* the possible forms of relief available in the statutory jurisdiction and refers with approval to an article by Hammond J.[125] Fisher J signalled that in determining the form of remedy a court might give under s 9, the following factors may be relevant: the justice of recognising the cancelling party's stronger claim to choose the form of remedy, economic efficiency, the possible advantages of the proprietary status quo, difficulties in defining and enforcing behavioural remedies, the unique attractions of specific property, difficulty in calculating loss, the conduct of the parties, the effect on third parties, the public interest, and the weight attached to the interests at stake.[126]

This new flexibility would have come as a surprise to the CCLRC which was particularly concerned to ensure that the Act did not affect the remedies of specific performance, injunction, declaration, or damages. Ironically, it also comes as a surprise to Hammond J, who has criticised this basket of remedies approach under s 9, accepting Coote's criticisms of *Newmans* that it is "law reform by a side wind".[127]

---

123 See also Burrows, supra at note 89, at 87 para 1.90.

124 Supra at note 1, at 2 para 2.

125 Hammond, "Rethinking Remedies: The Changing Conception of the Relationship Between Legal and Equitable Remedies" in Berryman (ed), *Remedies: Issues and Perspectives* (1991) 87.

126 Supra at note 19, at 96-98.

127 Supra at note 72, at 341; see also Coote, supra at note 80.

2. Individualised Justice

In a number of areas of contract law it makes sense to provide a mechanism for the parties to come before the court to seek adjudication and relief, such as when a contract is entered into on the basis of a mistake, or when a contract is frustrated by an act of God. Generally, such consequences cannot have been anticipated in advance, nor rules made for their resolution, whether by the parties or by statute. The added transaction costs created by reference of the dispute to a third party can accordingly be justified.

Breach of contract and misrepresentation are quite different propositions. Their consequences may be predicted with certainty: an entitlement to damages in a certain measure. It is possible that when a contract is cancelled circumstances may arise requiring external adjudication. However, that will be the exception rather than the rule. In the broad run of cases, lawyers should be able to advise their clients with certainty on the legal significance of their actions. If s 9 is read as placing remedies at the court's discretion, parties are encouraged to come before the court in a large proportion of cases. They can never be certain that their right to damages will be the limit of entitlement. If Fisher J's views as to remedies gain acceptance, parties will not reasonably be able to anticipate how the court will view a particular case, nor the form of relief it will deem appropriate. It may be hoped that in time clear principles will be developed under s 9. However, the experience of the first 15 years of the Contractual Remedies Act's operation has been quite the opposite. Only recently has it become clear that the profession's perception of s 9 may be far too limited, and that significant principles of remedies law are now open to reconsideration. Such uncertainty dramatically increases the transaction costs of any agreement. A party must include in its contract prices the risk cost of litigation in the event of dispute.

There will always be arguments for and against individualised justice. As the former Chairman of the CCLRC said in an introduction to the Act:[128]

> There is much to be said for individualised justice, so long as it is recognised that the cost of attaining it is high, in terms of effort and resources. Many undoubtedly think it is worth that price.

Courts have not been slow in recent years to intervene in a wide range of areas. Examples include undue influence, breach of fiduciary duty, unconscionability, estoppel, and relief against forfeiture. Yet courts must appreciate that they are in the business of consuming and allocating resources. Their decisions have economic consequences, not least in that litigation is expensive per se. It is not enough for courts to claim that they are doing justice in an individual case if that undermines certainty in the wider operation of the law.

In the case of s 9, the principal difficulty is scope for uncertainty. The CCLRC intended to create a discretion, but was clearly conscious of the need to limit

128 Paterson, "The Contractual Remedies Act 1979" [1980] NZLJ 307, 307.

discretionary power in the interests of those parties who never come before a court:[129]

> [W]e are of the opinion that, as far as possible, the decision of disputes under contracts should not be a matter of discretion. There should be known rules so that the parties may be encouraged and enabled to settle their differences out of Court.
>
> It is true that rules must be in general terms, thus leaving much room for debate which can be kept in bounds only by the rule itself; but the debate upon the exercise of judicial discretion can be endless.

VII: CONCLUSION

This article has sought to add to the scholarship on s 9 in two ways. First, it has attempted to analyse in detail the reasoning which underlies those cases upholding the broad view of the relief jurisdiction. Its purpose has been to show that as a matter of statutory interpretation the broad view cannot be sustained. Second, it has given the s 9 controversy a wider context and suggested that the approach to s 9, typified by *Newmans*, has significant ramifications for the process of law reform, for remedies law generally, and for those contracting parties who never litigate their agreements.

It is unlikely that the academic scholarship criticising the broad view will have much effect, given that the courts have chosen their course in the clear understanding that they are departing from the intentions of the original reformers. It must also be said that criticism of *Newmans* is by no means uniform.[130]

A major difficulty at present is that counsel have not yet appreciated the significance of the broad approach to s 9, and are not challenging that approach daily before the courts. For example, before the Court of Appeal in *Newmans*, both counsel assumed that Fisher J's approach in the Court below was correct. The Court of Appeal can perhaps be excused for failing to challenge that assumption in the absence of a lead from the Bar. Interestingly, Hammond J, the only judge to have broken the line since *Newmans*, did so in a case where counsel for the appellant was a robust critic of the *tabula rasa* approach to s 9.[131]

It is possible that a statutory amendment to s 9 will be introduced. Recently, Burrows raised the possibility of redrafting s 9(2)(b) to make clear that its purpose is restitutionary, and that it cannot be used to award a sum in the nature of damages.[132] However, drafting such a provision would be difficult and it may be that the current wide discretion is consistent with other judicial trends towards flexibility of remedy. Similarly, it would be virtually impossible to frame an

---

129 Supra at note 1, at 34 para 9.42.

130 See, for example, Beck, "Contract" [1993] NZ Recent Law Review 26, 40.

131 *Crump v Wala*, supra at note 72.

132 Burrows, supra at note 89, at 87-88.

exhaustive set of rules to operate in place of the current discretion. Dawson suggested making an amendment stating clearly that the primary purpose of the section is restitutionary.[133] The difficulty with that suggestion, and with Burrows' proposed redraft, is that s 9 is not purely restitutionary, so such an amendment would further confuse the issue.

A further possibility is that a s 9 case will be litigated in the more conservative atmosphere of the Privy Council. In any event, there is no realistic prospect of a dramatic turnaround in the short term.

There is a final irony. The approach to s 9 defined by Fisher J is similar to the ideas expressed by the current President of the Court of Appeal in an article written in 1978.[134] There Sir Robin Cooke advocated that judges be allowed to approach issues such as remoteness in a discretionary way, treating the common law rules as contributing to a list of relevant considerations rather than as laying down strict rules of law.

In its submissions on the Contractual Remedies Bill to the Statutes Revision Committee, the CCLRC cited Sir Robin Cooke's formulation as an example of the sort of discretion it was trying to create in s 9, but in respect of *relief* not remedies. In particular, they approved of freeing the courts to move in new directions after "having got into trouble through the evolution of too rigid doctrine".

Now s 9 has been used to enable the court to move freely, but in respect of the rules of damages rather than the envisaged relief, and in a virtually identical way to that advocated by Sir Robin Cooke. The CCLRC might have expressed less enthusiasm for the President's article, had it known that its intended reforms would be so dramatically skewed to reform the law of remedies across a broad front.

133 Dawson, "Contractual Remedies Act 1979 Commentary", in New Zealand Law Commission, *Contract Statutes Review*, NZLC R25 (1993) 101, 108 para 1.148.

134 Cooke, "Remoteness of Damages and Judicial Discretion" [1978] CLJ 288.

NORTHERN REGION
NEW ZEALAND RED CROSS

P O Box 5932, Wellesley Street, Auckland 1
Tel: (09)3774175
Fax: (09) 3095090

* * * *

New Zealand Red Cross Provides:

* Emergency preparedness and relief, in times of Disaster or Conflict in New Zealand and around the World

* Education and Information for all New Zealanders on International Humanitarian Law

* Community Services, with an emphasis on Primary Health Care

The Northern Region fulfills the aforementioned through its 'on call' Emergency Relief Team; the Meals on Wheels programme which delivers approx. 1500 meals daily throughout the Region; training courses which include First Aid, CPR, Humanitarian Law and caring for the elderly; and its Community Services which provide support to the needy of the North.

* * * *

An appropriate form of bequest would be:

'I give and bequeath the sum of $..... to the Northern Region of New Zealand Red Cross to be paid for the general purposes of the Northern Region to the Regional Director for the time being of such Region, whose receipt shall be good and valid discharge for same.'

It is important to ensure that the words 'Northern Region' appear in the form of bequest if it is the testator's wish that the funds be used for the benefit of people in the North.