

## ILLEGAL CONTRACTS BILL

### EXPLANATORY NOTE

THIS Bill implements the proposals of the Contracts and Commercial Law Reform Committee for the reform of the law relating to illegal contracts. The proposals are contained in a report of that Committee which was presented to the Minister of Justice in October 1969.

*Clause 1* relates to the Short Title of the Bill.

*Clause 2* is an interpretation clause.

*Clause 3* defines the term "illegal contract" for the purposes of the Act.

*Clause 4* provides that the Act shall bind the Crown.

*Clause 5* deals with contracts illegal by statute. Under the present law it is often difficult to determine whether a contract is affected by a breach of an enactment. The problem is described in paragraphs 7 to 9 of the Committee's report. This clause contains two rules which are designed to make it easier to determine whether a contract is affected by a breach of an enactment and to prevent the consequences of illegality from being visited unnecessarily on the parties to a contract.

*Subclause (1)* provides that a contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires.

*Subclause (2)* provides that a contract the object of which or of any provision of which is the doing of an act that is prohibited by any enactment shall be illegal, unless the enactment otherwise provides or its object otherwise requires.

*Clauses 6 and 7* deal with the consequences of illegality. As stated in paragraph 11 of the report of the Committee "Ordinarily neither party to an illegal contract can enforce it. . . . A result of this is that loss lies where it falls and there is not (except where a statute provides) any scope for the restitution of property illegally acquired or for striking a balance between the parties."

To deal with this problem the Committee recommended, in paragraph 11 of their report, as follows:

"Any general reform should, in our view, have the effect of making such contracts as are illegal, of no effect, so that no rights will pass under them and the position of the parties will be the same as if the illegal contract had never been entered into (clause 6 of the draft statute). We would qualify this rule, however, by giving to the courts a discretion to order that, notwithstanding the illegality, the contract be enforced in whole or in part. We would make this exception because we recognise that there may be circumstances where it may be impossible or unjust that the parties should be restored to their original position. We therefore make the recommendations set out in clause 7 of the attached draft statute."

*Clause 8* deals with agreements in restraint of trade. The Committee set out its views on these agreements, in paragraph 5 of its report, in the following words:

"The objective of the common law relating to them (agreements in restraint of trade) has been to ensure in the public interest that individuals are not unreasonably restrained from engaging in business enterprises or in following their chosen trades or professions. A contract which fails to comply with the common law requirements does not thereby become unenforceable as a whole. Only the offending portion is so affected, and then only if it is unreasonable.

"There is a difficulty, however, that turns on a merely verbal distinction between differing restraints. If the court should decide that a restraint as it stands is unreasonable it may, if it can do so by merely cutting out the offending portions, make it reasonable and thereafter enforce it. On the other hand, if to make the restraint reasonable would involve the alteration of words, the whole clause will be struck out and no restraint at all will be enforced. Assuming, to take an example, that a restraint limited to the North Island were reasonable, and a clause contained a restraint expressed to extend to "the North and South Islands of New Zealand", the offending reference to the South Island would be struck out by the court and the restraint over the North Island would be enforced. However, were the clause to be expressed to cover simply "New Zealand" it would have to be held to be entirely void. A recent illustration is the Australian case of *Papastravou v. Gavan* [1968] 2 N.S.W.R. 286.

"We consider this difference unjustifiable and we accordingly recommend (clause 8 of the draft statute) that the courts be given power in all cases to enforce restraints of trade so far as they are reasonable, even if this does involve a redrafting of offending portions."

*Clause 9* defines the jurisdiction of Magistrates' Courts in respect of the powers conferred by *clauses 7 and 8* of the Bill.

*Clause 10* is a savings provision. *Subclause (1)* provides that, except as provided in *clause 8*, nothing in the Act shall affect the law relating to:

- (a) Contracts, or provisions of contracts, which are in restraint of trade; or
- (b) Contracts, or provisions of contracts, which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of the Act or not.

*Subclause (2)* of this clause is designed to preserve the effect of the decision in *Shaw v. Shaw* [1954] 2 Q.B. 429. In this case it was held that an unmarried person who contracts to marry a person in ignorance of the married person's married status is entitled to bring an action for breach of promise of marriage.

*Hon. Mr Riddiford*

## ILLEGAL CONTRACTS

### ANALYSIS

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### A BILL INTITULED

#### An Act to reform the law relating to illegal contracts

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same,  
5 as follows:

1. **Short Title**—This Act may be cited as the Illegal Contracts Act 1970.

2. **Interpretation**—In this Act, unless the context otherwise requires,—

10 "Act" means any Act of the General Assembly; and includes any Act of the Parliament of England, of the Parliament of Great Britain, or of the Parliament of the United Kingdom, which is in force in New Zealand:

15 "Court" means the Supreme Court or a Magistrate's Court that has jurisdiction under section 9 of this Act:

“Enactment” means any provision of any Act, regulations, rules, bylaws, Order in Council, or Proclamation; and includes any provision of any notice, consent, approval, or direction which is given by any person pursuant to a power conferred by any Act or regulations: 5

“Property” means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property. 10

**3. “Illegal contract” defined**—Subject to section 5 of this Act, for the purposes of this Act the term “illegal contract” means any contract that is illegal at law or in equity, whether the illegality arises from the creation or performance of the contract; and includes a contract which contains an illegal provision, whether that provision is severable or not. 15

**4. Act to bind the Crown**—This Act shall bind the Crown. 20

**5. Breach of enactment**—(1) A contract lawfully entered into shall not become illegal or unenforceable by any party by reason of the fact that its performance is in breach of any enactment, unless the enactment expressly so provides or its object clearly so requires. 25

(2) A contract the object of which or of any provision of which is the doing of an act that is prohibited by any enactment shall be illegal, unless the enactment otherwise provides or its object otherwise requires.

**6. Illegal contracts to be of no effect**—(1) Notwithstanding any rule of law or equity to the contrary, but subject to the provisions of this Act and of any other enactment, every illegal contract shall be of no effect and no person shall become entitled to any property under a disposition made by or pursuant to any such contract: 30

Provided that nothing in this section shall invalidate— 35

(a) Any disposition of property by a party to an illegal contract for valuable consideration; or

(b) Any disposition of property made for valuable consideration by— 40

(i) A person who became entitled to the property under a disposition by a party to the illegal contract; or

5 (ii) A person who became entitled to the property through a person to whom subparagraph (i) of this paragraph applies—

if the person to whom the disposition was made was not a party to the illegal contract and had not at the time of the disposition notice that the property was the subject of, or  
10 the whole or part of the consideration for, an illegal contract and otherwise acts in good faith.

(2) In this section the term “disposition” has the meaning assigned to that term by section 2 of the Insolvency Act 1967.

7. Court may grant relief—(1) Notwithstanding the provisions of section 6 of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to—

- 20 (a) Any party to an illegal contract; or  
(b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or  
(c) Any person claiming through or under any such party—

25 such relief by way of compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) An application under subsection (1) of this section  
30 may be made by—

- (a) Any person to whom the Court may grant relief pursuant to subsection (1) of this section; or  
(b) Any other person where it is material for that person to know whether relief will be granted under that subsection.

35 (3) In considering whether to grant relief under subsection (1) of this section the Court shall have regard to—

- (a) The conduct of the parties; and  
40 (b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and  
(c) Such other matters as it thinks proper;

but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection. 5

(5) The Court may by any order made under subsection (1) of this section vest any property that was the subject of, or the whole or part of the consideration for, an illegal contract in any party to the proceedings or may direct any such party to transfer or assign any such property to any other party to the proceedings. 10

(6) Any order made under subsection (1) of this section, or any provision of any such order, may be made upon and subject to such terms and conditions as the Court thinks fit. 15

**8. Restraints of trade—**(1) Where any provision of any contract constitutes an unreasonable restraint of trade, the Court may— 20

- (a) Delete the provision and give effect to the contract as so amended; or
- (b) So modify the provision that at the time the contract was entered into the provision as modified would have been reasonable, and give effect to the contract as so modified; or 25
- (c) Where the deletion or modification of the provision would so alter the bargain between the parties that it would be unreasonable to allow the contract to stand, decline to enforce the contract. 30

(2) The Court may modify a provision under paragraph (b) of subsection (1) of this section, notwithstanding that the modification cannot be effected by the deletion of words from the provision.

**9. Jurisdiction of Magistrates' Courts—**(1) A Magistrate's Court shall have jurisdiction to exercise any of the powers conferred by any of the provisions of sections 7 and 8 of this Act in any case where— 35

- 5 (a) The occasion for the exercise of the power arises in the course of any civil proceedings (other than an application made for the purposes of subsection (1) of section 7 of this Act) properly before the Court; or
- (b) The value of the consideration for the promise or act of any party to the contract is not more than \$2,000; or
- 10 (c) The parties agree, in accordance with section 37 of the Magistrates' Courts Act 1947, that a Magistrate's Court shall have jurisdiction to hear and determine the application.
- (2) For the purposes of section 43 of the Magistrates' Courts Act 1947, an application made to a Magistrate's Court pursuant to subsection (1) of section 7 of this Act shall be deemed to be an action.

10. **Savings**—(1) Except as provided in section 8 of this Act, nothing in this Act shall affect the law relating to:

- 20 (a) Contracts, or provisions of contracts, which are in restraint of trade; or
- (b) Contracts, or provisions of contracts, which purport to oust the jurisdiction of any Court, whether that Court is a Court within the meaning of this Act or not.
- 25 (2) Nothing in this Act shall affect the right of any person to bring an action for breach of promise of marriage and every such action shall be heard and determined as if this Act had not been passed.