

SCOTTISH LAW COMMISSION
(Scot Law Com No 174)

Report on Remedies for Breach of Contract

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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¹ Now amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820)

SCOTTISH LAW COMMISSION

Item 4 of our Fifth Programme of Law Reform

Remedies for Breach of Contract

To: Jim Wallace Esq QC, MSP, Deputy First Minister and Minister for Justice

We have the honour to submit to the Scottish Ministers our Report on Remedies for Breach of Contract.

(Signed)

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6 December 1999

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Part 1 Introduction

Background to report

1.1 In April 1999 we published a discussion paper¹ on remedies for breach of contract.² Our preliminary conclusion was that the existing Scottish law was broadly satisfactory, and in line with recent international instruments on the subject.³ We identified, however, a number of areas where some reform or clarification might have been thought desirable. We made provisional proposals and invited views. We pointed out that the strategy for reform - a Bill limited to a few points, or a more comprehensive restatement - would depend on the results of consultation.⁴

1.2 We are grateful to those who submitted comments on the discussion paper⁵ and who attended the meeting of our Contract Law Advisory Group where the proposals for reform were discussed.⁶

Results of consultation

1.3 There was general agreement with our assessment of the current law and there was support for most of the reforms or clarifications suggested. A few consultees, however, doubted the wisdom of legislating on many of the matters mentioned. In the view of these consultees the fact that a need for clarification, or for some minor reform, had been identified did not necessarily justify piecemeal legislation.

Strategy for reform

1.4 We have decided, having regard to our current priorities and resources and to the mixed reaction on consultation, not to recommend a general statutory restatement of the law on remedies for breach of contract. We have therefore attempted to identify those proposals which both attracted strong support and appear to require immediate legislative action. Only four reforms seemed to us to fall into this category. Many other proposals which attracted support would, if implemented, clarify the law or bring about a minor improvement, but do not appear to us to require legislation outwith the context of a comprehensive statutory restatement.

1.5 The four reforms recommended in this report would change the following rules

¹ *Remedies for Breach of Contract*, Discussion Paper No 109 (referred to in this report as "the discussion paper").

² The discussion paper was produced, as is this report, under our Fifth Programme of Law Reform (Scot Law Com No 159, 1997) Item No 4: Obligations.

³ In particular the Vienna Convention on Contracts for the International Sale of Goods (1980); the Principles of European Contract Law (completed and revised version 1998); and the Unidroit Principles of International Commercial Contracts (1994). In the rest of this report these instruments are referred to respectively as "the Vienna Convention", "the European Principles" and "the Unidroit Principles".

⁴ Discussion paper para 1.8.

⁵ See Appendix B.

⁶ See Appendix B.

1 the rule which allows a party unreasonably to proceed with unwanted performance and claim payment for it⁷

2 the rule preventing recovery of certain kinds of non-patrimonial loss caused by breach of contract⁸

3 the rule preventing damages for breach of contract from being reduced to take account of the fact that the aggrieved party has contributed to the loss⁹

4 the rule that interim decrees of specific implement of contractual obligations are not available as such.¹⁰

1.6 We recommend in Part 6 that our recommendations on the above matters should extend also to unilateral voluntary obligations and we explain in Part 7 our reasons for not recommending immediate legislation on the many other matters on which we consulted.

Draft Bill

1.7 A draft Bill to give effect to our recommendations for statutory reform is appended.¹¹

The Scotland Act 1998

1.8 The matters dealt with in this report are, in our view, within the legislative competence of the Scottish Parliament. The reforms recommended are all in the area of Scottish private law¹² and, even if some of them might affect parties to contracts dealing with reserved matters, the purpose of the reforms is to reform the relevant rules across the board, in a way which is consistent for all cases whether concerned with reserved matters or not.¹³ We recommend commencement rules which will prevent the reforms being retrospective.¹⁴ They will not affect any actions raised or substantive rights acquired before the legislation comes into force. Enactment of the draft Bill would not, in our view, infringe human rights.

⁷ See Part 2. This rule comes from the case of *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1.

⁸ See Part 3.

⁹ See Part 4.

¹⁰ See Part 5.

¹¹ Appendix A.

¹² Scotland Act 1998, s 126(4).

¹³ Scotland Act 1998, s 29(4).

¹⁴ Para 6.8.

Part 2 Unreasonably Proceeding with Unwanted Performance

Existing law

2.1 The leading case in this area is *White & Carter (Councils) Ltd v McGregor*.¹ The case involved a contract for the display, for three years, of advertisements of the business of a Clydebank garage. In 1954 there had been an agreement to display the advertisements. In 1957 there was a further three year contract, which became the subject of the dispute. The second contract was made by the sales manager of the garage but on the day it was made the owner of the garage wrote to the pursuers to cancel the contract. The pursuers refused to accept this cancellation and the advertisements were displayed. The pursuers successfully brought an action for the price due under the contract.

2.2 Because *White & Carter (Councils) Ltd* involved a party who did not claim damages, but instead the price due under the contract, the rules on mitigation of loss did not apply. The result was wasted and unwanted performance.² Lord Keith, dissenting, gave the example of an expert who goes to Hong Kong and prepares a report for a fee of £10,000, knowing from the beginning that the report is no longer wanted.³ Many similar examples could be given.

2.3 A possible qualification of the rule affirmed in *White & Carter (Councils) Ltd* may be recognised if the pursuer had no "legitimate interest" in performing. Lord Reid left this possibility open when he said:⁴

"It may well be that, if it can be shown that a person has no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages, he ought not to be allowed to saddle the other party with an additional burden with no benefit to himself."

This has enabled *White & Carter (Councils) Ltd* to be distinguished in England when it has appeared that full performance of the contract was wasteful.⁵

2.4 The problems were illustrated again in *Salaried Staff London Loan Company Ltd v Swears and Wells Ltd*.⁶ Tenants under a 35 year lease repudiated the lease after 5 years. The landlords refused to accept the repudiation and held the tenants to their contract. The tenants were sued for rent and service charges for a period of nearly a year subsequent to

¹ 1962 SC (HL) 1.

² Treitel, *The Law of Contract* (9th ed, 1995) 915-918; Burrows, *Remedies for Torts and Breach of Contract* (2nd ed, 1994) 318-322.

³ 1962 SC (HL) 1 at 24.

⁴ 1962 SC (HL) 1 at 14.

⁵ *Attica Sea Carriers Corp v Ferrostaal Poseidon Bulk Reederei GMBH* [1976] 1 Lloyd's Rep 250; *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All ER 129.

⁶ 1985 SC 189.

the repudiation. The landlords' action succeeded. On the question whether the landlords could have sued each year for the next 29 years Lord President Emslie said:⁷

"If the pursuers continue to maintain the contract and continue to sue for payment of unpaid rent in subsequent actions it may well be that different considerations will then arise."

Similar reservations were expressed by Lord Cameron⁸ and Lord Ross,⁹ who referred to the possibility that

"it might be inferred that it would be manifestly unjust or unreasonable to allow the pursuers to continue suing for rent".

These remarks recognised that there is a problem but do not provide a solution.

2.5 The rule in *White & Carter (Councils) Ltd* operates only when, as in that case, one party could perform without the co-operation of the other party. The advertisements were placed on litter bins. The pursuers could perform without the assistance of the garage. It would presumably have been a different matter if it had been the first contract between the parties and the garage had been required to provide the material for the advertisement. The pursuers would have had no option but to seek damages. It is difficult to defend a principle which turns on the distinction between contracts which require the co-operation of the other party for performance, and those which do not.¹⁰

Criticism of existing law

2.6 There is nothing unreasonable in a general rule that contracts must be performed and that a party is entitled to perform and claim payment in accordance with the agreed terms. What is unreasonable is to push that general rule to absurd lengths. Most people, we believe, would consider it absurd to allow a party who has been clearly told that performance is unwanted, who has no special interest in tendering performance, and for whom damages would be an adequate remedy, to proceed to perform simply in order to increase the burden on the other party. And yet that appears to be the existing law, although it is true that the courts might yet be able to recognise exceptions to it. Almost all the consultees who responded on this issue considered that reform was desirable.

Recommendation

2.7 Our recommendation is based on the solution to this problem contained in the *Principles of European Contract Law*. The *Principles* have the following provision.¹¹

"Where the creditor has not yet performed its obligation and it is clear that the debtor will be unwilling to receive performance, the creditor may nonetheless proceed with its performance and may recover any sum due under the contract unless:

⁷ At 194.

⁸ At 197.

⁹ At 199.

¹⁰ Scott, "Contract - Repudiation - Performance by Innocent Party" [1962] Cambridge Law Journal 12 at 14.

¹¹ Art 9:101(2).

- (a) it could have made a reasonable substitute transaction without significant effort or expense; or
- (b) performance would be unreasonable in the circumstances."

The starting point is that, notwithstanding intimation that performance is no longer wanted, a contracting party is entitled to perform in accordance with the contract and to sue for the contract price, but there are exceptions for the cases where there is no legitimate interest in performing or where performance would be unreasonable. In such cases the pursuer's remedy is to rescind the contract and claim damages. The rules on mitigation of loss would then apply.

2.8 The reference to a "substitute transaction" is to a transaction by which the creditor obtains a satisfactory substitute performance. A common example would be that of a commercial manufacturer of standard goods with a ready market who is able to obtain another buyer without difficulty. The manufacturer could not force unwanted goods on a purchaser and sue for the price. Another example would be that of a landlord whose tenant repudiates a lease which has still many years to run. The landlord could not go on claiming rent for the whole duration of the lease if the subjects could easily be re-let to another tenant on reasonable terms. The landlord would, of course, be able to rescind and claim damages for the difference between the rent obtainable from the new tenant (if less) and the rent due under the repudiated contract.

2.9 Cases where a reasonable substitute transaction could easily have been obtained are examples of cases where it would have been unreasonable to proceed with unwanted performance. Paragraph (b) deals with the situation where performance would be unreasonable for some other reason.¹² A typical example would be a case like *White and Carter (Councils)* where, before the performance has begun, the party entitled to it says that it is no longer required and where the performing party has no legitimate interest in continuing with performance rather than claiming damages for the repudiation.

2.10 We recommend that

1. There should be legislation, designed to solve the problem revealed by *White & Carter (Councils) Ltd v McGregor*, to the effect that a party to a contract who has been told that performance under the contract is no longer wanted but who, being in a position to give performance without the co-operation of the other party, has proceeded to perform, is not entitled to recover payment for performance occurring after intimation that further performance is unwanted if (a) that party could have entered into a reasonable substitute transaction without unreasonable effort or expense or (b) it was unreasonable for that party to proceed with the performance.

Draft Bill, section 1

¹² See also *Clea Shipping Corp v Bulk Oil International Ltd (The Alaskan Trader)* [1984] 1 All ER 129, where the court held that the question was simply whether continued performance by one party against the wishes of the other was reasonable in the circumstances.

Part 3 Recovery of Non-patrimonial Loss

Introduction

3.1 The question for consideration here is whether it should be made clear that there is no bar, other than the normal rule disallowing damages for losses which are too remote,¹ to the recovery of damages for non-patrimonial² loss or harm caused by a breach of contract. Non-patrimonial loss may take the form, for example, of loss of reputation³ or loss of amenity or loss of the satisfaction of obtaining performance precisely in accordance with the contract. Non-patrimonial harm may take the form, for example, of physical illness or injury, pain or suffering, distress or more severe psychological harm, or trouble and inconvenience.

3.2 Compensation for loss of the satisfaction of obtaining the due performance, sometimes called disappointed expectations, may be particularly important in cases where there is no other obvious loss or harm. If damages for this type of loss cannot be awarded there may be cases where no damages at all can be awarded even if the aggrieved party has been deprived of the agreed performance.⁴

Example. For nostalgic reasons A wishes to have the lower parts of the walls of a new house constructed from granite from the part of the country where he was born and brought up. He contracts for this specifically and informs the builder, B, of the importance he attaches to the source of the stone. B uses local granite which costs the same but is of a superior quality for building. One of B's employees tells A where the stone came from but by this time the house is completed. The court would not order specific implement because that would be too harsh and unreasonable.⁵ It would not order damages based on the cost of tearing the house down and rebuilding it because that would be equally unreasonable.⁶ The house is no less valuable than it would have been with the other granite. So no damages could be obtained on the basis of diminution in value. Yet most people would probably consider that A should receive some damages for B's breach of contract.⁷

¹ Under this normal rule damages will be limited to the loss which the defender might reasonably have contemplated at the time of the contract, taking into account any special circumstances made known to the defender by the pursuer. See *Balfour Beatty Construction (Scotland) Ltd v Scottish Power plc* 1994 SLT 807 and the discussion paper, paras 8.15-8.22.

² Patrimonial loss covers financial or economic loss, such as loss of profit or the cost of rectification or replacement, or the loss caused by a diminution in the value of property. Non-patrimonial loss is all other loss.

³ Loss of reputation may in turn lead to financial loss. For example, loss of an employee's reputation for honesty may lead to a loss of employment opportunities. There is no reason why such financial loss should not be recovered in appropriate cases. See *Mahmud v BCCI* [1998] AC 20; *Johnson v Unisys Ltd* [1999] 1 All ER 854 at 860.

⁴ See *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 at 374.

⁵ See the discussion paper, para 6.7.

⁶ See the discussion paper, paras 8.37-8.42 and *Ruxley Electronics Ltd v Forsyth* [1996] AC 344.

⁷ A similar case was first mentioned by Cardozo J. in *Jacob & Youngs Inc v Kent* (1921) 129 N.E. 889. Other examples of the same kind were given in *Ruxley Electronics Ltd v Forsyth* [1996] AC 344.

Existing law

3.3 Under the existing law it is clear that damages can be recovered for physical illness or injury caused by a breach of contract,⁸ although often there will be an overlapping claim in delict which may mask the contractual claim. Damages can also be recovered for trouble and inconvenience caused by a breach of contract.⁹ It is not clear whether damages can be recovered for loss of reputation caused by a breach of contract.¹⁰ It was for a long time considered that, following the decision of the House of Lords in the English case of *Addis v Gramophone Co*,¹¹ damages could not be recovered for mental distress or injured feelings caused by a breach of contract.¹² More recently, exceptions have been recognised in cases where, because of the nature of the contract, the likelihood of distress was or ought to have been in the contemplation of the defender at the time of the contract. For example, damages were awarded when a photographer was in breach of a contract to take photographs at a wedding¹³ and a proof was allowed on a claim for damages for "upset and distress" when a caravan site proprietor was in breach of a contract to provide a site "of the highest amenity" for a residential caravan.¹⁴ There have also been cases in England where the nature of the contract has meant that the likelihood of distress or injured feelings being caused by a breach was reasonably foreseeable at the time of the conclusion of the contract.¹⁵ There have been suggestions in some of these cases that a distinction falls to be drawn between commercial and "social" contracts but the soundness and practicability of that distinction is doubtful. The true distinction seems to be between those cases where the likelihood of distress or injured feelings is foreseen or reasonably foreseeable at the time of the contract and cases where it is not. Mental distress or injury to feelings cannot be suffered by a company or other legal entity, although such an entity can be put to trouble and inconvenience,¹⁶ and that in itself serves to rule out this head of damages in many commercial contracts.

3.4 Some of the judges in the English case of *Ruxley Electronics Ltd v Forsyth*¹⁷ clearly favoured the allowance of damages for non-patrimonial loss caused by a breach of contract, including loss of the personal value to the aggrieved party in receiving the performance contracted for, but the statement on this point in the House of Lords were on a matter which did not fall to be decided at that stage.

⁸ See eg *Cameron v Young* 1907 SC 475; *Dickie v Amicable Property Investment Building Society* 1911 SC 1079; *Fitzpatrick v Barr* 1948 SLT (Sh Ct) 5.

⁹ *Webster & Co v Cramond Iron Co* (1875) 2 R 752; *McArdle v City of Glasgow DC* 1989 SCLR 19; *Hardwick v Gebbie* 1991 SLT 258; *Mills v Findlay* 1994 SCLR 397.

¹⁰ The question was raised but not settled in any satisfactory way in *Millar v Bellvale Chemical Co* (1898) 1 F 297 and *Dodwell v Highland Industrial Caterers Ltd* 1952 SLT (Notes) 57. In English law, the statements in *Mahmud v BCCI* [1998] AC 20 are rather against recoverability of damages for non-financial aspects of loss of reputation.

¹¹ [1909] AC 488.

¹² See Gloag, *Contract* (2nd ed, 1929) 686. It is by no means certain that, properly read, *Addis* justifies any such general conclusion. There was earlier Scottish authority to the contrary effect. See *Cameron v Fletcher* (1872) 10 M 301; *Campbell v MacLachlan* (1896) 4 SLT 143.

¹³ *Diesen v Samson* 1971 SLT (Sh Ct) 49.

¹⁴ *Colston v Marshall* 1993 SCLR 43.

¹⁵ *Jarvis v Swans Tours Ltd* [1973] QB 233 (contract to provide holiday); *Jackson v Horizon Holidays Ltd* [1975] 3 All ER 92 (contract to provide holiday); *Heywood v Wellers* [1976] QB 446 (solicitor failed, in breach of contract, to obtain injunction against molestation); *Calabar Properties Ltd v Stitche* [1984] 1 WLR 287 (contract for occupation of house as a home); *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 (contract for construction of swimming pool).

¹⁶ *Webster & Co v Cramond Iron Co* (1875) 2 R 752.

¹⁷ [1996] AC 344. See in particular Lord Bridge of Harwich at 354; Lord Mustill at 360-361 and Lord Lloyd of Berwick at 373-374.

Criticism of existing law

3.5 The courts have shown signs of breaking free from the restrictions once thought to be imposed by the *Addis* case. The law, however, is not clear. *Addis* has never been over-ruled. It creates an unnecessary difficulty and a temptation to resort to unsound distinctions. It would not, in our view, make any sense to perpetuate an arbitrary distinction between inconvenience and distress or to introduce an arbitrary distinction between commercial and social contracts. The normal test for remoteness, which disallows damages for any loss which the defender could not reasonably have contemplated at the time of the contract, would be adequate in this area.

3.6 The Scottish law in this area is out of line with recent international models. The Unidroit *Principles* have the following rule on the types of loss for which damages may be obtained.¹⁸

"(1) The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which is suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm.

(2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress."

The European *Principles* also expressly allow damages for non-pecuniary loss of any kind.¹⁹

3.7 Almost all consultees supported reform to allow damages to be recovered for non-patrimonial loss or harm caused by a breach of contract. The Faculty of Advocates, however, expressed doubts. It said that contract law was about economic relations,²⁰ noted that damages for non-patrimonial loss caused by a breach of contract could already be recovered in a number of defined instances, and suggested that the law should be left to develop on an incremental, case by case basis. We accept that that would be a possible course of action but, given the long-standing difficulties in this area, we consider that a more rapid and reliable method of achieving reform is by legislation.

¹⁸ Art 7.4.2.

¹⁹ Art 9:501(2).

²⁰ This is perhaps not wholly true. Certainly, people often contract for non-economic benefits or for a mixture of economic and non-economic benefits.

Recommendation

3.8 We recommend that

2. It should be made clear that, subject to the normal remoteness rule, the loss or harm for which damages may be recovered for breach of contract includes non-patrimonial loss or harm of any kind, and in particular includes loss of the satisfaction of obtaining what was contracted for and harm in the form of pain, suffering or mental distress.

Draft Bill, section 2

Part 4 Loss Partly Attributable to Aggrieved Party

Existing law

4.1 A plea of contributory negligence¹ is not generally available in claims based on breach of contract.² At least according to the prevailing view, a person aggrieved by a breach of contract can often recover full damages for any foreseeable loss or harm caused by the breach, without any possibility of a deduction to take account of the extent to which that person may have contributed to the loss or harm suffered. This forces questions of causation into an unnatural framework. It obliges courts to reach all or nothing conclusions.

Earlier proposals for reform

4.2 In 1988 this Commission published a report³ with the following key recommendations.

"20. Where the defender's liability for breach of a contractual duty of care is the same as his liability in delict for negligence, the plea of contributory negligence should be available as a defence whether the action is framed in delict or in contract.

21. The plea of contributory negligence should be available to the defender where he is in breach of a contractual duty of care but is under no corresponding common law duty to take reasonable care.

22. The plea of contributory negligence should not be available where the defender's breach of a contractual obligation does not depend on his having been negligent.

23. In so far as contributory negligence is relevant in actions founded on breach of contract, parties should be entitled to exclude the plea in their contract.

24. The plea of contributory negligence should not be available in answer to any action founded on ... liability for an intentional breach of a contractual duty of care."⁴

These recommendations have not been implemented. The first one may have been overtaken by case law.⁵

¹ The term "contributory negligence" is commonly used in this context but is inappropriate. The important question is whether the aggrieved party contributed to the loss or its exacerbation. It does not matter whether that was done intentionally or negligently. Indeed there is a stronger argument for taking account of intentional conduct than there is for taking account of negligent conduct in this area.

² The Law Reform (Contributory Negligence) Act 1945 allowed damages to be apportioned to take account of the pursuer's contributory negligence. Its wording, using terms like "fault" and "damage", is such that it might be applicable in certain cases of breach of contract but it was intended for delict cases and, in practice, has not been used in contract cases except where there is, or could be, a delict claim on the same facts. The point is considered in *Lancashire Textiles (Jersey) Ltd v Thomson Shepherd & Co Ltd* 1986 SLT 41 at 45. See also *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 at 860-867 and 875.

³ Report on *Civil Liability - Contribution* (Scot Law Com No 115, 1988).

⁴ p 57 of Report. See also paras 4.15 to 4.26 of Report.

4.3 In 1993 the English Law Commission came to very similar conclusions.⁶ Like the Scottish Law Commission it drew short of recommending that contributory negligence should be generally available in breach of contract cases. It did recommend that it should be available whenever a plaintiff suffered damage as the result partly of the breach of a contractual duty to take reasonable care or exercise reasonable skill and partly of the plaintiff's own contributory negligence. These recommendations have not been implemented either.

International models

4.4 The European *Principles* have an article headed "Loss Attributable to Aggrieved Party" which provides as follows.⁷

"The non-performing party is not liable for loss suffered by the aggrieved party to the extent that the aggrieved party contributed to the non-performance or its effects."

One criticism of this rule is that it is too mechanistic. It takes no account of degree of fault. The aggrieved party may have contributed accidentally or blamelessly to the non-performance or its effects. The Unidroit *Principles* are more subtle. They provide that⁸

"Where the harm is due in part to an act or omission of the aggrieved party or to another event as to which that party bears the risk, the amount of damages shall be reduced to the extent that these factors have contributed to the harm, having regard to the conduct of each of the parties."

Assessment

4.5 We regard the earlier Commission recommendation as the minimum reform which should be considered in this area. The question for consideration now is whether it would be desirable to go beyond the Commission's earlier recommendation and introduce a wider provision.

4.6 The main reason for this Commission's recommendation that contributory negligence should not be available to the defender where the defender's breach did not consist of negligence was that where the defender's fault was irrelevant to the breach, the pursuer's fault should also be irrelevant.⁹ This, however, does not necessarily follow. The fact that the party in breach is liable notwithstanding absence of fault does not necessarily mean that liability should extend to loss or damage which was partly caused by the aggrieved party. In any event it could be provided, as in the Unidroit *Principles*, that the conduct of both parties can be taken into consideration where both have contributed to the loss or harm.

⁵ This depends on whether the reasoning of the majority of the English Court of Appeal in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 would be followed in Scotland.

⁶ Report on *Contributory Negligence as a Defence in Contract* (Law Com No 219, 1993).

⁷ Art 9:504.

⁸ Art 7.4.7.

⁹ Scot Law Com No 115 (1988) para 4.18 - "The fault of the defender is irrelevant to liability: therefore any fault on the part of the pursuer should also be irrelevant."

4.7 There was also an argument that the parties should be free to contract for extensive liability, regardless of contributory fault, if they so wished.¹⁰ However, there is no reason why legislation on contributory fault should prevent them from doing this.

4.8 It was also said that to allow contributory negligence to operate in all contractual cases would weaken the position of consumers and give rise to unacceptable uncertainty in commercial dealings.¹¹ Neither argument now seems convincing. The present law does not prevent arguments about who caused loss or harm. It just forces the arguments into an unrealistic framework where only extreme solutions are possible and whether there is no room for fair and reasonable results, based on an apportionment of blame.¹² It is difficult to believe that that is in the interests of either consumers or commercial contracting parties.

4.9 In making its modest and limited recommendations in 1988 the Scottish Law Commission was adopting a cautious approach. A similar approach had been adopted in many common law jurisdictions and, as we have seen, was adopted, for substantially the same reasons, by the English Law Commission five years later. Nonetheless it is clear that there were, and are, arguments for going further.

4.10 On principle it would seem to be desirable to take into account the conduct of the aggrieved party in contributing to the loss or harm. This is just an extension of the policy underlying the well-established rules on mitigation of loss. In cases where loss or damage is sustained as a result of breach of contract it will often be the case that the aggrieved party is partly to blame for the loss or harm. To force courts into an all or nothing choice is likely to produce unreasonable results.

Example. A contractor contracts with an electricity supply company for a continuous supply of electricity. The company, in breach of the contract, allows an interruption in the supply. This is one of the causes of a loss to the contractor who has to re-lay a large volume of concrete. Another casual factor was that the contractor failed to take reasonable steps to see that a back-up system was available before beginning a task for which a continuous supply of concrete was indispensable.¹³

In a case like this, awarding the contractor full damages or no damages may be equally unattractive. The reasonable course may be to apportion the liability, taking the conduct of both parties into account.¹⁴ Other, more commonplace, examples could easily be imagined. For example, a party to a contract for the carriage of goods gives the carrier a wrong address and then, when the carrier fails to take all reasonable steps to ascertain the correct address in time, claims damages for late delivery. Or a person who has bought sophisticated electronic equipment which is not in all respects conform to contract causes damage to it by ignoring the clear instructions supplied with it and taking foolish and unreasonable steps to remedy the small defect. Or a woman injures herself in foolishly and unreasonably attempting to

¹⁰ Scot Law Com No 115 (1988) para 4.19 - "If [a person] agrees to be bound by the contract in all circumstances, even those involving carelessness by the other contracting party, he should not, as a matter of general law, be able to plead that party's conduct in answer to a claim for breach of contract."

¹¹ Scot Law Com No 115 (1988) para 4.20.

¹² "In cases of shared responsibility for damage it is as unjust that the person suffering the damage should recover 100 per cent. as it is that he should recover nothing." O'Connor LJ in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 at 862.

¹³ This is a hypothetical example suggested by the case of *Balfour Beatty Construction v Scottish Power* 1994 SLT 807.

¹⁴ If the electricity company had caused the loss intentionally, having been warned, for example, that the operation was beginning and that there were no back-up arrangements, then the deliberate nature of their conduct would no doubt be taken fully into account.

climb over a high gate which ought, in terms of a contract, to have been left open.¹⁵ In some such cases the effect of the existing law may be that the aggrieved party recovers nothing. A court, faced with arguments that there is no room for apportioning liability, may feel obliged to hold that the aggrieved party's conduct was the sole cause, or the sole effective cause, of the loss.¹⁶

4.11 It is not, in our view, justifiable to draw a distinction between contracts involving the exercise of care or skill and other contracts. The above examples are all ones where it would seem reasonable to take contributory fault into account but none of them involves a contract to exercise care or skill. It may be a matter of chance whether an obligation is expressed as an obligation to achieve a result or to use all reasonable care and skill to achieve a result.

4.12 On consultation almost all of the consultees who responded on this issue favoured reform along the lines suggested in the discussion paper.

Recommendation

4.13 We recommend that

3. **It should be provided that, where loss or harm is caused partly by a breach of contract and partly by the act or omission of the aggrieved party, the amount of damages should be reducible to take account of the extent to which the aggrieved party's conduct contributed to the loss or harm, the conduct of both parties being taken into account.**

Draft Bill, section 3

¹⁵ This is a less colourful version of the facts in *Sayers v Harlow UDC* [1958] 1 WLR 623 where the plaintiff injured herself in attempting to climb out of a locked toilet cubicle.

¹⁶ See eg *Quinn v Burch Bros (Builders) Ltd* [1966] 2 QB 370; *Lambert v Lewis* [1982] AC 225 at 277B; *Young v Purdy* [1996] 2 FLR 795.

Part 5 Interim specific implement

Introduction

5.1 A decree for specific implement of a contractual obligation¹ orders the defender to perform the obligation. Our consultation indicated that the law on this remedy was, with one exception, regarded as satisfactory. The exception related to doubts over the availability of an interim remedy of specific implement. It would be a serious defect in the remedy of specific implement if an interim remedy were not available.

Existing law

5.2 At one time it was thought that there was no interim remedy available, apart from interim interdict in certain types of case, to compel performance. Fortunately, it has now been held² that, although interim specific implement as such may not be available at common law, an interim remedy can be obtained under sections 46 and 47(2) of the Court of Session Act 1988 which give the court certain powers to make specific orders in proceedings pending before it. It is not, however, clear that these sections cover all the situations which need to be covered. Section 46 provides:

"Where a respondent in any application or proceedings in the Court, whether before or after the institution of such proceedings or application, has *done any act* which the Court might have prohibited by interdict, the Court may ordain the respondent to perform any act which may be necessary for reinstating the petitioner in his possessory right, *or for granting specific relief against the illegal act complained of*". (Emphasis added).

Section 47(2) provides:

"In any cause in dependence before the Court, the Court may, on the motion of any party to the cause, make such order regarding the interim possession of any property to which the cause relates, or regarding the subject matter of the cause, as the court may think fit."

Section 46 applies only where the respondent has done any act. It cannot apply where the respondent has simply failed to do what was required under the contract. Section 47 gives the court power to "make such order ... regarding the subject matter of the cause, as the court may think fit". This seems to be wide enough to enable the court to make any order, including an order for interim specific implement, but whether that is a correct reading is open to some doubt. If all interim orders are included in the general words it is not clear why it was necessary to refer in particular to interim possession of property. Nor is it clear what is meant by the subject matter of the cause. Is a contract a subject matter of an action for breach of contract or does subject-matter have a more concrete meaning? It seems to us

¹ Other than one for the payment of money, where the remedy is simply an action for payment.

² *Church Commissioners for England v Abbey National plc* 1994 SC 651.

that these provisions are not perfectly adapted to the problem of interim decrees of specific implement and that they have been pressed into service for want of anything better.

5.3 The position in the sheriff courts is even more unclear. It is said in the leading book on sheriff court practice that interim specific implement is available³ but there is no statutory provision on which such a remedy could be based and the cases are not conclusive as to the existence of a general remedy. There are a few cases on special types of order such as interim orders for the consignment or deposit of money⁴ but there appear to be no reported cases on interim specific implement of an obligation to do something other than consign or pay money. It would be surprising if the sheriff courts had, at common law, greater powers than the Court of Session.

5.4 One effect of doubts as to the availability of an interim decree of specific implement is that practitioners have attempted to force cases more suitable for specific implement into the form of an application for interdict and interim interdict.⁵ This, in turn, gives rise to unfruitful discussions as to the distinction between positive and negative interdicts.⁶

Results of consultation

5.5 In the discussion paper we invited views on whether there should be an express provision enabling interim decrees of specific implement to be obtained. There was strong support for such a provision. A few consultees suggested dealing with the matter by rules of court. It would not, however, in our view, be right to introduce a new remedy by means of rules of court. The statutory authority to make rules of court is limited to rules regulating and prescribing "the procedure and practice to be followed".⁷ That does not clearly cover the introduction of a new remedy, even if of an interim character. A statutory provision is needed.

Recommendation

5.6 We recommend that

4. It should be provided by statute that an interim decree of specific implement of a contractual obligation is competent both in the Court of Session and in the sheriff courts.

Draft Bill, section 4

5.7 This recommendation is confined to decrees ordering implement of contractual obligations. We recommend later an extension to unilateral voluntary obligations.⁸ There could be other situations, for example in relation to nuisance, where interim specific implement would be useful. To make recommendations on such matters would, however, take us too far beyond the subject matter of this report and too far beyond our consultation.

³ Macphail, *Sheriff Court Practice* (2nd edn, 1998) para 21.79.

⁴ *Mackenzie v Balerno Paper Mill Co* (1883) 10 R 1147; *Mackenzie v Templeton* (1876) 12 Sh Ct Rep 323; *George Hotel (Glasgow) Ltd v Prestwick Hotels Ltd* 1961 SLT (Sh Ct) 61.

⁵ See the discussion paper para 7.2.

⁶ See the discussion paper Part 7.

⁷ Court of Session Act 1988 s 5; Sheriff Courts (Scotland) Act 1971 s 32.

⁸ Para 6.4.

We hope that the question of allowing interim specific implement in non-contractual contexts will be borne in mind in any future reform of the law on civil remedies.

Part 6 Other Recommendations

Unilateral voluntary obligations

6.1 The preceding recommendations in this report could, at least in theory, be applicable to breach of a unilateral voluntary obligation, such as a promise to pay or to do something.

6.2 The applicability of our recommendations to unilateral voluntary obligations is perhaps least obvious in the case of the recommendation designed to deal with the problem revealed by the case of *White & Carter (Councils) Ltd v McGregor*¹. It may seem at first sight as if that problem is one of contract law only. That, however, is not the case. The same essential problem could arise in the case of a unilateral voluntary obligation such as a promise to pay a reward. Suppose, for example, that X promises to pay Y £10,000 if Y produces a report on conditions in a distant country. The promise is in properly subscribed writing and is binding on X. There is no obligation on Y and no need for any acceptance by Y. The arrangement is a unilateral voluntary obligation. The obligation is conditional but there is no contract. Before Y has had time to do anything, X informs Y that the report is no longer wanted. Y nonetheless produces the unwanted report and claims payment of the promised £10,000. The position is essentially the same as that which led to the decision in *White & Carter (Councils) Ltd*. It would be unfortunate if statutory reform of the rule in that case extended only to contracts and if courts were to feel compelled to apply the reasoning in the case to unilateral voluntary obligations.

6.3 It is easier to see that breach of a unilateral voluntary obligation could cause non-patrimonial loss or harm, or could cause loss or harm to which the party suffering the loss or harm partly contributed, or could give rise to a situation where interim specific implement would be appropriate.

6.4 Cases where our recommendations would apply to unilateral voluntary obligations will be rare but, for completeness, we recommend that

5. **The above recommendations should also apply to unilateral voluntary obligations.**

Draft Bill, sections 1 to 4

Commencement

6.5 Three of the legislative reforms recommended in this report relate directly to what happens in court actions. They affect the way in which damages are calculated, by allowing more types of non-patrimonial loss to be included or by allowing conduct contributing to the loss or harm to be taken into account, or they provide a clearer and more certain legal basis for an interim remedy of specific implement.² In relation to these matters there is no

¹ 1962 SC (HL) 1.

² Recommendations 2-4.

reason for not applying the new law to proceedings begun after the new Act comes into force. People could not reasonably have ordered their affairs on the basis that there would never be any liability for non-patrimonial loss, or no prospect of the aggrieved party's conduct being taken into account or no prospect of an interim remedy. Some types of non-patrimonial loss can already be included within a claim for damages for breach of contract and the law is known to be developing incrementally. Conduct contributing to the loss may be held under the existing law to be the sole effective cause of the loss and, in some types of case, might be held to be covered by the Law Reform (Contributory Negligence) Act 1945.³ An interim remedy for specific implement may be made available in the Court of Session by using sections 46 or 47 of the Court of Session Act 1988 and the leading text-book expresses the view that such a remedy is available in the sheriff courts.⁴ We consider therefore that these new rules on remedies should apply to any proceedings begun after the new Act comes into force even if the relevant contract had been entered into before that date. It would be undesirable if in some actions after that date the courts had to seek to provide an appropriate remedy by manipulating the old law while in others they could make an appropriate remedy available cleanly under the new law.

6.6 Our recommendation on payment for unwanted performance is different in character. It could be seen as affecting the right to payment rather than just a remedy. In any event, it would be potentially unfair to change the rule on this point if, in reliance on the old law, a party to a contract had already responded to an intimation that performance was unwanted by continuing with performance in the confident expectation that, however unreasonable the conduct, full payment under the contract could be recovered. In relation to this recommendation the fairest course is to avoid all danger of retrospectivity by applying the new rule only to cases where the intimation that the performance is unwanted takes place after the new legislation comes into force.

6.7 Our recommendation on unilateral voluntary obligations is parasitic on other recommendations. So no special recommendation on commencement is necessary in relation to it.

6.8 We recommend that

6. (a) **Any provision enacted to implement recommendation 1 should apply where the intimation that performance is unwanted takes place after the implementing legislation comes into force.**
- (b) **Any provision enacted to implement recommendations 2, 3 and 4 should apply to any proceedings begun after the implementing legislation comes into force.**

Draft Bill, section 5

³ See para 4.1.

⁴ See Macphail, *Sheriff Court Practice* (2nd edn, 1998) para 21.79. As noted at para 5.3 above, the cases supporting this conclusion deal with rather limited types of performance, such as the consignment of money.

Part 7 Proposals not followed by recommendations

Introduction

7.1 We have decided not to recommend immediate legislation on a number of matters discussed in our discussion paper. In this Part we explain why. The fact that we do not recommend immediate legislation on a proposal does not necessarily mean that we consider it to be without merit. Indeed most of the proposals discussed in this Part received strong support on consultation and many would undoubtedly feature in any comprehensive statutory restatement or codification. Generally speaking, the reason for not proceeding further at this stage with any supported proposal is that, while the reform might be potentially useful, it is not of such a nature as to require immediate legislative action.

Contractual warranties

7.2 In the discussion paper we asked whether it should be made clear that breach, in relation to contract, covered the situation where a contractual warranty, not involving any obligation to perform, proved to be untrue.¹ Underlying this question was a concern that the common approach of defining breach of contract in terms of a failure to perform might give the impression that a breach of a contractual warranty was not a breach of contract. Those who responded to the question were virtually unanimous in approving of the proposed clarification, although some doubted the need for legislation and one suggested that the word "inaccurate" would be better than "untrue" because "untrue" suggested a deliberate falsehood. We have concluded that the doubt to which we drew attention is theoretical rather than real and that there is no real risk that any court would hold that breach of a contractual warranty was not a breach of contract. The immediate remedy for any confusion lies in the hands of those writing books. Any eventual statutory restatement could readily take account of the point.

Anticipatory breach

7.3 We asked whether it should be made clear that the aggrieved party's remedies for anticipatory breach arise not only when there is a total repudiation of the contract but also when it is clear that there will be a material breach of the contract.² The consultees who responded to this question were unanimous in their support of such clarification although one warned of the care needed when defining material breach because of the complexity of building contracts. We have concluded, however, that this is not a matter requiring urgent legislation. The law would go this way anyway and development can be left to the courts or to a more comprehensive legislative restatement.

¹ Para 2.4. Proposition 1.

² Para 2.7. Proposition 2.

7.4 We also asked in the discussion paper whether it should be made clear that the aggrieved party's remedies for anticipatory breach can arise in relation to an anticipatory breach of a severable part of the contract, the remedies being confined to that part of the contract.³ Almost all of those who commented agreed that this should be made clear. Two of the consultees noted that the difficulty of defining which parts of a contract are severable might restrict the effectiveness of the proposition and one saw this as such an insurmountable problem that it responded to the proposal in the negative. Again, we have concluded that there is not an urgent need for piecemeal legislation. Clarification would be advantageous but there is little doubt as to the way the law would develop if a suitable case arose.

Definition of material breach

7.5 We asked whether there would be any advantage in having a statutory provision defining or explaining the type of breach which would justify rescission.⁴ We did not, however, show any enthusiasm for a departure from the well-accepted term "material breach" and consultees were of the same view. There was no support for change and we recommend none.

Structure of remedies

7.6 We asked whether the existing structure of remedies for breach of contract was satisfactory, expressing the provisional view that it was.⁵ Consultees agreed. This is not a matter requiring any reforming legislation but an acceptable structure would be an important part of any statutory restatement and the views of consultees on this point are therefore useful and reassuring.

Relationship between remedies

7.7 We asked whether there would be any advantage in a statutory provision making clear the relationship between the different remedies for breach of contract and, in particular, making it clear that damages can be claimed whether or not the contract was rescinded.⁶ There was a majority in favour of such a provision, although some consultees thought that it would be appropriate only in the context of a statutory restatement. This is not a matter requiring immediate legislation.

Position where both parties in breach

7.8 We suggested in the discussion paper that it should be made clear that a party to a contract is not disentitled, merely by being in breach, from any available remedy for the other party's breach of contract.⁷ We expressed the view, however, that there was no general rule in the existing law that a party in breach could not sue for breach. We pointed out that many of the judicial statements denying a remedy to the party in breach could be regarded as doing so on the ground that the other party was exercising a lawful right of retention or suspension of performance and was therefore **not** in breach. We also pointed out the absurd

³ Para 2.8. Proposition 3.

⁴ Para 2.17. Proposition 4.

⁵ Para 2.19. Proposition 5.

⁶ Para 2.20. Proposition 6.

⁷ Para 2.26. Proposition 7.

consequences of any rule that a party in breach could not sue for breach. The logical result would be that in any case where both parties were in breach neither could recover damages. We did not think that this was the existing law.

7.9 On consultation, almost all consultees who responded on this question thought that the law should be clarified as proposed. We have no doubt that the law should not contain any general rule that a party in breach is disentitled from exercising contractual rights or pursuing remedies for breach by the other party. The question which we have found more difficult is whether there is actually a need for legislative reform. If it is already the position that there is no such rule then any legislation would not only be unnecessary but might be harmful. It might be harmful in suggesting that the law was being changed and that in relation to, say, contracts entered into before the date of commencement or actions begun before that date there was a rule denying recovery to a party in breach. It might also be harmful because it would be open to misinterpretation. It would not be the intention of any new statutory provision to affect the law on retention or suspension of performance. Yet it might give rise to arguments that these remedies of an aggrieved party were being restricted in some way. It would also not be the intention of any new provision to interfere with express contractual rights but again there might, depending on how a provision was drafted, be a danger of misinterpretation or misapprehension. There could also be difficulties in relation to the date of commencement of a new provision. Should it apply retrospectively, on the ground that no change in the law was intended, or only to contracts entered into after the date of commencement of the new legislation, on the ground that rights were being affected, or to actions begun after the date of commencement, on the ground that only remedies were being affected?

7.10 These considerations have led us to re-examine the authorities with some care in order to see whether legislative intervention is necessary.

7.11 The leading case is *Graham & Co v United Turkey Red Co Ltd*.⁸ Graham and Company, a firm of commercial agents, entered into a contract with UTR to act as UTR's agents in obtaining sales of their products and undertook to act solely for them. At first they did so but for some sixteen months prior to the termination of the contract they had acted also for other manufacturers. Graham and Company sought an accounting for commission, the balance of commission due to them and damages. The Second Division held that the pursuers were not entitled to commission during the period in which they were in breach of contract. They were entitled to an accounting for the earlier period during which they had complied with the contract. It is immediately apparent that this case cannot be authority for the proposition that a party in breach cannot sue on the contract. Graham and Company did sue on the contract, with some success.⁹ There were statements about the mutuality of contractual obligations, but the actual decision was simply that the pursuers could recover commission to which they were entitled but could not recover commission to which they were not entitled. They were not entitled to commission for the last sixteen months of the

⁸ 1922 SC 533.

⁹ A plea in law by the defenders to the effect that the pursuers, being in material breach, were barred from suing was repelled by the Lord Ordinary and did not feature in the discussion in the Inner House.

agency because there was a rule of agency law¹⁰ that an agent forfeited commission for any period when the agent was in material breach of contract.

7.12 It is true that there are numerous judicial statements about the mutuality of contractual obligations.¹¹ Some of them can be read as saying that a party in breach, or in material breach, cannot exercise rights under the contract or sue for damages for its breach. However, the correct interpretation of most such statements is, in our view, that they relate to the remedies of rescission or suspension of performance - one party is entitled to bring the contract to an end if the other is in material breach or to refuse to perform until the other party has performed countervailing obligations which fall to be performed earlier or at the same time. The result of the right to suspend performance is often that a party in breach cannot sue on the contract until that party performs, or at least offers to perform, countervailing obligations. That, however, is a very different matter from saying that a party in breach (or material breach) can never exercise contractual rights or sue on the contract. There are situations where the remedy of suspension of performance is not relevant or not available and in those situations a party in breach may well be able to sue on the contract or exercise contractual rights.

7.13 If we were to recommend legislation it would probably be to the effect that a party in breach of contract is not thereby disentitled from exercising any right or pursuing any remedy arising out of the other party's breach of contract. It is clear, however, that this is already the position. There is no general disentitlement. In *Bank of East Asia Ltd v Scottish Enterprise*¹² Lord Jauncey, in a speech with which the other judges concurred, said this

"I do not consider that the authorities warrant so broad a proposition as that any material breach by one party to a contract necessarily disentitles him from enforcing any and every obligation due by the other party."

There is, in our view, no need to put into slightly different legislative words a statement which carries the authority of a unanimous decision of the House of Lords. We conclude that no recommendation is required because it is already the case that a party in breach is not automatically disentitled from exercising contractual rights or suing on the contract. Everything depends on the terms of the particular contract and on the law on suspension of performance. A number of statements in cases prior to the *Bank of East Asia* case must now be disregarded.¹³

Suspension of performance

7.14 The discussion paper contained four provisional proposals for clarification of the law on suspension of performance - the remedy whereby a party to a contract is entitled to withhold or retain performance until the other party performs any countervailing obligations due to be performed earlier or at the same time.

¹⁰ The court referred to Story on *Agency* and English cases on agency. See 1922 SC 533 at 542-543. See now, however, the Commercial Agents (Council Directive) Regulations 1993 (SI 1993 No 3053) reg 7 and *Roy v M R Pearlman Ltd* 1999 SCLR 803.

¹¹ See Gloag, *Contract* (2nd ed, 1929) 592-596; McBryde, *Contract* 303-307.

¹² 1997 SLT 1213 at 1216L.

¹³ These include the remarks of Lord Low in *Steel v Young* 1907 SC 360 at 366 that "a person who has broken his contract cannot sue upon it" and the remarks of Lord Wrenbury in *Forrest v Scottish County Investment Co* 1916 SC (HL) 28 at 39 to the effect that a builder in breach of contract could never sue for the contract price.

7.15 The first suggestion was that the remedy should be available where it was clear that there was going to be a material breach even if the actual time for performance had not arrived.¹⁴ Almost all consultees agreed that this would be desirable. The Faculty of Advocates thought, however, that there was no need for legislation as it was already the law that suspension of performance was possible in response to an anticipatory breach. We have already noted that the law on anticipatory breach is likely to recognise that there need not be an express repudiation.¹⁵ In these circumstances we do not consider that there is an immediate need for legislation on this aspect of the remedy of suspension of performance.

7.16 The second suggestion was that it should be made clear that, where there had been an actual breach of contract, not being a trivial breach, the remedy of suspension of performance was available even if the breach was not material.¹⁶ This proposal failed to achieve majority support. There was unease at the prospect of a further category of breaches which were not material but were nonetheless not trivial. Some consultees thought that, as suspension of performance was itself a serious remedy and open to abuse, it should be available only where the breach was material.

7.17 The third suggestion was that the remedy of suspension of performance should not be available where the other party had substantially performed but the performance was defective and it would be unreasonable to require the defects to be remedied.¹⁷ There was opposition to this proposal on the ground that it would unduly weaken the position of the aggrieved party, given that it might apply to quite serious breaches. It failed to gain majority support.

7.18 The fourth possibility on which we canvassed views was that it might be expressly provided that the remedy of suspension of performance must be exercised in good faith.¹⁸ Most respondents did not support this solution. Some did not give reasons. Others thought that good faith would introduce too much uncertainty and would be too difficult to define and apply.

7.19 The result of the consultation on suspension of performance is that most respondents appeared to think that some limitation was necessary (perhaps by confining the remedy to cases of material breach) but failed to support any of the specific suggestions made. There is a need for some further thought and clarification here but we do not have any mandate for an immediate legislative solution.

Rescission

7.20 We suggested in the discussion paper that it should be made clear that rescission is effected by intimation to the party in breach.¹⁹ Almost all consultees agreed that this should be the rule, although the Faculty of Advocates made the point that in some circumstances intimation of rescission might be implied from conduct. There was a strongly expressed view that it was clearly the law already that some form of intimation was required. It was one of those rules so obvious that it went without saying and did not need to be supported

¹⁴ Para 3.10. Proposition 8.

¹⁵ Para 7.3 above.

¹⁶ Para 3.11. Proposition 9.

¹⁷ Paras 3.12-3.14. Proposition 10.

¹⁸ Para 3.15. Proposition 11.

¹⁹ Para 4.6. Proposition 12.

by authority. We are inclined to agree with this last point of view. It seems clear that the decision to rescind must be communicated in some way to the party in breach. We do not believe that reforming legislation is necessary here.

7.21 We asked whether in the case of a remediable breach of contract the basic rule should be (a) that the aggrieved party could not rescind unless the other party had been given a reasonable opportunity to remedy the breach or (b) that the aggrieved party could rescind without giving the other party an opportunity to remedy the breach.²⁰ We inclined to the view that, subject to exceptions,²¹ the latter was probably the existing law. Opinion was divided on consultation but a clear majority favoured the second option - that the basic rule should be that the aggrieved party should be able rescind without giving the other party an opportunity to remedy the breach. We agree with this view. The other view would either shift the balance of power too much in favour of the party in breach of contract and against the aggrieved party or be so hedged about with complex qualifications as to introduce more uncertainty than it would remove. As we consider that the existing background law does not require an opportunity to cure to be given to the party in breach we make no recommendation for legislation.

7.22 We also suggest that it should be made clear that if performance had been made or offered, but in a way which was a material breach of the contract, the right to rescind was lost after the lapse of a reasonable time from the date when the aggrieved party became, or could reasonably have been expected to become, aware of the breach.²² Most consultees agreed with this proposal although one thought that, as it was already the law, legislation was unnecessary. The effect of lapse of time on the right to rescind is recognised in the case of sale of goods, under section 35 of the Sale of Goods Act 1979, and we believe that if a suitable case were to arise it would be recognised in other cases too. The absence of clear authority can probably be explained by the fact that in cases of unreasonable delay there would almost always be personal bar. We do not believe that legislation is necessary.

7.23 We sought views on whether the redressing of economic imbalances caused by rescission of a partly performed contract should be left to the law on unjustified enrichment or regulated in a statute on remedies for breach of contract.²³ Our provisional view was that it would be better to leave the matter to the law on unjustified enrichment. A majority of those who responded to this question agreed. Legislation is not required to achieve this result. In the discussion paper we had commented adversely on the case of *Connelly v Simpson*²⁴ which, on one view, appeared to hold that a claim for redress of unjustified enrichment was not available in any case where there had been a breach of contract. Not all consultees thought that the case could be taken as authority for that proposition. One of the surprising features of the case was that it was never made clear whether or not the contract had been rescinded, and yet that must be a crucial point in any such case. It seems unlikely that this rather special case will prevent development of the law in the direction of allowing the economic imbalances which can arise from rescission of a contract from being remedied by resort to the law on unjustified enrichment. We think that it can be left to be distinguished in subsequent cases.

²⁰ Para 4.22. Proposition 13.

²¹ Notably in relation to leases. See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 ss 4-7.

²² Para 4.24. Proposition 14.

²³ Para 4.52. Proposition 15.

²⁴ 1993 SC 391.

7.24 We noted the theoretical confusion surrounding the so-called *quantum meruit* rule (that is the rule that a person who has provided work or services under a rescinded contract is normally entitled to reasonable remuneration) and asked whether it should be made clear that this was simply an example of the operation of the law on unjustified enrichment.²⁵ Almost all consultees favoured this approach. We think, however, that in the absence of a statutory restatement this sort of doctrinal clarification is best left to the courts and the legal writers.

Forced deduction of rectification costs

7.25 We referred in the discussion paper to the difficult lines of cases beginning with *Ramsay v Brand*²⁶ in which certain statements appeared to say that a party claiming payment under a contract which had been substantially performed, apart from some minor breach, could only recover the price subject to a deduction of the cost of rectifying the breach.²⁷ We noted that, although this approach produced reasonable results in cases where the minor breach was readily remediable, it produced unreasonable results in those cases where it was not reasonable to expect the breach to be rectified - for example, where a builder had used the wrong kind of cement in building a house. If the other party could not rescind, or chose not to rescind, the builder could not claim redress on the basis of unjustified enrichment and was left with no claim at all. We suggested that it should be made clear that there was no absolute rule requiring the cost of rectification to be deducted in such cases.

7.26 With one exception, consultees considered that the supposed rule of *Ramsay v Brand* should be swept away. We were initially inclined to recommend immediate legislation for this purpose. On reflection, however, we have come to the conclusion that this is unnecessary. The supposed rule has not led to unfortunate results in practice, partly because such matters are usually regulated by specific provisions in construction contracts and partly because the courts have felt able to disregard the statements made in *Ramsay v Brand* whenever these statements would lead to injustice.²⁸ We do not think that the supposed rule is a live issue any more. It derives from statements by a judge, made in the context of a particular case at a time when the rules on rescission, suspension of performance and damages for breach were not so developed as they are now. The statements have been criticised in subsequent cases.²⁹ It would be wrong to regard them as if they were the words of a statute. We do not believe that they would be followed in any case where they would produce absurd results. It seems clear that the supposed rule of *Ramsay v Brand* would not be incorporated in any statutory restatement of the law on remedies for breach of contract. It can be left to wither away.

7.27 Recent developments, reinforced by recommendations in this report, help to free the way for reasonable solutions in cases where builders have completed their performance except for certain minor, non-material breaches which cannot reasonably be rectified and which might hardly affect the value of the property. First, it is now clear that a claim for

²⁵ Paras 4.46 and 4.52. Proposition 17.

²⁶ (1898) 25 R 1212.

²⁷ It is implicit in these dicta that the aggrieved party is not entitled to suspend performance until the contract is performed according to its terms, presumably because the breach is not sufficiently material.

²⁸ See eg *Stewart Roofing Co Ltd v Shanlin* 1958 SLT (Sh Ct) 53 where the sheriff refused to follow *Ramsay v Brand* on the ground that subsequent cases had thrown the law into such confusion that he was no longer bound to do so.

²⁹ In *Forrest v Scottish County Investment Co* 1916 SC (HL) 28. See also *Speirs Ltd v Petersen* 1924 SC 428.

damages by the aggrieved party need not be based on the cost of rectification where rectification would be unreasonable in the circumstances.³⁰ This development would be reinforced and consolidated by our recommendation on non-patrimonial loss, which would allow a claim for loss of the satisfaction of receiving the due performance even if there had been no diminution in the value of the property in question.³¹ Secondly, as we have seen,³² it is now clear that there is no absolute rule that a party in breach cannot sue on the contract. Everything will depend on the terms of the particular contract³³ and on the rules on suspension of performance³⁴ but there will now be cases where a builder who has substantially performed the contract will be able to sue on the contract, subject to the possibility of a counter-claim by the other party for damages for minor defects, such damages not necessarily being based on the cost of rectification.³⁵

Specific implement

7.28 We invited views in the discussion paper on whether there was a need for greater clarity as to the circumstances in which a decree of specific implement would or would not be granted.³⁶ Our preliminary view was that the existing law was satisfactory. Consultees agreed. We think that no reforming legislation is necessary.

Interdict

7.29 We suggested in the discussion paper that it should be made competent to grant an interdict notwithstanding that in substance it compelled performance of a contract.³⁷ There was a mixed reaction on consultation. Several consultees thought that such a reform would be unhelpful. They considered that the distinction between interdict and specific implement was natural and understandable. The Lord President noted that, in a doubtful case, the remedies of interdict and specific implement could both be sought. We have been influenced by these views and have concluded that reform is unnecessary. Making interim remedies of specific implement more readily and clearly available, as we have recommended earlier in this report,³⁸ would help to solve some of the practical difficulties in this area.

³⁰ *Ruxley Electronics Ltd v Forsyth* [1996] AC 344.

³¹ Para 3.8.

³² Paras 7.8-7.13.

³³ There is nothing to stop parties from agreeing that not a penny will be payable until the contract has been completely performed, in all its details, to the highest measurable standards of accuracy. In many situations involving high technology such provisions would be entirely appropriate. Conversely there is nothing to stop parties from agreeing to a system of price abatement for minor deviations. There are situations where that too would be entirely appropriate.

³⁴ Although there is some uncertainty in these rules (see paras 7.14-7.19 above) it is clear that there will be some cases of minor unintentional breaches where the remedy of retention or suspension of performance will not be available.

³⁵ English law has reached this position by a different route, via the doctrine of the entire contract rather than the doctrine of mutuality. See *Dakin (H) & Co Ltd v Lee* [1916] 1 KB 566; *Hoening v Isaacs* [1952] 2 All E R 176; *Ruxley Electronics Ltd v Forsyth* [1996] AC 344 esp at 363.

³⁶ Para 6.13. Proposition 20.

³⁷ Para 7.22. Proposition 22.

³⁸ Para 5.6.

Purpose of damages for breach of contract

7.30 Most consultees agreed with our suggestion³⁹ that the purpose of damages should, in general, be compensation for loss or harm caused by the breach. This is not something which requires legislation. It is, however, an important point to have established for the purpose of any future statutory restatement.

The remoteness rule

7.31 We asked whether the rule of remoteness of damages, often expressed by reference to the old English case of *Hadley v Baxendale*⁴⁰ as interpreted in subsequent cases, should be restated in terms of foreseeability.⁴¹ Most respondents agreed but a few thought that legislation was unnecessary and one thought that it would be undesirable. This is something that can be left to a comprehensive statutory restatement. There is no need for immediate legislation.

7.32 Hardly any consultees thought that there should be an exception to the proposed foreseeability rule if the breach was intentionally or grossly negligent.⁴²

Reliance damages

7.33 Almost all consultees agreed with our preliminary view that there was no need to introduce an alternative measure of damages, available at the pursuer's option and designed to restore the pursuer's position to what it would have been had the contract never been entered into.⁴³ We would not recommend any such rule.

Cost of rectification not sole measure

7.34 In the discussion paper we asked whether it should be made clear that the cost of rectification need not be used as the basis of assessing damages in any case where to do so would be unreasonable. We suggested that in such a case damages should be based on an assessment of the loss, including non-patrimonial loss, sustained by the aggrieved party in the absence of rectification.⁴⁴ Most consultees agreed that this should be made clear. Two, however, thought that there was no need for legislation as the decision of the House of Lords in the English case of *Ruxley Electronics Ltd v Forsyth*⁴⁵ would be followed in Scotland. One consultee considered that the aggrieved party should always be entitled to the full cost of rectification, a view which we do not share and which other consultees did not share. We have already recommended the enactment of a provision to make it clear that non-patrimonial loss, including the loss of the satisfaction of obtaining the performance specified in the contract, should be a permissible head of damages for breach of contract.⁴⁶ This would free the Scottish courts from any difficulty they might otherwise have had in following the *Ruxley* case. We do not think that any further legislative reform is required.

³⁹ Para 8.5. Proposition 23.

⁴⁰ (1854) 9 Ex 341.

⁴¹ Para 8.22. Proposition 24.

⁴² Para 8.22. Proposition 25.

⁴³ Para 8.36. Proposition 27.

⁴⁴ Para 8.42. Proposition 28.

⁴⁵ [1996] AC 344.

⁴⁶ Para 3.8.

Losses suffered by a third party

7.35 We expressed the provisional view in the discussion paper that no new special rule was necessary to enable a party to a contract to recover damages for losses suffered by a third party.⁴⁷ Almost all consultees agreed. We do not therefore recommend any legislation on this matter.

Reducing uncertainty

7.36 We put forward several proposals for reducing the uncertainty with which a party aggrieved by a breach of contract is often faced.

7.37 *Adequate assurance of performance.* One proposal was that a party who reasonably believed that there would be a material breach by the other party should be able to demand an adequate assurance of performance, the effect being that the aggrieved party could withhold performance in the meantime and could rescind the contract if an adequate assurance were not given within a reasonable time.⁴⁸ Most respondents agreed with this proposal. Four disagreed, however, three of them on the ground that there would be a risk of creating more uncertainty than was removed. One observed that such assurances could already be demanded informally and that that was both useful and sufficient. In the light of the comments received we do not make any recommendations on this point.

7.38 *Ultimatum procedure.* Another proposal was that there should be a general rule that a party faced by a delay in performance under a contract could give a reasonable additional time for performance under threat of rescission if the time limit were not met.⁴⁹ Most consultees agreed with this proposal. One supporter of the reform pointed out that the ultimatum procedure was widely used by conveyancers and was a useful tool. One respondent, however, thought that the proposal might not in fact reduce uncertainty. Another pointed out that the existence of such a rule in relation to sales of land was well established and expressed the view that development into a more general rule could be left to the courts. Another doubted the wisdom of enabling non-material breaches to be converted into material breaches by an ultimatum procedure. Our own view is that the ultimatum procedure is a useful one. We consider, however, that it is so well established in the law⁵⁰ that further development can be left to the courts. It would be a useful rule to include in any future general restatement of the law on remedies for breach of contract but immediate legislation is not necessary.

7.39 *Summary declarator procedure.* We asked consultees, without much enthusiasm, whether there would be advantages in a new summary declarator procedure to enable a prompt judicial decision to be obtained on such matters as the materiality of a breach of contract.⁵¹ Our lack of enthusiasm was due to our awareness of the developments that had already taken place in the Commercial Court and of the inherent difficulties of obtaining rapid responses to difficult and disputed questions of fact. Our reservations were shared by

⁴⁷ Para 8.49. Proposition 29.

⁴⁸ Para 9.2. Proposition 30.

⁴⁹ Para 9.5. Proposition 31.

⁵⁰ *Rodger (Builders) Ltd v Fawdry* 1950 SC 483 at 492; *Inveresk Paper Co Ltd v Pembry Machinery Co Ltd* 1972 SLT (Notes) 63; *Johnstone v Harris* 1977 SC 365; *Charisma Properties Ltd v Grayling (1994) Ltd* 1996 SC 556 at 558.

⁵¹ Para 9.6. Proposition 32.

respondents. There was a general view that such a procedure would be impracticable. We make no recommendation.

7.40 *Replacement transaction.* We invited views as to whether there would be any advantage in introducing a rule to the effect that where the aggrieved party had terminated the contract and had made a replacement transaction within a reasonable time and in a reasonable manner the aggrieved party could recover the difference between the contract price and the price of the replacement transaction as well as damages for any further harm.⁵² Most consultees favoured such a rule but four considered that the existing rules on mitigation of loss provided sufficient flexibility. We do not think that the introduction of such a rule, although it might be marginally helpful in some cases, can be regarded as a legislative priority and we therefore make no recommendation.

Miscellaneous

7.41 We invited suggestions from consultees on other possible approaches to the problems we had identified and on other problems relating to remedies for breach of contract. It was suggested that there was a need for further work in relation to

- (a) illegal contracts
- (b) the severability of contractual obligations
- (c) third party rights, including a clarification of the right of a third party beneficiary of a contract to claim damages for breach
- (d) reduction and *restitutio in integrum*
- (e) pre-contractual liability in damages, especially in relation to negligent and fraudulent misrepresentation
- (f) a remedy of price abatement distinct from a counter-claim for damages
- (g) civil imprisonment as it applies to a decree for specific implement.

We cannot, in the absence of thorough research and consultation, make any recommendations on any of these topics in the present report but we are grateful to respondents for drawing them to our attention.

⁵² Para 9.10. Proposition 33.

Part 8 List of Recommendations

1. There should be legislation, designed to solve the problem revealed by *White & Carter (Councils) Ltd v McGregor*, to the effect that a party to a contract who had been told that performance under the contract is no longer wanted but who, being in a position to give performance without the co-operation of the other party, has proceeded to perform, is not entitled to recover payment for performance occurring after intimation that further performance is unwanted if (a) that party could have entered into a reasonable substitute transaction without unreasonable effort or expense or (b) it was unreasonable for that party to proceed with the performance.

Para 2.10; Draft Bill, section 1

2. It should be made clear that, subject to the normal remoteness rule, the loss or harm for which damages may be recovered for breach of contract includes non-patrimonial loss or harm of any kind, and in particular includes loss of the satisfaction of obtaining what was contracted for and harm in the form of pain, suffering or mental distress.

Para 3.8; Draft Bill, section 2

3. It should be provided that, where loss or harm is caused partly by a breach of contract and partly by the act or omission of the aggrieved party, the amount of damages should be reducible to take account of the extent to which the aggrieved party's conduct contributed to the loss or harm, the conduct of both parties being taken into account.

Para 4.13; Draft Bill, section 3

4. It should be provided by statute that an interim decree of specific implement of a contractual obligation is competent both in the Court of Session and in the sheriff courts.

Para 5.6; Draft Bill, section 4

5. The above recommendations should also apply to unilateral voluntary obligations.

Para 6.4; Draft Bill, sections 1 to 4

6. (a) Any provision enacted to implement recommendation 1 should apply where the intimation that performance is unwanted takes place after the implementing legislation comes into force.

(b) Any provisions enacted to implement recommendations 2, 3 and 4 should apply to any proceedings begun after the implementing legislation comes into force.

Para 6.8; Draft Bill, section 5

APPENDIX A
Draft
Contract (Scotland) Bill

CONTENTS

Section

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- 2 Non-patrimonial loss recoverable on breach
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- 5 Application, commencement and citation

Contract (Scotland) Bill

An Act of the Scottish Parliament to reform certain rules of law relating to rights arising on, and remedies for, breach of contract and unilateral voluntary obligation.

1. Restriction of right to payment for unwanted performance

(1) Where—

- (a) a party to a contract or the beneficiary under a conditional unilateral voluntary obligation (the "performing party") is, before completion of performance, informed by another party to the contract or the person undertaking the obligation that performance is no longer required;
- (b) the performing party is able to proceed or continue with performance without the co-operation of that other party or that person; and
- (c) either—
 - (i) the performing party can, without unreasonable effort or expense, secure a reasonable substitute transaction; or
 - (ii) it is unreasonable for the performing party to proceed or continue with performance,

then the performing party is not entitled, on so proceeding or continuing, to recover the consideration due under the contract or benefit due under the obligation in respect of performance occurring after the performing party has been so informed.

- (2) Subsection (1) above does not affect any right of the performing party to recover damages for breach of contract or conditional unilateral voluntary obligation.

2 Non-patrimonial loss recoverable on breach

- (1) Non-patrimonial loss or harm is included within the heads of damages which may be awarded for breach of contract or for breach of a unilateral voluntary obligation.
- (2) The following are examples of the kinds of loss or harm referred to in subsection (1) above: injury to feelings, loss of reputation, loss of amenity, loss of satisfaction in obtaining performance of the contract or obligation, grief and distress.

Explanatory notes

Section 1

Section 1 is designed to modify the law resulting from the case of *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1. In that case, which concerned a cancelled contract for placing advertising matter on litter bins, it was held that, where a party was in a position to perform under a contract without co-operation from the other party, and proceeded to do so despite being told that the performance was no longer wanted, that party could recover the full payment due under the contract. The section prevents payment for unwanted performance from being recovered in cases where it is unreasonable to proceed with the unwanted performance. See Part 2 of the report. In such cases damages could still be recovered. The section applies to conditional unilateral voluntary obligations, such as a promise to pay a reward for doing something, in the same way as to contracts. See para 6.2 of the report.

Example. A company contracts with a botanist to go to Brazil, spend six months on field research and produce a report. The day after the contract has been completed the company discovers that it no longer needs the research. It tells the botanist that it no longer wants the report, that the contract is cancelled and that it will pay full compensation, including compensation for any non-patrimonial loss or harm suffered by the loss of the contract. As the botanist could readily obtain other suitable work, compensation would be much less than the full contract fee. The botanist rejects this offer, proceeds to Brazil, produces an unwanted report and claims the full contractual fee. Under the existing law it seems that the botanist will succeed, although some judges have indicated that exceptions to the normal rule may have to be recognised. The new section would prevent the contractual fee from being recovered but would not prevent damages from being recovered.

Subsection (1)

This subsection restricts the right of the performing party to recover the consideration or benefit due for the unwanted performance.

Paragraphs (a) to (c) set out the conditions which have to be met before the statutory restriction of the right to recover comes into effect. The party who is entitled to render the performance must have been told that the performance is no longer wanted. That party must have been able to proceed to perform without the co-operation of the other party or person. (If such co-operation was needed and was not provided then the result sought by the section is achieved automatically without legislation because the performing party, being unable to perform, is thrown back on the remedy of damages.) The performing party must have been in a position to secure a reasonable substitute transaction without unreasonable effort or expense or it must have been, for some other reason, unreasonable for the performing party to proceed with performance.

If these conditions are met, the concluding lines of the subsection prevent the performing party from recovering the consideration or benefit due for any performance given after intimation that performance was no longer wanted.

Subsection (2)

This makes it clear that the performing party is not prevented from claiming damages.

Section 2

This section makes it clear that damages for breach of a contract or unilateral voluntary obligation can be recovered for non-patrimonial loss or harm - that is, for loss or harm not consisting of monetary or economic loss, or damage to property - caused by the breach. The existing law allows such damages to be recovered in some types of cases but not generally. See paras 3.3-3.5 of the report.

Subsection (1)

This sets out the general rule.

Subsection (2)

This subsection gives some examples of the types of non-patrimonial loss or harm which could be recovered. The type described as loss of satisfaction in obtaining performance of the contract or obligation (sometimes called "disappointed expectations") is particularly important for the future development of the law. See para 3.2 of the report and *Ruxley Electronics Ltd v Forsyth* [1996] AC 344.

3 Damages where losses etc. caused also by party not in breach

(1) Where loss or harm is caused to a party to a contract or a beneficiary of a unilateral voluntary obligation—

(a) partly by breach of the contract by another party to it or breach of the obligation by the person undertaking it; and

(b) partly by an act or omission of the first mentioned party or the beneficiary,

the damages recoverable in respect of the breach may be reduced proportionately to the extent that the loss or harm was caused by that act or omission.

(2) In considering whether to reduce damages under subsection (1) above and the extent to which loss or harm was caused by a person's act or omission, a court shall have regard to the whole circumstances of the case, including the conduct of both or all persons concerned.

4 Interim specific implement

It is competent for the Court of Session or the sheriff to order interim specific implement of a contractual or unilateral voluntary obligation.

5 Application, commencement and citation

(1) Section 1 of this Act applies as respects contracts and conditional unilateral voluntary obligations in respect of which the performing party is, after this Act comes into force, informed by another party to the contract or, as the case may be, the person undertaking the obligation that performance is not required.

(2) Sections 2 to 4 above apply for the purposes of proceedings begun after this Act comes into force.

(3) This Act (except this subsection and subsection (4) below) comes into force on the expiry of two months after it has received Royal Assent.

(4) This Act may be cited as the Contract (Scotland) Act 1999.

Explanatory notes

Section 3

This section allows damages to be reduced to take account of the fact that both parties to a contract or unilateral voluntary obligation may have contributed to the loss or harm. At present, under the Law Reform (Contributory Negligence) Act 1945, it is possible to apportion damages in this way in cases based on delict and probably also in cases based on contract where a delict claim would have been possible on the same facts. Apportionment is not, however, possible in other cases based on breach of a contract or unilateral voluntary obligation. See *Lancashire Textiles (Jersey) Ltd v Thomson Shepherd & Co Ltd* 1986 SLT 41 at 45; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852 at 860 - 867 and 875. The existing law forces questions of causation into an artificial framework. In some cases the courts may be forced to deny any claim for damages because the claimant had the last chance to avoid the loss or harm complained of. See Part 4 of the report.

Subsection (1)

This gives the courts a discretion to reduce the damages proportionately to take account of the fact that both parties were partly responsible for the loss or harm.

Subsection (2)

This subsection requires the court to have regard to the whole circumstances of the case, including the conduct of both or all parties to the contract or obligation.

Section 4

This section makes it clear that the Court of Session and the sheriffs can grant interim decrees of specific implement. The law is at present uncertain. There are sections in the Court of Session Act 1988 which enable interim remedies of a similar nature to be granted in some circumstances and there are some cases, of a rather special nature, where interim orders to do something have been granted in the sheriff courts, but there is no clear basis for a general power to grant interim decrees of specific implement as such. See paras 5.1-5.4 of the report.

Section 5

This section contains the rules on application, commencement and citation.

Subsection (1)

Section 1 of the Bill deals with payment for unwanted performance. It will not apply to cases where the performing party was told before the commencement date of the new Act that performance was unwanted. In such cases the performing party was entitled to rely on the old law. Where the intimation that performance is unwanted comes after the date of commencement of the new Act, the new law will apply.

Subsection (2)

Sections 2 to 4 of the Bill alter the rules on what courts can do in awarding damages or awarding interim specific implement. In all of the areas covered, the existing law appears to be in the course of development. The courts have hinted at the possibility of exceptions to the rule in *White & Carter (Councils) Ltd v McGregor* 1962 SC (HL) 1. They have allowed damages for non-patrimonial loss in certain types of case. They have taken account of the contribution of aggrieved parties to the loss or harm complained of, either by disallowing damages completely on the ground that the aggrieved party's conduct was the sole effective cause or by apportioning damages in cases which could be squeezed within the words of the Law Reform (Contributory Negligence) Act 1945 because a claim based on delict could have been available on the same facts. Because the new rules are concerned with remedies, rather than substantive rights, and because they clarify and develop an already uncertain and developing law, it seems legitimate and appropriate to apply them to proceedings begun after the new Act comes into force, even if the relevant contracts were entered into before that date.

Subsections (3) and (4)

These subsections are of a standard nature.

APPENDIX B

List of those who submitted written comments on Discussion Paper No 109

Centre for Research into Law Reform, School of Law, University of Glasgow
The Faculty of Advocates
The Faculty of Law, University of Aberdeen
The Faculty of Procurators, Paisley
Professor W M Gordon, School of Law, University of Glasgow
The Law Society of Scotland
Professor Hector MacQueen, Faculty of Law, University of Edinburgh
Sheriff Principal Gordon Nicholson, QC, Edinburgh
Professor Colin T Reid, Department of Law, University of Dundee
The Right Honourable the Lord Rodger of Earlsferry, Lord President
The Royal Institute of Chartered Surveyors in Scotland
The Scottish Law Agents Society
The Sheriffs' Association
The Society of Local Authority Lawyers & Administrators in Scotland
The Society of Writers to HM Signet (view of 3 members)
Professor Joseph Thomson, School of Law, University of Glasgow

Members of Contract Law Advisory Group who attended meeting to consider proposals in Discussion Paper No 109 on 11 June 1999

Professor John Blackie, Law School, University of Strathclyde
Dr Eric Clive, Scottish Law Commission (Chairman of the Group)
The Hon Lord Coulsfield, Senator of the College of Justice
Ms Laura Dolan, Scottish Courts Administration
Mr George Jamieson, Solicitor, Messrs Walker Laird, Paisley
Miss Laura Macgregor, School of Law, University of Glasgow
Professor Hector MacQueen, Faculty of Law, University of Edinburgh
Professor W W McBryde, Department of Law, University of Dundee
Ms Christine McLintock, Solicitor, Messrs McGrigor Donald, Edinburgh
Sheriff Principal Gordon Nicholson, QC, Edinburgh
Dr Hamish Patrick, Solicitor, Messrs Tods Murray, Edinburgh
Ms Lindy Patterson, Solicitor, Messrs Bird Semple, Edinburgh
Professor Joseph Thomson, School of Law, University of Glasgow
Mr Niall Whitty, Scottish Law Commission
Sheriff A B Wilkinson, QC, Edinburgh
Mr James Wolffe, Advocate
Mr Stephen Woolman, QC