

Subpart 3—Contractual remedies

33 **Meaning of cancel**

In this subpart, unless the context otherwise requires, **cancel**, in relation to a contract, means cancel in accordance with sections 36 to 40.

Compare: 1979 No 11 s 2

34 **Remedy provided in contract**

If a contract expressly provides for a remedy for misrepresentation, repudiation, or breach of contract, or makes express provision for any of the other matters to which sections 35 to 49 relate, those sections have effect subject to that provision.

Compare: 1979 No 11 s 5

Damages for misrepresentation

35 **Damages for misrepresentation**

- (1) If a party to a contract (**A**) has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made to A by or on behalf of another party to that contract (**B**),—
 - (a) A is entitled to damages from B in the same manner and to the same extent as if the representation were a term of the contract that has been breached; and
 - (b) A is not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, entitled to damages from B for deceit or negligence in respect of the misrepresentation.
- (2) Subsection (1) applies to contracts for the sale of goods—
 - (a) despite sections 197 and 201(2); but
 - (b) subject to section 34.

Compare: 1979 No 11 s 6

*Cancellation***36 Party may cancel contract if another party repudiates it**

- (1) A party to a contract may cancel the contract if, by words or conduct, another party (**B**) repudiates the contract by making it clear that B does not intend to—
- (a) perform B's obligations under the contract; or
 - (b) complete the performance of B's obligations under the contract.
- (2) This section is subject to the rest of this subpart.

Compare: 1979 No 11 s 7(2)

37 Party may cancel contract if induced to enter into it by misrepresentation or if term is or will be breached

- (1) A party to a contract may cancel it if—
- (a) the party has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; or
 - (b) a term in the contract is breached by another party to the contract; or
 - (c) it is clear that a term in the contract will be breached by another party to the contract.
- (2) If subsection (1)(a), (b), or (c) applies, a party may exercise the right to cancel the contract if, and only if,—
- (a) the parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to the cancelling party; or
 - (b) the effect of the misrepresentation or breach of the contract is, or, in the case of an anticipated breach, will be,—
 - (i) substantially to reduce the benefit of the contract to the cancelling party; or
 - (ii) substantially to increase the burden of the cancelling party under the contract; or
 - (iii) in relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
- (3) Subsection (1) is subject to the rest of this subpart, but does not limit section 36.

Compare: 1979 No 11 s 7(3), (4)

38 No cancellation if contract is affirmed

A party is not entitled to cancel the contract if, with full knowledge of the repudiation, misrepresentation, or breach, the party has affirmed the contract.

Compare: 1979 No 11 s 7(5)

39 Parties with substantially same interest

- (1) A party who has substantially the same interest under the contract as the party whose act constitutes the repudiation, misrepresentation, or breach may cancel the contract only with the leave of the court.
- (2) The court may, on application made for the purpose, grant leave under subsection (1) if it is satisfied that it is just to do so.
- (3) The leave may be granted on the terms and conditions that the court thinks fit.

Compare: 1979 No 11 s 7(6), (7)

40 Sections 36 to 39 have effect in place of rules of common law and of equity

- (1) Sections 36 to 39 have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation, repudiation, or breach.
- (2) This section applies except as otherwise expressly provided in this subpart.

Compare: 1979 No 11 s 7(1)

41 When cancellation may take effect

- (1) The cancellation of a contract by a party does not take effect—
 - (a) before the time at which the cancellation is made known to the other party; or
 - (b) before the time at which the party cancelling the contract shows, by some clear means that is reasonable in the circumstances, an intention to cancel the contract, if—
 - (i) it is not reasonably practicable for the cancelling party to communicate with the other party; or
 - (ii) the other party cannot reasonably expect to receive notice of the cancellation because of that other party's conduct in relation to the contract.
- (2) The cancellation may be made known by words or by conduct showing an intention to cancel, or both. It is not necessary to use any particular form of words, so long as the intention to cancel is made known.

Compare: 1979 No 11 s 8(1), (2)

42 Effect of cancellation

- (1) When a contract is cancelled, the following provisions apply:

- (a) to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further:
 - (b) to the extent that the contract has been performed at the time of the cancellation, no party is, by reason only of the cancellation, divested of any property transferred or money paid under the contract.
 - (2) This section is subject to the rest of this subpart.
 - (3) Nothing in this section affects the right of a party to recover damages for a misrepresentation or the repudiation or breach of the contract by another party.
- Compare: 1979 No 11 s 8(3), (4)

Power of court to grant relief

43 Power of court to grant relief

- (1) When a contract is cancelled by any party, the court may, if it is just and practicable to do so, make an order or orders granting relief under this section.
- (2) The relief may be granted in the course of any proceeding or on application made for the purpose.
- (3) An order under this section may—
 - (a) direct a party to pay to any other party the sum that the court thinks just (subject to section 35):
 - (b) direct a party to do or refrain from doing, in relation to any other party, any act or thing that the court thinks just:
 - (c) vest the whole or any part of any relevant property in a party:
 - (d) direct a party to transfer or assign the whole or any part of any relevant property to any other party:
 - (e) direct a party to deliver the whole or any part of the possession of any relevant property to any other party.
- (4) In subsection (3),—

party means a party to the proceeding

relevant property means real or personal property that was the subject of the contract or was the whole or part of the consideration for the contract.

Compare: 1979 No 11 s 9(1), (2)

44 Order for relief may be subject to terms and conditions

- (1) An order under section 43 may be made on the terms and conditions that the court thinks fit.
- (2) However, a term or condition must not have the effect of preventing a claim for damages by any party.

Compare: 1979 No 11 s 9(3)

45 Matters court must have regard to

In considering whether to make an order under section 43, and in considering the terms of any order, the court must have regard to—

- (a) the terms of the contract; and
- (b) the extent to which any party to the contract was or would have been able to perform it in whole or in part; and
- (c) any expenditure incurred by a party in, or for the purpose of, performing the contract; and
- (d) the value, in the court's opinion, of any work or services performed by a party in, or for the purpose of, performing the contract; and
- (e) any benefit or advantage obtained by a party because of anything done by another party in, or for the purpose of, performing the contract; and
- (f) any other matters that the court thinks proper.

Compare: 1979 No 11 s 9(4)

46 Protection of purchaser of property in good faith and for valuable consideration

No order may be made under section 43(3)(c) to (e) that would have the effect of depriving a person, not being a party to the contract, of the possession of, or any estate or interest in, any property acquired by the person in good faith and for valuable consideration.

Compare: 1979 No 11 s 9(5)

47 Party who has altered position

- (1) No order may be made under section 43 in respect of any property if any party to the contract has so altered the party's position in relation to the property that, having regard to all relevant circumstances, it would, in the opinion of the court, be inequitable to any party to make the order.
- (2) This section applies whether the party altered the party's position before or after the cancellation of the contract.

Compare: 1979 No 11 s 9(6)

48 Persons who may apply

An application for relief under section 43 may be made by—

- (a) a party to the contract; or
- (b) a person claiming through or under a party to the contract; or
- (c) any other person if it is material for the person to know whether relief under section 43 will be granted.

Compare: 1979 No 11 s 9(7)

49 Recovery of damages

- (1) A party to a contract is not prevented by the cancellation of the contract, or by the granting of relief under section 43, from recovering damages for a misrepresentation or the repudiation or breach of the contract by another party to the contract.
- (2) However, the value of any relief granted under section 43 must be taken into account in assessing those damages.
- (3) Subsection (1) is subject to sections 34, 35, and 50 to 53.
- (4) Any sum ordered to be paid by a party to the contract to any other party to the contract under section 43(3) may be set off against any damages payable by the party to that other party.

Compare: 1979 No 11 s 10