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WE ARE REMINDED OF A PROMISE

In Auckland they do it so well. Take refuse disposal for example. Mention the topic to a city engineer anywhere else and watch his face. If his eyes glaze and his jaw goes slack, if he drools and mutters incomprehensibly, and if, in extremis, he bursts into demoniacal laughter and reaches for his torque wrench you will know at once that he has been through the lot. Dysentery in ducks, seagulls scaring the cats, sludge in the drains, paper on the patio, rubbish on the roads, poisons seeping through waterways, people who will not sell their land, people who want a tip closer, people who want it further away, people who want to dump at night and people who want to sleep at night not to mention those regular performers the coliform bacteria and a nasty smell when the wind blows from the north-east. When that lot has been sorted out he is left with the comparatively trifling problem of wrapping the lot up in a mixture of earth of specified permeability and wire netting designed to prevent the passage in all but the prevailing winds.

Again consider harbour reclamation. In Wellington where there is in the eyes of some an adverse sea/flat land ratio the Harbour Board sought to remedy this by popping a bit of the surplus land into the harbour. A dusty statute of yore provided authorisation and all should have gone smoothly. Unfortunately someone was unkind enough to suggest that it could be a good idea to obtain an environmental impact report. Fortunately this was prepared and commented on and audited with such expedition that it was not necessary for work actually to stop altogether but it did take the shine off an otherwise pleasant and harmonious operation.

Auckland is not immune to the problems faced by other municipalities but it does tend to go about resolving them in a different way. For example it has for some time disposed of much of its refuse by way of harbour reclamation. Today this method could pose some very nice points of law not the least of which concerns the extent to which and the time at which the procedures of the Town and Country Planning Act 1953 begin to apply to a reclamation. That the authorities concerned should wish to avoid the delays involved in attaching their name to a leading case is perfectly understandable – and a sad commentary on the state of our planning law relating to harbours. In a stroke that was as masterly as it was simple potential planning delays were avoided by specifying in recent legislation required to authorise further reclamation that the reclamation would be by means of refuse disposal and then by preserving the application of the Town and Country Planning Act 1953 except to the extent that it was necessarily modified by that earlier provision. To state the obvious, refuse disposal has been authorised as of use without the need to go through any of the procedures normally required by the Town and Country Planning Act 1953.

Of course, there may be a few nigglers who will assert that there has been some interference with their rights of objection and that local authorities should not be able to sidestep the statutory obstacles placed in their way with such ease. Others may ask, where, is the Environmental Impact Report? All of which goes to illustrate that planning laws in this area, where they exist, are of little use to anyone.

Before other authorities start visiting their

local Member with draft Bills in hand, would it be indelicate to suggest to the Minister of Works that now that he has been in office for over one year he could show a little more activity over implementing his promise to give urgency to carrying out the oft-repeated promise of his predecessor in the Labour Government to give urgency to implementing the promise of his predecessor in the National Government to introduce a comprehensive reorganisation of the town planning legislation.

Tony Black

APPEALS TO THE PRIVY COUNCIL

In [1973] NZLJ 506 we published a list of the results of appeals to the Judicial Committee of the Privy Council from the Court of Appeal, as from the time of the establishment of that Court as a separate Court in 1958. The information was supplied by the Chief Justice from the official records.

The following table brings the record up to date.

PRIVY COUNCIL DECISIONS ON APPEALS FROM NEW ZEALAND: 1974–6

Parties	*Supreme Court*	*Court of Appeal*	*Privy Council*
Police v Duffield (No 2)	Macarthur J	Appeal dismissed (North P, Turner and Haslam JJ) [1971] NZLR 710	Leave to appeal refused [1974] 1 NZLR 416 (Note)
NZ Shipping Co Ltd v A M Satterthwaite & Co Ltd	Beattie J [1972] NZLR 385	Appeal allowed (Turner P, Richmond and Perry JJ) [1973] 1 NZLR 174	Appeal allowed (Viscount Dilhorne and Lord Simon dissenting) [1974] 1 NZLR 505; [1975] AC 154
Holden v C I R Meneer v C I R	Haslam J 4 A T R 399	Appeals dismissed (Wild CJ and Richmond J; Turner P dissenting) [1973] 2 NZLR 523; 4 ATR 399	Appeals allowed [1974] 2 NZLR 52; 4 ATR 399; [1974] AC 868
Fahey v M S D Spiers Ltd	Quilliam J [1973] 1 NZLR 478	Appeal dismissed (McCarthy P, Richmond and Beattie JJ) [1973] 2 NZLR 655	Appeal dismissed [1975] 1 NZLR 240
R v Nakhla (No 1)	Wild CJ and jury	Appeal dismissed (McCarthy P, Richmond and Beattie JJ) [1974] 1 NZLR 441	Appeal allowed [1975] 1 NZLR 393
Ashton v I R C Wheelans v I R C	Wilson J 3 A T R 308	Appeal allowed (McCarthy P, Richmond and Speight JJ) [1974] 2 NZLR 321; 4 ATR 381	Appeal dismissed [1975] 2 NZLR 717
Europa Oil (NZ) Ltd v C I R	McMullin J 3 A T R	Appeal allowed in part (McCarthy P, Richmond and Beattie JJ) [1974] 2 NZLR 737	Appeal allowed (Lord Wilberforce dissenting) [1976] 1 NZLR 546
Hannaford & Burton Ltd v Polaroid Corporation	Beattie J [1974] 1 NZLR 368	Appeal allowed (Richmond, Woodhouse and Cooke JJ) [1975] 1 NZLR 566	Appeal allowed [1976] 2 NZLR 15
Haldane v Haldane	Wild CJ	Appeal allowed in part (McCarthy P and Richmond J; Woodhouse J dissenting) [1975] 1 NZLR 672	Appeal allowed [1976] 2 NZLR 715

CASE AND COMMENT

Suicide and the Deaths by Accident Compensation Act

In an article entitled "Suicide and the Claims of Dependants" [1976] NZLJ 54, it was submitted that in some circumstances the dependants of those who have committed suicide may continue to have rights to damages under the Deaths by Accident Compensation Act 1952, notwithstanding the provisions of s 5 of the Accident Compensation Act 1972. The type of situation envisaged in the article was one where a person with suicidal tendencies, but sane under the *M'Naghten* rules, had been placed in the custody of another for the purpose of protecting him or her from those tendencies. If through the wrongful act, neglect or default of the custodian death by suicide should occur, it was submitted that the dependants would be able to recover damages from the custodian, certainly if the deceased were subject to controllable impulses to suicide, and quite possibly in other cases. The basic premise of that submission was that in such a case, death not being the result of "personal injury by accident", s 5 of the Accident Compensation Act would not apply. All this depended of course on "personal injury by accident" not thereafter being defined in terms wide enough to include intentional self-destruction.

The article was written long before the report appeared of *G v Auckland Hospital Board* [1976] 1 NZLR 638. In the course of his judgment in that case, Henry J stated without qualification (at 639)

> "The effect of s 5 is that, as on and from 1 April 1974, all claims for compensation under either the Deaths by Accident Compensation Act 1952 or the Workers' Compensation Act 1956 were brought within the provisions of the Accident Compensation Act 1972 and independent proceedings under those Acts could no longer be taken for claims which arose on or after 1 April 1974".

Prima facie, this dictum is a direct negation of the submission made in the article. However, since the dictum follows immediately a quotation from s 5 (1), including the words "where any person suffers personal injury by accident", it can be assumed that the learned Judge intended his reference to the Deaths by Accident Compensation Act to be confined to deaths resulting from such injuries. The crucial point remains, whether intended self destruction constitutes personal injury by accident.

In *G v Auckland Hospital Board* the plaintiff while a patient in the Auckland Hospital had been raped by one of the Hospital Board's employees. The learned judge held that her action for damages must fail because the rape had constituted a "personal injury by accident" so that her claim was caught by s 5. In reaching this conclusion, he referred to a line of English cases principally on workers' compensation, the last of which was *Jones v Secretary of State for Social Services* [1972] AC 945. There, Lord Diplock (at 1009) approved and adopted a statement from the earlier case of *Fenton v J Thorley & Co Ltd* [1903] AC 443 that an accident causing personal injury covered

(1) An event which was not intended by the person who suffered the misfortune, and
(2) An event which, although intended by the person who caused it to occur, resulted in a misfortune to him which he did not intend.

It was, Henry J said, from the viewpoint of the sufferer that "injury by accident" was to be construed. In G's case, the event, qua the plaintiff, was unintended, unexpected, unlooked for and was in every way an untoward event which befell her and caused her injury.

It would seem to follow then that the learned judge has not, at least by his definition of personal injury by accident, done anything to reduce the continuing rights of the dependants of intended suicides, in appropriate cases, to recover damages under the Deaths by Accident Compensation Act. It is to be noted that the Ministerial reply published at [1976] NZLJ 456 seems to envisage that the Deaths by Accident Compensation Act may continue to have effect in some cases, notwithstanding s 5 of the Accident Compensation Act.

Brian Coote
Professor of Law,
University of Auckland.

Leases and the Land Transfer Act: the effect of registration on a void right of renewal and void or illegal covenants generally: the *Mercantile Credits* case.

The judgments of the High Court of Australia in *Travinto Nominees Pty Ltd v Vlattas* (1973) CLR 129 (discussed by the writer in a 1975 Law Conference paper "The Land Transfer System:

problems and developments since *Frazer v Walker*" [1976] NZLJ 473, 478-479) had the effect of casting some doubt on the decision of Finlay J in *Pearson v Aotea Maori Land Board* [1945] NZLR 542 that a void right of renewal included in a lease is validated and rendered indefeasible by registration of the lease. The High Court has now had to consider the problem further, in *Mercantile Credits Ltd v Shell Co (Aust) Ltd* (1976) 50 ALJR 487. In the latter case a registered proprietor of the fee simple under the South Australian Torrens statute (the Real Property Act 1886-1945) mortgaged in 1973 land already subject to a registered memorandum of lease expiring on 1 March 1974. The lease contained certain rights of renewal, one of which the lessee exercised in February 1974. A memorandum of extension for a further term of five years was accordingly entered into but was not registered. The registered proprietor of the fee simple (lessor) having defaulted under the mortgage, the mortgagee moved in May 1974 to exercise its power of sale. It claimed to do so free of the extended term of the lease, on the ground that the indefeasible estate created by registration of the lease did not extend to the rights of renewal conferred by the lessor's covenants in that behalf.

The validity of the right of renewal exercised was not in question. The High Court had merely to decide whether such a right, when properly included in a registered lease, had priority over a mortgage of the fee simple given and registered after registration of the lease.

Barwick CJ, Gibbs and Stephen JJ were unanimous that it had priority, so that the mortgagee must sell the land subject to the covenant for renewal and the unregistered renewal term obtained under it by the lessee. In so deciding the learned Judges gave limited approval to *Pearson v Aotea Maori Land Board* (supra) and some earlier New Zealand decisions such as *Fels v Knowles* (1906) 26 NZLR 604 and *Roberts v District Land Registrar at Gisborne* (1909) 28 NZLR 616:

> "... all of which cases, in so far as they decided that a memorandum of lease may contain a right of purchase or of renewal and that such rights, *having no illegality in their creation,* obtain priority and indefeasibility by the registration of the memorandum, were, in my respectful opinion, correctly decided." p 492 per Barwick CJ (emphasis added).

Gibbs J, treating the question as one of priority and not of indefeasibility (at 494; "although the two questions appear to depend on the same considerations") remarked that it was unnecessary to consider what would have been the position "if the covenant had been void before registration of the lease"; and in effect perhaps gave a more qualified approval of the New Zealand cases than did the Chief Justice. Stephen J (at 496) thought "the legislation evinces a clear intention that rights of renewal may be registered and, when registered, will attract to renewed terms all the advantages of registration". In his opinion, then, registration conferred "indefeasibility" upon rights of renewal. His somewhat generally expressed approval of the New Zealand decisions is probably to be taken subject to similar qualifications to those expressed by his brethren.

One preliminary point must be disposed of before any discussion of the judgments and of the present law as to the indefeasibility of options to renew included in registered leases. First, inclusion in such a lease of an option to purchase the lessor's estate, mentioned in the passage quoted above from Barwick CJ's judgment, is expressly authorised by s 118 of the Land Transfer Act 1952, as it is by s 117 of the Real Property Act 1886-1945 (South Australia). *Fels v Knowles* is clear authority that registration of the lease cures any defect in respect of the provision conferring the option, such as lack of power of the lessor (eg as a trustee). The difficulties of extending the same protection to an option for renewal are greater, for the Land Transfer Act 1952, like the other Australasian Torrens statutes, lacks any provision generally authorising their registration. It is these difficulties that need to be considered in the light of the *Mercantile Credits* case.

Finlay J in *Pearson v Aotea Maori Land Board* stated the law thus, in the passage now in effect approved by the High Court so far as it applies to a right of renewal properly included in a registered lease:

> "... leases with a right of renewal must be regarded as to the term in the light of a grant of a definitive number of years, with the right in a lessor to add something in the way of an additional term or terms. In that sense the right of renewal is adjectival in relation to the term granted. It constitutes a material qualification of the term, and is therefore something more than a mere ancillary right. It is, in other words, an integral part of the estate shown by the Register as vested in the lessee. Its registration is, I think, in consequence authorized under the Land Transfer Act. That a right of renewal also creates an equitable estate in the land is in my view merely coincidental" (p 550-551).

The passage is clearly intended to apply to any right of renewal, whether in a form conferred by lessor's covenant or by a condition mutually agreed on by the parties. In this present note the term "lessor's covenant to renew" includes both the alternatives.

Finlay J took the law as he had so stated it as supporting his decision that the right of renewal improperly included, which the lessor Land Board had no power to grant (and which would have been void), was validated and rendered indefeasible by registration of the lease containing it. In this he followed the view expressed by Edwards J in *Roberts v District Land Registrar at Gisborne.*

It may be useful to set out the points made by the Australian judges in reaching agreement with Finlay J to the extent that they did, so far as the same points may be established from or are relevant to the New Zealand Torrens system and particular sections of the Land Transfer Act 1952:

(1) The Land Transfer Act 1952 provides for the registration of instruments in prescribed form "purporting to deal with any estate or interest in land": Barwick CJ at 490 (see s 42), rather than for the registration of prescribed estates and interests in land.

(2) The memorandum of lease, one of the prescribed forms, may include "special covenants": Barwick CJ at 490-491; Gibbs J at 492 (see s 115 and the form K in the Second Schedule).

(3) Covenants running with the land "are so annexed to the land as to create something in the nature of an interest in the land": Gibbs J, at 493, quoting Farwell J in *Muller v Trafford* ([1901] 1 Ch 54, 61) cf Barwick CJ at 490, 491, and Stephen J at 496.

(4) A lessor's covenant to renew the term may be included in a memorandum of lease as a special covenant; and, since it runs with the land, it is "in the nature of an interest in the land" (see (3) above).

(5) Upon registration of the memorandum of lease the right created by the covenant to renew passes, under s 41, as part of "the estate or interest specified in the instrument": Barwick CJ at 490; Gibbs J at 493.

(6) In the result the right of renewal shares in the priority conferred through registration of the lease by s 37 (all three Judges) and also the indefeasibility conferred by s 62: Barwick CJ at 492 and Stephen J at 496.

Farwell J's authoritative statement in *Muller v Trafford,* relied on by the High Court of Australia in the *Mercantile Credits* case and also by Finlay J in *Pearson v Aotea Maori Land Board,* illuminates the nature of covenants running with the land and their relationship with grants of leasehold. But, for the Torrens lawyer faced with the proposition that the indefeasibility afforded by registration of a memorandum of lease extends to the covenants running with the land, there are serious problems which the High Court was able to leave unanswered and Finlay J's solution to which must, with respect, still be accounted somewhat doubtful.

One may clear the ground by recalling that indefeasibility of title is, as the Privy Council explained in *Frazer v Walker* [1967] NZLR 1069, 1075, [1967] 1 AC 569, 580: "... a convenient description of the immunity from attack by adverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys". This immunity from attack is afforded by registration of an instrument passing the estate or interest in question. There is no doubt that a lawyer tends in his thinking to separate the estate or interest which passes or is created by registration from any covenants in the instrument, no matter how closely they relate to the estate or interest. And indeed an estate or interest may be granted or transferred without the presence of any accompanying covenants whatever. To take an appropriate (if uncommon) example, one may grant a term of years by a memorandum of lease in Form K with no special covenants included and (where the property is not residential so that the Property Law Amendment Act 1975 applies) with those that would otherwise be implied by statute excluded by express declaration. It is easy to see how the principle of immediate indefeasibility established by *Frazer v Walker* then applies. The leasehold so granted will have priority according to its time of registration under s 37 and will be indefeasibly vested under ss 62 and 63 in a lessee for value who is in good faith. This will be so even if the lease is void for whatever reason, except where the exceptional principle of *Gibb v Messer* [1891] AC 248 applies. Introduce special covenants that run with the land into the instrument and there is, as the High Court has shown, no great difficulty over *priority.* The covenant for renewal, as such a covenant, has its priority established (by registration of the lease) over the subsequent mortgage of the fee simple. But how far beyond that the covenant for renewal and the right conferred by it appropriately share in the *indefeasibility* of the leasehold estate is a difficult matter, notwithstanding the decision in *Pearson's* case.

After all, covenants in a lease depend for their effectiveness on contractual remedies, in particular the award of damages and the equitable remedies of injunction and specific performance. Where the covenant is personal and collateral, and is for some reason, defective – perhaps because the lessor or lessee had no power to enter into it or because the covenant is unreasonably in restraint of trade – it is clear that registration of the instrument cannot validate the covenant: *Travinto Nominees v Vlattas* (1973) 129 CLR 1, 17, per Barwick CJ. Subject to any application of the Illegal Contracts

Act 1970 the remedies remain unavailable. But what of covenants that run with the land or the reversion, which the lessor or lessee has no power to make or which are illegal? Are these validated by registration of the lease, so that specific performance in particular is available to give effect to them?

Analysis, related for the moment to the lessor's covenant to renew, suggests the following propositions, both perhaps somewhat uncertain:

(1) A covenant to renew which is illegal in the sense that it is forbidden by a particular statute is not validated by registration of the lease containing it: *Travinto Nominees v Vlattas.* This proposition is perhaps contrary to a wide understanding of the principle in *Pearson v Aotea Maori Land Board.* But a New Zealand court, disposed to hold that the particular statute overrides the indefeasibility provisions of the Land Transfer Act, should find no difficulty in distinguishing that case.

(2) A covenant to renew which is void because the lessor had no power to grant it (either because statutory powers or those conferred by a trust instrument are exceeded) is validated by registration of the lease. *Pearson's* case supports this proposition in New Zealand. The *Mercantile Credits* and *Vlattas* cases leave the point undecided in Australia.

Nevertheless, as to (2), the tendency of Barwick CJ and of Stephen J in the *Mercantile Credits* case is to support it. In particular, the former said (at 491):

> "It is now settled that an estate or interest purportedly created by an instrument, void under the general law, derives validity and indefeasibility from the registration of the instrument purporting to create that estate or interest: see *Frazer v Walker,* [1967] 1 AC 569, and the New Zealand decisions of which their Lordships there approved. But the specific enforceability of the covenant for renewal, assuming its validity either under the general law *or because of its presence in the registered instrument,* will be decided under the general law" (emphasis is added).

This must mean that the presence of a covenant for renewal in a registered lease ensures the validity of the former notwithstanding that it was until registration void (though not illegal) under the general law. Presumably specific performance could be refused no longer because of the invalid mode of creation but now only if the circumstances of exercise of the option to renew were such that the equitable remedy should be denied.

The observations of the Court of Appeal in *Fels v Knowles* (1906) 26 NZLR 604, 623, in holding that indeafeasibility extends to a lessee's option to purchase included in a registered lease under (now) s 118, may be adapted to provide an explanation of the concept as it applies here:

> "The registered proprietor can grant [the option], and his power to do so cannot be questioned; but this leaves open all questions as to whether the words used are effectual to grant the option, and as to whether or not the lessee is, in the circumstances which exist when he seeks to exercise the option, entitled to do so."

The limitations which this passage places upon the indefeasibility of a right of renewal or of an option to purchase are significant. Contrasts may be made with the indefeasibility of the registered fee simple, leasehold or life estate simpliciter (that is considered without "running" covenants). First, prescribed operative words in the Forms in the Second Schedule to the Act ensure that the creation of the estate is certain, with no need for judicial interpretation. Secondly, the holder of a registered estate has the full protection of ss 62 and 63 of the Land Transfer Act 1952. His rights *at law* to assert and exercise his proprietorship are established by the register itself. The passage shows that that is not so of the leaseholder's registered option of renewal or purchase and that it is difficult to apply the doctrine of indefeasibility in its entirety to any right the separate exercise of which depends principally on discretionary remedies.

The passage from Farwell J's judgment in *Muller v Trafford,* upon which both the High Court and Finlay J in *Pearson's* case relied, served admirably Farwell J's purpose of explaining why the rule against perpetuities does not apply to leasehold covenants running with the land or the reversion. But it may lead to strange results when put forward for the quite different purpose of fixing the proper limits of the indefeasibility of a registered leasehold estate under the Torrens system in regard to such covenants. It is, for example, by no means clearly appropriate that a lessee's covenant to build on the demised land, being one such covenant, should by registration of the lease be rendered absolutely binding on a corporation lessee having no power to build. And yet that is the effect of the rule in *Pearson v Aotea Maori Land Board,* which must apply to all covenants running with the land or the reversion.

The covenant for renewal is really in a different category from other "running" covenants. Indeed, its place in that classification has been considered an anomaly though too long occupied to be vacated now (*Woodall v Clifton* [1905] 2 Ch 257, 279). Upon the lessee's exercise of the right, "a new lease, a new demise" comes into being: Gibbs J, *Mercantile Credits* at 493-494

(citing *Gerraty v McGavin* (1914) 18 CLR 152, 163 and other cases). In this the right is much closer to a lessee's option to purchase the freehold which did not run with the land but is registrable under s 118. What is needed is a redrafted section 118 and also (cf E A Francis, *Torrens Title in Australasia* (1972) Vol 1 282) a new section authorising covenants or options to renew to be included in Land Transfer leases; both of which sections would clearly show the effect of registration on the respective rights so included – namely to secure priority and (if that is desired) to cure any lack of power to grant or exercise the right on the part of the lessor or lessee. Forms for creation of the rights should be prescribed, to remove the first uncertainty mentioned in the passage quoted above from *Fels v Knowles*. It might also be necessary to clarify the effect of registration of leases on "running" covenants other than the covenant to renew.

As the law stands, in the light of *Fels v Knowles, Pearson v Aotea Maori Land Board, Travinto Nominees v Vlattas* and now of *Mercantile Credits Ltd v Shell Co (Aust) Ltd,* some guidance may be offered for those acting for or dealing with trustees or corporate bodies with limited powers of granting or taking leases or of covenanting.

First (and this is apart from what is discussed above), where the lease is not to be registered, inquiry must be made to ascertain that the trustee or corporation (whether lessor or lessee) is within its powers – for no registration will take place to cure any lack of power. That is to state the obvious and the axiomatic; but some misconception does exist that at least where intending trustee-lessors are registered proprietors of the land, one need not inquire as to what are their powers to lease and to grant renewals. Section 182 of the Land Transfer Act 1952 does not remove the need to make proper inquiry, at least on the accepted interpretation of that section (as to which see D J Whalan, "The Position of Purchasers Pending Registration" in *New Zealand Torrens System Centennial Essays* (1971) ed G W Hinde) 120).

Secondly, where the lease is to be registered:

(a) Those dealing with the trustee or corporation must inquire to ascertain that any personal or collateral covenants (ie covenants not running with the land) to be included and entered into by that party (whether as lessor or lessee) are within power. Registration will not cure the defect if they are not. The one exception is "a right for or covenant by the lessee to purchase the land", which is collateral but is nevertheless registrable under s 118 of the Land Transfer Act; as to this there need be no such inquiry.

(b) Subject to what is said above, it appears (though not without doubt) that no such inquiry need be made where the proposed covenants run with the land or reversion (such as a lessor's covenant to renew the term), as these will on present authority share in the indefeasibility conferred by registration in good faith on the leasehold estate or the reversionary estate as the case may be. But it is important to check if there is any doubt that the covenant is indeed one that runs. See the lists of "running" and "non-running" covenants in Woodfall, *Landlord and Tenant* (1968 27th ed Blundell and Wellings), 487 et seq.

Finally, registration in good faith will not cure any *statutory illegality* (as distinct from mere excess of power) in the granting or taking of any lease or in respect of any covenant to renew or other running covenant. A wide interpretation of *Pearson v Aotea Maori Land Board* may show cases where it is otherwise, but only where the Court holds that the statute was not intended to override the indefeasibility provisions of the Land Transfer Act.

Professor F M Brookfield
University of Auckland

Half a loaf? – A research document published by the Institute of Personnel Management reports that the white-collar section of the General and Municipal Workers' Union has 26 fulltime officials, of whom 98 per cent are male and 2 per cent female. You try to work it out *The Times* 22 June 1976.

Change for the sake of change? – One of the English Law Commissioners, Professor Diamond, says that law reform means not just change, but change for the better. Because of this, and because views of what is "better" will differ, it is vital that in our work we should seek out the current values of Australian society. Meditation and introspection by a small group of lawyers will not be good enough. This Report sets out the attitude of the Commission on this and the way in which we propose to elicit public values. Law reformers must spare no efforts to interest and involve the community in their work. This obligation becomes especially relevant when one considers the topical and important tasks given to us. We are aware of the need to learn the techniques of communication if we are to be effective. What will be the use of reports if no one reads them and the audience to which they are addressed simply allows them to gather dust? Mr Justice Kirby, 1974 Report of Australian Law Reform Commission.

ESTATE PLANNING

THE MATRIMONIAL HOME ALLOWANCE

By JOHN PREBBLE, *an Auckland Practitioner.*

The new matrimonial home allowance, introduced by the Estate and Gift Duties Amendment Act 1976 was described by Tony Black at [1976] NZLJ 506. As Mr Black points out, the new measure is open to serious criticism from the point of view of social policy. But at the same time, the Act has several important consequences for, and will be welcomed by, the estate planner.

Although the Act was designed to implement the Government's election promise to extend to farmers benefits in respect of death duties similar to those enjoyed by the owners of joint family homes, the legislation is couched in general terms and its benefits are not confined to farmers. Provided there is an appropriate "matrimonial home", the allowance is available in the estate of the first of two spouses to die, regardless of occupation.

Perhaps the most important consequences of the Amendment Act lie in its effect on the joint family homes legislation.

There is now no estate duty benefit in registering a house as a joint family home. The full value of a man's home can be deducted from his dutiable estate, so long as it, or property of equivalent value, is left to his wife.

Registration of a joint family home now has some disadvantages. The home owner gives up the element of flexibility that he loses by adding his spouse as a co-owner, without any corresponding duty saving. Moreover, the matrimonial home allowance will often be preferable to relying on joint family home registration, particularly where the widow is likely to have her own estate duty problem. Mr Black has identified the sting in the tail of any estate duty exemption that is tied to the transfer of property to a surviving spouse – that spouse's estate will be swollen, and the rate and amount of duty payable on her estate increased. But, unlike the joint family home exemption, the matrimonial home allowance is not necessarily tied to the transfer of the house property itself to the surviving spouse. A testator may leave merely a life interest in his home to his widow, and still benefit from the matrimonial home allowance. The allowance will equal the full value of the home, so long as a testator leaves sufficient other property to his widow, as well as the life interest. The following example illustrates both the savings that the matrimonial home allowance makes where the testator owns his home absolutely, and the benefits over and above registration of a joint family home.

Take a wealthy testator, owning a house property worth $100,000 and other property totalling $300,000. He leaves the whole of his estate to his children, subject to a life interest to his wife, aged sixty at his death. The value of the life interest, pursuant to the Estate and Gift Duties Act 1968, Schedule II, Table B, is $237,988. That is, this testator has left enough to his wife for her to take full advantage of both the matrimonial home allowance and the widow's relief provided under s 36 of the principal Act. The following tables assume that the wife has no property of her own, and show the duties chargeable (a) without and (b) with the matrimonial home allowance, and (c) with the house registered as a joint family home.

(a)

	$
Dutiable estate	400,000
duty thereon	130,200
less widow's relief	19,530
Duty	110,670
Duty on widow's estate	nil
Total duty	110,670

(b)

	$
Dutiable estate	400,000
less matrimonial home allowance (value of house)	100,000
final balance	300,000
duty thereon	90,200
less widow's relief	18,040
Duty	72,160
Duty on widow's estate	nil
Total duty	72,160

(c)

	$
Dutiable estate (house registered as j f h)	300,000
duty thereon	90,200
less widow's relief	18,040
Duty	72,160
Duty on widow's estate comprising house property ($100,000)	16,500
Total duty	88,660

Had the testator not left his wife a life interest in his house, but had devised it to her absolutely,

the results in tables (a) and (b) would be similar to that in table (c), with a further $16,500 duty being charged on the widow's death. Thus the matrimonial home allowance permits the wealthier testator to have the best of both worlds: he can reduce his own death duties by leaving property to his widow, and he can minimise her liabilities by resorting to the life interest, a devise not available in respect of a joint family home.

If the wife owns property in her own right, the benefits of the matrimonial home allowance/life interest combination are of course increased as she moves into a higher estate duty bracket. For example, if the wife owned other property worth $100,000, the advantage of table (b) over table (c) would increase from $16,500 to $25,500.

Unlike a joint family home, one can own two or more "matrimonial homes", since under the Amendment Act, a matrimonial home need only be used "from time to time" as a family residence. This is another provision that can be rather generous to the client of an estate planning adviser.

Where a deceased owned two "matrimonial homes", for example a principal residence and a holiday cottage, his administrators can choose which one will be considered for the allowance. They would, presumably, choose the more valuable. However, a two-house family would be well advised to ensure that one residence is in the name of each spouse. The will of each home owner can then give the other that house, or property of equivalent value, free of estate duties. This will ensure that whoever dies first, the family benefits from the matrimonial home allowance. Duty on the death of the second spouse to die can be minimised, as mentioned above, by each spouse leaving to the other merely a life interest.

Finally, the amendment Act furnishes a small loophole in s 21 of the Joint Family Homes Act 1964, as amended in 1974. Section 21 prevents a man from divesting himself of his property free of gift duty by registering and then deregistering a succession of joint family homes, thus each time transferring half the value to the wife, without paying gift duty. Under the Amendment Act, a man can now register one house as a joint family home and later deregister it, and then devise another "matrimonial home" to his wife by will. He thus transfers half the value of the first house and all of the second house to his wife without duty. Buying a second house simply to take advantage of the legislation as it now stands would probably not be worth while. But the professional advisers of a wealthy man who owns two houses, or is thinking of changing his residence, should bear these possibilities in mind.

PRACTICE NOTE

Accident Compensation Appeal Authority – Form of appeal

A number of enquiries has been received by the Accident Compensation Commission as to the form of the notice of appeal to the Appeal Authority. The Act makes provision for the bringing down of regulations prescribing a form of notice, but no regulations have as yet been promulgated.

The accompanying sample form of notice of appeal is published as a suggested form for the assistance of appellants and counsel. The form has the appeal Authority's approval, but it should be noted that notices of appeal which do not follow the suggested form will nevertheless be acceptable.

THE ACCIDENT COMPENSATION APPEAL AUTHORITY NEW ZEALAND

IN THE MATTER of the Accident Compensation Act 1972
AND
IN THE MATTER of an appeal pursuant to s 162 by [full name] of [address], [occupation].

TAKE NOTICE that the abovenamed Appellant HEREBY APPEALS against a decision dated the day of 19 on the Appellant's application for review heard at on the day of 19 .

UPON THE GROUNDS

1.
2.

WHEREFORE the Appellant claims by way of relief:

(a)
(b)

DATED at this day of 19 .

SOLICITOR FOR THE APPELLANT

TO: The Accident Compensation Appeal Authority,
Tribunals Divison, Justice Department,
Private Bag,
Postal Centre,
WELLINGTON.

AND TO: The Accident Compensation Commission,
Private Bag,
WELLINGTON.

ACCIDENT COMPENSATION

ACCIDENT COMPENSATION AND PRIVATE HOSPITALS

By GEOFFREY PALMER, *Professor of Law, Victoria University of Wellington.*

The Accident Compensation Act 1972 makes provision for the payment of doctors' fees for those covered by the Act where medical treatment is required. The payments are over and above the general medical services benefit paid under social security *(a)*. Section 111 of the Act provides that the Accident Compensation Commission shall pay the cost of medical treatment so far as the person is not entitled to any benefit under the Social Security Act 1964. The payment is conditional upon the amount charged being reasonable by New Zealand standards *(b)*.

In practice what happens is that the appropriate general medical services benefit is paid for each visit to the doctor arising out of an accident as with any medical consultation. That benefit now averages $2.45 per consultation. There is a higher rate for pensioners and specialists' consultations and a lower one for ordinary general practitioner consultations. The balance of the actual fee charged by the doctor to the accident victim is paid by the Accident Compensation Commission. It is the policy of the Commission to regard a fee of up to $5.50 total as reasonable without special notation. Where out-of-hours attendance, travel or some extra treatment out of the ordinary is required the Commission requires a notation before the amount can be regarded as reasonable. The Commission has endeavoured to be flexible and co-operative about fees. It uses a system of bulk billing under which doctors receive full payment and the vast majority of doctors in New Zealand, over 90 percent, are taking advantage of the bulk billing facility.

The administration of the payment system seems to have met with approval from the medical profession whose paper work is somewhat reduced and who now have no bad debts from accident victims. At the same time the fee-for-service is preserved. The Commission has refrained from developing a complicated schedule of fees which it will pay for different treatments. It does monitor payments to see that individual doctors do not get too far away from normal rates of charge for various treatments. The Commission sometimes writes to doctors pointing out anomalies which may occur in their charges. By and large it appears that the medical profession has acted responsibly and there has been no need so far to introduce any rigidity into the system. It does seem unnecessarily cumbersome to have two agencies dealing with payment for one medical treatment, the Health Department and the Accident Compensation Commission. Attention is being given to streamlining that duplication of effort.

The method of payment for doctors may prove to be the pathfinder for a breakthrough in the provision of free medical services. Should accident compensation be extended to sickness the same method of paying doctors would appear to be practical *(c)*. In that event a comprehensive system of medical treatment free to the patient would result. In spite of early expressions of discontent from the medical profession before the scheme began the whole administration of the medical fees to doctors under accident compensation appears to have settled down well.

The payment of fees for private hospitals has been a great deal more controversial. The creaks and groans in New Zealand's health services system are not of the Commission's making, but it has to live with them. The Commission's medical handbook sets out two pages of rather complicated comments on the Commission's attitude to private hospitals, the burden of which seems to be that while the Commission does not wish to interfere with the decision of the doctor "the overall economics to compensation scheme ... might become distorted if disproportion expenditure were incurred for private hospital treatment" *(d)*. In conclusion the Commission states:

> "The Commission's acceptance of financial responsibility should be obtained in advance for any proposed private hospital treatment. Such advance acceptance does not have to be obtained, but, if it is not, the patient faces the risk that the Commission may not later agree. The financial responsibility would then be that of the patient. An informal advance approach to the Commission's local claims-handling Agent would therefore be desirable and in the patient's own interests. However,

(a) Social Security Act 1964, Part II.

(b) Accident Compensation Act 1972, s 111(1)(b).

(c) A Health Service for New Zealand, AJHR 1975, H 23, p 119.

(d) Accident Compensation Commission, *Accident Compensation Medical Handbook* 15 (1st ed, 1974).

an exception could be made in the case where urgent treatment, which could only be obtained in a private hospital, does not allow sufficient time to obtain advance Commission acceptance." (at p 16).

The Handbook sets out a number of factors by which the Commission "could be influenced". These are:

the rehabilitation of the injured person

the overall economics of the compensation scheme within which must be included the actual cost of the private hospital treatment and a comparison between the cost of that treatment and the costs of allowing compensation payments to run on because quick public hospital treatment was not available

any factors of public interest such as the desirability of retaining and attracting adequate medical services

the extent and quality of services and facilities in the particular area

the convenience to the patient and his family

the emergency nature of any treatment required and the location of available facilities

the opinion of the patient's medical advisers.

The Handbook makes it clear that the Commission's policy is "flexible and co-operative, the welfare of the patient being regarded as paramount . . .". It is made plain that the Commission could not normally be expected to pay for a stay in a private hospital likely to exceed 10 days or if proper public hospital treatment were available immediately or within a reasonable time. This policy has given rise to considerable misunderstanding and difficulty. Applications for review have been frequent. About a quarter of the appeals so far have concerned the question. There are clear instances where private hospital treatment can save the Commission money in compensation; for example, the man who has a disabling hernia who cannot secure rapid treatment at a public hospital because of waiting lists can be expeditiously dealt with in a private hospital. On the other hand a fear exists that doctors, for a variety of reasons, will elect to use private hospitals where public hospitals would serve the purpose just as well. For public hospital treatment, the Commission pays nothing.

In a recent decision of the Appeal Authority, in *Re Turner (e)*, it was argued on behalf of a doctor's son who fractured his leg badly while skiing that the public hospital could not have coped effectively with the treatment and the surgeon was therefore justified in treating him at a private hospital. Having heard evidence from the Medical Superintendent of the Public Hospital Blair J reached the conclusion that the assumption that the public hospital could not cope was erroneous. Blair J said that the Act conferred a measure of discretion on the Commission in regard to the payment of private hospital fees and he approved the statement in the Medical Handbook setting out the Commission's policy. Nevertheless, in the circumstances of the particular case, the Judge held that since it was impractical to obtain the Commission's approval in advance for private hospital treatment of a weekend skiing accident requiring immediate attention it would be proper for the Commission to make a compromise payment which "on the one hand recognises that in the light of present knowledge a claim for private hospital treatment could not be sustained, but on the other accepts that the decision to send the patient to a private hospital was an understandable error for which there was a degree of justification". The bill, therefore, was split down the middle. In such cases, liability for the balance presumably falls on the patient. In other words the Health benefit pays some, the Commission some and the patient some.

By s 181 of the Accident Compensation Act 1972 the Governor-General may from time to time, by Order in Council make regulations "prescribing the circumstances in which, the extent to which, and the method by which the Commission shall, in accordance with section 111 of this Act, pay the costs of treatments and medical certificates in respect of which payments that have been made under that section, and may enter into arrangements and make contributions under that section; prescribing the persons to whom those payments may be so made; and regulating the making of payments under section 112 of this Act:"

So far no regulations have been made governing payment for medical treatment. Nonetheless the existence of such a power in the Act has, if another decision of Blair J be correct, considerable significance for the interpretation of the words which appear in s 111 of the Act. Section 111 provides as follows:

> "(1) Subject to any regulations made under this Act, where a person suffers personal injury by accident, in respect of which he has cover under this Act, if as a result of the personal injury by accident he requires to obtain a medical certificate for the purposes of this Act, or requires any treatment to which this section applies, the Commission shall pay the cost thereof so far as —
>
> "(a) that person is not entitled to any

(e) *Re Turner* (1976) 1 NZAR 7, ACC report 53 (Nov, 1976), Accident Compensation Appeal Authority, Decision No 6.

benefit under Part II of the Social Security Act 1964 in respect thereof; and

"(b) the Commission considers that the amount to be paid by it is reasonable by New Zealand standards taking into account any contribution made by the Commission under subsection (3) of this section."

Counsel in *Re Manthel (f)* argued that those words in s 111 meant that the policy of the Commission formulated in its medical handbook mentioned earlier was outside the terms of the statute. Counsel argued that the Commission had an obligation to pay private hospital expenses and related charges so long as the charges were fair and reasonable and that the type and extent of treatment was normal by New Zealand standards. Blair J made the fundamental point that the Commission's policy as set out in the handbook was "valid only so far as it is a correct reflection of the law as set out in the statute". He accepted that if Counsel's submission was correct then the Commission's stated policy as regards its power to limit its financial responsibility to those patients seeking private hospital treatment was wrong. On a literal reading of the provision Blair J was of the opinion that section 111 granted an accident victim an unrestricted right to obtain hospital treatment and to have the costs thereof paid for by the Commission so long as the amount was reasonable.

The literal reading, however, did not prevail. Blair J insisted on reading the statutory language in context. Part of that context related to power to make regulations. Accordingly, Blair J held that:

"... the words in the paragraph contemplate that in deciding upon the reasonableness of the charges the Commission can have regard to the circumstances in which they were incurred and this would include deciding, in each case, whether it was reasonable for the patient to prefer the private hospital system to that of the public. Such a decision would be made in the light of the Commission's knowledge of the structure of hospital services in this country and it can be assumed that Parliament, in enacting the Accident Compensation Act would be aware also of the structure and of the necessity for the Commission, or some like authority to have some control over the respective weight which the public and private hospitals would bear in caring for accident victims. The point I am making is that the 'circumstances' for the Commission to have regard to would include the background hospital situation in New Zealand and the need to control the flow of accident cases into the different arms of the hospital service."

By these means the learned Judge used an unexercised power in section 181 as an aid to the interpretation of s 111 of the Act. So the conclusion was reached that the Commission was entitled to apply the section in the way it did by means of announcing a policy in the Medical Handbook.

The learned Judge buttresses that conclusion with some powerful policy arguments. He points out that if all accident victims in a particular weekend in a particular town chose to be treated in private hospitals chaos would occur. That conclusion cannot be doubted. Indeed, Blair J demonstrates a robust and realistic appreciation of the practical situation facing the Commission. It appears, with respect, to be a sensible approach to the interpretation of a statute like the Accident Compensation Act. While literal interpretation of the language may enjoy certain logical virtues the practical difficulties created for a scheme the size of accident compensation by a rigid approach cannot be doubted.

Notwithstanding the sensible result reached the means of arriving at it must be regarded as somewhat dubious. To say that the words in a statute must be read in the context of an unexercised regulation-making power relating to them cannot in theory affect the meaning of the words. No absurdity would have resulted from interpreting the words in the way in which Counsel contended.

As a general proposition the approach to construction adopted in *Manthel* has serious implications. Stated baldly it amounts to this: where a statute contains an unexercised regulation-making power the administering authority can implement a policy in applying the statute which could have been promulgated in regulations. The policy can be held within power by reliance upon the unexercised regulation-making power.

At the bottom it is a bootstrap argument. Regulations could have been made to do X. X was done without any regulation being made. Therefore, X is valid under the statute. That amounts to a proleptic view of statutory interpretation. X could have been done by regulation. To accomplish X without regulation is valid because it could have been accomplished by regulation. In other words, why upset by a judicial decision an action which would be indisputably valid if carried out in another way.

If the facts of the case are changed a little it is not clear that the same analysis would have led to

(f) *Re Manthel* (1976) 1 NZAR 69, Accident Compensation Appeal Authority, Decision No 15.

an identical result. Let us imagine that the Commission's policy was that it would pay no private hospital expenses whatsoever. It would appear that regulations to that effect would be valid if made, since everything in s 111 is subject to "any regulations made under this Act". Yet I doubt whether Blair J would have adopted the same line of analysis in the changed circumstances. What led Blair J to the line of reasoning he adopted, I suggest, was the reasonableness of the action taken by the Commission in all the circumstances. So the novel mode of statutory interpretation he adopted to justify the result should be read, I respectfully suggest, in the light of the "reasonableness" gloss I have just made upon it.

Use of the new theory propounded in *Manthel* would only be available in instances where an unexercised regulation making power existed and the provision had been drafted in such a way that administration was contemplated without the need to make any regulations. So the scope for application of the new theory is not perhaps so very wide. To interpret the statute in the imaginative way he did show that Blair J was concerned to implement the broad policy objectives of the legislation. New Zealand Courts do not often approach the business of interpreting statutes in this way. A policy oriented approach to statutory interpretation has some attractions but also poses risks. It would require considerable skills of discrimination and subtlety absent from the literal approach which, despite s 5(j) of the Acts Interpretation Act 1924, in reality dominates statutory interpretation in New Zealand.

Manthel's case also shows the way to the manner in which the Appeal Authority conceives of the approach it should adopt to reviewing decisions reached by the Accident Compensation Commission. Citing *Hammond v Hutt Valley Milk Board* [1958] NZLR 720, Blair J pointed out that the Appeal Authority should interfere with review decisions if an error of law has been made or the decision has been reached by the application of wrong principles. It may interfere where the decision relates to the exercise of discretion or to a finding of fact where the Appeal Authority has re-heard the evidence or permitted the introduction of fresh evidence which has thrown a new light on the matter. Subject to those circumstances the Appeal Authority "should be circumspect in over-ruling a decision based on the original evidence and which amounts to an exercise of a discretion". With respect the approach adopted by the Authority is sound. It will prevent floods of appeals resulting in administrative uncertainty and difficulty for the Commission at the first level. On the other hand, the scope of review suggested by Blair J will provide adequate protection for those complaining about the Commission's decisions.

In another decision of the Appeal Authority Blair J spelt out the consequences for the medical profession of failing properly to advise their patients of the Commission's policy under s 111. *Re New (g)* involved the question of payment of private hospital treatment and surgical fees for an operation performed in a private hospital on a child who suffered an accident at school when she fractured her nasal bones. Blair J found that consent to private hospital treatment had not been obtained and admission to the private hospital had been made at the initiative of the surgeon. There was evidence that an identical operation could have been performed at a nearby public hospital without delay. The appeal was dismissed by the learned Judge who felt constrained to offer some words of warning to the medical profession:

> ". . . I feel obliged to comment that if the surgeon had had regard to the Handbook the parents of the child may not have been made liable for these hospital and surgical expenses as it is plain that there was no obstacle to the child being treated in the public hospital system. This case, and other cases that have come before me have demonstrated that the medical profession has a particular responsibility in accident cases to ensure that the patient fully understands the financial implications of a recommendation by the doctor that the patient enter a private hospital with its attendant costs . . . To avoid any misunderstanding between doctor and patient and for the doctor's protection in cases where the patient selects private hospital treatment in circumstances where public hospital treatment is available, it seems to me that it would be prudent for the doctor to ask the patient to sign a written form of consent which shows that the patient has been properly advised on the point and has elected to bear the cost of private hospital treatment."

That suggestion offered by Blair J clearly implies that in his opinion the expanding liability in tort for negligent advice may well encompass the situation with which he was dealing. His suggestion that the Medical Association should prepare a suitable form of consent probably will be followed.

It may turn out that the most interesting aspect of accident compensation to lawyers will be the knotty problems of statutory interpretation thrown up by a statute which is both too long and prolix. The Accident Compensation Commission is apparently embarking on a programme of major

(g) *Re New*, 7 September 1976, Decision No 13, ACC report 62 (Nov, 1976).

legislative reconstruction but the results probably will not see the light of day for a year or so. And the Commission's track record in the preparation of amendments to the Act raises the question whether the task is one which can be safely left to the Commission at all.

FAMILY LAW

NON-APPLICATION OF "MOTHER PRINCIPLE" IN CUSTODY PROCEEDINGS

By Professor P R H WEBB *of Auckland University.*

The judgment of Jeffries J in *McKean v McKean*, delivered on 16 August last, affords a very good example of a situation in which it was thought right to award custody of young children to their father.

The facts were complicated, but it is worth setting them out in order to show his Honour's approach to them. The appellant was the father of the children in question, and the respondent was the mother. It would appear that the couple had, before marriage, led a somewhat rebellious life, both of them being "in the leather jacket set". The mother became pregnant to the father in 1967, when they were aged 16 and 20 respectively. They married early in 1968. The elder child, a boy, was born in April 1968 and the younger, a girl, in April 1970. In June 1976 a Magistrate awarded custody to the mother and the father appealed to the Supreme Court.

It is necessary to delve further into the background. After marrying, the parents remained in the Manawatu and the father worked in a Palmerston North nursery. At the father's instigation, and against the mother's wishes, they began a series of moves connected with his occupation of nurseryman and farmer. During this period, the father testified, the marriage was characterised by a failure to communicate and the mother's attitude to him was frigid. He also said that the mother told him before the birth of their girl "she had no time, no feeling for" their boy, which, the father stated, upset him. Indeed, several times in his evidence the father referred to his concern about her attitude towards the children, in particular the boy. The mother, when questioned, did not deny it and explained that she was then very depressed. At all events, his Honour was satisfied that, during the marriage, the mother's emotional feelings were numbed and that she might not have always clearly distinguished between her husband and her son. On the other hand, he was equally satisfied that her maternal responses to both children were now normal.

During 1971, the father began to plan to pursue an academic course at a university and it was decided that he would go to the University of Otago and in early 1972 he shifted the family to Dunedin and there enrolled as a law student. A home was purchased in Dunedin with his parents' help. It was set in half an acre of ground and provided the opportunity to supplement the family income by the pursuit of horticultural activities in which the father had considerable expertise.

The parties agreed that their marriage was a disaster from the early weeks after its solemnisation. The father said he was troubled by its early failure and that he had made sincere efforts to identify and rectify the causes. He was unable to do the former and thus could not attempt the latter. In the view of Jeffries J the incompatibility was fundamental and deep-seated. He noted that the father was four years older than the wife and had reached adulthood at the time of the marriage. The father was "also answering the promptings of an awakening intelligence which was making him aware of the conflict between what he had recently been and was, and what he might be. Being sixteen, pregnant and emerging from the social environment of the motor bike gang to the responsibilities of home-making and the regimen of family life must have been an intolerable strain on an adolescent girl. If chance had partnered her with a more conventional man himself untroubled by nascent intellectual ambitions I am satisfied that she might, and probably would, have succeeded as wife, mother and home-maker. That was not to be, and neither party can be blamed."

Despite the move to Dunedin, the tension and unhappiness of the couple continued unabated. The boy, the husband complained, could do nothing right in the wife's eyes. The girl had been given the "run of the ropes". The strained relationships resulted in the mother returning in 1973 to Palmerston North and the children being placed on the husband's parents' farm. The wife later returned to Dunedin with the children. The husband said that they were both desperately unhappy and in May 1974, apparently while they were back in Palmerston North, they agreed to separate. The children went to the farm again and they stayed there for the mid-term of 1974. The mother remained in Palmerston North. The father went back to Dunedin. The children went to his care in Dunedin for the third term of 1974 and

had been with him ever since.

After the break-up, the mother became depressed and to a certain extent unstable. She saw a solicitor and an application was filed for a separation order, custody of the children and a maintenance order for herself. After some vicissitudes, the custody application was proceeded with.

It is necessary now to mention a Miss Walker, who, for nearly two years had been the children's surrogate mother. She was a fellow law student of the father, who testified that, as part of finding a strategy to have the children with him again in Dunedin, he and Miss Walker decided that they would conjointly take care of the children in the Dunedin home. She went to live there from September 1974 and continued to live there and care for the children as a mother. In July 1975, the wife's custody application came on for hearing. She consented, with full knowledge of the domestic arrangements for the care of the children, to a custody order in the father's favour for both children. She had had no physical contact with the children from September 1974 to July 1975. At the end of that year, the father completed his degree course.

There must now be mentioned what might be thought to be a completely disabling blot on the father's escutcheon. Early in 1976, he was arrested and charged with cultivation of cannabis plants. At the time of his arrest, there was found at the Dunedin home "the astonishing number of 2897 plants" and the case attracted "enormous publicity". Jeffries J noted that the father had said before him that he grew the plants for two purposes. First, the plant had possible commercial capability as hemp. Secondly, the father was using the plants to conduct a horticultural experiment. There was an implication that he was not growing them for illegal use. At any rate, the father appears to have pleaded guilty to the charge of cultivation, and he was sent to prison for 18 months. It was pointed out to Jeffries J that he had not been charged with any offence such as sale, supply, or use. Apparently no evidence was found of use by the father of cannabis. His Honour felt inclined to accept the truth of this, being struck by the ascetic characteristics of the father. His Honour had the further advantage of seeing the Magistrate's notes on sentence and observed that no comment by the Magistrate detracted from what was favourable to the father as above outlined. It would also seem that Miss Walker was also charged but that she pleaded not guilty and, at the conclusion of the police case, the charge was dismissed.

After the sentence, the mother lodged an application for custody of the two children, who had remained in Miss Walker's care. The hearing took place in Dunedin in May 1976, and the Magistrate awarded custody to the mother. An interim stay was obtained pending the hearing of the appeal and the children remained in Miss Walker's care.

It is now necessary to turn to the mother's situation since the separation in 1974. She suffered greatly at this time. She did however recover "from youthful bohemianism" and, on return to Palmerston North, became a wages clerk at Massey University, a post she still held at the time of the hearing. She continued the studies she had begun in Dunedin. She met a young man, who was a clerk in the Post Office Savings Bank, and the friendship ripened into courtship and engagement to marry when possible. She had a two-bedroom flat available for herself and the children and was prepared to give up work to care for the children full-time. The young man gave evidence in the Magistrate's Court and before Jeffries J in support of the mother's application and understood its consequences for them as a couple contemplating marriage.

His Honour adverted to s 23 (1) of the Guardianship Act 1968 and nicely observed that it was "a direction which is seductive in its simplicity, but in reality conceals a most complex and far reaching judgment. The proper study of mankind is man and the proper place to begin an examination of the welfare of a child or children is with the children themselves who are the subject of the application." He proceeded to observe that the children were now aged eight and six and emerging from infancy to childhood and thereby effectively entering the world. "In Shakespeare's seven ages", continued his Honour, "two are within the jurisdiction of the Court under the Guardianship Act and few would quarrel with the assertion that the age of the 'shining morning face' is formative and possibly the most significant of all seven. At this crucial stage what then represents welfare for these children?" In the mind of the learned Judge "it is above all security and stability. The early years of their life to May 1974 by the evidence of the two most dominant persons was one of tension, incompatibility and at the very best emotional vacillation. Unpropitious for the orderly, physical, intellectual and emotional development of children. After further upheaval in place and personnel during mid 1974 a kind of calm descended and thereafter the children's lives attained a degree of normalcy. That lasted for 18 months and was sharply broken by the headstrong and wanton repudiation of the law by their father. With measured disregard for the criminal law, encouraged perhaps by an academic reading of the [Narcotics Act], he cultivated cannabis in considerable quantity. I am not entirely convinced

by his explanations. The statute is not inflexible and if the cultivation was without the taint of illegality a licence could have been sought. However, having said that I must still return to the central point and ask myself the question: if security and stability are welfare for these children how then is it most likely to be attained in these circumstances? To answer that some analysis must be undertaken of the practical meaning of security and stability." In his Honour's view, probably the most important single event in a man's development was to learn mobility through standing and walking, which is usually accompanied by learning speech. At about seven years of age, those accomplishments are put to work to enable a child to bring himself to terms with the world about him. On his map, he has three important landmarks – his home, school and street (broadly his immediate physical environment). An integral part of that physical envirronment which gives it life and meaning is the personnel – parents, teachers, friends and neighbours. Partly because his life is beginning to teem with new experiences he prizes above all familiarity of place and face. It is from familiarity that he obtains his security and stability. Therefore, Jeffries J stated, at no other stage in a child's development is it more important to maintain, if at all possible, regularity and evenness in his evironment. His development is closely associated with activity which is not confined to the physical. Equally important is his mental and social activity. All activity flourishes in a familiar environment in which a child is able to move with confidence. To change suddenly that environment is to bring that activity to a halt, and no one can confidently state when it will recommence. One thing was certain to his Honour: that while the activity is slowed or halted it is lost forever. Development is a continuing process and cannot effectively be postponed to a later date. A tree that is girdled bears that mark its life long.

Among other matters, counsel for the father pointed out that the home in Dunedin had, with the exception of one term in 1974, been the children's home since May 1972 and that the father had been the constant parent all that time and "was the anchor". He had also faced the matter of the conviction, but said that the sins of the father should not be visited on the children, who now had a lesson about the need to obey the law.

His Honour then turned to the matter of the father's release from prison. His behaviour there had been exemplary and in September he was due for work parole, which meant that he would be able to see much more of his family. Should that prove satisfactory, he would be due for release in early March 1977, ie, in a further seven months.

Counsel for the mother pointed out that the father's position had worsened, whereas that of the mother had improved. He also emphasised that the father had failed to remain in de facto control of his children through his own actions and observed that there was really a contest here between the mother and Miss Walker and that the former, as natural parent, was prima facie entitled to custody.

"In my judgment", said Jeffries J, "both parties have given any tribunal faced with the task of deciding on custody of the children reason for grave doubts about fitness. The most recent events which befell the father are concrete and lend themselves easily to censure and blame. The mother's deficiencies and failures more readily evoke sympathy. Her past conduct towards the children and in the manner she has conducted herself personally since the separation tend towards neutrality, and therefore assessment of her as a person to whom custody might be given is more elusive. I noted it was Miss Walker who paid for the children's air fare to Palmerston North to see their mother at Easter last."

Notwithstanding their age, the learned Judge evidently interviewed the children in the registrar's presence; they presented as well cared for children and both expressed a definite preference to remain in their present environment and spoke of their liking for school and friends. The boy mentioned that he did not wish to "hurt" his mother by expressing the wish to stay in Dunedin.

Jeffries J concluded that he must reverse the Court below and award custody to the father "with reasonable, and I trust liberal, access to the mother". He added that, in his opinion, the children's lives might be seriously affected if the mother were to have custody and it was a failure. "In other words", he said, "the balance of risk lies more in that direction than leaving them with the father who has a proven record albeit blemished by his recent arrest and sentence."

His Honour felt it incumbent upon him to comment on Miss Walker, since the practical effect of his decision was to give her custody of the children until their father was released in, at the earliest, seven months' time. He indicated that the most obvious point was that it was she who knew the children well, having cared for them for nearly two years. She had given evidence before him and had satisfied him that she was an understanding and compassionate young woman. She had showed in the past a willingness to do what was in her power to keep the place of the natural mother before the children. Moreover also, the social worker who reported to the Court had done so very favourably on her role in the children's lives. "In some ways", his Honour observed, " there

might be reason for gratitude by all parties at the advent of Miss Walker into this family."

His Honour expressed himself as aware that, literally defined, the "mother principle" was not being applied but added that, in his view, the situation warranted its non-application. He ended by saying explicitly that he did not regard the matter of the cannabis and its consequences as a change of circumstances warranting a recasting of the order made in July 1975, and drew attention to *Miller v Low* [1952] NZLR 575, 589.

It is respectfully submitted that this truly sympathetic decision should be enshrined in the New Zealand Law Reports for its intrinsic legal worth and in an anthology of New Zealand prose for its literary merit. Even so, any compassionate reader of this case will be compelled to say to himself, as in any custody case, "Sunt lacrimae rerum".

PROBATE AND ADMINISTRATION

OUSTING THE FAMILY PROTECTION JURISDICTION

Family Protection claims may be defeated by a contract to leave property by will. R J SUTTON *of Auckland University Law Faculty examines this proposition.*

The decision of Wild CJ in *Re Webster, Dray v Webster* [1976] 2 NZLR 304 has intriguing implications. Can claimants under the Family Protection Act 1955 be defeated by a simple expedient, adopted by the testator of his lifetime, which puts his estate beyond the reach of their proceedings?

The facts

The testatrix died in 1973, owned a house property and very little else. She had intended to deal fairly with her four sons and three daughters by leaving her property to all of them in equal shares. In 1956, however, when she was 72 years old, it became clear that she would have difficulty in carrying out necessary repairs to the property, and even in meeting ordinary rates and other outgoings. She wanted to live in the house for as long as she could. Three of her sons then agreed to take over the responsibility for the repairs, maintenance and outgoings. In return, the testatrix promised she would leave them the property after her death. It was understood that when the property came to them, the sons would pay the other four children an amount equivalent to the value of their share if the property had been sold in 1956 and the proceeds distributed equally then.

This arrangement was honoured by the testatrix in her will. The house property was specifically devised to the three sons, charged with the payment of a total sum of $2,800 among the four other children. The house property was valued in 1956 at $4,900 giving a notional share of $700 for each child. There matters stood between 1956 and 1973. In the meantime, events occurred which gave rise, in the mind of one daughter at least, to doubts whether the distribution was a fair one. Two of the testatrix's daughters fell upon hard times, a fact which the testatrix should have considered if she had updated her will. The house property increased in value from $4,900 to $20,000. While some of the increase was due to the efforts and expenditure of the three sons, much of it was simply the reflection of general increases in property values.

Proceedings were brought under the Family Protection Act when the testatrix died. There seems little doubt, if the house property were regarded as part of the estate, that these proceedings would have succeeded. The sons objected that any award involving the house property would be an infringement of the arrangements made between them and the testatrix in 1956. The purpose of that arrangement had been to "fix" the value of the property as at that date, giving an incentive to the three sons to maintain and improve the property while their mother lived in it. The daughter who lodged the family protection claim replied that the jurisdiction of the Court to ensure a fair distribution of her mother's estate could not be ousted by a mere contract made between the mother and her favoured beneficiaries.

The decision

The learned Chief Justice upheld the sons' contention. Their agreement with the testatrix prevented the Court from making any award charged against the house property. The agreement was a binding contract to leave the property to the sons by will. If the testatrix was so bound, the property was not part of her estate for the purposes of s 4 of the Family Protection Act, which authorises awards to be made "out of the estate of any deceased person". The Chief Justice referred to the advice of the majority of the Privy Council in *Schaefer v Schuhmann* [1972] AC 572, an appeal from New South Wales where there is similar legislation. The Privy Council there stated

that property which was the subject of a contractual testamentary promise was not available in family protection proceedings. Regarding himself as bound by that decision, the Chief Justice held that the house property could not be affected by an order he might have jurisdiction to make. Whatever the merits of the daughter's claim that the testatrix had acted unfairly, her proceedings must fail.

This conclusion appears startling, but the more obvious arguments in the daughter's favour were conclusively disposed of by the Privy Council advice. It might be contended that the house property, since it passed under the testatrix's will, was part of her "estate" according to the ordinary meaning of that word. To this contention, the Privy Council replied at 585,

> "The Act contains no definition of the "estate" out of which the court is empowered by s 3 (1) to make provision for members of the family. It is, however, clear that it cannot mean the gross estate passing to the executor but must be confined to the net estate available to answer the dispositions made by the will. Again if one reads the section without having in mind the particular problem created by dispositions made in pursuance of previous contracts the language suggests that what the court is given power to do is to make such provision for members of the testator's family as the testator ought to have made, and could have made, but failed to make. The view that the court is not being given power to do something which the testator could not effectually have done himself receives strong support from s 4 (1) which says that a provision made under the Act is to operate and take effect as if it had been made by codicil executed by the testator immediately before his death."

There is no provision in New Zealand which corresponds to the last-mentioned s 4 (1) in the New South Wales Act. However, although the Chief Justice did not advert to this difference in his judgment, it was too minor a point to justify his departing from the Privy Council's advice.

The Privy Council also dealt with the argument that the contract to leave property by will is performed when the testator dies having executed a valid will which is apt to achieve the desired result. The contractual legatee, according to this argument, must then take his chance along with all other legatees that his interest may be diminished as a result of family protection proceedings. The Privy Council referred to a number of cases in various contexts, where the Courts had refused to "reduce contract rights to the level of gifts under a will" (at 587-590). Interestingly enough, only one of the cases, the decision of the Tasmanian Court of Appeal in *In re Richardson's Estate* (1934) 29 Tas LR 149, related specifically to a family protection claim. There seems much to be said for the Privy Council's view that a legacy made in pursuance of a valid contract has a special status and ought not lightly to be dealt with like any other legacy. What is troubling about the Privy Council's advice is that this consideration need not inevitably lead to the conclusion that contractual legacies should never be diminished as a result of family protection awards. If the jurisdiction were not so limited, due weight could still be given to the contractual aspects of the matter when the Court came to compare the merits of the family protection claims with those of the beneficiaries under the will. This approach, indeed, appears to have been taken by Crisp and Clark JJ in *In re Richardson's Estate*, supra, at 156-7, 158. The crucial question, in the writer's respectful submission, is whether the contractual claimant should be accorded absolute superiority or only such superiority as the merits of his contract deserve over those whose claims may be of a different kind though no less pressing. If that is the question, then the Privy Council's reasoning on this point seems to have been largely misdirected. However, whatever reservations a commentator may have about the decision, it was hardly open to the Chief Justice sitting at first instance to depart from Privy Council authority on this account.

Before Wild CJ, a new argument was pressed which would not have been available in an appeal from New South Wales. Under the Law Reform (Testamentary Promises) Act 1949, the Court is given special powers to deal with promises made by a testator in return for work performed or services rendered. If he promises to make some testamentary provision for the promisee and fails to honour his promise, it is to be enforced against the executors in the estate as if it were "a promise for payment by the deceased in his lifetime of such amount as may be reasonable, having regard to all the circumstances of the case, including in particular the circumstances in which the promise was made and the services rendered or the work was performed, the value of the services or work, the value of the testamentary provision promised, the amount of the estate, and the nature and amounts of the claims of other persons in respect of the estate, whether as creditors, beneficiaries, wife, husband, children, next-to-kin, or otherwise". This provision, which was put into its present form by amending legislation in 1961, shows clearly that in cases to which the act applies the testamentary promise claimant in New Zealand is not given automatic superiority over members of

the family, but must take his chances along with everyone else.

The learned Chief Justice dismissed this argument on the ground that the legislation has traditionally been regarded as supplementary to the ordinary rights of those who claim under contracts to make wills; see *Reynolds v Marshall* [1952] NZLR 384, 393. It may be objected that the legislature has significantly amended the wording of the section since the matter was last closely examined by Gresson J in *Nealon v Public Trustee* [1949] NZLR 148, 166. In particular, the 1949 legislation widened the ambit of the Act to include claims against property, as well as money claims. The 1961 legislation specifically required the Court, in all cases, to "balance" the testamentary promise claim against claims of other creditors and members of the testator's family. Previously the Court only had this "balancing power" if the testator himself had failed to specify a set amount, or if his promise related to real or personal property other than money. If he chose to promise money, then the amount promised would rank as a debt in the estate, presumably with prioity over family protection claimants. These amendments may signify a change in the fundamental philosophy of the section, and it could now be contended that contracts to make wills in return for services rendered or work performed are not enforceable according to their tenor, but must be subjected to a "balancing test" with other testamentary claims. In any event, the new legislation is a valuable indication of legislative philosophy which must surely carry weight in the interpretation of New Zealand's Family Protection Act. This commentator would suggest, with respect, that the argument based upon the Testamentary Promise legislation was too lightly dismissed by the learned Chief Justice.

The decision in *Re Webster* is nevertheless authority for the proposition that if a testator makes a legally binding contract to leave property in a certain way and makes his will accordingly, the provision in the will is to be treated as primarily contractual and therefore immune from any family protection award. There are related situations which still call for judicial determination. If the testamentary provision is made in pursuance of a promise which is not contractually valid and could only have been enforced under the testamentary promises legislation, then the position is obviously different and it appears strongly arguable that the testamentary promise claimant must submit to the same kind of "balancing test" that would have been applied had the testator not honoured his promise. If conversely the testamentary promise is contractually valid but it is not honoured by the testator, the position is unclear. The answer may depend on whether a person seeking to enforce a contract must now submit to a "balancing test" under the testamentary promises legislation, or whether he is free to rely solely on the contract.

A means of escape from the family protection jurisdiction?

It has long been settled that a family protection claimant cannot lose his rights by agreeing with the testator that he will not bring family protection proceedings. This is so even where the agreement is made in pursuance of a proceedings. This is so even where the agreement is made in pursuance of a family settlement which is otherwise fair and reasonable. In *Gardner v Boag* [1923] NZLR 739, 745, Chapman J observed:

> "After careful consideration of the whole of the provisions of Part II of the Act I have come to the conclusion that this is a declaration of State Policy and that, as such, is paramount to all contracts. In this connection it may further be pointed out what might be done if this were not so; for an argument ab inconvenienti, though seldom cogent, is often relevant. If such a contractual power exists it is unrestricted and paramount. The contract might be made when the estate was small, and its inadequacy might be overlooked when the testator's circumstances had greatly improved, while the amount of the provision might remain so small that in view of the increased cost of living, which is notoriously subject to periodic fluctuations, it must prove wholly insufficient. It could make no difference whether there is consideration or not so long as the document is so executed as to be valid. The condition of the wife as to health would also be immaterial. The security on which the original provision was based might, too, have failed, yet the covenant would remain good. The wife might be starving, not in the midst of but in the vicinity of plenty, yet she would be barred by the covenant. I am convinced that the Legislature aimed at dealing with those known contingencies and correcting possible abuses."

Cf *Parish v Parish* [1924] NZLR 307 (Full Court); *Hooker v Guardian Trusts and Executors Co* [1927] GLR 536. There is no suggestion, either in *Schaefer v Schuhmann* or *Re Webster*, that these cases are now to be regarded as incorrectly decided.

Yet, if *Re Webster* correctly states the law, a testator may be able to achieve precisely the same results by contracting with his own favoured beneficiaries. All the inconveniences referred to by Chapman J would remain, yet the contract would

be valid and would preclude investigation under the Family Protection Act. In *Gardner v Boag* itself, the testator unwisely contracted with the wife he proposed to disinherit, and his contract was struck down. He should have contracted with the sons to whom he proposed to leave the property. As long as he left the property to the sons, the wife would have been powerless. Or, to take a more extreme example, a testator might by deed undertake to a trusted friend that he would will his property only in such manner as the friend might direct. Every time he made a will he would obtain his friend's concurrence. By this means he would without any inconvenience to himself put his entire estate beyond the reach of anyone he wished to disinherit. One reaches the extraordinary and anomalous conclusion that what the testator cannot do with the family protection claimant's concurrence he can readily do behind his back.

New Zealand law was not always in this unsatisfactory state. The Privy Council itself, in *Dillon v Public Trustee* [1941] AC 294, held that a contract to leave property to a favoured legatee did not oust the jurisdiction of the Court to make a family protection award. That decision was regarded as unsatisfactory by the majority of their Lordships in *Schaefer v Schuhmann* and they declined to follow it. However, the case deserves a reference, particularly since it was an appeal from the New Zealand Court of Appeal, which had adopted the views which were later espoused in *Schaefer*. Reversing the Court of Appeal, the Privy Council had this to say in *Dillon's* case at 303-4:

> "The testator is under no reproach in the matter at all. His will duly provides for the fulfilment of his contract with his children and gives all that is left for distribution to their stepmother. But the contract cannot oust the jurisdiction of the court, and there is nothing in s 33 of the Family Protection Act which restricts the court's power to redistribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into inter vivos . . . if (the opposing view) was so, a young bachelor who had agreed for a consideration to leave all his property by his last will to a relative, friend or creditor, might later marry and leave his widow and children without any support in circumstances where the Act could not modify the distribution of the testamentary estate. The manifest purpose of the Family Protection Act, however, is to secure on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for. . ."

The Privy Council's former view was thus predicated on the theory that a contract of a testamentary character must, as a matter of public policy, be made subject to the Court's statutory power and duty to ensure the fair distribution of deceased estates among those for whose maintenance and support the testator has a duty to provide.

The same view was expressed elegantly by Lord Simon of Glaisdale in the dissenting advice he gave in *Schaefer v Schuhmann*. He said at 596-7:

> "We are concerned here with three different sorts of social obligation to which legal affect has been given. The first arises because a system of quid pro quo is fundamental to ordered human society. Legal regimes therefore enforce contractual obligations if the promisor himself makes default; and, if the promisor dies in default, will generally make his personal representative do what the deceased should himself have done. The second type of obligation arises where property gets into a person's hands which is not meant for his own benefit and in such circumstances justice demands that he should use it for the purpose for which it was in fact intended. Obvious examples are the situations of a trustee or of a personal representative of a deceased's estate. I accept that where A convenants to bequeath property to B, A's personal representative will generally be constructive trustee of the property for B, and that the law (as developed in courts of Equity) will generally compel the personal representative to do what the deceased should himself have done. The third type of obligation – that of a deceased to provide for his dependants – arises juristically from the statute, which (like that rule of Equity) empowers the court to order the personal representative to do what the deceased should himself have done.
>
> "But I cannot see any reason, social or juridical, which makes the first two types of obligation in any way more potent or overriding than the third. On the contrary, a statutory provision generally prevails over a rule of judge-made law where there is any conflict. But in the instant situation, in my view, none of the three types of obligation overrides any other; they are concurrent. The promisee's contractual or equitable rights fall to be considered along with the dependant's statutory rights."

This happy result, in Lord Simon's view, would come about if *Dillon's* case were upheld. By refusing to accord the contract paramountcy, that

decision enabled the Courts to consider the merits of contractual and family protection claimants together.

The decisions in *Schaefer v Schuhmann* and *Re Webster* take a contrary view. They allow a testator considerably more latitude in disposing of his property through a system of contract than has hitherto been thought either desirable or legally permissible. In allowing such contractual dispositions of property, the law gives greater emphasis to the testator's freedom to do as he pleases with his own property. Judicial control of his dispositive power is seen only in the provisions of the Family Protection Act and the Law Reform (Testamentary Promises) Act, which according to the Chief Justice have no place in matters of pure contract. The necessary consequence of this view is that a testator can the more readily escape his statutory obligations to provide by will for his close family.

What contracts are supreme, and why?

How much latitude is allowed the testator who disposes of his property by way of contract to make a will? The position is succinctly stated by the Chief Justice in *Re Webster* at p 309 in these terms: "I think that the true rationale of *Schaefer v Schuhmann* is that the 'estate' out of which provision can be made is that part of it which the testator is free to deal with." If any part of the estate is subject to a binding contract to dispose of it by will, the testator is not free to deal with it in that sense, and it is therefore immune from Family Protection proceedings. When "for good consideration the testatrix bound herself contractually" to make the provision in the will, all the beneficiaries were successfully translated from will claimants into contract claimants. No further conditions apparently had to be complied with.

The Chief Justice seems to have taken the view that the rationale of *Schaefer v Schuhmann* applies to any legally enforceable contract. At first sight, there appears to be an attractive argument to the contrary. The Board expressly confined its consideration, at 585, to "the rights of a person on whom a testator has agreed for valuable consideration under a bona fide contract to confer a benefit by will". In a later passage, the advice refers at 592 to the testator acting "in the normal course of arranging his affairs in his lifetime". It might therefore be argued that before a contract excluded the family protection jurisdiction it must be (a) for valuable consideration, and not merely technically binding (as, for example, in the case of a deed without consideration); (b) bona fide, and not entered into for the prime purpose of defeating the family protection legislation; and (c) a "normal arrangement", and not anything suspicious or strange. No reference is made in the Chief Justice's judgment to these restrictions.

Deeper investigation, however, may show that this argument is not tenable. Much as one may dislike its results, the Chief Justice's formulation is the correct one. It is essential to the Board's reasoning that the word "estate" in s 4 of the Family Protection Act does not include "property which the testator has bound himself by contract to dispose of in a particular way". It is also essential to the Board's reasoning that the legislature had not considered or provided for contractual testamentary provisions, and hence a series of anomalies, to which reference will be made later in this commentary, would follow if the word "estate" were to be considered to cover them. That the legislature should have considered and included contracts to make wills which, though legally valid, were not "bona fide and normal", and yet not considered those which were, is inconceivable. There is nothing in the wording of s 4 which might support such an assertion. Indeed, had the legislature intended to deal with transactions designed to evade the provisions of the Family Protection Act it would surely have specifically referred to them, as was done in the Matrimonial Proceedings Act 1963, ss 80 and 81, and would have included dispositions by way of inter vivos trust, as well as contracts for testamentary dispositions. Moreover, the anomalies which their Lordships were at pains to prevent in relation to bona fide transactions can equally occur, in even more acute form, where the contract is designed to defeat the provisions of the Act. The logic of their Lordships' reasoning, therefore, seems to apply to all forms of contracts to make wills, whether bona fide and normal or not.

Why did the Privy Council reach such an unpalatable conclusion? The words of the statute do not compel it. Nor does it follow from a desire not to "reduce contract rights to the level of gifts under a will", since that would not be the consequence of the contrary view. The key to the Privy Council's reasoning seems to lie in various parts of the judgment where "anomalies" are referred to, and in the following passage at 592:

> "...It seems most unlikely that those who framed the New Zealand and New South Wales statutes – or for the matter of that the English Inheritance (Family Provision) Act 1938 – had the problem posed by contracts to leave legacies or to dispose of property by will in mind.
>
> "The question whether contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in

> the normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the court under legislation of this character is a question of social policy under which different people may reasonably take different views. In this connection it is not without interest to observe that by the Law Reform (Testamentary Promises) Acts 1944 and 1949 the New Zealand legislature has itself enacted provisions designed to protect persons who have rendered services to testators in reliance on promises on their part which have not been honoured to leave them benefits by will. If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation deliberately framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies, as flow from the decision in *Dillon v Public Trustee* . . ."

The supposed "anomalies" arising from the decision in *Dillon* will be examined in the next section. First, however, a few comments should be made on this passage, as applied not to the New South Wales but the New Zealand legislation. With all due respect to the Chief Justice's contrary view, it seems to be founded not upon considerations of general legal principle, but upon the Privy Council's view of what is politic in judicial lawmaking and the construction of statutes. The assumption that the legislature cannot have considered the topic may be valid in New South Wales, but it would be quite fallacious in New Zealand. The Family Protection Act was re-enacted in 1955, after *Dillon's* case, and under well-established practices in statutory construction that case should be regarded as having been approved and endorsed by legislation re-enacted in virtually the same terms. Indeed, the new provisions of the Law Reform (Testamentary Promises) Act 1949 give ample guidance on legislative policy in this matter, and may in fact have been predicated upon the assumption that contracts to make wills could not override the family protection jurisdiction. Had the case come up on appeal from New Zealand, where all this background would have been available to the Board in the course of argument, a different view might well have been taken of what is sound policy. Instead, the Privy Council carried its own counsels of caution to such an extreme that it did not merely maintain the status quo, but felt obliged to over-rule its own previous decision in *Dillon* in order to spare Commonwealth Courts the trouble of dealing with supposed anomalies.

Our present view of precedent may compel us to accept the risk of such distortions in the interpretation of our legislation. As the learned Chief Justice observed in *Re Webster* at p 309:

> "Having regard to the similarity in the essential terms of s 4 in the New Zealand Act and s 3 (1) in the New South Wales Act I think that that principle must now apply in New Zealand just as it does in New South Wales. Although in *Schaefer's* case the Privy Council merely declined to follow *Dillon's* case (not being bound by its previous decisions – *Attorney-General for Ontario v Canada Temperance Federation* [1946] AC 193, 206) I think the effect is the same as if the Board had expressly overruled it."

The present case, however, once again poses the question whether we should continue to accept the Privy Council as our highest Court. The retiring President of our own Court of Appeal recently expressed his doubts about the wisdom of retaining a body which faces difficulties in "understanding the backgrounds to New Zealand cases, our social philosophies, our ways of life generally, sometimes even our language" ([1976] NZLJ 380). There is some evidence of such lack of understanding even in the dissenting opinion of Lord Simon, where he described family protection legislation as being based upon the view that "children, who did not ask to be brought into the world and whose upbringing is required for society for its continuity, have a right of support *until capable of self support*" (595-6; commentator's italics). In New Zealand, the purpose of control of testamentary disposition would appear to have gone well beyond the mere support of those who cannot support themselves. This is illustrated by recent judgments in favour of adult children, who are increasingly successful in family protection claims; their success can be justified only on the theory that a parent owes even adult children who are self-sufficient a duty to distribute his property fairly among his family. This indicates that the law of family protection assumes a much wider social role in New Zealand than Lord Simon would assign to it. It seems inevitable, where Judges do not fully understand a society, that they will proceed cautiously in applying and interpreting the laws. Certainly an abundance of caution was displayed in *Schaefer v Schuhmann*. It may be that some way can be found, short of abolishing appeals to the Privy Council altogether, which can overcome this effect on our jurisprudence.

Unless our Court of Appeal is prepared to depart from *Schaefer v Schuhmann*, however, or

unless the New Zealand legislature is once more to turn its attention to a matter which it may well have regarded as already settled, the Privy Council decision must stand. It leads without escape to the propositions of law expressed by the learned Chief Justice. If so, there is little point in considering whether their Lordships' fears about possible anomalies were justified. The comments that follow may well be of little practical consequence.

The "anomalies" resulting from Dillon

Returning to the reasoning of the majority of the Board in *Schaefer v Schuhmann*, it is clear that the possibility of anomalous results weighed very heavily with their Lordships, and their reasoning merits an examination here. Brief comments are interposed, though it will be seen that their Lordships were entering upon difficult and largely unsettled law. A complete critique would be beyond the scope of this commentary.

It was first necessary for their Lordships to examine the legal position of a disappointed testamentary promisee. The results of their examination may be summarised thus:

(1) A covenantee who is promised a sum of money or other similar provision in a will may prove along with all other creditors in the testator's estate, even though the estate is insolvent; *Graham v Wickham* (1863) 1 De GJ & Sm 474. (It is difficult to assess the validity of that proposition according to modern New Zealand insolvency law. If the promise were given as part of the promisor's marriage settlement, the debt would be deferred under our Insolvency Act, ss 104 (1) (i) and 54 (4), and would not rank with ordinary debts. The position with voluntary debts is unclear; it is beyond the scope of the present comment to explore *Ex p Pottinger, In Re Stewart* (1878) LR 8 Ch D 621 in relation to deceased insolvent estates in New Zealand, or the effect of the new "gift" provisions in the Insolvency Act 1967, s 54, on such debts. On deceased insolvent estates generally, see Garrow and Willis, *Law of Wills and Administration* (4th ed 1971), 624-6).

(2) The amount for which the promisee might prove will depend upon the precise terms of the promise; for example, a promise to leave him a share of residue would be valueless if the testator died insolvent, as in *Jervis v Wolferstan* (1874) LR 18 Eq 18, 24. (This principle might frequently be invoked in the context of family protection claims. If the promisee is given to understand that he will have to defend his legacy against family protection claims, then his damages claim in the event he is given no legacy at all will be correspondingly diminished. The same thing would happen if the law does not permit him as a matter of public policy to make contracts with a testator so as to exclude family protection claims.)

(3) A covenantee who is promised some specific asset may have rights during the testator's lifetime. If the property is sold the testator may be immediately liable to damages. The convenantee may even invoke the aid of equity to prevent a sale to someone with notice of his rights; *Synge v Synge* [1894] 1 QB 466. (The above comments under (2) apply equally to any inter vivos contract claim under this heading. Where equity is invoked, it must presumably be shown (a) that the consideration was, in the eye of equity, sufficient, because "equity will not assist a volunteer"; and (b) that the contract itself did not contravene public policy, because "he who comes to equity must come with clean hands".)

(4) If the testator dies insolvent, the promisee of specific property cannot claim it, but must prove in the estate for its value. (No authority is cited for this proposition which their Lordships surmise at 586. It seems inconsistent with proposition (3); one would have thought that if the promisee had an equity to keep out would-be purchasers, he would surely have the equity to keep out the unsecured creditors in the testator's estate.)

Having established these basic principles, their Lordships went on to consider how they would apply to a series of apparently anomalous situations. If it could be shown that a testamentary promisee whose promise was honoured is worse off, under the law as stated in *Dillon's* case, than if the promise had been dishonoured, an anomaly would be demonstrated. Adopting this approach, the Board referred to the following hypothetical situations. It must be stressed, however, that their Lordships did not have any such anomalous case before them in *Schaefer v Schuhmann*. On the contrary, it was a very ordinary case where an elderly testator had made a testamentary promise to his housekeeper which greatly exceeded the value of the services rendered on account of the promise. Nor was any case cited where such an anomaly had arisen. The anomalies were hypothetical cases devised by their Lordships' ingenuity, and quite untested by the normal process whereby legal problems ascend to the Privy Council.

These situations were considered:

(a) Where a testator dies insolvent, the promisee will succeed in competition with the creditors for the property he has been promised, subject only to a rateable abatement with them; but if the testator dies solvent, the whole property might be given to the family protection claimants to the exclusion of the promisee. (If the promisee's claim were indeed valueless in competition with the family protection claimants, then

this would be taken into account when it was valued as a contingent debt under s 98, Insolvency Act 1967; cf *In Re Galyer* [1931] GLR 539. The promisee would get nothing in an insolvent estate, unless he had an equity in specific property. But how could he have an equity, if his contract so manifestly defeated family protection claimants?)

(b) Where a testator parted with property specifically promised during his lifetime, he would have to pay damages at that date. True, those damages might be diminished on account of the possibility of future family protection claims against the property, but who could tell at that time what those claims would be? this is not an anomaly but a practical difficulty which would only arise in most unusual circumstances. Justice could still be done by rough estimate).

(c) If the promise did bring about a situation where the testator was, at the date of his death, trustee for the promisee, then it is difficult to see how a family protection order could be made against the property. (It is perfectly possible for a testator to constitute himself trustee of his own property for someone else during his lifetime, and it is well known that such property is not then affected by the Family Protection Act. However, few testators find this means of evading the Family Protection Act attractive, since they must divest themselves of virtually all their assets in a rather cumbersome way. It is an entirely different matter, however, to allow them to set up trusts which entail little or no personal inconvenience while they are alive, but which attach to the estate precisely at the moment of death. There is no reason why such trusts should not be amenable to Family Protection proceedings, as are donationes mortis causa (s 2 (5)). If the contract to make a will is contrary to public policy to the extent that it excludes family protection claims, so too must be the trust which springs up as a result of that contract.)

Looking at these proffered anomalies, this commentator is puzzled at the assertion that they are "astonishing". They are hardly anomalies at all, and they are utterly remote from the day-to-day practice of family protection.

Schaefer v Schuhmann in New Zealand

All of this leads this commentator reluctantly yet respectfully to the view that, to the extent that *Schaefer v Schuhmann* is a New Zealand authority, a contrary decision would have been preferable. The following points may be listed against the decision.

(1) It is contrary to previously established law;

(2) It is not the result of the logical development of legal principle, nor is it compelled by decisions of authority;

(3) The words of the statute were quite ample to achieve the opposite result, and have to be read restrictively if the decision is to be supported;

(4) It is contrary to legislative policy, as shown by the re-enactment of the Family Protection Act in the same form after *Dillon's* case, and by the provisions of the Law Reform (Testamentary Promises) Act;

(5) It permits a testator too much autonomy of will, contrary to established social policy; it entices him into contractual dispositions of his property when testamentary dispositions are more efficient and socially desirable;

(6) It is inconsistent with the policy put forward in those cases where family protection claimants have not been permitted to "contract out" of their rights under the Act;

(7) It is the result of an unduly cautious approach to judicial lawmaking and statutory construction, by Judges who are not familiar with New Zealand society;

(8) The supposed "astonishing anomalies" which figure prominently in the opinion do not on closer examination seem to be either astonishing or anomalies, nor are they of practical significance.

While it was no doubt proper for Wild CJ at first instance to follow the decision in preference to the earlier advice in *Dillon's* case, it is to be hoped that the earlier authority will soon be reinstated either by a decision of the Court of Appeal or by legislation.

Conclusion

Until that happens, however, it appears that the law to be applied by Courts of first instance is that stated in *Re Webster*. A testamentary provision made in pursuance of a valid contract is unassailable in family protection proceedings. While in *Re Webster* itself this rule appears not to have produced an unjust result, the implications of the rule are considerable. A testator who chooses a contractual rather than testamentary scheme of disposition of his property on death, can avoid the responsibilities which would otherwise be imposed upon him by the Family Protection Act. Disappointed family protection claimants must then either suffer their sorrows in silence, or undertake the burden of persuading the Court of Appeal that it should not follow a decision of the Privy Council.

A fair, large and liberal interpretation? – "If I am asked whether I have arrived at the meaning of the words which Parliament intended, I say frankly I have not the faintest idea." Scrutton LJ in *Green v Premier Glynrhonwy Slate Co* [1928] 1 KB 566.