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CLAIMS BY BENEFICIARIES

Beneficiaries as a class rarely cause problems. They are more like blotting paper, passively absorbing a testator's bounty. It is those who are not beneficiaries who are more prone to litigate. However, in two recent cases beneficiaries have been a little more assertive.

Will attested by beneficiary's spouse: Ross v Caunters [1979] 3 All ER 580 (ChD).

A testator had his will witnessed by a beneficiary's spouse. The solicitor who had prepared and forwarded the will to the testator had neither warned him that attestation by a beneficiary's spouse would invalidate the gift nor, when the will was returned, did he notice the attestation by the spouse. The beneficiary was understandably displeased to discover the invalidity of the intended gift and successfully sued the solicitors in negligence. Liability was held to arise directly from *Donoghue v Stevenson* [1932] AC 562 and not indirectly via *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. This result will undoubtedly meet the approval of the reasonable beneficiary who, one may expect, would be totally unimpressed by the suggestion that the only duty owed was to the testator who, or whose estate, would be likely to recover no more than nominal damages for there would be no financial loss.

Until the very recent decision of Quilliam J in *Rowe v Cleary* (Supreme Court, Palmerston North, 26 November 1979), it was by no means certain that this result would follow in New Zealand. One of the arguments raised by the defence in *Ross v Caunters* was that "a solicitor could not be liable in negligence in relation to his professional work to anyone save his client, and that his liability to his client was only in contract, and not in tort. This latter proposition strongly suggested that there could be no liability to third parties in tort, for if the solicitor was not liable in tort even to his own client, it would be remarkable to hold him liable in tort to third parties."

On the strength of such cases as *Esso Petroleum Co Ltd v Mardon* [1975] 1 All ER 203, Sir Robert Megarry VC dealt with that argument by holding that "a solicitor's liability to his client for negligence is not confined to liability in contract, to the exclusion of liability in tort: the client may base his claim on tort, irrespective of contract."

In New Zealand the cases on which Sir Robert relied crash headlong into the decision of the Court of Appeal in *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 101 in which it was held that a professional man's relationship with his client is contractual and actions are to be founded upon contract alone. That decision as it bears on concurrent remedies in contract and tort was recently followed by Mr Justice Jeffries in *Marlborough Properties Ltd v Marlborough Fibreglass Ltd* [1979] Butterworths Current Law 769, albeit with some reluctance — "I cannot see New Zealand law long maintaining a pocket of resistance to the direction the two great branches of the common law is now taking."

Quilliam J also regarded himself as bound to follow *McLaren Maycroft* but he was not prepared to take it any further than he had to in *Rowe's* case, which was an action for negligence against a solicitor, both Mr and Mrs Rowe were plaintiffs but it was conceded that no contractual relationship existed between Mrs Rowe and the defendant. As far as Mr Rowe was concerned *McLaren Maycroft* prevented any

remedy in tort. However Mrs Rowe was not so limited and his Honour "reached the decision that the trend of modern authority is such that a claim of this kind ought to be recognised. . . . . It is, I think, consistent with this trend to say that a solicitor who fails to exercise a proper standard of care in his duty towards his client ought reasonably to have had in contemplation the consequences upon the client's husband or wife. I realise there may be an apparent incongruity in holding that the defendant it liable to his client in contract only, but to his client's wife in tort, but I do not see this as a reason for declining to reach the view I have."

These cases raise, very acutely, the question of how far a solicitor's (or any other professional adviser's) obligations should extend. On the one hand there is a fairly prevalent community attitude that those who suffer loss should have a remedy and that those who are negligent should pay. Yet on the other hand a solicitor gives advice for a fee. Certainly he should be answerable to his client who after all pays him. But to what extent should he be answerable to those who do not? Unless professional advisers are to become a form of community indemnifer there is good reason to limit liability at least to special relationships of the type envisaged in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Others would go further and say a solicitor's obligations should be governed by contract alone.

As Quilliam J pointed out, it is anomalous that a client should be limited to a remedy in contract while others may claim in tort. Yet it should not be immediately assumed that the incongruity is best removed by giving the client a tortious remedy *McLaren Maycroft* may prove to be the only case in step.

Assertion of Matrimonial Property claim by beneficiary

In the second case, *Re Plumley* [1979] Butterworths Current Law 825 the testatrix and her husband had, so one may infer, been living happily together up until the testatrix died. The testatrix's husband was a farmer and held a valuable farm property in his own name. The testatrix had a small estate of which she left personal effects to a daughter and the residue of about $4,000 to her son. The son sought to require the administrator to initiate proceedings under the Matrimonial Property Act 1963 on behalf of the estate. The administrator declined whereupon the son applied to have him removed.

Mr Justice Barker held that even though the spouses had lived happily together during their married life without either spouse raising any question as to property ownership it was still open to the personal representative of one of them to raise a "question" under s 5 of the Matrimonial Property Act 1963. In view of the difference of opinion between trustee and beneficiary it was felt expedient that the trustee either resign or be removed by the Court and that the son be appointed in his place.

It is by no means certain that the son would overcome a defence based on common intention but even so the prospect of this sort of litigation must now become a matter of some concern to those giving advice on wills where there is a rift in the family. Caution may well require that even though the estate be exhausted by bequests the residue should be left to the surviving spouse. Any other suggestions?

Tony Black

CONSTITUTIONAL LAW

THE SELF-CONTRADICTORINESS OF NEW ZEALAND CONSTITUTIONALISM

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From time to time occasions arise when New Zealand lawyers find it pertinent to advocate that,[1] or provoke enquiry into whether,[2] our nation should have a written constitution. The ensuing debate usually preoccupies itself with the merits and demerits of written constitutions. Only rarely does it take account of whether a written constitution, however appropriate elsewhere, is appropriate to New Zealand.

It is assumed throughout such debates that the issue of a written constitution for New Zealand can be determined in the abstract. There may be a number of explanations for this assumption. In the first place New Zealanders

are yet somewhat deficient in recognising New Zealand's own social, legal, and constitutional identity. It is taken for granted that what applies to other nations is applicable to New Zealand. Nor is this to be remedied by a search for national identity, which risks an arbitrary and artificial disassociation from our origins, including our constitutional origins, as a matter of mistaken principle. In the second place, because we think of ourselves as a young country, we set small premium on legal history, and thereby do grave disservice to constitutional law.

From this point of view it is curiously wrong how matters of constitutional law, especially the issue of a written constitution for New Zealand, are often argued entirely as matters of abstract jurisprudence. Why, even "jurisprudence without history is blind", said Balduinus in the fourteenth century.

Constitutional law without constitutional history is not only blind, but deaf and dumb as well. Our own constitutional history began not in 1840, but at least in Anglo-Saxon times. It is this that is the testbed of our constitutional law, because the constitution which we already have and which contributes so much to our unselfconscious identity is the result of centuries of experience in law and government. Our standard of judgment in these matters is not one lightly taken up nor lightly to be put down, but is the result of the legal history which has given it birth and nurtured its development.

Whether this experience of law and government can be written down is another matter. It may be possible to profess our heritage by the way we live, but it is hardly possible to preach far less command it. Yet there is a view abroad today that anything can be done by legislation. It is an old and recurrent by von Savigny[3] in his essay "On the Vocation of Our Age for Legislation and Jurisprudence". Yet it still rides from to time like some premonitive horseman of the Apocalypse. Indeed it is often the feeling abroad that anything at all can be done by legislation which provokes those to find hope in a written constitution by way of restraint.

Why not, therefore, attempt to write down one's heritage? There is much more of our constitution in writing than usually given credit for. The Statutes Drafting and Compilation Act 1920, which secures the independence from the executive of New Zealand's Parliamentary counsel as officers of Parliament, is one such example of our frequently forgotten constitution in writing. There are those too who prefer to ignore the constitutional force in New Zealand of England's Bill of Rights, just as there are those, and lawyers among them, who never learned that some at least of Magna Carta remains in force on New Zealand's statute book. Why not, therefore, undertake the whole enterprise legislatively and systematically and beat those who have no feeling for our legal heritage at their own game?

The answer to this question is simply that in so doing we would lose our heritage. "If you can't beat them join them" is an admission not only of defeat but of treason to the cause.

To understand this in the context of the cry of constitutionalism, it is necessary to examine New Zealand's legal heritage, not so much from the obvious aspect of common law, but from the less obvious aspect of legislation.

It cannot be denied from a study of legal history that, not only from 1840 but from "the Grand Experiment"[4] of years before, New Zealand has made her way by legislation.[5] The Treaty of Waitangi alone constitutes the exception to the rule, but so once was the Magna Carta a mere conveyance[6] and not a statute. It is certainly not by legal fictions nor equity, those instruments which Maine[7] used to equate social and legal progress of earlier ages, that New Zealand's legal history has developed from the ex-

[1] See Constitutional Society, *Draft Constitution of New Zealand* (Auckland, 1961); Brassington, A C. "The Constitution of New Zealand — Aspects of Change and Development" [1963] NZLJ 213, 221; see also submissions by Constitutional Society in *Evidence Presented to the Constitutional Reform Committee 1964 on the New Zealand Bill of Rights* (Wellington, 1965); Paterson, D E, *First Draft, Constitution of New Zealand* (Wellington, 1977).

[2] See Palmer, G, *Unbridled Power* (Wellington, 1979); and consider also NZBC radio news service report of September 1979 of remarks attributed to Rt Hon Sir Owen Woodhouse.

[3] von Savigny (1779-1861) was Prussian Minister of Legislation; see Dias, *Jurisprudence* 4th ed pp 515-528.

[4] See Foden, N A *New Zealand Legal History (1642-1842)* (Wellington, 1965) pp vii-viii, 23-49.

[5] See Robson, J L *New Zealand — The Development of its Laws and Constitution* (2nd ed London, 1967) especially chs 6 and 15.

[6] See Stubbs, W, *Select Charters Illustrative of English Constitutional History* (8th ed Oxford, 1895) pp 271-284; *Taswell-Langmead's English Constitutional History* (11th ed Plucknett, London, 1960) pp 65-92; Adams, G B *Constitutional History of England* pp 130-131.

[7] Maine, Sir Henry, *Ancient Law* (London, 1861).

[8] The Blackstonian doctrine upheld by *Cooper v Stuart* [1889] 14 App Cas 286 is sometimes viewed as being limited in New Zealand by *Campbell v Hall* (1774) Lofft, 655; but "in all important official documents New Zealand is said to have been acquired by settlement. It was not a conquered, nor a ceded but a settled Colony": Foden, N A, *The Constitutional Development of New Zealand in the First Decade* (Wellington, 1938) p 26.

pansion of English common law to,[8] and the resettlement of English statute in this land.[9]

When one examines the legislation of New Zealand, from the early ordinances to contemporary statutes, one finds, not a constitutional, but an institutional view of law. Policy is not the province of enacted abstract principle, but the province of institutions created to function and administer the law with a life of their own. This institutional view is apparent from the earliest ordinances. The Supreme Court Ordinance of 1841, for example, did not define the jurisdiction of the New Zealand Supreme Court according to the abstract principles of English common law and equity, but instead referred to the jurisdiction of the English Courts of Queens Bench, Common Pleas and Exchequer and the jurisdiction in equity of the Chancellor.[10] There was no mistaking the innovative nature of this legislation. In fusing common law and equity it preceded the English Judicature Acts by over 30 years. It was done by referring to legal institutions, however, just as the fusion of common law and equity in England was also done institutionally so much later. No less than subsequent legislation the Supreme Court Ordinance evidenced an institutional rather than a constitutional view of law.

So also, even New Zealand's Constitution Acts have been concerned not with abstract principles, but instead from the first, with setting up and defining the membership and powers of a legislature. The whole history of New Zealand's so-called constitutional legislation has been to reduce and eliminate all mention of abstract principle, until now even the reference to "peace, order and good government"[11] no longer appears in our statute book.

Sometimes this institutional view of a legal system can be viewed most ironically, both from within and without the nation. There are those strict theorists[12] who would deny the presence of a parliament in New Zealand by reason inter alia of our legislature's institutional and legislative origins. And of course we have always poked fun at ourselves[13] for the number of institutions we have in New Zealand to administer law and government, even though this be more of a tragedy. Perhaps, however, their number is in decline.

The whole of New Zealand's legal history, only exemplified by these few instances, is against the enactment of constitutional principles. There may indeed be a certain species of self-contradiction in trying to enact principles, and convert and entrench them, however fundamentally, into substantive law. It would be outright historicism,[14] nevertheless, to suggest that New Zealand's legal history prohibits a written constitution. It is the conclusion of this article rather that the enactment of a written constitution would be a revolution to New Zealand's legal system. The consequences of such a revolution are unknown without a study of legal history. Whether the value of New Zealand's legal heritage can be less than that which obliges present difficulties to be met head on rather than running to take cover behind a paper constitution is questionable. The cry for a written constitution in New Zealand is largely a political cry and not a legal one. In those terms it presages a revolution. In any other terms it denotes a self-contradiction in New Zealand constitutionalism. In "It Could Happen Here"[15] the proponent of a written constitution paints a nightmarish picture of revolution against our present social and legal values. A written constitution has been elsewhere[16] seen by the same author to prevent this revolution coming about. Yet in terms of our legal heritage a written constitution is itself a revolution. This is the paradox whereby we often bring about that which we most actively seek to prevent.

[9] English Laws Act 1858; note that whereas the preamble to this Act recites ". . . whereas doubts have . . . been raised as to what Acts of the Imperial Parliament passed before [14th January 1840] are in force . . . section 1 purports to extend the scope of the Act to "the laws of England" in general.

[10] Supreme Court Ordinance 1841, ss 2 & 3.

[11] Section 53 of the New Zealand Constitution Act 1852 (UK) repealed and substituted by s 2 of the New Zealand Constitution Amendment Act 1973.

[12] The view that the history of the origins and evolution of the United Kingdom Parliament as a High Court and Sovereign Legislature inherently determine the notion of parliament, and in turn prohibit colonial and commonwealth legislatures from being considered parliaments at all.

[13] Smith, *From N to Z*; see also Palmer op cit pp 32-33, 168-169 on quangos.

[14] Popper, K R, *The Open Society and its Enemies* vol II *The High Tide of Prophecy: Hegel, Marx, and the Aftermath*, and also his *Poverty of Historicism*.

[15] [1974] NZLJ 553.

[16] [1963] NZLJ 213, 221.

CASE AND COMMENT

Exceptional extraordinary circumstances?

Having noted the decision of Speight J in *Johnson v Johnson* in [1979] NZLJ 485 the writer feels bound to record the decision of Roper J in *Aarons v Aarons* (his judgment was delivered on 18 July last).

It was an appeal from the decision of a Magistrate's Court and Roper J deliberately delayed the issue of his decision until *Martin v Martin* [1979] 1 NZLR 97 and *Dalton v Dalton* [1979] 1 NZLR 113, both decisions of the Court of Appeal, had become available. The disputed matrimonial property consisted of the matrimonial home valued at $37,000, but subject to a mortgage the precise amount of which was not clear but was certainly not more than $10,000 and not less than $6,300. There was a possible liability of a further $6,000 either loaned or gifted to the respondent husband by his mother to finance the purchase of the home. There was also a car worth $2,000-$2,500. The chattels in the home were estimated at $4,000 in value. As to property not falling within s 11 of the Matrimonial Property Act 1976 and thus coming within s 15, there were life policies with a surrender value of some $6,000 and bank accounts amounting to $5,000 from which the appellant wife had already taken half the money. The Court below had held that the "extraordinary circumstances" provision in s 14 applied to the home and family chattels and that the husband's contribution to the marriage partnership had been clearly greater so that the proviso to s 15 (1) applied to the remaining property. That Court assessed the wife's interest in the home and family chattels (including the car) at one-quarter, divided the bank account equally, but awarded her no interest at all in the life policies. It is at once evident that Roper J was not confronted with a couple whose matrimonial home and family chattels were of the very high value of those brought to the *Johnsons'* marriage by the husband. On the other hand, there were also assets in dispute, in the case under review, that fell within s 15. Yet again, as in the *Johnson* case, the present marriage was not of contemporaries (the wife was 23 and the husband was 41) and it was not a marriage of financial equals or of more or less equal contributions. The marriage was a second one for the husband and his children were aged eight and 12 at the date of the second marriage, of which there were no children. It lasted about eight years, ie, for about half as long as the Johnsons' marriage. The husband, like the husband in the *Johnson* case, was a doctor. The wife held clerical positions for most of the marriage.

It appeared that the husband's contributions were as follows:

(a) The parties had married in England and had been able for some two years to travel widely and enjoy cultural pursuits and entertainment through the use of some thousands of dollars of the husband's funds brought from this country. He had also purchased a car in England and it was brought back here. Although both spouses worked whilst overseas, his Honour inferred that their activities would have had to be more restricted but for these funds.

(b) To buy the home, the husband had sold shares worth $13,000, raised a mortgage for $10,000, and obtained a loan or gift from his mother, as above stated. At a later stage he cashed his superannuation for $6,000 to enable alterations to be made to the home and surrendered an insurance policy for $1,400.

(c) He brought to the marriage an annual salary varying between $13,000 and $25,000 per annum over the greater part of the marriage.

As to the wife, her contributions were as follows:

(i) She worked for almost the whole marriage, earning a total of some $21,000 — a point to be contrasted with the Johnson marriage.

(ii) She had made a reasonable fist of the housekeeping in all the circumstances, but could have probably done better.

(iii) She had had a miscarriage.

(iv) She did some gardening and, for a time, had the husband's children living in the home.

Against her, it has to be said that she had

not done as much towards the marriage partnership as she might have and that the Magistrate had, additionally, not been impressed with the wife's handling of the family finances. As for them both, the Magistrate had also remarked they did not have all that much to show for their efforts with their double income and no family.

His Honour thoroughly examined the two Court of Appeal cases and concluded that they showed "that a disparity of contributions without more might suffice to bring the case within s 14, but it must be a gross disparity." He considered that, had he heard the case at first instance, he, too, would have held the case to be one for unequal sharing. He thought it had "certainly not been demonstrated that the learned Magistrate was wrong . . ." What evidently led Roper J to his view were the disparity of contributions and the shortness of the marriage even though it was not one to which s 13 applied. The first two years of it, he noted, appeared "to have been spent in a holiday atmosphere during which the question of contributions to a marriage partnership would hardly arise, and there could not have been much quality to the marriage in its last months."

His Honour observed further that the wife's one-quarter entitlement should apply to both bank account and insurance policies and that the necessary adjustments should be made. The money received from the husband's mother to finance the purchase of the home was to be taken as a gift to him and not as a debt, even though he might feel morally obliged to repay it. Thus that money should be ignored in assessing the one-quarter share of the wife.

No order was made for costs.

One cannot say, as in the *Johnson* case, that largesse had been showered upon the wife in the present case. Nor can one say that her contributions were minimal. Nor can one say that we are left with an elderly husband in poor health and a wife in sound health, as in the Johnsons' situation. And can one, when one recalls that the marriage in the *Martin* case was only three and a half years old when the parties separated, and was held not to be "short" within the meaning of s 13, justify unequal sharing in the present case? After all, in the *Martin* case, the Court of Appeal held that there was no case for unequal sharing and the family there seems to have been, roughly speaking, on a financial par with the family we are now concerned with. It is respectfully submitted that Roper J has here set the outward boundaries of s 14 beyond which no other Court should go while the law stands in its present state. It is, no doubt, a pity that *Barton v Barton* [1979] 1 NZLR 130 (CA) was not considered in relation to the s 15 property. But one wonders — was the husband lucky here?

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Scheme Interpretation — Scope and Validity of conditional use consent — Procedural defects — Bias — Delay

In *Attorney General ex rel Benfield & Others v Wellington City Corporation, Bank of New Zealand, BNZ Properties Ltd*, Supreme Court, Wellington, 10 July 1979 (A505/76), the 85-page judgment of Davison C J concerns the planning consent side of the saga involving erection of the new Bank of New Zealand building in Wellington. A multitude of important interpretation issues are raised, and can only be briefly covered in this note.

Initially the Bank obtained ownership or leases of the sites in question between 1969 and 1972, and entered an exchange and development agreement with the Council in late 1971 whereby the Council agreed in principle to the erection of a building of a certain gross floor area, and the Council agreed to co-operate as far as possible in implementing the development agreement. When the plans were produced to the Council in 1972, it appeared that the ordinances relating to a Bank and shopping building, which was a predominant use in the retail shopping B zone, would be exceeded as to height provisions, maximum plot ratio provisions, and minimum car parking requirements. The Council Planning Committee was disposed to grant a waiver on all of these matters, but on advice from the Town Clerk agreed that a conditional use application was required at least as to the height. It was assumed that by transferring certain reserve land into the plot ratio calculation the ordinances could be satisfied, and the Committee purported to grant a dispensation concerning parking. Accordingly, in late 1972, the Bank advertised for a conditional use consent and, as no objections were received, the committee approved the application (in accordance with a previous resolution to this effect, subject to no reasonable objections being received and to reduction of the gross floor area by 12,800 sq ft).

(1) *Predominant or conditional use.*

The first question was whether the Bank building was a predominant or conditional use

or required a specified departure application. The ordinance included Banks as a predominant use, but stated in the Predominant Use Clause 2.1.5(a) "consent of the Council shall not be required under these ordinances to the use of any land or building for any use specified at that time as a predominant use in the zone in which it is situated, if that use is in accordance with every requirement set forth in this code in respect of it as a predominant use; but any proposed departure from those requirements shall have the effect to constitute that use a conditional use, and the provisions of this code as to conditional uses in that zone shall apply as if that use had been specified as a conditional use within that zone". The learned Judge construed this clause to constitute the development, which did not comply as to height and plot ratio and car parking as requiring a conditional use application, as there were no minimums specified in the ordinances for those matters under the conditional use definition. Had the conditional use categories also specified minimum standards which were exceeded, then a specified departure would have been required.

(2) *Consents granted by Council.*

The application advertised was for consent to erect a free-standing, multi-storey banking office and retail shopping complex with basement carparking, the encroachment areas of which complex exceed the void areas on three faces of the building. There was no reference to height excesses in particular, but following *Godber v Wellington City* [1971] NZLR 104, the Judge held that there was substantial compliance and the application was reasonably clear in all the circumstances, taking into account also the publicity relating to the proposed 31-storey building. The approval given by the Council was directed to the height requirement and it was held that the consent was valid in permitting the excess height in the plans.

Concerning parking requirements, his Honour ruled that ordinance 1.4.5 which give the Council a complete discretion to waive compliance was ultra vires as beyond the statutory authorisations, but that ordinance 6.2.2 which permitted the council to waive parking provisions where compliance would not be "practicable, reasonable or necessary" was a valid dispensation provision. The allegation that there was no evidence upon which the Council could make these findings, submitted by the developer at the end of 1971, was not upheld upon the basis that the Council was entitled to act upon its own figures and experience concerning parking requirements. Accordingly, the parking dispensation accepting 132 spaces instead of the required 316, was upheld as valid.

Concerning the dispensation from the plot ratio requirement of approximately 5.5 gross floor area permitted to the net site area, the Judge was faced with determining difficult interpretation questions as to the nature of the site and the calculation of the gross floor area. In effect, it was held that both the freehold and the underground leasehold areas could be considered part of the "site", but in assessing the plot ratio figure, the leasehold area should not be included and there was no authority for the Council to make an allowance of 42,000 sq ft related to a notional transfer of Council reserve land on the old Bank site. Concerning the gross floor area, difficulties were faced in determining whether service rooms and lift areas should be taken into account or not. In the end result his Honour held that the Council was wrong in its calculation and had permitted approximately 12,900 sq ft in excess of the allowable area, being a 4 percent excess floor area overall. As the general waiver power was invalid, it could not be said that the Council had granted any dispensation as to the excess floor area.

(3) *Procedural defects*

(a) The public notice of the application for a conditional use consent was advertised twice with a six-day clear interval between notices. This was contrary to s 2, definition "public notice", of the Town and Country Planning Act 1953, which required a clear interval of one week. On this aspect his Honour declined to follow *Bodmin v Piako County* (1975) 5 NZTPA 348, distinguished *Attorney-General ex rel Graham Maiden Ltd v Northcote Borough* [1972] NZLR 510, and taking the overall approach of Cooke J in *New Zealand Institute of Agricultural Science v Ellesmere County* [1976] 1 NZLR 630, 636 ruled that non-compliance was minimal only and should be treated as not invalidating the procedure. There was substantial compliance and that was sufficient. (The notice obligation under the 1977 Act is one public advertisement only).

(b) It was alleged that a conditional use application could be made only by an owner or occupier of the properties and the Bank was not in that category at the time the application was made. On this point, his Honour ruled that the conditional use application could be made by any person and was not restricted to the owner or occupier (Palmer, *Planning Law in New Zealand* (1976), 116 accepted).

(c) The applicant alleged that the Council failed to observe its own scheme by entering an agreement binding itself to co-operate and grant dispensations and consents as necessary. In the circumstances his Honour did not accept that the Council had failed to observe the scheme provisions or contracted out of this duty.

(d) It was claimed further that the conduct of the Council amounted to bias and a disqualification. His Honour distinguished *Lower Hutt City Council v Bank* [1974] 1 NZLR 545, the *Laytons Wines* case [1977] 1 NZLR 570, and *Anderton v Auckland City Council* [1978] 1 NZLR 657, on the basis that there was no actual pre-judgment of a contest between sides. His Honour stated "There was no lis before the City Council. It had no duty to act judicially in the circumstances, although there can be little doubt that, had objections been raised re the Bank's proposals and those objections been pursued to hearing, the City Council would then have had a duty to the objectors to observe the principles of natural justice". But His Honour accepted that in any event, if there was a duty to act judicially, then no bias was demonstrated on the facts, in particular the agreement bound the Council to act only "within its authority" and this contemplated lawful action.

His Honour did, however, accept that the Council was in error in considering the plot ratio calculations to be satisfied, and that the Council was obliged to require a further conditional use application dealing with this aspect or at least, as finally determined, the Council might consider it could now under a new dispensation provision in accordance with the Planning Act grant a dispensation.

(4) *Delay by relators.*

Notwithstanding the findings on the merits, the Attorney-General in lending his fiat stipulated that no weight be given to his presence as a party nor that his presence be given particular weight concerning any question of delay. The defendants stated that the Court should refuse relief upon the grounds of inordinate delay between the granting of consent in February 1972 and the actual issue of the writ in November 1976. His Honour agreed that the delay had not been explained and that relief should not be granted to the applicants in respect of the declarations and writ of mandamus sought. His Honour did, however, summarise the position in accordance with the findings of law, noting that the question of consent to the excess gross floor area remained to be resolved. On the other hand, no specific orders would be made and no order was made in the judgment as to costs.

Comment. *The only question of law which leaves some doubt is the distinction by his Honour of the Anderton* case which in many respects involved similar factual circumstances, namely the entering of an agreement under which the Council bound itself to take steps to co-operate and grant consents to the development. In the *Anderton* case, Mahon J held the course of conduct amounted to actual pre-judgment and the Council could not give a valid consent. The distinction of the case, on the ground that no objectors were present and therefore no lis arose and no duty to act judicially, seems to overlook the general role and function of the Council to safeguard the public interest on *any* planning application whether objections and submissions are received or not. Even though a hearing may not take place in a formal sense where no objections are made, it is submitted that the Council duty in considering a planning application in all cases is one of a quasi-judicial nature, and the Council must act in the public interest without disqualification from legal bias or other factors constituting pre-judgment. The Town and Country Planning Act 1977, s 58, contemplates situations where the Council may negotiate with a proposed purchaser or lessee of *Council land* with a view to reaching agreement in principle upon a mutually acceptable planning scheme, and that section might well have applied to the *BNZ* case had it been in effect at the relevant time, as the agreement related to an exchange of land formerly owned by the Council.

The judgment is also interesting in that it reflects the increasing awareness by the public of the environmental disadvantages of multi-storey buildings. Whereas no objections were received in late 1971 to this project, by 1976 the awareness and opposition had developed significantly and today one would expect that any similar proposal could be strongly contested on the merits. Ironically the public notice requirements under the 1977 Act have been downgraded from two notices to one, and it behoves councils to agree to major developments only after some consultation with the community concerned.

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LEGAL LITERATURE

Children and the Law Jeffery Wilson, Butterworths, Toronto, 1978. 367 + xxxii pp NZ price $35 (hardback). Reviewed by W R Atkin, Senior Lecturer in Law, Victoria University of Wellington.

An attempt has been made in this book to collate the law as it affects children. In so doing the author draws principally upon the law of Ontario, but the federal and other provincial systems in Canada and to a lesser extent the law of England and Australia are also cited. Liberal quotations from statutes are balanced by reference to a considerable body of case-law, much of which would not be easily accessible to the New Zealand reader. The approach adopted by the author is largely descriptive. Little attempt is made to critically analyse the law, although bibliographies at the end of most chapters suggest that the author would prefer not to entirely ignore this aspect of his topic.

The material covered is wide-ranging. The largest chapter entitled somewhat awkwardly "The Belonging Child: The Family in Conflict" covers traditional areas of child law such as custody, adoption and care proceedings. Of interest to New Zealand readers in view of the Guardianship Amendment Bill currently before Parliament will be a section dealing with child kidnapping by a parent (pp 29-33). This problem is exacerbated in Canada by the existence of competing jurisdictions among all the provincial Courts and the federal Court.

In the context of the current review of our adoption laws (see Patricia Webb *A Review of the Law on Adoption* 1979, Justice Department) it is interesting to note judicial comment on whether an adopted child should be able to find out about his natural origins. In *Lyttle v Children's Aid Society of Metropolitan Toronto* (1976) 24 RFL 134 the debate was taken a step further when the Supreme Court of Ontario held that a natural father may be given access rights to his adopted child but refused to lay down any general rule (p 45).

Chapter 3 is a fairly straightforward analysis of the rules relating to financial support of children. It would have benefited from a rather clearer exposition of how the social welfare system assists children. At p 124 for instance we learn of the existence of the Family Benefits Act, RSO 1970 but are not really told what financial provision is made by this Act. At p 98 attention is drawn to the Ontario case of *Kett v Kett* (1976) 28 RFL1 where the Court ordered the suspension of child maintenance payments until arrangements for access had satisfactorily been made. This case is not without relevance to the New Zealand scene but as Wilson says in linking maintenance and access "The child's basic financial security becomes a function of the inevitable complication of the 'custody/access dance' ".

Chapter 4, "Children: Money and Civil Participation", contains a miscellany of rules running from minors' contracts through smoking (all of three lines) to the child's standing in civil actions. It is followed by a chapter on the criminal law (including reference to a new-styled offence "illiciting sexual intercourse" — p 179!) and one called "The Child and the Courtroom" where one might have expected an examination of such things as counsel for the child but which is in fact limited to a brief summary of the laws of evidence. The involvement of the legal profession with children has to wait until the end when the work of other professional people such as doctors and social workers is also explored. Meanwhile, there are also chapters on education and immigration, and 18 appendices.

Although the reader is confronted with an impressive array of material, one is left wondering whether the book is supposed to have any underlying thesis. Perhaps it is the absence of a coherent thesis that prevents the book from really coming alive. There is also some doubt who the intended readership is. The practitioner would probably find insufficient detailed referencing in many places and the lack of a list of statutes to accompany the list of cases at the front of the book would certainly be a disadvantage. The student, one suspects, would be somewhat confused because general principles seem to have been buried rather than highlighted.

For the New Zealand reader, several currently important topics will be found to have been inadequately treated. A typical example of this is the office of official guardian, discussed and recommended by the Royal Commission on the Courts (see p 168 of the Royal Commission's Report). The official guardian is first

mentioned at p 30 in a brief quote from a bill to deal with kidnapping. Mention is made in other isolated parts of the book but nowhere is the official guardian fully explained and examined.

Several faults in presentation mar the book. Just a few need comment. The use of "dependant" as an adjective is unnecessary, especially as the correct spelling is also used. On p 108, in a list of changes of the law relating to the death of a parent 6) follows 4), with 5) having apparently been thought superfluous. Finally there is p 150 which very unhelpfully draws our attention to a discussion "above at pages ???"!

Despite the above comments, anyone interested in the law affecting children, and anyone who wants an up-to-date rundown on Canadian law will find this book of some use.

FAMILY LAW

GUARDIANSHIP AMENDMENTS

By A H ANGELO *Reader in Law and* W R ATKIN *Lecturer in Law, Victoria University of Wellington*

There is a current quickening of legislative interest in matters relating to children. This is evident, not only from the discussion paper "A Review of the Law on Adoption" produced recently by the Department of Justice, but also from several amendments now before Parliament relating to the Guardianship Act 1968.

These amendments are found in the First Schedule to the Family Proceedings Bill 1978 and in the Guardianship Amendment Bill 1979. Both legislative proposals have been referred to the Statutes Revisions Committee and should be reported back to the House in the near future. While it is doubtful whether the Family Proceedings Bill as such will proceed to law this year, it is still likely that the Guardianship Amendment Bill may be enacted before the House rises, and it might be hoped that any such amending statute might pick up the scheduled amendments originally presented in the Family Proceedings Bill.

All these activities are most interesting and the legislature is to be commended for its interests on matters touching children in this the International Year of the Child.

There are three principal guardianship amendmnents in the First Schedule of the Family Proceedings Bill and they speak to different points. The first is access to children by relatives other than parents. The proposal is thast there should be a new s 16 which will provide, in limited circumstances, for the grandparents, the uncles and aunts, or the brothers or sisters of the child to have access.

The second matter is the provision of a new subsection in s 23, the effect of which will be to negative the mother principle and the father principle. Thirdly, a new offence clause, s 32A, is proposed. It will deal specifically with the hindering or preventing of the lawful exercise of access to a child, and provide a fine of up to a $1,000 for offenders.

In these three matters the policy is clear and the presentation straightforward. One area where comment might pertinently be made is in relation to the access to a child by other relatives. Ideally, this proposal should be liberalised to the point where the basic provision is made for access to the extended family through parents, but clear direction given that the purpose of access should be to maintain family links to the greatest extent possible given the prevailing circumstances. To that end access should be available to any poerson who has been part of the child's home environment.

The purpose of the Guardianship Amendment Bill is to provide a system for recognition and enforcement of overseas custody orders and also for the transmission of New Zealand custody orders overseas for recognition and enforcement there. While our system is generally well provided for in the judgment enforcement field, there is currently no effective system for the enforcement here of an overseas custody order. The reason for this is that the Common Law provisions for enforcement of foreign judgments relates only to those that are final and conclusive. This does not cover custody orders because they are always subject to variation in the interests of the child. The general Common Law principle is supported in the custody field specifically by the New Zealand Court of Appeal decision *Re B* [1971] NZLR 143 where the existence of a foreign Court order relating to the child was held to be subsidiary to the first and paramount consideration under the New Zealand statute — the welfare of the child. The freedom permitted the Courts under that decision was somewhat

limited in the later Supreme Court judgment of *C v C* [1973] 1 NZLR 129. There Speight J said (at pp 130-131) "The findings of the foreign Court which considered the same matters on a previous occasion should be given some weight more or less depending, among other things, on the status of the Court, the type of hearing whether it was a full one or a mere formality, and the similarity or otherwise of the laws of the country in question".

The effect of the New Zealand decision in *Re B* is that a New Zealand Court has a virtually free hand to decide custody in a conflict of laws situation whether or not an overseas Court has given a decision in the matter. This has the unfortunate effect of encouraging child kidnapping and forum shopping, with the consequent possibilities for disruption of a child's life and family insecurity.

The present Bill proposes a solution to these problems by legislative means. The impetus, it would appear, has come from Australian practice under the Family Law Act 1975 which already provides for reciprocal enforcement of New Zealand custody orders in Australia. What New Zealand therefore has to do is to create similar facilities here for Australian judgments. This the Bill will do. It envisages the registration and enforcement here of custody orders made in the United Kingdom or in any of the Australian jurisdictions. The difficulty is that extension of the rules to more countries depends upon designation by Order in Council and that in turn, it appears, depends on reciprocity.

This does not augur too well for the improvement of the legal position of children who are the subject of proceedings in states and jurisdictions other than the United Kingdom and Australia; the present provision for extension of the Guardianship Act 19658 (s 32 (3)) has not been used and the numbers of countries declared under similar provisions in the Reciprocal Enforcement of Judgments Act 1934 and the Adoption Act 1955 are few. This registration and enforcement provision should be extended to the widest possible range of jurisdictions and, in terms of recognition in New Zealand at least, there seems little reason to require reciprocity.

All these provisions relate to the much discussed problem of child abduction or child kidnapping. There are two main ways of dealing with this. One is for the New Zealand Courts to treat the principle set out in s 23 of the Guardianship Act 1968 as supreme in every case and investigate, what in the circumstances, is best in the interests of the child. The alternative is to provide for family security through the recognition of properly made foreign orders with intervention by a New Zealand Court to override that foreign order occurring only in extreme cases. The latter system should produce security for both the child and his family, and for children generally and act as a deterrent against moving minors across state lines surreptitiously.

The removal of children from one jurisdiction to another can happen in a great variety of circumstances, not all of which may be illegal or relate to proceedings pending between the parents. All, however, create the same practical difficulties and should be regarded equally for the purposes of recognition of foreign custody proceedings. A child may be removed by one parent from the jurisdiction when technically both parents still have equal custody rights. The removal may also take place when one parent takes the child from the lawful custodian other than in the exercise of access. Alternatively, the child, during legal access, may not be returned to the custodial parent. Or an attempt may be made to change the legal custodianship of the child during the legal exercise of access. A final example of the possibilities is that of a custodial parent changing the residence of a child in such a way that the access rights of the non-custodial parent are defeated.

The Bill would go some way towards reducing the heartbreak created in this area. It does not, however, seek to take preventive measures and though the Australian procedures are quite clear and positive in terms of the provision of passport stop-lists and related procedures, no evidence of such rules appears in the Guardianship Amendment Bill.

At a practical level many positive suggestions are also to be found in the paper presented by the Government of Canada to the Commonwealth Law Ministers at their meeting in Winnipeg in August 1977. While not all of those measures may be suited to the New Zealand situation, or are options that can be taken up without a greater degree of international co-operation than currently exists, there is nevertheless in Australian law and even more so in the United States Uniform Child Custody Jurisdiction Act 1968 evidence of a greater number of measures taken to counter international abduction of children and provide certainty than are found in this Bill. The measures possible in England and outlined in the Practice Direction in [1979] 1 WLR 1018 are also to be noted.

What does the Bill do then? Specifically, it provides for the enforcement of overseas

custody orders in New Zealand, and the transmission of New Zealand orders for enforcement overseas. The seeming generality of these purposes is, as has been indicated, restricted by the fact that the only countries that will be covered at the entry into force of the Bill will be the United Kingdom and the Australian jurisdictions. In a prescribed area there is provision for registration of the custody order in New Zealand, the effect of which will be to give the overseas custody order, which has been registered, the status of an order made here. Once that order has been registered, the jurisdiction of a New Zealand Court over the child will be restricted to those cases where the welfare of the child is seriously at risk. If there is a need to vary or discharge the order, the overseas Court will be notified. There is further provision for a Court order relating to the travel costs for the return of a child with any escort that may be necessary to the place from which it has been abducted.

This Bill appeared almost contemporaneously with the giving of decision by the Court of Appeal in the unreported judgment of *L v L* (22 June 1979 CA 68/79 — the judgment of the Court was delivered by Cooke J). Except for the foreign element in that case, it was no better and no worse than the average custody dispute. The foreign element, however, created a serious dilemma for the Courts. The children concerned had first been taken out of the country by their mother without the knowledge of the father. More recently, the father, in his turn, had brought them back from Australia without the knowledge of the mother. All this occurred while there was in existence a custody order made by consent in New Zealand to last until the children returned to Sydney and an earlier ex parte interim custody order in Australia. Both these orders were in favour of the mother. In spite of the Court of Appeal's clear sympathy for the application by the father, which was found to coincide with the wishes of the children, the Court confirmed the Supreme Court order for the return of the children to the mother in Australia for the full hearing of the custody issue there. This approach was justified on the basis that the welfare of the children required their return to Australia for an early settlement of the dispute because the full hearing was in fact set down there for argument within a few weeks.

The provisions in the Guardianship Amendment Bill would, it is anticipated, provide successfully for most Australian/New Zealand custody cases because there would simply be a recognition and enforcement of the Australian order here and vice versa. The only difficulty in respect of the *L v L* situation is that the order with which the Court of Appeal was confronted, was in fact an interim order and the Guardianship Amendment Bill does not speak directly to that particular possibility. The definition of "overseas custody order" in the Bill deals principally with the foreign quality of the order and is not explicit as to what constitutes an order for the purposes of the law.

"It is known now from child development studies that where there has already been one upheaval in a child's life due to a divorce or some other misfortune, the first and foremost requirement for the child's health and proper growth is stability, security and continuity of relationships. If the child is continuously being transferred from one parent to the other by conflicting Court decrees or self-help methods by parents, he may be a great deal worse off than if left with one parent, even though as an original proposition some better custody provision could have been made for him. Parental abductions, except in the rare cases where the child's health or life are in danger, rob the child of the opportunity to satisfy his (her) need for stability of environment and parental figures and constancy of affection. Child abduction also breeds reprisal in kind by the other parent. It is necessary to stop child abduction and restore the rule of law in the place of self-help for the sake of the parents, the reputation of the law, and most importantly, to remedy the harm done to children who are caught in these situations." ("The International Abduction of Children by a Parent" a paper produced by the Government of Canada for the Commonwealth Law Ministers (August 1977) 69, 72.

All the proposals before Parliament relating to the guardianship of children are promoted in the interests of children. It is to be hoped that they are enacted in the widest and strongest possible form and that they meet with early promulgation.

Is it really beyond the capacity of shrieval officials to devise at least a provisional timetable which would cut down the total of wasted hours represented by a fully occupied witness-room, or is it just so much easier to continue the present herding system as long as these essential parties to procedure continue to accept it without complaint? – *Scotsman.*

CORRESPONDENCE

Sir,

Air New Zealand — NAC Merger
Some comments

Your correspondent Michael J Neville (in your issue [1979] NZLJ 406) has commented on the article written by me which appeared in [1979] NZLJ 228 under the title "Unanswered Questions in the Air New Zealand-NAC Merger". In particular he criticises the sources and accuracy of the information available to me. If your correspondent looks at my article again he will see that in fact I referred to sources other than those which he describes as "speculative articles in the papers like the *National Business Review*." When I referred to decisions of the Air Services Licensing Authority he implies that the decisions must have been misreported. No doubt as he suggests I could have asked Air New Zealand for information as to what exactly happened and I am sure it would have been supplied. Your correspondent implies that all the correct procedures were in fact followed. This may be so, but does not this highlight the two main points which I was attempting to make in the article, firstly that the public (as shareholders in both Air New Zealand and NAC) did not have the information and background behind the takeover or merger made available to them before the event took place (I deliberately used the same sources of information avaible to the general public rather than ask for "inside" information). There is still no full information available to the public as to why the merger was thought to be so desirable, and whether there was general consensus about this amongst those with the appropriate knowledge to appreciate the reasons and implications in the merger. It may be trite to say that "Justice not only must be done, it must also be seen to be done". The same may be said about information, full information must be readily available to the public except where national security is involved.

The second point which I was attempting to make was that the merger took place without legislative authority, in fact it took place by what amounted to "Press Statement". (The New Zealand National Airways Corporation Dissolution Act 1978 which authorised and validated the actions was not enacted until some six months later).

In New Zealand we have a uni-cameral legislature, coupled with an electoral system which has been criticised as overdue for reform; unless we, as lawyers, are careful to see that the legislative processes are properly adhered to and that the public has ready access to the relevant information, then it can be argued that our democratic institutions are endangered.

Yours faithfully,

Margaret A Vennell
Senior Lecturer in Law
University of Auckland

Dear Sir,

re: Air New Zealand-NAC Merger and Appeal Decision No 61

I have followed with interest the sparring of Mrs Vennell (NZLJ, 19 June 1979) and Mr Neville (NZLJ, 2 October 1979).

However righteously indignant Mr Neville may be concerning Mrs Vennell's alleged "factual inaccuracies", I fear his credibility is dealt a serious blow by his reference in his critique of Mrs Vennell's article to Appeal Decision No 61 of the Air Services Licensing Appeal Authority. As counsel for the Whakatane District Council in that appeal and at the earlier hearing before the Air Services Licensing Authority, I feel it proper that I should expose Mr Neville's own "factual inaccuracies". To suggest that the matter under appeal was in relation to "a cessation of services between Whakatane and Gisborne which attracted two or three passengers per day" is absolute nonsense. On page 5 of that decision the Appeal Authority clearly directed his attention to the Whakatane-Auckland sector such as when he says:

> "NAC's application involved a cessation of its service to Auckland which departed from Whakatane at 0750 hours and arrived in Auckland at 0935 hours."
> "It is common ground that there can be delays of up to ten days before Whakatane passengers can be guaranteed a flight on this service to Auckland."

Then at page 6 of the decision:

> "The Corporation's evening service to Whakatane leaving Auckland at 1705 hours is discontinued."

Had that appeal proceeded on any other basis than that the Whakatane District Council wished to preserve the Whakatane-Auckland same day return link, it would have indeed been surprising, having regard to the manner in which the Council's case was presented to the Air Services Licensing Authority (Decision No 1976/33) and to the Appeal Authority.

Continued adherence to a minor, barely relevant, issue when explaining the reasoning behind the abandonment of a service NAC fought so hard to wrest from SPANZ in earlier years hardly enhances NAC's successor's badly tarnished image in the provinces. No doubt we have not seen the last of the reduction in domestic services to provincial areas in which the top-heavy management structure of the latest in government-backed, competition protected, monolithic, corporate bureaucracies has no interest. I am certain that, given no more than an equal opportunity to fly trunk routes, many an air services operator would welcome the chance to restore regular and frequent air services to provincial centres like Whakatane. Indeed, some operators are trying to do so without the chance to share in the high loading, profitable, trunk sectors. Whereas Air

New Zealand has the privilege of an entrenched licensed operation over all the most profitable routes (gained in the balmier days of adherence to the philosophy and social policy set fourth in section 13 of the New Zealand National Airways Corporation Act, 1949), smaller privately-backed operators are left to spar amongst themselves for the crumbs. So much for government and Air New Zealand concern for the ghost of section 13 and the social policy therein given statutory recognition.

Yours faithfully,

T S Richardson
Whakatane

SALE OF LAND

PAYMENT OF THE DEPOSIT ON A SALE OF LAND

By BRIAN COOTE, *Professor of Law, University of Auckland.*

"The law about the effect of failure to pay a deposit is not as clear in some respects as might be expected." So commented Cooke J, delivering the decision of the Court of Appeal in *Boote v RT Shiels* [1978] 1 NZLR 445, 452. Several factors may have contributed to this lack of clarity. One is the three-fold functions of a deposit: as an earnest of performance, as a solatium to a disappointed vendor, and as part-payment of the purchase price. Another is that the written terms of land sales contracts may well dictate differing results in superficially similar cases. A third factor is that until the recent decision of the House of Lords in *Johnson v Agnew* [1979] 1 All ER 883, English Chancery lawyers have seen discharge for breach as a rescission of the contract ab initio while common lawyers have seen it as a termination in futuro. The House of Lords has now, like the Courts of Australia and New Zealand before it, opted for the common law approach. But while it lasted this difference necessitated, at least in logic, somewhat differing treatments of the upaid deposit. A fourth factor has been the role played by estate agents in land sales cases.

In England and in Australia it appears that, while auctioneers have authority to receive deposits, estate agents ordinarily do not (Stonham, *Vendor and Purchaser* p 348). In New Zealand estate agents do have such authority (*Boote v RT Shiels* (supra), 452). Here again, differences in approach are liable to make for differences in result in apparently similar cases.

One area of at least superficial unclarity is the importance of a purchaser's failure to pay his deposit at the prescribed time or in the prescribed manner. In New Zealand such failures have usually been treated as giving grounds for a discharge for breach (eg *Stembridge v Morrison* (1914) 33 NZLR 621; *Watson v Healy Lands Ltd* [1965] NZLR 511; *Frampton v McCully* [1976] 1 NZLR 270, 277). But in two recent cases Cooke J and the Court of Appeal have taken an apparently quite different view (*McLennan v Wolfsohn* [1973] 2 NZLR 452; *Boote v RT Shiels* (supra)). It was into this particular area that the High Court of Australia had recently toventure in *Brien v Dwyer* (1978) 22 ALR 485. In that case, the contract called for payment of the deposit to the vendor's estate agent "upon the signing of this agreement." Instead, at some time during the month following the exchange of contracts, the estate agent accepted from the purchaser a post-dated cheque for the amount of the deposit. By an oversight of the agent, it was not until six weeks after its date that the cheques was presented for payment. On that same day, discovering for the first time what had happened, the vendor purported to discharge the contract for non-payment of the deposit. The purchaser sued for specific performance and was successful at first instance. That decision was reversed on appeal by the Court of Appeal of New South Wales, a result which in due course the High Court of Australia affirmed by a majority of four to one.

Time for Payment

On reaching their conclusion the High Court had to consider a number of issues, the first of which was the time at which the deposit was required to be paid. As already stated, the relevant words in the contract were "upon the signing of this agreement." Barwick CJ, and Gibbs and Aickin JJ, thought that this meant when the purchaser signed the agreement for transmission to the vendor, though Gibbs and Aickin JJ would have accepted, as alternatives, payment before the exchange of signed counterparts, or the signing of one contract document by both parties. The remaining members

of the Court, Jacob and Stephen JJ, placed the obligation at the earliest practicable time after the signing or exchange of the contracts. Since all except Stephen J (who expressed no opinion) were agreed that the purchaser's tender of a post-dated cheque could not in itself be regarded as a payment of the deposit, the purchaser was unable to show that he had met any one of the suggested alternative dates.

Of course, in any future case where exact timing does become important much is going to depend on the wording of the particular contract. But some considerations will remain constant. One is that, whatever the wording used, it must always be open to a vendor to refuse to contract unless and until the deposit has been paid. Not until a contract has been formed would there be anything to compel him to do otherwise. Given, though, that the vendor has signed and a contract been formed, the very nature of a deposit as an earnest would suggest that the obligation to pay should be immediate rather than at some reasonable time in the future. If it were otherwise the vendor would become bound at a point when he had no earnest that the deposit itself would be paid and no more than the promise of an earnest in relation to the rest of the contract. Moreover, as Barwick CJ pointed out in *Brien v Dwyer*, 490, there can be no norm by which to determine what lapse of time would be reasonable.

Discharging breach

The second issue to be decided by the High Court was whether the purchaser's failure to pay the deposit at the time and in the manner stipulated could be grounds for discharging the contract. It was held unanimously that a right to discharge for breach could arise in such circumstances and had done so because payment by post-dated cheque had not been a compliance with the contract. Nor had any notice by the vendor been necessary in order to make time of the essence. That was inherent in the nature of a deposit. Treatment of the non-payment of the deposit as a discharging breach may seem inconsistent with the view of Barwick CJ, and Gibbs and Aickin JJ that payment had to be made before the contract came into existence. No doubt the explanation would be that on the formation of the contract the purchaser must be taken to have promised that the deposit had already been paid or, if not, that it would be paid immediately. As to notice making time of the essence, the position in New Zealand is complicated by ss 50 and 118 of the Property Law Act 1952 which may require the vendor to give notice of default, though only to a purchaser in possession (*Bray v Kuch* (1909) 28 NZLR 667; *Watson v Healy Lands* (supra) 518-520).

The remaining major issue in *Brien v Dwyer* was whether such rights to discharge as the vendor might otherwise have had had been lost, if not when the estate agent accepted the post-dated cheque then at the date when the cheque became payable or, at the latest, when the cheque was finally banked and paid. On this issue the High Court was divided four to one. It was held, Jacob J dissenting, that the estate agent had had no authority, actual or ostensible, to accept payment of the deposit otherwise than in accordance with the provisions of the contract. Since there had at no time been any ratification by the vendor, nothing the agent had done could in any way inhibit the vendor's rights to discharge for breach. Jacobs J, dissenting, took the view that since the purchaser's default had in effect been remedied by payment of the deposit before the vendor had become aware of the breach, his right to discharge the contract had been lost. Any other result would, Jacobs J thought, be unfair since, the deposit having been paid, the vendor was in a position to get everything to which he was entitled under his bargain. The short answer to that proposition is, of course, that the vendor would not in fact have been in a position to get everything to which he was entitled. One of the things he had bargained for was to contract with a party who had provided an earnest of his performance before or at the time of contracting. Ex hypothesi, this would be something he could no longer have. His position might be likened to that of an insurer, the misstatements of whose insured in his proposal, though not causative of loss, undermine the relationship of confidence between the parties.

The interpretation placed by the High Court on the acts of the estate agent in the case before them can be contrasted with those of the majority of the New Zealand Court of Appeal in *Stembridge v Morrison* (supra). That was a case where stock and station agents acting as the vendor's estate agents had taken the purchaser's own cheque for the deposit but had then agreed to accept in substitution the cheques of third parties drawn in favour of the purchaser. By an oversight, the agents failed at the time to present these substitute cheques for payment but there was nothing to suggest that they would not have been met if presented. By a majority of three to two, the Court held the vendor bound to complete. There having been no ratification by the vendor, it must be taken that the agent in accepting a substitute mode of

payment of the deposit had acted within the scope of their authority.

Recovery of unpaid deposit

A point not adverted to in *Brien v Dwyer*, but one which might well have arisen on the facts, is a vendor's right to recover a deposit once he has elected to discharge the contract on the grounds of its non-payment. In the most recent New Zealand case, *Johnson v Jones* [1972] NZLR 313 noted (1973) 5 NZULR 292, McMullin J held that a vendor lost his right to recover an unpaid deposit once he had elected a discharge for breach. One of the grounds on which the learned Judge relied was the wording of the contract in that case and in that respect his judgment may well be unassailable. But in large measure his decision was based on *Lowe v Hope* 1970 Ch 94 in which a Chancery Judge adopted the then prevailing but non-discredited view that a discharge for breach entailed a rescission of the contract ab initio. On that premise it of course followed that the unpaid deposit was irrecoverable. A quite different result should follow from seeing a discharge for breach as operating only as to the future and hence as having no effect on rights already accrued. A third ground was that it followed from the nature of a deposit as an earnest of performance that its rationale disappeared once the contract had been discharged. This reasoning, it is submitted, ignores the function of a deposit as a form of recompense to a disappointed vendor.

Two recent New Zealand cases

A final point is whether *Brien v Dwyer* is consistent with the treatment of delay in, and non-payment of, a deposit as being matters of small account by Cooke J and the New Zealand Court of Appeal in *McLennan v Wolfsohn* (supra) and *Boote v RT Sheils* (supra) respectively. In *McLennan v Wolfsohn* the vendor had purported to rescind for non-payment of the deposit and thereafter resisted any attempt by the purchaser to make late payment. The case arose from an estate agent's claim for his commission. Cooke J found for the agent but, in doing so, said obiter (p 460) that he doubted very much whether even against the purchaser the vendor could successfully rely on the non-payment. His ground for so saying was that the vendor's solicitors had twice acknowledged the existence of the contract before the question of non-payment of the deposit was raised. These acknowledgements, thought the learned Judge, constituted an affirmation of the contract or gave rise to an estoppel, quasi-estoppel, election or waiver of some kind. The importance of that conclusion it is submitted, lies not in whether or not it was correct on the facts of that particular case but in that it involved no derogation from the importance of the payment of a deposit. Cooke J was saying no more than that rights to discharge for non-payment of a deposit could be lost by the vendor's own subsequent acts or by those of his agents acting within their obstensible authority.

The explanation of *Boote v RT Shiels* is a little different. There, the contract was expressed to be subject to the approval of the purchaser's solicitor. The vendor's estate agent had told the purchaser he need not pay the deposit until the solicitor's approval had been obtained. Accordingly the deposit was paid at the same time as the purchaser notified the approval. The Court of Appeal thought that the deposit ought strictly to have been paid earlier than it was. However, the vendor was not seeking to rescind the contract but was claiming only that the lateness of payment was a breach justifying refusal of a decree of specific performance. The Court did not think the few days' delay was a breach serious enough to have this effect. In the circumstances, there was no question of the purchaser's having shown any unwillingness to perform his obligations under the contract. The decision of the Court of Appeal of New South Wales in *Brien v Dwyer* was distinguished on that basis. With respect, that distinction is a little difficult to accept. The purchaser in the Australian case had also been led by an estate agent to believe that delayed payment would be acceptable. The additional delay had been the fault of the agent, not of the purchaser. The true distinction between the two cases, it is submitted, is that the late payment in the *Boote* case was accepted by an agent who must be taken to have had authority to do so. This constituted an acceptance of a substantial performance and an affirmation of the contract. It seems clear from *Brien v Dwyer* that in the absence of any affirmation or waiver binding on him, a vendor can refuse late payment and discharge the contract for breach even where the delay is no more than the week or so it was in the *Boote* case.

Contractual Remedies Act

In due course, the questions raised in *Brien v Dwyer* will in this country have to be reconsidered in the light of the new Contractual Remedies Act. Prima facie, though, it seems likely that from their very nature deposits will retain their special place on the basis that the parties will be taken under s 9 (3) expressly or impliedly to have so provided.