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THE ROLE OF AN APPELLATE JUDGE

At the AULSA Conference at Dunedin in August the Right Honourable Mr Justice Richardson presented a paper with the above title. The paper itself will be printed in a forthcoming issue of the Otago University Law Review and the purpose of this note is simply to highlight some of the main points that emerged, not so much from the paper itself, as from the discussion that followed.

Judicial work-load

A review of the judicial work-load seems an odd starting point for a discussion of the role of an Appellate Judge. However it is a very relevant starting point for a consideration of the function of the Court must precede any decision as to how the demands of an ever expanding work-load are to be met. In particular it involves deciding whether the main function of the Court of Appeal is to provide justice in individual cases or whether it is to develop the common law in a logical and coherent manner.

If the former view is taken, that the function of the Court is to provide justice in individual cases, then there could be no objection to an indefinite expansion of the membership of the Court to meet the work-load. As the decision itself would then become more important than the development of the law an erosion of the present collegiate character of the Court would not be particularly significant.

On the other hand if the development of the law is the predominant consideration then it is important to preserve the collegiate character of the Court and also the public standing that follows from its limited size. Not unsurprisingly it was this view that commended itself to Mr Justice Richardson who, however, felt that to hold the work-load within manageable proportions in the future consideration may, at some stage, have to be given "to the development of some form of screening mechanism." This he felt would be necessary;

> ". . . unless the legislature give consideration to some fundamental questions — such as, what are the reasons for the huge increases in the numbers of criminal and civil cases; are the Court processes the best machinery for dealing with all the classes of case that now go there; and what should be the role of the Courts in our society — [for] pressures on the Courts overall are likely to continue even if the pressure points themselves are shifted. Thus, in our case, the shifting of some classes of jury trials to the District Court, which is expected to take effect shortly, may well lead to more jury trials. So it is unlikely to reduce and at least initially it may increase the flow of appeals against conviction and sentence to the Court of Appeal."

Professor Gerard Nash (Monash) considered the heavy work-load to be the penalty for over-criminalisation and adherence to rules developed for nineteenth century juries which we have not re-thought. He mentioned, as an example, the direction to be given to a jury where a person claims he killed in self-defence (see *Viro v R* (1978) 18 ALR 257 (HCA)). That direction when read late in the afternoon, is a certain soporific.

Mr Justice Richardson likewise made reference to the direction to be given to a jury in corroboration cases. He felt the refinement of the law was making these directions increasingly complex and more difficult and

questioned whether they were really necessary. He asked whether in light of current attitudes and knowledge it is necessary any longer to be so careful about warning of the dangers of relying on evidence of identification. These rules were becoming increasingly inflexible at a time when community awareness made inflexible rules unnecessary. Yet these rules were so rigid that if the formula was not adhered to then invariably a new trial followed.

The Court of Appeal continues to do individual justice in criminal cases by delivering oral judgments and this to some extent moves this category of case away from those of a more developmental nature. Professor Nash however asks whether we can afford the complex procedural and evidential rules that are giving rise to many appeals — or as he put it more bluntly at one point — how much justice can we afford without overloading the Court of Appeal?

So some fundamental restructuring may well be required if the work-load is to be held within limits that can be handled by a collegiate Appeal Court of the present size.

Privy Council

In his paper Richardson J mentioned that while in theory the Court of Appeal is an intermediate Court, in practice it is a Court of last resort. Appellate decisions from other Commonwealth countries and decisions of the House of Lords and Privy Council are influential "where there are no differentiating factors . . . justifying a divergent approach." This influence was described as a "light rein".

Dr Gerald Orchard (Canterbury) took up this point and suggested that the existence of a right of appeal to the Privy Council, theoretical as it may be in the generality of cases had several, largely inhibitory, effects, namely:

(a) It increases the authoritative effect of United Kingdom precedent. In particular the Privy Council has said that in the absence of differentiating local circumstances it would find the persuasive effect of House of Lords decisions very great.

(b) It inhibits the capacity of the Court of Appeal to develop our case law in the best way for New Zealand — a point made by Sir Thaddeus McCarthy on his retirement ([1976] NZLJ 380). An authoritative decision of the Privy Council could remove flexibility and make the light rein a hobble. *Reid v Reid* was suggested as an example of a case with social implications in which this could happen.

(c) The abolition of appeals to the Privy Council would increase the authority of the Court of Appeal as an independent developer of law — a view suggested by Professor Gordon Orr in submissions made by him to the Royal Commission on the Courts in his capacity as (then) Secretary of Justice.

(d) It limits the ability of the Court to formulate its own rules as to whether it will regard itself as being bound to follow its own decisions.

Mr Justice Richardson responded with the observation that New Zealand social circumstances differ so much from those prevailing in England that he would be reluctant to apply expressions of public and social policy enunciated by English Courts unless he was sure the same conditions existed here. He mentioned as an example the House of Lords decision in *R v Sang* [1979] 2 All ER 1222 concerning judicial discretion to exclude evidence on the ground it was illegally or unfairly obtained. The approach adopted by New Zealand Courts differs from that adopted by the House of Lords and he felt that while we must reconsider our position in light of *Sang* the final decision must be based on our own social conditions.

The discussion on the Privy Council was a useful airing of the topic but as Professor Keith pointed out, at present it is not a matter of great moment. It is an anachronism but nothing has happened yet to bring matters to a head. However there are points of potential tension and, as Richardson J observed, with five permanent members the Court of Appeal is large enough to act as an appeal Court of last resort.

Limiting discretion

The other major point developed by Dr Orchard concerned the extent to which the Court of Appeal should inhibit its discretion, and in particular any statutory discretion, by laying down general rules. He pointed to *Reid v Reid* [1979] 1 NZLR 572 (CA) as a case in which the view had been expressed that the Court of Appeal should not lay down such principles and expressed disagreement with that attitude. In discretionary areas he felt there to be a need for guidelines to prevent resort to "oak tree" justice.

Mr Justice Richardson preferred the Court to speak broadly about relevant considerations rather than laying down rules. He was con-

cerned that once principles were laid down for the exercise of a discretion an ossification factor would come into play, and he also felt there was a real danger that, regardless of the circumstances, the principles laid down would be looked on as a check list to be ticked off as a case proceeded.

The most compelling observation however was that of Professor Richard Sutton (Otago) who suggested a need to look at the function of the discretion. Often a statutory discretion was introduced to change law that was, for one reason or another, wrongly stated and this, in effect, simply gave the Courts an opportunity to start again. He suggested that in cases involving a discretion there frequently are a number of factors that need to be balanced consistently and that it is from that balancing that principles do in fact develop.

Judges as law makers

Today, with the emphasis on more personalised justice, a law making Judge, and particularly a law making Appellate Judge, is not in an easy position. He has, as Professor Nash pointed out, a dual concern, first for the case before him, and secondly for the development of the common law. A trial Judge, in his view, is closer to the litigant and likely to be more caught up with the justice, merits — call it what you will — of the case. In contrast to this he considers an Appellate Judge should act at a sufficient remove from the parties to enable a tempering of over-enthusiastic legal development based on a case-by-case approach and to ensure the development of the law in an evolutionary way based on second or even third thoughts. The lower Courts he sees as providing the cases for the law but not the logic for its development. The development of the law must come first.

Commenting on this approach Richardson J observed that while an Appellate Judge must be remote from the arena he must not be remote from society. Indeed, he cannot be remote from society, for as he also commented, with legislation being increasingly seen as providing a solution to our social difficulties the Courts are being forced into areas that 15 — 20 years ago would have been shunned as more appropriate to Government action. The Courts have an obligation to do justice to individual litigants and this is particularly so where there is no effective political remedy available. He considers that if society does not like the Court's solution it can do something about it, perhaps by legislation or regulation. He felt that Judges had reached the point where they were not worried that decisions had political consequences and were not worried about Parliament stepping in. Today, he said, Judges felt a wider obligation to society and consequently social policies could not be ignored.

This made it important that a Judge "should have a philosophy of life, a framework of reference against which to probe and test the economic, social and political questions involved." In the bulk of cases the identification of community values was relatively straightforward but matters became more difficult where society was clearly divided and in such cases "a Judge may be involved in social change and in resolving conflicts between competing social values in a pluralistic society".

He then went on to say in a particularly important paragraph:

> "In so acting Judges are shaping the laws to meet the aspirations and necessities of the times. Thus we must recognise that affirmative government is a feature of New Zealand life; that change and continuity sit uneasily together; that we are a multicultural society and in many areas we cannot draw on universally accepted values; but that justice in the abstract cannot always be achieved. Particularly in this class of case, social awareness is just as important as professional competence."

Indications then, are that he sees the Court of Appeal as taking a very much more active part than it traditionally has in bringing the laws into accord with the needs of society. He acknowledges there will be friction. Striking the right balance between legislature, Judiciary and the Executive will require careful judgment, as indeed it always has and he expects a more rigorous feedback of comment and principled criticism. Indeed his Honour's closing words invite, in the future, a more rigorous interplay between the Judiciary and society.

> "For myself I would be sceptical of the true relevance of the work of the Courts if our judgments were not subject to rigorous scrutiny and debate. If no one is criticising our work it is because we are making no impact. If we are playing our part in society inevitably there will be criticisms of decisions in particular cases and of trends in the development of our laws; and inevitably there will be some tensions in the relations between the Judiciary and other law making institutions."

TONY BLACK

COURTS PRACTICE AND PROCEDURE

STARE DECISIS IN THE COURT OF APPEAL

"So long as there is an Appeal from a Court of Appeal to their Lordships' Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law . . .". Dr G F ORCHARD* *argues that this advice should be rejected by the New Zealand Court of Appeal.*

Introduction

To what extent is the New Zealand Court of Appeal bound by its own decisions? Given the desire for certainty and consistency, and the entrenchment of stare decisis in common law jurisdictions, it is clear that decisions of the Court of Appeal will be of more than merely persuasive force in that Court. This leaves two main possibilities: the Court could adopt a rule that it is bound by its previous decisions, subject to a limited number of specified exceptions (there being no doubt that *some* qualification to such a general rule is necessary), or it could adopt a rule that it will normally follow its earlier decisions but will reject them in exceptional cases when it appears right to do so, without attempting to specify all of those exceptional classes of case in advance. The former is the approach currently applied in civil cases in the English Court of Appeal, pursuant to *Young v Bristol Aeroplane Co Ltd* [1944] KB 718, but since 1966 the House of Lords has adopted the latter approach (see *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77), and such a rule has long been applied by the Privy Council.[1]

For years Lord Denning has urged that the Court of Appeal should abandon the more rigid rule in *Young*,[2] but this has been one of his least successful campaigns — "my most extravagant dissent and . . . my most humiliating defeat".[3] The Master of the Rolls has never carried the whole of the Court of Appeal on this issue[4] and the House of Lords has been prompted (or provoked) to declare that the rule in *Young* is binding on the Court of Appeal.[5]

Of course this struggle has been concerned only with the position in England. In New Zealand, the Court of Appeal has more than once considered the possibility that it should apply the rule in *Young v Bristol Aeroplane Co* but has found it unnecessary to decide the question.[6] No distinction has yet been drawn between cases before and after the establishment of the permanent Court in 1958, but it could be inferred from *McFarland v Sharp* [1972] NZLR 838, 841-842 that in any event the Court is unlikely to favour a rule which categorises the cases where overruling is permissible. Now however the Privy Council has been good enough to announce that the rule in *Young* applies generally to all intermediate appellate Courts. Or at least it should.

Their Lordships' advice

Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1980] 2 WLR 171 PC was an appeal from the Court of Appeal of the West Indies Associated States Supreme Court. One of the issues was whether an Order in Council was invalid as being inconsistent with the coun-

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[1] Eg, *Gideon Nkumbule v R* [1950] AC 379; *Baker v R* [1975] AC 774, 787-788.

[2] Eg, *Gallie v Lee* [1969] 2 Ch 17; *Davis v Johnson* [1978] 1 All ER 841.

[3] Lord Denning, *The Discipline of the Law*, Butterworths 1979, 298.

[4] See his rather convenient aknowledgement of this in *Miliangos v Geo Frank (Textiles) Ltd* [1975] QB 487, 503.

[5] *Davis v Johnson* [1979] AC 264; *Farrell v Alexander* [1977] AC 59; cf *Miliangos v Geo Frank (Textiles) Ltd* [1976] AC 443, 470-471 per Lord Simon ("clear law").

[6] *Re Rayner* [1948] NZLR 455; *Preston v Preston* [1955] NZLR 1251, 1259-60; *Re Manson* [1964] NZLR 257, 271; cf *R v Richardson-Wilson* [1979] 1 NZLR 187, 191; for an Australasian survey, see Kidd, "Stare Decisis in Intermediate Appellate Courts" (1978) 52 ALJ 274.

try's Constitution. The Court of Appeal held that it was bound by two of its own earlier decisions to hold that it was invalid. The Privy Council held that the Order was valid but that the Court of Appeal was right in holding itself bound by its earlier decisions to reach the opposite conclusion: none of the exceptions to the rule in *Young v Bristol Aeroplane Co* were in point and that was the rule the Court of Appeal should apply.

For New Zealand the interest of this is that their Lordships made it clear that this was not a special rule for the West Indies but applied to *any* Court of Appeal whose decision is subject to review by the Privy Council, which of course is usually the position here:

> "So long as there is an appeal from a Court of Appeal to their Lordships' Board or to the House of Lords, the Court of Appeal should follow its own decisions on a point of law and leave it to the final appellate tribunal to correct any error in law which may have crept into any previous decision of the Court of Appeal. Neither their Lordships' Board nor the House of Lords is now bound by its own decisions, and it is for them in the very exceptional cases in which this Board or the House of Lords has plainly erred in the past to correct those errors — just as it is for them alone to correct the errors of the Court of Appeal . . . it is . . . most important in the public interest that the Court of Appeal should be bound by its own previous decision on questions of law save for the three exceptions specified in *Young v Bristol Aeroplane Co Ltd.*"[7]

At the same time their Lordships acknowledged that, because their function was to decide the case according to their view of the substantive law, this was necessarily obiter and of persuasive authority only. "No doubt it would be treated with great respect but it can not be of binding authority because the point can never come before this Board or the House of Lords for decision."[8]

Thus, even assuming that decisions of the Privy Council in appeals from other countries are generally binding here, in the absence of distinguishing local circumstances,[9] it is clear the New Zealand Court of Appeal is at liberty to reject this advice.[10] It is submitted that, with all suitable respect, the Court should reject it. There is no reason to believe that the question was given very careful consideration in *A-G v Reynolds*, and in New Zealand at least the rule in *Young* is open to serious objection.

The Reasoning in A-G v Reynolds

The House of Lords had recently dealt with the position of the English Court of Appeal at some length, which might explain, but does not excuse, the cursory treatment of the issue in *A-G v Reynolds*. So brief is the discussion that no reason is actually given to justify the imposition of the rule in *Young*, it being dogmatically assumed that because their Lordships agreed that the rule was right for the English Court of Appeal it followed that it was appropriate for other Commonwealth Courts. No overt consideration was given to the possibility that circumstances in different countries might so vary from those in England that some different rule was justified notwithstanding the possibility of an appeal to London. This is a startling omission.

Their Lordships referred to only one authority tending against their opinion. This was a statement of Isaacs J in *Australian Agricultural Co v Federated Engine-Drivers And Firemen's Association of Australasia* (1913) 17 CLR 261, 278-279 to the effect that Judges should not follow their previous decisions which they found were "manifestly wrong" because their sworn duty was to apply the law as they thought it really was, not merely as their predecessors had declared it to be. The Privy Council dismissed this by noting that because all Judges have a duty to apply "the law" it would logically follow that a Judge could ignore decisions of higher Courts which he thought were "wrong". This disposal of the dictum of Isaacs J is unsatisfactory in that it ig-

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[7] [1980] 2 WLR 171, 186, per Lord Salmon delivering the opinion of the Board.

[8] [1980] 2 WLR 171, 185-186; cf *Davis v Johnson* [1979] AC 264, 344, per Lord Salmon; but contrast the exceptional opinion in *Geelong Harbour Trust Commissioners v Gibbs Bright & Co (A Firm)* [1974] AC 810 (PC) where the Board elected not to decide the substantive point because it was not prepared to say the High Court of Australia was wrong in following its previous decision irrespective of whether it was right or wrong.

[9] This is suggested by *Bakhshuwen v Bakhshuwen* [1952] AC 1, 14, and *Morris v English, Scottish and Australian Bank* (1957) 97 CLR 624; but contrast *Negro v Pietro's Bread Co* [1933] 1 DLR 490 Ont CA; cf *Baker v R* [1975] AC 774, 788; *de Lasala v de Lasala* [1979] 3 WLR 390, 398.

[10] And in England Lord Salmon would apparently allow the overthrow of *Young* by the whole Court of Appeal: *Davis v Johnson* [1979] AC 264, 344, but Lord Simon thought legislation would be needed: *Miliangos v Geo Frank (Textiles) Ltd* [1976] AC 443, 470-471; sed quaere.

the question of common law damages the Court of Appeal carefully reconsidered *Capital and Suburban Properties v Swycher*[30]. It was the view of the Court that there was no injustice in denying common law damages when a specific performance order proved abortive because whether a plaintiff chose the equitable remedy of specific performance or the common law remedy of damages the two remedies were in financial terms equivalent. Buckley LJ pointed out that if there had been an election to have damages the measure of damages:

> "would have been the excess of the contract price bringing the deposit into account over the value of the property at the date of the breach. The plaintiff would have thus recovered in the form of the property, free from the contract, the deposit and the damages, the equivalent of the purchase price. Leaving consequential losses out of account he could not recover more than this. Under the specific performance order, if it were worked out, the vendor would receive the whole amount due under the contract."[31]

Goff, LJ expressed agreement with this view saying:

> "Moreover for the reason given, and if I may respectfully say so, most clearly analysed by Buckley LJ in *Swycher's* case, namely that the vendor can be no better off by releasing him from his obligation to convey and awarding damages than he will be by working out the specific performance decree which he has elected to obtain there is no reason why if granted the indulgence of retaining the land he should also be allowed to claim damages at common law."[32]

The decision in *Swycher's* case was criticised by Dawson in an article "Damages After Specific Performance"[33]. Dawson argued that the true position was that the defaulting party's failure to comply with a decree of specific performance gave the innocent party a further right to obtain the normal remedies available for wrongful repudiation, namely to treat himself as discharged and to bring an action on the contract for damages or to rescind the contract and seek restitutio in integrum. There is a similar criticism of the decision in a casenote in [1976] NZ Recent Law 138 where the view was expressed that *Henty v Schroder* was wrongly decided. It is also of interest that the view taken by the Court of Appeal was in conflict with the approach of New Zealand Judges, eg Cleary J in *White v Ross* and Casey J in *Hunt v Hyde*. In the House of Lords Lord Wilberforce dealt with the position following an order for specific performance continuing his "uncontroversial propositions" saying:

> "Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. . . . Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for enforcement of the order *or* may apply to the court to dissolve the order and ask the court to put an end to the contract."

He continued:

> "These propositions being as I think they are, uncontrovertible there only remains the question whether, if the vendor takes the latter course, ie of applying to the Court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?". If, as is clear, the vendor is entitled (after and notwithstanding that an order for specific performance has been made) if the purchaser still does not complete the contract, to ask the Court to permit him to accept the purchasser's repudiation and to declare the contract to be terminated, why, if the Court accedes to this, should there not follow the ordinary consequences undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?"[34]

As to *Henty v Schroder* he considered that

> "If it were not for the great authority of Jessel MR I can hardly believe that so fragile and insecure a foundation for the law would ever have survived."[35]

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[30] In which apparently the question of equitable damages was not argued.
[31] [1978] Ch at p 191; [1978] 3 All ER at p 322.
[32] Ibid pp 196-7, 326-7.
[33] (1977) 93 LQR 232.
[34] [1979] 1 All ER at p 890.
[35] Ibid p 891.

been expressly overruled, it is inconsistent with a decision (or a "subsequent decision") of the House of Lords; (3) The Court is not obliged to follow its earlier decision if it is satisfied it was given per incuriam.

The reason for insisting on such a strict rule is probably best explained by Lord Diplock in *Davis v Johnson*.[14] The Court of Appeal is "at the very centre" of the English legal system and if it was free to overrule its previous decisions simply because it thought them wrong or no longer appropriate there would be a risk of excessive uncertainty and inconsistency in the law, which risk increases as the membership of the Court (at present some 17) and the number of divisions in which it sits increases. Such freedom in the Court of Appeal is unnecessary because the avoidance of undue restriction on the development of the law is adequately secured by the Court of last resort having the power to overrule others and itself.

No doubt these considerations led to the pronouncement in *A-G v Reynolds* but before considering them it is convenient to mention certain qualifications which need to be made to the proposition that intermediate appellate Courts should follow their own decisions "save for the three exceptions" in *Young*.

First, exception 2 in *Young* is in terms confined to inconsistency with a decision of the House of Lords but in relation to the New Zealand Court of Appeal this should obviously read "Privy Council". But in addition the New Zealand Court has always accepted that a-contrary decision of the House of Lords justifies a departure from an earlier decision of the Court of Appeal. Now that it is recognised that decisions of the House of Lords are of very highly persuasive authority but not strictly binding[15] this would not be regarded as obligatory, but such inconsistency would still permit the overruling of the Court's earlier decision. Indeed in England an as yet unquestioned equivalent qualification to the general rule has been introduced, it being said that the Court of Appeal need not follow its earlier decision if the Privy Council has disapproved it or "cast doubt" on it.[16] To this extent it is safe to assume that the proposition in *A-G v Reynolds* must be modified, but English Judges have no monopoly on wisdom and if a decision of the House of Lords frees the Court of Appeal from the fetter of its own earlier decision, should that not also be true of a decision of the High Court of Australia, or the Supreme Court of Canada? However any such extension of exception 2 casts doubt on the sense of the rule that decisions are binding subject only to defined exceptions: if contrary decisions of non-binding tribunals remove the fetter it should suffice that the Court of Appeal thinks its earlier decision was plainly wrong, for it seems irrelevant that the accident of litigation in some other country has led to a different decision.

Second, in allowing only the three exceptions in *Young* the Privy Council ignores *Boys v Chaplin* [1968] 2 QB 1 (CA) where it was held there was a fourth exception, that an interlocutory decision of two Lord Justices does not bind the English Court of Appeal. In New Zealand the Court of Appeal must always sit with at least three Judges, but the question could arise whether decisions on interlocutory applications necessarily have the same authority as final decisions. In *Boys v Chaplin* the reason given for the extra exceptions was that such issues must generally be disposed of expeditiously, so there is an increased risk of error arising from inadequate argument or consideration. This again illustrates the unsatisfactory nature of the rigid rule in *Young* for, if *Boys v Chaplin* be correct, the fact of inadequate argument or consideration should logically be recognised as justifying departure from an earlier decision, whether it was interlocutory or final.

There are other possible qualifications to *Young* which were not adverted to in *A-G v Reynolds*. If the earlier decision was based on two alternative reasons it may well be that the Court of Appeal is free to follow one and reject the other (*Dixon v BBC* [1979] 2 WLR 647 (CA)), and if the earlier decision turned on the application of a rule of international law it may be that the decision ceases to bind if international law is found to have changed (*Trendtex Trading Co v Central Bank of Nigeria* [1977] 1 All ER 881 (CA)). Moreover, only decisions on questions of law are binding and this allows evasion of the rule by the sometimes arbitrary classification of an issue as one of "fact". In *Dyson Holdings Ltd v Fox* [1975] 3 All ER 1030 (CA) it was held that whether a surviving

[14] [1979] AC 264, 326-327, approving Scarman LJ in *Tiverton Estates Ltd v Wearwell Ltd* [1975] 1 Ch 146, 172 and *Farrell v Alexander* [1976] QB 345, 371.

[15] Eg, *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741, 757 (CA); cf *de Lasala v de Lasala* [1979] 3 WLR 390 (PC); but see *Abbott v R* [1977] AC 755, 763.

[16] *Worcestor Works Finance Ltd v Cooden Engineering Ltd* [1972] 1 QB 210, 217; cf *Doughty v Turner Manufacturing Co* [1964] 2 QB 510.

mistress was a "member of the family" of a deceased tenant was a question of "fact" depending on the generally accepted meaning of "family", so an earlier decision of the Court of Appeal that she could not be so regarded ceased to be binding after the generally accepted scope of the concept of "the family" changed, for this necessarily meant that the possible answer to the question had also changed.

Third, another unexpressed qualification to the general approval of the rule in *Young* in *A-G v Reynolds* is that it is presumably confined to civil cases. In England the Court of Appeal does not apply the rule in its criminal jurisdiction where, following the practice of the Court of Criminal Appeal, stare decisis is not so rigidly applied.[17] This extra freedom is plainly appropriate in New Zealand for the Privy Council refuses to act as a true Court of criminal appeal. Nevertheless, the distinction between civil and criminal cases seems most unsatisfactory. It was justified in *Taylor* on the basis that the liberty of the subject was at stake but, apart from the fact that logically this suggests the possibility of overruling in civil cases simply because fundamental rights are at stake, it seems the Court may overrule an earlier decision that was favourable to the accused.[18] Although it will be unusual for people to order their affairs in reliance on a ruling in a criminal case[19] this extra freedom is inconsistent with the insistence by the House of Lords that there is special need for certainty in criminal cases.[20] The distinction is also capable of leading to absurdity: for example, in *A-G v Reynolds* the question whether the Order in Council was valid arose in a civil action and *Young* was said to apply, but the same question could arise on a prosecution for contravention of laws made pursuant to the Order, but then it seems the rule relating to precedent would be different.

Finally, it must be noted that although the scope of the per incuriam rule (exception 3 in *Young*) may be uncertain, to date it has been regarded as extremely limited. It apparently applies only if the earlier decision was given in ignorance of some applicable legislation or binding precedent (or perhaps in conscious disregard of such a precedent), and only if application of that authority would have led to a different decision.[21] Logically the per incuriam rule suggests that in the event of inconsistent decisions of the Court of Appeal the first should be followed, but exception 1 treats this as a special case and gives the Court a choice between the two decisions, although perhaps the Court should be allowed to reject both if neither is satisfactory.

Conclusions

The strict rule in *Young* has been justified on the basis that it is needed to ensure certainty and consistency in the law. But the ability of the Court to restrictively distinguish unpopular precedents means that the extent to which certainty is achievable is necessarily limited, and the rather arbitrary limits to the exceptions in *Young* are unsatisfactory. The practice now adopted in the House of Lords is more flexible but hardly leads to a significantly higher degree of unpredictability. It is much the better rule for New Zealand.

The House has emphasised that although the categories of cases are not closed it will exercise its power to overrule itself most sparingly. Apart from the narrow question of precedent, judicial reform of the law is inappropriate when detailed investigation of social, economic and administrative issues is needed, and the remedies available to the Court are inadequate;[22] and even superior Courts should not assume the power to set aside fundamental doctrines of the common law, or cases which will have had manifold influence on the content of both the common law and legislation.[23]

More particularly, a Court should be specially slow to overrule its earlier decision if, for example, it is likely that it has been relied upon by people in ordering their affairs (a problem which in the future might be met by

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[17] *Gould* [1968] 2 QB 65 (CA); *Taylor* [1950] 2 KB 368 (CCA); Zellick, "Precedent in the Court of Appeal, Criminal Division" [1974] Crim LR 222.

[18] *Newsome* [1970] 2 QB 711; Zellick, op cit, 237.

[19] Cross, *Precedent in English Law* (2nd ed) 107-108; but the Police will make various prosecuting decisions in reliance on such decisions.

[20] *Knuller (Publishing, Printing and Promotions) Ltd v DPP* [1973] AC 222; *Practice Statement (Judicial Precedent)* [1966] 3 All ER 77.

[21] *Miliangos v Geo Frank (Textiles) Ltd* [1976] AC 443, 477-478; the principle does not entitle a Court to disregard a decision of a higher Court: *Broome v Cassell & Co* [1972] AC, 1027; *Baker v R* [1975] AC 774; and if an intermediate Court does not follow a higher Court it seems a lower Court must follow the intermediate Court: *Miliangos*, ibid.

[22] Cf *Lim Poh Choo v Camden Health Authority* [1980] AC 174; Note (1979) 42 MLR 721.

[23] A principle possibly breached by the dicta of Lord Denning in *Pearlman v Keepers and Governors of Harrow School* [1979] 1 All ER 365, 377.

prospective overruling[24]); or if it has been generally accepted and causes little difficulty in practice; or if it turns on the interpretation of legislation (where more than one view is often possible).[25] Nevertheless, the practice adopted by the House of Lords (and the Privy Council and High Court of Australia) allows the Court significantly more scope than the rule in *Young v Bristol Aeroplane Co.* The exceptions in *Young* are available, but other cases arise where overruling is appropriate in the interests of the proper development of the law. For example, the earlier decision may be found to be based on faulty reasoning or assumptions and may have led to unsatisfactory or unjust consequences in practice.[26] Even on a point of statutory interpretation overruling might be the right course if the earlier Court did not appreciate the full consequences of its decision and they are such that Parliament could not have intended them.[27] And even when an earlier decision was not "wrong" when decided, overruling may be called for if circumstances have so changed that in the interests of justice some new rule is required and can be stated and administered without undue difficulty.[28] Moreover, if the formulation of a rule in an earlier case is rejected it may be desirable in the interests of certainty that the decision be overruled, for repeated distinguishing may lead to confusion and uncertainty.

The need to promote the proper development of the law has led to the universal acceptance of the view that the rule in *Young* is inappropriate in Courts of last resort; it is equally inappropriate for the New Zealand Court of Appeal. The forthright statement of Fair J in *Re Rayner*[29] is still substantially true today:

> "The Court of Appeal in New Zealand occupies a position in the judicial hierarchy which differs very materially from that of the Court of Appeal in England. Owing to the expense and delay entailed in an appeal to the Privy Council, in general only a wealthy person can take the risk of the heavy costs . . . and the number of appeals is small. It consequently follows that the Court of Appeal is in effect, in nearly all cases, the final Court in New Zealand."

The comparatively small number of Judges in New Zealand and the limited familiarity of the Privy Council with our law and circumstances also serve to distinguish the New Zealand position; as does the fact that legal aid is available to a respondent only with the approval of the Minister of Justice, and to an appellant only upon a certificate of the Attorney-General that a question of law of exceptional public importance is involved and that aid is desirable in the public interest (Legal Aid Act 1969, s 15(1)(g)).

In England appeals to the Lords are no doubt expensive and only a small minority of cases go there, but legal aid will often be available and applications to the Appellate Committee for leave to appeal seem common enough.[30] This factor was ignored in *A-G v Reynolds,* but in *Davis v Johnson* [1979] AC 264, Lord Diplock's approval of *Young* was conditional upon the existence of a further appellate Court *and* the availability of "reasonable means of access to it". The right of appeal to the Privy Council does not seem to meet this test. Appeals from New Zealand to the Privy Council are few and sporadic and although the Privy Council and the House of Lords have (for the most part) a common membership the Board does not have the general function of supervising the development of New Zealand law. The prerogative jurisdiction of the Privy Council is not truly comparable with the appellate jurisdiction of the House of Lords in theory or practice and the appliction of *Young* in this country would be an inconvenient and excessive inhibition on the development of New Zealand law.

There is indeed one curious statutory provision which provides some support for the view that *Young* does not apply in New Zealand. Section 12 of the Declaratory Judgments Act 1908 provides that:

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[24] See, eg, Nicol, "Prospective Overruling — A New Device?" (1976) 39 MLR 542.

[25] *Jones v Secretary of State for Social Services* [1972] AC 944; for a detailed discussion of relevant factors, see Lyndal V Prott, "When Will a Superior Court Overrule Its Own Decision?" (1978) 152 ALJ 304; and see Kavanagh, "Stare Decisis in the House of Lords" (1973) 5 NZULR 323; cf *Re Manson* [1964] NZLR 257, 271.

[26] *Conway v Rimmer* [1968] AC 910, although it is disputable whether this case involves overruling or distinguishing.

[27] *Vestey v IRC (Nos 1 & 2)* [1979] 3 WLR 915 (HL).

[28] *Miliangos v Geo Frank (Textiles) Ltd* [1976] AC 443 (HL); cf *Herrington v British Railways Bd* [1972] AC 877 (HL); contra *Geelong Harbour Commrs v Gibbs Bright* [1974] AC 810, 818 (PC).

[29] [1948] NZLR 455, 484; cf *A-G for NSW v Perpetual Trustee Co* (1952) 85 CLR 237, 244, per Dixon J.

[30] See Blom-Cooper and Drewry, *Final Appeal* (1972), Ch 7, and Appendix 2(c).

> "Subject to any decision of the Privy Council, any decision of the Court of Appeal under this Act shall be binding as a precedent in all other Courts in New Zealand."

It is not clear why such an express provision was thought to be necessary in respect of declaratory judgments but the wording of s 12 seems clearly to imply that such a judgment (and perhaps a judgment refusing declaratory relief) is not absolutely binding on the Court of Appeal itself — the section operates only in respect of *other* Courts. But if this is so in respect of declaratory judgments it would be odd if there was a different rule of precedent for judgments granting or refusing other forms of relief.

SALE OF LAND

RECENT DEVELOPMENTS IN THE LAW RELATING TO RESCISSION AND DAMAGES IN CONTRACTS FOR THE SALE OF LAND

By W M PATTERSON.

The recent decision of the House of Lords in *Johnson v Agnew*[1] will be welcomed as a landmark decision in an area of the law that has caused many difficulties for both conveyancers and common lawyers over a considerable period of time and provided a fertile ground for debate among academic writers.

The problem area related to the remedies available to an innocent party "where the time for performance of a contract for sale of land is long past, both at law and in equity, and one party has long been refusing to perform any of his obligations under the contract" per Megarry J in *Horsler v Zorro*[2]. Could the innocent party "rescind" the contract while yet preserving his right to claim damages? If, on the other hand, he chose to enforce the contract by seeking a decree of specific performance and the defaulting party continued to refuse to perform or events occurred with or without the "aid" of the defaulting party that made specific performance impossible what then were the rights of the innocent party? Could he change horses in mid-stream, so to speak, elect to rescind and thereafter pursue a claim for common law damages, and if so, what was the measure of those damages?

The controversy with regard to the question of rescission related to the distinction between rescission in the strict sense (or rescission ab initio) which requires restoration of the parties to their original position (restitutio in integrum) and prevents any claim for damages[3] and rescission in the sense that implies that the innocent party accepts the breach of the other as discharging him from the duty of further performing his side of the contract but leaves him free to claim damages from the defaulting party for his breach.

The rights of the innocent party were described by Megarry J in the following terms in *Horsler v Zorro*:

> "If a vendor repudiates the contract, the purchaser may accept the repudiation, treat the contract as at an end, and sue for damages for breach of contract. On the other hand, the purchaser may choose to rescind the contract, in which case the parties will be as far as possible restored to their positions before the contract was made. In the latter case, however, it is difficult to see how the purchaser can in the same breath seek to treat matters as if the contract had not been made and yet claim damages for the breach of it: See eg *Barber v Wolfe* [1945] Ch 187; [1945] 1 All ER 399."[4]

The decision in *Horsler v Zorro* sparked a lengthy article by Michael Albery QC entitled

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[1] [1979] 1 All ER 883.

[2] [1975] Ch 302 at p 309; [1975] 1 All ER 584 at p 589.

[3] Although there may in appropriate cases be awarded "limited damages" ibid p 313-6, p 594-5 and see Dawson, "Rescission and Damages" 1976 39 Mod Law Review 214 at p 217-9.

[4] Ibid p 307, 588.

"Mr Cyprian Williams Great Heresy"[5] in which the author argued powerfully that the doctrine of rescission ab initio was applicable only to cases where a contract was affected by an inherent cause of invalidity, eg misrepresentation or undue influence, this defect in the making of the contract rendering it voidable at the instance of the innocent party enabling him to rescind out of Court. If such a contract was avoided justice was done by restoring the parties as nearly as possible to their former positions. Any right to damages arose not as a result of a breach of contract (because the effect of avoidance was that the contract was treated as never having existed) but because of the misrepresentation or undue influence etc. Where, however, there was a breach going to the root of the contract the author argued that the innocent party might elect either to affirm the contract and claim damages or treat the contract as repudiated thus discharging him from further performance but leaving the breach intact which also gave rise to a right to seek damages[6].

Albery took issue with the views expressed by Williams in the Fourth edition of his book *Vendor and Purchase*[7] and also in his book *Sale of Land*[8] that rescission meant rescission ab initio and required restitutio in integrum, expressing the view[9] that Williams "wrongly annexed the remedy of rescission and restitutio in integrum to breach of contract" and in attempting to explain cases where an innocent party was held able to accept an essential breach as discharging him from the contract yet claim damages (which he said a number of eminent law lords had called rescission) "stood this on its head" by calling it affirmation of the contract. After a lengthy consideration of the cases the author considered that two only lent support to Williams, namely *Henty v Schroder*[10] and *Hutchings v Humphreys*[11] and the latter case was suspect because North J who decided it clearly misunderstood an earlier decision of *Watson v Cox*[12]. As to *Henty v Schroder* he suggested that Sir George Jessel MR who decided it failed to distinguish between rescission ab initio and rescission in the wider sense earlier referred to and that his decision was contrary to both principle and authority. For the same reason he criticised the decision in *Barber v Wolfe*[13] while conceding that it could be supported on another ground. His conclusion was that there is no basis in the cases for the restitutio in integrum principle in cases of breach of contract for the sale of land, and from this premise he strongly argued that the decision in *Horsler v Zorro* was wrong.It is interesting to compare Albery's view with that of Dawson in an article in which he supported the decision in *Horsler v Zorro* as being a rare example of a modern Court "using the term 'rescission' in its strict and proper sense"[14].Dawson challenged Albery's view that the doctrine of rescission ab initio is inapplicable where there has been an essential breach citing Professor Williston's article "Repudiation of Contracts"[15] which contained what Dawson considered still perhaps the best collection of English authorities supporting Megarry J.

In *Horsler v Zorro* the defendant contracted to sell his house to the plaintiffs for £4,000 the date for completion being 26 July 1971. The defendant refused to proceed and on 30 November 1971 the plaintiffs issued a writ seeking specific performance or alternatively damages for breach of contract. On 4 April 1972 their solicitors informed the defendant's solicitors that they did not intend to press proceedings for specific performance but wished to recover their deposit and to look for a property elsewhere. The deposit was duly returned and shortly thereafter the plaintiffs amended their writ by deleting the claim for specific performance claiming instead rescission and damages for breach of contract. It was held by Megarry J that since the plaintiffs had abandoned their claim for specific performance they were not entitled to equitable damages in lieu thereof and further that since they had elected to rescind the contract they were precluded from claiming common law damages other than nominal damages for breach.

It is clear that the learned judge considered the Williams' view of rescission the correct one. He quoted as follows from the 1930 edition of Williams' book *The Contract of Sale of Land*:

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[5] (1975) 91 LQR 337.

[6] He stated that the measure of damages in this case might be less than would be the case if the contract were affirmed.

[7] At pp 993 and 1004.

[8] At p 121.

[9] (1975) 91 LQR 340.

[10] (1879) 12 Ch D 666.

[11] (1885) 54 LJ Ch 650.

[12] (1873) LR 15 Eq 219.

[13] [1945] Ch 187; [1945] 1 All ER 399.

[14] [1976] 39 Mod Law Review 214.

[15] (1901) 14 Harv LR 317.

> "If the innocent party elects to rescind he cannot then recover damages for the loss of his bargain, because he cannot in the same breath say that the contract should be set aside and the parties restored to their former positions and also that the contract should be treated as still being in force, and the party in breach made to pay damages for the breach of the contract."[16]

He cited in support of this proposition *Henty v Schroder* and *Barber v Wolfe* even though both cases related to matters arising following the failure to comply with a decree for specific performance.

After *Horsler v Zorro* the question of rescission was considered by the English Court of Appeal in both *Capital and Suburban Properties Ltd v Swycher*[17] and *Johnson v Agnew*[18] in both of which cases *Horsler v Zorro* was cited but, perhaps significantly, not referred to in the judgments. In neither case did the question of rescission prior to an order for specific performance arise directly since each was concerned with events following such an order but probably conscious of the uncertainty that existed in this area the Judges, particularly Buckley LJ, seemed to go out of their way to try to clarify the law. Buckley LJ in Swycher's case said:

> "If, time having been made of the essence of the contract for a sale of land, the purchaser does not complete within due time, the vendor may (a) treat the purchaser as having repudiated the contract and pursue his remedy at law in damages for breach of contract or (b) he may pursue his equitable remedy of specific performance."[19]

He mentioned that both remedies could be sought in one writ but that an election had to be made at the trial as to which was wanted. Sir John Pennycuick repeated the dichotomy saying:

> "The vendor may elect between two remedies: (i) he may accept the purchaser's default as a repudiation of the contract and claim damages at common law or (where available) under an express provision for liquidated damages contained in the contract: or (ii) he may refuse to accept the default as a repudiation and claim a decree of specific performance."[20]

In *Johnson v Agnew* Buckley LJ repeated his views (which were concurred in by both other Judges) as follows:

> "If a purchaser fails to complete by a completion date which is of the essence of the contract, the vendor may at his choice treat the contract as repudiated and himself as discharged from any obligation under it, and may sue for damages for the breach; or he may sue for specific peformance. He may seek both these remedies as alternatives in one action but before judgment he must elect which remedy he wants."[21]

It is doubtful whether *Horsler v Zorro* could be said to have survived these two decisions particularly in view of the further criticism by Goff LJ in *Buckland v Farmer and Moody (a firm)*[22] in which Albery's article was referred to with obvious approval and the view expressed that *Horsler v Zorro* was wrongly decided on the question of damages but the coup de grace was decisively administered when *Johnson v Agnew* reached the House of Lords.[23] Lord Silberforce delivering a speech which had the agreement of the other four law lords sitting in the case put the position beyond doubt in the following passage:

> "In this situation it is possible to state at least some uncontroversial propositions of law. First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can *either* treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; *or* he may seek from the Court an order for specific performance with damages for any loss arising from delay in performance. This is simply the ordinary law of contract applied to contracts capable of specific performance. Secondly the vendor may proceed by action for the above remedies (viz specific performance or damages) in the alternative. At the trial he will, however, have to elect which remedy to pursue. Thirdly, if the vendor treats the purchaser

[16] [1975] Ch at p 309; [1975] 1 All ER at p 589.
[17] [1976] Ch 319; [1976] 1 All ER 881.
[18] [1978] Ch 176; [1978] 3 All ER 314.
[19] [1976] Ch at p 327; [1976] 1 All ER at p 888.
[20] Ibid p 330, 888 and on the subject of election of remedies see also *Ogle v Comboyuro Investments Pty Ltd* (1976) 50 AL JR 580.
[21] [1978] Ch at p 980; [1978] 3 All ER at p 321.
[22] [1978] 3 All ER 929 at p 943.
[23] [1979] 1 All ER 883.

> as having repudiated the contract and accepts the repudiation, he cannot thereafter seek specific performance. This follows from the fact that the purchaser having repudiated the contract and his repudiation having been accepted, both parties are discharged from further performance. At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so called 'rescission' is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases the contract is treated as never having come into existence . . . In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear under the general law of contract that acceptance of a repudiatory breach does not bring about "rescission ab initio."[24]

He referred to *Heyman v Darwins Limited*[25] as establishing those propositions. He concluded as follows:

> "In particular *Barber v Wolfe* and *Horsler v Zorro* cannot stand so far as they are based on the theory of "rescission ab initio" which has no application to the termination of a contract on accepted repudiation."[26]

The value of this decision from the point of view of the conveyancer is that no longer will he have to worry about the way in which he frames his correspondence with a defaulting purchaser or vendor or his solicitors lest he, by inadvertently referring to "rescission" of the agreement, leave his client without remedy in damages or at least cause his common law partner a few headaches when the case comes to Court. Although the decision is not binding on New Zealand Courts it is unlikely that the propositions now laid down would not be followed here particularly since they confirm in large measure the decision of Cleary J in *White v Ross*[27] followed by McMullin J in *Chatfield v Elmstone Resthouse Limited*[28] and Casey J in *Hunt v Hyde*[29].

Election of remedies

The "changing horses in mid-stream" question was directly in issue in *Horsler v Zorro, Capital and Suburban Properties Limited v Swycher* and *Johnson v Agnew*. In *Horsler v Zorro* as has been seen, the plaintiff changed his horse before a decree of specific performance was made yet lost. In *Capital and Suburban Properties Ltd v Swycher* the plaintiff changed horses after the decree and also lost. There an order for specific performance was not complied with and on motion by the plaintiff it was declared that the purchaser's deposit had been forfeited, that the vendors were at liberty to resell and that the purchaser should pay to the vendors any loss on the resale. On appeal it was held that at the trial the vendors were required to elect whether to repudiate the contract and claim damages or affirm the contract and recover any moneys due and that if the latter election was made by seeking specific performance (as was the case) the vendors could not later resile from this election and revive the claim for damages even though they could rescind.

In *Johnson v Agnew* the plaintiff's horse was virtually changed for him. There the vendors agreed to sell property which was mortgaged. The purchaser failed to complete and the vendors sought (inter alia) specific performance and damages in addition to or in lieu of specific performance. An order was made but before it could be given effect to the mortgagees sold for a sum insufficient to discharge the mortgages. The vendors no longer able to give title and in danger of becoming heavily insolvent applied (inter alia) for a declaration that they were entitled to treat the contract as repudiated by the purchaser and an inquiry as to damages. This was refused at first instance and the vendors appealed, seeking as a further alternative damages in lieu of specific performance under the Chancery Amendment Act 1858. The Court of Appeal followed its earlier decision in *Capital and Suburban Properties Ltd v Swycher* on the question of common law damages holding that no award could be made but did award equitable damages under the Chancery Amendment Act. The Court held that the default under the mortgages should not prejudice the plaintiffs since, if the purchaser had completed on time the plaintiffs would have been able to discharge the mortgages and give good title. On

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[24] Ibid p 889.
[25] [1942] AC 356 at p 399 per Lord Porter.
[26] [1979] 1 All ER at p 894.
[27] [1960] NZLR 247.
[28] [1975] 2 NZLR 269 at pp 277-278.
[29] [1976] 2 NZLR 453 at p 457.

the question of common law damages the Court of Appeal carefully reconsidered *Capital and Suburban Properties v Swycher*[30]. It was the view of the Court that there was no injustice in denying common law damages when a specific performance order proved abortive because whether a plaintiff chose the equitable remedy of specific performance or the common law remedy of damages the two remedies were in financial terms equivalent. Buckley LJ pointed out that if there had been an election to have damages the measure of damages:

> "would have been the excess of the contract price bringing the deposit into account over the value of the property at the date of the breach. The plaintiff would have thus recovered in the form of the property, free from the contract, the deposit and the damages, the equivalent of the purchase price. Leaving consequential losses out of account he could not recover more than this. Under the specific performance order, if it were worked out, the vendor would receive the whole amount due under the contract."[31]

Goff, LJ expressed agreement with this view saying:

> "Moreover for the reason given, and if I may respectfully say so, most clearly analysed by Buckley LJ in *Swycher's* case, namely that the vendor can be no better off by releasing him from his obligation to convey and awarding damages than he will be by working out the specific performance decree which he has elected to obtain there is no reason why if granted the indulgence of retaining the land he should also be allowed to claim damages at common law."[32]

The decision in *Swycher's* case was criticised by Dawson in an article "Damages After Specific Performance"[33]. Dawson argued that the true position was that the defaulting party's failure to comply with a decree of specific performance gave the innocent party a further right to obtain the normal remedies available for wrongful repudiation, namely to treat himself as discharged and to bring an action on the contract for damages or to rescind the contract and seek restitutio in integrum. There is a similar criticism of the decision in a casenote in [1976] NZ Recent Law 138 where the view was expressed that *Henty v Schroder* was wrongly decided. It is also of interest that the view taken by the Court of Appeal was in conflict with the approach of New Zealand Judges, eg Cleary J in *White v Ross* and Casey J in *Hunt v Hyde*. In the House of Lords Lord Wilberforce dealt with the position following an order for specific performance continuing his "uncontroversial propositions" saying:

> "Fourthly, if an order for specific performance is sought and is made, the contract remains in effect and is not merged in the judgment for specific performance. . . . Fifthly, if the order for specific performance is not complied with by the purchaser, the vendor may *either* apply to the court for enforcement of the order *or* may apply to the court to dissolve the order and ask the court to put an end to the contract."

He continued:

> "These propositions being as I think they are, uncontrovertible there only remains the question whether, if the vendor takes the latter course, ie of applying to the Court to put an end to the contract, he is entitled to recover damages for breach of the contract. On principle one may ask "Why ever not?". If, as is clear, the vendor is entitled (after and notwithstanding that an order for specific performance has been made) if the purchaser still does not complete the contract, to ask the Court to permit him to accept the purchasser's repudiation and to declare the contract to be terminated, why, if the Court accedes to this, should there not follow the ordinary consequences undoubted under the general law of contract, that on such acceptance and termination the vendor may recover damages for breach of contract?"[34]

As to *Henty v Schroder* he considered that

> "If it were not for the great authority of Jessel MR I can hardly believe that so fragile and insecure a foundation for the law would ever have survived."[35]

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[30] In which apparently the question of equitable damages was not argued.
[31] [1978] Ch at p 191; [1978] 3 All ER at p 322.
[32] Ibid pp 196-7, 326-7.
[33] (1977) 93 LQR 232.
[34] [1979] 1 All ER at p 890.
[35] Ibid p 891.

He observed that at first instance the decision had been followed, usually uncritically, and that text book authority in general supported the decision. He referred in particular to Williams' books on the subject and after quoting the passage earlier referred to stating the view that damages would not lie said:

> "My Lords, this passage is almost a perfect illustration of the dangers, well perceived by our predecessors but tending to be neglected in modern times, of placing reliance on text book authority for an analysis of judicial decisions."[36]

After considering the cases which supposedly supported the view in the text book he expressed the view that with the exception of *Henty v Schroder* none of them in fact supported the text and expressed the view that

> "The state of authority then, so far as English law is concerned, is that, starting from a judgment in which no reasons are given, and which may rest on any one of several foundations, of which one is unsound and another obsolete, a wavering chain of precedent has been built up, relying on that foundation which is itself unsound. Systems based on precedent unfortunately often develop in this way and it is sometimes the case that the resultant doctrine becomes too firmly cemented to be dislodged."[37]

He turned to decisions of the Australian Courts which had adopted as he called it "a robuster attitude." Presumably the New Zealand authorities were not cited. He referred to *McDonald v Dennys Lascelles Limited* [38] and *Holland v Wiltshire*[39] and then referred at length to *McKenna v Richey*[40] saying that he was happy to follow that case and concluded:

> "In my opinion *Henty v Schroder* cannot stand against the powerful tide of logical objection and judicial reasoning. It should no longer be regarded as of authority; the cases following it should be overruled."[41]

He then went on to say that the decision in *Swycher's* case was really a rationalisation of *Henty v Schroder* "the weakness of which case the Court well perceived"[42]. On the question of irrevocable election he accepted the view that an election to put an end to a contract by accepting the other party's repudiation was irrevocable saying "This is simply because the contract has gone, what is dead is dead"[43], but he did not, however, accept that the alternative election was likewise irrevocable saying:

> "A vendor who seeks (and gets) specific performance is merely electing for a course which may or may not lead to implementation of the contract; what he elects for is not eternal and unconditional affirmation, but a continuance of the contract under control of the Court which control involves the power, in certain events, to terminate it. If he makes an election at all, he does so when he decides not to proceed under the order for specific performance, but asks the Court to terminate the contract."[44]

He concluded that *Swycher's* case

> "Whether it should be regarded as resting on *Henty v Schroder* or on an independent argument based on election, was wrongly decided in so far as it denied a right to contractual damages and should so far be overruled."[45]

and that the vendors in that case

> "Should have been entitled, on discharge of the contract, on grounds of normal and accepted principle, to damages appropriate for a breach of contract."[46]

A point of particular interest in the decision is the treatment by Lord Wilberforce of the question as to the time at which common law damages should be assessed. This can be a matter of great importance where it is the purchaser who is the innocent party and either specific performance is refused or is rendered impossible by the action of the vendor as for example selling the property to a third party. In *Wroth v Tyler*[47] a case on equitable damages to be referred to shortly, Megarry J had left this question open and again in *Horsler v Zorro* he had suggested that where a purchaser had aban-

[36] Ibid p 892.
[37] Idem.
[38] (1933) 48 CLR 457 at pp 476-477.
[39] (1954) 90 CLR 409.
[40] [1950] VLR 360. This is the same case that Buckley LJ in the Court of Appeal in *Johnson v Agnew* had said that he would have been disposed to follow if the matter had been res integra.
[41] [1979] 1 All ER 883 at p 894.
[42] Idem.
[43] Idem.
[44] Idem.
[45] Ibid p 895.
[46] Idem.
[47] [1974] Ch 30; [1973] 1 All ER 897.

doned a claim for specific performance he thereupon ceased to treat the land as property in which he had a specific interest and that damages could perhaps be awarded on the basis of an analogy with a disappointed purchaser of goods but thought he should not take the point any further as it had been argued on one side only. Likewise, McMullin J in *Souster v Epsom Plumbing Ltd*[48] had considered the question briefly but preferred to leave it open stating that there were authorities both ways. A more flexible approach to common law damages had been foreshadowed in *Radford v De Froberville*[49] where it was said:

> "The older authorities in this area of the law were decided in times of relative financial stability in which the date of assessment made relatively little, if any, difference and the passage of time could be adequately compensated for by an award of interest. But that is not the position today and if the law is to bear any relation to reality it must keep pace with the era in which we live."[50]

The decision of the House of Lords is quite clear. Lord Wilberforce said:

> "In cases where a breach of contract for sale has occurred and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."[51]

If in such a case damages are to be assessed as at the date upon which the defaulting party renders an order for specific performance impossible rather than the date of the breach, then in a time of inflating land values a purchaser will nearly always be better off if he pursues resolutely a claim of specific performance even if he thinks he may later prefer to abandon this claim and seek damages. If he does so he need only establish that he acted reasonably to have damages awarded as at the later date.

Equitable damages

The right to equitable damages and the basis upon which such damages are awarded has not caused difficulty in New Zealand and here the value of *Johnson v Agnew* is to establish that there is no difference between the measure of damages at common law and in equity thus resolving some doubts previously expressed on this point. The most influential of the recent cases prior to *Johnson v Agnew* was *Wroth v Tyler*[52]. The defendant entered into an unconditional contract to sell for L6,000 (net of fittings) a bungalow occupied by his wife, his daughter and himself. The day after contracts were exchanged (and the contract therefore became binding on him) his wife unknown to him lodged a notice of her right to occupation under ss 1 and 2 of the Matrimonial Homes Act 1967 against the title at the Land Registry[53]. The defendant did not immediately learn of his wife's action and when he did instructed his solicitor to withdraw from the contract. The completion date was 31 October 1971 and the defendant having tried and failed to get his wife to withdraw the notice was unable to complete. In January, 1972 the plaintiffs issued a writ for specific performance seeking damages in lieu thereof. At the date of completion the value of the property was L7,500 but in January, 1973 when judgment was given the value had risen to L11,500. It was argued that the rule in *Bain v Fothergill*[54] applied. The rule stated in that case was that

> "Upon a contract for the sale of real estate where the vendor, without his default, is unable to make a good title, the purchaser is not by law entitled to recover damages for the loss of his bargain."[55]

Megarry J reviewed the cases and decided that the rule was inapplicable to registered land and also anomalous and said that it should not be extended[56]. The next question was whether the damages should be assessed at the date of the

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[48] [1974] 2 NZLR 515.
[49] [1978] 1 All ER 33.
[50] Ibid p 40.
[51] [1979] 1 All ER p 896.
[52] [1974] Ch 30; [1973] 1 All ER 897.
[53] This procedure is similar to that under s 42 of the Matrimonial Property Act 1976 (NZ) and despite differences in the English procedure the case is something of a warning to the NZ conveyancer.
[54] (1874) LR 7 HL 158.
[55] Ibid p 170.
[56] A similar view has been taken in New Zealand in *Waring v S J Brentnall Ltd* [1975] 2 NZLR 401 where Chilwell J said:

> "It is my judgment that a general application of the rule would be out of tune with conveyancing practices in New Zealand having regard to the precision and certainty which the provisions of the Land Transfer Act 1952 have created. It seems to me that the most that can be said is, as was said by McGregor J (in

breach or at the date of the Court's refusal to grant specific performance. As the amounts at issue were L1,500 and L5,500 respectively the question was of considerable significance. Megarry J briefly considered the question of common law damages but concluded that he did not need to explore that issue because equitable damages could be awarded under the Chancery Amendment Act 1858 (also known as Lord Cairns' Act). Megarry J referring to the Act stated that damages assessed under the Act were to be ascertained in accordance with that Act on a basis which is not identical with that of the common law"[57]. Section 2 of that Act provides that

> "In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement it shall be lawful for the same Court, if it shall think fit to award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such manner as the Court shall direct."[58]

Megarry J expressed the view that the Act had extended the field of damages and that the wording of s 2 envisaged that the damages awarded would in fact constitute a true substitute for specific performance and that the Court had jurisdiction to award such damages as would put the plaintiffs into as good a position as if the contract had been performed. This jurisdiction extended in his view to an award of damages assessed by reference to a period subsequent to the date of the breach in an appropriate case. This decision was applied in New Zealand in *Souster v Epsom Plumbing Ltd*[59] where an order for specific performance was refused but an order made for an inquiry as to damages. McMullin J was faced with a submission that although Lord Cairns' Act applied in New Zealand the reasoning of Megarry J in *Wroth v Tyler* that the Act permitted a measure of damages greater than that applied in Courts of common law was incorrect. It was argued in support of this submission that the Act did not confer an independent and substantive right to claim damages but was merely a procedural statute designed to give a Court of Chancery jurisdiction to award damages in lieu of or in addition to the making of an injunction or an order for specific performance which formerly those Courts had not had power to do. The English cases were reviewed at some length and in addition the learned Judge found considerable assistance in the decision of Scholl J in *Bosaid v Andry*[60] where the same view was taken as that of Megarry J in *Wroth v Tyler*. McMullin J pointed out that where a party seeks a decree of specific performance

> "he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead)."[61]

On that basis he thought that the logic in the judgment of Scholl J was hard to refute "for if the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the Court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end. Until the contract is brought to an end by the action of the Court, the contract remains on foot"[62].

It was accordingly held that the plaintiff was entitled to damages as at the date of making the order and that the proper measure of

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Jacobs v Bills [1967] NZLR 249) that the rule can "seldom" have application in New Zealand when the land is subject to the Act."

and see also *Malhotra v Choudhury* [1979] 1 All ER 186 where the same view was taken.

[57] This view was also that of Foster J in *Biggin v Minton* [1977] 2 All ER 647 at p 649 who referring to *McKenna v Richey* [1950] VLR 360 said:

> ". . . unfortunately at the end the learned Judge said that damages in lieu of specific performance are the same as common law damages which in my judgment they are not."

[58] The Act is in force in New Zealand. See *Ryder v Hall* (1905) 27 NZLR 385 at 394, *Dell v Beasley* [1959] NZLR 89, *Souster v Epsom Plumbing Limited* [1974] 2 NZLR 515 at 518 and *Dundee Farm Ltd v Bambury Holdings Ltd* [1976] 2 NZLR 747 at 756.

[59] [1974] 2 NZLR 515.

[60] [1963] VLR 465.

[61] Ibid p 526.

[62] Idem.

damages was the difference between the value of the land at that date and the contract price[63].

The view of Megarry J in *Wroth v Tyler* that equitable damages are to be assessed in a manner which is not identical with the common law was not accepted in *Johnson v Agnew* when it reached the House of Lords. Lord Wilberforce referred to the majority decision of the House of Lords in *Leeds Industrial Co-operative Society Ltd v Slack*[64] as deciding that Lord Cairns' Act created the power to award damages in some cases in which damages could not be recovered at common law and said:

> "But apart from these and similar cases where damages could not be claimed at all in common law, there is sound authority for the proposition that the Act does not provide for the assessment of damages on any new basis. The wording of s 2 that damages 'may be assessed in such manner as the Court shall direct' does not so suggest, but clearly refers only to procedure."[65]

After reviewing a number of authorities Lord Wilberforce considered that both having regard to those authorities and also on principle there was in the Act no warrant for the Court awarding damages differently from common law damages but he did say that the question was left open on what date such damages, however awarded, ought to be assessed. The principle that damages are compensatory was referred to it being pointed out that where the contract is one of sale assessment of damages is usually at the date of the breach but that this is not an absolute rule and that the Court had power to fix such other date as may be appropriate in the circumstances to avoid injustice. It was concluded that the vendors had acted reasonably in seeking specific performance and that the date on which damages should be assessed was the date on which that remedy became aborted. In fact the result in the House of Lords was more favourable to the plaintiff than in the Court of Appeal because the date was fixed as being the date upon which the mortgagees contracted to sell a portion of the property which was 4½ months later than the date as at which the Court of Appeal ordered specific performance.

It is obvious that in considering the question of common law damages Judges prior to this decision have hesitated over the question whether the award of common law damages could be made as at some date later than the breach. In one dramatic stroke these doubts seem to have been removed although a new uncertainty may now have been born, namely the relationship between "reasonableness" in the sense used by Lord Wilberforce and the duty to mitigate. On mitigation Oliver J in *Radford v De Froberville*[66] had said:

> "It is difficult to see how, assuming that it is reasonable for a plaintiff to seek specific performance, he can be under a duty to mitigate by acquiring equivalent property until he knows whether or not the Court is going to give him his decree"[67]

but he also said that that did not apply where the contract was one which could not be specifically performed where the plaintiff's right to damages must be qualified by his duty to mitigate. One may wonder whether some new principles may develop following *Johnson v Agnew.*

Conclusion and Summary

In view of the tendency to rather slow development of the principles of land law generally the developments referred to herein can only be described as dramatic. Of the 35 cases referred to in Lord Wilberforce's speech, no English case prior to *Wroth v Tyler* was decided after the end of the Second World War and the great majority were decided prior to the First World War. Similarly the relevant New Zealand decisions are quite recent. This could be an indication of the impact of inflation as suggested by Oliver J in *Radford v De Froberville.*

Now in the short space of six years since *Wroth v Tyler* the real nature of rescission in a contract for the sale of land has been settled the identical nature of damages at common law and equity has been established and the doctrine that such damages must be truly compensatory

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[63] There was an additional factor in that particular case, namely that the defendant had spent a considerable sum in improving the property which might have enhanced the value of the property and that it would be necessary for credit to be given for the amount by which the property had been enhanced in value. It is perhaps worthy of note that the defendant in such a case does not get an order for repayment of what he has expended but is entitled to no more than the amount by which the value of the property has been enhanced.

[64] [1924] AC 851.

[65] [1979] 1 All ER at p 895.

[66] [1978] 1 All ER 33.

[67] Ibid p 56.

giving the Court a wide discretion as to the time at which damages should be assessed has been re-examined.

In spite of this some questions still remain and no doubt further developments will yet take place. It is assumed that the distinction between common law and equitable damages will remain despite the equivalence of the two remedies. Presumably when the innocent party terminates contract, as in *Swycher's* case, or is forced to abandon a claim for specific performance prior to obtaining an order, as in the example given in *Souster's* case, of a purchaser forced to limit his claim to damages because the vendor has resold, the remedy will be common law damages but where the Court refuses to grant specific performance as in *Wroth v Tyler* or though such an order has become abortive, the plaintiff has not asked to be discharged from the order as in *Johnson v Agnew* the remedy will be equitable damages.

No doubt also the question of mitigation will receive further consideration now that a lead has been given as to fixing damages at a date later than that of the breach.

A further area of uncertainty is shown by the decision in *Grant v Dawkins* [68] which has some similarities to *Johnson v Agnew*. There it was the vendor who was in default and the cost of redeeming mortgages over the property exceeded the purchase money. The purchaser sought an order requiring the defendant to convey the property free from the mortgages or, in the alternative, an order that the purchase price be abated and damages paid as well if necessary so as to recoup the amount owing under the mortgages. The Court was prepared to make such an order but on the basis that the damages to be awarded should not exceed the amount by which the value of the property exceeded the purchase price. Valuation at the date of completion rather than the date of breach was permitted which was likely to result in an increase in the value of the property and thus the measure of damages. No authority was given by Goff J for the proposition that there was a limit to the amount of damages that could be awarded and it seems that in some cases this could work a hardship to the innocent party. The case is noted in 38 The Conveyancer where at page 47 it is suggested that possibly the plaintiff purchaser could have paid off the mortgages and taken an assignment of the mortgages and then sued the defendant under the personal covenant. If action such as this could enable the innocent party to recover the additional amount there seems no reason in principle why the Court should not grant the full measure of damages and it is submitted that the decision is inconsistent with the principle of placing the innocent party as far as possible in the position he would have been in had the contract been performed.

Finally an illustration of the principle that the innocent party must act reasonably and if he fails to do so this may affect his position in relation to the time at which damages is assessed is seen in *Malhotra v Choudhury*.[69] In that case there had been delay by the plaintiff in bringing the proceedings and the time at which damages were assessed was put back one year. A similar view was taken by Quilliam J in *Hickey v Bruhns*.[70]

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[68] [1973] 3 All ER 897.
[69] [1979] 1 All ER 186.
[70] [1977] 2 NZLR 71.

"SOLICITOR'S APPROVAL" — A PARTIAL SOLUTION

By PROFESSOR BRIAN COOTE, *University of Auckland.*

In his thoughtful letter published at [1980] NZLJ 296, Mr Alan Jenkinson agrees with the analysis of the cases given in the present writer's article on "solicitor's approval" clauses at [1980] NZLJ 78 but deprecates what he sees as the sympathies expressed. These he takes to lie with the imposition of constraints on the solicitors who have to operate under such clauses. The main thesis of the present writer's various articles and notes on "solicitor's approval" clauses certaintly has been that, *if* an immediately binding contract for sale and purchase is to be created, the solicitors concerned must be placed under constraints since their clients would otherwise have undertaken no immediate obligation (unless merely to consult their solicitors, which in real terms could hardly have been intended) and hence would have provided no immediate consideration. The law knows no category of simple executory bilateral contract where one party, only, provides consideration and one party, only, is bound. But since the question has been raised, the writer's personal view, for what it is worth, is that the preferable solution to the problem of the "solicitor's approval" agreement is to treat such clauses, wherever such an interpretation is possible, as preventing the formation of any contract at all unless and until any required approval has been signified. The possibility of such a construction was discussed in [1976] NZLJ 40, 41-42. The purpose of this present article is to state the reasons for the personal preference.

The basic problem with land sales in New Zealand stems from the way in which they are commonly conducted. It would seem that in a great many cases they culminate with the signature by both parties, before they have taken professional advice, to a common form of contract prepared by an estate agent and into which may have been inserted additional clauses drafted either by the parties themselves or the estate agent. It is a system fraught with dangers for the lay parties, particularly at the house sale level, and is one which the associations of estate agents in England have agreed it would be unprofessional for their members to follow ((1966) 63 L Soc Gaz 267), cited at [1975] NZLJ 123, 124.

The English solution has, of course, been to adopt the "subject to contract" system under which neither party is bound until their solicitors have prepared and exchanged a more formal later document. In Scotland, it appears, the problem does not arise because the solicitors themselves fill the role of estate agents. In this country, on the other hand, the only concession made to the protection of the parties has been the inclusion of conditions in what the Courts have generally taken to be an immediately binding contract, the characteristic condition being "subject to finance". The disadvantage of the "subject to finance" clause is that the protection it gives is only partial. Indeed, that may well be true of any system of conditional common form contracts. Certainly, the English Law Commission reported in 1975 (Report on "Subject to Contract" Agreements: Law Com No 65) that in its view *no* system of immediate conditional contracts could adequately protect the parties. The reasons for this view were summarised at [1975] NZLJ 123, 125.

In truth, to cling to the notion of an immediate contract places the Courts in a dilemma. The more likely it is that the parties intended an immediately binding contract, the greater the constraints on the solicitor are likely to be, because the greater the constraints, the greater the price being paid for the other party to be bound immediately. On the other hand, the greater the constraints on the solicitor, the greater the intrusion on the relationship of solicitor and client and, hence, the less likely it would be that the parties intended any such result. The proper way to escape from that dilemma, it is submitted, is for the Courts, wherever possible, to refuse to embark upon it in the first place and for them to hold, at least as a prima facie inference, that the use of a solicitor's approval clause means that no binding obligation has been accepted, and hence no contract has been formed, unless and until approval has been signified. That, as Mr Jenkin-

son has suggested, would be to do no more than give the words their normal literal meaning.

In *Carruthers v Whittaker* [1975] 2 NZLR 667, the Court of Appeal effectively solved the problem of the "authenticated signature fiction" for this country by recognising a common understanding that, on a sale of land, neither party is bound unless and until both have signed and copies have been exchanged. A similar service could now be served by making the formation of contracts subject to solicitor's approval, in the absence of strong indications to the contrary, depend upon the approval being given.

That would, of course, not in itself solve all the problems of consumer protection in land sales. Nor could it by itself solve all the problems of "solicitor's approval" agreements since, for the quite accidental reasons mentioned by Mr Jenkinson, the parties or their lay advisers may use words of present contract even though they bear no relation to the real intention of the parties. For these reasons, the present writer's view has been and remains that a statutory solution is also desirable.

A range of such constraints has been suggested, and canvassed in the writer's earlier articles. At one extreme is that of Cooke J in *Frampton v McCully* [1976] 1 NZLR 270, 277 and in *Boote v RT Shiels Ltd* [1978] 1 NZLR 445, 451, that the approval be confined to "conveyancing aspects". That test was influenced by *Caney v Leith* [1937] 2 All ER 532, a case involving the assignment of a lease as an incident to the transfer of a hotel business. The approval was expressly limited to the lease so that no question of approval of the bargain itself arose. In *Provost Developments Ltd v Collingwood Towers Ltd* (Supreme Court, judgment 15 November 1979) Holland J, quite rightly, it is submitted, saw a difference between a case such as *Caney v Leith*, supra on the one hand, and an agreement for sale and purchase such as the one before him where there was no express limitation of the approval and where the client could be expected to require and seek advice on the bargain itself in all its aspects, rather than on any one aspect of it alone. A situation in which the client expects and receives advice on the wider aspects of the bargain but in which the adviser might be compelled to withhold approval against his client's interests or contrary to his express instructions, or both, would obviously be an intolerable one for the adviser. It would be an intrusion into his normal duty to and relationship with his client of the most embarrassing and destructive kind. Worse still, if what happened in the *Provost Developments* case is any indication, it could lay open to public examination a relationship which in other circumstances is regarded as one of almost total confidentiality. It is difficult to suppose that the lay parties would either intend or envisage such a result.

On the other hand to recognise, as to a large extend did Holland J in the *Provost Developments* case, the realities of the solicitor-client relationship and to allow the solicitor to exercise his judgment on wider grounds, yet at the same time to hold that an immediately binding contract was formed, is to go to the opposite extreme. No doubt, technically, consideration might be found in an implied promise by the party concerned to consult his solicitor, and in a constraint on the solicitor not to act from malice or mere caprice. The real issue is whether a consideration so elusive and ephemeral is sufficient to support the inference of an intention to contract. It seems hardly credible that the one party would have intended to accept it as the price of his being bound immediately while the other of them was for practical purposes left free to do as he liked. Yet here, again, even so elusive a constraint could still constitute an intrusion on the relationship of solicitor and client and, potentially, render it open to some degree of public examination.

In these circumstances it is submitted that the "solicitor's approval" clause can fairly be seen as an attempt to give the parties the comprehensive sort of protection the "subject to contract" system provides in England, while remaining within the usages of the New Zealand practice of securing signed forms of agreement before the parties obtain professional advice. In the legal sense, if the object were to bind one party but not the other, the correct course would be to use a form of option. Similarly, if the intention were to leave both parties free, it would be to agree "subject to contract".

At least three reasons can be suggested why those courses are not followed. The first is the estate agent's desire to secure his commission. The second is the conservative use by estate agents without legal training of the forms with which they are familiar. The third is the very real convenience to all parties of having an already signed and exchanged agreement to hand once the condition has been fulfilled.

If, on the other hand, a fourth reason were a desire by one or other, or both, parties to bind the other of them without binding himself, the objection would have to be made that any such desire was incapable of fulfilment for the reason already given. That reason is that the law knows no category of executory bilateral

contract binding one party, whether absolutely or conditionally, but under which the other is not bound at all. The nearest approach allowed at law is an option. That is a contract where one party, for consideration, binds himself to hold open the offer of another, later contract.

If it is correct that the intention behind "solicitor's approval" clauses is to give comprehensive protection to the parties akin to that they would enjoy under the English system, a price has to be paid, as it is in England. The fact that neither party is bound until approval is given means that they risk being "gazumped". In England, the sanction against such conduct is moral opprobrium and no doubt the same could become true in this country as well.

So far, the case for saying that "solicitor's approval" clauses prevent there being an immediate contract has been argued from the need to protect the parties and their assumed intention to meet that need. But the case, it is submitted, becomes even clearer when the alternatives are considered. For the reasons already given a finding of an immediately binding contract makes it necessary to hold that constraints of some kind have been placed upon the solicitors concerned in the granting or withholding of their approval.

FAMILY LAW

THE ENGLISH SPECIAL PROCEDURE FOR DIVORCE

By W R ATKIN.

Substantive rules are becoming increasingly unimportant in divorce law today. Instead, far more attention in law reform is being paid to the procedures used in the divorce process. In New Zealand the traditional grounds for divorce are being replaced by the single ground of two years separation, and although a considerable number of cases have been argued in Australia on the meaning of "separation", for the most part the law and the facts will be quite straightforward. At the same time, however, New Zealand is proposing to make the procedural reform par excellence, the establishment of a family Court. If fully implemented, this change should be of far more significance than the alteration in the grounds of divorce.

A further change which may be contemplated in New Zealand is the adoption of a system similar to the English "Special Procedure" for divorce.[1] Under this system, the divorce decree is pronounced in open Court in the absence of the parties after the registrar has checked the forms completed by the petitioner. These forms are relatively simple and freely available from County Courts, along with a booklet for those proceeding without legal representation. Filing can be completed by post, hence the slightly misleading description "postal divorces". The filing fee is £16.

At the initial stage, the petitioner must specify the grounds for the petition, and where applicable, complete a statement setting out the arrangements proposed for the children. The respondent is served with these documents together with a notice of proceedings and acknowledgement of service. If the petition is undefended, the petitioner files an Affidavit of Evidence (the standard affidavit being set out in question and answer form) and a Request for Directions for Trial. The case is then put on the special procedure list and the papers examined by the registrar.

Once the registrar is satisfied that the petitioner is entitled to a decree, the pronouncement of the decree by the Judge is a mere formality. The Judge has no residual discretion to refuse the decree, if for instance he harbours doubts about the grounds being met by the petitioner's evidence. The rubber-stamping nature of the Judge's role was confirmed by the Court of Appeal in *Day v Day* [1979] 2 WLR 681 where the Judge was held to have no power to grant leave to file an answer out of time and to take the case off the special procedure list. In *Sims v Sims* (1979) 129 NZLJ 546 however, the Court of Appeal held that a special procedure decree nisi should not have been pronounced where the husband had indicated an intention

[1] The main rules relating to this are found in R 33 (3) and R 48 of the Matrimonial Causes Rules 1977. (SI 1977/344).

to defend and had made a properly constituted application to file an answer. Thus there is some remedy where a case is put on the special procedure list by mistake or without the respondent having had a proper opportunity to pursue his defence.

The special procedure was first introduced in 1973 and related only to undefended petitions of childless couples based on two years living apart. In 1975 it was extended to most other undefended petitions of childless couples and finally in 1977 to all undefended petitions, no matter what the grounds and whether or not there were dependent children. Along with this final extension came the removal of legal aid in divorce cases, but the New Zealand reader must remember that the English system permits payments for the giving of legal *advice* (as opposed to legal aid) in the filling out of the necessary documents. According to one publication,[2] the legal advice limit of L55 allows a solicitor to do about two and three quarter hours work before exceeding the limit.

The transformation which the special procedure has brought to the English situation can be seen from the relevant statistics. In 1976, 28 percent of divorces were by special procedure, in 1977, 66 percent and by 1978 (the most recent figures) 97 percent. As Ormrod L J said in *Day v Day* (supra at p 683), to call it the "special" procedure is a misnomer as "it is now the ordinary procedure for dealing with undefended cases of all kinds. . ."

The special procedure no doubt has certain advantages. It takes up less time of the Court, and is much cheaper, both to the parties and to the legal aid fund (under the previous English system). It enables "do-it-yourself" divorces to become a reality. It also overcomes what is, according to one piece of research, the "humiliating. . .public recital of the details of the marriage breakdown".[3] A dead marriage can be given a decent burial.

Nevertheless, several caveats need to be entered before the special procedure should be considered acceptable for New Zealand.

(1) The method of initiating the system (and later extending it) was by government decision and announcement.On what was a quite major and radical change in procedures, no public debate or discussion took place. When the point made at the beginning of this article is remembered, that in family law today procedural changes are just as important if not more important than substantive changes to the law, it will be appreciated how unfortunate the law reform process was in this instance.

(2) The procedural changes sit somewhat uneasily with the English substantive law. The latter requires irretrievable breakdown of the marriage to be proven by one of several "facts", including such traditional grounds as adultery and desertion. But as the Law Society has pointed out,[4] the special procedure effectively removes the opportunity for testing the parties' evidence in open Court. There is no cross-examination, for instance, of whether adultery has made it intolerable for the petitioner to live with the respondent (as required by s 1 (2) (a) of the Matrimonial Causes Act 1973). The relevance therefore of the substantive rules is minimised. An allied point to this is the suggestion that the special procedure is essentially an administrative process dressed up as a judicial act, providing the public with no assurance that justice is being done, and that the law is being correctly administered. No doubt much, though not all, of the sting of these points is removed with the introduction of the largely non-controversial ground for divorce of a period of separation.

(3) Mainly because of the removal of legal aid, solicitors are not brought into the divorce process until much later when they are asked to deal with ancillary matters. The legal advice scheme mentioned above is of only very limited assistance. According to leading researcher Mervyn Murch,[5] the removal of legal aid may unwittingly have also removed an early opportunity for "undercover" counselling and support by solicitors. (This is despite the criticism often levelled at the role of lawyers in family disputes!) It has also rendered irrelevant the requirement in s 6 (1) of the Matrimonial Causes Act 1973 that solicitors certify whether or not they have informed people of the availability of counselling services, because solicitors are no longer likely to be representing people at the time of divorce.[6]

The special procedure, then, provides a simple method for people to get divorced, but it does not truly 'free" married couples. It fails

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[2] *Torn Lives*? A Study by the Family Action Group (1979, Oxford), at p 152.

[3] Elston, Fuller and Murch "Judicial Hearings of Undefended Divorces" (1975) 38 MLR 609, 639.

[4] *A Better Way Out* (January, 1979) at p 14.

[5] "The Role of Solicitors in Divorce Proceedings" Part II (1978) 41 MLR 25, 33.

[6] Cf clause 8 (2) of the Family Proceedings Bill (No 2) 1979, which is drafted more tightly than the English provision and is not limited to divorce proceedings.

entirely to deal with the more significant aspects of marital breakdown, such as the settlement of the parties' financial affairs and the final determination of the custody of the children. Early legal advice may greatly assist in resolving these problems, but the special procedure serves only to delay such action.

(4) Not only is advice from solicitors available at somewhat too late a stage, but also no system of marriage counselling is available for the parties to try and reconcile or to conciliate their differences. Where couples have to appear and go through some form of conciliation (as with separation orders under the Domestic Proceedings Act 1968), the possibilities of reconciliation and agreement are at least kept open. The special procedure however, operates on the basis of non-appearance. Were New Zealand to adopt this procedure, would the success of the counselling and conciliation provisions of the family proceedings legislation be jeopardised?

Conclusion

It is not the purpose of this article to oppose procedural changes. On the contrary, it is reiterated that reform of the family proceedings rules is just as vital as the reforms contained in the principal legislation.

It is hoped however that because of their increasingly great significance, the procedures will not be reformed by back door methods. They should follow upon public discussion and an analysis of overseas experiences.

LEGAL LITERATURE

Environmental Law, David Williams, Butterworths 1980, xxx, 330 pp, with index. Reviewed by A A T Ellis.

David Williams' book has been awaited eagerly by those of us with a particular interest in the field of environmental law.

It is immediately plain that this definitive presentation will appeal to many others who have hitherto not recognised the validity of gathering many aspects of the law together for this purpose. Each chapter is a comfortable unit, wherein the author musters not only the propositions of law, but also the technical and planning bases upon which they depend. This is particularly true of the chapter on Water Law, an area in which the author has already established his reputation.

The book of some 300 pages traces the development of legal control of man's abuse of the environment from the smoke abatement laws of Edward I in 1273. It deals comprehensively with the law relating to air, land and water. The necessary emphasis on pollution and its modern controls is nicely balanced by full references to the law of nuisance and property. The author is at pains to emphasise the importance of Administrative Law remedies in this developing branch of the law.

The book is also essentially topical. Not only is it right up to date, but for the discerning reader it traces the relatively rapid, and even exciting, progress of the law over the past decade. Not only does the text give ample space to our own efforts, but full and scholarly references to cases, conferences, texts and a wide variety of overseas sources. The text is balanced and informative. It will encourage every reader to look wider for his or her comparisons and examples.

Mr Williams does not avoid a full treatment of controversial matters such as the National Development Act and Standing to Sue, and he devotes a chapter to the legal position of Forests, Native Plants and Trees.

In his preface, the author aplogises for omitting treatment of such topics as National Parks, Energy and Wild Life Protection. These topics are at present loaded with political and legal uncertainty. I cannot say that he has entirely made up for this by excellent dissertations on Noise and Marine Pollution. He need not, however, apologise, but if he insists on his apology, I personally would be satisfied if Volume II of *Williams' Environmental Law* soon appeared to keep this excellent work company.