Conciliation

In *Walker* v. *Walker* [1973] 2 N.Z.L.R. 7 the Court of Appeal accepted that the Domestic Proceedings Act (Part 2) placed no duty on the parties to take positive steps to effect a reconciliation. It was noted, however, that failure to do so might be taken into account by the court as an important factor in deciding whether or not to make a separation order. Hence if the parties failed to take some positive steps to achieve a reconciliation the court might be justified in refusing a separation order on the ground that the parties have failed to prove that they are unlikely to be reconciled.

Matrimonial property

Dryden v. *Dryden* [1973] 1 N.Z.L.R. 440 (Court of Appeal) arose from a dispute as to the ownership of a matrimonial home which was registered as a joint family home. The husband had made an application to the Supreme Court under s. 5 Matrimonial Property Act 1963 and had been granted an order giving him a two-thirds share in the home and the wife a one-third share. The wife appealed. It was held that a "question" arises sufficient to found jurisdiction under s. 5 where one spouse asserts a claim in the home which is different from that shown on the face of the title (per Richmond and Turner JJ.). The Court was not, however, prepared to uphold the order as both parties still lived in the home and, although there was serious disharmony, there was no divorce or separation pending. In view of this it was held that the Court should not make an order apportioning interests in the home and that the application was premature. The Court held that it also must be satisfied that the order would be just in all the circumstances before such an order would be made. McCarthy J. was of the opinion that "expressed" common intention (Matrimonial Property Act s. 6 (2)) might be read from conduct but was not prepared to accept that in this case the disharmony was sufficiently serious to negative the previously expressed common intention that they held the property as joint tenants.

E. J. M. Rawnsley.

LAND LAW

Licences — Equitable Estoppel

In *The Proprietors of Hauhungaroa 2 C Block* v. *Attorney-General* [1973] 1 N.Z.L.R. 289 the Court of Appeal held, following the decision of the Privy Council in *Plimmer* v. *Wellington City Corporation* (1884) 9 A.C. 199, that equity will protect a licensee where he has been encouraged to incur expenditure on the land in circumstances which give rise to a reasonable expectation that he will be able to continue to enjoy the benefits of his expenditure. On the facts in this case the Court held that:

"The appellant stood by and accepted the benefit of full performance by the Crown of that which it had encouraged and licensed the Crown to do. In such circumstances any attempt by the appellant to repudiate its own part of the arrangement, namely the licence given to the Crown, and to treat the Crown as a trespasser, would in my view amount to a fraud, which a Court of Equity would not suffer to prevail" (402, per Richmond J.).

Lease or Licence?

In *Daalman* v. *Oosterdijk* [1973] 1 N.Z.L.R. 717 McMullin J. was called upon to consider if a management agreement was a lease or a licence. The agreement provided for the payment of rent, and maintenance of the property, as well as for re-entry without notice in the event of the breach of any of the convenants.

The learned Judge said that it was first necessary to examine the terms of the deed and surrounding circumstances. In examining the deed a judge is not bound by the label used, but he must look at its substance rather than its form in order to interpret the intention of the parties, remembering that a grant of exclusive possession is of prime importance. Earlier it had been stated that a grant of exclusive possession will generally be indicative of a lease, but not necessarily so. The existence of a right of exclusive possession is not dependent on express words to that effect. It is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession.

Lease — Determination — Section 118 (7) Property Law Act 1952

In *Daalman* v. *Oosterdijk, supra,* it was held that s. 118 (7) Property Law Act 1952 (which relates to relief against forfeiture of a lease) only applies in respect of leases when proceedings for ejectment have been brought by an action and not where the landlord has re-entered and determined the lease. The lessee must seek his remedy in equity in cases of re-entry without action.

Lease — Option to Renew — Refusal — Section 120 Property Law Act 1952

In *Vince Bevan Ltd.* v. *Fingaard Nominees Ltd.* [1973] 2 N.Z.L.R. 290 the Court of Appeal laid down the conditions that would have to be met before the Court had jurisdiction to hear an application for relief under s. 120 Property Law Act 1952 against a refusal by a lessor to grant an application to renew the lease by the lessee.

These conditions are: (1) a lease which contains a covenant providing for the renewal of the lease; (2) a refusal to grant a renewal; (3) statement of the grounds for the refusal; (4) the ground must be a failure to perform a covenant in the lease. The Court added that if the notice of refusal *purported* to be on the ground that, or was based on the *allegation* that, there was a breach of a convenant, then that would be sufficient to give the Court jurisdiction.

Mortgage — Section 92 Property Law Act 1952 — Notice

In *Stanley* v. *Auckland Co-operative Terminating Building Society* [1973] 2 N.Z.L.R. 673 Perry J. held that for a notice by a mortgagor to a mortgagee in the event of a breach of a covenant in the mortgage to be valid for the purposes of s. 92 Property Law Act 1952 the notice must state: (1) the defect complained of; (2) the date on which the power of sale will be exercised or when the moneys become payable; (3) whether or not the defect is capable of remedy. The Court rejected the view that where there are a number of instalments in arrears the number must be stated. There was provision in the mortgage in this case for the payment of fines in the event of default. The defendant tried to argue that the notice should have made reference to this covenant in the mortgage, but the Court rejected this.

Land Transfer Act 1952 — Indefeasibility — Fraud — Easements

The leading case in land law in 1973 was undoubtedly the decision of the Court of Appeal in *Sutton* v. *O'Kane* [1973] 2 N.Z.L.R. 304. The case arose out of a dispute between the appellants and respondents concerning a right of way across the former's land to the respondent's land. The predecessors in title to both properties had entered into an agreement to create a legal right of way but had not carried out this agreement. At the time the appellants bought the land they believed that there was a legal right of way and they allowed the respondent to use it for some time. Relations between the two parties deteriorated and when the appellants learned that there was no legal right of way they refused the respondent access.

The Court of Appeal was called upon to consider: (1) if there was a legal easement or not; (2) the status of the easement, whether legal or equitable, under the Land Transfer Act 1952 and in particular whether it had been omitted from the title for the purposes of s. 62 (b) of that Act; (3) whether the appellant had committed fraud in refusing to allow the respondent to continue to use the right of way.

(1) In answer to the first question the Court agreed unanimously that the right of way was an equitable easement. The Court stated that there were only two ways by which a legal easement could be created under the Land Transfer Act 1952; and those ways were either by means of an easement certificate pursuant to s. 90A of the Act, or by a memorandum of transfer pursuant to s. 90 (1) of the Act. Counsel for the respondent argued that the latter method had been relied on here. In support of this contention he pointed to the memorial noted against the title which included the words, "Subject to the DCC's conditions of consent to the grant or reserving of a right of way hereof as endorsed on deposited plan 11192". The Court rejected this saying that it did not meet the requirements needed to create a legal easement.

The Court did not lay down an exhaustive list of these requirements. In particular the Court refused to express a view as to whether s. 90 (1) requires an express statement as to the

dominant tenement. But the Court did consider some of the requirements: (1) there must be no variation in substance from the ordinary form of the memorandum of transfer referred to in s. 90; (2) express words must be used in the memorandum to single out the interest intended to be created; (3) the memorandum must be executed by the transferee. The Court did not have to proceed further as the purported creation of an easement by the earlier owners of the land did not meet the third requirement.

(2) The argument that the right of way in question was an omission from the title for the purposes of s. 62 (b) Land Transfer Act 1952 was rejected by the Court. That section refers to the omission or misdescription of any right of way or other easement and provides that this is one of the exceptions to the principle that a registered proprietor holds title to the land absolutely free. The reason for the Court's conclusion was that s. 62 (b) refers to those easements which are registered or are capable of being registered only. The section does not have application to equitable easements as was the situation in this case.

(3) In considering the issue of fraud the Court after referring to s. 182 of the Act agreed that mere knowledge of an interest is not fraud, and that fraud means actual dishonesty or dishonest conduct. This was familiar ground. What was new was the Court's consideration of whether for the purposes of ss. 62 and 182 Land Transfer Act 1952 fraud could only be found, if at all, at the time of registration, or if it could be found after registration. It was argued in this case that there was no fraud at the time of registration but that fraud arose later with the repudiation of the right of way by the appellants.

Wild C. J. found that there was no fraud at the time of registration (as did all the Judges) and also that on the facts there was no fraud after registration. Richmond J. agreed with the conclusion of the learned Chief Justice, but went further to argue that for the purposes of s. 62 fraud is limited to the time of registration. He expressly went no further than that, saying that in other circumstances fraud might arise after registration. Turner P. disagreed with the majority arguing (1) that neither s. 62 nor s. 182 precluded the possibility of fraud after registration, and (2) that on the facts in this case there was fraud.

While the majority did not have to consider if there was fraud on the facts since they had held it could not arise in this case as a matter of law, they did consider the evidence. Unlike the situation in *McCrae* v. *Wheeler* [1969] N.Z.L.R. 333, there was no express undertaking by the appellants to recognise the right of way. In fact both parties operated on the mistaken belief that there was a legal right of way and the majority found that this was an honest belief on the appellants' part and that there was no intention to mislead the respondent. Whilst the majority restricted their consideration of the question of fraud to the Land Transfer Act 1952, Turner P. took a wider approach. The learned President argued that the appellant knew of the existence of an equitable right of way, its use, and that

the respondent had expended money on it. This in the learned President's view was more than mere knowledge for the purposes of s. 182 and amounted to fraud.

Legislation

The Rent Appeal Act 1973 provides for the setting up of Rent Appeal Boards with the function of assessing, on application from either landlord or tenant, equitable rents. In making such an assessment the Board is to take into account the matters referred to in s. 8 and such assessments are to remain in force for one year. There is provision in s. 9 (1) for the rehearing of applications and in s. 12 for appeals to the Supreme Court on questions of law.

D. J. Clark.

PLANNING LAW

Operative district scheme — conditional use

In *Pap* v. *Onehunga Borough Council* (1973) 4 T.C.P.A. 347 the appellant had applied under s. 28C for consent to erect a factory in addition to existing factory premises. The Council in granting its consent imposed as one of the conditions that an existing building on the site be removed because it did not comply with the fire resistant ratings for the area. The Appeal Board held that the power to make conditions under s. 28C (3) is to be construed as limited to the imposition of conditions with respect to matters relevant to the implementation of planning policy in accordance with the Act and the District Scheme and that the cessation of uses which are existing uses under s. 36 of the Act or the demolition of existing buildings in which such uses are being carried on, for the sole reason that the buildings do not have the fire resistance ratings which would be required for new buildings, cannot be made a matter of planning policy. The condition was therefore held to be unreasonable and void.

Operative district scheme — change or review — specified departure

In *Auckland Gliding Club* v. *Franklin County* (1973) 4 T.C.P.A. 355 an application for specified departure from an operative district scheme was made under s. 35 of the Act. Between the date of application and date of hearing public notification of a change in the District Scheme was given under s. 30A. The Appeal Board held that where such a situation arose the proper procedure to follow was for the applicant to lodge an additional application under s. 30B. The applications would then normally be heard together but separate decisions would be given in the terms of each section. In *MacDonald* v. *Dunedin City* (1973) 4 T.C.P.A. 305 an application was lodged under s. 30B but before the matter was finally disposed of the change was implemented.