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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

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C.P. No.132/93

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BETWEEN TALLANGATTA PROPERTIES LTD

Plaintiff

A N D BRUCE EDWARD O'MALLEY

Defendant

Hearing: 30, 31 May 1994

Counsel: P.M. James & K.J. Crossland for Plaintiff
Defendant in person

Judgment: - 2 JUN 1994

JUDGMENT OF TIPPING, J.

Introduction

In early 1989 the Defendant, Mr B.E. O'Malley was in financial difficulties. He had only one asset of substance left. It was a property situated at Tallangatta Bay in Kenepuru Sound. This property was on a freehold title but also enjoyed the benefit of what was then called a foreshore licence issued under the Harbours Act 1950. That licence authorised Mr O'Malley to use and occupy part of the foreshore and land below low water mark on which were situated a jetty, boatshed and slipway. The land on which these improvements were located is often colloquially referred to as the Queen's Chain. In addition a walkway linking the boatshed to the house was constructed. Its lower part was also on the Queen's Chain.

Because of the financial pressure which he was under, Mr O'Malley wished to take steps to transfer the Tallangatta Bay property out of his name and into a trust for the benefit of his family. In these circumstances Mr O'Malley approached his old friend Mr E.G.P. March. Mr O'Malley told Mr March that the Tallangatta Bay property was his last major asset and that he wanted to realise that property so as to produce funds to meet some of his more pressing obligations. At this time the Sounds property was subject to a first mortgage to the nominee company of Harman & Co, Mr O'Malley's solicitors. There was also a second mortgage over the property to Westpac Banking Corporation primarily to secure Mr O'Malley's personal overdraft.

Mr O'Malley told Mr March that he could not raise the necessary finance from other sources. Accordingly he asked Mr March whether he would be prepared to assist by purchasing the property. Mr March was not looking for such a property at this time. Nevertheless, because he was concerned for Mr O'Malley and his family, he was prepared to consider the idea. Mr March had never seen the property and relied on what Mr O'Malley told him about it. Mr O'Malley told Mr March that the property enjoyed the benefit of a jetty, boatshed and a walkway to the house. There was no specific mention of the foreshore licence but Mr March, naturally enough, assumed that if he should purchase the property he would get the benefit of the foreshore improvements as well as the house itself.

The power and water are connected to the boatshed and jetty from the house. The power source for the boatshed and the jetty is in the house. There is also a single alarm system on the property which covers both the house and the boatshed on one circuit. The jetty is of the floating kind. It has the capacity to move up and down with the tide but is, of course, otherwise fixed. The property has no access by motor vehicle. It is possible to walk in but only with considerable difficulty. It would be possible

to fly onto the property by helicopter but the whole layout of the house and its connection by means of the walkway to the jetty suggests that access by water is what is generally intended.

Events in Question

On 17 March 1989 Messrs O'Malley and March entered into a contract for sale and purchase of the property which was described in the agreement as comprising 5638 square metres, being the land in Certificate of Title 2A/287. That was the legal description of the property without the land and assets covered by the foreshore licence. The purchase price was fixed at \$320,000.00 and the possession date was said to be 7 April 1989. The agreement is on the third edition (1987) of the form approved by the Real Estate Institute and the New Zealand Law Society. It was subject to two special conditions numbered respectively 14 and 15. Special condition 14 was a conventional finance condition making the agreement subject to Mr March arranging finance satisfactory to himself within fourteen days. Special condition 15 provided as follows:

"This agreement is subject to the vendor [Mr O'Malley] receiving an offer for the sale of his Markline Launch acceptable to him within 7 days provided that it is acknowledged that this provision is solely for the benefit of the vendor who may waive it at any time within the 7 day period."

In the agreement the purchaser is described as Mr March or his nominee. Mr March signed "as nominee".

The evidence establishes that nothing was done to implement this agreement and it appears to have lapsed. Indeed there is some suggestion that this particular agreement was entered into in order to buy time with Mr O'Malley's creditors. In his evidence Mr O'Malley initially suggested that the purchase price of \$320,000.00 was established by reference to a valuation prepared by a man called Newdick. However, the formal valuation of Mr Newdick is dated 22 May 1989 and it appears that in

this respect Mr O'Malley must have been in error, unless there was some earlier oral intimation by Mr Newdick of his valuation. There is no evidence of that. The Newdick valuation has later relevance.

A little later, probably some time in May 1989, Mr O'Malley approached Mr March again. He reiterated his concerns about his financial position. He told Mr March that he wished to protect the interests of his family. He took steps in this direction by establishing a trust. The document to achieve this is in evidence. The copy in the agreed bundle does not appear to be dated. The document is described as being between "B.E. O'Malley Trust" (sic) as the settlor and Mr March "hereinafter called the Trustees" (sic). The document was signed by Mr O'Malley himself as settlor and it was also signed by Mr March as trustee and by Mr O'Malley as trustee. Another relevant step was taken. A company called Tallangatta Properties Ltd, the Plaintiff in this proceeding, was incorporated with Mr March as the principal shareholder and governing director. Mr March undertook that he was holding his shares in Tallangatta Properties in his capacity as a trustee of the B.E. O'Malley Trust.

The next and for present purposes crucial step was the transfer of the property at Tallangatta Bay from Mr O'Malley to Tallangatta Properties Ltd. The formal memorandum of transfer appears to have been originally drafted on the basis that the property was going to be transferred subject to the existing mortgages. Indeed as I understand the evidence, the transfer was originally lodged for registration and subsequently withdrawn. I am not entirely sure whether that was before or after certain amendments but that is not material. The memorandum of transfer recited that it was in pursuance of the agreement dated 17 March 1989. The consideration was expressed to be \$210,000.00, although it is apparent that this figure was altered from another figure which may well have been the originally intended price of \$320,000.00. In short, pursuant to the memorandum of transfer, as

ultimately registered, all the land in CT 2A/287 was transferred by Mr O'Malley to Tallangatta Properties Ltd for \$210,000.00.

In order to fund the purchase Tallangatta borrowed the purchase price of \$210,000.00 from the Countrywide Bank. Because of a perceived conflict of interest, Messrs Harman & Co (primarily Messrs R.C. Standage and C.S. Cousins) decided that for the purposes of this transaction Tallangatta Properties should be independently represented. Mr Kerry Williams was instructed to act for both Mr O'Malley and Tallangatta Properties, i.e. vendor and purchaser, while Messrs Harman & Co (Mr R.C. Standage) acted for Countrywide Bank. Mr Williams' contribution to the affair was minimal. In his own words he acted simply as a functionary and as a vehicle for the movement of funds. He did not receive any fee.

Issues

The whole problem and what has led to this litigation is that the foreshore licence was not transferred from Mr O'Malley to Tallangatta Properties along with the freehold. Tallangatta Properties through Mr March says that it was always part of the deal that the foreshore licence and associated improvements were to be transferred. Mr O'Malley says that while this may originally have been intended, a studied decision was made by him to exclude the foreshore licence and the associated assets and that this was made clear to all concerned before the transaction was implemented. The onus is on Tallangatta Properties to satisfy me on the balance of probabilities that its version of the contract is the correct one.

In that respect Tallangatta relies first on the evidence of Mr March... He was clear and precise in his evidence that there was never any change from the original intention to transfer both the freehold and the foreshore licence. That also was the understanding of Countrywide Bank through its solicitor Mr Standage. This is where the Newdick valuation comes back into the picture. That valuation, dated 22 May 1989, was

referred to in the loan offer made by Countrywide Bank to Tallangatta Properties Ltd and dated 6 July 1989. That loan offer was made subject to a special condition that Mr Newdick give his written consent for the Bank to rely on his 22 May valuation. As is conventional the Bank wanted the ability to rely on the valuation for its purposes because the valuation had earlier been prepared without reference to Countrywide.

Mr Newdick duly gave approval, or so I infer from the circumstances, and this meant that Countrywide was expressly relying on his valuation in agreeing to advance \$210,000.00. This amount was the figure up to which Mr Newdick considered the property would be a satisfactory security for a first mortgage advance. It represented 70% or thereabouts of Mr Newdick's total valuation of \$303,000.00. That figure did not include chattels and when they (fixed carpets and curtains) were brought in at an estimate of \$7,000.00 the total valuation became \$310,000.00.

The key point is that when setting out the basis of his valuation, although he did not refer to the foreshore licence as such, Mr Newdick referred in some detail to the improvements situated on the land covered by the foreshore licence. He referred to the near new boatshed and boat ramp, the "excellent floating jetty" and the timber steps which had been built from the jetty up to the house. In reaching his total valuation Mr Newdick included figures of \$9,250.00 for the boatshed, \$15,000.00 for the "jetties/walkway", \$3,000.00 for the boat ramp and \$8,000.00 for the steps to the house. It is perfectly obvious therefore that Mr Newdick's valuation was based on the proposition that the property comprised not only the freehold but the foreshore licence and associated assets.

Mr Standage's evidence, so far as this point is concerned, supports the evidence of Mr March that at no time was there a change from what was originally contemplated, i.e. the freehold plus the foreshore licence. Mr O'Malley's evidence was to the contrary. He asserted that it

was important to him that the transaction be entirely above board. He was therefore, so he said, mindful of the need to put Tallangatta in funds to span the difference between the amount which could be borrowed (\$210,000.00) and the value of the property (\$310,000.00) as per Mr Newdick. Because he could not do this, Mr O'Malley asserts that he decided to exclude the foreshore licence and associated assets from the deal. He contended that certain difficulties with his father also led to this consequence. It was said by Mr O'Malley that his father would be giving evidence to support his proposition but when the time came the evidence was not called.

Mr Williams' involvement in the affair was such that he could not say which version was correct, in spite of the fact that he was purportedly acting for Tallangatta. Mr O'Malley gave evidence from which I gained the clear impression that Mr C.J. Cousins was privy to his change of plan. It is therefore relevant to note that Mr O'Malley did not call Mr Cousins to support him. Mr O'Malley acknowledged that there was nothing whatever in writing to which he could point to support his contention. He suggested however that the amended purchase price of \$210,000.00 supported his version of events.

If there had been any respectable evidence that the foreshore licence and associated improvements were truly worth \$100,000.00 that might have been a point of some force. The only evidence which I have suggests that the true figure would have been substantially less - see Mr Newdick's valuation. Reference can also be made to the provision in the contract of sale from Tallangatta to Mr Hill by means of which the sum of \$30,000.00 was held back pending resolution of the point at issue. It is far more likely in my view, having considered all the evidence, that Mr March is correct when he said that the amended purchase price simply reflected the amount which could be borrowed.

Mr Standage was inclined to agree with my impression that the figure of \$210,000.00 was also convenient for another reason. If taken at face value, it would conceal the true worth of the property which was in the vicinity of \$310,000.00. This, at least at face value, might tend to put Mr O'Malley's creditors off the scent. Indeed Mr Standage observed that to show any amount greater than \$210,000.00 in the transfer would have "avoided the compromise" which Mr O'Malley had arranged with Westpac. It would also, as Mr Standage acknowledged, have resulted in Tallangatta Properties owing Mr O'Malley money which would no doubt have been inconvenient both to the company and to Mr O'Malley viz a viz his creditors.

In short I reject the suggestion that the stated consideration of \$210,000.00 supports Mr O'Malley's version of the contract. It is my judgment that Mr O'Malley has sought after the event to take opportunistic advantage of the way in which the consideration for the transfer was expressed. Mr O'Malley also argued that the condition in the agreement of 17 March 1989 concerning his Markline launch supported his contention. While it is clear that this agreement was subject to Mr O'Malley receiving a satisfactory offer for the sale of his launch, the evidence falls a long way short of supporting the proposition that the sale of the launch was going to produce sufficient funds to bridge the gap between what could be borrowed and the true worth of the property. A document in evidence, which purports to be an extract from either a final or a draft proposal by Mr O'Malley to his creditors, records that the boat was sold for \$120,000.00. The document then goes on to record that the major part of the sale price went to repay a chattel security on the boat and the balance was applied to Mr O'Malley's creditors and his general expenses. The point about the boat which Mr O'Malley claimed to support his view of the case clearly, on this basis, does not do so.

There is no contemporaneous document to support Mr O'Malley. Indeed there are documents, some of them sworn documents, to which Mr James referred in cross-examination and in his submissions, which, if anything, point in the other direction. At no stage was any distinction made between the freehold and the foreshore licence. For example, in the same document as that referred to above concerning the launch, Mr O'Malley appears to be setting out certain assets which he had earlier owned. He speaks of the Harewood property, a Rolls Royce, and then what he described as "a bach in the Sounds at Tallangatta Bay". The document is drafted on the basis that Mr O'Malley sold the bach to Tallangatta Properties for \$210,000.00. It then goes on to suggest that Mr O'Malley had the property valued by a firm of valuers at \$207,000.00. Mr O'Malley seemed to acknowledge in his evidence that this valuation was historical and irrelevant but the clear impression given by the document is that the valuation supported the purchase price. There is no suggestion that Mr O'Malley had retained the foreshore licence and improvements which is the only honest basis upon which such a contention might have been possible.

The document appears to have been drafted to make the creditors think that Tallangatta Properties had paid full value for the whole property and thus put them off the scent of the proposition that the property had been transferred for an inadequate consideration. Mr O'Malley purported to explain why he had not included the foreshore licence and associated assets in the statement by saying that he had constituted himself a trustee of those assets for his family. No declaration of trust or other similar document was produced. Mr O'Malley seemed to be of the view that as he was the legal owner he could simply make himself trustee without formality. This overlooks the obvious point that a transfer from Mr O'Malley as beneficial owner to himself as trustee for others involves a transfer of the beneficial

interest and would, if true, amount to a gift of the value of the assets transferred.

The inconvenient fact that no gift duty was paid and no gift statement was in evidence must cast considerable doubt on the proposition. I say that because Mr O'Malley appeared to suggest that he had received legal advice about the matter. Although the quality of the legal advice evident in this case is not high, it seems hardly conceivable that a solicitor could advise a client that the beneficial interest in assets claimed to be worth \$100,000.00 could be satisfactorily shifted by oral declaration without a gift statement or an acknowledgement of debt at the very least. Indeed, if Mr O'Malley was constituting himself a trustee of the foreshore licence and associated assets, he, as trustee, would clearly owe himself their value and thus he would be in exactly the same difficulty as he says he was so anxious to avoid in the case of Tallangatta Properties.

In my judgment, having carefully considered both the oral evidence and the relevant documentation, Mr O'Malley's contention is wholly unconvincing. I accept the evidence of Mr March and that of Mr Standage. They both gave their evidence candidly. Mr Standage fairly acknowledged the shortcomings involved in his oversight of the foreshore licence. It was suggested by Mr O'Malley that Mr Standage had perjured himself to feather his firm's nest. This proposition derived from the contention that Mr Standage and his firm stood to benefit from the success of Tallangatta Properties in this case because such success would produce a further \$30,000.00 from the purchaser Mr Hill which would go to Mr Standage's firm under an arrangement earlier struck. I have borne that point in mind but it does not lead me to the view that Mr Standage's evidence was false, let alone deliberately false.

The inherent probabilities support Tallangatta's case. If you are transferring a property which relies for access on a jetty, boatshed and

slipway you would ordinarily transfer the means of access as well as the property. As Mr James put it, you ordinarily transfer the key with the house. In a sense the foreshore access is no more than a very expensive key to the convenient enjoyment of the freehold. The inherent probabilities strongly favour the transfer of the freehold and the foreshore licence together. Although Tallangatta has the onus of proof, I am entitled to bear the inherent probabilities in mind, along with the oral and documentary evidence, and to look for evidence which suggests that the bargain was in fact something inherently improbable. Put at its simplest there is no evidence supporting Mr O'Malley's version of events, but his own say so.

Having given his evidence and all the points he made careful consideration I am bound to say that I cannot accept what he told me. Thus I hold that the transaction between Tallangatta Properties Ltd and Mr O'Malley, entirely oral as it was, represented an agreement whereby Mr O'Malley was to transfer to Tallangatta both the freehold and the foreshore licence and associated improvements. Mr O'Malley has only performed that agreement in part and when called on to perform the balance, i.e. to transfer the foreshore licence, he has refused to do so. He is thereby in breach of contract.

Legality of Contract

Before considering the relief to which Tallangatta may be entitled it is necessary to consider whether the contract is legally enforceable at all. Although the point was not pleaded, nor raised by Mr O'Malley, the Court must take notice of any illegality which it may find in a contract. I must therefore consider whether the contract is prima facie unenforceable for illegality. If that is so I must consider whether, as Mr James argued, Tallangatta should be given relief under the Illegal Contracts Act 1970.

There are two bases upon which the contract is vulnerable to an allegation of illegality. In accordance with my earlier findings the substance

of the contract was that Mr O'Malley was to transfer the freehold and the foreshore licence with its associated improvements to Tallangatta Properties Ltd for \$210,000.00. On the evidence before the Court the true worth of the assets involved at the time of the transaction was in the vicinity of \$310,000.00. Thus there was, at least prima facie, an inadequacy of consideration passing from Tallangatta to O'Malley. The assets being transferred were worth \$100,000.00 more than the price being paid for them.

Mr James suggested that this prima facie appearance was not in fact the reality because as well as the Countrywide Bank mortgage Tallangatta gave a contemporaneous mortgage to Harman's nominee company. That is undoubtedly so but there is no clear evidence demonstrating that by dint of giving that mortgage Tallangatta was giving consideration to Mr O'Malley. I am by no means clear on the evidence what this mortgage related to. There was a suggestion that it was securing costs which Mr O'Malley owed Harman's but if that were so one would have expected the mortgage to have been to the firm rather than the nominee company, although I suppose the nominee company could have taken the mortgage on behalf of the firm.

Even if the mortgage did secure costs owed by Mr O'Malley there is no evidence to suggest that Mr O'Malley was on the giving of the mortgage, released from any personal obligation. At best therefore it would seem that the mortgage was by way of additional security and not by way of exoneration of Mr O'Malley. While Tallangatta Properties may thereby have guaranteed Mr O'Malley's costs, it is clear from the evidence that steps were taken to try and invalidate this mortgage. Thus on all fronts it is quite unclear whether the giving of the mortgage provided consideration from Tallangatta Properties to Mr O'Malley such as would dispel the prima facie

conclusion that Mr O'Malley made an undeclared gift of approximately \$100,000.00 to Tallangatta when the transaction was implemented.

For the purposes of the Estate & Gift Duties Act 1968 a gift is a disposition of property without fully adequate consideration in money or money's worth passing to the person making the disposition. Where the consideration is inadequate there is a gift to the extent of the inadequacy. On the evidence I am of the view that there probably was a gift inherent in this transaction. Pursuant to s.86 of the Act gift duty, which would undoubtedly have been payable on this analysis, is a debt due and payable to the Crown by the donor (Mr O'Malley). Without excluding the liability of the donor gift duty is also a debt payable to the Crown by the donee (Tallangatta).

It is possible that on a more detailed analysis and a fuller understanding of the Harman nominee mortgage issue it may be able to be shown that there was no element of gift involved, or at least no dutiable gift. I am simply stating the position as it appears on the evidence before me. I would have thought, with respect, that in terms of Tallangatta's case it would have been reasonably obvious that prima facie a gift arose and therefore it was for Tallangatta to establish to the Court's satisfaction that the prima facie position was not in fact the correct position. It was inherent in Tallangatta's case and its version of the contract that assets prima facie worth \$310,000.00 had passed for a consideration of only \$210,000.00.

Pursuant to s.95 of the Act it is an offence wilfully or negligently to give false information to or to mislead or attempt to mislead the Inland Revenue Department in relation to any liability for gift duty. Tallangatta presented the transfer for assessment of stamp duty. A nil assessment was made and there was nothing wrong with that because the property was residential. It is, however, more than arguable that false information was given to the Department in that the substance of the

transaction and in particular the value of the assets being transferred was not correctly set out. It is also more than arguable that the Department was negligently misled into thinking that there was no element of gift involved.

If that is so, the consequence may well be that the transaction represented an illegal contract within the meaning of s.3 of the Illegal Contracts Act 1970. Because of the lack of clear evidence and the lack of any helpful argument on the point, it is not possible for me to say conclusively whether this is so but I shall assume it to be so and then decide whether or not Tallangatta should have relief. There is a further basis upon which the transaction may well amount to an illegal contract. By dint of the inadequacy of consideration the deal, in terms of Tallangatta's case, seems to me, at least prima facie, to have amounted to a contract intended in material part to defeat Mr O'Malley's creditors.

The idea seems to have been to get assets worth \$310,000.00 out of Mr O'Malley's name and into the name of a trust in return for a payment of only \$210,000.00. As Mr Standage acknowledged, at least at face value this appears to have been an attempt to deprive Mr O'Malley's creditors of access to \$100,000.00. Again the point was not explored in any depth and may also be subject to the Harman & Co mortgage point. My view of the evidence as it stands is, however, that the point is seriously arguable and this may be a further ground upon which Tallangatta, before it can enforce the contract, needs relief under the Illegal Contracts Act 1970.

Relief Under Illegal Contracts Act 1970

The essential starting point is that an illegal contract has no effect. This means that it is unenforceable to the extent that it remains unperformed. However, the Court may in terms of s.7 grant relief. The relief available includes validation of the contract in whole or in part. Here validation is required in part, i.e. that part which remains unperformed. Although no formal relief had been sought by Tallangatta in the pleadings, Mr

James sought such relief orally and Mr O'Malley elected to make no submissions.

In considering whether to grant relief I must have regard first to the conduct of the parties. For this purpose I shall treat Mr March's mind as being the mind of Tallangatta. I am satisfied that none of the matters upon which the contract may be illegal was known to Mr March. His motivation was simply to assist an old friend and he had reason to believe, both from what Mr O'Malley told him and because the transaction was in the hands of solicitors, that everything would be above board. I am therefore of the view that in relation to Tallangatta's conduct there is no reason why relief should not be granted and indeed every reason why it should. Mr March was innocent of any possible wrongdoing and his motives for agreeing to be involved in the transaction were genuine and proper.

I am then required, in the case of a breach of any enactment, to consider the object of the enactment and the gravity of any penalty provided for such breach. In the case of the gift duty point the object of the Act is to avoid people making concealed gifts. It is also to recover gift duty where a gift has been made. The primary liability is of course on the donor, Mr O'Malley, but there is a parallel liability on the donee, Tallangatta. I am satisfied, however, that Mr March had no reason to think of gift duty and I do not think such problems as there may be on this front should mean that the transaction remains unenforceable.

The same could well be said in relation to the possible detriment to Mr O'Malley's creditors. Again I am satisfied that Mr March had no reason to think that he was lending himself to a scheme which had or might have that effect. I doubt that he even knew what consideration had been put in the memorandum of transfer or how the transaction was being structured. He knew that he was assisting in moving assets from Mr O'Malley to a trust but there is nothing wrong with that as a concept and

such inadequacy of consideration as there may have been is not something of which Mr March was aware.

I have considered the whole compass of the case and in particular the clear indication in the Act that I must not grant relief if I consider that to do so would not be in the public interest. In this particular case I can see nothing contrary to the public interest in granting relief and I therefore order that if the contract is an illegal contract it is to be validated to the extent necessary for the purposes of the relief which I propose to grant hereunder.

Remedy

Tallangatta seeks principally an order for specific performance. It seeks an order requiring Mr O'Malley to transfer the foreshore licence in terms of the contract. The foreshore licence has become what is known under the Resource Management Act 1991 as a coastal permit: see s.87(c). A coastal permit is a type of resource consent. Section 122(1) provides that a resource consent is neither real nor personal property. That means, I would have thought, that a contract for the transfer of a resource consent is not governed by the Contracts Enforcement Act 1956. Even if that is not so, there has clearly here been part performance: see Fleming v. Beevers [1994] 1 N.Z.L.R. 385 C.A. A coastal permit is transferable: see s.135. Thus it seems clear enough that there can be an order for specific performance in relation to a contract for the transfer of a coastal permit.

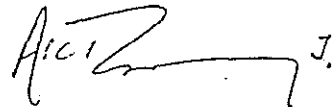
The question is whether this is a case for specific performance or whether Tallangatta should be left to a claim for damages. Equity developed the remedy of specific performance for cases where damages at law would not do justice. If an asset subject to a contract is readily procurable in the market then damages will generally be the appropriate remedy. Specific performance on the other hand is generally the appropriate remedy in cases involving contracts for the transfer of unique assets.

Here the coastal permit and the associated assets are really an integral part of the whole property at Tallangatta Bay. An intent to transfer one without the other is an inherently unlikely proposition. It is therefore a clear case for specific performance. Another relevant factor is that Tallangatta, in circumstances that need not be discussed, has entered into a contract to sell the whole property, i.e. freehold and coastal permit, to Mr Michael Hill. Special condition No.2 in that contract, which was entered into on 2 April 1993, would win no prizes for draftsmanship. The nub of the matter is, however, that Tallangatta appears to have bound itself to use its best endeavours to transfer the coastal permit as well as the freehold. The freehold has in fact, as I understand it, been transferred and unless specific performance is granted Tallangatta will not be able to perform its contract with Mr Hill.

That contract was no doubt entered into on the premise that if Tallangatta's view of its contract with Mr O'Malley was upheld the Court would be very likely to award specific performance. That was a reasonable view to take. Tallangatta could be in some difficulties viz a viz Mr Hill if specific performance were not granted. In that event Mr Hill would have to try and get a contract with Mr O'Malley in whose name the coastal permit stands. Whatever price he had to pay would be likely to define the damages which he could get from Tallangatta and which Tallangatta would then be able to pass on to Mr O'Malley. Therefore, whichever way one looks at the matter, specific performance is the appropriate remedy rather than leaving Tallangatta to a claim for damages against Mr O'Malley.

For these reasons I order Mr O'Malley to transfer to Tallangatta Properties Ltd the coastal permit in question issued by the Marlborough District Council and being referred to under file no. U930245. I reserve all questions of costs. If agreement cannot be reached I will deal with the matter on receipt of memoranda. I direct in that event that Tallangatta

Properties Ltd file its memorandum first setting out what order it seeks and on what basis. Mr O'Malley is to have 14 days from service of a copy of that memorandum within which to reply and Tallangatta is to have a right of reply to any memorandum filed by Mr O'Malley within a further period of 14 days.

A handwritten signature in black ink, appearing to read "A. J. J." with a stylized flourish extending to the right.