

The Re-opening of Oppressive Credit Contracts Under the Credit Contracts Act 1981: A Case of Caveat Creditor.

by

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I. INTRODUCTION

The Credit Contracts Act 1981 came into force on 1 June 1982 amid strong criticism. Indeed, it was labelled “New Zealand’s Frankenstein Monster.” Notwithstanding this censure, the objective of the Act to protect borrowers from the sharp business practices of some financiers is laudable.

As stated in the preamble, the main aims of the Credit Contracts Act are: to ensure disclosure of credit terms; to ensure disclosure of the cost of credit; to prevent misleading credit advertising; and to prevent oppressive credit contracts. The latter aim is provided for in Part I of the Act, which is generally concerned with the right of a court to re-open oppressive credit contracts (this power being contained in s 10). As we shall see, this is not a novel concept. The doctrine that a court may give relief to the “weak” party when a transaction is harsh and unconscionable has been developed by the Courts of Equity over the last three and a half centuries.¹

The principal criticism of the re-opening provisions of the Act is that they introduce consumerism into the law of contract at the expense of certainty, and to the detriment of the lender’s rights of enforcement. It is hoped that this paper, in analysing Part I of the Credit Contracts Act, will determine the validity of this criticism.

¹ See, for example, *Earl of Arglasse v Muschamp* (1683) 1 Vern 237; 23 ER 438; *Wiseman v Beake* (1690) 2 Vern 121; 23 ER 688.

II. THE EQUITABLE JURISDICTION

The equitable doctrine of unconscionability of contract² is that where a party is not equal to protecting itself when dealing with another party and that other party takes advantage of this to force an unfair bargain, the courts will declare the transaction unconscionable. Once the weaker party proves that it is at a serious disadvantage when dealing with the stronger party, then the transaction will be set aside unless the other party can show that the bargain was fair and just.

The first element that must be established to invoke this doctrine³ is an inability to protect oneself. Although both parties to a contract may have capacity at common law, equity will intervene if the inequality of bargaining power is such as to place one of them at a serious disadvantage to the other.⁴ Examples⁵ of such situations are illness, poverty, age, necessity, lack of education or business experience, drunkenness, emotional distress, impaired faculties and infirmity of body or mind. Coming within one of those categories is, however, not enough to prove an inability to protect oneself. The principal concern is whether, as a result of being in that category, one was disadvantaged in relation to the other side.⁶ Secondly, there must be a resulting unfair bargain.⁷ In deciding whether such unfairness exists, equity will look to all the circumstances, not just the price.⁸

III. THE LEGISLATION

A. *The Moneylenders Act 1908*

This well-established doctrine ultimately laid the foundation for s 3 of the Moneylenders Act 1908 which gave the court statutory authority to re-open harsh and unconscionable transactions. A contract fell within the scope of this section if the rate of interest was unduly high; if excessive amounts were charged for expenses, inquiries, fines, bonuses,

² Driscoll, P J *Unconscionability of Contract* (1982) (Dissertation deposited with the Auckland University Law Library).

³ *Ibid*, s 7. It has been held that New Zealand courts have the jurisdiction to set aside unconscionable bargains in the exercise of their general equitable jurisdiction: *Archer v Cutler* [1980] 1 NZLR 386, 402.

⁴ *Blomley v Ryan* (1956) 99 CLR 362, 405.

⁵ This list is by no means exhaustive.

⁶ *Lewis v Pead* (1789) 1 Ves Jun 19; 30 ER 210. Thus in *Ernestway Holdings Ltd v Joseph* [1978] NZ Recent Law 161 Jeffries J. refused to set aside as unconscionable a contract entered into by an extremely old woman. He held that not only was the contract fair, but also that the woman was very discerning and quite capable of looking after herself. Yet by contrast the court in *Shaffer v Blyth* (1920) 36 TLR 689 rejected a plea from the plaintiff that Shaffer, being a solicitor, above everyone else was capable of protecting his own interests. The court held that the necessity to borrow money to care for his sick wife was such as to put him in a disadvantaged situation vis a vis the other side.

⁷ *Richardson v Harris* [1930] NZLR 890. Unfair bargain, in this context, means that an unconscionable weakness has been taken advantage of.

⁸ *Middleton v Brown* (1878) 47 LJ Ch 411.

premiums or other charges; or if it was in any manner harsh and unconscionable or otherwise such that a Court of Equity would give relief.⁹ In such cases the court was given wide powers to revise and re-adjust the transaction in accordance with what it considered to be reasonable.¹⁰

The re-opening powers contained in s 3 were available against moneylenders (as defined in s 2 of that Act) and people who, while not caught by the definition in s 2, were included by virtue of s 3(9) if they loaned money at a rate of interest exceeding ten per cent per annum. Subsections (2) and (3) gave the courts a wide discretion regarding remedies available to borrowers in appropriate cases. Apart from the power to take an account between the parties, the court could order the moneylender to repay amounts due to the debtor and if the lender had parted with a security, the court could order him to compensate that party. Under subsection (4), the court had the power to grant the debtor a remedy against any third party who shared in the profits of the moneylender.

The Contracts and Commercial Law Reform Committee noted¹¹ the main advantage of s 3 was that, without purporting to control the terms of lending agreements and without fixing rate ceilings, it enabled the courts to grant a remedy to a debtor against a harsh or unscrupulous financier. Thus while s 3 did not interfere with ordinary transactions, it was a useful weapon against those financiers who employed sharp practices and who drove unfair bargains.

However, there were two notable weaknesses in the Act in this context.¹² The first was that the re-opening provisions applied only to moneylenders and to private individuals who lent money at rates exceeding ten per cent per annum. It followed, therefore, that s 3 did not apply to privately-made loans below this rate. Moreover, it was illogical to protect borrowers without providing corresponding protection for those who obtain credit by other means. The other weakness concerning s 3 was that the re-opening machinery was available only where the transaction was "harsh and unconscionable" at its outset, so there was no provision for re-opening in the case of the unconscionable exercise of a power reasonably conferred by the contract itself.

⁹ In comparison the English counterpart required not only that interest be excessive, but also that the transaction be harsh and unconscionable (see s 1 of the Moneylenders Act 1900 (U.K.)).

¹⁰ Pannam C., *The Law of Moneylenders in Australia and New Zealand* (1965). From the cases it seems clear that s 3 applied only where the harsh and unconscionable element was present at the time the contract was made: *Foley Motors Limited v McGhee* [1970] NZLR 649.

¹¹ Report of the Contracts and Commercial Law Reform Committee, *Credit Contracts* (1977), p 56.

¹² Dugdale, *Credit Contracts Act 1981*, p 2.

As a result of these findings, the Committee recommended a re-tention of the basic re-opening jurisdiction with the proviso that it be improved to remedy these weaknesses.

B. The Credit Contracts Act 1981

The Moneylenders Act 1908 has now been repealed by the Credit Contracts Act 1981. This Act, by incorporating the recommendations of the Committee regarding the flaws noted in the repealed Act, now grants the court, under Part I, a general power to investigate the terms and mode of enforcement of credit transactions. This power applies to all credit contracts.¹³

IV. RE-OPENING THE OPPRESSIVE CREDIT CONTRACT

The main scheme of re-opening under Part I centres on sections 10 to 13. These sections cover the Court's power to re-open oppressive credit contracts and to set guidelines for their re-opening, limiting the time frame within which proceedings can be brought and defining the classes of evidence which are admissible in such actions.

A. Jurisdiction

1. The Grounds for Relief

Section 10, like its predecessor,¹⁴ is the backbone of the Act and it provides the basic jurisdiction for a court to re-open an "oppressive" credit contract.¹⁵ Section 10 provides:

- (1) Where, in any proceedings (whether or not instituted pursuant to this Act), the court considers that —
 - (a) A credit contract, or any term thereof, is oppressive; or
 - (b) A party under a credit contract has exercised, or intends to exercise a right or power conferred by the contract in an oppressive manner; or
 - (c) A party under a credit contract has induced another party to enter into the contract by oppressive means —
 the court may re-open the contract.
- (2) Where a party under a credit contract refuses to agree to the early termination of the contract, or to vary or waive any term of the contract, or imposes conditions on such agreement he shall, for the purposes of this Act, be deemed to be exercising a right or power under the contract.
- (3) Where, with the knowledge of the creditor under a re-opened credit contract —
 - (a) The credit provided pursuant to the contract was used (whether in whole or in part) to pay amounts owing under another credit contract or other credit contracts; or
 - (b) Amounts owing under the contract were paid from credit provided pursuant to another credit contract or other credit contracts —
 and the creditors under the contracts are either the same person or related bodies corporate, the court may re-open all or any of those other contracts (whether or not it considers that any of paragraphs (a) to (c) of subsection (1) of this section apply in respect thereof).

¹³ See section 3 for the definition of a credit contract.

¹⁴ Section 3 Moneylenders Act 1908.

¹⁵ See section 14 for the power of a court on the re-opening of a credit contract.

Under s 10(1)(a) the Court may re-open a credit contract if a term of the contract is “oppressive.” Thus the court would review such a term at the time the agreement was made. This was the position under the Moneylenders Act 1908, and was obviously maintained as it is elementary that changes in the financial market, such as movements in interest rates, should not in themselves give grounds for relief. It has been submitted,¹⁶ in relation to this provision, that if a contract falls within the statutory definition of a “credit contract”, then a term may be attacked as “oppressive” even though it does not relate to the credit element of the contract. In the case of a hire purchase agreement, for example, it may be claimed that the cash price of the goods is oppressively high. While it was never the Committee’s intention that anything other than a credit term should be reviewed by the court (because the Act is concerned with credit) a judge would only have to point to the words of subsection (1)(a) (a credit contract or *any term thereof*)¹⁷ to justify reviewing, say, the cash price in a hire purchase agreement.

Section 10 (1)(b) gives the court the power to re-open a credit contract if one party exercises, or intends to exercise, in an “oppressive manner” a right or power reasonably conferred upon that party by the contract. Although there was some authority¹⁸ for enacting this provision, it was generally recognised, in the words of Lord Reid, that “...[i]t might be, but it never has been the law that a person is only entitled to enforce his contractual rights in a reasonable way, and that a Court will not support an attempt to enforce them in an unreasonable way”.¹⁹

As might be expected, this novel provision has proved to be popular as a ground for re-opening. It has been invoked in relation to the exercise of powers to demand the whole balance owing in the event of default;²⁰ powers to appoint a receiver;²¹ powers of sale;²² and no doubt it will be invoked also in relation to powers of seizure and entry into possession.

Under s 10 (1)(c) a court can re-open a credit contract if either party to the contract has induced another party to enter into it by “oppressive” means. An example of the type of situation covered by this

¹⁶ Dugdale, *op. cit. supra*, 32.

¹⁷ Emphasis added.

¹⁸ *Clark v National Mutual Life Association of Australia* [1966] NZLR 196.

¹⁹ *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, 430.

²⁰ *Dennis Hedley Ltd v Freefit Mufflers Ltd* (unreported), High Court, Auckland, (A.732/82).

²¹ *Ibid.*

²² *Hart v Hayden* (unreported), High Court, Auckland, (A.132/82); *Udy v Kuzinas* (unreported), High Court, Rotorua, (A.1/83). *Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd* (unreported), High Court, Auckland, (A.1247/83); *Bruns v Appleyard* (unreported), High Court, Auckland, (A.827/83).

provision is that of the gullible person who is persuaded by somewhat misleading advertising to deposit money at an inadequate interest rate with a lending institution. As proof of such an "oppressive" inducement this plaintiff, pursuant to s 13(3), could show as evidence the inducements offered by the institution's competitors, perhaps concentrating on the clarity of such other inducements.

Section 10 (2) adds a fourth jurisdictional ground. This provision treats the refusal of a party to allow early termination of the contract as the exercise of a right or power, which then allows a court, under s 10(1)(b), to re-open the contract if that party exercises such right or power in an "oppressive" manner. Subsection (2), by its terms, refers to a refusal to agree, or to agree unconditionally, to premature repayment. This subsection gives the court the power to intervene in such circumstances as a refusal by an otherwise adequately secured mortgagee to release part of his security or to agree to grant priority to a security needed for secondary financing,²³ or to be bound by the grant of an easement or term of years.²⁴

2. *Linked Transactions*

As part of the extension of the court's power to review credit contracts, certain provisions in the Act give the courts power to re-open not only all "oppressive" credit contracts, but also transactions related to the original credit contract.

Section 10(3) recognizes that a debtor may, in borrowing from a creditor, later fall into difficulties, whereupon the debtor may obtain a new loan to repay the old one from the same creditor.²⁵ Obviously an effective re-opening provision must contain a power to examine the whole series of transactions, and s 10(3) contains such a power.²⁶

B. *"Oppressive" Defined*

We have seen the grounds in s 10 upon which a court can re-open credit contracts, and essential to all of them is that there is an "oppressive" element involved.

Section 9 of the Act defines "oppressive" as meaning "oppressive, harsh, unjustly burdensome, unconscionable, or in contravention of reasonable standards of commercial practice."

Determining the meaning of each of the above terms²⁷ is made a little

²³ As was the case in *Hart v Hayden*, *supra*.

²⁴ Dugdale, *op.cit.*, 33.

²⁵ For subs (3) to apply the creditors in a series of transactions have to be the same person or "related bodies corporate" (a term which is defined in s 2(2)).

²⁶ For discussion on s 4, which is concerned with collateral contracts and linked transactions proper, see Dugdale, *op. cit.*, 23-25; Driscoll, *op.cit.*, 80.

²⁷ Each of the meanings assigned to the term "oppressive" are required to be read disjunctively and are now each separate grounds for re-opening credit contracts under s 10.

easier by the fact that the Committee has, in defining the term “oppressive”, generally chosen to use words which have been individually examined by the courts in the context of unconscionable bargains. Where appropriate, the courts will look for assistance to these cases.

1. *Oppressive*

The word oppressive is generally used to describe the actions of one person toward a second person when that first person is in a position of power, as in the situation of tyrant and subject.²⁸ To be more specific, oppression is the imposition of unfairness in a harsh manner where such a relationship exists.²⁹ The term “oppressive” will therefore be particularly relevant in the context of s 10(1)(b) insofar as it relates to the exercise by a creditor of his power under a credit contract.

2. *Unjustly Burdensome, Harsh*

The Shorter Oxford English Dictionary defines oppressive as “unjustly burdensome, harsh or merciless”, and it has been suggested³⁰ that these two phrases will be interpreted along the same lines as oppressive. On the other hand, Dugdale,³¹ while submitting that “unjustly burdensome” will be interpreted in the same way as “oppressive”, contends that the term “harsh” will not. Rather he thinks that because the old formula of harsh *and* unconscionable³² has been dispensed with by the new Act, an inequality of values so gross as to warrant the description “harsh” will be sufficient to entitle a court to re-open a credit contract.

The latter view seems to be the more realistic because the change in wording was arguably effected so as to give the courts more power to intervene in serious cases of hardship.³³

3. *Unconscionable*

This term captures the essence of the equitable jurisdiction, discussed previously, which has existed since the seventeenth century. In *Archer v Cutler*³⁴ McMullin J cited, with approval, *Blomley v Ryan*³⁵ where Kitto J said of the court’s jurisdiction to set aside unconscionable transactions:

²⁸ Dugdale, *op.cit.*, 30.

²⁹ See the definition of “oppressive” *supra*, as given in the *Shorter Oxford English Dictionary*.

³⁰ Driscoll, P J, *op.cit.*, 76; Jones, D O, “Oppressive Credit Contracts” [1982] NZLR 326.

³¹ *Op.cit.*, 31.

³² Emphasis *his*.

³³ See Dugdale, *op.cit.*, 31.

³⁴ [1980] 1 NZLR 386, 402.

³⁵ (1956) 99 CLR 362.

“This is a well-known head of equity. It applies wherever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interest, and the other party unconsciously takes advantage of the opportunity thus placed in his hands.”

The particular meaning of the term “oppressive” will thus be interpreted in the same way as it has been by the courts in the exercise of their inherent equitable jurisdiction. The court will review not only the exchange of value occurring in the transaction, but also the respective positions of the parties themselves.

4. *In Contravention of Reasonable Standards of Commercial Practice*

These words were substituted during the passage of the Bill through Parliament for the words proposed by the Committee — “in contravention of acceptable standards of fair dealing.”³⁶ It was held in *Multiservice Bookbinding Ltd v Marden*,³⁷ after an examination of the relevant cases, that there is a difference between an unreasonable term and an unconscionable one, in that “mere unreasonableness does not make a term oppressive or unconscionable”.³⁸

Clearly the two are not the same and the position taken in the above case is correct. Reasonableness has never, by itself, been the concern of equity. It deals only with the terms of the contract, whereas unconscionability looks at the relevant position and strengths of the parties.

This discussion leaves unresolved why the Legislature changed the wording, and whether the change effectively alters the whole meaning of “oppressive” as defined in s 9. The possible answers to this are varied. One writer suggests³⁹ that the change is just an updating of the language used by Lord McNaghten, while another⁴⁰ feels there is probably no change in meaning at all. The actual answer is provided by the Legislature itself, for we are told in the course of the Parliamentary debates⁴¹ that the definition of “oppressive” was changed in the manner we have seen so as to require a more objective assessment of market practices by the Court before it decides whether a particular contract is “oppressive”. While a court could not use this statement as authority for taking the position suggested, it could interpret s 9 in such a manner. Given such an interpretation, there would be no actual change in meaning from the words used by Lord McNaghten.

It seems that Courts will still consider whether one party has taken

³⁶ The original words were used by Lord McNaghten in *Samuel v Newbold* [1906] AC 461, 470 to describe ‘harsh and unconscionable’ transactions, and had these words been retained, the courts would have gained some assistance from His Lordship’s remarks.

³⁷ [1979] Ch 84.

³⁸ *Supra*, 109.

³⁹ Jones, D O, *loc.cit.*, 327.

⁴⁰ Dugdale, *op.cit.*

⁴¹ New Zealand Parliamentary Debates (1981) Vol. 440, 2971.

advantage of the “weakness” or necessity of the other to an extent which strikes the court as being outside what the current morality of the ordinary business person would allow. This is where the criterion of reasonable standards of commercial practice comes in.⁴² It is submitted that the phrase “in contravention of reasonable standards of commercial practice” will be useful as a particular ground under s 9 where there are observed commercial practices and parties contravene those practices.⁴³

C. Guidelines for Re-Opening Credit Contracts

Because the novel concept of oppression necessarily engenders some doubt as to its ambit, the Legislature has wisely provided guidelines for intervention in s 11.

Section 11 (1) states that oppression must be considered in relation to the circumstances at the time the contract was made or the acts performed.⁴⁴

Section 11(2) sets out the matters the court must consider in deciding whether to re-open a credit contract under s 10(1). In paragraph (a) these matters are stated to include “all the circumstances relating to the making of the contract, the exercise of the right or power conferred by the contract, or the inducement to enter the contract, as the case may be”. Paragraph (b) further provides four specific guidelines⁴⁵ to be referred to in the appropriate circumstances.

The first guideline reads:

(i) Whether the finance rate for the contract or any other amount payable by the debtor under the contract (whether or not a default by the debtor), is oppressive.

Oppressive finance rates and payments are not defined in the Act, but one can expect that the court will look to the meaning of “oppressive” as defined in s 9, which has regard to the reasonable standards of commercial practice. The courts may also, with some caution,⁴⁶ use the earlier cases decided under s 3 of the Moneylenders Act 1908, whereby excessive interest was in itself a ground for re-opening a moneylending transaction.

The second guideline reads:

(ii) Where a debtor is in default under the contract, whether the time is given to the debtor by or pursuant to the contract to remedy the default is oppressive having regard to the likelihood of loss to the creditor.”

In relation to mortgagee sales,⁴⁷ this provision⁴⁸ probably does no

⁴² See Driscoll, *op.cit.*, 77.

⁴³ As in *Bruns v Appleyard*, see text *infra* at p. 32-34.

⁴⁴ This provision adds nothing to the common law. See *Balkind v Ralph* [1918] NZLR 929, 934; *Harrison v Grenlin* (1961) 78 WN (NSW) 711, 718; *Foley Motors v McGhee* [1970] NZLR 649.

⁴⁵ The best discussion of which is found in Jones, D O, *loc. cit.*, 327-328.

⁴⁶ Dugdale, *op.cit.*, 33, after scrutinizing the cases suggests certain rules in this context, but he later confesses that perhaps the best golden rule is that there is no golden rule.

⁴⁷ The subject of most post-Act cases.

⁴⁸ See Jones, D O, *loc.cit.*, 327.

more than reinforce the existing requirements under the Property Law Act 1952 requiring a mortgagee to give certain periods of notice before exercising a power of sale. Debenture holders will, however, have to think seriously about giving adequate notice of default before appointing a receiver because one is often appointed at the same time as notice of default is given. It would be wise for a creditor to adopt this approach in view of the possibility that if the debtor is not given sufficient notice of default, the court may exercise its powers under s 14(1)(e) and (f) to set aside the security or to order a receiver to refrain from acting.

The third guideline reads:

(iii) Where the creditor has required, as a condition of early repayment of the credit outstanding under the contract, that the debtor pay interest for a period subsequent to the date of repayment, whether the amount of interest is oppressive having regard to the expenses of the creditor and the likelihood that the amount repaid can be reinvested on similar terms.

This provision will not affect creditors who provide a right to repay at any time with interest calculated on a daily basis.⁴⁹ In practice, however, many financiers are prepared to accept early repayment of a loan, provided the debtor pays about three months' interest.⁵⁰ Such a demand, pursuant to this provision, would have to be justified objectively having regard to the two factors listed there. It would seem, for example, that if a creditor could establish that he was unable to reinvest the money on terms similar to those in the contract, and that he was seeking no more than was reasonable having regard to the terms of such reinvestment as could be obtained, such a demand would, *prima facie*, not be "oppressive".

It has been submitted⁵¹ that s 81(2) of the Property Law Act 1952 has, to some extent, been impliedly repealed by this guideline. Where a debtor had chosen to redeem his mortgage before the expiration of its term, a creditor had been traditionally permitted by s 81(2) to charge interest to the debtor for the unexpired portion of the mortgage. This provision has therefore been impliedly repealed to the extent that now interest can be charged only for the unexpired portion of the term if the amount is not "oppressive".

The fourth guideline reads:

(iv) Where the creditor has refused to release part of any security relating to the contract or has agreed to such a release subject to conditions, whether the refusal is, or the conditions are, oppressive having regard to the amount of the credit and the extent of the security that would remain after the release.

Creditors are often asked to release part of a security held and, as is illustrated by the case of *Hart v Haydon*⁵² (where the court issued an interim injunction), they are generally unwilling to comply except on

⁴⁹ *Ibid.*

⁵⁰ Report of the Contracts and Commercial Law Reform Committee, *op.cit.*, 78.

⁵¹ Jones, D O, *loc.cit.*, 328.

⁵² For the facts of the case, see text *infra* at p. 29.

their own terms. However, in the light of the above case, creditors will now have to think twice before refusing such requests.⁵³ In applying this provision one would expect the court to place emphasis on the level of security that had been given initially in order to see whether that security level would be maintained if partial releases were given by the creditor.

In addition to these guidelines s 11(2)(c) gives the court an unfettered discretion by allowing it to consider such other matters as it thinks fit.

D. Provisions Relating to Re-Opening Proceedings

Section 12 of the Act provides:

Notwithstanding any other enactment or rule of law proceedings seeking the re-opening of a credit contract may be instituted in the court by any party to the contract at any time earlier than six months after the date the last obligation to be performed under the contract is performed; but may not be so instituted at any other time

An extension of time is provided,⁵⁴ however, in relation to earlier contracts in a chain of contracts of the sort described in s 10(3).⁵⁵ Where this is the case, re-opening proceedings may be instituted at any time earlier than six months after the date the last obligation to be performed under any of those credit contracts was performed. This raises a somewhat anomalous point, for it appears that if the last obligation were not performed by a debtor, the six month period would not begin to run. Therefore, the re-opening proceedings could be brought many years after it was intended that the last obligation be performed. If this is the way in which these provisions are interpreted, a debtor⁵⁶ may obtain a "benefit" from his own breach of contract.

E. Evidence

Obviously one will need to supply some form of evidence to establish oppression, and s 13 clears any doubts as to what classes of evidence are admissible.⁵⁷ Subsection (1) permits evidence of what credit terms were offered by the creditor's competitors at the time the contract was entered into. Similarly, in subs (2) evidence may be adduced to point out that the powers or rights exercised by the creditor were also used by other creditors in relation to other debtors. Finally, under subs (3)

⁵³ In *Hart v Haydon*, *supra*, the court issued an injunction to a mortgagee's sale because of such a refusal.

⁵⁴ In a proviso to s 12.

⁵⁵ See text *supra*, at p. 22 and for a discussion of s 10(3) see p. 22 *infra*.

⁵⁶ This may well be the case, for in *Congregated Christian Church of Samoa Henderson Trust v Broadlands Finance Ltd* (Unreported) High Court, Auckland (A.820/82), the Judge could not decide the case under the Credit Contracts Act 1981 as it was not clear on the evidence when the last obligation to be performed had been performed (emphasis mine).

⁵⁷ Uncertainty exists as to whether evidence of matters of fact bearing upon the question of whether a transaction is harsh and unconscionable, which is a question of law, is admissible in court. See the Committee's report, *op.cit.*, 69.

evidence may be adduced regarding the inducements offered, at the relevant periods, by the competitors of the party under attack.

VI. THE CASES

The re-opening provisions contained in Part I of the Act have now been considered by the courts on several occasions. It is therefore proposed to analyse these cases in order to ascertain any principles or guidelines emerging from them.

*A. Dennis Hedley Ltd v Freefit Mufflers Ltd*⁵⁸

In this case the plaintiff sought an interim injunction under the re-opening provisions to restrain the defendant from exercising a power to call up the principal sum secured by a debenture and appointing a receiver and manager of the property of the plaintiff.

The facts of the case were that the defendant sold its business to the plaintiff and the balance of the purchase price outstanding (\$70,000) was secured by a second debenture. By clause 33 of the debenture the plaintiff covenanted, *inter alia*, not to sell its business or undertaking or any part of it without the prior written consent of the defendant. The plaintiff did sell part and agreed to sell other parts of its business without obtaining the defendant's consent. The defendant then gave notice of its intention to call up the moneys secured by the debenture, and, in the event of failure to pay, its intention to appoint a receiver.

The plaintiff alleged on three separate grounds — each of which was rejected by Holland J — that the defendant's conduct was "oppressive" under s 10(1)(b) of the Act.

The first ground was that the amounts owing under each of the debentures had been considerably reduced. His Honour accepted this but thought this was nothing more nor less than was contemplated in the original agreement.

The second ground was that the plaintiff had replaced the assets it had sold with assets of corresponding value. His Honour accepted this as fact, but stated that the assets received were of a completely different nature to those sold and the plaintiff was now conducting a business of quite a different nature from that conducted when the debenture was given.

The third and final ground was that the defendant's only motive for wanting to sell was to reclaim its money which was earning interest far below the market rate. Holland J stated he may have considered making some order under the Act if that were the sole reason the defendant had purported to exercise its power.

As this was a case of first instance, His Honour was very careful not to generalize as to any of the principles involved. He made several find-

⁵⁸ *Supra*.

ings which are of general use, however. First, His Honour stated that the onus of establishing oppression lies on the plaintiff, and that the onus is not shifted in proceedings for an interim injunction. Secondly, and because of the circumstances involved in the case,⁵⁹ His Honour held that before relief could be granted, it was necessary for the plaintiff to satisfy the court as to its financial stability and position, and no such evidence had been produced. Thirdly, Holland J stated there was nothing unreasonable and certainly nothing "oppressive" in a provision requiring the consent of the debenture holder before a substantial change in the business of the borrowing company takes place. His Honour, in this case,⁶⁰ did not apply the usual tests in relation to interim injunctions whereby the plaintiff does not have to present more than an arguable case.

B. *Hart v Haydon*⁶¹

Here, the plaintiffs applied for an interim injunction to restrain the defendants from proceeding with a mortgagee sale of farm property.

The plaintiffs purchased a stud farm for \$1,500,000 with a mortgage back to the defendants for \$700,000, of which \$200,000 was to be paid on 1 September 1982. The mortgage contained a condition entitling the plaintiffs to register a prior mortgage of up to \$500,000 provided that the mortgagors had kept and observed the covenants contained in the mortgage. The plaintiffs had difficulty raising the first mortgage and failed to make the capital payment of \$200,000. They failed to pay the first two instalments of interest due under the mortgage. The defendants consequently issued s 92 notices⁶² in relation to the default of the first interest instalment, which required payment by 1 October 1982, and notified the plaintiffs that if the notice was not complied with the defendants would have the power to sell the land. One day after the capital payment of \$200,000 became due, a further s 92 notice was issued in respect of that amount. Earlier the plaintiffs had sought an extension of time to repay the \$200,000 sum, but this had been refused.

The defaults were not remedied and a mortgagee sale was set down for 3 December 1982. On the day before this proposed sale the plaintiffs sought an injunction, having negotiated a first mortgage of \$500,000 (at 27 per cent per annum) conditional upon the defendants' giving a Memorandum of Priority making the recently-negotiated

⁵⁹ There, perhaps, could have been a valid reason for calling up the principal sum if the plaintiff's financial position was not sound.

⁶⁰ Holland J. did, however, appear to resile from this observation about the test to be applied in such cases, for he employed the 'arguable case' test in *Hart v Haydon*, *supra*.

⁶¹ *Supra*.

⁶² This is a notice, provided for under s 92 Property Law Act 1952, requiring remedy, the sanction being that the mortgagee's power of sale will be exercised.

mortgage a first mortgage. The defendants declined to grant a Memorandum of Priority, pointing out that under the terms of their mortgage they were under no obligation to do so (the plaintiffs having failed to keep the conditions of the mortgage). The defendants stated that although the mortgagees would agree to withdraw the property from sale if all payments in default were brought up to date prior to the sale, nevertheless the mortgagees would not agree to give priority to the proposed first mortgage.

Holland J was satisfied the plaintiffs had an arguable case that the conduct⁶³ of the defendants in the circumstances in insisting on proceeding with the exercise of the power of sale when all sums in default could be paid was "oppressive." It was clear that the default in repayment of the capital sum of \$200,000 could be remedied by the defendant's giving priority to a first mortgage of \$500,000 which, but for the defaults of the plaintiffs, they would be contractually bound to give. The balance of convenience favoured the plaintiffs.

If the sale were to proceed, it was highly unlikely the plaintiffs would be able to regain their priority, whereas the defendants could be protected by an undertaking as to damages. Therefore, Holland J granted an interim injunction but imposed a condition that the defaults in payment be remedied prior to the sale and independently of any new first mortgage.⁶⁴ His Honour emphasized he was not holding that in all cases a mortgagee must give priority to a new advance to enable defaults under the mortgage to be removed.

C. *Udy v Kuzinas*⁶⁵

Here, the plaintiffs applied for an interim injunction to restrain the exercise of powers of sale under a mortgage. They purchased the defendant's property for \$130,000, with a vendor mortgage of \$50,000. The third interest instalment fell due on 1 September 1982 and was not paid. A s 92 notice was issued requiring remedy by 30 November 1982. The necessary sum was sent to the wrong solicitors, and by the time the mistake was realised the notice period had expired. When the mistake was discovered the plaintiffs offered to pay that amount to the defendants but they refused payment and insisted upon proceeding with the mortgagee sale.

Pritchard J commenced his judgment by stating that it was too early

⁶³ Hence this was a claim under s 10(1)(b).

⁶⁴ This injunction was rescinded by Sinclair J on 2 March 1983 partly because none of the conditions imposed by Holland J had been complied with, and partly because certain discrepancies had arisen between the plaintiff's evidence at the original hearing and the facts as they now appear to be. It had now become plain that the necessary advance of \$500,000 would not have been immediately available to the plaintiffs had the defendants granted priority of mortgage.

⁶⁵ *Supra*.

to lay down general principles as to the application of the Act and that at this stage each case had to be considered on the broad merits of the situation. His Honour noted there was an uncontradicted assertion that the mortgagee's motive was to obtain repayment of the principal to re-invest at a higher rate of interest. He held, therefore, the insistence on the sale was "oppressive" in terms of s 10 (1)(b) and issued an injunction.

*D. Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd*⁶⁶

In this case, the applicant wanted an interim injunction to restrain the defendant from exercising its power of sale under a mortgage.

The facts were that the applicant purchased a property for \$97,500 which was payable on 8 May 1982. The applicant had anticipated being able to finance the purchase from the sale of another property, but this did not eventuate. Consequently in May 1982 it needed to raise the finance necessary to complete the purchase. The applicant deposed⁶⁷ that after endeavouring to obtain finance from a number of sources without success, it approached the defendant for a loan of \$120,000. The defendant offered to provide the sum on condition that the applicant purchase from the defendant two sections for a total price of \$98,700. This further sum was paid for by a \$8770 deposit and a first mortgage. It was claimed that because of the urgency of the situation the applicant was unable to obtain an independent valuation report on the two sections, but approached the defendant concerning the value placed on them. The defendant stated there was to be no negotiation and the loan of \$120,000 would not be available if the applicant did not pay the asking price. Ultimately the defendant loaned the applicant \$120,000 with interest at 18% which was to be repaid on 10 May 1983. The defendant also loaned the applicant \$90,000 secured by a mortgage on the two sections (which had been transferred to the applicant). This loan was interest free with a principal discount for early repayment.

The applicant repaid the \$120,000 loan and then claimed the price at which it was required to purchase the two sections was grossly inflated as a registered valuer had placed a total value of \$48,000 on them. As a result the \$90,000 loan was not repaid and this led to the proposed mortgagee sale. In response a re-opening of the whole credit contract (including the \$120,000 loan) was sought. The defendant submitted

⁶⁶ High Court, Auckland (M.1247/83), Tompkins J.

⁶⁷ This case was effectively heard only on affidavits submitted by the applicant. Notwithstanding this, Tompkins J doubted whether it would have been possible, on the affidavits, for the court to decide what were essentially factual differences between the parties.

that the transaction should not be judged as "oppressive" because the applicant was itself a property developer, presumably familiar with raising finance on property purchases, and was for that reason in a different category from what it described as "a helpless individual."⁶⁸ It was further submitted that what the applicant was really complaining about was the price at which it had purchased the two properties, the point being that, under s 4(2) of the Credit Contracts Act, the price of a land transaction involving a vendor mortgage cannot be re-opened.⁶⁹

Tompkins J was not persuaded by these submissions, however, and issued an interim injunction restraining the proposed mortgagee sale on the ground that there was a serious question to be tried as to whether the applicant's being required to purchase the property from the defendant (at a grossly inflated price) as a term of the \$120,000 loan was "oppressive" within the meaning of the Act.⁷⁰

On the evidence presented, this was undoubtedly the correct finding, for as Tompkins J stated:

"Its assertion that it was in a desperate financial position, that it had tried a significant number of sources to obtain finance that it needed, that the offer by the Defendant to provide the necessary finance was subject to the firm and non-negotiable condition that the Applicant purchased the ... sections at the price nominated by the Defendant, that that price was substantially in excess of the value of the sections, and that in the circumstances in which the Applicant found itself it has no real option but to accept the terms the Defendant required, gives the Applicant at least grounds for contending that the transaction ought to be re-opened under the Act."^{70a}

The balance of convenience favoured deferring any sale pending determination of the applicant's motion to re-open the transaction. The applicant was ordered to pay \$20,000 into court as protection for the mortgagee against possible losses resulting from deferral of the mortgagee sale.

*E. Bruns v Appleyard*⁷¹

Here, the plaintiff purchased a property in July 1981 for \$120,000 (it was subsequently valued at approximately \$180,000 after certain improvements were made). Finance was obtained from the defendant in the sum of \$80,000 which was secured by a first mortgage payable on 30 June 1983 with interest payable quarterly. The third instalment fell due on 30 March 1983 and was not paid. A s 92 notice was sent to

⁶⁸ This was the same kind of argument contended for in *Shaffer v Blyth*, *supra*, footnote 6.

⁶⁹ Because the term attacked was in the loan contract of \$120,000, s 4(2) did not apply.

⁷⁰ Hence this was a claim under s 10(1)(a) of the Act. The grounds upon which the applicant claimed that the term requiring him to purchase the sections was "oppressive", was that the applicant was required to purchase them at a price more than double their fair market value.

⁷¹ (Unreported) High Court, Auckland (A.827/83).

the plaintiff by registered post, requiring remedy by 7 June 1983.⁷² The defaults were not remedied, however, and a mortgagee sale was set down for 20 July 1983. At the auction the auctioneer (pursuant to instructions issued by the defendant's solicitor) declined to accept bids from either the plaintiff (as mortgagor) or his friend. Notwithstanding this, the plaintiff's friend announced she was bidding on her own behalf but her bid was rejected. The eventual "purchaser" bid \$115,000 but was met by a bid of \$116,000 from the plaintiff's friend — again her bid was rejected by the auctioneer in accordance with the solicitor's instructions. Hence the property was knocked down to the "purchaser" at \$115,000. In response, the plaintiff sought an injunction restraining the mortgagees from transferring the property to the "purchaser".

The defendant raised two initial points, each of which were rejected by Chilwell J, before substantive arguments were heard. The first was that the courts should not apply the "arguable case test". His Honour stated there was no authority for such a proposition. The second point was that the Act was never intended to provide additional grounds for injunctive relief because re-opening of a credit contract is a matter for trial. Re-opening is a condition precedent for granting relief under the Act, and therefore it would be premature to grant an injunction. His Honour stated the Court has power at a re-opening to direct any party to the contract to do or refrain from doing in relation to any other party any act or thing, and an injunction to preserve the status quo pending trial was clearly available.

With regard to substantive matters, the plaintiff contended that when regard is had to the mortgagee's duty⁷³ to the mortgagor to take reasonable care to obtain whatever was the true market value of the property at the time of sale or to sell for the best price reasonably obtainable, not only was the mortgagees' refusal to accept bids from the plaintiff and his friend in breach of that duty, but it was also an "oppressive" exercise of their power in terms of s 10(1)(b) of the Act, in that it was in contravention of reasonable standards of commercial practice. In support of this contention, the plaintiff submitted that when the alleged breach by the mortgagees of their legal duty to the mortgagor in proceeding to sell the property for \$65,000 less than its market value (as the circumstances disclosed) is also considered, this amounted to an arguable case of oppressive conduct. Moreover, it was submitted the defendant's conduct in refusing to accept the bid of the

⁷² In fact delivery of the notice was not effected by the Post Office until 14 June 1983. Thus an issue arose as to the validity of the notice because s 92(2)(a) states that the date is to be specified for remedy in the notice shall not be earlier than four weeks from the service of the notice.

⁷³ Chilwell J held that the plaintiff had somewhat overstated the extent of the legal duty but not so seriously as to destroy his contention.

plaintiff himself was oppressive, the point being there is ample authority⁷⁴ for the proposition that a mortgagee is able to sell to the mortgagor.

Chilwell J accepted the arguments of the plaintiff and accordingly found there was a serious question to be tried of "oppressive" conduct on the part of the defendants. The balance of convenience favoured the plaintiffs. The preservation of the status quo required a restraint upon the completion of the allegedly invalid⁷⁵ or "oppressive" sale. The plaintiff could easily satisfy an award of damages if the interim injunction should not have been ordered, and finally the defendants' position was not as disadvantageous as that of the plaintiff.

The plaintiff was ordered to pay \$17,000 into court to cover the interest instalment, the auctioneer's commission and expenses, and the stamp duty paid by the purchaser.

VII. CONCLUSIONS

Because the condition precedent to successfully re-opening a credit contract is the existence of oppression, it is submitted that the major area of concern at the present time is the way in which the courts will interpret the word "oppressive." Obviously at this early stage there have been no judicial attempts to establish any general principles as to the ambit of oppression. Each judge has been careful not to generalise and thus every case has been treated on its own facts. Nevertheless, it is possible to indicate how the courts may construe the meaning of the term "oppressive" as defined by s 9 of the Act.

In deciding whether there has been oppression, it seems probable the courts will have regard (expressly or by implication) to current market practices. Support for this view can be gained from the cases themselves, for the judges in two of the cases discussed above indicated that if a party's motive for purporting to exercise a power given under a contract was untenable (for example, wanting to reinvest money at a higher interest rate), then the court would grant a remedy. This was clearly the ground for relief in *Udy v Kuzinas*⁷⁶. Holland J indicated in *Dennis Hedley Ltd v Freefit Mufflers Ltd*⁷⁷ that if this had been the defendant's only motive he may well have granted an injunction. This ground for relief would obviously, as a motive for acting, contravene reasonable standards of commercial practice. Similarly in *Bruns v Appleyard*⁷⁸ Chilwell J, in granting in-

⁷⁴ See Ball, *Law of Mortgages* (1935), 235 and *Edwards v McDowell* (1933) 50 WN (NSW) 244.

⁷⁵ His Honour held, on this cause of action, that the plaintiff raised a serious question to be tried in relation to the deemed date of delivery.

⁷⁶ *Supra*.

⁷⁷ *Supra*.

⁷⁸ *Supra*.

terim relief, expressly accepted the plaintiff's submission that the defendants had contravened reasonable standards of commercial practice by not accepting the bids from the mortgagor and his friend on the ground that this breached the observed practice or duty of obtaining the best price reasonably obtainable.

It is submitted that if a party relied on the term "unconscionable" as contained in s 9 then in paying regard to the unfair bargain criteria of the two-fold test contained therein⁷⁹, the court will likewise have regard (either expressly or impliedly) to the current market practices. An example of this approach can be seen in *Italia Holdings (Properties) Ltd v Lonsdale Holdings (Auckland) Ltd*⁸⁰ where the transaction was obviously unconscionable; the defendant's driving a hard bargain on the urgent need of the applicant.

In establishing the "hard bargain" criteria, the Court was influenced by the fact that the applicant was required to purchase the relevant properties at a price more than double their *fair market value*.⁸¹ In regard to s 9 as a whole, the present writer agrees with Dugdale when he states:

"... the deliberate abandonment of the familiar formula contained in s 3 of the repealed Act, the width of the terms employed and the use of the word "or" (which has the consequence that the jurisdictional requirement exists even if only one element of the definition is satisfied) signal an intention on the part of the legislature that the Courts should have a power to intervene in every case where in the Court's view there is a sufficiently serious element of unfairness."⁸²

However, as foreshadowed such unfairness will be measured against the reasonable standards of commercial practice.

Secondly, we have seen that debtors have made the most of the introduction of the re-opening power contained in s 10(1)(b), and in all the cases decided thereunder the plaintiffs have sought interim relief only. Notwithstanding *Dennis Hedley Ltd v Freefit Mufflers Ltd*⁸³ and *Udy v Kuzinas*⁸⁴ the courts in this context are applying the tests laid down in *American Cyanamid v Ethicon Ltd*,⁸⁵ that is, whether there is a serious question to be tried, and whether the balance of convenience favours the granting of an injunction or not. Thus the "approach to the granting of relief will on all occasions be governed by the circumstances of the particular case and the particular type of case."⁸⁶ These, however, were not the grounds for relief in *Udy v Kuzinas*.⁸⁷ There,

⁷⁹ See text, *supra*, pp. 22-25.

⁸⁰ *Supra*.

⁸¹ Emphasis added.

⁸² Dugdale, *op.cit.*, 31.

⁸³ *Supra*, but see footnote 60.

⁸⁴ *Supra*.

⁸⁵ [1975] AC 396.

⁸⁶ *Per* Chilwell J, *Bruns v Appleyard*, *supra*, 38.

⁸⁷ *Supra*.

Pritchard J, in the only final judgment so far, found actual oppression under s 10 (1)(b). In terms of this provision, and notwithstanding the other interim injunction cases, His Honour held the court has the power, in the proper case, under ss 10 and 14 of the Credit Contracts Act, to grant an injunction restraining a mortgagee from exercising a power of sale which he is legally entitled to exercise. This case therefore establishes that not only can a court give an injunction (and therefore relief) on the grounds of the "serious question to be tried" test but the court may also give relief under ss 10 and 14, if oppression is held to be present.

Finally, we must consider whether the Act has caused significant uncertainty in the commercial world. As the cases illustrate, the powers contained in s 10 do introduce some element of "uncertainty" for on several occasions the courts have given relief so as to prevent creditors from exercising their contractual rights. Lenders will be naturally concerned that debtors may avoid their obligations by invoking the re-opening provisions and need only cite the case of *Hart v Haydon*⁸⁸ in support, for there the debtors were clearly in default, and yet the Judge gave relief (albeit conditional). Given this, critics could argue (and not without some merit) that the introduction of the powers contained in s 10 have created a situation which is intolerable in the commercial context where stability, predictability and certainty are necessary if commercial life is to be carried on efficiently. However, a possible answer to such criticism is provided by the Committee, for it stated:

"We are of the view that the general protection of debtors against harsh terms such as excessive fines is of greater importance than protection of a financier against the rare occurrence of vexatious and unfounded claims. It may be argued that our proposals will impart an element of uncertainty into all credit transactions. We do not think so and point out that the present s 3 has not had that result in relation to the transactions to which it applies."⁸⁹

Indeed, in the two years that the Act has been in force this has not been the case.

⁸⁸ *Supra*.

⁸⁹ See the Committee's report, *op.cit.*, 59.