

assessment of property rights of spouses should give way to the justice of the case:

In my opinion [the Act] enables the Court to consider the true spirit of transactions involving matrimonial property by giving due emphasis not only to the part played by the husband, but also to the important contributions which a skilful housewife can make to the general family welfare by the assumption of domestic responsibility, and by freeing her husband to win the money income they both need for the furtherance of their joint enterprise. (*ibid.*, 800).

In conclusion, it appears that irrespective of the finding of the Privy Council, Parliament might well consider amending the Matrimonial Property Act. Global orders should be permissible so that each and every property item will not have to be examined and orders made respectively.

The inconsistencies at present existing between the Matrimonial Property Act and Matrimonial Proceedings Act, outlined earlier, require removal so that the outcome will not be dependent upon which of the two Acts an application is brought under.

Ainsley Elliott

LAND LAW

Natural right of support

The question of whether a natural right of support extends to that which is artificially placed upon land was investigated in *Bognuda v. Upton and Shearer Ltd.* [1971] N.Z.L.R. 618. The plaintiff had erected a brick wall along his boundary in 1929. Forty years later the defendant contractors excavated a trench immediately adjacent to the wall. As a result of the excavation the wall collapsed and the removal of lateral support by the defendant was one of the grounds upon which the plaintiff claimed damages.

Engineering evidence was presented to show that without the weight of the wall the soil on the plaintiff's property would not have subsided and caused the wall to collapse. Quilliam J., applying the observations of Lord Selborne in *Dalton v. Angus* (1881) 6 App. Cas. 740, at 798, held that the support to those constructions which are placed artificially upon land does not exist as of right, and must be acquired by grant; usually the grant of an easement of support. Since no easement had been granted and the natural right of support did not extend to the wall, the defendant's motion for judgment succeeded.

In *Lotus Ltd. v. British Soda Co. Ltd.* [1971] 2 W.L.R. 7 the plaintiff's buildings were damaged as the result of wild brine pumping operations on neighbouring land. The wild brine (saturated brine resulting from the dissolution of rock salt by water) was pumped out from the substrata and replaced by water which provided inadequate support. Pennycuik V.C. held in the Chancery Division that the surface land had a right to be supported by the subjacent strata of minerals and whether the removal of the minerals was *in specie* or by the brine pumping method it would give rise to a cause of action.

Water Rights

The owner of lower land is bound to accept water which naturally drains on to his property from higher land. Speight J., in *Dijkmans v. Howick Borough* [1971] N.Z.L.R. 400 applying *Whalley v. Lancashire and Yorkshire Railway Company* (1884) 13 Q.B.D. 131 and *Gibbons v. Lenfesty* (1915) 84 L.J.P.C. 158 held that the lower owner is bound to accept water which is concentrated if that concentration is the result of "natural user" of the higher land and does not increase the burden upon the lower land. In this case the surface water was collected by the defendants and allowed to drain through pipes on to the plaintiff's property. The Supreme Court had to decide whether the concentrating of the water through the pipes was "natural user". The opinion of Speight J. was that:

Although the water was only from the natural superior watershed, it was an accelerated and concentrated delivery far beyond anything which would have come from natural user. (*op. cit.*, 408).

In his discussion of damages Speight J. concluded that the proper approach is on the basis of restoration cost and not the loss of value due to the damage.

Land Transfer

Two recent South Australian Supreme Court decisions further clarify the concept of the bona fide purchaser for value taking indefeasibly upon registration.

In *R. M. Hosking Properties Pty. Ltd. v. Barnes* [1971] S.A.S.R. 100 the defendants had an unregistered lease of land for two years with a covenant giving the option for renewal of the lease. During the period of the lease the owner agreed to sell the property to the plaintiff, who became aware of the unregistered lease after the agreement of sale, but before the date of settlement. The transfer went ahead and was registered under the Australian Real Property Act, 1886-1969. In an action for possession Walters J. held that the purchaser's knowledge of the unregistered lease did not prevent it from being a bona fide purchaser for value.

Similarly an unregistered lease was granted by the owner in *Achatz v. De Reuver* [1971] S.A.S.R. 240, this time with an agreement that the lessee should have first option to purchase the land. It was also agreed that any expenses incurred by the lessee in maintaining and altering the premises would be taken into consideration with regard to the purchase price if the lessee exercised the option to purchase. The lessee did not caveat his interest after spending money on maintenance and alterations. Without his knowledge the lessor agreed to sell the property to a third party, the plaintiff. In the period between agreement and settlement the lessee exercised his option to purchase. Ignoring the exercise of the option the lessor executed a memorandum of transfer which was registered by the third party. Hogarth J. held that the lessee's equitable interest, because it was accompanied by consideration, would have supported a caveat, but since the lessee had failed to protect his interest by lodging a caveat the third party as a bona fide purchaser for value was entitled to possession of the land.

Mortgagee's Duty

In *Cuckmere Brick Co. Ltd. v. Mutual Finance Ltd.* [1971] Ch. 249 the plaintiffs had charged land to the defendants by way of a mortgage to secure a loan of £50,000. After two years the defendants' statutory power of sale became exercisable. In their advertising with respect to the sale they failed to publicize that there was planning permission for one hundred flats to be built on the mortgaged property. The plaintiff mortgagors drew the defendants' attention to the omission and asked that the sale be delayed so that the public could be made aware of the planning permission for the flats. The defendants agreed to mention the possibility of flats at the auction, but would not consent to any postponement. When the auction did take place the property sold for £44,000—a price substantially less than the £75,000 the plaintiffs alleged the property to be worth.

It was held in the English Court of Appeal following *Tomlin v. Lace* (1889) 43 Ch.D. 191 that a mortgagee in exercising his power of sale owed a duty to the mortgagor to take care to obtain a proper price, or as Salmond L.J. said, "the proper market price". The majority of the Court, with Cross L.J. dissenting, also held that on the evidence the trial Judge had been justified in finding that the defendants had been in breach of such duty in selling without adequately publicizing the planning permission for flats and refusing to postpone the auction sale.

The Court of Appeal granted leave to appeal to the House of Lords and it is expected that the appeal will allow the doubt as to whether it is the mortgagee's duty to obtain the best price, market price, proper price, or merely to act reasonably, to be resolved.

Legislation

Recently there have been several minor amendments in specialised areas of real property law but no major developments. The Property Law Amendment Act, 1971 adds section 102A to the Property Law Act, 1952. The new section provides for the payment of surplus money from the sale of a mortgaged property by the mortgagee to the Secretary of the Treasury if the mortgagor cannot be located after reasonable inquiries have been made.

B. V. Harris

TORTS

Defamation—qualified privilege

Macarthur J. in *Dunford Publicity Studios Ltd. v. News Media Ownership Ltd. and Gordon* [1971] N.Z.L.R. 961, reassessed the law relating to qualified privilege. The action arose following two articles in the newspaper *Truth* relating to a road safety competition which had initially been supported by the Minister of Transport. This support was withdrawn when he realised the competition was being run for profit. The first article printed a press statement by the Minister setting out his position with some background information on the competition. The second article was printed the following week and was headed, 'Auck-